

RESERVATIONS AND THE FUTURE OF INTER-AMERICAN JUSTICE

JESSICA TILLSON*

INTRODUCTION

Beginning in the mid-1940s with the creation of the Charter of the United Nations (UN Charter),¹ the ability to adjudicate claims of human rights abuses under international law has increased dramatically. In response to the Second World War and the enormous abuses that became a part of the intimate knowledge of the war's survivors, states took active steps to address the atrocities by creating norms and by creating 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

* Jessica Tillson is a second year law student at the University of Santa Clara School of Law and also served as a legal intern for the Inter-American Court of Human Rights. This paper was presented at the Yale Journal of International Law's Young Scholars Conference in March of 2006 as a part of a panel on processes and procedures before international tribunals. The author would like to graciously thank Professor Beth Van Schaack for her support and valuable comments on earlier drafts of this work. The author also thanks Francisco Rivera and Dean Copans for their friendship and feedback throughout the drafting process.

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 certainly is not the first time in history that states came 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 first Geneva Conventions in 1864 developed the General Act of Brussels and the protection of the wounded and sick in wartime. In 1919, the Covenant of the League of Nations led the way for the codification of human dignity over states' interests. 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, O.A.S.T.S. No. 36, 9 I.L.M. 673 (*entered into force* July 18, 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*

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

Although the system has been in place for over two decades, many procedures within the Inter-American system for human rights remain unclear. Two of these processes are the doctrines of reservations and declarations. As the Inter-American Court has applied these practices within its jurisprudence, a rather unpredictable and seemingly heterogeneous body of law has developed. This obscurity detrimentally affected 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 the limitation to be valid under the American Convention.

In Part I, this article will review international human rights accountability in general and the Latin American system in particular. Part II will consider the tools that nations have for maintaining autonomy even as they enter into international treaties. Specifically, Part II will highlight the similarities in and differences between the doctrines of reservations and

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).

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), Judgment of March 1, 2005, Inter-Am. Ct. H.R., (ser. C) No. 120, at ¶ 48(2) (2005), *available at* http://www.corteidh.or.cr/seriepdf/seriec_120_esp.pdf (last visited May 30, 2006).

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.

declarations. In Part III, litigation of reservations and declarations is considered, with a focus on the *Las Hermanas Serrano Cruz* case. Part III will closely evaluate the inconsistencies within the Inter-American Court's reasoning in *Las Hermanas Serrano Cruz* and will 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. Part IV of this article will identify some future opportunities to challenge the law that exists after *Las Hermanas Serrano Cruz*, ultimately concluding that the protection of non-derogable human rights must not be circumvented using the doctrines of reservations and declarations.

I. INTERNATIONAL RESPONSIBILITY

A. Human Rights Accountability: An Overview

Throughout the world, international human rights are playing an augmented role in the protection of both individual human rights and 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 is expanding.

The system of individual responsibility, where particular human rights abusers are held responsible, is pursued in both criminal and civil law. It is within this type of adjudication that former Latin American dictators increasingly are 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 the 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, under the legal theory of command responsibility.⁸ In addition, courts have utilized principles of universal jurisdiction, which allows countries like Spain to hold individuals accountable for human rights violations abroad.⁹

The second category of international accountability involves cases brought against entire countries rather than against individual nations' leaders. This type of case may arise either within a regional system or 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

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 U.S. Federal 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, 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 now may be obsolete due to various recent changes, its development initially was quite meaningful.

¹³ The UN Human Rights Commission is an additional body that is responsible for encouraging compliance as a part of the Economic and Social Council (ECOSOC). Like the Human Rights Committee to the ICCPR, The UN Human Rights Commission 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 generally has been to prepare the texts of the Universal Declaration, the Convention on the Political Rights of Women, and the drafting of

developments, these systems are based on multilateral treaties that may be evoked against breaching states.

Although human rights norms are drafted with universal applicability, regional systems based on specific, multilateral treaties incorporate the cultural, social, political, and economic needs of regional geographies. Because of their closer connection to particular regions, regional systems have been uniquely effective. This effectiveness results from uncommon understandings of events at hand, the ability to take cultural makeup into account, and anomalous regional legitimacy. Although much is yet to be accomplished, the creation of regional regulations has aided in the establishment of greater legal uniformity.

B. The Structure of the Latin American System

1. An Overview

The Latin American system of human rights accountability centers on the American Convention on Human Rights (American Convention),¹⁴ which gave birth both to the Inter-American Commission and to 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.¹⁶ Currently, twenty-four of thirty-four Member States to the Organization of American States (OAS) have both signed and ratified the instrument.¹⁷

various accompanying covenants to Universal Declaration. *See generally* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW at 575-578 (1998).

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 Organization of American States, *Signatures and Current Status of Ratifications*, available at <http://www.cidh.oas.org/Basicos/basic4.htm> (last visited May 30, 2006).

¹⁷ 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. Organization of American States, *Signatures and Current Status of Ratifications*, in 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].

The American Convention contains eighty-two articles and codifies a set of twenty-six rights that the Commission and the Court are to protect.¹⁸ 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 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.¹⁹ Under this Convention, the States Parties agree to “respect” and “ensure” the “free and full exercise” of these rights “to all persons subject to their jurisdiction.”²⁰

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. Although there is considerable overlap between the two procedural regulations, this article primarily will concern itself with the Court’s procedural rules.

2. Bringing a Case to the Court

For a human rights case to be heard before the Inter-American Court, the case usually first must be heard by the Inter-American Commission and the jurisdiction of the Court must be accepted by the state.²¹ The Court is empowered with three types of jurisdiction: provisional measures,²² advisory opinions,²³ and contentious opinions.²⁴ With the exception of the Court’s

¹⁸ See, generally, American Convention, *supra* note 3.

¹⁹ *Id.*, arts. 4-8, 10-13, 15-16, 20-22, 24.

²⁰ *Id.*, art. 1(1).

²¹ See *id.*, art. 63-64.

²² As granted by Article 63.2 of the American Convention, the Court has 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.

²³ See *id.*, art. 63.

advisory jurisdiction, cases first must pass through the Commission.²⁵ 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.²⁶ In the alternative, the petitioners must make a showing that the remedies provided were denied, did not comply with due process standards, or were unreasonably delayed.²⁷ The petition also must meet temporal jurisdiction requirements.²⁸ After these initial requirements are met, the Commission may proceed with the case pursuant to its role as a fact finder.²⁹ When possible, the parties in the dispute will reach a friendly settlement. However, if a settlement cannot be achieved, the Commission will prepare a report announcing both the facts it takes to be true and also the legal conclusions reached in the case.³⁰ Following the release of the Commission's report, the dispute may be referred to the Court for further adjudication on the merits.³¹

²⁴ *See id.*, art. 64.

²⁵ Advisory jurisdiction is triggered when a member state of the OAS, the Inter-American Commission, or a recognized OAS organ requests that the Court either interpret the American Convention or interpret 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* Organization of American States, Rules of Procedure of the Inter-American Court of Human Rights, (2003), art. 60, *in* BASIC DOCUMENTS, *supra* note 17.

²⁶ American Convention, *supra* note 3, art. 46(1)(a).

²⁷ *See id.*, art. 46.

²⁸ Namely, this means that the petition usually must be filed within six months of the final decision in the relevant domestic system. *See id.*, art. 46(1)(b).

²⁹ This either may take the form of requesting documents and materials from the parties or may take the form of an *in loco* visit to gather relevant information. Rules of Procedure of the Inter-American Court of Human Rights, *supra* note 25.

³⁰ American Convention, *supra* note 3, art. 50.

³¹ 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 25, 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 believe that because petitioners can bring a case before the Commission, they also should 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).

If a case is referred to the Inter-American Court, it will fall within the Court's contentious jurisdiction.³² At that time, the Court will review the facts and the Commission's report³³ as well as briefs and supporting documentary evidence submitted by the representatives of the purported victims³⁴ and by the state.³⁵ Though the Commission previously acted more as a representative for the purported victims, its role currently is seen as procedural, and thus the adversarial dispute is between the purported victim and the state.³⁶ Following the presentation of facts in the case, the judges of the tribunal will evaluate the evidence and determine whether there are any violations of the American Convention.

If the Court finds that there is a violation of a right or freedom that otherwise would be protected by the American Convention, it may rule on whether the state is in violation of the identified norm and it also may require that the injured party receive the enjoyment of such rights or freedoms. When appropriate, the Court also may find that the consequences of the measure or situation constituting the breach must be remedied and that fair compensation must be paid to the victim.³⁷ The Court's decision is obligatory and without appeal.

³² Though the Court's advisory jurisdiction is important, it is unnecessary to discuss that jurisdiction at this time, because the reservation doctrine in question is relevant only in the contentious context. For an extensive discussion of the Court's advisory jurisdiction, see 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); see also Thomas Buergenthal, *The Advisory Practice of the Inter-American Human Rights Court*, 79 AM. J. INT'L L. 1 (1985).

³³ The Commission appears as a complaining party in contentious cases; in this capacity, the Commission serves as an objective, impartial participant, rather than an adversarial party advocating for the victim. Organization of American States, 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) in BASIC DOCUMENTS, *supra* note 17.

³⁴ 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 of the Inter-American Court of Human Rights, *supra* note 25, art. 23(2).

³⁵ PASQUALUCCI, *supra* note 31, at 16.

³⁶ 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 25, art 2(23).

³⁷ American Convention, *supra* note 3, art. 63(1).

As previously stated, the Court's contentious jurisdiction is based on state consent. Therefore, contentious jurisdiction only may arise when a state specifically submits to the Court's jurisdiction,³⁸ either on an *ipso facto* or on 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.³⁹ Such a declaration is submitted pursuant to Article 62 of the American Convention, and may be conditional or unconditional.⁴⁰ 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, the state may accept jurisdiction on a case-by-cases basis, for a set category of cases, or for all potential cases brought against it.⁴¹ Usually, conditions imposed by states include limits imposed on the subject matter, personal, or temporal jurisdiction of the Court.⁴²

II. MAINTAINING STATE AUTONOMY IN THE INTER-AMERICAN SYSTEM

A. State Sovereignty through Reservations and Declarations

In this treaty-based system founded primarily on state consent, countries have the opportunity to retain their sovereignty via both substantive reservations to the American

³⁸ 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. *See Signatures and Current Status of Ratifications, supra* note 17.

³⁹ American Convention, *supra* note 3, art. 62(2). *See also*: PASQUALUCCI, *supra* note 31, at 87-89.

⁴⁰ 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.

American Convention, *supra* note 3, art. 62 (1-2). 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 first was established in *Ivcher Bronstein v. Peru*, (Competence), Inter-Am. Ct. H.R., Judgment of Sept. 24, 1999, (Ser. C) No. 54, ¶¶ 40, 46 (1999).

⁴¹ American Convention, *supra* note 3, art. 62.

⁴² PASQUALUCCI, *supra* note 31, at 87.

Convention and procedural declarations limiting the Court's jurisdiction.⁴³ In theory, these two mechanisms should maintain a balance between individual rights and state autonomy.

However, “[w]idely divergent and political economic systems”⁴⁴ exist within the context of international human rights law, though the body of law aims to achieve the uniform protection of rights. Treaty reservations and declarations often are permitted in the hope that these mechanisms will 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.”⁴⁵ In practice, the roles each mechanism plays and the impacts they each have often is unclear or ambiguous.

The Vienna Convention on the Law of Treaties,⁴⁶ which governs treaties between states, defines a reservation as a “unilateral statement, however phrased or 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

⁴³ 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 often is minute or imperceptible.

⁴⁴ T.O. ELIAS, *THE MODERN LAW OF TREATIES*, at 27 (1974).

⁴⁵ *See id.*

⁴⁶ 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 Organizations or between International Organizations, March 21, 1986, U.N. Int'l L. Comm'n, U.N. Doc. A/CONF.129/15, *reprinted in* United Nations Conference on the Law of Treaties Between States and International Organizations or Between International Organizations, Official Records, Documents of the Conference, vol. II, 94 (1995), *available at* <http://www.un.org/law/ilc/texts/trbtstat.htm> (last visited Jan. 13, 2006).

state.”⁴⁷ Thus reservations 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.”⁴⁸

A declaration, on the other hand, is a statement in which a state announces that it understands a treaty in a specific way. The definition of an interpretive declaration is nearly identical to that of a reservation; as announced in 1999 by the International Law Commission, a declaration 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 treaty provisions.”⁴⁹ 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.⁵⁰

Generally, the distinction between a reservation and a declaration is made with respect only to the legal effect that the state’s action has on the treaty.⁵¹ Though the difference between reservations and declarations often is unclear and the Vienna Convention provides no guidance, some attention has been given to clarifying the roles reservations and declarations play in international law. As the International Law Commission stated in its recent report on the topic,

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

⁴⁷ 1969 Vienna Convention on the Law of Treaties, May 23, 1969 art. 2 (1)(d), 1155 U.N.T.S. 331 (emphasis added), available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf (last visited Jan. 12, 2006) [hereinafter Vienna Convention].

⁴⁸ Report of the International Law Commission on the Work of its Fifty-First Session, UN GAOR, 54th Sess., Supp. No. 10, ch 6, draft guidelines, ¶ 1.1.1., U.N. Doc. A/54/10 (1999), available at http://untreaty.un.org/ilc/documentation/english/A_54_10.pdf (last visited Jan. 12, 2006) [hereinafter International Law Commission Report].

⁴⁹ *Id.*, ch 6, draft guidelines, ¶ 1.2 (emphasis added).

⁵⁰ *See id.*, ch 6, draft guidelines, ¶ 1.2.1.

⁵¹ *See id.*, ch 6, draft guidelines, ¶ 1.3.

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.⁵²

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.⁵³

States may use both declarations and reservations, but unfortunately they do not always do so in good faith. In fact, states often obscure the distinction between the two “by giving the name of ‘declarations’ to instruments that are obviously and unquestionably real reservations.”⁵⁴ In doing so, states “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 provisions of a treaty, they label them ‘reservations’, even though under the terms of the Vienna definition they are not.”⁵⁵ States generally have been permitted to make reservations to treaties because the interest of broad state participation within a system generally outweighs the desire for universal application of the law. However, reservations are not without necessary limitations. The International Court of Justice’s (ICJ) advisory opinion in *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*⁵⁶ established the earliest guidelines for reservation procedure. In that case, the ICJ considered the availability of reservations under the Genocide Convention, which contained no provision for reservations or for the interpretation of reservations. Within the first two years of the Convention’s use, eight different states had made a total of eighteen reservations to the treaty,⁵⁷ and the General

⁵² See *id.*, ch 6, draft guidelines, ¶ 1.2, cmt. 1.

⁵³ 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.

⁵⁴ International Law Commission Report, *supra* note 48, ch 6, draft guidelines, ¶ 1.2, cmt. 5.

⁵⁵ See *id.*, ch 6, draft guidelines, ¶ 1.2, cmt. 5.

⁵⁶ Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15 (May 28).

⁵⁷ *Id.* at 17-18.

Assembly challenged the validity and effects of the reservations.⁵⁸ Ultimately, the Court determined that the attempted reservation to the Genocide Convention was against the object and purpose of the treaty.⁵⁹ Most importantly, the ICJ detailed the procedural and substantive framework for implementing reservations.

In most cases, states can make reservations to instruments while still being 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 drafters to permit such reservations.⁶⁰ If a given reservation is consistent with the object and purpose of the treaty, then the reserving state still may be a party to the instrument. However, whether the treaty is enforced between the reserving state and an objecting state depends on the objecting state's assessment of the compatibility of the reservation with the treaty.⁶¹

Because a state generally cannot be bound in international law without the state's prior consent, a treaty comes 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 need not be granted if the objecting state determines in good faith that the reservation is outside of the object and purpose of the treaty.⁶² Moreover, if a reservation is objected to, all states that do not object are bound in reciprocity to the objecting state, pursuant to that country's limit.⁶³ Where objections are made, either the provision in question will be wholly removed from the treaty as applied between the two countries or, if the reservation is deemed improper, the reserving state no longer will be a party to the treaty.⁶⁴

⁵⁸ *Id.* at 16.

⁵⁹ *Id.* at 27.

⁶⁰ *Id.* at 24.

⁶¹ Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 56, at 26.

⁶² *Id.* at 27.

⁶³ *Id.* at 29.

⁶⁴ *Id.*

Within Latin America, general reservations to provisions of the American Convention may be made pursuant to Article 75, which provides that “[t]his Convention shall be subject to reservations only in conformity with the provisions of the Vienna Convention on the Law of Treaties signed on May 23, 1969.”⁶⁵ 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.⁶⁶

If a reservation properly adheres to Article 19, it will be deemed a valid reservation to the American Convention, as long as the reservation is not a departure from the object and purpose of the treaty. For example, Trinidad and Tobago’s unsuccessful attempt to allow the death penalty to be carried out against a person over seventy years old was a direct violation of Article 4(5) of the American Convention.⁶⁷ In 1998, with the reservation’s validity pending before the Commission, the Trinidad and Tobago denounced the American Convention in anticipation of an unfavorable decision.⁶⁸ Three years later, when the case made its way to the Court, the Court held Trinidad’s reservation to be against the object and purpose of the American Convention; the Court invalidated the reservation and found the country culpable of numerous violations to the Convention.⁶⁹

⁶⁵ American Convention, *supra* note 3, art. 75.

⁶⁶ Vienna Convention, *supra* note 47, art. 19.

⁶⁷ *Hilaire v. Trinidad and Tobago*, (Preliminary Exceptions), Inter-Am. Ct. H.R., Judgment of Sept. 1, 2001, (ser. C) No. 80, ¶ 88 (2001).

⁶⁸ The only way to remove the Court’s jurisdiction is to denounce the American Convention in its entirety. American Convention, *supra* note 3, art. 78.

⁶⁹ *Hilaire v. Trinidad and Tobago*, (Preliminary Exceptions), *supra* note 67, ¶ 98.

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 explicitly are permitted while declarations only are 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 the Court or of the Commission and not to the American Convention itself.

States may enact declarations upon acceptance of the Court's competence and pursuant to Article 62 of the American Convention. In practice, conditional interpretive declarations arguably may be more restrictive than "reservations" made under Article 75, because these declarations often will 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 Argentine domestic law supreme to the American Convention)⁷⁰ had little to no legal effect on the implementation of the American Convention. The same often is untrue of conditional interpretive declarations when the declarations limit *ratione temporis*.⁷¹ For example, Nicaragua's conditional interpretive declaration applied a temporal limitation to the Court's jurisdiction by limiting the Court's jurisdiction to facts occurring after the acceptance

⁷⁰ 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'." See Signatures and Current Status of Ratifications, in BASIC DOCUMENTS, *supra* note 17 (for the text of each country's reservations and declarations).

⁷¹ 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.

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.

Article 10 shall be interpreted to mean that the "miscarriage of justice" has been established by a national court.

Id.

date.⁷² At least within the context of international human rights law before the Inter-American Court, this declaration has the possible effect of eliminating jurisdiction over claims that otherwise would be considered continuing crimes. In general, continuing crimes, pursuant to Article 28 of the Vienna Convention,⁷³ fall into an exception in rules of non-retroactive application of the law. However, though the Court has been somewhat inconsistent, the recent *Las Hermanas Serrano 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.⁷⁴

B. Reservations and Declarations before the Inter-American Court

In the Inter-American system, about half of the States' Parties have made some sort of declaration to the American Convention, whereas less than ten have made reservations to the treaty.⁷⁵ Most of the declarations are procedural; they usually restrict *ratione temporis* either for an indefinite period or only past a specific date. Conversely, reservations generally are in

⁷² Nicaragua's declaration states:

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.

Id.

⁷³ 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." Vienna Convention, *supra* note 47, art. 28. 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. Though it is beyond the scope of this paper to evaluate this scenario at this time, the Vienna Convention was incorporated into jurisdiction before the International Criminal Court. *See id.* 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).

⁷⁴ *Las Hermanas Serrano Cruz vs. El Salvador [Serrano-Cruz Sisters v. El Salvador]*, (Preliminary Objections), Inter-Am. Ct. H.R., Judgment of November 23, 2004, (ser. C) No. 118, ¶ 79 (2004).

⁷⁵ Signatures and Current Status of Ratifications, in BASIC DOCUMENTS, *supra* note 17. Here, the line between reservations and declarations is fine, if not blurry. There often is very little distinction between declarations and reservations, and in many cases, declarations arguably are 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 certainly would prove valuable.

reference to specific, substantive rights.⁷⁶ Some interpretive declarations, such as the one made by Argentina, simply proclaim the supremacy of domestic over international law,⁷⁷ but 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 jurisdiction. When the first case against the country was brought to the Court, that limitation proved central to the Court's decision.

III. LITIGATING DECLARATIONS AND RESERVATIONS: EL SALVADOR AND *LAS HERMANAS SERRANO CRUZ*

A. El Salvador's Temporal Limitation to the American Convention

El Salvador ratified the American Convention in 1978, but the protection of human rights under the system did not play an active role in the country for nearly two decades.⁷⁸ During the 1980s, a violent civil war impacted nearly every aspect of life in El Salvador. 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."⁷⁹ Estimates by the United Nations established 75,000 people dead and over a million displaced.⁸⁰

Unfortunately, it was not until January 16, 1992, when the seemingly reconciled parties signed

⁷⁶ *See id.*

⁷⁷ *See supra* note 71 (Argentina's reservation to Article 21) and accompanying text.

⁷⁸ 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. See Signatures and Current Status of Ratifications, in BASIC DOCUMENTS, *supra* note 17.

⁷⁹ 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 Report].

⁸⁰ 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).

the Peace Agreement in the Castle of Chapultepec, Mexico, and “brought back the light and the chance to re-emerge from madness to hope.”⁸¹ Up until that time, however, violence was systematic and “arbitrary arrests, murders and selective and indiscriminate disappearances of leaders became common practice.”⁸²

Negotiators in the peace process agreed to refer human rights violations committed during the war to the UN Commission for the Truth (Truth Commission).⁸³ The Truth Commission investigated some of the most visible crimes in the country, and its 1993 report specifically named individuals involved in their execution.⁸⁴ 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. The law granted “full, absolute and unconditional amnesty to all those who participated in any way in 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.”⁸⁵ Essentially, no case could be adjudicated in domestic courts if the claim was based on facts taking place between 1980 and 1991.

Like many other states in the system, El Salvador accepted the Inter-American 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:

⁸¹ Truth Commission Report, *supra* note 79, at 10.

⁸² *Id.* at 27.

⁸³ *Id.* at 11.

⁸⁴ *Id.*

⁸⁵ 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).

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 began after the declaration of 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.⁸⁶

In this document, El Salvador attempted to exclude from the Court's jurisdiction any case arising out of the -Civil war.⁸⁷ This temporal limitation proved decisive in a case brought against El Salvador by the family members of two missing girls, Ernestina and Erlinda Serrano Cruz. Ultimately, El Salvador's conditional acceptance of the Court's jurisdiction substantially impacted the Court's decision.

B. Facts of the Case

Although the facts of the *Las Hermanas Serrano Cruz* case are convoluted, the abuse of the victims is 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.⁸⁸ They were last seen

⁸⁶ *Las Hermanas Serrano Cruz vs. El Salvador* [Serrano-Cruz Sisters v. El Salvador], (Preliminary Objections), Inter-Am. Ct. H.R., Judgment of November 23, 2004, (ser. C) No. 118, ¶ 54(a) (2004). 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.

Id. Note to reader: All translations, unless otherwise noted, are by the author.

⁸⁷ 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. See *Las Hermanas Serrano Cruz* (Preliminary Objections), *supra* note 86, ¶ 56(c). 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. *Id.* The representatives alleged that the limitation to specific cases lacked the required specificity of types of cases. *Id.* They also argued that the reservation was not reciprocal. *Id.* Thus, the only somewhat valid element of El Salvador's document was the limitation with respect to time. *Id.*

⁸⁸ *Las Hermanas Serrano Cruz vs. El Salvador* [Serrano-Cruz Sisters v. El Salvador], (Merits), Judgment of March 1, 2005, Inter-Am. Ct. H.R., (ser. C) No. 120, at ¶ 48(2) (2005), available at http://www.corteidh.or.cr/seriecpdf/seriec_120_esp.pdf (last visited May 30, 2006).

almost 24 years ago, when the Armed Forces of El Salvador took them via helicopter from their town.⁸⁹ Some confusion exists as to whether the girls were delivered either to the International Committee of the Red Cross or to the Red Cross of El Salvador, but the Commission was unable to make a definitive determination to that effect.⁹⁰ What is apparent, however, is that the girls disappeared.

One of the organizations that represented the girls' family before the Inter-American system, *La Asociación Pro-Búsqueda*, received 721 requests from families similarly situated and located about one-third of those children.⁹¹ 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 United States, France, Germany and the United Kingdom."⁹² *La Asociación Pro-Búsqueda* suspected that the girls were a part of this latter group.⁹³

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.]"⁹⁴ The Commission further accused the State of limiting its investigation by acts that were merely a mechanical repetition of

⁸⁹ See *id.* ¶ 2.

⁹⁰ See *id.* ¶ 2.

⁹¹ See *id.* ¶ 48(6).

⁹² 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).

⁹³ Milton Aparicio, Remarks at *La Asociación Pro-Búsqueda* Headquarters in San Salvador, El Salvador (Jan. 6, 2005).

⁹⁴ *Las Hermanas Serrano Cruz* (Merits), *supra* note 88, ¶ 49(b). ("El Estado...ni demostró mínimamente que hubiera desarrollado una investigación con la posibilidad de determinar lo acontecido.").

steps, without a true intent to investigate, clarify the facts, and sanction those responsible.⁹⁵ According to the Commission, the State was culpable because the “fundamental elements” needed for the investigation clearly were under El Salvador’s control.”⁹⁶ Moreover, the Commission alleged that this was part of a pattern of forced disappearances during the armed conflict that the State either perpetrated or tolerated.⁹⁷

Because the girls’ location remained unknown, their family members, represented by *La Asociación Pro-Búsqueda* and the Center for Justice and International Law (CEJIL), brought the case to the Inter-American Court. Importantly, the case sought to vindicate the rights both of the Serrano Cruz sisters themselves and of their surviving family members.⁹⁸ 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).⁹⁹ As always, these were alleged in relation to article 1.1 (the obligation of the State to respect the rights recognized in the Convention).¹⁰⁰ Possible violations of the family’s rights included violations of article 5 (right to personal integrity), 8 (judicial guarantees), 17 (protection of the family), and 25 (protection judicial), also in relation to article 1.1.¹⁰¹ The initial complaint was submitted to the

⁹⁵ *Id.* ¶ 49(c) (“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.”).

⁹⁶ *Id.* ¶ 49(c) (“Todo ello a pesar de que los elementos fundamentales para la averiguación estaban plenamente bajo su control.”)

⁹⁷ *Id.* ¶ 2.

⁹⁸ 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. Rules of Procedure of the Inter-American Court of Human Rights, (2003), art. 60, *in* BASIC DOCUMENTS, *supra* note 17. However, the “victims” in this case include the girls and also their family members who had suffered due to their prolonged absence.

⁹⁹ *Las Hermanas Serrano Cruz* (Merits), *supra* note 88, ¶ 2.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

Inter-American Court on June 14, 2003.¹⁰² By November of 2004, the Court was hearing preliminary objections by the State.¹⁰³

C. Preliminary Objections: The *Las Hermanas Serrano Cruz* Court's Holding

After hearing preliminary objections in the case, the Court decided, in a vote of six to one, to uphold the objection of the lack of *ratione temporis*.¹⁰⁴ The Court found that 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*,¹⁰⁵ where it had 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.¹⁰⁶

The *Las Hermanas Serrano Cruz* Court interpreted El Salvador's limitation as an instrument that 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.¹⁰⁷

¹⁰² *Id.* ¶ 3.

¹⁰³ *Id.* ¶ 21.

¹⁰⁴ 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 Objections), Inter-Am. Ct. H.R., Judgment of November 23, 2004, (ser. C) No. 118 (2004) (Trindade, J., dissenting).

¹⁰⁵ Alfonso Martín del Campo Dodd vs. Mexico (Preliminary Objections), Judgment of Sept. 3, 2004, Series C, No. 113, ¶ 68 (2004).

¹⁰⁶ *See Las Hermanas Serrano Cruz* (Preliminary Objections), *supra* note 86, ¶ 61 (citing Alfonso Martín del Campo Dodd vs. Mexico (Preliminary Objections), Judgment of Sept. 3, 2004, Series C, No. 113, ¶ 68 (2004)). 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.

Id.

¹⁰⁷ *Las Hermanas Serrano Cruz* (Preliminary Objections), *supra* note 86, ¶ 62 (“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.”).

This distinction is critical because classifying the limitation as a reservation rather than a declaration would have contextualized the document within the guidelines of the Vienna Convention. Thus, by labeling El Salvador's limitation a "declaration," the document no longer would need to be assessed within Article 19's framework. Specifically, as a "declaration," the limitation would not need to pass the "object and purpose" test laid out in the *Genocide Convention* case and Article 19.

The Court acknowledged that in other cases it had found such limitations to be against the object and purpose of the American Convention,¹⁰⁸ but it found this temporal limitation to the Court's jurisdiction to be valid under Article 62.¹⁰⁹ Unfortunately, the Court excluded claims that involved many of the more central alleged breaches of human rights 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.¹¹⁰ This bundle of rights also encompassed the act of forced disappearance, upon which the Court expressly declined to rule.¹¹¹ However, the Court did admit the family's claims under article 8 (right to a fair trial) and article 25 (right to judicial protection).¹¹² 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 humane treatment) with respect only to the family.¹¹³ Although culpability was

¹⁰⁸ See *id.* ¶ 75; see also *Constantine v. Trinidad and Tobago*, (Preliminary Objections), Inter-Am. Ct. H.R., Judgment of September 1, 2001, (ser. C) No. 82, ¶ 79 (2001); *Hilaire v. Trinidad and Tobago*, (Preliminary Exceptions), Inter-Am. Ct. H.R., Judgment of Sept. 1, 2001, (ser. C) No. 80, ¶ 88 (2001).

¹⁰⁹ *Las Hermanas Serrano Cruz* (Preliminary Objections), *supra* note 86, ¶ 73.

¹¹⁰ *Id.* ¶ 77.

¹¹¹ *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. *Id.*

¹¹² *Id.* ¶ 80.

¹¹³ *Las Hermanas Serrano Cruz* (Merits), *supra* note 88, ¶ 218.

placed on the State, the representatives enjoyed only a pyrrhic victory because of the enormous losses suffered in the preliminary objections phase of the case.

D. *Las Hermanas Serrano Cruz*: A Critique

Though at first blush El Salvador's restriction may seem like a fairly straightforward temporal limitation, several convoluted legal considerations must be taken into account. As the representatives of the purported victims argued, El Salvador's preliminary objection should have been thrown out for three main reasons.¹¹⁴ 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 be procedurally invalid. Finally, the reservation's effects and content were against the object and purpose of the American Convention.

1. Improper Classification as a Declaration

One of the most crucial decisions the Inter-American Court made in the *Las Hermanas Serrano Cruz* case was to classify El Salvador's limitation to *ratione temporis* as a declaration rather than a reservation. This distinction impacted the case enormously and undoubtedly will 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 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.¹¹⁵ It then later referred to the instrument as "this

¹¹⁴ *Las Hermanas Serrano Cruz* (Preliminary Objections), *supra* note 86, ¶ 56.

¹¹⁵ *Id.* ¶ 54(a).

reservation.”¹¹⁶ Moreover, the State again referred to the instrument as a reservation in its arguments before the Court.¹¹⁷ 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. As previously discussed, an analysis of the effect of such restrictions is required to determine whether the restriction is effectively a declaration or a reservation. A limitation that effectively 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. The limitation had the effect of removing all of the Convention’s substantive protections for facts arising before 1995.¹¹⁸

Specifically, the Court had no jurisdiction over violations of rights that are 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 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).¹¹⁹ Though some rights otherwise protected under the Convention may be derogable in times of war, these particular rights are not severable at any time.¹²⁰ Therefore, El Salvador sidestepped this problem by exempting such violations from the Court’s jurisdiction entirely.

¹¹⁶ *Id.*

¹¹⁷ *Id.* ¶ 54(g), 54(h).

¹¹⁸ Although 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.

¹¹⁹ American Convention, *supra* note 3, art. 27(2).

¹²⁰ American Convention, *supra* note 3, art. 27.

2. Improper Procedure

As a separate issue, the retroactive application of a reservation automatically would make the limitation invalid. If, in fact, El Salvador's limitation had been found to be a reservation and not a declaration, the limitation automatically would fail both under the Vienna Convention and under the American Convention. A reservation only may 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.¹²¹ Therefore, the temporal limitation should have been considered invalid based upon procedure alone. Thus the Court's inquiry could have ended very early in the preliminary objection phase.

Reservations must be made at the time a country consents to be bound by the treaty, so El Salvador only could have validly reserved the scope of the Court's competence when it ratified the American Convention in 1978. If the Court had followed this logic, however, both the *Las Hermanas Serrano Cruz* case and other cases involving reservations decided by the Court would be called into question. On the other hand, the Court's interpretation renders the American Convention procedurally contradictory to the Vienna Convention, which does not allow reservations to be made at any conceivable time. Although the American Convention's Article 75 procedure on reservations expressly announces that it will follow the Vienna Convention, the American Convention allows for limitations to the competence of the Court to be filed "at any subsequent time."¹²² If El Salvador's limitation was improperly classified as a declaration and truly was a reservation, it would be procedurally impossible to adhere to both Article 62 and Article 75 of the American Convention.

¹²¹ *Las Hermanas Serrano Cruz* (Preliminary Objections), *supra* note 86, ¶ 56(c)(i) ("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 46, art. 19. American Convention, *supra* note 3, art. 75.

¹²² American Convention, *supra* note 3, art. 62(1).

3. Object and Purpose Principles

Finally, the reservation upheld in this case most likely is against the object and purpose of the American Convention. By invalidating reservations that are against the object and purpose of the Convention, the Court has worked to safeguard the norms established within the treaty.¹²³ Specifically, in its Advisory Opinion on reservations, the Court emphasized that states should uphold the purpose of human rights treaties 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 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.¹²⁴

Human rights instruments deal with the protection of personal liberties, and these treaties should be considered in that light while interpreted and restricted. Although treaty law generally is careful to balance the interests involved, human rights treaties fall into a special category of instrument because 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 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 that 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

¹²³ *Id.* art. 1(1).

¹²⁴ 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).

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 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.¹²⁵

A “particularly troublesome” reservation is one that “seeks to subordinate a human rights treaty to domestic law of the reserving state.”¹²⁶ In effect, this is what El Salvador was doing—though not expressly—in its temporal limitation to the Court. El Salvador already had granted blanket amnesty to those responsible for grave human rights abuses during the civil war. Allowing for an exception to the American Convention removes one of the only other legal avenues available to victims of human rights abuses, arguably encouraging states to abuse the rights enumerated therein. Indeed, this avenue of redress exists precisely to respond where domestic remedies either are *de jure* or are *de facto* foreclosed. Removing the Court as a forum for victims is inconsistent with both the substantive and procedural goals of the American Convention.

More importantly, the Inter-American Court agrees that reservations acting against the object and purpose of the American Convention are impermissible. 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

¹²⁵ 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).

¹²⁶ ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE*, at 121 (2000).

and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein.”¹²⁷ “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.¹²⁸

The *Las Hermanas Serrano Cruz* Court declined to acknowledge El Salvador’s intention to provide those who committed atrocities during the war, and who are still in the government and the public eye, with greater protection than that which otherwise would be allowed under the American Convention. Between the amnesty law and the restriction to *ratione temporis*, nearly all criminals guilty of human rights abuses during the civil war were not subject to liability either in domestic or in 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 the temporal limitation, the Court excluded innumerable claims of human rights victims and acted against the object and purpose of the rights enumerated in the very treaty it is designed to enforce. 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.”¹²⁹

Intriguingly, the Inter-American Court recognized that this was a relevant issue in the *Las Hermanas Serrano Cruz* case. In fact, the Court drew a critical distinction between the *Las Hermanas Serrano Cruz* case and the Court’s previous holdings finding limitations on *ratione*

¹²⁷ American Convention, *supra* note 3, art 29(a).

¹²⁸ *Hilaire v. Trinidad and Tobago*, (Preliminary Objections), *supra* note 108, ¶ 90.

¹²⁹ *Las Hermanas Serrano Cruz* (Preliminary Objections), *supra* note 86, ¶ 56(b)(i) (“Asimismo, no es válida una reserva que permita que un Estado continúe violando los derechos humanos ‘sin ningún tipo de supervisión o condena.’”).

temporis by classifying similar temporal limitations as too “generalized” and with the specific goal of “subordinating the application of the Convention.”¹³⁰ Specifically, the Court previously had found other limitations to be inappropriate based on vague language that evidenced a state’s desire to exclude itself from provisions of the American Convention. However, these previous cases included facts that demonstrated clear and express subordination of the American Convention. Three cases evaluated Trinidad’s substantive restrictions to the Convention in favor of domestic courts.¹³¹ Trinidad made its reservation to the American Convention at the time of its adherence to the treaty¹³² but later filed a conditional interpretive declaration, which stated:

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.¹³³

In all three cases against Trinidad and Tobago, the Inter-American Court invalidated the country’s interpretive declaration, not the reservation. 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. Instead, the Court

¹³⁰ *Id.* ¶ 75 (“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.’”).

¹³¹ *Constantine v. Trinidad and Tobago (Preliminary Objections)*, *supra* note 108, ¶ 79; *Benjamin v. Trinidad and Tobago (Preliminary Objections)*, Inter-Am. Ct. H.R., Judgment of Sept. 1, 2001, (ser. C) No. 81, ¶ 79 (2001); *Hilaire v. Trinidad and Tobago (Preliminary Exceptions)*, *supra* note 108, ¶ 88.

¹³² 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.” Signatures and Current Status of Ratifications, *in* BASIC DOCUMENTS, *supra* note 17.

¹³³ *Id.*

classified the declaration as too general and held it to be made in bad faith.¹³⁴ Conversely, the Court in *Las Hermanas Serrano Cruz* decided that the limitation did not subordinate the Court's capacity to decide certain claims to an extent that it would diminish the power of the Convention and the Court.¹³⁵

IV. CLOSING THE *LAS HERMANAS SERRANO CRUZ* LOOPHOLE

Two main critiques of the *Las Hermanas Serrano Cruz* decision should serve as guideposts for the future. First, the interpretation of reservations and declarations must include adequate consideration of the effects of such limitations. Second, the procedural mechanisms allowed for both processes seem, 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 the State was not merely granting amnesty to its guilty for the sake of political motivations and doing so in contravention of the American Convention. Although the Inter-American Court previously ruled on the problem of amnesty in *Barrios Altos vs. Perú*,¹³⁶ the Court sidestepped amnesty altogether in this case, in the name of allowing more parties to submit to the Court's jurisdiction. Although allowing greater flexibility will encourage states to submit to the Court's jurisdiction because the states may control the subject matter heard at the court, it is also necessary to safeguard non-derogable rights of those within the Inter-American system's jurisdiction. The *Barrios Altos* decision held the amnesty law

¹³⁴ *Constantine v. Trinidad and Tobago (Preliminary Objections)*, *supra* note 108, ¶¶ 80-82; *Benjamin v. Trinidad and Tobago (Preliminary Objections)*, *supra* note 131, ¶¶ 80-82; *Hilaire v. Trinidad and Tobago (Preliminary Objections)*, *supra* note 108, ¶¶ 89-91.

¹³⁵ *Las Hermanas Serrano Cruz (Preliminary Objections)*, *supra* note 86, ¶ 75 ("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.").

¹³⁶ *Barrios Altos (Chumbipuma Aguirre y otros vs. Perú)*, Inter-Am. Ct. H.R., Judgment of March 14, 2001, (ser. C) No. 75 (2001)

of Perú to be in direct violation of Articles 8 and 25 of the American Convention, establishing such laws as contradictory to the treaty.¹³⁷ In Judge Sergio García's concurring opinion in *Barrios Altos*, he stated:

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.¹³⁸

However, in the *Las Hermanas Serrano Cruz* decision, Judge García was silent on the amnesty law and the enhanced effect of the Court's decision.¹³⁹

Understandably, the Court likely is concerned with the possibility of states denouncing the American Convention. With Trinidad's recent denunciation of the Convention, additional denunciations from other states arguably are 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 international treaty participation, but excessive limitations to the Court's jurisdiction will 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 rights of those individuals within its territory. It is imperative that the Court take a firm stand and demonstrate to State Parties that acceptance of the Court's competence may not be limited to any imaginable scenario. Strict guidelines must be imposed to protect human rights both substantively and procedurally.

¹³⁷ *Id.* ¶ 39.

¹³⁸ *Id.* ¶ 15.

¹³⁹ 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 may make reservations after they have ratified the American Convention by labeling the limitations as "declarations." This circumvention is against principles of international law as codified in Article 19 of the Vienna Convention. Logically, the Vienna Convention's procedure was drafted to 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 wherever non-derogable rights are at issue.

CONCLUSION

The *Las Hermanas Serrano Cruz* case has had a detrimental effect on the future of human rights adjudication in El Salvador and throughout the Americas. Although *La Asociación Pro-Búsqueda* intends to bring more cases to the Inter-American Commission,¹⁴⁰ the *Las Hermanas Serrano Cruz* decision does not allow victims to receive full, meaningful access to justice or redress through the Commission and the Inter-American Court.

The American Convention was entered into force in 1978, yet 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.

¹⁴⁰ One of these includes claims brought by victims of the *El Mozote* massacre. Milton Aparicio, *supra* note 93.

Many of these advances are directly attributable to the evolution of the practice and procedures of the Court and the Commission.”¹⁴¹ However, the protection is not yet perfect. As international law transforms and grows, procedural and substantive regulations must be adapted to fit current practices. Although the doctrine of reservations once was appropriate before international tribunals, the evolution of human rights law and jurisprudence sets out a trend to the contrary. The prohibition of reservations in the International Criminal Court’s recently ratified and drafted Rome Statute¹⁴² is instructive. A contemporary reevaluation of the procedures that are playing out in human rights tribunals worldwide likely is necessary.

In the context of human rights law especially, states need clarification so that they may adopt their policies accordingly. Likewise, the interests of human rights victims must be balanced against the rights of states. States’ consent-based, contractual duties 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.

¹⁴¹ PASQUALUCCI, *supra* note 31, at 349.

¹⁴² 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).