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## Member State Compliance with the Judgments of the Inter-American Court of Human Rights

Morse Tan

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## **Member State Compliance with the Judgments of the Inter-American Court of Human Rights**

MORSE TAN\*

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### **Abstract**

*This essay fills a gap by exploring compliance theory in international law to the Inter-American Court of Human Rights. After introducing the topic and setting the context, it delves into the question of why nations follow international law. Interacting with prominent theoretical models (including the managerial model, fairness and legitimacy, transnational legal process, self-interest, and a comparative perspective with Europe), it arrives at a critical synthesis in the conclusion.*

### **Member State Compliance with the Judgments of the Inter-American Court of Human Rights in its Inception Phase**

Non-compliance with the judgments of a court, considered the serious offence of "contempt of court" here in the United States, can carry serious penalties, especially criminal contempt of court.<sup>1</sup> In the case of the Inter-American Court of Human Rights,<sup>2</sup> hereinafter called the IACHR, the

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<sup>1</sup> 18 USCS §401 (2005); *see also* Green v. United States, 356 U.S. 165 (1958); Rebecca Yoheved Starr, *Twenty-Eighth Annual Review of Criminal Procedure: Authority of the Trial Judge*, 87 GEO. L.J. 1590 (1999).

<sup>2</sup> "The Inter-American Court of Human Rights is the sole judicial organ in the Inter-American human rights system. As such, it is the final arbiter of human rights in those American States that have ratified the American Convention on Human Rights." JO M. PASQUALUCCI, *PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS* (2003); *see also* Thomas Buergenthal, *The Inter-American Court of Human Rights* 76 A.I.J.L. 231 (1982). Since the Inter-American system of Human Rights was created, the creation of a judicial organ was a vital necessity. *See* CARLOS GARCIA BAUER, *LOS DERECHOS HUMANOS EN AMERICA [The Human Rights in America]* (1987). "The Court's purpose is specifically defined as the application and interpretation of the Convention. In carrying out its purpose the Court exercises both an adjudicatory and advisory jurisdiction." SCOTT DAVIDSON, *THE INTER-AMERICAN COURT OF HUMAN RIGHTS* (1992); *see also* Jo M. Pasqualucci, *Advisory Practice of the Inter-American Court of Human Rights: Contributing to the Evolution of International Human Rights Law* 38 STAN. J INT'L L. 241 (2002). For more information on the advisory jurisdiction, *see* MANUEL E. VENTURA ROBLES & DANIEL ZOVATTO, *LA FUNCION CONSULTIVA DE LA CORTE INTERAMERICANA DE DERECHOS HUMANOS: NATURALEZA Y PRINCIPIOS [THE ADVISORY JURISDICTION OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS: NATURE AND PRINCIPLES]* (1982-1987). For more information about the operation of the Human Rights Court, *see* Antonio Augusto Cancado Trindade, *The Operation of the Inter-American Court of Human Rights*, in *THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS* (David J. Harris & Stephen Livingstone eds., 1998). For a detailed history of the Inter-American Court of Human Right, *see also* Víctor Rodríguez 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 (2000); LA CORTE

*sequellae* seem less overt yet nonetheless maintain a sizable influence.<sup>3</sup> One might ask how a court such as the IACHR, given its lack of police or armed forces to enforce its orders, could possibly have a high rate of compliance from sovereign states. Yet at least at a certain level, the Court has had a very high level of compliance.<sup>4</sup>

It can be argued, as Prof. Douglass Cassel at Northwestern University School of Law does, that the Court has only had one and a half full-blown, defiant responses.<sup>5</sup> He writes especially about the Peru crisis<sup>6</sup> (but also mentions Trinidad and Tobago)<sup>7</sup> in "Peru Withdraws from the Court: Will the Inter-American Human Rights System Meet the Challenge?"<sup>8</sup>

Cassel first lays out a foundational paradox found in the Inter-American system of human rights:<sup>9</sup> the IACHR is at the zenith of its

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INTERAMERICANA DE DERECHOS HUMANOS [The Inter-American Court of Human Rights] (1986); The Inter-American Court of Justice, at <http://www.corteidh.or.cr/> (last visited Feb. 18, 2005).

<sup>3</sup> There are less overt but nonetheless real and perceived consequences for not complying: they can come in diplomatic, economic, political and social dimensions, for examples.

<sup>4</sup> While the Court has eventually received compliance with its reparation orders, it has had difficulty in getting State compliance with orders for States to press criminal prosecution in their domestic systems.

<sup>5</sup> Douglass Cassel, *Peru Withdraws from the Court: Will the Inter-American Human Rights System meet the Challenge?* 20 HUM. RTS. L.J. 167, 167-168 (1999).

<sup>6</sup> "The interaction between Peru and the Inter-American Court of Human Rights (Court) over the last few years has spawned a series of pathbreaking events. The Court issued unprecedented remedial judgments in cases that were brought against Peru under the American Convention of Human Rights and that arose out of the conviction and sentencing of civilians in military tribunals by so-called faceless judges pursuant to emergency decree laws on terrorism and treason. For the first time in its history, the Court ordered a state to release a prisoner, to nullify judgments of its courts and to reform its domestic laws." Bernard H. Oxman & Karen C. Sokol, *International Decision: Ivcher Bronstein Human Rights—Law of treaties – Jurisdiction of Inter-American Court of Human Rights—Effect of Attempted Withdrawal of Jurisdiction*, 95 AM. J. INT'L L. 178 (2001).

<sup>7</sup> Trinidad and Tobago, which had been a State Party, denounced the American Convention on May 26, 1998, effective May 26, 1999. PASQUALUCCI, PRACTICE AND PROCEDURE, *supra* note 2; *see also* Richard J. Wilson & Jan Perlin, *The Inter-American Human Rights System: Activities from Late 2000 Through October 2002*, 18 AM. U. INT'L L. REV. 651 (2003).

<sup>8</sup> Cassel, *supra* note 5, at 167; *see also* Karen C. Sokol, *Human Rights-laws of Treaties—Jurisdiction of Inter-American Court of Human Rights—Effect of Attempted Withdrawal of Jurisdiction*, 95 AM. J. OF INT'L L. 178-185 (2001). Sokol writes about the path-breaking nature of the interactions between Peru and the IACHR.

<sup>9</sup> "The inter-American human rights system is composed of a series of international documents. The principal human rights tools include: the American

acceptance as well as the exercise of its broad formal powers yet it contends with a relative paucity of diplomatic support.<sup>10</sup> This divide came to the forefront during the crisis of Peru's attempted withdrawal from the Court.<sup>11</sup>

Peru, which through former President Fujimori (who fled the country in October 2000<sup>12</sup>) had tried to openly defy the Court,<sup>13</sup> has since formally re-entered its place within the Court's jurisdiction.<sup>14</sup> Ivcher,<sup>15</sup> who had lost his

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Convention on Human Rights, and its accompanying protocols; the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights; and the Protocol to the American Convention on Human Rights to Abolish the Death Penalty. In addition, three regional inter-American conventions seek to broaden the scope of protected human rights: the Inter-American Convention to Prevent and Punish Torture; the Inter-American Convention on Forced Disappearance of Persons; and the Inter-American Convention for the Prevention, Punishment, and Eradication of Violence Against Women." Rescia & Seitles, *supra* note 2; see also DAVIDSON, *supra* note 2; TOM FARER, THE RISE OF THE INTER-AMERICAN HUMAN RIGHTS REGIME: NO LONGER A UNICORN, NOT YET AN OX, THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS (1998); Jo. M. Pasqualucci, *Victim Reparations in the Inter-American Human Rights System: A Critical Assessment of Current practice and procedure*, 18 MICH. J. INT'L L. 19 (1996).

<sup>10</sup> *Supra* note 5, at 167; see, e.g., *Financial Situation of the Court, 1997-1998* INTER-AM. CT. H.R. 31, OAS/Ser. L/III.29, doc. 5 (1998).

<sup>11</sup> Cassell, *supra* note 10. The Inter-American Court of Human Rights was informed by the Peruvian Embassy in Costa Rica that Peru adopted Legislative Resolution No. 27401 on January 18th, 2001. This Resolution charges the Executive Branch to do everything necessary to re-establish the State of Peru under the contentious jurisdiction of the Inter-American Court of Human Rights. Inter-American Court of Human Rights, at [http://www.corteidh.or.cr/PRENSA/2001/cp\\_2\\_esp.htm](http://www.corteidh.or.cr/PRENSA/2001/cp_2_esp.htm) (last visited 2003).

<sup>12</sup> "A popular uprising in the year 2000 forced Fujimori to flee to Japan, where he was seeking protection as a national, so as not to stand trial for multiple human rights violations" Sonia Picado, *The Evolution of Democracy and Human Rights in Latin America: A Ten Year Perspective* No. 3, HUM. RTS. BRIEF 28 (2004).

<sup>13</sup> "Peru made history by becoming the first state to deposit its withdrawal from the Court's jurisdiction without denouncing the American Convention. The Court deemed the withdrawal ineffective: even though states may ratify the American Convention before or without ever accepting the compulsory jurisdiction of the Court, once they do accept that jurisdiction, they may denounce it only through denunciation of the Convention as a whole." Peru may therefore not return to the *status quo ante*; once committed to the American Convention and the compulsory jurisdiction of the Court, it is both or none. Oxman & Sokol, *supra* note 6.

<sup>14</sup> Inter-American Court of Human Rights, at [http://www.corteidh.or.cr/PRENSA/2001/cp\\_4\\_esp.htm](http://www.corteidh.or.cr/PRENSA/2001/cp_4_esp.htm) 4 (last visited Sept. 2003). The Ivcher Bronstein case, *Interpretation of the Judgment on the Merits: Art. 67 American Convention on Human Rights, Judgment of September 4*, INTER-AM. CT. H.R., (ser. c), No. 84 (2001), available at <http://www1.umn.edu/humanrts/iachr/C/84-ing.html> (last visited Mar. 6, 2005).

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During this session, the Court delivered on the 6th of February. The Court decided unanimously:

1. to declare that the State violated the right to a nationality found in Article 20.1 and 20.3 of the American Convention of Human rights against Baruch Ivcher Bronstein.
2. to declare that the State violated the judicial rights in Article 8.1 and 8.2 of the American Convention of Human Rights against Baruch Ivcher Bronstein.
3. to declare that the State violated the right to judicial protection found in Article 25.1 of the American Convention of Human Rights against Baruch Ivcher Bronstein.
4. to declare that the State violated the right to private property found in Articles 21.1 and 21.2 of the American Convention of Human Rights against Baruch Ivcher Bronstein.
5. to declare that the State violated the right of free expression found in Articles 13.1 and 13.3 of the American Convention of Human Rights against Baruch Ivcher Bronstein.
6. to declare that the State did not meet its general obligation in Article 1.1 of the American Convention of Human Rights in connection with the violations of substantive rights spoken of in the previous resolution points prior to this Sentence.
7. that the State ought to investigate the deeds which generated the violations established in the present Sentence in order to identify and sanction the ones responsible for them.
8. that the State ought to facilitate the conditions for Baruch Ivcher Bronstein would be able recover the use and enjoyment of his rights as the majority owner of his Latin American Company as it was before August 1, 1997 according to the terms of the domestic legislation. Domestic law applies to the compensation pertaining to the dividends as the majority shareholder. For all of this, the respective requests ought to be submitted to the competent, national authorities.
9. The State ought to pay in equity Baruch Ivcher Bronstein an indemnization of \$20,000.00 or its equivalent in Peruvian currency to effectuate the payment of moral damages.
10. In equity, the State ought to pay Baruch Ivcher Bronstein the sum of \$50,000.00 U.S. dollars or its Peruvian equivalent to make him whole for the costs related to the domestic as well as international litigation.
11. The Court would supervise the execution of the Sentence until the closing of the case.

On March 14th, 2001, the Court decided the following in regards to the Ivcher Bronstein case:

1. To lift the provisional measures ordered by the Court in its resolutions of November 21st and 23rd, 2000 in favor of Baruch Ivcher Bronstein, his wife, Neomy Even de Ivcher, and their daughters Dafna Ivcher Even, Michal Ivcher Even, Tal Ivcher Even and Hadaz Ivcher Even as well as Ms. Rosario Lam Torres and Julio Sotelo Casanova, Jose Arrieta Matos, Emilio Rodriguez Larra?, Fernando Via? Villa, Menachem Ivcher Bronstein y Roger Gonzalez.

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2. To communicate the present Resolution to the State and to the Inter-American Commission.
  3. To archive the legal proceedings relative to the provisional measures in this case. Tribunal Constitucional de Peru at <http://www.tc.gob.pe/> (last visited February 18<sup>th</sup>, 2005).

[again unofficial paraphrase/translation of official material on the Court's web page] The Inter-American Court of Human Rights in San Jose, Costa Rica in its sessions from January 29<sup>th</sup> to February 9<sup>th</sup>, 2001, decided the following matters:

1. The Constitutional Court case. During the time of these sessions, the Court delivered this sentence on January 31<sup>st</sup>:  
Unanimously,
  1. to declare that the State violated judicial guarantees found in Article 8 of the Convention against Manuel Aguirre Roca, Guillermo Rey Terry y Delia Revoredo Marsano.
  2. to declare that the State violated the right to judicial protection found in Article 25 of the Convention against Manuel Aguirre Roca, Guillermo Rey Terry y Delia Revoredo Marsano.
  3. to declare that the State did not fulfill its general obligation under Article 1.1 of the Convention with respect to the violations of the substantive rights in the previous resolution points in this Sentence.
  4. that the State ought to order an investigation to determine the responsible parties in the human rights violations that were done in the matters pertaining to this Sentence in order to reveal the results of this investigation and punish those responsible.
  5. that the State ought to pay the amounts corresponding with the salaries in conformity with the legislation to Manuel Aguirre Roca, Guillermo Rey Terry y Delia Revoredo Marsano, in agreement with what was established in paragraphs 121 and 128 of this Sentence.
  6. In equity, that the State ought to pay the costs of the victims of the present case in accordance with paragraphs 126 and 128 of this sentence the following amounts: to Mr. Manuel Aguirre Roca US\$25,000.00 or its Peruvian equivalent at the time of effectuating the payment; to Mr. Guillermo Rey Terry US\$25,000.00 or its Peruvian equivalent at the time of effectuating the payment; and Mr. Delia Revoredo Marsano US\$35,000.00 at the time of effectuating the payment.
  7. that the Court would supervise the completion of the Sentence until the conclusion of the case.

The Constitutional Court case Provisional Measures on March 14<sup>th</sup>, 2001, the Court resolved:

1. To lift the provisional measures ordered by the Court in its Resolution of August 14<sup>th</sup>, 2000 for Delia Revoredo Marsano.
2. To communicate the present Resolution to the State of Peru and to the Inter-American Commission of Human Rights.
3. To archive the legal proceedings.

<sup>15</sup> See Oxman & Sokol, *supra* note 6.

television station, has had his station restored to him.<sup>16</sup> The Peruvian Constitutional Court Justices<sup>17</sup> ousted by former President Fujimori have been reinstated.<sup>18</sup> The Court can count itself the victor through the Peruvian crisis.<sup>19</sup>

Trinidad and Tobago,<sup>20</sup> which withdrew over capital punishment cases,<sup>21</sup> has rejoined (with reservations) the community of Latin American

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<sup>16</sup> See Wilson & Perlin, *supra* note 7.

<sup>17</sup> See Interpretation of the Judgment on the Merits: Art. 67 American Convention on Human Rights, Judgment of September 4, *supra* note 18.

<sup>18</sup> Jurisdiction, Resoluciones y Sentencias, Series C, No. 55 (2000), available at [http://corteidh.oea.nu.or.cr/ci/PUBLICAC/SERIE\\_C/C\\_55\\_ESP.HTM](http://corteidh.oea.nu.or.cr/ci/PUBLICAC/SERIE_C/C_55_ESP.HTM) (March 7, 2005); see also Interpretation of the Judgment on the Merits: Art. 67 American Convention on Human Rights, Judgment of September 4, *supra* note 18, "While Ivcher was struggling to regain his citizenship and his rights in the television station, President Alberto Fujimori, serving his second term, was endeavoring to overcome the limitations of Peru's 1993 Constitution, which prohibits a president from serving more than two consecutive terms. Fujimori's first term began in 1990, three years before the Constitution came into effect. In 1996, the Peruvian Congress enacted a statute that interpreted the term limitation as inapplicable to presidential terms that began prior to the approval of the Constitution. Three of the seven justices (with two abstentions) on Peru's Constitutional Tribunal (Tribunal Constitucional) invalidated the new statute, however, as it 'applied to the specific case of the incumbent President's candidacy for the office of President in the year 2000,' thereby threatening to frustrate Fujimori's ambitions for a third presidential term. Four months later, the Congress impeached the three justices and then voted in favor of removing them from the Constitutional Tribunal. Pursuant to a petition filed by a number of Peruvian congressional deputies, the Commission issued a report finding that Peru had violated the justices' rights to a fair trial, as well as the right of all Peruvians to an independent and impartial justice system. The Commission recommended that Peru reinstate the justices, but Peru failed to comply or to reach a friendly settlement after negotiations with the petitioners. The Commission then submitted the case to the Court." See also Oxman & Sokol, *supra* note 6.

<sup>19</sup> For more details about the Peruvian crisis, see ANA SALADO OSUNA, LOS CASOS PERUANOS ANTE LA CORTE INTERAMERICANA DE DERECHOS HUMANOS [PERU'S CASES BEFORE THE INTER-AMERICAN COURT OF HUMAN RIGHTS] (2004).

<sup>20</sup> Wilson & Perlin, *supra* note 7.

<sup>21</sup> "During 2001 and 2002, the Court decided both the admissibility and merits of a collection of death penalty cases from Trinidad and Tobago ('Trinidad'). The Court first considered Trinidad's preliminary objections in three separate cases, the Hilaire Case, the Benjamin et al. Case, and the Constantine et al. Case. The cases were later consolidated for disposition on the merits and reparations under the name *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*. All of these cases present complex issues of treaty application and treaty reservations, arising from Trinidad's aggressive efforts to defend its death penalty regime. Because of its desire to speed up executions, Trinidad withdrew its ratification of the Convention on May 26, 1999, one year after its announced intention to do so. The Commission and Court nonetheless continue to apply the Convention to all pending cases that arose when the Convention was in effect" *Id.*

nations under the jurisdiction of the Court. So the Court has prevailed through the one and a half outright challenges against it, both with Peru as well as Trinidad and Tobago.<sup>22</sup>

As of yet, no one has assessed the general state of compliance to the IACHR.<sup>23</sup> This article aims to start filling this gap in the scholarly literature. It also seeks to provide some theoretical grounding to compliance with international law, why the Court has received the degree of compliance it has had, as well as theory based clues to how the Court might gain greater compliance and influence<sup>24</sup>—since its work plays a critical role in bringing greater justice to this hemisphere.<sup>25</sup>

### Background and Foundation

A brief background of the Inter-American human rights system helps to set the stage for understanding the history, practice and procedure of the Inter-American court, which in turn gives context to the issue of compliance.<sup>26</sup>

The Court was installed in Costa Rica through a series of acts starting from September 3, 1979 in the National Theater of San Jose. The National Theatre, appropriately enough, was the location where the American

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<sup>22</sup>Interview with Professor Douglass Cassel, Northwestern University School of Law (Feb. 8, 2001).

<sup>23</sup>*Id.*; also see Mark W. Janis, *The Efficacy of Strasbourg Law*, 15 CONN. J. OF INT'L L. 39 (2000). Janis notes gaps in the compliance literature for the European system. There seem to be appreciably more gaps in the existing Inter-American human rights system literature.

<sup>24</sup>“Evaluating accomplishments and prospects in the area of international human rights law recalls the oft-used rhetorical question about whether the glass is half empty or half full. As far as human rights are concerned, if the question is 'how much has been achieved,' the answer must be 'a great deal.' If the question is 'how much remains to be achieved,' the answer will be the same: 'a great deal.' This statement made by Thomas Buergenthal about the accomplishment of international human rights in general could be applied to the Inter-American system of Human Rights. Thomas Buergenthal, *International Human Rights Law and Institutions: Accomplishments and Prospects*, 63 WASH L. REV. 1 (1988); see also, Michael F. Cosgrove, *Protecting the Protector: Preventing the Decline of the Inter-American System for the Protection of Human Rights*, 32 CASE W. RES. J. INT'L L. 39 (2000).

<sup>25</sup>See THOMAS BUERGENTHAL & DOUGLASS CASSEL, EL FUTURO DEL SISTEMA INTERAMERICANO DE PROTECCION DE LOS DERECHOS HUMANOS [THE FUTURE OF THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS] INTER-AMERICAN INSTITUTE OF HUMAN RIGHTS (1998).

<sup>26</sup>See THOMAS BUERGENTHAL & DINAH SHELTON, PROTECTING HUMAN RIGHTS IN THE AMERICAS: CASES AND MATERIALS (4th ed., 1995).

Convention (with which the Court is supposed to adjudicate) had been drafted close to a decade earlier.<sup>27</sup>

The Convention entered into force on July 18, 1978 when Grenada deposited its instrument of ratification to the Convention. Grenada acted as the pivotal eleventh member state of the OAS to do so.<sup>28</sup> On May 22, 1979, the States Parties to the Convention elected seven judges to serve as the original Inter-American Court of Human Rights.<sup>29</sup>

The Inter-American Court of Human Rights is the sole judicial organ in the Inter-American human rights system. As such, it is the final arbiter of human rights in those American States that have ratified the American Convention on Human Rights. As of January 2003, twenty-four of the thirty-five Member States of the OAS are State Parties to the American Convention.<sup>30</sup>

During its early years, the Court's prospects for improving the human rights of the people of the Americas appeared uninspiring. Dictators in the Western Hemisphere perpetrated gross and systematic violations of human rights. State-sponsored forced disappearances, extra-judicial killings, and torture were commonplace. The court's principal vehicle for contributing to international law during that period was its advisory opinions.<sup>31</sup>

When the Commission began to refer contentious cases to the Court, and the Court pronounced violations of human rights, it shocked the governments of newly emerging democracies. These States equated the need for human rights enforcement with preemptory power, not unlike the prior caudillos. Some feared that States would refuse to participate in proceedings before the court, a recurring problem before the International Court of Justice at that time. This fear proved largely unfounded. States responded to

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<sup>27</sup> *Installation of the Court*, 1980-1983 INTER-AM. CT. H.R. 9, OEA/ser. L/V/III.3, doc. 13 corr. 1 (1980).

<sup>28</sup> *Entry into Force of the American Convention*, 1980-1983 INTER-AM. CT. H.R. 7, OEA/ser. L/V/III.3, doc. 13 corr. 1 (1980).

<sup>29</sup> Their names and nationalities are as follows: Thomas Buergenthal (United States), Máximo Cisneros Sanchez (Peru), Huntley Eugene Munroe (Jamaica), Cesar Ordóñez Quintero (Colombia), Rodolfo Piza Escalante (Costa Rica), Carlos Roberto Reina Idiaquez (Honduras), M. Rafael Urquía (El Salvador).

<sup>30</sup> "These states are Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay and Venezuela. Trinidad and Tobago, which had been a State Party, denounced the American Convention on 26 May 1998, effective 26 May 1999." PASQUALUCCI, PRACTICE AND PROCEDURE, *supra* note 2.

<sup>31</sup> *Id.*

applications filed against them by designating agents, filing memoranda, and appearing and arguing at public hearings. To be sure, States often filed preliminary objections, many of which were frivolous; however, when the Court denied these objections, the states presented their defenses.

The reputation of the Inter-American Court increased as a result of the quality of its jurisprudence.<sup>32</sup> The status of the Court is reflected in the status of State witnesses who have appeared before it to defend State actions. For example, in *The Baena Ricardo Case*, in which 270 former State employees alleged that they were illegally dismissed from their jobs as a result of an *ex post facto* law, Guillermo Endara, the former president of Panama, and his vice-president testified before the Court.<sup>33</sup> In which 270 former State employees alleged that they were illegally dismissed from their jobs as a result of an *ex post facto* law, Guillermo Endara, the former president of Panama, and his vice-president testified before the Court. Eventually, some States accepted responsibility for the human rights violations before the Court reached a judgment—leaving only the issue of reparations to be decided.<sup>34</sup> The acceptance of international responsibility on the part of the State indirectly acknowledged that an Inter-American Court judgment attributing responsibility to a State for human rights violations would be taken seriously—both domestically and internationally.<sup>35</sup>

State compliance with Court-ordered reparations has similarly moved forward. As the Court has no coercive mechanisms in and of itself to enforce judgments, some thought that States would simply ignore them and refuse to make Court-ordered reparations to the victims. Honduras, under the presidency of Carlos Roberto Reina, a former Inter-American Court judge, eventually paid the compensation ordered by the Court. Most other States have also paid pecuniary compensation ordered by the Court, although many have balked and delayed payment for extensive periods.

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<sup>32</sup> For criteria referring cases to the Court, see Claudio Grossman, *President's Inaugural Session Speech at the 95th Regular Meeting of the Inter-American Commission on Human Rights*, 42 ST. LOUIS U. L.J. 1115 (1998).

<sup>33</sup> *Baena Ricardo et al. (270 Workers v. Panama)*: Merits, Inter-Am. Court H.R., Series C, No. 72, ¶ 65(h)-(i) (2001).

<sup>34</sup> “Cases in which States have accepted international responsibility include *Barrios Altos (Chumbipuma Aguirre et al v Peru)* (Merits), Case 75, Inter-Am C.H.R., para 31 ser.c, doc. 75. (2001); *Aloeboetoe et al v Suriname* (Merits), Inter-Am. C.H.R., para 22, ser.c, doc. 11(1991); *El Amparo v Venezuela* (Merits), Inter-Am. C.H.R., para 19, ser c, doc. 19 (1995); *Garrido and Baigorria v Argentina* (Merits), Inter-Am C.H.R., para 25, ser. c, doc. 26, (1996); *Del Caracazo v Venezuela* (Merits), Inter-Am C.H.R, para 37, ser c, doc. 58 (1999). *Las Palmeras v Colombia* (Merits), Inter-Am. C.H.R., para 19, ser c, doc. 90 (2001) accepting partial responsibility.” PASQUALUCCI, PRACTICE AND PROCEDURE, *supra* note 2 at 8.

<sup>35</sup> PASQUALUCCI, PRACTICE AND PROCEDURE, *supra* note 2.

Redress extends beyond compensation alone. The Court may also order the State to take actions or to desist from particular acts. When Peru complied with the Court's order to release from prison Maria Elena Loayza Tamayo,<sup>36</sup> a college professor, it marked a new level of State compliance.<sup>37</sup> Upon the Court's order, Peru also later released Cesti Hurtado from prison.<sup>38</sup>

Subsequently, in certain cases when the Court has declared a domestic law or judgment to be in violation of the American Convention, States have amended the laws,<sup>39</sup> domestic courts have declared them unconstitutional,<sup>40</sup> or domestic court judgments have been annulled.<sup>41</sup> These developments exalt Inter-American human rights law to supranational stature.

There exists, however, another level of State compliance with Court orders not yet commonly observed in the Inter-American system. The Court, in almost every case, orders the State to investigate, prosecute and punish the individuals responsible for the human rights violations. These orders seldom find fulfillment. In most cases, impunity reigns, and the State power structure lacks the means or the will to bring the perpetrators of human rights violations to justice. Some day, if and when the States regularly follow Court orders to prosecute and punish the violators, the Court will have contributed substantially to the fall of impunity and to the specific and general deterrence of human rights violations in this hemisphere.<sup>42</sup>

The initial apprehension that the member states would withdraw their acceptance of the Court's jurisdiction or denounce the American Convention has not generally met with reality. Only one State, Trinidad and Tobago, has denounced the Convention and the Court's jurisdiction, but it later returned with reservations.<sup>43</sup> Peru, which had announced its intention to withdraw its

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<sup>36</sup> See *Loayza Tamayo v. Peru (Merits)*, Inter-Am. C.H.R. para 5, 84, ser. c, doc. 33 (1997).

<sup>37</sup> PASQUALUCCI, PRACTICE AND PROCEDURE, *supra* note 2.

<sup>38</sup> *Cesti Hurtado v. Peru (Request for Interpretation of the Judgment of 29 September 1999)* Inter-Am. C.H.R., order of 19, ser. c, doc. 62 (1999).

<sup>39</sup> *Cantoral Benavides v Peru (Reparations)*, Inter-Am. C.H.R., para 76, ser c, doc. 88 (2001).

<sup>40</sup> *Suarez Rosero v. Ecuador (Reparations) (Art.63 (1), American Convention of Human Rights)*, Inter-Am. C.H.R., para 76, ser c, doc. 88 (2001); PASQUALUCCI, PRACTICE AND PROCEDURE, *supra* note 2.

<sup>41</sup> *Cesti Hurtado v. Peru (Reparations)* Inter-Am. C.H.R., para 15, ser. c, doc. 78, (2001).

<sup>42</sup> PASQUALUCCI, PRACTICE AND PROCEDURE, *supra* note 2.

<sup>43</sup> See Natasha Parassran Concepcion, *The Legal Implications of Trinidad & Tobago's Withdrawal from the American Convention on Human Rights*, 16 AM. U. INT'L L. REV. 847 (2001).

recognition of the Court's jurisdiction, has since reaffirmed its acceptance of the Court's jurisdiction. Moreover, additional States beyond the original member states have both ratified the Convention, and accepted the Court's jurisdiction.<sup>44</sup>

### **Agreement for the Court's Establishment and its Impact Towards Compliance**

The *Agreement between the Government of the Republic of Costa Rica and the Inter-American Court of Human Rights* established the legal context in which the Court operates within its host country.<sup>45</sup> Some of the portions of this agreement have a direct or indirect impact on our topic at hand.

- Article 1 provides that the IACHR is "autonomous."<sup>46</sup>
- Article 3 helps the Court to build a community of law.<sup>47</sup>
- Article 5 provides that the Court will enjoy the immunities and privileges in the "Agreement on Privileges and Immunities of the Organization of American States."<sup>48</sup> This article expressly takes "into account the importance and independence of the Court."<sup>49</sup>
- Article 6 protects the premises and archives of the Court from interference by any government search, seizure or interference.

Given the sensitive nature of rulings against national governments, this safeguard helps embolden the Court by making its archives and premises inviolate.<sup>50</sup>

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<sup>44</sup> See Press Release, Peruvian *Legislative Resolution No. 271532*, Inter-Am. C.H.R., CP2/01, at <http://corteidh.or.cr>. (last visited Mar. 6, 2005).

<sup>45</sup> *Agreement Between the Government of the Republic of Costa Rica and the Inter-American Court of Human Rights*, 1980-1983 INTER-AM. CT. H.R. 16, 17 OEA/ser. L/III.5, doc. 13 (1981) [hereinafter, *Costa Rica Agreement*].

<sup>46</sup> This is important because such a body must ideally be independent of the type of political pressure that could distort its judgment.

<sup>47</sup> It provides that the Court may enter into agreements of cooperation with law schools, bar associations, domestic courts, and research institutions dealing with human rights so that the Court can strengthen the principles of the Convention and the Court itself. *Id.* at 18.

<sup>48</sup> *Id.* at 17.

<sup>49</sup> Again, this independence is crucial for establishing the impartiality of the Court. This official acknowledgment of the importance of the Court, while possibly viewed as token, is nonetheless an official pronouncement by the Government of the Republic of Costa Rica, the host country of the Court. Especially during this formative period of the Court, such an official endorsement by Costa Rica could only be seen as a boon towards greater recognition and legitimacy, which aid in compliance. *Id.* at 17.

<sup>50</sup> *Id.* at 18-19.

Financial protection is also built into the agreement. Article 7 forbids taxes on the Court with the exception of charges for public utility services. It also bars the imposition of customs, duties or charges for official use by the Court. It specifically protects the Court's publications from any such customs, duties or charges. This Article prevents retaliatory charges from being placed on the Court. Economic pressure in these forms is thus forbidden by the agreement. In this way, the Court is protected from some illicit attempts at swaying or intimidating it by attacking its figurative pocketbook. Such a measure increases the Court's financial independence.<sup>51</sup>

Article 8 further protects the Court's pocketbook by permitting the Court to operate accounts in any currency, hold funds in a foreign currency, transfer funds between countries, and convert currency *without financial controls, regulations or moratoria of any kind*. This monetary authorization without the burden of financial controls, regulations or moratoria would be important, for example, when there are monetary reparations to handle. If these protections were not in place, a country ordered to pay reparations could impose regulations that would in effect circumvent the payment of the reparation.<sup>52</sup> In this same vein, any judicial or administrative process, according to Article 9, cannot touch the Court, its assets, income and other property. This immunity includes not being subject to domestic courts unless the IACHR expressly waives its immunity in a particular case. Article 9 thus gives the Court the liberty to judge without being judged itself by other courts.<sup>53</sup>

The Court also has what is known as a "total franking privilege." What this means is that the IACHR does not have to pay for postage on its mail. Furthermore, the Court enjoys favorable treatment of its official communications at the level of diplomatic missions as to the rates, taxes, press rates, and priorities for its communications. These Article 10 privileges come with insulation against censorship of its correspondence and other official communications of the Court. The Court may even use codes to relay messages secretly. These measures at once prevent interference with the Court's communications as well as help facilitate these communications.<sup>54</sup>

After Article 10 begin Chapters III-IX, which largely deal with the privileges and immunities of the Court and those who appear before the Court. These privileges include the granting of travel documents such as visas or diplomatic passports. Also, the immunities and privileges for judges are grounded minimally in the Vienna Convention on Diplomatic Relations,

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<sup>51</sup> *Id.* at 19.

<sup>52</sup> *Id.* at 17.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 20.

which Costa Rica ratified. Chapter IV, Article 14 extends the same immunities and privileges to the Secretary and Deputy Secretary of the Court with the exception that they shall not be granted the category of chiefs of mission. Staff receive the privileges and immunities found in the Agreement on Privileges and Immunities of the Organization of American States of May 15, 1949 as well as any other treaties in force. Chapter IX, Article 26 c) grants immunity for persons appearing before the Court from all administrative or judicial proceedings during their stay in Costa Rica, unless the Court waives this immunity out of necessity. Victims and claimants alike have the same immunities and privileges.<sup>55</sup>

Chapter XI, Article 28 provides that Costa Rica will continue to subsidize the Court annually in an amount not less than its initial grant, which is recorded in the Law of the General Budget of the Republic of Costa Rica.<sup>56</sup> For an introductory overview of the Inter-American Court of Human Rights, one would do well to read "A United States View of the Inter-American Court of Human Rights."<sup>57</sup>

### Compliance Theory

Laurence Helfer and Anne-Marie Slaughter provide factors pertaining to what they refer to as supranational adjudication in their rigorous and informative article, "Toward a Theory of Effective Supranational Adjudication."<sup>58</sup> While their immediate application is to the European Court of Justice (ECJ),<sup>59</sup> the European Court of Human Rights (ECHR)<sup>60</sup> and the

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<sup>55</sup> *Id.* at 20-25.

<sup>56</sup> *Id.* at 26.

<sup>57</sup> Douglass Cassel, *A United States View of the Inter-American Court of Human Rights*, in *THE MODERN WORLD OF HUMAN RIGHTS/ESSAYS IN HONOUR OF THOMAS BUERGENTHAL*, 209 (1996). It covers the Court's first 15 years while giving an American professor's view on why the U.S. might consider accepting the Court's contentious jurisdiction.

<sup>58</sup> Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 *YALE L.J.*, 273 (1997).

<sup>59</sup> European Court of Justice, at <http://europa.eu.int/institutions/court/> (last visited Mar. 7, 2005).

<sup>60</sup> "In the European Court of Human Rights, individuals can sue states-parties to the European Convention on Human Rights and Fundamental Freedoms [ECHR]. Just about every western and eastern European State (including Russia) is a state-party to the European Convention. As in the Inter-American system, private individuals and corporations cannot be sued. States, however, can be sued for failure to prevent foreseeable gross human rights violations committed by private persons. Furthermore, corporations can - and often do - sue states-parties. Only in dicta has the European Court recognized that shareholders can sue in exceptional circumstances. The European Court provides monetary damages, legal fees and costs awards; however, it does not provide injunctive relief and has not provided punitive damages. Another

United Nations Human Rights Committee,<sup>61</sup> they explicitly state how their "checklist" of factors could be applied to other international<sup>62</sup> (or supranational/aspiring towards supranational status) bodies.<sup>63</sup> These factors

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aspect of the adequacy of these international tribunal systems concerns the time it takes for the case to reach its conclusion. Assuming that the case is found admissible and the tribunal reaches the merits and damages award stage, the proceedings can last anywhere from two to ten years, depending on the case's complexity and the tribunal's interest in a particular case. The Inter-American system will generally take longer because of its lack of financial and staff resources and each case's two-stage process of going through both the Commission and Court. On the other hand, in addition to having more money and a larger staff, cases before the European Court do not have to go through a commission. The Inter-American system however, does have friendly dispute resolution mechanisms built into it that expedite the resolution of cases. Unfortunately, the European system no longer appears to have such a strong, friendly dispute resolution mechanism in place, as the old European Commission of Human Rights was dismantled a few years ago." Francisco Forrest Martin, *The International Human Rights & Ethical Aspects of the Forum Non Conveniens Doctrine*, 35 U. MIAMI INTER-AM. L. REV. 101 (2003); See The European Court of Human Rights, at <http://www.echr.coe.int/> (last visited Feb. 28, 2005); Luis Ignacio Sanchez Rodriguez, *The American and European Human Rights' System*, LA CORTE Y EL SISTEMA INTERAMERICANOS DE DERECHOS HUMANOS [The Court and the Inter-American System of Human Rights] (1994), at <http://www.echr.coe.int/> (last visited Feb. 18, 2005).

<sup>61</sup> "The United Nations Human Rights Committee was established to monitor the implementation of the Covenant and the Protocols to the Covenant in the territory of States parties. It is composed of 18 independent experts who are persons of high moral character and recognized competence in the field of human rights. The Committee convenes three times a year for sessions of three weeks' duration, normally in March at United Nations headquarters in New York and in July and November at the United Nations Office in Geneva." United Nations Human Rights Committee, at <http://www.unhcr.ch/html/menu2/6/a/introhrc.htm> (last visited Mar. 6, 2005).

<sup>62</sup> "The term 'international tribunal' is referenced in a number of United States statutes. From these statutory obligations, as interpreted, one can discern a workable definition for international tribunals as: an objective and impartial adjudicative body established by or with the imprimatur of two or more governments with the power to make a binding decision as to law or facts. This definition falls between the two extremes, rejecting a litmus test that excludes many international adjudicative bodies that do not meet certain artificial categories, but is not so broad as to embrace the whole panoply of potential candidate institutions." Roger P. Alford, *Federal Courts, International Tribunals, and the Continuum of Deference*, 43 VA. J. INT'L L. 675 (2003).

<sup>63</sup> "By definition, in a supranational body there is no democratically-legitimate hierarchical superior, as we understand that notion in a national sense. Rather, there are at best indirect political controls exercised by national executives over otherwise-autonomous supranational technocratic agents who owe their loyalty to the membership of the supranational body as a whole rather than to any one particular state." Peter L. Lindseth, *Democratic Legitimacy and the Administrative Character of*

have not been applied as an aggregate, as far as I know, in relation to the Inter-American system of human rights.<sup>64</sup>

What are these factors? Helfer and Slaughter divide up the factors into three main categories:

1. Factors within the control of states party to an agreement establishing a supranational tribunal;
2. factors within the control of the judiciary; and
3. factors often beyond the control of states or judges.<sup>65</sup>

Within the first category of factors within the control of states party to the agreement for a supranational tribunal's formation, they note four factors in descending order of importance:

1. composition of the tribunal;
2. caseload or functional capacity of the court;
3. independent fact-finding capacity; and
4. formal authority or status as law of the instrument that the tribunal is charged with interpreting and applying.<sup>66</sup>

Under factors within the control of the judiciary, this article finds the following factors the most important:

- awareness of audience;
- neutrality and demonstrated autonomy from political interests;
- incrementalism;
- quality of legal reasoning;
- judicial cross-fertilization and dialogue; and
- the form of opinions.<sup>67</sup>

The third cluster of factors is the one that fits into neither of the first two, broad categories. The three that this article notes are:

1. the nature of the violations;
2. autonomous domestic institutions committed to the rule of law and responsive to citizen interests; and
3. the relative cultural and political homogeneity of states subject to a supranational tribunal.<sup>68</sup>

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*Supranationalism: The Example of the European Community*, 99 COLUM. L. REV. 628 (1999).

<sup>64</sup> Wilson & Perlin, *supra* note 7; Christina M. Cerna, *The Inter-American System for the Protection of Human Rights*, 16 FLA. J. INT'L L. 195 (2004); Pasqualucci, *supra* note 2; Michael F. Cosgrove, *supra* note 24.

<sup>65</sup> Helfer & Slaughter *supra* note 58.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

It would be interesting to interact with these factors in reference to what the IACHR has done<sup>69</sup> and what it can yet do.<sup>70</sup> The Slaughter/ Helfer model can aid in analysis.

While the IACHR has its own particular characteristics, it does draw significantly from the European bodies.<sup>71</sup> The IACHR derives some of its substance (in the American Convention<sup>72</sup>) from the same stream that is found in Europe.<sup>73</sup> The IACHR even receives funding from the European Union<sup>74</sup> and European Union countries.

### Why Do Nations Obey International Law?

Louis Henkin states that "almost all nations observe almost all principles of international law and almost all of their obligations almost all of

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<sup>69</sup> See Manuel E. Ventura Robles, *La Corte Interamericana de Derechos Humanos: Camino hacia un Tribunal Permanente*, [The Inter-American Court of Human Rights: The Way Towards a Permanent Court], in LA CORTE INTERAMERICANA DE DERECHOS HUMANOS [The Inter-American Court of Human Rights] (1986).

<sup>70</sup> See Augusto Cancado Trindade & Manuel E. Ventura Robles, *El Futuro de la Corte InterAmericana de Derechos Humanos* [The Future of the Inter-American Court of Human Rights] (2003). To contemplate where the Inter-American system is at, and what direction it can go, see also Brenda Cossman, *Reform, Revolution, or Retrenchment? International Human Rights in the Post-Cold War Era*, 32 HARV. INT'L L.J. 339 (1991).

<sup>71</sup> European Court, *supra* note 59.

<sup>72</sup> The American Convention of Human Rights (American Convention), signed in 1969, incorporated the Commission and assigned it specified specific powers under the Convention. It also created the Inter-American Court of Human Rights (Inter-American Court). The American Convention entered into force in 1978. See the American Convention of Human Rights, at [http://www.hrcr.org/docs/American\\_Convention](http://www.hrcr.org/docs/American_Convention) (February 18th, 2005); NIETO NAVIA, INTRODUCCIÓN AL SISTEMA INTERAMERICANO DE PROTECCIÓN A LOS DERECHOS HUMANOS [Introduction to the Inter-American System of Human Rights] (1993).

<sup>73</sup> As regards regional human rights systems, "three systems are in existence today, one in Europe, one in the Americas, and the third, in Africa. The European system is the oldest of the three and is generally considered to be the most effective. The institutional structure established by the American Convention is modeled on that of the European Convention. The Inter-American Commission on Human Rights and the Inter-American Court have functions similar to those of their European counterparts" Buergenthal, *supra* note 24, at 15. For a comparison between the Inter-American Court of Human Rights and the European Court of Human Rights, see Martin, *supra* note 60.

<sup>74</sup> See European Union, at <http://europa.eu.int> (last visited Mar. 1, 2005).

the time" (emphasis omitted).<sup>75</sup> This assertion finds corroboration in a host of studies?<sup>76</sup>

Andrew T. Guzman notes that, "for years international law scholarship generally assumed that nations tend to comply with international law."<sup>77</sup> Yet some scholars contrarily claim that noncompliance is common. Tragically, the assumption of compliance may most contradict the reality in the realm of international human rights. Despite the great increase in human rights instruments since World War II, noncompliance remains more common than one might expect.<sup>78</sup> In the IACHR, however, compliance (at least on some levels) has stayed the norm with noncompliance the exception.

### The Managerial Model

*The New Sovereignty*, a crowning work by Professor Abram Chayes of Harvard Law School and former Legal Adviser to the U.S. State Department, together with Antonia Handler Chayes, who served as former Undersecretary of the U.S. Air Force, contend that a "managerial model" best accounts for compliance with international law within treaty regimes,<sup>79</sup> such as the one placing countries under the jurisdiction of the IACHR.<sup>80</sup> "According to the Chayes, treaty compliance also derives from the need to maintain one's status within a highly interrelated community of states."<sup>81</sup> The Chayes state, "[T]he fundamental instrument for maintaining compliance with treaties at an acceptable level is an iterative process of discourse among the parties, the treaty organization, and the wider public."<sup>82</sup> This is in contradistinction to the view that the looming threat of sanctions coerces

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<sup>75</sup> LOUIS HENKIN, *HOW NATIONS BEHAVE* 47 (2d ed. 1979), quoted in Harold Hongju Koh, *Why Do Nations Obey International Law?* 106 *YALE L.J.* 2599 (1997); see also David H. Moore, *A Signaling Theory of Human Rights Compliance*, 97 *NW. U. L. REV.* 879 (2003).

<sup>76</sup> Harold Hongju Koh, *Why Do Nations Obey International Law?* *YALE L.J.* 2599 (1997). In footnote 2 Koh cites a long string of studies along these lines.

<sup>77</sup> See Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 *CAL. L. REV.* 1823, 1826 (2002); Oona A. Hathaway, *Do Treaties Make a Difference? Human Rights Treaties and the Problem of Compliance*, 111 *YALE L.J.* 1935, 1937 (2002).

<sup>78</sup> See Moore, *supra* note 75.

<sup>79</sup> According to David Moore, "none of these approaches, however, offers a comprehensive description of compliance with international law in general or human rights in particular. To name some of the more apparent shortcomings in his view, the Chayes's managerial model assumes a tendency to comply rather than explaining compliance." *Id.*

<sup>80</sup> ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS*, 3 (1995).

<sup>81</sup> Moore, *supra* note 76.

<sup>82</sup> *Id.*

countries to follow the treaty regime. This observation seems to fit well with the compliance in the Inter-American Court of Human Rights--because the Organization of American States (OAS) General Assembly has yet to administer sanctions upon any member state.<sup>83</sup> Thus, the threat of sanctions is apparently not a live threat, which makes it implausible as the impetus for compliance with the judgments of the IACHR.

### **Fairness and Legitimacy**

New York University Law Professor Thomas Franck avers that the fairness of the international rules themselves constitutes the linchpin of compliance in his book *Fairness in International Law and Institutions*.<sup>84</sup> Franck speaks of nations bowing to international law even without the hatchet of formal enforcement over their heads in consideration of right process (legitimacy) and distributive justice.<sup>85</sup> These notions at their best tie into the foundational discussion that preceded this section. Much of Franck's own philosophical foundations can be found in his book, *The Power of Legitimacy among Nations* (1990).<sup>86</sup>

### **Transnational Legal Process**

Harold Koh,<sup>87</sup> who serves as the Dean of Yale Law School and formerly as an Associate Secretary of State, adopts a view of transnational

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<sup>83</sup> See Organization of American States, at <http://www.oas.org/main/main.asp?sLang=E&sLink=../documents/eng/structure.asp> (last visited Mar. 9, 2005), which gives the structure of the General Assembly of the OAS.

<sup>84</sup> THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* (1995). Franck's 1993 Hague Lectures in Public International Law provided a foundation from which to work.

<sup>85</sup> Susan Sturm provides an overview of the literature on judicial legitimacy. Judicial legitimacy is more crucial for the IACHR because it does not have coercive measures at its disposal to compel compliance. Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1355 (1991); see also [Scott C. Idleman](#), *A Prudential Theory of Judicial Candor* 73 TEX. L. REV. 1307 (1995). Scott identifies three factors that have an impact on judicial legitimacy. These factors are: 1) unanimity or near unanimity in decisions; 2) professional civility in opinions; 3) and continuity of the law over time. The IACHR often meets the unanimity or near unanimity in decisions factor, seems to be a model of professional civility and decorum, and is still relatively young, which does not allow extensive continuity of the law over time.

<sup>86</sup> THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990).

<sup>87</sup> "Harold Koh has argued that nations comply with international law as a result of repeated participation in transnational legal interactions with state and non-state actors which leads to internalization of international norms and the formation of national identity around those norms." See Moore, *supra* note 75.

legal process, which is the "complex process of institutional *interaction* whereby global norms are not just debated and *interpreted*, but ultimately *internalized* by domestic legal systems."<sup>88</sup> Koh acknowledges value in the works of the Chayes and Franck but deems them inadequate.<sup>89</sup>

Koh sees a massive sea change in the international law scene. The nature of this change includes:

1. an erosion of national sovereignty;
2. a multiplying of international regimes, institutions and non-state actors;
3. a blurring of the public-private distinction (in international law);
4. the rapid formation of customary and treaty-based rules;
5. the increasing interpenetration of international systems and domestic ones.<sup>90</sup>

Are these traits characteristic of the Western Hemisphere where the Inter-American system holds sway? To track Koh's list:

- 1) state sovereignty seems to persist more in the Western Hemisphere than it does in places like Europe;
- 2) the formation of the Inter-American Commission of Human Rights,<sup>91</sup> the Inter-American Court of Human Rights,<sup>92</sup> the

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<sup>88</sup> *Why Do Nations Obey International Law?*, *supra* note 76, at 2602; *see also* Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996).

<sup>89</sup> *Why Do Nations Obey International Law?*, *supra* note 76.

<sup>90</sup> *Id.* at 2604.

<sup>91</sup> "The Inter-American Commission of Human Rights (Commission) was created in 1959 to serve as a mechanism for overseeing national implementation of such human rights commitments. Composed of seven members elected in their individual capacity, the Commission started operating in 1960 with a vague mandate. In 1965, its competence was expanded to accept communications, request information from governments, and make recommendations "with the objective of bringing about more effective observance of human rights." In 1967, the OAS Charter was amended, and the Commission became a principal organ of the OAS. The Commission has three forms of jurisdiction. Its conventional jurisdiction applies to the states that have become parties to the American Convention. Its judicial invocative jurisdiction provides the competence to invoke the Inter-American Court; it applies to the state-parties to the American Convention that have accepted the Inter-American Court's jurisdiction. While these two forms of jurisdiction depend upon adherence to the American Convention, the Commission's declaration jurisdiction applies to all parties to the OAS Charter, indeed, to all states in the Americas. Hence, every independent state in the Western Hemisphere, even those which have not yet become party to the American Convention, is subject, in some form, to the Commission's jurisdiction. The Commission's jurisdiction may be invoked by citizens and organizations within the hemisphere." Michael Reisman, *Practical Matters for consideration in the establishment of a Regional Human Rights Mechanism: Lessons from the Inter-American experience*, ST. LOUIS-WARSAW TRANSATLANTIC L.J. 89, (1995); *see also*,

American Convention of Human Rights,<sup>93</sup> the North American Free Trade Agreement (NAFTA),<sup>94</sup> MercoSur,<sup>95</sup> the Organization of American States<sup>96</sup> itself and other examples seem to show a multiplication of international regimes and institutions.<sup>97</sup> Nonstate actors like Center for Justice and International Law (CEJIL),<sup>98</sup> Amnesty International,<sup>99</sup> Human Rights Watch,<sup>100</sup> the Centers for International Human Rights at Universities like American University, University of Notre Dame, Northwestern University and others have multiplied as well.

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The Inter-American Court of Human Rights, at <http://www.cidh.org/> (last visited Feb. 18, 2005).

<sup>92</sup> See Reisman *supra*, note 91.

<sup>93</sup> *Id.*

<sup>94</sup> “The North American Free Trade Agreement is ‘preeminently’ a trade agreement. Its main purpose is the establishment of a free trade zone between Canada, Mexico and the United States. The agreement enumerates its objectives as the elimination of trade barriers with respect to goods and services; the furthering of conditions of fair competition; the extension of investment possibilities; the protection of intellectual property rights; the creation of effective procedures concerning its implementation, application, joint administration, and dispute settlement; and the set-up of a framework for further cooperation.” Patrick Specht, *The Dispute Settlement Systems of the WTO and NAFTA: Analysis and Comparison*, 27 GA. J. INT’L & COMP. L. 57 (1998).

<sup>95</sup> The Common Market of the South (Mercado Comun del Sur) was created by the Treaty of Asuncion signed by Argentina, Brazil, Paraguay, and Uruguay in 1991. Chile and Bolivia became associate members in 1996 and 1997, respectively. This is the most important international commitment among these countries. See Mercosur, at <http://www.mercosur.org.uy> (last visited Feb. 18, 2005).

<sup>96</sup> The Organization of American States (OAS) is a pioneer of modern human rights law. The OAS Charter of 1948 incorporates the “fundamental rights of the individual” as one of the Organization’s founding principles. See *The Organization of American States*, at <http://www.oas.org/> (last visited Mar. 6, 2005); see also THOMAS BUERGENTHAL, ROBERT NORRIS & DINAH SHELTON, *PROTECTING HUMAN RIGHTS IN THE AMERICAS: SELECTED PROBLEMS*, (3d ed. rev., 1990).

<sup>97</sup> *Id.*

<sup>98</sup> The Center for Justice and International Law (CEJIL) is a non-governmental, non-profit organization with consultative status before the Organization of American States (OAS), the United Nations (UN). A central component of the work of the organization is the defense of human rights before the Inter-American Commission on Human Rights (“the Commission”) and the Inter-American Court of Human Rights (“the Court”). See Center for Justice and International Law, at <http://www.cejil.org/> (last visited Feb. 18, 2005).

<sup>99</sup> See Amnesty International, at <http://www.amnesty.org/> (last visited Mar. 6, 2005).

<sup>100</sup> See Human Rights Watch, at <http://www.hrw.org/> (last visited Mar. 6, 2005).

- 3) Private companies are becoming increasingly concerned about human rights and other such areas traditionally deemed to be within the realm of public, international law.<sup>101</sup>
- 4) Some of the examples under 2) above illustrate the formation of customary and treaty based rules. For the purposes of this article, the American Convention of Human Rights is the most pertinent example.<sup>102</sup>
- 5) The work of the Inter-American Court of Human Rights powerfully illustrates the inter-penetration of international and domestic systems in at least several ways:
  - the obligation of nations to change their laws to be in conformity with a judgment of the court;
  - the fact that those in the executive branches of domestic governments are often charged with carrying out the Court's ruling;
  - that domestic judicial and investigatory bodies have been ordered by the Court to continue investigations or judicial proceedings;
  - the judgments of the Court are sometimes reported on by domestic media channels.

So the changes in the international scene in general are largely found in the Western Hemisphere, the Inter-American system of human rights providing the key example. This analysis helps to map the matrix of compliance.

### Self-Interest

Some scholars try to root compliance in self-interest: “Jack Goldsmith and Eric Posner have rejected the notion that nations feel a sense of obligation to obey international law and have treated compliance as an ephemeral result of the convergence of a nation’s interest with the tenets of the law.”<sup>103</sup> The immediate financial cost of complying with the judgments would tend to cut against this view. However, the longer-term interests such as reputation, trade, and international relations could factor in favor of this view. Along these lines, Moore states that:

Respecting human rights tend to impose immediate costs-restraints on governments power or the costs of providing opportunities. Violating human rights provides, from the governments’s perspective, the immediate benefits of unrestrained action, while risking future costs, such as stunted

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<sup>101</sup> Many observers have noted this trend, including Judge Delissa Ridgeway of the Court of International Trade. Judge Delissa Ridgeway address, ABA Panel on International Law at the ABA National Conference (August 4, 2001).

<sup>102</sup> See Ridgeway, *supra* note 101.

<sup>103</sup> See Moore, *supra* note 75.

economic growth. Complying with human rights thus demonstrates a willingness to restrain present use of power for long-term benefits, while violating human rights preserves the full range of governments' power in the present at the expense of future gains.<sup>104</sup>

In this sense, Jo M. Pasqualucci refers to the informal effectiveness of the Inter-American Court in the sense that in repeated instances, referral of a case to the Court, or the Court's scheduling of a public hearing has brought about positive action within the state involved.<sup>105</sup>

### A Comparison with Europe

For a comparative analysis, Mark W. Janis, who holds the William F. Starr Professorship at the University of Connecticut, writes about the effectiveness of the European system.<sup>106</sup> He breaks down his study of compliance into three categories: 1) judgments (and decisions), 2) legal rules, and 3) the legal system itself.<sup>107</sup> He surveys the literature in these categories with prodigious footnotes.<sup>108</sup>

Janis suggests four possible tests for legitimacy, which he deems as "the most crucial 'practical' test for the efficacy of the Strasbourg legal system."<sup>109</sup> These tests are:

- 1) the case load in the European Court of Human Rights,

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<sup>104</sup> *Id.*

<sup>105</sup> "The referral of a case to an international court focuses international attention on the situation, and the publicity often curtails some abuses even before the Court reaches a judgment. Most states are surprisingly sensitive about their international reputations and world image. According to a former United States representative to the U.N. Commission of Human rights, despite the harsh realities of power politics, world opinion is a force to be reckoned with. Governments devote much time and energy, both in and out of the U.N., to defending and embellishing their own human rights image and demeaning that of others." Jo M. Pasqualucci, *The Inter-American Human Rights System: Establishing Precedents and Procedure in Human Rights Law*, 26 U. MIAMI INTER-AM. L. REV. 297 (1994-1995); see also Jo M. Pasqualucci, *Preliminary Objections Before the Inter-American Court of Human Rights: Legitimate Issues and Illegitimate tactics* 40 VA. J INT'L L. 1 (1999).

<sup>106</sup> Janis, *supra* note 23; see also Christian Tomuschat, *Quo Vadis, Argentoratium? The Success Story of the European Convention on Human Rights and a Few Dark Stains*, 13 HUM. RTS L.J. 401 (1992). Tomuschat devotes the third section of this article to enforcement, which he deems the real test.

<sup>107</sup> Janis *supra* note 106, at 40.

<sup>108</sup> *Id. passim.*

<sup>109</sup> *Id.* at 44.

- 2) the acceptance of what were the two optional clauses of the European Convention,
- 3) the growth in the number of states joining the Council of Europe and ratifying the Convention,<sup>110</sup> and
- 4) an increasing recognition of the legitimacy of the system.<sup>111</sup>

Janis concludes by noting the impressive level of compliance and gives a call to further studies on this heretofore high level of compliance (by international law standards) with Strasbourg law.<sup>112</sup>

Parallel analysis of the Inter-American system of human rights reveals:

- 1) a dramatically increased and increasing case load in the Inter-American Court of Human Rights;
- 2) broad acceptance and ratification of the American Convention of Human Rights with few reservations;
- 3) acceptance of the jurisdiction of the IACHR by the crush of Latin American countries. The English speaking countries like the U.S.A., Canada, and the English speaking Caribbean countries are exceptions in the hemisphere. With the acceptance of Mexico and Brazil, it is essentially a solid mass of countries under the Court's jurisdiction from Mexico through Central America down to the bottom of South America;
- 4) and an increasing recognition of the legitimacy of the system, even by Peru, which had previously posed the most serious challenge to the Court.<sup>113</sup>

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<sup>110</sup> Albania (13.07.1995), Andorra (10.11.1994), Armenia (25.01.2001), Austria (16.04.1956), Azerbaijan (25.01.2001), Belgium (05.05.1949), Bosnia & Herzegovina (24.04.2002), Bulgaria (07.05.1992), Croatia (06.11.1996), Cyprus (24.05.1961), Czech Republic (30.06.1993), Denmark (05.05.1949), Estonia (14.05.1993), Finland (05.05.1989), France (05.05.1949), Georgia (27.04.1999), Germany (13.07.1950), Greece (09.08.1949), Hungary (06.11.1990), Iceland (07.03.1950), Ireland (05.05.1949), Italy (05.05.1949), Latvia (10.02.1995), Liechtenstein (23.11.1978), Lithuania (14.05.1993), Luxembourg (05.05.1949), Malta (29.04.1965), Moldova (13.07.1995), Monaco (05.10.2004), Netherlands (05.05.1949), Norway (05.05.1949), Poland (26.11.1991), Portugal (22.09.1976), Romania (07.10.1993), Russian Federation (28.02.1996), San Marino (16.11.1988), Serbia and Montenegro (03.04.2003), Slovakia (30.06.1993), Slovenia (14.05.1993), Spain (24.11.1977), Sweden (05.05.1949), Switzerland (06.05.1963), "The former Yugoslav Republic of Macedonia" (09.11.1995), Turkey (09.08.1949), Ukraine (09.11.1995), United Kingdom (05.05.1949). Council of Europe, at [http://www.coe.int/T/e/com/about\\_coe/member\\_states/default.asp](http://www.coe.int/T/e/com/about_coe/member_states/default.asp) (last visited Mar. 9, 2005).

<sup>111</sup> Mark Janis, *Russia and the 'Legality' of Strasbourg Law*, EUR J. INT'L L. 93 (1997).

<sup>112</sup> Janis, *supra* note 106, at 46.

## Conclusion

Over twenty years ago, international human rights law was not taken very seriously. It was considered to be "soft law". However, over the years, there have been dozens of cases before the Inter-American Court of Human Rights<sup>114</sup> and thousands of cases in which the European Court of Human Rights<sup>115</sup> have found states in violation of their international legal obligations with respect to human rights. Of those many rulings, only a few states have refused or been slow to comply with these Courts' orders. There is little doubt that now international human rights law is "hard law," i.e., effective law in many respects. Therefore, international human rights fora generally are both available, and provide remedies to violations of human rights with which states often comply.

Professor Douglass Cassel, the Director of the Center for International Human Rights at Northwestern University School of Law, has looked more at state compliance with international law in the Inter-American system than just about any other legal scholar.<sup>116</sup> The judgments of the IACHR are considered "hard law" as they are legally binding.<sup>117</sup> Cassel notes that:

States have been more apt to comply with judgments and orders of the Court than with resolutions of the Commission. However, they do so in part because the Court, unlike the Commission, is a judicial body, and is also the second and final instance in the process, whereas the Commission is the first. Greater compliance with Court orders, then, is due not only to the distinction between soft and hard law, but to the

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<sup>113</sup> "On January 23, 2001, after former President Fujimori's flight to Japan and the establishment of an interim government, Peru notified the Court that it had repudiated, by legislative act, the prior notice of withdrawal from its jurisdiction and reestablished its recognition of the Court's competence. Peru's reaffirmation of its acceptance of the Court's jurisdiction is also manifest in the collaborative approach it has taken on pending cases." Wilson & Perlin, *supra* note 7.

<sup>114</sup> For a list of cases addressed by the Inter-American Court of Human Rights, see The Inter-American Court of Human Rights Website, at [http://www.corteidh.or.cr/seriecing/index\\_serie\\_c\\_ing.html](http://www.corteidh.or.cr/seriecing/index_serie_c_ing.html) (last visited June 24, 2003).

<sup>115</sup> Between November 1, 2002 and February 28, 2003 alone, the European Court of Human Rights dealt with 7031 cases. *Human Rights Information Bulletin No. 58*, Eur. Ct. H. R. at 2 (Nov. 2002- Feb. 2003).

<sup>116</sup> Douglass Cassel, Jr., *Inter-American Human Rights Law, Soft and Hard: What Difference? in COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM* 393-418 (Dinah Shelton ed., 2000).

<sup>117</sup> *Id.* at 2.

differing nature of the promulgating institutions and their decision making processes.<sup>118</sup>

Cassel brings together legitimacy's "compliance pull" from Prof. Franck, the Chayes' "iterative process of discourse", as well as Koh's "transnational legal process" as mutually compatible theoretical frameworks for viewing the Inter-American system.<sup>119</sup> All of these things point to a culture of compliance, an informal ideological regime—ideas akin to what Helfer and Slaughter put forth.<sup>120</sup> To be a member in good standing of the informal "Latin American Club" so to say, a state would do well to comply with the judgments of the IACHR, at least cosmetically if not substantively.<sup>121</sup> Otherwise, tacit but starkly understood repercussions follow from the other members of the "Club."<sup>122</sup>

Similar statements can be made about the Inter-American system. Up to the present, compliance has been rather impressive in regards to financial reparations: yet room for improvement exists with orders to States to prosecute such crimes in their domestic systems.

At present, much room yet exists for many further studies of compliance in the Inter-American Court of Human Rights. This study comes as a single salvo in what could be a steady stream of scholarship on compliance in the Inter-American system yet to come. May it encourage further analysis on this vitally important part of the pursuit of justice in this hemisphere!

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<sup>118</sup> *Id.* at 3-4.

<sup>119</sup> *Id.* at 4-5.

<sup>120</sup> *Id.*

<sup>121</sup> Interview with Professor Douglass Cassel, *supra* note 22.

<sup>122</sup> *Id.*