



CENTER FOR HUMAN RIGHTS AND GLOBAL JUSTICE WORKING PAPER
NUMBER 1, 2005

THE HONORABLE THOMAS BUERGENTHAL
REMEMBERING THE EARLY YEARS OF THE INTER-AMERICAN COURT
OF HUMAN RIGHTS

NYU School of Law • New York, NY 10012
No part of this paper may be reproduced in any form
without permission of the author.

REMEMBERING THE EARLY YEARS OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS

© THOMAS BUERGENTHAL
Judge, International Court of Justice
Author email: t.buergenthal@icj-cij.org

The Center for Human Rights and Global Justice was established in 2002 to stimulate cutting edge scholarship and to make original and constructive contributions to on-going policy debates in the field of human rights. By emphasizing interdisciplinary analyses, the Center's programs seek to situate international human rights law in the broader context of the political, jurisprudential, economic, sociological, historical, anthropological and other influences that shape it and determine its impact. The Center's Faculty Director is Philip Alston, its Executive Director is Smita Narula, and its Research Director is Margaret Satterthwaite. CHRJ thanks Stephanie Welch for copyediting and formatting this paper.

Abstract

This paper is not a traditional article, but the reminiscences and reflections of the last surviving member of the first group of judges elected in 1979 to serve on the newly established Inter-American Court of Human Rights. The paper discusses the evolution of the Court from an under-funded institution with few contentious cases brought before it to a well-established court with a full docket – a court that is steadily gaining recognition in the region and successfully surmounting its initial growing pains.

However, despite significant progress that occurred during the 25 years since the Court's establishment, the Court still has a long way to go to gain the acceptance and prestige in the Americas that the European Court enjoys in its region. For example, the decisions of the Inter-American Court have not yet become part of the domestic law of the States Parties to the American Convention, and until this happens the Court will have a limited impact on the day-to-day administration of justice in those countries. The 2001 change in the rules of procedure of the Court – requiring the Commission to refer to the Court all cases of non-compliance by States – may prompt national legislatures and courts to pay greater attention to the judgments of the Inter-American Court. The effect of these changes is not yet known and the future of the Inter-American Court remains wide open, but it is hoped that the Court will continue to be an institution that inspires hope in people whose human rights are being violated.

I. Introduction

Recently I was reminded that I am now the last surviving member of the first group of judges elected in 1979 to serve on the newly established Inter-American Court of Human Rights. That explains why I feel the need to reflect on the early years of the Court and some problems we faced. This is not therefore your traditional paper, but the reminiscences and reflections of a human rights judge who had the rare opportunity to participate in a novel and exciting judicial experience.

When I joined the Inter-American Court, much of the Western Hemisphere was still in the throgs of massive human rights violations. In the Americas of that time, the Cold War permitted the military regimes and civilian dictators to torture and disappear anyone whom they labeled as subversives. Often, too, the mere public discussion of human rights could land a person in jail or worse.

This was the political climate in which the Inter-American Court opened shop, so to speak. But apart from the political problems for human rights inherent to this climate, there were many practical matters that had to be dealt with, for we had to begin at the very beginning. Statutes, Rules of Procedure and Headquarters Agreements had to be drafted and negotiated. Internal judicial procedures had to be promulgated, personnel had to be hired, even judicial robes had to be selected and bought. All this and more, without a budget and with judges serving part-time, and none with prior judicial experience.

II. Election to the Court

It all began in 1978 with the entry into force of the American Convention on Human Rights.¹ I was teaching at the University of Texas Law School in Austin at the time. One of the courses I taught was a seminar on international human rights law. Here I also dealt with the inter-American human rights system and would regularly point out that, since the United States had not ratified the Convention, the U.S. would not be able to nominate candidates for the Court. Although I would explain that U.S. citizens could nevertheless be nominated by any other State that had ratified the Convention, I seriously doubted that this would ever happen, and never missed a chance to say so. As it turned out, I could not have been more wrong.

One afternoon in early 1979 I received a telephone call from a person who identified himself as the Ambassador of Costa Rica to the United States and the Organization of the American States. His reason for calling, he explained, was the forthcoming election of judges to the soon to be established Inter-American Court of Human Rights. He went on to say that he was instructed by his Government to ask whether I would allow Costa Rica to nominate me to the Court. Convinced that this was a hoax and that the caller was a student in my seminar, I thanked the caller and asked him for his phone number, ostensibly to enable me to call him back after I had had a chance to discuss the matter with my wife. I still could not quite believe it when the number proved to be that of the Costa Rican Embassy in Washington. A few months later, I was elected to the Court.²

¹ See American Convention on Human Rights [hereinafter Convention], Nov. 22, 1969, 1144 U.N.T.S. 123, art.53(2), *reprinted in* T. BUERGENTHAL & D. SHELTON, *PROTECTING HUMAN RIGHTS IN THE AMERICAS : CASES AND MATERIALS*, at 617-30 (4th ed. 1995).

² The American Convention permits a State Party to nominate up to three judicial candidates. They need not be nationals of the nominating State, but must be nationals of an OAS Member State. See Convention art. 53(2). It

III. Constituting the Court

Once the Court was constituted—it was formally inaugurated in San José, Costa Rica, on September 3, 1979—our work began in earnest. Among our initial tasks was the preparation of a draft Statute for the Court, which had to be approved by the OAS General Assembly.³ We also had to submit a draft budget to it.

First, however, we had to overcome an unexpected obstacle. Following the Court's festive inauguration, with all the pomp and ceremony Costa Rica could muster, we faced a sad reality: while our official seat was in that lovely country, its Government had not provided us with a place of our own—not even a suite of offices. As a result, we held our first working session in the bathhouse of the Costa Rican bar association. Here the voices of children swimming and jumping into the association's pool often drowned out our early drafting efforts, hardly an auspicious beginning for those of us who thought of ourselves as modern-day John Marshalls. Some time later, we moved to temporary offices in Costa Rica's Supreme Court building and eventually to permanent quarters.

Believing that the draft Statute to be submitted to the OAS General Assembly provided a rare opportunity to enlarge the Court's powers, we drafted it accordingly. Our political realism was soon tested at the annual meeting of the OAS General Assembly, which took place in La Paz, Bolivia in 1979. Judge Rodolfo Piza, our newly elected President, and I were delegated to represent the Court at that meeting. I was flattered to have been so selected, particularly since I was the youngest judge, but I soon learned that the real reason for my selection had to do with the altitude of La Paz. At more than 12,000 feet above sea level, La Paz was not a city to which any of my older and wiser colleagues wished to travel, and I did not know better.

Although the altitude of La Paz affected me for only a day or two, the problems facing us there proved to be much more serious. In 1979, most of South America was either in the hands of military regimes or controlled by them, including Brazil, Argentina, Paraguay, Bolivia, Chile, and Uruguay. With the exception of democratic Costa Rica, the situation in Central America was not much better, nor in neighboring Panama, Haiti, or the Dominican Republic. Mexico's then so-called "democracy" was also not favorably disposed to human rights or international human rights institutions. Yet, all these countries had a vote in deciding on the contents of our Statute and our budget, despite the fact they had not even ratified the Convention.

That left basically only Costa Rica, Venezuela, and Colombia—Peru was just emerging from a leftist dictatorship—among the Latin American countries, in addition to the small

was thus possible for Costa Rica to nominate Rodolfo Piza from Costa Rica and me at the same time. The Costa Rican government wished to ensure that the Court would become an important institution and believed that a judge from a major country in the Americas who was familiar with the workings of regional human rights systems would help achieve this. I had by then written a number of articles on the European and inter-American systems and had had some input in the drafting of the American Convention. I understand that Costa Rica also assumed that the nomination of an American or Brazilian would encourage these countries eventually to ratify the Convention. That, unfortunately, has still not happened as far as the U.S. is concerned. As a result, no other U.S. citizen was nominated to the Court after I completed my two full terms.

³ The task of drafting our Statute and rules of procedure—the Court itself was alone to determine the latter—was facilitated by the fact that we could draw liberally on the Statute and Rules of Court of the I.C.J. and on the relevant instruments of the European Court of Human Rights.

Commonwealth Caribbean nations, willing in 1979 to see the Inter-American Commission on Human Rights⁴ and Court become effective institutions for the protection of human rights. But their influence was not significant enough to overcome the opposition of the non-democratic states.⁵ In short, the Assembly was dominated by States strongly opposed to regional institutions with power to protect human rights and they readily succeeded in blocking our efforts to strengthen the Court, including a proposal for a full-time Court.

Although we could have anticipated the Assembly's rejection of a full-time Court, what came as a shock was the Assembly's failure to adopt a budget for the Court. That is, we ended up one vote short of the two-thirds majority needed for the adoption of the budget. Despite the fact that we had been assured that we had the necessary votes, including the support of Sandinista Nicaragua, when it came to the actual vote, the Nicaraguan delegate did not respond to the roll call. He claimed later that he had fallen asleep. We never learned whether his sleep was motivated by diplomatic considerations or induced by altitude sickness. At any rate, if it had not been for some financial assistance from the Government of Costa Rica and an emergency appropriation from the OAS a year later, the Court would not have been able to convene the two prescribed regular meetings during that budget period.

What followed next in La Paz could have come straight out of a Garcia Marquez novel and illustrated in some measure the realities facing a human rights court in the Americas of that time. When we had arrived in La Paz, the Assembly had been inaugurated by the President of Bolivia. A few days later we were again welcomed to Bolivia by its President, but this time it was a new President, and when we left Bolivia there was yet another President at the helm of the country. Bolivia had lived up to its then-reputation as a nation with more presidents than years of independence.

At the next session of the Court, my colleagues charged me with negotiating the Court's headquarters agreement with Costa Rica. My counterpart in these negotiations was the head of the one-member legal department of the Costa Rican Foreign Ministry. She assured me that the Court would obtain whatever it needed to function effectively. But because she was seriously understaffed, she would be grateful if I could present her with a draft agreement. The request was easy to comply with since the Court had already adopted a draft proposal. As our subsequent negotiations demonstrated, the Costa Rican legal adviser lived up to her promise.

The most innovative provision of the headquarters agreement, as ultimately concluded, was the brainchild of Judge Rodolfo Piza. It stipulated that a final judgment of the Inter-American Court, once communicated to the competent administrative or judicial authorities of Costa Rica, would be enforceable in Costa Rica in the same manner as judgments of its own

⁴ Under the Convention, the Commission deals with individual application and inter-state complaints relating to the States Parties to the Convention. The Commission also performs certain functions as a Charter organ of the Organization of American States. See Statute of the Inter-American Commission on Human Rights (1979) arts. 18, 20.

⁵ The United States, claiming that because it had not ratified the Convention, it could not take a strong position in favor of the Court, offered only reluctant support, despite President Jimmy Carter's strong commitment to the promotion of international human rights. See Schneider, *A New Administration's New Policy: The Rise to Power of Human Rights*, in HUMAN RIGHTS AND U.S. FOREIGN POLICY 3 (P. Brown & D. MacLean eds. 1979).

courts.⁶ It was our hope that this provision would serve as a model for similar agreements with other States Parties.⁷ This hope has to date not been realized.

Given the dictatorial regimes in power in many countries of the Americas at the time, the Court wished to ensure that its judges would enjoy full diplomatic protection even if they incurred the displeasure of their own governments. Costa Rica therefore agreed to a stipulation in the headquarters agreement entitling a judge of the Court to a Costa Rican diplomatic passport whenever his/her country of nationality failed to provide it. Costa Rica also agreed to place its diplomatic and consular missions in other countries at the disposal of judges on official visits to such countries.⁸ We failed, however, to get Costa Rica to accord the President of the Court precedence for protocol purposes over the Dean of the Diplomatic Corps, which is the status the Netherlands accords to the President of the International Court of Justice.⁹ Here we ran up against the highly effective lobbying by the Papal Nuncio who, in Costa Rica as in some other Latin American countries, always serves as Dean of the Diplomatic Corps. When it comes to negotiating skills, novice human rights judges are no match for Vatican diplomats.

IV. Some Early Cases

The first case to come to the Court was unique in the annals of international jurisprudence. Labeled *Costa Rica v. Costa Rica*, the most apt description for it, its official name is *In the Matter of Viviana Gallardo et al.*¹⁰ Viviana Gallardo was a young Costa Rican woman who, with some other individuals, had been arrested by the Costa Rican police following a shoot-out in which one policeman was killed. Shortly after her arrest, while being held in a police station, she was shot dead by an off-duty policeman who was a friend of the dead officer. These events caused great consternation in Costa Rica, a country that prides itself, with good reason, on being a democracy committed to the rule of law and human rights. Fearing for Costa Rica's international reputation, the President of Costa Rica, who had earlier participated in the inauguration of the Inter-American Court, concluded that the ideal solution would be to submit the matter to the Court. After all, the Court had its seat only a few blocks from the Presidential Palace, so why not take advantage of its presence in the country and put it to work.

Although we appreciated the Costa Rican President's confidence in the Court, we had no choice but to reject the very first contentious case referred to us—assuming it could properly be described as a contentious case. The problem was that, although the exhaustion of domestic remedies requirement provided for in the Convention¹¹ could in principle be waived, this was not true of the proceedings before the Inter-American Commission, which Costa Rica had also sought to waive. Unlike before the Court, individuals have standing in the Commission to present their case on equal footing with the States Parties.¹² To let a State

⁶ See Agreement between the Inter-American Court of Human Rights and the Government of the Republic of Costa Rica [hereinafter IACHR & Costa Rica Agreement], Sept. 10, 1981, art. 27, reprinted in INTER-AM. Y.B. ON HUM. RTS. 214 (1987); 24 HUM. RTS. L.J. 302 (2003).

⁷ Such a provision would have strengthened the ambiguous language of the Convention on this subject. See Convention art. 68(2).

⁸ See IACHR & Costa Rica Agreement art. 12.

⁹ See Letter from the Minister for Foreign Affairs of the Netherlands to the President of the International Court of Justice (Feb. 26, 1971), reprinted in I.C.J. Acts and Documents No. 5, at 211.

¹⁰ See *In re Viviana Gallardo*, Decision of Nov. 13, 1981, Inter-Am. Ct. H.R., Ser. A, No.101/81.

¹¹ See Convention art. 46(1)(a).

¹² See *id.* art. 44; *cf. id.* art. 61.

unilaterally waive a right that was designed in part to protect the interests of individuals was, in the Court's view, incompatible with the balance the Convention sought to achieve. The Court therefore ruled the case inadmissible and transferred it to the Commission, but Ms. Gallardo's family refused to pursue the matter there. So much for our first case.

Assuming the *Gallardo Case* was a contentious case rather than a request for an advisory opinion, as has been suggested from time to time, no other contentious cases were referred to the Court until the *Honduran Disappearance Cases* reached us in 1986.¹³ By that time, however, the Court had rendered a number of important advisory opinions¹⁴ requested by States Parties and the Commission. One of the earliest came to us at the request of the Commission.¹⁵ It was prompted by a series of summary executions in Guatemala that the government claimed did not violate the Convention's prohibition on the reestablishment of the death penalty because of its reservation to that provision. The Commission concluded that the reservation did not apply to Guatemala's action. Believing however that it would be useful for the Court to address this problem, the Commission referred the issue in a general form to the Court as an advisory opinion request. Guatemala, which had not accepted the Court's contentious jurisdiction, challenged the admissibility of the request on the ground that it was a disguised contentious case brought against it. Once the Court had ruled against Guatemala on that point, Guatemala declared in open Court that it had decided to suspend all further executions, repeatedly emphasizing that its decision had nothing to do with the Court's holding on admissibility.¹⁶ The executions did stop. A year earlier, Pope John Paul II on a visit to Central America had appealed, without success, to the Guatemalan authorities to stop the executions. And we had succeeded with a mere advisory opinion. It was quite a morale booster for the Court.

Another early advisory opinion request has had important freedom of expression consequences in the Americas. It came to the Court in a convoluted manner. The *Schmidt Case*,¹⁷ as it came to be known, concerned Stephen Schmidt, an American journalist living in Costa Rica. Schmidt worked initially in San José as a reporter for an English language weekly, *The Tico Times*, and later also for Costa Rica's largest Spanish language newspaper, *La Nación*. As soon as the Inter-American Court had arrived in Costa Rica, Schmidt began to write about the Court, the Convention, and the rights it guaranteed. He was particularly interested in Article 13 of the Convention, which guarantees the right to freedom of thought and expression and provides that the right "includes the freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice."¹⁸ Schmidt concluded that this provision could not be squared with a law then in force in Costa Rica. That law required all practicing journalists to belong to the national Journalism Association, which restricted membership to graduates of the Journalism School of the University of Costa Rica. Schmidt did not satisfy this requirement.

¹³ See *infra* Part V for a discussion of these cases.

¹⁴ See, e.g., J. PASQUALUCCI, *THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS* 7, 47-52 (2003).

¹⁵ See *Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights)*, Advisory Opinion of Sept. 8, 1983, Inter-Am. Ct. H.R., Ser. A, No. OC-3/83.

¹⁶ See *id.*; C. Moyer and D. Padilla, *Executions in Guatemala as Decreed by the Courts of Special Jurisdiction in 1982-83: A Case Study*, 6 HUM. RTS. Q. 507 (1984).

¹⁷ See *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion of Nov. 13, 1985, Inter-Am. Ct. H.R., Ser. A, OC-5/85 [hereinafter *Compulsory Membership in an Association Prescribed by Law*].

¹⁸ Convention art. 13.

Although it was an offence under Costa Rican law to work as a reporter without being a member of the Costa Rican Journalism Association, it had never sought to enforce the law against Schmidt. But that was before Schmidt had heard of Article 13 of the American Convention. Schmidt kicked off his campaign against the law at an annual meeting of the Inter-American Press Association. After publicly declaring that he did not belong to the Costa Rica Journalism Association, he challenged the Association to refer charges against him, which it promptly did. There followed proceedings in Costa Rican courts, and while Schmidt won his case in a lower court, the decision was reversed by the Supreme Court, which imposed a three months suspended prison sentence and placed him on probation for a period of three years.

Schmidt thereupon instituted proceedings against Costa Rica in the Inter-American Commission on Human Rights. The Commission ruled against him by a 6 to 1 vote. It found that the law was legitimate labor legislation and did not violate freedom of expression as guaranteed in Article 13.¹⁹ This appeared to be the end of the matter because neither the Commission nor Costa Rica referred the case to the Court within the requisite three-months period, and Schmidt, as a private party, had no standing to do so.²⁰

But the case did not end here. Some months after the Commission had rendered its decision in the *Schmidt Case*, a new President of Costa Rica was invited to address a meeting of the Inter-American Press Association being held in Miami. A staunch enemy of restrictive journalism laws in force in various Latin American countries, the Association appeared to have had a special reason for inviting the President. During the question-and-answer period, after Costa Rica was chided for its failure to take the *Schmidt Case* to the Court, the President was asked whether his government's inaction was due to Costa Rica's fear that it would have lost the case in the Court. That was vehemently denied by the President, who asserted that the Costa Rican law had nothing to do with freedom of expression. Then, someone asked, why not test that proposition and have Costa Rica request an advisory opinion from the Court on the legality of the law under the Convention of the Journalism Association law.²¹ The President replied that he would be prepared to do so and, a few months later, the Government of Costa Rica did just that. In November 1985, the Court ruled unanimously that the law violated Article 13 of the Convention.²²

Thereafter a number of attempts to annul the law in the Costa Rican courts failed, ostensibly because of the non-binding character of the Court's advisory opinions. The law remained on the books until the entry into force of a constitutional amendment, which established the Constitutional Chamber of the Supreme Court of Costa Rica. Among the new judges named to that Chamber was Judge Rodolfo Piza, the first President of the Inter-American Court of Human Rights. Piza had voted in favor of the Inter-American Court's ruling that the law violated the Convention and had in the past espoused the view that states had an obligation to

¹⁹ See Case 9178, Inter-Am. C.H.R., Resolution No. 17/84, Costa Rica, Oct. 3, 1984.

²⁰ See Convention art. 61(1) ("Only the States Parties and the Commission shall have the right to submit a case to the Court.").

²¹ Article 64(2) of the Convention provides for these types of advisory opinion requests. It reads as follows: "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." Article 64(1) provides for advisory opinion requests seeking an interpretation of the "Convention and of other treaties concerning the protection of human rights in the American States." See generally, PASQUALUCCI, *supra* note 14, at 37-39.

²² See Compulsory Membership in an Association Prescribed by Law, Inter-Am. Ct. H.R., Ser. A, OC-5/85.

comply with Article 64(2) advisory opinions that they had requested. To no one's surprise, not long after the Costa Rican Constitutional Chamber came into being, it set aside the Journalism Association law. Stephen Schmidt had made his point.

V. The Court and the Commission: Referring Contentious Cases

The Convention provides that in addition to States, the Inter-American Commission may refer contentious cases to the Court.²³ However, the Convention does not spell what criteria should guide the Commission in making this decision. To our great chagrin and frustration, between 1979, when the Court was inaugurated, and 1986, the Commission referred no contentious case to the Court and, except for the *Viviana Gallardo Case*, no State had done so either. Whether the Commission realized it or not, by failing to utilize the Court, it was undermining not only the Court's effectiveness, but also its own ability to enforce the rights the Convention guaranteed. But for whatever reasons, including no doubt institutional rivalry, the Commission missed many an opportunity to refer cases to the Court. Informal discussions between the Commission and Court, designed to promote case referral strategies, proved futile.

The Court's frustration reached its limit with the Commission's failure to take the *Schmidt Case* to the Court. Here, after all, was a contentious case that was particularly well suited for referral, but the Commission did not send it to the Court. The Court's opportunity to go public with this problem presented itself in the advisory opinion phase of the *Schmidt Case*. Here the Court had to address the question whether a contentious case decided by the Commission that could no longer be referred to the Court due to the expiration of the relevant time limits could nevertheless be heard by it if presented as an advisory opinion request. The Court answered the question in the affirmative and went on to make the following statement regarding the Commission's failure to refer cases to the Court:

Although the Convention does not specify under what circumstances a case should be referred to the Court by the Commission, it is implicit in the function that the Convention assigns to the Commission and to the Court that certain cases should be referred by the former to the Court. . . . The *Schmidt Case* clearly falls into this category. The controversial legal issues it raised had not been previously considered by the Court; the domestic proceedings in Costa Rica produced conflicting judicial decisions; the Commission itself was not able to arrive at a unanimous decision on the relevant legal issues; and its subject is a matter of special importance to the hemisphere because several States have adopted laws similar to that of Costa Rica.²⁴

The Court then emphasized that when States do not refer cases to the Court, and since individuals have no standing to do so, the Commission "alone is in a position, by referring a case to the Court, to ensure the effective functioning of the protective system established by the Convention."²⁵

²³ Convention art. 61(1).

²⁴ Compulsory Membership in an Association Prescribed by Law, Inter-Am. Ct. H.R., Ser. A, OC-5/85, at para. 25.

²⁵ *Id.* at para. 26.

A year later, the Commission referred not just one but three contentious cases to the Court.²⁶ They are commonly referred to as the *Honduran Disappearance Cases*. The best known of these is the *Velásquez Rodríguez Case*. These cases represented the tip of the iceberg of a group of cases, involving some 300 alleged forced disappearances in Honduras. For years the Commission had engaged in fruitless correspondence with the Honduran government regarding these cases without making any progress whatsoever.

Both the admissibility and the merits phases of the *Honduran Disappearance Cases* presented many novel legal issues.²⁷ These were, after all, the first disappearance cases ever to be referred to an international court. One difficult evidentiary issue the Court had to deal with is attributable to the fact that merely because a person has disappeared in a given country, does not mean that the government is responsible for his or her disappearance. Responsibility for forced disappearances is therefore very difficult to attribute to governments, and that is precisely why some governments engage in the practice. The Court concluded, however, that this evidentiary problem can be overcome if there is evidence of other disappearances having a common pattern pointing to a general practice. The Court accordingly ruled that if the Commission could prove that a practice of disappearances existed in Honduras and if it could show that the people disappearing in that country had engaged in similar activities or had similar backgrounds considered as subversive by the government, a rebuttable presumption will have been established between the practice and the disappearance in the specific case. The burden would then shift to the Government to show that it had no part in the specific disappearance.²⁸

In two of the three cases comprising the *Honduran Disappearance Cases*, that is, in the *Velásquez Rodríguez Case* and in the *Godínez Cruz Case*, the Government could not sustain that burden and was held responsible for the forced disappearances of the two named individuals and their likely death.²⁹ In the *Fairén Garbí and Solís Corrales Case*, the third case, the Government successfully rebutted the presumption of its involvement because there was nothing in the backgrounds of the victims—they were Costa Ricans traveling to Mexico to visit a relative—to suggest that the Honduran authorities had reason to suspect them of anti-state activities.³⁰ There was also some doubt as to whether the two Costa Ricans had in fact disappeared in Honduras rather than in El Salvador or Guatemala. The inquiry on this issue was not helped by the failure of El Salvador and Guatemala to cooperate with the Court, and by the Court's lack of power to compel them.

After the Court had found the Government of Honduras responsible for the forced disappearances of Velásquez Rodríguez and Godínez Cruz, it awarded damages to their next of kin.³¹ There followed a disagreement between the Government of Honduras, on the one side, and the Commission and Court, on the other, concerning the amounts due the families.

²⁶ See *Velásquez Rodríguez Case*, Judgment of July 29, 1988, Inter-Am. Ct. H.R., Ser. C, No. 4; *Godínez Cruz Case*, Judgment of Jan. 20, 1989, Inter-Am. Ct. H.R., Ser. C, No. 5; *Fairén Garbí and Solís Corrales Case*, Judgment of Mar. 15, 1989, Inter-Am. Ct. H.R., Ser. C, No. 6.

²⁷ See D. Shelton, *Judicial Review of State Action by International Courts*, 12 *FORDHAM INT'L L.J.* 361 (1989); D. Shelton, *Private Violence, Public Wrongs, and the Responsibility of States*, 13 *FORDHAM INT'L L.J.* 1 (1989/1990).

²⁸ See *Velásquez Rodríguez Case*, Inter-Am. Ct. H.R., Ser. C, No. 4, at paras. 122-26, 147-48.

²⁹ See *id.* at para. 147; *Godínez Cruz Case*, Inter-Am. Ct. H.R., Ser. C, No. 5, at paras. 153-54.

³⁰ See *Fairén Garbí and Solís Corrales Case*, Inter-Am. Ct. H.R., Ser. C, No. 6, at paras. 158-159.

³¹ *Velásquez Rodríguez Case*, Inter-Am. Ct. H.R., Ser. C, No. 4, at para. 194(5); *Godínez Cruz Case*, Inter-Am. Ct. H.R., Ser. C, No. 5, at para. 203(5).

The problem arose because Honduras had failed to pay the damages within the time specified by the Court and before a devaluation of the Honduran currency. Thereafter the Government offered to make the remaining payments in the newly devalued currency, which would have reduced their value by about half of the amount outstanding in relation to the prior dollar value. The Court rejected the offer on the ground that, had the Government made the payments according to the payment schedule fixed by the Court, the families would have received their share prior to the devaluation. This matter remained unresolved for a number of years with Honduras failing to make up the difference.

The deadlock continued until Judge Carlos Roberto Reina, who had served on the Court during the first six years of its existence, became President of Honduras. Shortly after his election, he was asked on CNN what steps he would take to resolve the dispute. He responded without hesitation that he considered the Court's judgment to be a debt of honor of the State of Honduras and that he would see to it that the judgments were complied with. He was true to his word. In 1995, although I was no longer on the Court, I was asked by the Court's President to represent him at a ceremony in Washington, at the seat of the Inter-American Commission on Human Rights, to receive the check for the remaining amount due from the Honduran Government. The moral of the story: when it comes to the enforcement of human rights judgments, it helps when former international human rights judges become presidents of their countries.

One more episode regarding the Velásquez Rodríguez Case is worth recounting. During the proceedings of the case, Honduras had claimed, *inter alia*, that Velásquez had been seen in a guerilla camp in Colombia. The evidence was extremely weak—it consisted basically of an affidavit by a witness who claimed that he had spoken with another person who had seen Velásquez in that camp. The Court did not consider this evidence credible enough to overcome all the other evidence that supported the conclusion that Velásquez fit the type of individuals who were being disappeared in Honduras, and that he was a victim of this practice.

A couple of years after I had left the Court, I received a call from one of my former colleagues. He informed me that reports were circulating in Latin American newspapers that an individual, who claimed to have seen Velásquez Rodríguez alive, was willing for \$100,000 to arrange a meeting with Velásquez. He apparently convinced a Honduran clergyman, the Security Minister of Costa Rica, and another official to charter a small plane and fly with him and the money to meet Velásquez. My former colleague and I then discussed the consequences for the Court if Velásquez turned out to be alive. Of course, we also immediately checked the judgment to see whether we had made a formal finding that he had been killed, which to our great relief we had not.³² A few days later I learned that once in flight, the plane and its passengers were hijacked by the informant. After forcing the plane to land, he absconded with the money, but not before gleefully confessing that he had invented the entire story about Velásquez Rodríguez. Some months later he was reported to have been killed in an unrelated shoot-out with the police in Mexico.

VI. The Inter-American Institute of Human Rights

³² The Court found that “[o]n September 12, 1981, between 4:30 and 5:00 p.m., several heavily-armed men in civilian clothes driving a white Ford without license plates kidnapped Manfredo Velásquez from a parking lot in downtown Tegucigalpa. Today, nearly seven years later, he remains disappeared, which creates a reasonable presumption that he is dead.” Velásquez Rodríguez Case, Inter-Am. Ct. H.R., Ser. C, No. 4, at para. 147(e).

The difficult political situation that existed in the region before the gradual transition to democracy prompted the Court to take some steps that proved and continue to prove important for its existence in helping to protect human rights in the Americas. As soon as it was constituted, the Court decided to create a non-governmental institution that would engage in promotional activities designed to advance the goals of the inter-American human rights system in general, and the Court in particular. Two years later, the Inter-American Institute of Human Rights was established as a non-governmental and non-political international institution, created by means of an agreement between the Court and the Government of Costa Rica.³³

Over the years the Institute, mainly with funding from United States, European, and Canadian governmental aid agencies and private foundations, has been able to support the work of the Court and the Inter-American Commission by convening conferences, organizing human rights training and teaching programs, promoting and engaging in human rights research, and publishing books and pamphlets bearing on the subject—all activities in which members of the Commission and judges of the Court participate. The joint Court/Institute library, financed principally by the Institute, has become the leading human rights research institution in Latin America, attracting students and researchers from the region and many parts of the world. None of these and related activities could have been financed by the Court on the meager budget the OAS provided for it, nor could the Court itself, as an intergovernmental body, have engaged in some of these activities. In the early years of the Court's existence, for example, whenever the Court needed to hold extra sessions for which no funding was forthcoming from the OAS, the Institute would finance the travel of judges to the seat of the Court by inviting us to a meeting in San José that just happened to coincide with the Court's needs.

The Institute's annual summer course has for more than two decades now brought university professors, civil servants, military officers, journalists, lawyers, and NGO representatives from the Americas to San José to participate in a variety of human rights courses and seminars. Here the students are introduced to the inter-American human rights systems and the role it can and should play in promoting human rights in the region. Also offered are lectures dealing with other international and regional systems as well as with specialized human rights issues. Over the years, the alumni of the summer program and the various specialized seminars offered by the Institute have formed a human rights network that permits them to keep abreast of human rights developments in their respective countries and to exchange other relevant information, including information about cases before the Court and Commission.

VII. Relations with the European Human Rights Courts

As soon as the Inter-American Court was established, we decided to cultivate special contacts with the European Court of Human Rights. This effort began with the inauguration of our Court in San José, which was attended by the Vice-President of the European Court of Human Rights. There followed an informal agreement between the Inter-American Court and the European Court, providing for periodic meetings between judges of the two courts, alternating between Strasbourg and San José. Apart from our need to have the benefit of the European

³³ Nikken, *Sobre la Autonomía y Naturaleza del Instituto Interamericano de Derechos Humanos*, in *THE MODERN WORLD OF HUMAN RIGHTS: ESSAYS IN HONOR OF THOMAS BUERGENTHAL* 3 (A. Cançado Trindade ed. 1996); Picado, *Thomas Buergenthal*, in *THE MODERN WORLD OF HUMAN RIGHTS: ESSAYS IN HONOR OF THOMAS BUERGENTHAL* 19 (A. Cançado Trindade ed. 1996).

Court's prior judicial experience,³⁴ it was also important for us to be seen by the governments in the Americas to have international support outside our region.³⁵

At the time, the membership of the European Convention consisted mainly of Western European democratic nations with relatively strong economies and political systems based on the rule of law and human rights. This was in sharp contrast to the situation prevailing in the Americas, where a majority of countries had never really known democracy and where poverty, corruption, and discrimination were rampant. This contrast came into sharp focus during one of our periodic visits to Strasbourg. While we were there, the European Court was hearing a case that concerned the legality under the European Convention of corporal punishment in British schools.³⁶ As we listened to the arguments of the parties, one of my Latin American colleagues leaned over to me and whispered, "if this issue ever comes to our Court, we will know that we've solved the human rights problems of our region."

The demise of the Soviet Union and the expansion of the Council of Europe's membership may have brought the European and American human rights systems closer together. As a result of the accession to the European Convention of former Soviet republics and Soviet bloc countries, certain human rights problems that the inter-American system had to face in the past are beginning to confront the European Court as it deals with cases from these newer Member States.³⁷ The precedents established by the Inter-American Court concerning disappearances, states of siege, the meaning of the rule of law, and so forth, which at one time seemed of no relevance to the European system, may well prove of interest to the enlarged and transformed European human rights system.³⁸

VIII. Some Random Reflections

In the 25 years since its establishment, the Inter-American Human Rights Court's docket of contentious cases has grown significantly³⁹ and, on the whole, the Court's judgments are being complied with. It is slowly but steadily gaining recognition in the region and successfully surmounting its initial growing pains. The position of the Court was significantly strengthened by the political transformation of the Americas in the early 1980's, which resulted in the fall of many oppressive regimes. The newly elected governments rapidly ratified the American Convention and gradually recognized the jurisdiction of the Court. Today all Latin American OAS Member States have accepted the Court's jurisdiction.

³⁴ Since the American Convention was modeled on the European Convention, there was a great deal for us to learn from our European colleagues. On this subject and our collaboration with the European Convention institutions, see Buergenthal, *The European and Inter-American Human Rights Courts: Beneficial Interaction*, in PROTECTING HUMAN RIGHTS: THE EUROPEAN PERSPECTIVE 123 (P. Mahoney, F. Matscher, H. Petzold & L. Wildhaber eds. 2000).

³⁵ Similar contacts will be important for the new African human rights court. The Inter-American Court held a meeting with the African Commission on Human and People's Rights not long after that body was established.

³⁶ See *Campbell & Cosans v. United Kingdom*, Eur. Ct. H.R., Ser. A. vol. 48 (1982).

³⁷ See P. Leuprecht, *Innovations in the European System of Human Rights Protection: Is Enlargement Compatible with Reinforcement?*, 8 TRANSNAT'L L. & CONTEMP. PROBS. 313 (1998).

³⁸ Advisory Opinion of May 9, 1986, Inter-Am. Ct. H.R., Ser. A, OC-6/86 (the word "laws" in article 30 of the American Convention on Human Rights); Advisory Opinion of Jan. 30, 1987, Inter-Am. Ct. H.R., Ser. A, OC-8/87 (writ of *habeas corpus* and related remedies may not be suspended in emergency situations); Advisory Opinion of Oct. 6, 1987, Inter-Am. Ct. H.R., Ser. A, OC-9/87 (judicial guarantees in states of emergency (arts. 27(2), 25 and 8 American Convention On Human Rights)). Relevant too are the *Honduran Disappearance Cases*. See Velásquez Rodríguez Case, Judgment of July 29, 1988, Inter-Am. Ct. H.R., Ser. C, No. 4; Godínez Cruz Case, Judgment of Jan. 20, 1989, Inter-Am. Ct. H.R., Ser. C, No. 5.

³⁹ See generally, PASQUALUCCI, *supra* note 14, at 181 *et seq.*

This is a sea change compared to the situation that existed in 1979. Of course, the U.S., Canada, and a majority of Commonwealth Caribbean States have to date not even ratified the Convention.

Since 1991, when I left the Inter-American Court, the Court has decided many contentious cases and our early problems remain little more than reminiscences of days gone by. But despite the fact that this year the Court celebrates its twenty-fifth anniversary, it still has a long way to go to gain the acceptance and prestige in the Americas that the European Court enjoys in its region or, at least, in the Western European parts thereof. It had been my great hope, for example, that the decisions of the Inter-American Court would gradually have become part of the domestic law of the States Parties to the American Convention, but that has not happened.⁴⁰ Until it does, the Court will have a limited impact on the day-to-day administration of justice in those countries. With the exception of the Commonwealth Caribbean nations, all other States Parties treat duly ratified self-executing treaties as directly applicable domestic law.⁴¹ And yet, to my knowledge, few national courts in the Americas look to the case law of the Inter-American Court or, for that matter, to the Convention.⁴² Why that should be so, I do not know, but it is clear to me that the inter-American human rights system will not function effectively until the decisions of the Court are routinely relied upon by national courts and legislatures. The European system by contrast has been able to thrive precisely because of the interaction between national judicial institutions and the Strasbourg institutions.⁴³

It may well be that a 2001 change in the rules of procedure of the Inter-American Commission on Human Rights⁴⁴ will prompt national legislatures and courts to pay greater attention to the judgments of the Inter-American Court. Article 44 of the Commission's amended Rules of Procedure now require it to refer to the Court all cases of non-compliance by States with the recommendations adopted by the Commission in these cases.⁴⁵ In the past, the Commission tended to refer very few cases to the Court. That situation had improved gradually even before the 2001 amendment. Now that governments can expect to find themselves before the Court in ever more cases, they will have to pay much greater attention to the Court's jurisprudence and seek to implement it on the domestic level, either by

⁴⁰ See, e.g., Inter-Am. Inst. of H.R., *Judicium and Vita: Jurisprudencia Nacional de América Latina en Derechos Humanos*, No. 7 (2000).

⁴¹ See generally, T. Buergenthal, *Self-Executing and Non-Self-Executing Treaties in National and International Law*, 234 HAGUE ACAD. RECUEIL DES COURS 303, 341 *et seq.* (1992).

⁴² There are some notable exceptions to this pattern. Thus, in Judgment of July 7, 1992, C.J.N., Argen., Case No. E. 64. XXIII, the Argentine Supreme Court overruled a prior decision and, in reliance on an advisory decision of the Inter-American Court (Enforceability of the Right to Reply or Correction, Advisory Opinion of Aug. 29, 1986, Inter-Am. Ct. H.R., Ser. A, OC-7/86), held that article 14 of the American Convention on Human Rights created in Argentina a directly enforceable right of reply. See Buergenthal, *International Tribunals and National Courts: The Internationalization of Domestic Adjudication*, in RECHT ZWISCHEN UMBRUCH UND BEWAHRUNG (FESTSCHRIFT FÜR RUDOLF BERNHARDT) 687, 695-99 (U. Beyerlin, M. Bothe, R. Hofmann, E-U. Petersmann 1995); H. Jarmul, *The Effect of Decisions of Regional Human Rights Tribunals on National Courts*, 28 N.Y.U. J. INT'L L. & POL. 311 (1995).

⁴³ See generally, J. Polakiewicz & V. Jacob-Foltzer, *The European Human Rights Convention in Domestic Law: The Impact of Strasbourg Case Law in States where Direct Effect is given to the Convention*, 12 HUM. RTS. L.J. 65 (Part I) and 125 (Part II) (1991).

⁴⁴ The new Rules of Procedure of the Inter-American Commission on Human Rights [hereinafter Rules of Procedure] entered into force on May 1, 2001. For the amended text, see 22 HUM. RTS. L.J. 293 (2001). See also, D. Shelton, *New Rules of Procedure for the Inter-American Commission on Human Rights*, 22 HUM. RTS. L.J. 169 (2001).

⁴⁵ The new Rules of Procedure permit the Commission, by an absolute majority vote and a reasoned decision, to override the references requirement. See Rules of Procedure art. 44(1).

legislation or by encouraging their courts to do so, in order to avoid being repeatedly held in non-compliance with their obligations under the Convention.

Of course, Europe and especially Western Europe have a much longer tradition than Latin America when it comes to respect for the rule of law and legal institutions. The corruption of legal institutions by Latin America's military regimes and civilian dictatorships brought the law and courts generally into disrepute. This reality affected and continues to affect how judges in these countries think of their role and of the function of law in their societies. It has also tended to stifle whatever judicial creativity and independence judges need in order to be able to recognize the relevance of and to invoke international judicial pronouncements in the exercise of their functions.

I have also frequently wondered whether the small size of the Inter-American Court of Human Rights contributes to the limited domestic effect of its judgments. Some 24 nations have ratified the Convention, but the Court still only has seven judges. *Ad hoc* judges can, of course, be appointed in cases involving States that have no judges on the Court.⁴⁶ But this does not take account of the fact that, given a seven-member court, fewer than one-third of the States Parties have a judge on the Court. The other two-thirds and their judiciaries seldom have an opportunity to interact with the Court except when their governments are parties to a case. This lack of interaction between these governments and the Court and between national judges and their international judges cannot but affect the interest and confidence the governments and their judicial institutions have in the Court. While the mammoth size of the European Human Rights Court with its more than forty judges has at times invited ridicule, its size has confidence-building advantages that should not be underestimated. Each of these judges provides an informal link between the Court and his national judiciary. This is an advantage the Inter-American Court does not have when compared to the European Court.

Another problem we faced in the Inter-American Court—it is probably still a problem today—had to do with our inability to have the press and electronic media take much note of our existence. Only when we dealt with the *Schmidt Case*, which of course was of special interest to the press, did we get good coverage. The fact that few international correspondents are stationed in Costa Rica no doubt had something to do with the lack of coverage in general. But our real problem in this regard stemmed from the difficulty all courts face in one form or another: judges and court employees are prevented from making any but the blandest pronouncements about the cases being heard or to be heard in their court. The pronouncements they feel free to make certainly do not attract the public attention that human rights courts need in order to have an impact, particularly when they are new. If the judgments of international human rights courts are not adequately publicized, they are much easier for governments to disregard. This has been and continues to be a problem for the Inter-American Court.

That the message sometimes gets through even without massive public relations efforts was vividly demonstrated to me while I served on the United Nations Truth Commission for El Salvador. We were interviewing some *campesinos* in a small village where serious human rights violations had taken place during El Salvador's long civil war. One of the witnesses, an old farmer, reported on what had happened in his village. He concluded with the demand that the government comply fully with the "Velásquez Rodríguez Law." Our chairman responded, "you mean the Velásquez Rodríguez Case?" "Yes," the old man replied, "the law that does

⁴⁶ Convention art. 55(2).

away with impunity and makes governments pay for their human rights violations.” It will always remain a mystery for me how he, living in that far away village in El Salvador, had heard about a judgment of the Inter-American Court sitting in San José, Costa Rica. But the fact that he had heard of it suggests that sometimes news that inspires hope in people whose human rights are being violated has a way of getting through and giving them hope.