IMPLEMENTATION OF THE JUDGMENTS OF THE COURT

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Summary: I. Introduction. II. The Parties to the Dispute. III. Judgments as Precedents. IV. Advisory Opinions.

I. INTRODUCTION

The topic assigned to me is the "Implementation of the Judgments of the Court." As I understand it, I am to address the question of the obligations the American Convention on Human Rights imposes on the States Parties to comply with the judgments of the Inter-American Court of Human Rights and the legal or normative effect of such judgments.

This complex of issues has not been dealt with extensively in the literature,[1] nor has the Court itself had much occasion to address it. The Convention too has little to say on the subject. At the same time, it is clear that this subject will gain increasing attention as the volume of the Court's jurisprudence increases and national courts are called upon to give effect to these decisions.

I propose to address the topic assigned to me from a number of perspectives. I will deal first with the effect of a judgment of the Court on the parties to the case and the consequences that follow therefrom as far as compliance is concerned. Next, I will address the precedential effect of the Court's judgment on the States Parties to the Convention in general. Both of these issues will be considered from the point of view of international and national law. I will conclude a discussion of the normative effect of advisory opinions.

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1 See generally V. M. Rodríguez Rescia, "La ejecución de sentencias de la Corte," en J. Méndez y F. Cox (eds), El Futuro del Sistema Interamericano de Protección de los Derechos Humanos 448 (San José, 1998); L.I. Sánchez Rodríguez, "Los sistemas de protección americano y europeo de los derechos humanos: el problema de la ejecución interna de las sentencias de las respectivas Cortes de Justicia," en R. Nieto Navia (ed), La Corte y el Sistema Interamericano de Derechos Humanos 501 (San José, 1994).

II. THE PARTIES TO THE DISPUTE

Any discussion of the effect of a judgment of the Court on the parties to the case must begin with the language of Articles 67 and 68 of the Convention. The here relevant provision of Article 67 stipulates: " the judgment of the Court shall be final and not subject to appeal." Paragraph 1 of Article 68 provides that "the States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties." The second paragraph of Article 68 reads as follows: "That part of a judgment that stipulates compensatory damages may be executed in the country concerned in accordance with domestic procedure governing the execution of judgments against the state." Finally, it is also relevant to note that Article 65 of the Convention, after requiring the Court to provide the General Assembly of the Organization of American States with an annual report of its work, declares that the Court "shall specify, in particular, the cases in which a state has not complied with its judgments, making any pertinent recommendations."

It is thus clear that the States Parties to the Convention have an obligation under international law to comply with a final judgment of the Court in a case to which they are parties. This conclusion immediately suggests the question as to the beneficiaries of this obligation, that is, who has the right or the standing to seek to enforce this obligation on the international plane. Here one would have to distinguish between enforcement efforts within the framework of the Organization of American States and enforcement efforts outside that institutional framework. Within the OAS system, the Commission certainly has that right by virtue of the functions it performs under Article 41 of the Convention and Articles 18 and 19 of its Statute. It is clear also that the OAS General Assembly and the Permanent Council have the right to seek compliance by a State Party with a decision of the Court in a case to which such State was a party. As far as the role of the Assembly is concerned, the right to seek compliance flows in part from the obligation the Court has under Article 65 of the Convention to inform the Assembly of the failure of States to comply with the Court's judgments. It is also based on the general powers the Assembly, and through it the Permanent Council, have under the OAS Charter. The problem these institutions face in seeking to obtain compliance with the Court's judgments is that they have the power only to adopt recommendations and lack the power to impose sanctions, which is not to say that the political effect of an Assembly finding that a State is in default of its obligations under the Convention is insignificant. The mere threat of such a finding may under certain circumstances bring about compliance. In this regard, of course, much depends upon the political will of the Member States of the OAS. They have in the past shown little eagerness to support efforts by the Commission or Court to prod delinquent States to comply with their human rights obligations.

Before leaving this subject, it is important to clarify one point regarding the scope of Article 65. The mere fact that this provision requires the Court to present an annual report of its activities, does not mean, as some have suggested in the literature, that the Court's obligation to specify "the cases in which a state has not complied with its judgment," is limited to cases that have arisen during the reporting year. It seems to me that the language and obvious purpose of

Article 65 permit the Court to call the Assembly's attention to the delinquent State's non-compliance and to make appropriate recommendations for as many years as the non-compliance continues. This is so because as long as the non-compliance continues, it must be deemed to affect the work of the Court during the relevant reporting year.

It must be asked next whether States Parties to the Convention have standing to institute proceedings in the Inter-American Court of Human Rights against another State to demand compliance with a judgment of the Court in a case in which they were not parties. I believe the answer is yes, if the judgment rendered was in favor of a national of the plaintiff State. The Court's jurisdiction hear such an inter-State case would be based on Article 61(1) of the Convention, which provides that "only States Parties and the Commission have the right to submit a case to the Court read together with Article 62(3). That provision declares that "the jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of the Convention that are submitted to it...." The clauses to be applied and interpreted would be Articles 67 and 68, which deal with the effect of the Court's judgments. I don't believe that Article 61(2) of the Convention, which provides that "in order for the Court to hear a case, it is necessary that the procedures set forth in Articles 48 to 50 shall be completed," prevents the institution of this inter-State action. In reaching this conclusion, which is not without doubt, I would argue that the case giving rise to the controversy was submitted to the procedures provided for under Articles 48 to 50. It could also be argued, probably more convincingly that Article 61(2) is not applicable to inter-State disputes relating to the obligations assumed by the States Parties under Articles 67 and 68, and that it applies only to claims relating to violations of the human rights guaranteed in the Convention.

In view of the fact that nationality is not a basis for the protective system established by the Convention,[2] it could also be argued that the above inter-State proceeding can be instituted by any State Party to the Convention, which has accepted the Court's jurisdiction. Even if one were to grant that standing here is more doubtful, it is clear that any OAS Member State would have the right under Article 64 of the Convention to seek an advisory opinion of the Court concerning the obligations under the Convention and, hence, under international law, of the State that has failed to comply with the Court's judgment.

Of course, you might ask why institute any of these actions against a State that continues to fail to comply with the original judgment. The simple answer is that these subsequent proceedings keep the delinquency in the public view and thus serve as a legitimate basis for putting more political pressure on the delinquent State to comply with its obligations. That, after all, is what this game is all about.

Let me now turn to a more difficult problem: the domestic legal effect of the Court's judgment in the State party to the case before the Court. In dealing with this issue, we start with

2 On this subject, see generally I-Am Court HR, Advisory Opinion OC-2/82, para 29 (1982).

Article 68(2) of the Convention, which reads as follows: "That part of a judgment that stipulates compensatory damages may be executed in the country concerned in accordance with domestic procedure governing the execution of judgments against the state." A reading of this provision yields two conclusions. The first is that the Article does not require the beneficiary of the judgment, that is, the private party who was awarded compensatory damages, to seek execution through domestic courts. It would, of course, permit that party to seek such execution if the State Party refused to pay, but it does not make it a condition precedent of such payment. Moreover, it would be a mistake to assume that the use of the permissive "may" in Article 68(2) compels the conclusion that the private party does not have a right to this remedy and that, as a result, the State was free to grant it or not. I would submit instead that the proper reading of this language is that, if the State provides a remedy for the execution of judgments against the State, the private party beneficiary of the Court's judgment has a right to resort to this remedy.

Let me explain and amplify the foregoing conclusion. When interpreting Article 68(2), one has to distinguish between its international and domestic applicability. As a matter of international law, the provision grants the private party a right to seek execution of the Court's judgment through the domestic courts, provided only that the domestic legal system has a procedure in place for the execution of money judgments against the State. But if no such domestic procedure exists, the State is not obliged under Article 68(2) to establish it.

The domestic application of Article 68(2) depends on the legal system within which its application is sought. In a country where the provisions of a treaty become domestic law upon the State's ratification of the treaty, the national judge would be free to give effect to the right Article 68(2) confers on the private party and permit the execution of the judgment, provided that the existing national legislation establishes general procedures for the executions of judgments against the state. It must be recognized, however, the relevant national legislation may be so narrowly drawn that it might prevent extending it to the judgments of the Court.

In States where treaties do not enjoy the status of domestic law upon their ratification, Article 68(2) would most likely not be given effect. Here it should be noted, however, that if the national law of such a State does provide a procedure for the execution of judgments against the State, it would be a breach of the Convention for such a State not to extend those procedures to the beneficiaries of the Court's judgment. This conclusion follows from the fact that Article 68(2) requires the Court's money judgments to be treated, for purposes of domestic execution, the same way as domestic judgments against the State. Here it is irrelevant what legal status treaties enjoy in any given country.

I would assume that some of you must wondering whether I have overlooked one important issue as far as the domestic application of Article 68(2) is concerned. It has to do with the question whether the private party beneficiary of the Court's judgment has standing to invoke the relevant domestic procedures, considering that he or she was not a formal party

to the proceedings before the Court. This formalistic argument overlooks the fact that the real party in interest is the private party on whose behalf the case was referred to the Court, either by the Commission or a State. Nevertheless, it is entirely possible that one or the other national court might adopt such a formalistic approach and claim that the private party has no standing to enforce the judgment. It would be wise, therefore, for the Inter-American Court to anticipate such a holding and, in its judgment, treat the private party for purposes of its compensatory award as a party with standing to invoke the remedy provided for in Article 68(2).

It should now be asked whether the manner in which Article 68(2) is worded indicate that the drafters of the Convention wished to preclude the domestic enforcement of any but the compensatory parts of the Court's judgment. Put another way, must the Convention be read to prevent domestic courts from holding that they have the right or power to give effect to those parts of the Court's judgment that impose obligations other than compensatory damages. Here I am thinking, for example, of a judgment holding that a person's imprisonment violates the Convention and that he should be released.

In my opinion, Article 68(2) only establishes a special method for enforcing monetary damages against the State. It does not lay down any particular rules for the domestic enforcement of other types of judgments and thus leaves States free to regulate or not to regulate the subject on the domestic plane. On the international law plane they are, of course, under an obligation to comply with the judgment. In short, the language of Article 68(2) does not prevent a domestic court in a State Party to the Convention from giving effect to a judgment of the Inter-American Court, provided it has the power to do so under its domestic law.

Whether a domestic court would do so, will depend upon the domestic law status of treaties in the country where the court sits.[3] A court in a State in which the American Convention does not have the status of domestic law will not be able to enforce the judgment of the Inter-American Court without a special national law authorizing it to do so. This is so because here neither the Convention nor the Court's judgment is source of law for the national courts.

The situation will be different in a State in which treaties in general or only human rights treaties enjoy the status of domestic constitutional law or domestic law superior to that of ordinary national law. (One or the other is increasingly the case in many Latin American countries.) Here the domestic court could take the position that Article 68(1) of the Convention is binding

3 See generally T. Buergenthal, "Self-Executing and Non-Self-Executing Treaties in National and International Law," 235 Recueil des cours 303 (Hague Academy, 1992); T. Buergenthal, "Modern Constitutions and Human Rights Treaties," 36 Columbia J. Trans.L. 211 (1997).

on all organs of the State and not only on the executive branch of the government.[4] The court would therefore rule that it is bound by virtue of Article 68(1) to enforce the judgment of the Inter-American Court, provided the measures called for in that judgment are measures the domestic court has the power to take. Hence, if the Inter-American Court required the release from prison of an incarcerated individual, the national court could order the person's release, assuming that similar powers are vested in it in appropriate circumstances under domestic law. Here you might ask, what is the theoretical or doctrinal basis justifying the result I have postulated? The answer, I would submit, is that for States in which the Convention has the status of domestic law, particularly constitutional law or law superior to that to ordinary domestic law, the "obligation to comply with the judgment of the Court" assumed by a State party to the case" under Article 68(1), converts the judgment of the Court into a treaty obligation which, as such, enjoys the same normative status under domestic law as the treaty itself. This treaty obligation is self-executing or not, depending upon the power of the domestic court to execute it. That, in turn, will depend upon the contents of the judgment of the Inter-American Court, upon what it provides or what measures it requires the State to take. In sum, to the extent that the judgment of the Inter-American Court is by virtue of Article 68(1) binding treaty law for a State party to the case, a national court can be deemed to have the power to reverse a prior domestic court decision in conflict with the judgment of the Inter-American Court or to refuse to give effect to a national law found by the Inter-American Court to be in violation of the Convention.

Applying this same argument to States where the Convention only has the status of ordinary national law, it is clear that the judgment of Inter-American Court will not be able to override the application of a later domestic law in conflict with that judgment. By the same token, though, it will take precedence over ordinary laws which entered into force before the Inter-American Court's judgment was issued. These conclusions follow from the application of the rule *lex posterior derogat priori.*

Let me note, in this connection, that this same principle comes into play in States where the Convention has a normative status higher than ordinary law. As a result, a judgment of the Court could only trump laws or domestic decisions based on laws having a lower normative status or, in the case of laws of the same normative rank, where the Court's judgment is later in date. Of course, where the Convention has the status of constitutional law, which it now has in a number of States, domestic courts would have to reconcile the constitutional obligation to give effect to the Court's judgment with whatever other constitutional provisions might also be applicable.

4 On this subject see two very important decisions: Ekmekdjian v. Sofovich, Supreme Court of Argentina, Judgment of 7 July 1992; Constitutional Chamber of the Supreme Court of Costa Rica, Acción de inconstitucionalidad No. 421-S- 90- Voto No. 2313, Judgment of 9 May 1995. For a discussion of the Ekmedjian case, see T. Buergenthal, " La jurisprudencia internacional en el derecho interno," en R. Nieto Navia (ed), La Corte y el Sistema Interamericano de Derechos Humanos 67 (1994).

Many of the questions I have discussed up to this point could be dealt with in the States Parties to the Convention by means either of an agreement with the Inter-American Court or by statute. Thus, the agreement between the Court and Costa Rica, regulating matters relating to the seat of the Court (Convenio de Sede) reads as follows: " Las resoluciones de la Corte y, en su caso, de su Presidente, una vez comunicadas a las autoridades administrativas o judiciales correspondientes de la República, tendrán la misma fuerza ejecutiva y ejecutoria que las dictadas por los Tribunales costarricenses."[5] This provision of the agreement with Costa Rica was drafted by the Court in the hope that it would serve as a model for similar agreements between the Court and other States Parties to the Convention. Todate, however, no such agreements have been concluded with any other State.

A law adopted in Peru in 1982 pursuant to Article 105 of the Peruvian Constitution provided that a decision of international bodies whose obligatory jurisdiction Peru had accepted, "no requiere [en el Perú] para su validez y eficacia de reconocimiento, revisión ni examen previo alguno." This law charged the Supreme Court of Peru with the execution of such a decision.[6] Before this law could be applied in Peru, it was abrogated together with the 1980 Peruvian Constitution. But the law in question would be the type of law that could and should be adopted in the States Parties to execute the Courts judgments. To my knowledge only the Guatemalan Constitution contains a similar clause, but it too has to date not been applied.

III. JUDGMENTS AS PRECEDENTS

We come now to the question of the normative effect, if any, of a judgment of the Inter-American Court in a State Party to the Convention that was not a party to the case within the meaning of Article 68(1) of the Convention. Here it is clear that the State Parties to the Convention have not assumed a formal obligation to recognize the legal effect of such judgments. At most, such judgments constitute judicial precedent as to the meaning of disputed provisions of the Convention. But they are not binding judicial precedent in the Anglo-Saxon sense of requiring lower courts to follow the decisions of higher courts in the same judicial system.

In theory, therefore, a domestic court is free to reach a decision that is in conflict with a prior judgment of the Court interpreting the Convention. But even in countries that do not accept the Anglo-Saxon doctrine of precedent - which is the case generally for all Latin American countries - national courts do not as a rule depart from the pronouncements of higher courts unless they have good reason to do so. This practice is justified by the recognition that

5 Convenio de Sede entre Costa Rica y la Corte Interamericana de Derechos Humanos, art. 27, suscrito en San José de Costa Rica, el 10 de Setiembre de 1981.

6 Ley de Hábeas Corpus y Amparo, No. 23506, art. 40 (1982).

the lower court does not have the last word on the subject and that it will most likely be reversed by the higher court if it does not follow the precedent the latter established in a like case. To submit litigants to decisions of lower courts, which will very likely be reversed by higher courts, is inherently arbitrary and thus incompatible with the orderly and fair administration of justice, be it domestic or international. Of course, there are exceptions to this proposition, particularly if a lower court concludes that there are good and not previously advanced arguments to depart from the precedent.

The same principles should apply to decisions of the Inter-American Court. Although these decisions are not binding on States that were not parties to the case, they are emitted by the Court which, under the Convention, has the last word on the meaning of this treaty.These decisions are entitled, therefore, to be followed unless good and convincing reasons compel the domestic court to depart from them. A domestic court that fails to do so acts in a manner that is arbitrary and, it is arguable, thus deprives the individual of the right Article 25(1) of the Convention guarantees. That provision reads as follows: " Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for the protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention...."[7] It can certainly be argued that a domestic court, which for no good reason refuses to grant a litigant remedies to which he or she is entitled under well-established precedents of the Inter-American Court, acts in an arbitrary manner and thus denies the affected individual "simple and prompt recourse ... to a competent tribunal for the protection against acts that violate his fundamental rights recognized ... by this Convention."

Even if one were not to accept the foregoing interpretation, I believe that a national court of a State Party to the Convention should, even if it does not have to, take a decision of the Court into account when called upon to apply the Convention in a similar case. This approach would seem to be implicit in the principle that treaties are to be interpreted in good faith. It also makes good practical sense since a national court which fails to follow the precedents established by the Court subjects its State to a predictable adverse decision once the case gets to the Inter-American Court.

IV. ADVISORY OPINIONS

Advisory opinions are not binding, of course. But that does not mean that they lack legal or normative effect. They are rendered by the Inter-American Court in the exercise of judicial functions conferred on it by the Convention. When the Court renders an advisory opinion,

7 I recognize that the purpose of this provision was to establish the right to amparo or habeas corpus, which does not mean that it is not applicable to acts of judicial arbitrarisness resulting from the failure of following established precedent.

it engages in a judicial and not academic exercise. Its advisory powers were conferred on the Court in order to enable the Member States of the OAS and OAS organs to obtain from it an authoritative interpretation of the Convention and related human rights treaties. The opinions the Court renders in the discharge of this function thus have an undisputed juridical legitimacy, which the Member States and OAS organs can rely on for their decision-making processes. Their value as precedent derives from the fact that the Court is the highest judicial institution within the OAS system for the interpretation and application of the Convention and related human rights treaties.

It follows therefrom that the authoritativeness of advisory opinions as precedents within the Convention system can be equated to that enjoyed by the Court's contentious decisions in relation to States that were not parties to the case that produced the judgment. This is a point that is often overlooked because of the erroneous assumption that contentious decisions somehow have an inherently greater normative effect than advisory opinions. They have that effect only with regard to the parties to the case. As far as other States are concerned, they have the status of non-binding precedent equal in weight and respect to that enjoyed by advisory opinions.