

THE ROLE OF RESERVATIONS AND DECLARATIONS
BEFORE THE INTER-AMERICAN COURT OF HUMAN RIGHTS:
THE *LAS HERMANAS SERRANO CRUZ* CASE AND THE FUTURE OF INTER-AMERICAN JUSTICE

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INTRODUCTION

Since the mid-1940's with the creation of the Charter of the United Nations,¹ the ability to adjudicate claims of human rights abuses under international law has increased dramatically. In a response to the Second World War and the enormous abuses that became a part of the intimate knowledge of its survivors, states took active steps to address the atrocities they had witnessed by creating norms and institutions to adjudicate those norms.² The inception of the UN Charter spurred a global effort to promote and protect human rights within the legal arena, and encouraged the development of a wide variety of conventions throughout many regions of the world.³ Within Latin America, regional protection arose via the inter-American system for

¹ U.N. CHARTER, *signed* 26 June 1945, 59 Stat. 1031, T.S. 993 (*entered into force* 24 Oct. 1945) [hereinafter U.N. CHARTER].

² This is certainly not the first time in history that states had come together to foster human rights. For example, the Treaty of Vienna (1815) was developed to enforce the formal prohibition of the slave trade, and the General Act of Brussels, as well as the protection of the wounded and sick in wartime is developed by the first Geneva Conventions in 1864. In the early 1900's, the Covenant of the League of Nations led the way in 1919 for the codification of human dignity over the interests of States. Moreover, the rise of international norms similarly encouraged the increased protection for minority groups, guaranteeing basic rights across universal classes. *See* Declaration of Eight Courts Relative to the Universal Abolition of the Slave Trade, Feb. 8, 1815, 63 Consol. T.S. 473; Declaration of the General Act of the Brussels Conference, July 2, 1890, 27 Stat. 886, T.S. No. 383; Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Aug. 22, 1864, 129 Consol. T.S. 361; LEAGUE OF NATIONS COVENANT *available in* HAROLD S. QUIGLEY, FROM VERSAILLES TO LOCARNO: A SKETCH OF THE RECENT DEVELOPMENT OF INTERNATIONAL ORGANIZATION at 90 (1927).

³ To name only a few: American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123, 9 I.L.M. 673 (*entered into force* 18 July 1978) [hereinafter American Convention]; *see also* European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, *amended by* Protocol 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, May 11, 1994, Eur. T. S. No. 155, *available at* <http://conventions.coe.int/treaty/EN/Treaties/html/005.htm> (last visited Jan. 13, 2006); International Covenant on Civil and Political Rights, *adopted* 16 Dec. 1966, 999 U.N.T.S. 171 (*entered into force* 23 Mar. 1976); International Covenant on Economic Social and Cultural Rights, *adopted* 16 Dec. 1966, 993 U.N.T.S. 3 (*entered into force* 3 Jan. 1976).

human rights, based on the American Convention on Human Rights and its creation of both the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. Certainly, comprehensive international accountability is now an ideal that has “captured the imagination of mankind,” and the process of democratization seems irreversible within Latin America.⁴

Though the system has been in place for over two decades, many procedures within the inter-American system for human rights remain unclear. One of these processes is the doctrine of reservations and declarations. As the practice has been applied within the Inter-American Court’s jurisprudence, a rather unpredictable and seemingly heterogeneous body of law has developed. This obscurity detrimentally affected in the first contentious case ever brought to the Inter-American Court against the state of El Salvador—*Las Hermanas Serrano Cruz vs. El Salvador*.⁵ In *Las Hermanas Serrano Cruz*, the Court upheld a preliminary objection to *ratione temporis* submitted by El Salvador when it accepted the Court’s jurisdiction.⁶ The State’s restriction was improper both substantively and procedurally, but the Court held it to be valid under the American Convention. This paper will closely evaluate the inconsistencies within the Court’s reasoning, and suggest that at a minimum, the Court amend its procedural allowances for reservations and declarations. In the alternative, serious consideration should be given to prohibiting reservations and declarations to the American Convention in their entirety.

⁴ Thomas Buergenthal, *The Normative and Institutional Evolution of International Human Rights*, 19 HUM. RTS. Q. 703, 704, 716 (1997).

⁵ *Las Hermanas Serrano Cruz vs. El Salvador* [Serrano-Cruz Sisters v. El Salvador], (Merits), Inter-Am Court H.R., Judgment of March 1, 2005, (ser. C) No. 120, ¶ 48(2) [hereinafter *Las Hermanas Serrano Cruz* (Merits)].

⁶ For the purposes of this paper, the term “competence” will be used interchangeably with “jurisdiction.” In the Inter-American parlance, the term employed is *competencia*, which most directly translates to “jurisdiction” in English. The two terms are henceforth used as equivalents.

INTERNATIONAL RESPONSIBILITY

Throughout the world, international human rights are playing an augmented role in the protection of both individual human rights, as well as the rights of States. The system has two categories of protection: those rights that are classified as personal, protected in criminal and tort suits brought against individual perpetrators, and those rights seen as the responsibility of States, protected in suits brought directly against the State. Through the increased development and refinement of both types of protection, the prosecution of human rights abusers has expanded.

The system of individual responsibility, where particular human rights abusers are held responsible, is pursued in both criminal and tort cases. It is within this type of adjudication that former Latin American dictators are increasingly being held accountable. A current example of such a suit is the effort underway to hold General Augusto Pinochet responsible before the international community for the many breaches of human rights norms that were committed during his reign as the head of state of Chile.⁷ In some cases, individuals have been civilly sued in District Courts in the United States under the Alien Tort Statute, and increasingly, though the legal theory of command responsibility.⁸ In addition, courts have utilized principles of universal jurisdiction, which has allowed countries like Spain to hold individuals accountable for human rights violations abroad.⁹

⁷ See generally Naomi Roht-Arriaza, *The Pinochet Precedent and Universal Jurisdiction*, 35 NEW ENG. L. REV. 311 (2001).

⁸ See generally Francisco Rivera, *Inter-American Justice: Now Available in a District Court Near You*, 45 SANTA CLARA L. REV. 889 (2005); Beth Van Schaack, *Command Responsibility: The Anatomy of Proof in Romagoza v. Garcia*, 36 U.C. DAVIS L. REV. 1213 (2003).

⁹ See generally Rigoberta Menchú y otros [Rigoberta Menchú et al.], STC 237/2005, Sept. 26, 2005 available at <http://www.tribunalconstitucional.es/JC.htm> (last visited Jan. 14, 2006); see also Sentencia por crímenes contra la humanidad en el caso Adolfo Scilingo [Sentencing for crimes against humanity in the Adolfo Scilingo case], Audiencia Nacional, Sumario 19/1997,

The second category of international accountability involves cases brought against entire countries, rather than those at their heads or acting upon their behalf. This type of case takes place in two different types of forums: those based on regional systems and those that take place within the UN system of human rights. The protection of human rights is part of the conglomerate of the UN's six "principal organs," which are: the General Assembly, the Security Council, the Secretariat, the International Court of Justice (ICJ), the Trusteeship Council, and the Economic and Social Council.¹⁰ In addition, protection has strengthened through the creation of the UN Human Rights Committee¹¹ and the Committee on the Elimination of Racial Discrimination (CERD)¹² during the late 1970s, when the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on All Forms of Racial Discrimination (ICEAFRD) were entered into force.¹³ As is true in the latter developments, these systems are based on multilateral treaties that may be evoked against states in breach.

Although human rights norms are drafted with universal applicability, regional systems based on specific, multilateral treaties have been designed with particularity to cultural, social,

Rollo de Sala 139/1997, Juzgado C. Instrucción No. 5, April 19, 2005 *available at* <http://derechos.org/nizkor/espana/juicioral/doc/sentencia.html> (last visited Jan. 14, 2006).

¹⁰ U.N. CHARTER, *supra* note 1 art. 7.

¹¹ The Human Rights Committee is a treaty body that ensures compliance with the ICCPR.

¹² Though the CERD may now be obsolete due to various recent changes, its development was initially quite meaningful.

¹³ An additional body that is responsible for encouraging compliance as a part of the Economic and Social Council (ECOSOC) is the UN Human Rights Commission. Like the Human Rights Committee to the ICCPR, it may not hear lawsuits based on breaches of the treaties. Rather, there is an allowance for complaints against states to be brought before them. The Commission's principle function has generally been to prepare the texts of the Universal Declaration, the Convention on the Political Rights of Women, and the drafting of various accompanying covenants to Universal Declaration. *See generally* IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* at 575-578 (1998).

political, and economic needs of those geographies. Because of their closer connection to particular regions, they have been uniquely effective. Mainly, this has been due to uncommon understandings of events at hand, the ability to take cultural makeup into account, and anomalous regional legitimacy. Though much is yet to be accomplished, the creation of regional regulations has aided in the establishment of greater legal uniformity.

The Structure of the Latin American System

The Latin American system of human rights accountability centers on the American Convention on Human Rights (American Convention),¹⁴ which, itself, gave birth to both the Inter-American Commission and the Inter-American Court.¹⁵ Most countries in the region—except the United States, Canada, and various Caribbean island nations—have ratified the American Convention. Currently, 24 of 34 Member States to the Organization of American States (OAS) have both signed and ratified the instrument.¹⁶

The American Convention contains eighty-two articles and codifies a set of 26 rights that the Commission and the Court are to protect. These include, but are not limited to: the right to life, right to humane treatment, freedom from slavery, right to personal liberty, right to a fair trial, right to compensation, right to privacy, freedom of conscience and religion, freedom of

¹⁴ American Convention, *supra* note 3.

¹⁵ Thomas Buergenthal, *The Inter-American System for the Protection of Human Rights in HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES* 437-493 at 447 (Theodor Meron ed, 1984).

¹⁶ These 24 states include: 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. BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, O.A.S. Doc. OEA/Ser.L.V/I.4 rev. 8, 48 (May 22, 2001), *available at* <http://www.cidh.oas.org/basic.htm> (last visited Jan. 12, 2006) [hereinafter BASIC DOCUMENTS].

thought and expression, right of assembly, freedom of association, right to nationality, right to property, freedom of movement and residence, and right to equal protection.¹⁷ The States Parties to the Convention agree under that instrument to “respect” and “ensure” the “free and full exercise” of these rights “to all persons subject to their jurisdiction.”¹⁸

Pursuant to the American Convention, regional accountability in Latin America is implemented as part of a two-level structure where cases are heard. First, cases are presented before the Inter-American Commission on Human Rights; and second, before the Inter-American Court for Human Rights. The procedures before both bodies are governed by a strict set of guidelines that dramatically restrict the amount and types of cases heard. Though there is considerable overlap between the two procedural regulations, this paper will primarily concern itself with the Court’s procedural rules.

Bringing a Case to the Court

For a human rights case to be heard before the Inter-American Court, it usually must be heard first by the Inter-American Commission and the jurisdiction of the Court must be accepted by the state. The Court is empowered with three types of jurisdiction: provisional measures,¹⁹ advisory opinions,²⁰ and contentious opinions.²¹ With the exception of the Court’s advisory

¹⁷ American Convention, *supra* note 3, arts. 4-8, 10-13, 15-16, 20-22, 24.

¹⁸ *Id.* art. 1(1).

¹⁹ As granted by Article 63.2 of the American Convention, the court is given the power to act “in cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons.” *See id.* art. 63.2.

²⁰ *See id.* art. 63.

²¹ *See id.* art. 64.

jurisdiction, cases must pass through the Commission.²² In this sense the Commission, acts as a gatekeeper for the Court in contentious cases.

As a threshold requirement for a case to reach the Commission, the petitioners must have exhausted all domestic remedies in their home country.²³ In the alternative, they must be able to make a showing that the remedies provided were denied, did not comply with due process standards, or were unreasonably delayed.²⁴ Second, the petition must also meet temporal jurisdiction requirements.²⁵ After these initial requirements are met, the Commission may proceed with the case pursuant to its role as a fact finder.²⁶ When possible, the parties in the dispute will reach a friendly settlement. If a settlement cannot be achieved, the Commission will prepare a report announcing the facts it takes to be true and its conclusions reached in the case.²⁷

²² Advisory jurisdiction is triggered when a member state of the OAS, the Inter-American Commission, or a recognized OAS organ requests that the Court interpret either the American Convention or another treaty concerning the protection of human rights in the American states. The purpose of the advisory function is to aid states and organs to adhere to and correctly apply various human rights treaties without subjecting them to the formalism and sanctions associated with the contentious judicial process. *See id.* art. 64. *See also* Rules of Procedure of the Inter-American Court of Human Rights, *supra* note 17, art. 60.

²³ American Convention, *supra* note 3, art. 46(a).

²⁴ *See id.* art. 46.

²⁵ Namely, this means that the petition must usually be filed within six months of the final decision in the relevant domestic system. *See id.* art. 46(b).

²⁶ This may either take the form of requesting documents and materials from the parties or an in loco visit to gather relevant information. Rules of Procedure of the Inter-American Court of Human Rights art. 40, [hereinafter Rules of Procedure] *approved by* the Court at its Forty-Ninth Regular Session held Nov. 16-25, 2000 (entered into force June 1, 2001) *available in* BASIC DOCUMENTS, *supra* note 15.

²⁷ American Convention, *supra* note 3, art. 50.

Following the release of the Commission's report, the dispute may be referred to the Court for further adjudication on the merits.²⁸

In the event that the case is referred to the Inter-American Court, it will fall within the Court's contentious jurisdiction.²⁹ At that time, the Court will review the facts and report submitted by the Commission, which appears as a complaining party in contentious cases,³⁰ as well as briefs and supporting documentary evidence submitted by the representatives of the purported victims³¹ and by the State.³² Though the Commission previously acted more as a representative for the purported victims, its role is currently envisioned as procedural, and, thus,

²⁸ At this time, the purported victims may not refer a case to the Inter-American Court. As provided by Article 23 of the Rules of Procedure, the alleged victims may participate in the case "when the application has been admitted." Rules of Procedure of the Inter-American Court of Human Rights, *supra* note 17, art. 23. Despite the amended rules of procedure, the victim's role within the system is still one of the most frequent criticisms of the Inter-American system's procedure at this time, since it does not recognize an active role for the victim. Many scholars in the field believe that since petitioners are able to bring a case before the Commission, they should also be able to do so with respect to the Court. *See generally*: JO M. PASQUALUCCI, *THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS*, at 19 (2003).

²⁹ Though the Court's advisory jurisdiction is important, it is unnecessary to discuss that jurisdiction at this time, since the reservation doctrine in question is relevant in the contentious context. For an extensive discussion of the Court's advisory jurisdiction, *see generally* 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); Thomas Buergenthal, *The Advisory Practice of the Inter-American Human Rights Court*, 79 *AM. J. INT'L L.* 1 (1985).

³⁰ In this capacity, the Commission is to serve as an objective, impartial participant, rather than an adversarial party advocating for the victim. Statute of the Inter-American Court of Human Rights art. 28, *adopted by* the General Assembly of the OAS at its Ninth Regular Session, held in La Paz, Bolivia, October, 1979 (Resolution No. 488) *available in* BASIC DOCUMENTS, *supra* note 15.

³¹ The representatives of the purported victims are permitted to appear in court pursuant to Article 23(2) of the 2001 Rules of Procedure, which provides: "When there are several alleged victims, next of kin or duly accredited representatives, they shall designate a common intervenor who shall be the only person authorized to present pleadings, motions and evidence during the proceedings, including the public hearings." Rules of Procedure, *supra* note 24, art. 23(2).

³² PASQUALUCCI, *supra* note 26, at 16.

the adversarial dispute is played out between the purported victim and the State.³³ Following the presentation of facts in the case, the judges of the tribunal will then evaluate the evidence in light of the briefs and come to a conclusion based on the alleged violations of the American Convention.

If the Court finds that there is a violation of a right or freedom protected by the American Convention, it is empowered to rule on whether the state has violated a given right or freedom, and require that the injured party be ensured the enjoyment of such rights or freedoms. The Court will also find, when appropriate, that the consequences of the measure or situation constituting the breach shall be remedied, and that fair compensation shall be paid to the victim.³⁴ Once the Court issues its holding in a given case, that decision is obligatory and without appeal.

As previously stated, the Court's contentious jurisdiction is based on state consent. Therefore, contentious jurisdiction may only arise when a State has specifically submitted to the Court's jurisdiction,³⁵ on either an *ipso facto* or an *ad hoc* basis. Therefore, if a State is not willing to grant the Court general jurisdiction, it may independently submit itself to limited recognition of the Tribunal's competence.³⁶ Such a declaration is submitted pursuant to Article

³³ Under the 2001 amended Rules of Procedure, the Commission's role is envisioned as merely procedural. Rules of Procedure of the Inter-American Court of Human Rights, *supra* note 17, art 2(23).

³⁴ American Convention, *supra* note 3, art. 63(1).

³⁵ The following OAS Member States have accepted the Inter-American Court's jurisdiction: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Trinidad and Tobago (denounced the Convention on May 26, 1998), Uruguay, and Venezuela. These states parties are listed in BASIC DOCUMENTS, *supra* note 15.

³⁶ American Convention, *supra* note 3, art. 62(2). *See also*: PASQUALUCCI, *supra* note 26, at 87-89.

62 of the American Convention, and may be conditional or unconditional. Specifically, this provision provides:

[A] State Party may, upon depositing its instrument of ratification or adherence to this Convention, or at any subsequent time, declare that it recognizes as binding, *ipso facto*, and not requiring special agreement, the jurisdiction of the Court on all matters relating to the interpretation or application of this Convention. Such declaration may be made unconditionally, on the condition of reciprocity, for a specified period, or for specific cases.³⁷

The mere ratification of the Court's Statute, without more, is taken as an *ipso facto* approval of the Court's jurisdiction. However, where a country wishes to avail itself of the Court in specific circumstances only, it may accept jurisdiction on a case-by-cases basis, for a set category of cases, or for all potential cases brought against it.³⁸ Usually, conditions imposed by States include limits imposed on the subject matter, personal, or temporal jurisdiction of the Court.³⁹

MAINTAINING STATE AUTONOMY IN THE INTER-AMERICAN SYSTEM

³⁷ American Convention, *supra* note 3, art. 62 (2). In addition, the Inter-American Court's jurisdiction may not be renounced independently of the American Convention. If a state initially accepts the Court's jurisdiction, it may not remove itself from the reach of the tribunal without denouncing the American Convention. This rule was first established in *Ivcher Bronstein v. Peru, (Competence)*, Inter-Am. Court H.R., Judgment of Sept. 24, 1999, (Ser. C) No. 54, ¶¶ 40, 46.

³⁸ American Convention, *supra* note 3, art. 62.

³⁹ PASQUALUCCI, *supra* note 26, at 87.

In this treaty-based system founded primarily on state consent, countries have been given the opportunity to retain their sovereignty via substantive reservations to the American Convention and procedural declarations limiting the Court's jurisdiction.⁴⁰ In theory, these procedures are designed to maintain a balance between individual rights while also safeguarding state autonomy. Respect must be given to the existence of "widely divergent and political economic systems,"⁴¹ within the context of international human rights law, which is designed to encourage uniform protection of rights. Therefore, reservations and declarations are often permitted to allow states to become parties to multilateral treaties without subordinating domestic law and principles to international interests. Indeed, "the formulation of reservations, far from impairing the integrity of treaties, provides a satisfactory means of eliminating avoidable difficulties that might stand in the way of international co-operation."⁴² However, in practice, the roles each mechanism plays and the impacts that they have are often unclear and sometimes ambiguous.

The Vienna Convention on the Law of Treaties (Vienna Convention), which governs treaties between states,⁴³ defines a reservation as a "unilateral statement, however phrased or

⁴⁰ Though the terms "reservation" and "declaration" mean two separate things for international law of treaties, that meaning has been blurred in the Latin American system. Therefore, though a careful distinction is made between the two in this section, the reader should take note that the qualitative difference between the terms is often minute or imperceptible.

⁴¹ T.O. ELIAS, *THE MODERN LAW OF TREATIES*, at 27 (1974).

⁴² *See id.* at 27.

⁴³ For the purposes of this paper, "Vienna Convention" will be used in reference to the 1969 Vienna Convention on the Law of Treaties. Though it is geared towards states, its provisions have been adopted by the inter-American system. The 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations also discusses reservations, but its terms are nearly identical to that of the 1969 Vienna Convention, with most provisions simply adding the term "international organization" where states are discussed. Vienna Convention on the Law of Treaties between States and International

named, made by a State, when signing, ratifying, accepting, approving, or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that state.”⁴⁴ They are enacted with the intent to “exclude or modify the legal effect of certain provisions of a treaty or of the treaty as a whole with respect to certain specific aspects in their application to the State or to the international organization which formulates the reservation.”⁴⁵

Conversely, a declaration is a statement in which a State announces that it understands a treaty in a specific way. Nearly identical to that of a reservation, the definition of an interpretive declaration, as announced in 1999 by the International Law Commission, is “a unilateral statement, however phrased or named, made by a State or by an international organization whereby that State or that organization purports to specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions.”⁴⁶ Logically, a declaration is considered a conditional interpretive declaration when a state conditions its intent to be bound on its own declarative interpretation of an instrument.⁴⁷

Organizations or between International Organizations, March 21, 1986, *available at* <http://www.un.org/law/ilc/texts/trbtstat.htm> (last visited Jan. 13, 2006).

⁴⁴ 1969 Vienna Convention on the Law of Treaties, May 23, 1969 art. 2 (1)(d), 1155 U.N.T.S. 331, *available at* <http://www.un.org/law/ilc/texts/treaties.htm> (last visited Jan. 12, 2006) [hereinafter Vienna Convention].

⁴⁵ UNGA “Report of the International Law Commission on the Work of its Fifty-First Session” (1999) A/54/10, ch 6, draft guidelines, ¶ 1.1.1, *available at* <http://www.un.org/law/ilc/reports/1999/english/chap6.htm>, (last visited Jan. 12, 2006) [hereinafter International Law Commission].

⁴⁶ International Law Commission, *supra* note 43, ch 6, draft guidelines, ¶ 1.2.

⁴⁷ *See id.* at ch 6, draft guidelines, ¶. 1.2.1.

Generally, the distinction between a reservation and a declaration is made with respect only to the legal effect the document has on the treaty.⁴⁸ Though the difference between the reservations and declarations is often unclear, and there is no guidance provided in the Vienna Convention, there has been recent attention given to clarifying the roles reservations and declarations play in international law. As the International Law Commission stated in its recent report,

Notwithstanding the apparent silence of the 1969 and 1986 Vienna Conventions on this phenomenon, States have always felt that they could attach to their expression of consent to be bound by multilateral treaty declarations whereby they indicate the spirit in which they agree to be bound; these declarations do not, however, seek to modify or exclude the legal effect of certain provisions of the treaty and thus do not constitute reservations, but interpretative declarations.⁴⁹

Therefore, interpretive declarations—conditional or otherwise—are not intended to change the legal effect of the document, while reservations are intended to do precisely that.⁵⁰

The practice of states using both mechanisms, unfortunately, is not always in good faith. In fact, often states obscure the distinction between the two “by giving the name of ‘declarations’ to instruments that are obviously and unquestionably real reservations.”⁵¹ In doing so, “they hope not to arouse the vigilance of the other States Parties while attaining the same objectives; conversely, to give greater weight to declarations that clearly have no legal effect on the

⁴⁸ See *id.* at ch 6, draft guidelines, ¶ 1.3.

⁴⁹ See *id.* at ch 6, draft guidelines, ¶ 1.2, comt. 1.

⁵⁰ As shall be discussed later, some declarations, such as those placing a limit on *ratione temporis* may change the legal effect of a human rights treaty.

⁵¹ International Law Commission, *supra* note 43, ch 6, draft guidelines, ¶ 1.2, comt. 5.

provisions of a treaty, they label them ‘reservations,’ even though under the terms of the Vienna definition they are not.”⁵²

States have generally been permitted to make reservations to treaties because the interest of wide state participation within a system has generally outweighed the desire for universal application of the law. However, reservations are not without necessary limitations. The earliest guidelines for reservation procedure were established in the International Court of Justice’s (ICJ) advisory opinion on *Reservations to the Convention on the Prevention and punishment of the Crime of Genocide*.⁵³ In that case, the ICJ was faced with evaluating the availability of reservations under the Genocide Convention, which contained no provision for reservations or their interpretation. Within the first two years of the Convention’s use, eight different states made a total of eighteen reservations to the treaty.⁵⁴ In response, the General Assembly submitted the issue to the ICJ for a determination on the validity and effects of the reservations.⁵⁵ Ultimately, the Court determined that the attempted reservation to the Genocide Convention was against the object and purpose of the treaty.⁵⁶ Most importantly, though, the ICJ also detailed the procedural and substantive framework for implementing reservations.

In most cases, states are allowed to make reservations to instruments, while still being regarded as a party unless another country makes an objection to the reservation. If there is no provision in a treaty, the ability of states to make reservations will depend on the intent of the

⁵² *See id.* ch 6, draft guidelines, ¶ 1.2, comt. 5.

⁵³ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, 1951 I.C.J. 15 (May 28) [hereinafter *Genocide Convention Case*].

⁵⁴ *Genocide Convention Case*, *supra* note 50, at 17-18.

⁵⁵ *See id.* at 16.

⁵⁶ *See id.* at 27.

drafters to permit such reservations.⁵⁷ If a given reservation is determined to be consistent with the object and purpose of the treaty, the reserving State could be determined a party to the instrument. However, whether the treaty is enforced as between the reserving state and an objecting state shall depend upon the objecting state's assessment of the compatibility of the reservation with the treaty.⁵⁸

Since a state generally cannot be bound in international law without its prior consent, the treaty would come into force between an objecting state and a reserving state only upon the objector's consent to the reservation. This consent may not be arbitrarily withheld, but it will not be granted if the objecting state determines in good faith that the reservation is outside of the object and purpose of the treaty.⁵⁹ Moreover, if a reservation is objected to, all states that do not object shall be bound in reciprocity to the objecting state, pursuant to that country's limit.⁶⁰ Where objections are made, the provision in question will either be wholly removed from the treaty as applied between the two countries, or, if the reservation is deemed improper, the reserving state will no longer be a party to the treaty.⁶¹ In modern international law, the procedure developed from this case has been codified in Article 19 of the Vienna Convention, which is followed in the Inter-American system.

Within Latin America, general reservations to provisions of the American Convention are enabled under Article 75, which provides: "This Convention shall be subject to reservations only in conformity with the provisions of the Vienna Convention on the Law of Treaties signed on

⁵⁷ *See id.* at 24.

⁵⁸ *See id.* at 26.

⁵⁹ *See id.* at 27.

⁶⁰ *See id.* at 29.

⁶¹ *See id.* at 29.

May 23, 1969.”⁶² Thus, when interpreting whether a State’s reservation is in keeping with the American Convention, the Court is charged with interpreting the Vienna Convention’s Article 19, which reads:

A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation

unless:

(a) the reservation is prohibited by the treaty;

(b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

(c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.⁶³

If a reservation properly adheres to Article 19, it shall be deemed a valid reservation to the American Convention, provided it is not a departure from the object and purpose of the treaty. One example of a reservation that was held to be against the object and purpose of the American Convention is Trinidad and Tobago’s unsuccessful attempt to allow the death penalty to be carried out against a person over seventy years old—a direct violation of Article 4(5) of the American Convention.⁶⁴ The reservation was submitted to the OAS Secretary General in 1991 upon the acceptance of the jurisdiction of the Court. In 1998, with the *Hilaire v. Trinidad and Tobago* case pending before the Commission, the country denounced the American Convention

⁶² American Convention, *supra* note 3, art. 75.

⁶³ Vienna Convention, *supra* note 42, art. 19.

⁶⁴ *Hilaire v. Trinidad and Tobago*, (Preliminary Exceptions), Inter-Am. Court H.R., Judgment of Sept. 1, 2001, (ser. C) No. 80, ¶ 88 [hereinafter *Hilaire v. Trinidad and Tobago*, (Preliminary Objections)].

in anticipation of an unfavorable decision.⁶⁵ Three years later, when the case made its way to the Court, Trinidad's reservation was held as acting against the object and purpose of the American Convention, the reservation was invalidated, and the country was found culpable of numerous violations to the Convention.⁶⁶

Although the American Convention's guidelines closely limit the instances in which reservations are appropriate, it allows declarations much more generally. Moreover, reservations to the American Convention itself are permitted, while declarations are only mentioned in the treaty in reference to the acceptance of the Court or the Commission's jurisdiction. Technically, then, declarations are made in reference to the procedural rules and statutes of those two bodies, and not to the American Convention.

Declarations are enacted upon acceptance of the Court's competence and pursuant to Article 62 of the American Convention. In practice, conditional interpretive declarations may arguably be more restrictive than "reservations" made under Article 75, since they will often limit more individual rights provided by the American Convention. For example, a reservation such as Argentina's, which limited the treaty's application with respect to Article 21 alone, thus making domestic law supreme over the American Convention,⁶⁷ had little to no legal effect on the implementation of the American Convention. The same is often untrue of conditional

⁶⁵ The only way to remove the Court's jurisdiction is to denounce the American Convention in its entirety. American Convention art. 78. For the text of Trinidad's denunciation, *see* BASIC DOCUMENTS, *supra* note 15.

⁶⁶ *Hilaire v. Trinidad and Tobago*, (Preliminary Exceptions), *supra* note 62, ¶ 98.

⁶⁷ Specifically, the text of the reservation stated: "The Argentine Government establishes that questions relating to the Government's economic policy shall not be subject to review by an international tribunal. Neither shall it consider reviewable anything the national courts may determine to be matters of 'public utility' and 'social interest', nor anything they may understand to be 'fair compensation'." The text of each country's reservations and declarations are listed in BASIC DOCUMENTS, *supra* note 15.

interpretive declarations when they limit *ratione temporis*.⁶⁸ For example, Nicaragua's conditional interpretive declaration applied a temporal limitation to the Court's jurisdiction when it limited its acceptance of the Court's jurisdiction to facts occurring after the acceptance date.⁶⁹ At least within the context of international human rights law before the Inter-American Court, this declaration has the possible effect of eliminating as a cause of action those claims that would otherwise be considered continuing crimes. In general, continuing crimes, pursuant to Article 28 of the Vienna Convention,⁷⁰ fall into an exception in rules of non-retroactive application of the law. However, though the Court has been somewhat inconsistent, the recent *Hermanas Serrano*

⁶⁸ To be clear, Argentina's interpretive statements are, most likely, in keeping with the American Convention both in procedure and substance. Their texts reads: "Article 5, paragraph 3, shall be interpreted to mean that a punishment shall not be applied to any person other than the criminal, that is, that there shall be no vicarious criminal punishment." *Also* "Article 7, paragraph 7, shall be interpreted to mean that the prohibition against "detention for debt" does not involve prohibiting the state from basing punishment on default of certain debts, when the punishment is not imposed for default itself but rather for a prior independent, illegal, punishable act." *And finally*, "Article 10 shall be interpreted to mean that the "miscarriage of justice" has been established by a national court." *Available in* BASIC DOCUMENTS, *supra* note 15.

⁶⁹ Nicaragua's declaration stated: "The foregoing notwithstanding, the Government of Nicaragua states for the record that its acceptance of the competence of the Inter-American Court of Human Rights is given for an indefinite period, is general in character and grounded in reciprocity, and is subject to the reservation that this recognition of competence applies only to cases arising solely out of events subsequent to, and out of acts which began to be committed after, the date of deposit of this declaration with the Secretary General of the Organization of American States." *Available in* BASIC DOCUMENTS, *supra* note 15.

⁷⁰ Vienna Convention's Article 28 states: "Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party." This provision may be interpreted to refer to all crimes *but* continuing crimes as they would not have "ceased to exist" as provided in the treaty. Vienna Convention, *supra* note 42, art. 28. Though it is beyond the scope of this paper to evaluate this scenario at this time, it was incorporated into jurisdiction before the International Criminal Court. The Rome Statute currently allows continuing crimes to be heard before the tribunal. *See generally* Alan Nissel, *Continuing Crimes in the Rome Statute*, 25 MICH. J. INT'L L. 653 (2004).

Cruz decision seems to dictate that continuing crimes will not be heard on the merits when those violations were commenced before the conditional acceptance of the Court's jurisdiction.⁷¹

Reservations and Declarations before the Inter-American Court

In the Inter-American system, about half of the States Parties have, at one point, made some sort of declaration to the American Convention, whereas less than ten have made reservations to the that treaty.⁷² Most of the declarations that have been submitted are procedural, which is to say that they usually restrict *ratione temporis* either on the basis of an indefinite period or only past a specific date. Conversely, reservations are generally in reference to specific, substantive rights.⁷³ While some interpretive declarations simply proclaim the supremacy of domestic over international law, such as that made by Argentina,⁷⁴ others are more directly procedural, applying explicit limitations to the Court's competence. Though the previously discussed confusion between declarations and reservations is pervasive and some hesitation must be exercised before classifying limitations in either category, "declarations" submitted under Article 62 of the treaty have been more frequent than reservations. El Salvador is one of the countries that submitted a "declaration" upon its acceptance of the Court's

⁷¹ See *Las Hermanas Serrano Cruz (Preliminary Objections)*, *supra* note 81, ¶. 79.

⁷² BASIC DOCUMENTS, *supra* note 15. The line between reservations and declarations here is a fine if not blurry. There is often very little distinction between declarations and reservations, and in many cases, declarations are arguably misclassified. For that reason, it is difficult to categorize the exact numbers of declarations versus reservations that have been made. Though it is beyond the scope of this paper to do so at this time, a future study based on such a quantitative and qualitative assessment would certainly prove valuable.

⁷³ See *id.*

⁷⁴ See *supra* note 68 (Argentina's reservation to Article 21) and accompanying text.

jurisdiction. When the first case against the country was brought to the Court, that limitation proved central to the Court's decision.

El Salvador's History and the Temporal Limitation

Though El Salvador ratified the American Convention in 1978, the protection of human rights under the system did not play an active role in the country for nearly two decades.⁷⁵ During the 1980's, nearly every aspect of life in El Salvador was impacted by a violent Civil war. From 1980 to 1991, El Salvador was "engulfed in a war which plunged Salvadorian society into violence, left it with thousands and thousands of people dead and exposed it to appalling crimes."⁷⁶ Estimates by the United Nations established 75,000 people dead and over a million displaced.⁷⁷ Unfortunately, it was not until January 16, 1992 when the seemingly reconciled parties signed the Peace Agreement in the Castle of Chapultepec, Mexico, and "brought back the light and the chance to re-emerge from madness to hope."⁷⁸ Up until that time, though, violence was systematically implemented, and "arbitrary arrests, murders and selective and indiscriminate disappearances of leaders became common practice."⁷⁹

⁷⁵ Over twenty years passed between the date of ratification of the American Convention and the first public hearing against the country before the Inter-American Court. Ratification information is available in BASIC DOCUMENTS, *supra* note 15.

⁷⁶ Security Council, *Report of the UN Truth Commission on El Salvador*, U.N. Doc S/25500 at 10 (April 1, 1993) available at <http://www.derechos.org/nizkor/salvador/informes/truth.html> (last visited Jan. 14, 2006) [hereinafter Truth Commission].

⁷⁷ Nicole Hertvik, *El Salvador: Effecting Change from Within*, United Nations Chronicle available at http://www.un.org/Pubs/chronicle/2002/issue3/0302p75_el_salvador.html (last visited Jan. 13, 2006).

⁷⁸ Truth Commission, *supra* note 77, at 10.

⁷⁹ *See id.* at 27.

In efforts to investigate the tragedies that occurred in the country, the negotiators in the peace process agreed to refer human rights violations committed during the war to the UN Commission for the Truth (Truth Commission).⁸⁰ The Truth Commission investigated some of the most visible crimes in the country, and its 1993 report specifically named individuals involved in their execution.⁸¹ In response to the blame placed on its officers and officials, the Salvadoran government released an amnesty law that would forever pardon those involved in crimes during the Civil war. It granted “full, absolute and unconditional amnesty to all those who participated in any way to the commission, prior to January 1, 1992, of political crimes or common crimes linked to political crimes or common crimes, in which the number of persons involved is no less than twenty.”⁸² Essentially, then, no case could be fairly adjudicated in domestic courts if based on facts taking place between 1980 and 1991.

Like many other states in the system, El Salvador accepted the Court’s jurisdiction on a conditional basis. The Secretary General of the OAS accepted the temporal restriction imposed by El Salvador in 1995, when the country submitted to the jurisdiction of the Court. In El Salvador’s “declaration,” the State expressly stated that it would accept jurisdiction only:

For an indefinite term, under the condition of reciprocity and with the express reservation that, in cases where the court’s competence is recognized, the Court shall have jurisdiction only and exclusively over facts or judicial acts taking place after, or those facts or judicial acts which before after the declaration of

⁸⁰ *See id.* at 11.

⁸¹ *See id.*

⁸² Ley de Amnistía General para la Consolidación de la Paz [General Amnesty Law for the Consolidation of Peace], Decreto No. 486 de fecha 20 de marzo de 1993, *publicado* el 22 de marzo de 1993 *available at* www.acnur.org/biblioteca/pdf/1841.pdf (last visited Jan. 13, 2006).

acceptance of the court's competence was deposited. This reservation excludes from the jurisdiction of the Court the facts or judicial acts occurring or beginning before the deposit date of said declaration.⁸³

In this document, El Salvador attempted to exclude from the Court's jurisdiction any case arising out of the civil war.⁸⁴ This temporal limitation proved decisive in a case brought against El Salvador by the family members of two missing girls, Ernestina and Erlindina Serrano Cruz. Ultimately, El Salvador's conditional acceptance of the Court's jurisdiction substantially impacted the Court's decision.

Facts of the Case

⁸³ *Las Hermanas Serrano Cruz vs. El Salvador* [Serrano-Cruz Sisters v. El Salvador], (Preliminary Objections), Inter-Am Court H.R., Judgment of November 23, 2004, (ser. C) No. 118, ¶ 54(a) [hereinafter *Las Hermanas Serrano Cruz* (Preliminary Objections)]. The Spanish text of this paragraph is: “El “instrumento de ratificación de aceptación de competencia de la Corte”, depositado por El Salvador el 6 de junio de 1995 en la Secretaría General de la OEA, reconoce la competencia de la Corte “por un plazo indefinido, bajo condición de reciprocidad y con la reserva expresa de que en los casos en que se reconoce la competencia de la Corte comprende sola y exclusivamente los hechos o actos jurídicos posteriores o hechos o actos jurídicos cuyo principio de ejecución sean posteriores a la fecha de depósito de la declaración de aceptación” de la competencia. Esta “reserva” excluye de la competencia de la Corte los hechos o actos jurídicos que sean anteriores a la fecha de depósito de dicha declaración o cuyo principio de ejecución no sea posterior a esa fecha.” *Note to reader*: All translations, unless otherwise noted, are by the author.

⁸⁴ An issue disputed before the Court that will not be further discussed in this paper, but which is a valid critique of the reservation, is the vagueness with which El Salvador evoked Article 62 of the American Convention. Though it is able to restrict jurisdiction based on specific facts, specific time, or on the condition of reciprocity, it was unclear as to which provision its limitation targeted. The representatives alleged that the limitation to specific cases lacked the required specificity of types of cases. They also argued that the reservation was not reciprocal. Thus, the only somewhat valid element of El Salvador's document was the limitation with respect to time. *See Las Hermanas Serrano Cruz* (Preliminary Objections), *supra* note X, ¶ 56(c).

Though the facts of the *Hermanas Serrano Cruz* case are convoluted, the abuse of the victims remains clear. In early summer of 1982, Erlinda and Ernestina Serrano, who at that time were 3 and 7 years old, disappeared from Chalatenango, El Salvador.⁸⁵ They were last seen almost 24 years ago, when the Armed Forces of El Salvador took them via helicopter from their town.⁸⁶ Though there is some confusion as to whether the girls were delivered to either the International Committee of the Red Cross or the Red Cross of El Salvador, the Commission was unable to make a definitive determination to that effect.⁸⁷ What is clear, however, is that they disappeared.

One of the organizations that represented the girls' family before the Inter-American system, *La Asociación Pro-Búsqueda*, had received 721 requests from families similarly situated, and has been able to locate about one-third of those children.⁸⁸ It is now known that of the thousands of children victimized during the conflict, "hundreds were assassinated in massacres committed by the armed forces; others were taken after their parents were murdered or after becoming separated from them during army attacks on their villages. Some were taken to orphanages, others were given up for adoption either within El Salvador or abroad, including the

⁸⁵ *Las Hermanas Serrano Cruz*, (Merits), *supra* note 5, ¶ 48(2).

⁸⁶ *See id.* ¶ 2.

⁸⁷ *See id.* ¶ 2.

⁸⁸ *See id.* ¶ 48(6).

United States, France, Germany and the United Kingdom.”⁸⁹ *La Asociación Pro-Búsqueda* suspected that the girls were a part of this latter group.⁹⁰

With respect to the Serrano Cruz investigation, the Commission concluded that the State had “not even minimally demonstrated that it had developed an investigation with the possibilities of discovering what had happened [to the girls].”⁹¹ The Commission further accused the State of limiting its investigation by acts that were merely a mechanical repetition of steps, without a true intent to investigate, clarify the facts, and sanction those responsible.⁹² Culpability was placed on the State, in the Commission’s eyes, because the “fundamental elements” needed for the investigation were “clearly under its control.”⁹³ Moreover, the Commission alleged that the facts forming this case were a part of a pattern of forced disappearances during the armed conflict that were perpetrated or tolerated by the State.⁹⁴

Since the girls’ location remains unknown, the case was brought to the Inter-American Court by their family members, represented by *La Asociación Pro-Búsqueda* and the Center for

⁸⁹ Amnesty Int’l, *El Salvador: Where are the Disappeared Children?*, AI Index AMR 29/004/2003, July 30, 2003 available at <http://web.amnesty.org/library/index/engamr290042003> (last visited Dec. 18, 2005).

⁹⁰ Milton Aparicio, Remarks at *La Asociación Pro Búsqueda* Headquarters in San Salvador, El Salvador (Jan. 6, 2005) [hereinafter Milton Aparicio].

⁹¹ *Las Hermanas Serrano Cruz (Merits)*, *supra* note 5, ¶ 49(b). The Spanish text of this paragraph provides: “El Estado...ni demostró mínimamente que hubiera desarrollado una investigación con la posibilidad de determinar lo acontecido.”

⁹² *See id.* ¶ 49(c). The Spanish text of this paragraph provides: “En sus observaciones sobre el fondo del caso [...] el Estado se limitó a relatar una investigación caracterizada por la repetición mecánica de actuaciones, sin el impulso que demuestre la voluntad de investigar, esclarecer los hechos, y sancionar a los responsables.”

⁹³ *See id.* ¶ 49(c). The Spanish text of this section provides: “Todo ello a pesar de que los elementos fundamentales para la averiguación estaban plenamente bajo su control.”

⁹⁴ *See id.* ¶ 2.

Justice and International Law (CEJIL). Importantly, claims were made both for the benefit of the Serrano Cruz sisters themselves and for the surviving family.⁹⁵ Some of the alleged violations of the American Convention with respect to the girls were articles: 4 (right to life), 7 (right to personal liberty), 18 (right to a name), and 19 (right of the child).⁹⁶ As always, these were alleged in relation to article 1.1 (the obligation of the State to respect the rights recognized in the Convention).⁹⁷ Additionally, the Commission submitted to the Court for consideration, a possible violation of article 5 (right to personal integrity), 8 (judicial guarantees), 17 (protection of the family), and 25 (protection judicial), also in relation to article 1.1 for the family members of the girls.⁹⁸ The initial complaint was submitted to the Inter-American Court on June 14, 2003.⁹⁹ By November of 2004, the Court was hearing preliminary objections by the State.¹⁰⁰

PRELIMINARY OBJECTIONS: THE COURT'S HOLDING

After hearing preliminary objections in the case, the Court decided, in a vote of six to one, in favor of upholding the objection of the lack of *ratione temporis*.¹⁰¹ The Court found that

⁹⁵ Pursuant to Article 23 of the Rules of Procedure of the Inter-American Court, the next of kin of the victims in question may bring a case on their behalf. Insert rules of procedure citation. However, the “victims” in this case include the girls and also their family members who had suffered due to their prolonged absence.

⁹⁶ *Las Hermanas Serrano Cruz (Merits)*, *supra* note 5, ¶ 2.

⁹⁷ *See id.* ¶ 2.

⁹⁸ *See id.* ¶ 2.

⁹⁹ *See id.* ¶ 3.

¹⁰⁰ *See id.* ¶ 21.

¹⁰¹ Brazilian judge, Cançado Trindade wrote a strong dissent in the preliminary objections phase. *See generally* *Las Hermanas Serrano Cruz [Serrano-Cruz Sisters v. El Salvador]* (Preliminary

the temporal restriction could not be considered a reservation. To support this assertion, the Inter-American Court referred back to its holding in the case of *Martín del Campo Dodd v. Mexico* case where it stated:

The recognition of the jurisdiction of the Court is a unilateral act of every State, conditioned on the terms of the American Convention in its entirety. As a result, this is not an issue of reservations. If a doctrine discusses reservations, upon recognizing the jurisdiction of an international tribunal, it is dealing with, in reality, the limitations of the recognition of this jurisdiction and not technically with reservations of a multilateral treaty.¹⁰²

The Court thus interpreted El Salvador's limitation as an instrument which solely limited the competence of the Court within the guidelines set out by Article 62 of the Convention, and not as more, as the representatives had argued.¹⁰³

This distinction is a critical one, since the classification of the limitation as a reservation, and not as a declaration, would contextualize the document within the guidelines of the Vienna

Objections), Inter-Am Court H.R., Judgment of November 23, 2004, (ser. C) No. 118 (Trindade, J., dissenting).

¹⁰² See *Las Hermanas Serrano Cruz (Preliminary Objections)*, *supra* note 81, ¶ 61 (citing *Alfonso Martín del Campo Dodd vs. Mexico (Preliminary Objections)*, Series C, No. 113, ¶ 68). The Spanish text of this paragraph provides: “[El] reconocimiento de la competencia” de la Corte [...] es un acto unilateral de cada Estado[,] condicionado por los términos de la propia Convención Americana como un todo y, por lo tanto, no está sujeta a reservas. Si bien alguna doctrina habla de “reservas” al reconocimiento de la competencia de un tribunal internacional, se trata, en realidad, de limitaciones al reconocimiento de esa competencia y no técnicamente de reservas a un tratado multilateral.”

¹⁰³ *Las Hermanas Serrano Cruz (Preliminary Objections)*, *supra* note 81, ¶ 62. The Spanish text of this section provides: “Es decir, El Salvador utilizó la facultad estipulada en el artículo 62 de dicho tratado y estableció una limitación temporal respecto de los casos que podrían someterse al conocimiento del Tribunal.”

Convention. That is to say, by labeling El Salvador's limitation a "declaration," the document would no longer need to be assessed within Article 19's framework. Specifically, as a "declaration," the document would not need to pass the "object and purpose" test laid out in the *Genocide Convention* case and Article 19.

While the Court acknowledged that in other cases it had found such documents to be against the object and purpose of the American Convention,¹⁰⁴ it found this temporal limitation to the Court's jurisdiction as valid under Article 62.¹⁰⁵ Unfortunately, the claims that were excluded as a result included many of the more "important" articles with relation to the Serrano Cruz sisters themselves. The Court omitted article 4 (right to life), article 5 (right to humane treatment), and article 7 (right to personal liberty) with respect to the girls.¹⁰⁶ This bundle of rights also encompassed the act of forced disappearance, which the Court expressly declined to rule upon.¹⁰⁷ However, the Court did decide to admit the family's claims on article 8 (right to a fair trial) and article 25 (right to judicial protection).¹⁰⁸ Eventually, the Court held on the merits that El Salvador was responsible for breaching its duties under articles 8(1) (right to a fair trial) and 25 (right to judicial protection), with respect to the girls and the family, and article 5 (right to

¹⁰⁴ *See id.* ¶ 75. *See also* Constantine et al. v. Trinidad and Tobago, (Preliminary Objections), Inter-Am Court H.R., Judgment of September 1, 2001, (ser. C) No. 82, ¶ 79 [hereinafter Constantine v. Trinidad and Tobago (Preliminary Objections)]; Hilaire v. Trinidad and Tobago, (Preliminary Exceptions), *supra* note 62, ¶ 88.

¹⁰⁵ Serrano-Cruz Sisters v. El Salvador Case, (Preliminary Objections), *supra* note 81, ¶ 73.

¹⁰⁶ Las Hermanas Serrano Cruz (Preliminary Objections), *supra* note 81, ¶ 77.

¹⁰⁷ *See id.* ¶ 79. Again, the Court decided not to rule on this claim because it believed that this continuing crime, with acts beginning well before the submission to the court's jurisdiction, was excluded via El Salvador's temporal limitation.

¹⁰⁸ *See id.* ¶ 80.

humane treatment) with respect only to the family.¹⁰⁹ While culpability was placed on the State, the representatives enjoyed only a pyrrhic victory due to the enormous losses suffered in the preliminary objections phase of the case.

SHORTCOMINGS IN THE DECISION

Though at first blush El Salvador's restriction may seem like a fairly straightforward temporal limitation, there are a great number of convoluted legal considerations involved. As the representatives of the purported victims argued, El Salvador's preliminary objection should have been thrown out for three main reasons.¹¹⁰ First, the document was incorrectly classified as a declaration and not as a reservation to the American Convention. Second, assuming its reclassification as a reservation, the temporal limitation would then be procedurally invalid. Finally, its effects and content were against the object and purpose of the American Convention.

Improper Classification

One of the most crucial decisions made by the Inter-American Court in the *Hermanas Serrano Cruz* case was the classification of El Salvador's limitation to *ratione temporis* as a declaration, rather than a reservation. This incorrect distinction enormously impacted the case, and it will undoubtedly influence many cases in the future.

The first element of the Court's evaluation pertains to the form of the restriction. The language of the limitation alone should have led the Court to classify the document as a

¹⁰⁹ Las Hermanas Serrano Cruz (Merits), *supra* note 5, ¶ 218.

¹¹⁰ Las Hermanas Serrano Cruz, (Preliminary Objections), *supra* note 81, ¶ 56.

reservation. Within its limitation, the State recognized the Court’s jurisdiction “for an indefinite term,” but then added “with the express reservation” that jurisdiction should be limited to facts occurring after the acceptance of jurisdiction.¹¹¹ It then later referred to the instrument as “this reservation.”¹¹² Moreover, the State again referred to the instrument as a reservation in its arguments before the Court.¹¹³ Yet, the Inter-American Court overlooked this language and did not address it in its opinion.

In addition, the Court failed to consider the effect of the reservation. If, as previously discussed, the principle difference between a declaration and a reservation is derived via an analysis of the effect of such restrictions, certainly a limitation that removes binding judicial power from all articles of the American Convention is much more a reservation than a conditional interpretive declaration. The limitation was not a mere clarification of the meaning of the treaty, as would be the case if it were a declaration. Classifying it as a reservation had the effect of removing as causes of action all of the Convention’s substantive protections for facts arising before 1995.¹¹⁴

Specifically, the violations that were excluded from the Court’s jurisdiction were rights that are considered non-derogable under the American Convention. Such claims included the rights to: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from Ex Post Facto

¹¹¹ *See id.* ¶ 54(a).

¹¹² *See id.* ¶ 54(a).

¹¹³ *See id.* ¶ 54(g), 54(h).

¹¹⁴ Though the continuing crime of forced disappearance should have been reached on the merits pursuant to Vienna Convention article 28 and the exception for facts which have not ceased to exist, that was not a concept followed by this court. Therefore, the effect of the limitation was quite pervasive.

Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), and the judicial guarantees essential for the protection of such rights as dictated by Article 27(2).¹¹⁵ Though some rights otherwise protected under the Convention may be derogable in times of war, these are not severable at any time.¹¹⁶ Therefore, El Salvador sidestepped this problem by exempting such violations from the Court's jurisdiction entirely.

Improper Procedure

Another issue that arises along with misclassification of the instrument is the fact that, technically, the retroactive application of a reservation would automatically make the limitation invalid. If, in fact, El Salvador's instrument were a reservation and not a declaration, it would automatically fail under both the Vienna Convention and the American Convention. Since a reservation may only be made at the time of the signature, ratification, acceptance or approval of the treaty pursuant to Article 19 of the Vienna Convention and Article 75 of the American Convention,¹¹⁷ the temporal limitation would be considered invalid based upon procedure alone. Therefore, the Court's inquiry could have ended very early on in the preliminary objection phase.

¹¹⁵ American Convention, *supra* note 3, art. 27(2).

¹¹⁶ American Convention, *supra* note 3, art. 27.

¹¹⁷ Las Hermanas Serrano Cruz (Preliminary Objections), *supra* note 81, ¶ 56(c)(i). The Spanish text of this paragraph provides: "De acuerdo con lo establecido en la Convención de Viena sobre el Derecho de los Tratados, no es posible introducir reservas a un tratado luego de su firma, ratificación, aceptación o aprobación." *See also* Vienna Convention, *supra* note 42, art. 19. American Convention, *supra* note 3, art. 75.

Since reservations must be made at the time consent to be bound by the treaty is given, El Salvador would have needed to reserve the scope of the Court's competence in 1978, when it ratified the American Convention. Likewise, this would call into question other reservations procedure within the Inter-American system for human rights that purports to follow the Vienna Convention, while adhering directly to a procedurally contradictory instrument—the American Convention. Although the American Convention's Article 75 procedure on reservations expressly announces that it will follow the Vienna Convention, it allows for limitations to the competence of the Court to be filed “at any subsequent time.”¹¹⁸ If, as previously argued, this temporal limitation was improperly classified as a declaration and was truly a reservation, it would be impossible for procedure to adhere to both Article 62 and Article 75 of the American Convention.

Object and Purpose Principles

Finally, the reservation upheld in this case is most likely against the object and purpose of the American Convention. To determine if reservations are against the object and purpose of the Convention, the Court has worked to safeguard the norms established within the treaty.¹¹⁹ Specifically, in its Advisory Opinion on reservations, the Court emphasized that the purpose of human rights treaties should be upheld by states while making reservations:

The Court must emphasize, however, that modern human rights treaties in general, and the American Convention in particular, are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for

¹¹⁸ American Convention, *supra* note 3, art. 62(1).

¹¹⁹ *See id.* art. 1(1).

the mutual benefit of the contracting States. Their object and purpose is the protection of the basic rights of individual human beings irrespective of their nationality, both against the State of their nationality and all other contracting States. In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other States, but towards all individuals within their jurisdiction.¹²⁰

Since human rights instruments deal with the protection of personal liberties, they should be considered in that light while interpreted and restricted. While treaty law is generally careful to create a balance between the interests involved, human rights treaties fall into a special category of instrument, given the fact that they deal directly with the protection of human life. As a result, traditional guidelines—such as those created and followed under the Vienna Convention’s attempt to guide and encourage state reciprocity—may be insufficient regulations within the context of human rights law. Importantly, the Human Rights Committee to the ICCPR has also recognized this concept. Specifically, the Committee has stated:

As indicated above, it is the Vienna Convention on the Law of Treaties provides the definition of reservations and also the application of the object and purpose test in the absence of other specific provisions. But the Committee believes that its provisions on the role of State objections in relation to reservations are inappropriate to address the problem of reservations to human rights treaties. Such treaties, and the Covenant specifically, are not a web of inter-State exchanges of

¹²⁰ Advisory Opinion OC-2/82, *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights* (Arts. 74 and 75), Inter-Am. Ct. H.R. (ser. A) ¶ 29 (Sept. 24, 1982).

mutual obligations. They concern the endowment of individuals with rights. The principle of inter-State reciprocity has no place, save perhaps in the limited context of reservations to declarations on the Committee's competence under article 41. And because the operation of the classic rules on reservations is so inadequate for the Covenant, States have often not seen any legal interest in or need to object to reservations. The absence of protest by States cannot imply that a reservation is either compatible or incompatible with the object and purpose of the Covenant.¹²¹

Certainly a “particularly troublesome” reservation is “one which seeks to subordinate a human rights treaty to domestic law of the reserving state.”¹²² This, in effect, is what El Salvador was doing—though not expressly—in its temporal limitation to the Court. Since there had been blanket amnesty granted to those responsible for grave human rights abuses during the civil war, allowing for an additional exception to be granted via the American Convention removes one of the only other legal avenues available to victims of human rights abuses, and it arguably encourages States to abuse the rights enumerated therein. Indeed, this avenue of redress exists precisely to respond to situations in which domestic remedies are either de jure or de facto foreclosed. Thus, removing the Court as a forum for victims is inconsistent with both the substantive and procedural goals of the American Convention.

¹²¹ UNHCR, *General Comment No. 24: Issues Relating to Reservations Made Upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations under Article 41 of the Covenant*, ¶ 17, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994) available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/69c55b086f72957ec12563ed004ecf7a?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/69c55b086f72957ec12563ed004ecf7a?Opendocument) (last visited Jan. 14, 2006).

¹²² ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE*, at 121 (2000).

Importantly, the Inter-American Court has expressed its agreement with the concept that reservations that act against the object and purpose of the American Convention should not be allowed. In the 2001 *Hilare v. Trinidad and Tobago*, one of three cases against that State, the Court interpreted Article 29(a) of the American Convention, which states: “No provision of the Convention shall be interpreted as permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein.”¹²³ “Consequently,” the Court elaborated, “it would be meaningless to suppose that a State which had freely decided to accept the compulsory jurisdiction of the Court had decided at the same time to restrict the exercise of its functions as foreseen in the Convention. On the contrary, the mere acceptance by the State leads to the overwhelming presumption that the State will subject itself to the compulsory jurisdiction of the Court.”¹²⁴

Therefore, when the Court interpreted El Salvador’s reservation, it should have acknowledged the State’s intention to provide those who had committed atrocities during the war, and who are still in the government and the public eye, with greater protection than that which would typically be allowed under the American Convention. Between the amnesty law and the granted restriction to *ratione temporis*, nearly all criminals guilty of human rights abuses during the civil war were not triable in domestic or international courts within the region. Though the Inter-American Court has no jurisdiction over individual human rights abusers, state policies implemented by those individuals may be evaluated before the Court, thus implicating individual abuses. By upholding temporal limitation, the Court excluded innumerable claims of human rights victims and acted against the object and purpose of the rights enumerated in the

¹²³ American Convention, *supra* note 3, art 29(a).

¹²⁴ *Hilaire v. Trinidad and Tobago*, (Preliminary Objections), *supra* note 62, ¶ 90.

very treaty it is designed to protect. Certainly, as the representatives argued before the Inter-American Court, “a reservation that permits a State to continue violating human rights without any type of supervision or condemnation is not valid.”¹²⁵

Intriguingly, the Inter-American Court recognized that this was a relevant issue in the *Hermanas Serrano Cruz* case. In fact, the Court drew a critical distinction between its previous holdings finding limitations on *ratione temporis* and the *Serrano Cruz* case by classifying similar temporal limitations as too “generalized” and with the specific goal of “subordinating the application of the Convention.”¹²⁶ That is to say, the Court previously found other limitations to be inappropriate based on vague language that evidenced a desire by the State to exclude itself from provisions of the American Convention. However, the cases that the Court cited provided facts based on clear and express subordination of the American Convention. Those three cases evaluated Trinidad’s substantive restrictions to the Convention in favor of domestic courts.¹²⁷ Trinidad made its reservation to the American Convention at the time of its adhesion to the treaty,¹²⁸ but it later filed a conditional interpretive declaration, which stated:

¹²⁵ *Las Hermanas Serrano Cruz* (Preliminary Objections), *supra* note 81, ¶ 56(b)(i). The Spanish text of this paragraph provides: “Asimismo, no es válida una reserva que permita que un Estado continúe violando los derechos humanos ‘sin ningún tipo de supervisión o condena.’”

¹²⁶ *See id.* ¶ 75. The Spanish text of this paragraph provides: “La Corte observa que, a diferencia de este caso, se trató de una limitación con ‘un alcance general, que termina por subordinar la aplicación de la Convención al derecho interno [...] en forma total y según lo dispongan sus tribunales nacionales.’”

¹²⁷ *Constantine v. Trinidad and Tobago* (Preliminary Objections), *supra* note 100, ¶ 79; *Benjamin et al. v. Trinidad and Tobago* (Preliminary Objections), Inter-Am. Court H.R., Judgment of Sept. 1, 2001, (ser. C) No. 81, ¶ 79 [hereinafter *Benjamin v. Trinidad and Tobago* (Preliminary Objections)]. *Hilaire v. Trinidad and Tobago* (Preliminary Exceptions), *supra* note 125, ¶ 88.

¹²⁸ The text of Trinidad’s initial reservation is: “As regards Article 4(5) of the Convention the Government of The Republic of Trinidad and Tobago makes reservation in that under the laws of Trinidad and Tobago there is no prohibition against the carrying out a sentence of death on a person over seventy (70) years of age.” *Available in* BASIC DOCUMENTS, *supra* note 15.

As regards Article 62 of the Convention, the Government of the Republic of Trinidad and Tobago recognizes the compulsory jurisdiction of the Inter-American Court of Human Rights as stated in said article only to such extent that recognition is consistent with the relevant sections of the Constitution of the Republic of Trinidad and Tobago; and provided that any judgment of the court does not infringe, create or abolish any existing rights or duties of any private citizen.¹²⁹

In all three cases against Trinidad and Tobago, the Inter-American Court invalidated the country's interpretive declaration, and not the reservation. Although the Court could have taken a definitive stance on the attempted modification of the death penalty policy in the country accompanied by what likely would have been an identical outcome of Trinidad's denunciation, it instead invalidated the declaration. The Court classified it as too generalized, and held it to be made in bad faith.¹³⁰ Conversely, the Court in *Hermanas Serrano Cruz* decided that the limitation in this case did not subordinate its capacity to decide certain claims to an extent that it would diminish the power of the Convention and the Court.¹³¹

¹²⁹ *See id.*

¹³⁰ *Constantine v. Trinidad and Tobago (Preliminary Objections)*, *supra* note 100, ¶¶ 80-82; *Benjamin v. Trinidad and Tobago (Preliminary Objections)*, *supra* note 127, ¶¶ 80-82; *Hilaire v. Trinidad and Tobago, (Preliminary Objections)*, *supra* note 62, ¶¶ 89-91.

¹³¹ *Las Hermanas Serrano Cruz (Preliminary Objections)*, *supra* note 81, ¶ 75. The Spanish text of this paragraph provides: "Por el contrario, la aplicación de la referida limitación efectuada por El Salvador no queda subordinada a la interpretación que el Estado le otorgue en cada caso, sino que corresponde al Tribunal determinar si los hechos sometidos a su conocimiento se encuentran bajo la exclusión de la limitación."

CONCLUSION

The *Hermanas Serrano Cruz* case has had a detrimental effect on the future of human rights adjudication in El Salvador and throughout the Americas. Though there are three cases *La Asociación Pro-Búsqueda* intends on presenting to the Inter-American Commission,¹³² the *Hermanas Serrano Cruz* decision does not allow victims to receive full, meaningful access to justice or redress.

There are two main critiques of the decision that should serve as guideposts for the future. First, the interpretation of reservations and declarations must not be completed without adequate consideration given to the effects of such documents. Second, the procedural mechanisms allowed for both processes seems, at this point, both antiquated and inappropriate for the current procedures of the Inter-American Court.

In evaluating El Salvador's reservation and its effects, the Inter-American Court should have placed a higher burden on the State to prove that it was not merely granting amnesty to its guilty for the sake of political motivations. Though the Inter-American Court has ruled on the problem of amnesty before in *Barrios Altos vs. Perú*,¹³³ the Court sidestepped amnesty altogether in this case, in the name of allowing more parties to submit to the Court's jurisdiction. The *Barrios Altos* decision held the amnesty law of Perú to be in direct violation of Articles 8 and 25 of the American Convention, establishing such laws as contradictory to the treaty.¹³⁴ In Judge Sergio García's concurring opinion of the *Barrios Altos* decision, he stated:

¹³² One of these includes claims brought by victims of the *El Mozote* massacre. Milton Aparicio, *supra* note 90.

¹³³ *Barrios Altos (Chumbipuma Aguirre y otros vs. Perú)*, Inter-Am. Court H.R., Judgment of March 14, 2001, (ser. C) No. 75.

¹³⁴ *See id.* ¶ 39.

The Court's judgment makes it clear that the self-amnesty laws referred to in this case are incompatible with the American Convention, which Peru signed and ratified, and which is therefore a source of the State's international obligations, entered into in the exercise of its sovereignty. In my opinion, this incompatibility signifies that those laws are null and void, because they are at odds with the State's international commitments.¹³⁵

In the *Hermanas Serrano Cruz* decision, though, Judge García was silent on the amnesty law and the enhanced effect it was given by the Court's decision.¹³⁶

Understandably, the Court is likely concerned with the possibility of States denouncing the American Convention. With Trinidad's recent denunciation of the Convention, additional denunciations from other states are arguably a valid concern for the future of human rights protection within the region. Reservations and declarations can help to protect the system from such departures and encourage greater participation, but excessive limitations to the jurisdiction of the Court will only continue to result in a dramatic decrease in universality and uniformity within the system. Although this tension is real and must not be ignored, the Court should adhere to its purpose and firmly, aggressively, and consistently protect the human right of those individuals within its territory. It is imperative that the Court take a firm stand and demonstrate to State Parties that accepting the Court's competence may not be limited to any imaginable scenario. There must be strict guidelines imposed such that human rights are protected both substantively and procedurally.

¹³⁵ *See id.* ¶ 15.

¹³⁶ In fairness to Judge García, El Salvador's amnesty law was not specifically challenged before the Inter-American Court in this case. That having been said, El Salvador's intentions were clear.

Second, the Court's interpretation of the direct link between the Vienna Convention's guidelines for reservations and the American Convention's procedures is inconsistent and contradictory. As previously discussed, it is virtually impossible for a State to adhere to both Article 62 and Article 75 (which is an adoption of Article 19 of the Vienna Convention) of the American Convention. Currently, States are permitted to make reservations after ratification of the American Convention by labeling them "declarations." This is against principles of international law as codified in Article 19 of the Vienna Convention. Logically, the Vienna Convention's procedure was drafted to thus permit States from changing the scope and depth of international norms at their leisure. A solution to this problem for the Inter-American system would involve the development of clearer definitions and allowances for declarations and their use. The most desirable result is the prohibition of reservations throughout the system in a context where non-derogable rights are at issue.

Though the American Convention was entered into force in 1978, it was drafted in 1969. Within the context of international law, which is relatively young in comparison to most domestic legal systems, this is a substantial amount of time for law to go mostly unchanged. To be sure, "the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights have made significant advances in the protection of human rights in the region. Many of these advances are directly attributable to the evolution of the practice and procedures of the Court and the Commission."¹³⁷ However, the process is not yet perfect. As international law transforms and grows, procedural and substantive regulations must be adapted to fit current practices. While the doctrine of reservations was once appropriate before international tribunals, the evolution of human rights law and jurisprudence seems to set out a trend to the contrary. As has been exemplified by the prohibition of reservations in the International Criminal Court's

¹³⁷ PASQUALUCCI, *supra* note 26, at 349.

recently ratified and drafted Rome Statute,¹³⁸ it is likely necessary to reevaluate and modernize the procedures that are being played out in human rights tribunals worldwide.

In the context of human rights law especially, it is imperative that clarification be given to States so that they may adopt their policies accordingly. Likewise, the interests of human rights victims must be balanced against the rights of States. Consent-based, contractual duties of States must be harmonized with the interests of individual, often non-derogable, rights. Within the inter-American system, this process should begin with a re-evaluation of the American Convention for Human Rights.

¹³⁸ Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9, (entered into force July 1, 2002) *available at* <http://www.un.org/law/icc/statute/romefra.htm> (last visited Jan. 13, 2006).