International Protection of Religion Freedom: National Implementation

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

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The intervention of Inter-American organs protecting human rights, namely, the Inter-American Commission on Human Rights (IACHR) and the American Convention on Human Rights or the "Court of San José," has guaranteed the right to exercise religious freedom in the American hemisphere, vigorously promoting the defense of human rights. On various occasions, the internal legislation of member States of the OAS has been revised at the national level to guarantee religious freedom as a result of the efficient intervention of the "Court of San José" and the Inter-American Commission. A significant element relating to the member States and the OAS are the legal instruments of the Inter-American System that determine the normative prevalence of inter-American regional norms with respect to national legal ordinances. In the same way, practical examples of both the regional organs protecting human rights and the pronouncements of the General Assembly of the OAS corroborate the efficacy of the system regarding the protection of religious freedom for each individual.

Effectuation of rights protected by the IACHR

In the first article of its charter, the IACHR asserts that member States are obliged to respect, guarantee, and permit the exercise of the rights and freedoms recognized in the organization's charter. Among those specified in the Court of San

José are the rights guaranteed to each individual who is subject (article 1.2) to the jurisprudence of a member State without suffering any discrimination of a religious nature. The IACHR incorporates into its first article the principle of non-discrimination. Article 1.2 clarifies that the concept of the individual is defined as every human being.

According to the norms of article 2, the member States of the IACHR have the duty to guarantee, by all possible means, the right to exercise freedoms protected by the IACHR. To accomplish this, they must turn to legislative measures and any other means necessary to implement these rights and freedoms. Such measures, however, should be adopted, whether in harmony with the respective constitutional norms of the member State, or by respecting the charter and articles of the IACHR. The norms of the IACHR should be effected by the member State by including these norms into its legal code, whether by national legislation, which may not contradict regional norms, or by measures of "another nature." The intent of article 2 is thus to guarantee the efficacy of the norms of the IACHR, for otherwise, the IACHR would run the risk of becoming a "dead letter," having no application in the lives of the individuals within the jurisdiction of its member States.

A concrete example of a decision resulting from the influence of an Inter-American organ on an OAS member State is Columbian law No. 288/96, dated 5 July 1996. This law regulates the procedure to comply with the decisions of international organs to protect human rights, like the Inter-American Commission, which condemned Columbia for violating human rights (article 01). The Columbian law created a competent Committee of Ministers to consider the decisions of the international organization and control the payment of possible indemnities. The adoption of law No. 288 by Columbia was subsequently held up by the Inter-American Commission as a "very important measure taken to protect human rights in Columbia."[1]

[1] §10, Chapter V, ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, 1996 (OEA/Ser.L/V/II.95, Doc. 7 rev.). Approved by the Commission in its 95th Ordinary Period of Sessions, held between 24 February and 14 March 1997.

Meaning and Reach of IACHR Recommendations, according to the interpretation of the Inter-American Court

It is important to underscore the meaning of the term "recommendations," used by the IACHR. According to the judgment of the Inter-American Court in the case of *Caballero Delgado and Santana v. Columbia*,[2] the term should be interpreted according to the regulations of article 31.1 of the Vienna Convention on the Law of Treaties.[3] In the understanding of the Court, this means that its judgments "do not have the character of an obligatory judicial decision for which the failure to comply would generate State responsibility." For this reason, the State cannot be held responsible for not following a recommendation that is not obligatory. As a decision without legal force, its unfulfillment generates no responsibility for the State in question.

Nearly two years later, in a sentence dated 17 September 1997, *Case of Loayza Tamayo vs. Peru* (series C, no. 33), the Inter-American Court reaffirmed this same understanding but in a mitigated way. From a wider perspective, the Court judged that the member State participating in a treaty on human rights "has the obligation to make every effort to apply the recommendations of a protection organ such as the Inter-American Commission" (§80). Specifically regarding the State's responsibility to comply or not with the Recommendations within the Inter-American System, the Court asserted that the member States of the IACHR "undertake to heed the recommendations approved by the Commission in its reports" (§81). The San José Court does not use the term obligation, but it affirms the duty of the States to follow the recommendations of the Inter-American Commission, as part of the commitment assumed as members of the Inter-American System and as part of its adherence to the Commission's legal instruments.

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[2] CASE OF CABALLERO DELGADO AND SANTANA VS. COLOMBIA, sentence dated 8 December 1995, series C, no. 22

[3] Article 31.1 — "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." (*Vienna Convention on the Law of Treaties*)

Implementing the Inter-American Norms Protecting Religious Freedom in Member States of the Organization of American States

When shown that a right protected by the inter-American legal instruments has been violated, the inter-American organs that protect human rights seek to guarantee the rights and freedoms violated by recourse to the Inter-American Court and, when considered necessary, to impose upon the State (or the States) responsible for the violation the obligation to make reparations for the harm caused and to pay an adequate indemnity. Because the decisions of the Court have a definitive character and may not be appealed, the condemned State must respect them and comply with them. In cases of extreme gravity and demonstrated need, in order to avoid irreparable harm, according to article 25 of its charter, the Court *ex-officio*, or at the request of the parties, can judge that a member State adopt provisional measures.

The regional inter-American norms protecting religious freedom and its relation with the internal rights of member States of the American Convention on Human Rights

On several occasions, the Court and the Inter-American Commission have made pronouncements stipulating that member States of the Inter-American Commission on Human Rights (IACHR) cannot invoke internal rights in order to exempt themselves from complying with the norms of the Inter-American System. A classic example of this behavior were the decisions relating to the amnesty laws passed in countries like Peru, Chile, Suriname, and El Salvador (*Case Monseñor Oscar Arnulfo Romero and Galdámaz v. El Salvador*), which were considered incompatible with the content and spirit of the IACHR.

In the case of *Almonacid Arellano and others v. Chile*, judgment 26 September 2006, the San José Court judged that the Chilean amnesty law, Decree No. 2.191,[4] was incompatible with the content and spirit of the IACHR.[5] In the case of *Barrios Altos v. Peru*, regarding Peru's amnesty laws, "the Court considers that ... amnesty laws Nº 26479 and Nº 26492[6] are incompatible with the American Convention on Human Rights, and, accordingly, lack legal effect."[7] The same posture was adopted by the Commission and later confirmed by the Court in relation to the 1989 amnesty law of Suriname, formerly Dutch Guiana, in the *Case of the Moiwana Community v. Suriname*.[8]

Considering the Case of *Monseñor Oscar Arnulfo Romero and Galdámez v. El Salvador*[9] to be one of great political, social, and religious significance on an international level, the Inter-American Commission determined that the approval by the Republic of El Salvador of the "General Amnesty Law for the Consolidation of Peace" (Decree No. 486 of 1993), was a violation of the IACHR. More explicitly, the Commission declared that the State in question had:

> "violated Article 2 of the American Convention. In addition, by applying it to this case, the State has violated the right to justice and its duty to investigate, try, and make reparations, established in Articles 1(1), 8(1), and 25 of the American Convention, to the detriment of Monsignor Romero's next-of-kin, the members of the religious community to which he belonged and Salvadoran society as a whole. (§158)

[4] Approved by the Military Junta governing Chile on 18 April 1978.
[5] Mr. Almonacid Arellano and other petitioners were victims of State agents during the period that followed the military coup of 1973.
[6] Law 26479, 15 June 1995, "grants a general amnesty to all those members of the security forces and civilians who were the subject of a complaint, investigation, indictment, trial or conviction, or who were serving prison sentences, for human rights violations committed between May 1980 and 15 June 1995." According to the Inter-American Court, a few days after the Peruvian Congress approved a second amnesty law, Law No. 26492, which, *inter alia*, prevented judgments from being pronounced regarding the legality or applicability of the first amnesty law. (§54.7, Caso *Santiago Gómez Palomino v. Peru,* sentence 22 November 2005).
[7] *Case Barrios Altos v. Peru* (Chumbipuma Aguirre and others against Peru), sentence 14 March 2001, series C, No. 73, par. 44.
[8] *Case of the Moiwana Community v. Suriname.* CIDH. Sentence 15 June 2005. Series C, No. 124.
[9] *Report* No. 37/00, Case 11,481, Monseñor Oscar Arnulfo Romero and Galdámez v. El Salvador, 13 April 2000.

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

Thus, a characteristic of the Inter-American System is the prevalence of conventional regional norms above the norms of internal rights that offend protected human rights or that restrict the right to justice and the legal procedures necessary to achieve and exercise that justice. In the Inter-American System, the regional inter-American norm that protects human rights prevails over the internal norms that violate or impede the enjoyment of one or more of the protected rights.

Protecting the Right to Conscientious Objection and Religious Freedom through an "amicable solution"—the Case of Alfredo Díaz Bustos v. Bolivia[10]

Alfredo Díaz Bustos, a Jehovah's Witness supported by the City Defender of the Republic of Bolivia, sought assistance from the Inter-American Commission, claiming that the Bolivian State had violated the following rights protected by the IACHR: the obligation to respect rights (art. 1), the duty to adopt internal provisions (art. 2), the freedom of conscience and of religion (art. 12), the freedom of thought and of expression (art. 13), political rights (art. 23), equality before the law (art. 24), judicial protection (art. 25). The Commission declared the case admissible.

Mr. Bustos considered himself to have been discriminated against for being a member of the Congregation of Jehovah's Witnesses, seeing that under Bolivian Law it was possible for Catholics to be exempted from military service but not for those of other faiths and religious confessions. For this reason, Mr. Bustos accused Bolivia of not recognizing his right to conscientious objection to obligatory military service.

The case *Alfredo Díaz Bustos v. Bolivia* is a good example of the application of the norms of Article 48.1.f of the IACHR, according to which the Commission must place itself at the disposition of the parties after receiving a petition in order to reach an amicable solution to the conflict founded upon the rights protected by the IACHR. On 4 July 2005, the

[10] Report No. 52/04, Petition 14/04, Admissibility, Alfredo Díaz Bustos v. Bolivia, 13 October 2004; and Report No. 97/05, Petition 14/04, Amicable Solution, Alfredo Díaz Bustos v. Bolivia, 27 October 2005.

State of Bolivia and Mr. Alfredo Díaz Bustos celebrated a transnational accord. In it, Bolivia committed to provide freely to the petitioner the "Libreta Militar de redención" [Release from Military Service], guaranteeing that in a case of armed conflict he would not be assigned to the battlefront. For his part, Mr. Díaz Bustos agreed to comply with his anticipated legal military commitment and to apply to the Court if terms of art. 48 of the IACHR were resolved.

An aspect of great relevance in this case was its influence in modifying the application of internal norms of the member State of the Inter-American System. As part of the agreement between parties, the State of Bolivia committed to alter its military legislation in order to incorporate the right to conscientious objection to military service.

Implementing Inter-American Norms and the Case of "The Last Temptation of Christ" (Olmedo Bustos and others vs. Chile)[11]

The case *"The Last Temptation of Christ" v. Chile* is perhaps the most renowned and contentious case relating to the right to freedom of religion in all of the Inter-American System of Human Rights' Protection.[12] The case was brought by the Commission to the Court in January 1999, applying for a decision regarding the violation of articles 13 (freedom of thought and expression) and 12 (freedom of religion) of the IACHR. Juan Pablo Olmedo Bustos, Ciro Colombara López, Claudio Márquez Vidal, Alex Muñoz Wilson, Matías Insunza Tagle and Hernán Aguirre Fuentes, Chilean citizens, accused the Chilean government of violating these rights in virtue of the "judicial censor imposed on the cinematographic exhibition of the film *The Last Temptation of Christ*, confirmed by the Most Excellent Supreme Court of Chile […] on 17 June 1997."[13]

The censorship imposed by the Chilean Supreme Court originates from a judicial appeal brought by Sergio García Valdés, Vicente Torres Irarrázabal, Francisco Javier

[11] Case "The Last Temptation of Christ" (Olmedo Bustos and Others) v. Chile, sentence 5 February 2001, series C, No. 73.

[12] One example is the article of the Italian legal scholar Benedetto Conforti about the international protection of religious freedom in which the only case cited from the Inter-American System is precisely the case of *"The Last Temptation of Christ" v. Chile*. Conforti, Benedetto., "La tutela internazionale della libertà religiosa", in *Rivista Internazionale dei Diritti dell'Uomo*, XV. 2 (2002), Vita e Pensiero, p. 269-283.

[13] §2. Case "The Last Temptation of Christ" (Olmedo Bustos e outros) v. Chile. sentence 5 February 2001. Series C, No. 73.

Donoso Barriga, Matías Pérez Cruz, Jorge Reyes Zapata, Cristian Heerwagen Guzmán and Joel González Castillo, in the name of Jesus Cristo, from the Catholic Church and themselves on 20 January 1997, before the Chilean Justice, requesting the prohibition of the film, *The Last Temptation of Christ*, by Martin Scorsese, base don a book with the same title by Nikos Kazantzakis. The Santiago Court of Appeals accepted the request and its sentence was confirmed by the Chilean Supreme Court. According to the Chilean Supreme Court, the defamed and dishonored presentation of the figure of Jesus Christ offended all those who, as was the case of the petitioners, founded their faith in Him.

Legal Channels to the Inter-American Commission on Human Rights

The Inter-American Commission on Human Rights resolved in its 100th period of Sessions to approve Report No. 69/98, in which it concluded that:

1. the prohibition to exhibit the film "The Last Temptation of Christ" by the Chilean Justice was incompatible with norms of the IACHR;
2. the Chilean State had violated the rights protected by articles 12 and 13 of the Inter-American Commission on Human Rights;
3. by upholding this censorship, the Chilean state had not complied with its commitment made in article 2 of the IACHR, which establishes the adoption of internal regulations that provide for the enjoyment of rights protected by the IACHR;
4. and finally, the Commission recognized the efforts of the Chilean democratic government to effectuate the right to freedom of expression.

For these reasons, the IACHR recommended that the Chilean government suspend the censorship against the exhibition of the film *The Last Temptation of Christ* and that internal legislation guarantee the ability to enjoy the rights and freedoms protected by the IACHR. These recommendations were not accepted by the Chilean government

and the case was then directed to the Inter-American Court on Human Rights, soliciting that Chile be ordered to:

1. "To authorize the normal cinematographic exhibition and publicity of the film "The Last Temptation of Christ."
2. To adapt its constitutional and legal norms to the standards of freedom of expression embodied in the American Convention, [in order] to eliminate prior censorship of cinematographic productions and their publicity.
3. To ensure that, in the exercise of their different powers, public bodies [,] their authorities and officials [effectively] exercise the rights and freedoms of expression, conscience and religion recognized in the American Convention and [...] abstain from imposing prior censorship on cinematographic productions.
4. To make reparations to the victims in this case for the damage suffered.
5. To pay the costs and reimburse the expenses incurred by the victims when litigating this case in both [the] domestic sphere and before the Commission and the Court, as well as reasonable fees for their representatives."

Decision of the Inter-American Court on Human Rights

The case was resolved with a unanimous decision of merit and reparations by the Court on 5 February 2001, which verified the existence of a violation by Chile of the right to freedom of expression and thought protected by article 13 of the IACHR, but the Court declares that there was no violation of the right to freedom of religion protected under article 12 of the IACHR. For the State of Chile, the consequences included modifying the internal legal censorship that films were previously[14] subject to in Chilean territory, and the payment of monetary reparations to the victims. As Conforti affirms, the decision of the Inter-American Court was influenced by the posture adopted with respect to religious freedom in the European System.[15] In its

[14] The laws in effect in Chile were established by constitutional law and by Decree No. 679 in 1974.

[15] "La Corte interamericana ha adottato l'approccio della Commissione europea, ritenendo che proprio l'interdizione totale, e non limitata ai soli adulti, della proiezione della pellicola, abbia violato la libertà di espressione." cfr. CONFORTI, Benedetto., "La tutela internazionale della libertà religiosa", in *Rivista Internazionale dei Diritti dell'Uomo*…p. 283.

Resolution dated 28 November 2003, the IACHR declared that the Chilean State had fully complied with the Court's declaration.[16]

In a particular way, the content of paragraph 79 of this ruling deserves attention. In the understanding of the Inter-American Court on Human Rights, the right to freedom of conscience and religion is one of the pillars of democratic society and "in its religious dimension, it constitutes a far-reaching element in the protection of the convictions of those who profess a religion and in their way of life."[17] After analyzing the probable violation of the right to religions freedom, the Court decided that in the Case *Olmedo Bustos et al v. Chile*, there was no violation of religious freedom in accordance with the norms of art. 12 of the IACHR. The Court concluded affirming that the censorship of the film *The Last Temptation of Christ* by the Chilean government did not violate article 12 of the IACHR, seeing that in the religious nature of the case, no one was denied the right to preserve, change, profess, or express his or her religion or beliefs.

In his "Separate Opinion," which accompanies the judgment, Judge Roux Rengifo interprets the protection of religious freedom specifically in terms of the absence of coercion in religious matters. He affirms that the State has the duty to guarantee the freedom to change religion or beliefs, a process he describes as "prolonged and complex, including vacillations, quibbling, and searching," necessitating that "whoever engages in this process can do so in an atmosphere of complete freedom and, in particular, that no one be restricted, without infringing on their rights, from gathering all of the experiential, emotional, conceptual, and informative elements considered necessary to decide to either change or retain one's faith."

He concludes by saying that "if the State fall short by either action or omission in these duties it violates the right to freedom of religion and conscience."

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[16] Case "The Last Temptation of Christ" (Olmedo Bustos and others) v. Chile / Compliance with judgment (Resolution 28 November 2003).

[17] Case "The Last Temptation of Christ" (Olmedo Bustos and others) v. Chile. Judgment dated 5 February 2001, series C, no. 73, § 79.

On one hand the judgment recognizes that the State can limit the exercise of free religious expression when there is a conflict with other rights or such expression constitutes a threat to society or political stability. On the other hand, however, the Court concludes that in the terms of the IACHR, the State cannot prohibit the exercise of religious freedom when it is not deemed to incite violence. The Inter-American Commission interprets the freedom of expression as one of the foundational principles of democratic society, considering it an abuse the censorship of ideas and opinions, even if they are unpopular.[18] Thus according to the understanding of the Inter-American Court, the right to freedom of expression in a religious sense is valid not only for the diffusion of ideas that are favorably received but also for those that shock, unsettle, or offend the State or a fraction of the population.[19]

[18] §79 — Report No. 69/98, Case 11.803, IACHR.
[19] §81 and 83 — Report No. 69/98, Case 11.803, IACHR.