The Contribution Made by Advisory Opinion 4 and Advisory Opinion 18 by the Inter-American Court of Human Rights to the Concept of Discrimination within the Inter-American System for the Protection of Human Rights.

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On the thirty first of May, 2004, the Chilean Supreme Court ruled that a mother who invited her same-sex partner to live with her was unfit to retain custody of her three daughters, who would be better served in the custody of their heterosexual father. The sentence established, *inter alia*, that the mother had a right to be a lesbian, but that when she had decided to express her sexual orientation (by participating in a homosexual relationship) she had chosen to pursue her own interests over those of her daughters, a decision deemed grave enough to merit the intervention of the State to protect her children[1]. Another argument offered by the Court to justify the removal of the children from their home, was that the girls would suffer stigmatisation and discrimination by their peers and that it was therefore in their best interests to be raised by heterosexuals[2]. Nothing was said of the woman's son, born of a previous relationship and who still lives with her and her partner.

The issues of discrimination that arise from this case become more complicated once the legal framework that the sentence is based upon is examined. Article 225 of the Chilean Civil Code, which governs the custody of children, states that whenever parents live separately, custody will be awarded to the mother unless a judge orders otherwise due to "abuse, neglect or any other serious circumstance". In this case the mother's homosexual relationship qualified as a "serious circumstance" that annulled the discriminatory presumption that she was a better parent than her ex-husband, simply because she was a woman.

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[1] Supreme Court, Sentence in case Nº1193-03, 31st of May, 2004, paragraph sixteen.

[2] Ibídem, paragraph eighteen.

Discrimination is endemic in Chile and indeed throughout Latin America. A mainstream culture born of colonisation, Catholicism and unequal distribution of wealth has brought forth societies that still widely discriminate on the grounds of race, ethnicity, sex and class[3]. Rejection of certain sectors of society was a strategic necessity of the dictatorships of the twentieth century but, with the attention of human rights efforts focused on gross systematic violations of the rights to life, liberty and physical integrity, discrimination often went unchecked. The Catholic Church emerged from many dictatorships as champion of the human rights cause in Latin America and their contribution in the struggle against the abuse of public power is still significant. However, with regards to certain topics, their moral standpoint, can act as a dampener in the advance of the movement within democracy today. This is especially patent with regards to women's rights, sexual and reproductive rights and the rights of sexual minorities[4]. The violation of all of the above is rooted in discrimination.

Latin American States are often responsible for breaching both their duty to respect the right to equal treatment and their duty to ensure that right to all those present in their territory. Thus, minorities are often forced to deal not only with cultural based bigotry but also State sanctioned discrimination. The aforementioned sentence is but one in a long list of examples.

In this context, the Inter-American system for the protection of human rights emerges as an appropriate tool for the enforcement of the right to non-discrimination wherever the State has shown itself to be reluctant to comply with its international obligations. Therefore, the question that begs to be answered is exactly how much has the system done and how much can it do to advance this cause.

There are two general human rights instruments within the Inter-American system: the American Declaration of the Rights and Duties of Man (the "American Declaration") and the American Convention on Human Rights (the "American Convention"). All States members of the OAS are signatories of

[3] With regards to the Catholic Church and human rights, see Medina, Cecilia, "La Convención Americana: Teoría y Jurisprudencia. Vida, Integridad Personal, Libertad Personal, Debido Proceso y Recurso Judicial", Chapter II, 2004. Currently in print.

[4] The Chilean Catholic Church has been extremely vocal in its rejection of new legislation regarding divorce and the morning after pill. For example, see El Mostrador, 18th of March 2004, "Iglesia Católica: Ley de Divorcio Perjudica a la Familia" and El Mostrador, 10th of June 2004, "Iglesia Católica Reitera Objeciones Hacia 'Píldora del Día Después'" both in http://www.elmostrador.cl

the American Declaration, which contains a non-discrimination clause in its article II[5]. On the other hand, the American Convention is far more elaborate and includes a section referring to State obligations, a catalogue of human rights, and a section that modifies and establishes monitoring bodies and lays out the procedure to be applied by them. It contains two separate equality and non-discrimination clauses[6].

The Inter-American system houses two main deliberative monitoring bodies: the Inter-American Commission on Human Rights (the "Commission") and the Inter-American Court of Human Rights (the "Court"). The Commission's wide mandate makes it both a political and a cuasi-judicial body[7]. Its competence extends over all of the States members of the OAS and, among other mechanisms, it monitors compliance with various American human rights treaties by way of the drafting of country reports and by way of the examination of individual communications[8]. All individual communications presented in the Inter-American system must be examined by the Commission. Once a conclusion has been reached, the Commission or the State involved may send the case to the Court for further consideration[9].

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[5] Article II states that "All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor".

[6] Article 1. Obligation to Respect Rights

1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.
2. For the purposes of this Convention, "person" means every human being.

Article 24. Right to Equal Protection

All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.

[7] Article 106 of the Charter of the OAS states that "There shall be an Inter-American Commission on Human Rights, whose principal function shall be to promote the observance and protection of human rights and to serve as a consultative organ of the Organization in these matters". Article 41 of the American Convention on Human Rights details the contents of this function.

[8] The competence of the Commission, *ratione materiae*, when examining individual communications is limited to the American Convention on Human Rights, the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, the Inter-American Convention to Prevent and Punish Torture, the Inter-American Convention on the Forced Disappearance of Persons and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women.

[9] In fact, in 2000, the Commission amended its rules of procedure so that all cases where the State has not complied with its recommendations are referred to the Court, unless the Commission decides otherwise. Rules of Procedure of the Inter-American Commission on Human Rights, article 44.1.

The Court, on the other hand, is a judicial body with both a contentious and an advisory function. When drafting advisory opinions, it may interpret any human rights treaty applicable to States parties in the OAS, including treaties pertaining to the Universal System[10]. When examining individual cases the competence of the Court is limited to the States parties to the American Convention who have expressly recognised its jurisdiction. Its rulings may only refer to obligations set forth in the American Convention[11], in part of one article of the Protocol on Economic, Social and Cultural Rights[12], in the Inter-American Convention on Forced Disappearance of Persons[13] and the Inter-American Convention to Prevent and Punish Torture[14].

Although both bodies may examine individual complaints[15], the most important difference between them in this respect arises precisely from their differing natures; the sentences passed down by the Court when examining individual cases are legally binding, the resolutions previously drafted by the Commission in the same cases are not[16]. Thus the importance of the Court's jurisprudence.

Given that the right to non-discrimination is so widely violated within the States parties to the American Convention, one would think that the Court has already developed copious jurisprudence to address the problem. However, the fact of the matter is that in over twenty years of existence the Court has never once found that a State has discriminated against a person.

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[10] Article 64.1 of the American Convention states that: "The member states of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states. Within their spheres of competence, the organs listed in Chapter X of the Charter of the Organization of American States, as amended by the Protocol of Buenos Aires, may in like manner consult the Court".

[11] Article 62 of the American Convention on Human Rights.

[12] Article 19.6 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights.

[13] Article XIII of the Inter-American Convention on Forced Disappearance of Persons.

[14] Inter-American Court of Human Rights, *Villagrán Morales and Others Case,* Judgment of November 19th, 1999, Series C No. 63, paragraphs 247-248; *Cantoral Benavides Case*, Judgment of August 18th, 2000, Series C No. 69, paragraphs 180-191.

[15] Where the body examines whether or not a specific international human rights norm has been violated with regards to a specific person or group of persons (as opposed to the general situation of human rights in a given State or the abstract determination of the content of a particular international human rights norm).

[16] With regards to the Commission, articles 50 and 51 of the American Convention. With regards to the Court, article 68 of the American Convention.

Whilst the Commission makes a point of including chapters dedicated to significant minorities in its country reports[17] and has resolved numerous cases where equality has been an issue[18], the Court has yet to enter this particular forum with a ruling an a contentious case[19].

There are many possible explanations for this. If we take a look at the individual cases that the Court has been called upon to examine, it is immediately evident that equality has not been a priority for the Commission when submitting cases to Inter-American judicial review. The Court has passed a total of 106 sentences in 45 individual cases[20]. Of these cases 37 refer to forced disappearance of persons, violations of the right to life, torture or other violations of the right to physical and psychological integrity. While other regional human rights systems have been able to advance human rights theory by way of the examination of "hard cases", the Inter-American Court is unfortunately still called upon to determine the responsibility of States in government sponsored massacres[21].

The extended duration of the process before the Inter-American system is another factor that has limited the number of cases that the Court has been able to examine. It must be noted that, unlike its permanent European counterpart, the Court holds sessions four times a year, for a total of 8 weeks. In addition to this, the procedure employed by the Court contemplates the examination of admissibility, re-examination of evidence including extensive oral testimony, sentencing, determination of reparations and the possibility of interpretation of sentences passed by the Court. In addition to this, States have

[17] The Commission has consistently included chapters on women, children and indigenous peoples in every country report since the 1995 report on the situation of human rights in Haiti (although previous scattered examples exist).

[18] Examples of cases where the Commission has found that the State has violated the right to non-discrimination include: María Eugenia Morales de Sierra v. Guatemala, Report Nº 4/01, Case 11.625, 19th of January 2001 and; Statehood Solidarity Committee v. The United States of America, Report Nº 98/03, Case 11.204.

[19] In the Genie Lacayo Case, the right to equality before the law was argued but the Court deemed that the State was not responsible for its violation. Inter-American Court of Human Rights, *Genie Lacayo Case*, Judgment of January 29th, 1997, Series C, Nº30, paragraph 88.

[20] The Court typically drafts separate sentences for provisional measures, admissibility, merits, reparations and interpretation of any of these.

[21] One of the Court's latest cases is titled the "Plan de Sánchez Massacre". It details the torture and murder of approximately 268 residents of a rural village, in one day, at the hands of the Guatemalan military. The victims were mainly of indigenous origin; women and girls were raped before they were killed. On the 23rd of April, 2004 in a hearing before the Court, the Guatemalan State formally accepted responsibility for the massacre, almost eight years after the case had first been presented to the Inter-American system, almost twenty two years after the facts.

been prone to request extensions of deadlines in proceedings before the Commission and the Court[22], and to ask the Court to interpret its own judgments. All of this makes it possible for a case to be before the Court for several years before the State actually repairs victims.

Having tried to explain the absence of discrimination judgments from the Court's contentious jurisprudence, it must be said that several of the cases that have been resolved by the Court do in fact raise issues in the field of equality rights. For example, many of those victims of forced disappearances, extra-judicial executions or torture were targeted because they belonged to a certain category that was deemed undesirable: political opponents, indigenous peoples, street children, etc. Although the Court was firm and unambiguous when it ruled that the violations of the victim's right to life and integrity were unlawful, it has so far failed to expressly recognize those violations took place because of an arbitrary distinction made between the victims and the rest of society. Some will say that this kind of statement from the Court may be superfluous and unnecessary given that it would not add to result of the ruling. However, had the Court taken this path, those who attempt to invoke international non-discrimination precedents in this region would have a lot more to work with.

Even if the previous argument is rejected, there have been cases where equality rights have been a key element but have not been considered by the Court in its ruling. A patent example of this was the Ivcher Bronstein case against Peru[23] where an Israeli born Peruvian national was persecuted and stripped of his nationality in order for the government to put into effect against him a norm that forbade foreigners from owning television stations. The Court found violations to the right to nationality, property, due process, freedom of expression and the right to judicial protection along with the violation of the State's obligation to respect the rights set forth in the American Convention. The right to equal protection before the law was not examined.

After this somewhat critical overview of the contentious jurisprudence of the Court, it must be said that the Inter-American Court has not completely

[22] At times with devastating consequences for the case, see Inter-American Court of Human Rights, *Cayara Case*, Admissibility Judgment of February 3rd, 1993. Series C Nº 14.
[23] Inter-American Court of Human Rights, *Ivcher Bronstein Case*, Judgment of February 6th, 2001. Series C Nº 74.

ignored the matter of non-discrimination. In fact, it has drafted two advisory opinions based on the non-discrimination clauses contained in articles 1.1 and 24 of the American Convention. It is the contribution of these documents, Advisory Opinion 4 and Advisory Opinion 18 that will be examined in this essay[24].

Advisory Opinion 4: The Influence of European Jurisprudence.

Advisory Opinion 4 was drafted in 1984, several years after the establishment of the Court which had, up until then, seen very little activity[25]. The request was made by the State of Costa Rica (host to the Court) and referred to a proposed modification to their Constitution with regards to the naturalization of foreign citizens.

Given the turmoil in Latin America during the eighties, especially in Central America, Costa Rica had decided to tighten its naturalization laws, imposing stricter requirements for candidates wishing to acquire Costa Rican citizenship. The proposed amendment to the constitution, which regulated citizenship, employed several different categories of applicant and imposed harsher demands on some over others. The Court was asked by the State to evaluate whether or not the proposal complied with the American Convention.

The proposed amendment replaced the existing naturalization regime for the following articles:

> "Article 14. The following are Costa Ricans by naturalization:
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> 1) Those who have acquired this status by virtue of previous laws;
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> 2) Native-born nationals of the other countries of Central America, Spaniards and Ibero-Americans with five years official residence in the country and who fulfil the other requirements of the law;
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> 3) Central Americans, Spaniards and Ibero-Americans, who are not native-born, and other foreigners who have held official residence for a minimum period of seven years and who fulfil the other requirements of the law;

[24] A third, Advisory Opinion 17 that deals with the legal status and human rights of children includes an application of the finding of Advisory Opinion 4 to the child. Advisory Opinion 11 touches on the subject of discrimination due to economic status while examining "Exceptions to the Exhaustion of Domestic Remedies (Arts. 46(1), 46(2)(a) and 46 (2)(b) of the American Convention on Human Rights)" (paragraph 22).

[25] The Court did not rule in a contentious case until 1987.

4) A foreign woman who, by marriage to a Costa Rican loses her nationality or who after two years of marriage to a Costa Rican and the same period of residence in the country, indicates her desire to take on our nationality; and

5) Anyone who receives honorary nationality from the Legislative Assembly.

Article 15. Anyone who applies for naturalization must give evidence of good conduct, must show that he has a known occupation or means of livelihood, and must know how to speak, write and read the Spanish language. The applicant shall submit to a comprehensive examination on the history of the country and its values and shall, at the same time, promise to reside within the national territory regularly and swear to respect the constitutional order of the Republic.

The requirements and procedures for applications of naturalization shall be established by law"[26].

Anticipating an adverse opinion by the Court with regards to article 14.4, which distinguishes between male and female spouses, a group of members of congress submitted the following alternate text

"MOTION OF AMENDMENT to Article 14(4) of the Constitution presented by the Deputies of the Special Committee:

A foreigner, who by marriage to a Costa Rican loses his or her nationality and who after two years of marriage to a Costa Rican and the same period of residence in the country, indicates his or her desire to take on the nationality of the spouse"[27].

The State requested that the Court examine the proposed amendment in light of the rights to protection of the family (article 17 of the American Convention), nationality (article 20 of the American Convention) and equal protection (article 24 of the American Convention). The Court chose to do so only with regards to the last two rights[28].

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[26] Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84, January 19, 1984, Inter-Am. Ct. H.R. (Ser. A) No. 4 (1984), paragraph 7.

[27] Idem.

[28] Despite the fact that the Human Rights Committee had used the right to protection of family life to resolve the similar Aumeerudy Cziffra case some three years before and as the European Court of Human Rights would one year later in the Abdulaziz, Cabales and Balkandali case.

After finding that the right to nationality as established in the American Convention had not been violated[29], the Court began to examine whether or not each category mentioned in the proposal withstood the test of equal protection. In order to do this, the Court felt the need to first lay the foundations of what must be understood as equality and non-discrimination.

When examining the concept of equality, in order to properly explain why equal treatment is a human right, the Court resorted to the *iusnatural* ideology prevalent in many American countries[30] and stated that:

> "The notion of equality springs directly from the oneness of the human family and is linked to the essential dignity of the individual. That principle cannot be reconciled with the notion that a given group has the right to privileged treatment because of its perceived superiority. It is equally irreconcilable with that notion to characterize a group as inferior and treat it with hostility or otherwise subject it to discrimination in the enjoyment of rights which are accorded to others not so classified. It is impermissible to subject human beings to differences in treatment that are inconsistent with their unique and congenerous character"[31].

It then went on to use the criteria of "offence to human dignity" to affirm that not all differences in treatment constitute discrimination, citing the European Court of Human Rights in the Belgian Linguistics Case to adopt the idea that objective and reasonable differences were compatible with the principle of equality, provided they were proportional to legitimate aims[32].

The Court concluded its explanation of the concept of equality so understood in the American Convention by pointing out that the presence of discrimination had to be determined on a case by case basis because:

> "Although it cannot be denied that a given factual context may make it more or less difficult to determine whether or not one has encountered the situation described in the foregoing paragraph, it is

[29] *Supra*, footnote 26, paragraph 42.
[30] See Gros Espiel, Hector, "La Declaración Americana: Raíces Conceptuales y Políticas en la Historia, la Filosofía y el Derecho Americano", in "Revista IIDH, Número Especial en Conmemoración del Cuadragésimo Aniversario de la Declaración Americana de Derechos y Deberes del Hombre" Instituto Interamericano de Derechos Humanos, San José, 1989, pp. 56-57.
[31] *Supra*, footnote 26, paragraph 55.
[32] *Ibidem*, paragraphs 56 and 57.

> equally true that, starting with the notion of the essential oneness and dignity of the human family, it is possible to identify circumstances in which considerations of public welfare may justify departures to a greater or lesser degree from the standards articulated above. One is here dealing with values which take on concrete dimensions in the face of those real situations in which they have to be applied and which permit in each case a certain margin of appreciation in giving expression to them"[33].

The Court had begun its examination of the possible violations of equality provisions by specifying that the American Convention contains two non-discrimination provisions (much like the International Covenant on Civil and Political Rights). Article 1.1 obliges States to respect and ensure the rights set forth in the American Convention to all persons without discrimination. This would therefore be what Bayefsky calls a "subordinate equality norm" in that it "prohibit[s] discrimination only in the context of the rights and freedoms set out elsewhere in the respective instruments"[34].

On the other hand, article 24 of the American Convention recognises the "right to equal protection" in the sense that "[a]ll persons are equal before the law. Consequently they are entitled, without discrimination, to equal protection of the law". The Court did not specify that this article was the corresponding "autonomous equality norm"[35], but instead stated that:

> "Although Articles 24 and 1(1) are conceptually not identical - the Court may perhaps have occasion at some future date to articulate the differences - Article 24 restates to a certain degree the principle established in Article 1(1). In recognizing equality before the law, it prohibits all discriminatory treatment originating in a legal prescription. The prohibition against discrimination so broadly proclaimed in Article 1(1) with regard to the rights and guarantees enumerated in the

[33] *Ibidem*, paragraph 58.
[34] Bayefsky, Anne, "The Principle of Equality or Non-Discrimination in International Law", in "International Human Rights Law" Volume II. Professor Rebecca J. Cook, Universidad of Toronto Law School, 1991-92, p. 66. Nowak uses the term "accessory prohibition of discrimination" in Nowak, Manfred. U.N. Covenant on Civil and Political Rights - CCPR Commentary. Editorial N.P. Engel, 1993, p.43. In this respect, article 1.1 of the American Convention is equivalent to article 2.1 of the International Covenant on Civil and Political Rights and article 14 of the European Convention
[35] Bayefsky in *ibidem*.

> Convention thus extends to the domestic law of the States Parties, permitting the conclusion that in these provisions the States Parties, by acceding to the Convention, have undertaken to maintain their laws free of discriminatory regulations" [36].

It is understood therefore, that if article 24 is not to be a mere repetition of article 1.1, the forbidding of discrimination with regards to rights not specified in the American Convention extends only to the law, albeit in the broadest sense of the word. On the other hand, article 24 does not require the prohibited discrimination to be referred to a human right, because equality before the law is a right in itself, and in this sense it covers a wider scope than article 1.1.

The Court began its examination of the specific case at hand by stating unequivocally that the State of Costa Rica had the "sovereign power (…) to decide what standards should determine the granting or denial of nationality to aliens who seek it"[37]. According to the Court, this sovereign power included the right to distinguish between applicants who have a greater affinity with Costa Rican values and interests, providing the distinctions be both objective and reasonable. The Court went on to determine if each of these distinctions met with the requirements of reasonableness and objectiveness[38].

The less rigorous residency requirements demanded of Central and Ibero-Americans and Spaniards were deemed to meet the criteria due to the fact that, according to the Court, Costa Rica had the "right and the duty" to preserve its "traditional beliefs, values and institutions" and this right and duty would be served by preferring those with "closer historical, cultural and spiritual bonds with the people of Costa Rica"[39].

With regards to the harsher residency requirements for Central and Ibero-Americans and Spaniards who were not native born, presumably due to

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[36] *Supra*, footnote 26, paragraph 54.
[37] *Ibidem*, paragraph 59.
[38] The different categories of applicants in the present case depended upon i) whether or not the applicant was a national of certain "privileged" States, namely Central American States, Ibero-American States or Spain; ii) whether or not the applicant was native-born of these States or had been naturalized and; iii) whether or not the applicant was a woman who had married a Costa Rican national.
[39] *Supra*, footnote 26, paragraph 60. It must be said that the Court supposed that the history, culture and spirit of Costa Rican society was uniformly one of Hispanic origin. In a dissenting opinion, Judge Piza, a Costa Rican national, pointed out that the Court had overlooked the indigenous peoples of the country and the large African American Anglophone population that resides on its Caribbean coast. Separate Vote of Judge Rodolfo Piza, paragraph 23.

suspicion of the rigorousness of these countries' naturalization processes, the Court deemed that that it could not "conclude that the proposed amendment is clearly discriminatory in character"[40]. It went on to say that:

> "…the Court's conclusion should not be viewed as approval of the practice which prevails in some areas to limit to an exaggerated and unjustified degree the political rights of naturalized individuals. Most of these situations involve cases not now before the Court that do, however, constitute clear instances of discrimination on the basis of origin or place of birth, unjustly creating two distinct hierarchies of nationals in one single country"[41].

The same reasoning was employed by the Court when it ruled that the requirement that applicants should speak, write and read Spanish as well as pass an exam on Costa Rican history and values was not unreasonable or unjustified[42]. However, it warned the State of "the risk that these requirements will become the vehicle for subjective and arbitrary judgments as well as instruments for the effectuation of discriminatory policies which, although not directly apparent on the face of the law, could well be the consequence of its application"[43].

Unfortunately, the Court failed to recognize that discriminatory intent is irrelevant when the outcome of the proposed legislation might produce an unreasonable difference in the enjoyment of a human right[44]. The criteria of the Court here should have been *pro-personae* in that measures should be taken to reasonably avoid a future violation of a human right, even if that violation is more a possibility that a probability.

The only part of the proposal that the Court deemed discriminatory was article 14.4 that favoured women over men when naturalizing spouses. After

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[40] *Ibidem*, paragraph 61. Judge Buergenthal dissented on this point. Separate Vote of Judge Thomas Buergenthal, paragraph 4.
[41] *Ibidem*, paragraph 62.
[42] Judge Piza dissented on this point, *Ibidem*, Separate Vote of Judge Rodolfo Piza, paragraphs 25 and 26.
[43] *Ibidem*, paragraph 63.
[44] This is the position held by Judge Tanaka in his individual opinion regarding the Southeast Africa Cases before the International Court of Justice in 1966 as quoted by Bayefsky, s*upra*, footnote 36, p. 68. This is also apparent from article 1 of both the CERD and the CEDAW conventions. Also, the Human Rights Committee in General Comment Nº18, paragraph 7 and in Simunek et al v. the Czech Republic, CCPR/C/54/D/516/1992, paragraph 11.7.

referring to the Convention on the Nationality of Women and article 17.4 of the American Convention (equality of spouses), the Court declared that:

> "…the different treatment envisaged for spouses by paragraph 4 of Article 14 of the proposed amendment, which applies to the acquisition of Costa Rican nationality in cases involving special circumstances brought about by marriage, cannot be justified and must be considered to be discriminatory"[45].

It went on to say that the alternate text that replaced the words "foreign woman" for the word "foreigner" was more consistent with the American Convention.

The analysis by the Court of the factual circumstances at hand is a direct application of the guideline that it laid down when determining that the presence of discrimination must be determined on a case to case basis. While discrimination on the grounds of sex, as a suspect category, will be found unlawful anywhere in the world, the preference given to certain nationals who supposedly hold closer cultural, historical and spiritual bonds with the country they wish to emigrate to may not have been so easily deemed non-discriminatory if we were speaking of a more multicultural country[46]. I find it hard to accept that "cultural ties", especially when determined by place of birth, can be used as criteria for determining naturalization preference without constituting discriminatory discourse in itself.

Advisory Opinion 18: Equality and Non-Discrimination as *Ius Cogens*.

Eighteen years after Advisory Opinion 4, the Court was called upon by the United Mexican States to decide whether or not the detrimental treatment of undocumented migrant workers contravened the principle of non-discrimination set forth in several international human rights instruments[47].

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[45] *Supra*, footnote 26, paragraph 67.

[46] I recall footnote 39 here.

[47] The enquiry, in as much as non-discrimination is concerned, referred to articles 1 and 24 of the American Convention, articles 2 and 26 of the International Covenant on Civil and Political Rights, articles 3.1 and 17 of the OAS Charter, article II of the American Declaration on the Rights and Duties of Man and article 2 of the Universal Declaration of Human Rights. As stated beforehand, the competence of the Court to interpret these instruments is based on article 64.1 of the American Convention.
The consultation put forward by the Mexican State asked the Court to discuss the:

It should be said that this request for an advisory opinion falls within the wide international legal offensive undertaken by the Mexican government against certain policies enforced by and certain practices condoned by the government of the United States of America[48]. The text of the Advisory Opinion, including the initial submissions made by the Mexican government do not specifically mention the United States as the subject of the enquiry, but from the abuses detailed and the fact that the vast majority of Mexican emigration is directed to its northern neighbour, the implication is clear[49].

In order to answer the query, the Court separately analysed the obligation to respect and guarantee human rights and the fundamental nature of the principle of equality and non-discrimination[50]; the application of the principle of equality and non-discrimination to migrants[51]; the rights of undocumented migrant workers[52] and finally; State obligations when determining migratory policies in light of the international instruments for the protection of human rights[53].

"…deprivation of the enjoyment and exercise of certain labor rights [of migrant workers,] and its compatibility with the obligation of the American States to ensure the principles of legal equality, non-discrimination and the equal and effective protection of the law embodied in international instruments for the protection of human rights; and also with the subordination or conditioning of the observance of the obligations imposed by international human rights law, including those of an erga omnes nature, with a view to attaining certain domestic policy objectives of an American State." In addition, the request dealt with "the meaning that the principles of legal equality, non-discrimination and the equal and effective protection of the law have come to signify in the context of the progressive development of international human rights law and its codification". Advisory Opinion OC-18/03 of September 17, 2003, Requested by the United Mexican States: Legal Status and Rights of Undocumented Migrants, Inter-Am. Ct. H.R. (Ser. A) No. 18 (2003), paragraph 1.

[48] This Advisory Opinion is preceded by another also requested by Mexico, Advisory Opinion 16, relative to The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99, October 1, 1999, Inter-Am. Ct. H.R. (Ser A) No. 16 (1999). Also, on the 31st of March, 2004, the International Court of Justice found that the convictions of fifty one Mexican nationals were unlawful due to the fact that the United States' authorities had, *inter alia*, failed to advise them of their right to consular assistance and had not contacted consular officials when they were arrested. Case Concerning Avena and Other Mexican Nationals (Mexico vs. United States of America), International Court of Justice, 31st of March, 2004, General List Nº128.

[49] The United States has not ratified the American Convention, but it is party to all the other instruments invoked by Mexico, namely the International Covenant on Civil and Political Rights, the OAS Charter, the American Declaration on the Rights and Duties of Man and the Universal Declaration of Human Rights.

[50] Advisory Opinion OC-18/03 of September 17, 2003, Requested by the United Mexican States: Legal Status and Rights of Undocumented Migrants, Inter-Am. Ct. H.R. (Ser. A) No. 18 (2003), paragraphs 70-101.

[51] *Ibidem*, paragraphs 111-127.

[52] *Ibidem*, paragraphs 128-160.

[53] *Ibidem*, paragraphs 161-172.

In as much as is important for the purposes of this essay, it can be said that Advisory Opinion 18 built upon the foundations laid by Advisory Opinion 4 and looked to solidify the Inter-American theory regarding non-discrimination. It did this by providing a concrete conceptualisation of discrimination and by outlining the contents and consequences of the State obligations in this matter.

The Court's first advancement in this Advisory Opinion is a clearer definition of discrimination:

> "This Advisory Opinion will differentiate by using the terms distinction and discrimination. The term distinction will be used to indicate what is admissible, because it is reasonable, proportionate and objective. Discrimination will be used to refer to what is inadmissible, because it violates human rights. Therefore, the term "discrimination" will be used to refer to any exclusion, restriction or privilege that is not objective and reasonable, and which adversely affects human rights"[54].

This definition is slightly more restrictive than the one employed by the Human Rights Committee. While the HRC refers to "any distinction, exclusion, restriction or preference", the Court does not employ the broadest term, "distinction". Likewise, there is no explicit reference to the discriminatory intent. It can be interpreted from the wording of the definition that the Court requires a discriminatory result only, but given its conclusions in Advisory Opinion 4, clarification was required.

Jurisprudence from the European Court of Human Rights was once again referred to by the Court to assure that "not all differences in treatment are in themselves offensive to human dignity" and that "difference in treatment is only discriminatory when it has no objective and reasonable justification"[55].

Continuing with its desire to clarify what had been established by Advisory Opinion 4, the Court then detailed that the obligations imposed upon States by the principle of non-discrimination are: "to not introduce discriminatory

[54] *Ibidem*, paragraph 84.
[55] *Ibidem*, paragraph 89. Here the Court refers to Willis v. the United Kingdom, Wessels-Bergervoet v the Netherlands, Petrovic v. Austria, and the Belgian Linguistics Case.

regulations into their laws, to purge their laws of all discriminatory regulations and to combat discriminatory practices"[56].

The Court, had touched on the issue of special measures whilst explaining that not all differences were discrimination by saying that "[d]istinctions based on de facto inequalities may be established; such distinctions constitute an instrument for the protection of those who should be protected, considering their situation of greater or lesser weakness or helplessness"[57]. Later, when determining the requirements that the principle of non-discrimination imposed upon States, it went on to assure that the implementation of special measures was obligatory for States, wherever necessary:

> "States are obliged to take affirmative action to reverse or change discriminatory situations that exist in their societies to the detriment of a specific group of persons. This implies the special obligation to protect that the State must exercise with regard to acts and practices of third parties who, with its tolerance or acquiescence, create, maintain or promote discriminatory situations"[58].

One of the more arguable aspects of this Advisory Opinion was presented with regards to the relationship that exists between the obligation to respect and to guarantee human rights and the principle of equality.

> "There is an inseparable connection between the obligation to respect and guarantee human rights and the principle of equality and non-discrimination. States are obliged to respect and guarantee the full and free exercise of rights and freedoms without any discrimination. Non-compliance by the State with the general obligation to respect and guarantee human rights, owing to any discriminatory treatment, gives rise to its international responsibility.

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[56] *Ibidem*, paragraph 88. The quoted text was taken and translated from the original Spanish draft of this Advisory Opinion which is, inexplicably, more complete that the English version. The Court later elaborates on these obligations in paragraphs 102 to 110.

[57] Idem. This statement is slightly more categorical that the one made in 1984, where the Court said that "There may well exist certain factual inequalities that might legitimately give rise to inequalities in legal treatment that do not violate principles of justice. They may in fact be instrumental in achieving justice or in protecting those who find themselves in a weak legal position." *Supra*, footnote 26, paragraph 56.

[58] *Supra*, footnote 50, paragraph 104.

> The principle of the equal and effective protection of the law and of non-discrimination is embodied in many international instruments. The fact that the principle of equality and non-discrimination is regulated in so many international instruments is evidence that there is a universal obligation to respect and guarantee the human rights arising from that general basic principle" [59].

The Court appears to contradict itself here. The assertion that the obligation to respect and ensure is inextricably connected to the principle of non-discrimination is correct and in line with the idea that this principle permeates all human rights law[60]. But it would appear from the second paragraph of this excerpt that the Court holds that the principle of equality is the basis from which the obligation to respect and ensure is derived. It offers no argument to support this statement, which only serves to confuse the reader and cloud the Court's theory.

Further along in the opinion, and while actively pursuing its precedent-setting role, the Court quoted a number of rulings and opinions from specialized bodies from all around the world, namely the European Court of Human Rights, the Human Rights Committee and the African Commission on Human and Peoples Rights[61]. This exercise served to underline the universal character of the principle of equality and non-discrimination. The conclusion reached by the Court was, once again, that due to the State obligation to respect and ensure human rights without discrimination, any discriminatory treatment entailed international responsibility for that State" [62].

The last major contribution made by the Court to the concept of non-discrimination came as an answer to Mexico's original query as to the meaning of this principle in light of the progressive development of international human rights law. The Court held that:

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[59] *Ibidem*, paragraphs 85 and 86.
[60] See, for example, Medina, Cecilia "Doctrina" in Manual de Derecho Internacional de los Derechos Humanos para Defensores Penales Públicos, Documentos Oficiales Nº 1, Centro de Documentación Defensoría Penal Pública, December 2003, p.27 and Bayefsky in *supra* footnote 34, p. 65.
[61] *Supra*, footnote 50, paragraphs 89 to 95.
[62] *Ibidem*, paragraph 96. The text must be read in Spanish, the language that the Court used to draft the opinion. Once again deficient translation has lead to misunderstandings in the English text.

> "The principle of equality before the law and non-discrimination permeates every act of the powers of the State, in all their manifestations, related to respecting and ensuring human rights. Indeed, this principle may be considered peremptory under general international law, inasmuch as it applies to all States, whether or not they are party to a specific international treaty, and gives rise to effects with regard to third parties, including individuals. This implies that the State, both internationally and in its domestic legal system, and by means of the acts of any of its powers or of third parties who act under its tolerance, acquiescence or negligence, cannot behave in a way that is contrary to the principle of equality and non-discrimination, to the detriment of a determined group of persons.
>
> Accordingly, this Court considers that the principle of equality before the law, equal protection before the law and non-discrimination belongs to jus cogens, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws […]This principle (equality and non-discrimination) forms part of general international law. At the existing stage of the development of international law, the fundamental principle of equality and non-discrimination has entered the realm of jus cogens"[63].

The characterization employed by the Court, that of *ius cogens*, had been forwarded in several of the *amicus curiae* presented by third parties to the conflict[64] and came to judicially recognise that the principle of non-discrimination had become an imperative of international law and therefore bound States regardless of their contractual obligations in the field of human rights.

The last theoretical contribution made by this Advisory Opinion was made in relation to discriminatory categorizations:

> "Nowadays, no legal act that is in conflict with this fundamental principle is acceptable, and discriminatory treatment of any person, owing to gender, race, color, language, religion or belief, political or other opinion, national, ethnic or social origin, nationality, age,

[63] *Ibidem*, paragraphs 100 and 101.
[64] *Ibidem*, paragraph 47.

economic situation, property, civil status, birth or any other status is unacceptable"[65].

It is interesting that the Court chose to add to the categories numbered in the human rights treaties that it was interpreting. However, its replacement of the word "sex" with the word "gender" cannot be seen as progress but rather as a misconception; the Court seemed to erroneously understand the terms as synonymous. The addition of the categories gender, belief, ethnic origin, nationality, age, economic situation, property, and civil status illustrate that the Court is of the opinion that the catalogue set forth by article 1.1 of the American Convention is merely illustrative and by no means limits the prohibition of discrimination to its terms. In the same order of things, the Court also eliminated the word "social" in the open ended clause "any other social status", indicating that the limitation that it imposed is at present clearly unjustified.

When dealing with the factual circumstances that originated the request for an advisory opinion, the Court held that the State was entitled to make distinctions between national workers and migrant workers and between documented and undocumented migrant workers, if these distinctions were reasonable, objective, proportional and did not harm human rights, including the labour rights that emerge from any employment relationship[66].

The Court was clear in that the obligations born of the principle of equality and non-discrimination were not circumscribed to the action or inaction of the State in the public sphere but that on the contrary, they also encompassed the duty of States to ensure that the private sector abided by the same rules when dealing with migrant workers, be they documented or not. I believe that this conclusion is evidently coherent with the international regulations that States are bound by. However, I cannot avoid noting that despite the great value of the legal analysis undertaken by the Court, the practical aspects of the problems faced by undocumented migrant workers transcend the reaches of this opinion, for obvious reasons. The migrant labour market operates in a clandestine environment and States have a legitimate interest in tracking down illegal immigrants and possibly deporting them. States need the collaboration of the victims of labour abuses in order to clamp down on

[65] *Ibidem*, paragraph 101.
[66] *Ibidem*, paragraphs 119 and 133 to 136.

them, but the reality is that few undocumented migrant workers will come forward if doing so will alert the authorities to their migrant status. This is why the abuse of undocumented migrant workers is so lucrative for unscrupulous employers. States, in order to comply with their obligation to respect and ensure human rights without discrimination, need to find a way to reconcile their interest in protecting human rights with their interest in controlling immigration.

The general conclusion reached by the Court in this matter was phrased as follows:

> "The Court considers that the State may not subordinate or condition the observance of the principle of equality before the law and non-discrimination to achieving the goals of its public policies, whatever these may be, including those of a migratory nature. This general principle must be respected and guaranteed always. Any act or omission to the contrary is inconsistent with the international human rights instruments"[67].

In this paragraph, the Court has clearly sent a message to States that may tend to justify violations of the human rights of certain minorities by invoking the legitimacy of the objectives of their public policies. The principle of equality and non-discrimination as *ius cogens* must become the guiding light for all States, in every area of their action. Therefore, although States have the sovereign right to determine their priorities and the public policies used to reach them, they are always limited by their obligation to respect and ensure human rights without discrimination.

Conclusions

Despite the fact that the Inter-American Court of Human Rights has not made a habit of incorporating the principle of equality and non-discrimination into its contentious jurisprudence, the theory that it has established in these two advisory opinions is significant and can be summarised as follows:

a) The definition of discrimination as "any exclusion, restriction or privilege that is not objective and reasonable, and which adversely affects human rights"[68]. This concept properly incorporates the notion

[67] *Ibidem*, paragraph 172.
[68] *Ibidem*, paragraph 84.

that not all distinctions are discriminatory and that distinctions based on objective and reasonable criteria must be deemed legitimate.

b) The detail of the obligations imposed on States by the principle of equality and non-discrimination, including the obligation to implement special measures to reverse *de facto* discrimination.

c) The assertion that the principle of equality and non-discrimination is *ius cogens* and therefore applicable to all human rights and to all States, whether or not they are parties to the human rights treaties that expressly recognise it.

d) The assertion that the categories with regards to which arbitrary differentiation is forbidden are more than those mentioned in the human rights treaties examined by the Court. In effect, the Court has unequivocally stated that discrimination on any ground is prohibited.

With this scenario in mind it seems that the Court should not have any difficulty applying its criteria for non-discrimination to a contentious case like the one detailed at the beginning of this piece. In fact, given the importance that the Court has recognised of the principle of non-discrimination and given the extension of its boundaries, it would be logical that the Court would begin to incorporate it into the judgments made in individual cases[69], whether the right to equality is the predominant complaint or not[70]. In this event, it would be expected that the allegations of discrimination would be treated with the severity suggested by these Advisory Opinions.

Santiago, July 2004.

[69] Instead of overlooking the matter as it did after Advisory Opinion 4.

[70] It is possible that the Court will be called upon to resolve the complaints of discrimination currently being examined by the Commission. An interesting case is that of Marta Lucía Álvarez Giraldo v. Colombia, where the author, a currently imprisoned lesbian, was denied conjugal visitation rights due to her sexual orientation. The Commission declared the case admissible in May of 1999, but it has yet to find on the merits. Report Nº 71/99, Case Nº 11.656, 4th of May, 1999.