

OPINION OF JUDGE JULIO A. BARBERIS

1. This judgment finds that the Argentine State violated Articles 8 and 25 of the American Convention on Human Rights, a finding supported by an analysis of the facts and of the law set out therein. However, rather than directly stating that Argentina violated those articles, it uses a peculiar expression to the effect that the State violated the articles in question "in relation to Article 1(1)" of the Convention. The Court uses this expression in the title to Chapter VII of the Judgment, in the conclusion of that same chapter, and in the final decision. In the body of the Judgment, the Court speaks simply of the violation of Articles 8 and 25, without adding the reference to Article 1(1). What does it mean that a State has violated certain articles of the Convention "in relation" to another article of the same text? For an answer, one has to turn to the Court's own case law.

2. Article 1, paragraph 1, of the American Convention on Human Rights reads as follows:

"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."

This provision requires States parties to respect the human rights recognized in the Convention without discrimination of any kind.

This provision can apply to any right protected under the Convention, such as the prohibition against slavery, the right to judicial guarantees, or freedom of association. A domestic law that denies a racial minority recourse to the court of last instance or that allows servitude when the persons involved are certain foreign-born nationals would be a violation of this provision of the Convention. While, as we see it, the obligation established in Article 1, paragraph 1, is that of nondiscrimination, the Court has its own interpretation of Article 1(1).

3. The Court has had occasion to interpret and apply Article 1(1) in its advisory opinions, its judgments and its decisions ordering provisional measures. The first time the Court examined this particular provision was in Advisory Opinion OC-4 of January 19, 1984. There the Court wrote the following:

"Article 1(1) of the Convention, a rule general in scope which applies to all the provisions of the treaty, imposes on the States Parties the obligation to respect and guarantee the free and full exercise of the rights and freedoms recognized therein 'without any discrimination'. In other words, regardless of its origin or the form it may assume, any treatment that can be considered to be discriminatory with regard to the exercise of any of the rights guaranteed under the Convention is *per se* incompatible with that instrument." ⁽¹⁾.

By the Court's interpretation, States parties are obligated to respect the rights and guarantees enumerated in the Convention, without making distinctions of any kind. For example, a law that guarantees freedom of expression but that prohibits publication of magazines in a given language would be in violation of Article 1(1) of

(1) *LAC/HR*, Series A, N° 4, par. 30.

the American Convention, as this provision upholds the obligation not to discriminate.

4. In its July 29, 1988 Judgment in the Velásquez Rodríguez case, the Court laid out a new interpretation of Article 1(1) that would shape the Court's jurisprudence thereafter. It is interesting to examine the Court's reasoning in this judgment.

The Inter-American Commission on Human Rights had filed an application against Honduras, for the abduction and disappearance of Angel Manfredo Velásquez Rodríguez. In the application, Honduras was accused of having violated articles 7 (the right to personal liberty), 5 (the right to humane treatment), and 4 (the right to life) of the Convention.

After citing the text of Article 1(1) of the Convention, the Court wrote the following:

"This article specifies the obligation assumed by the States Parties in relation to each of the rights protected. Each claim alleging that one of those rights has been infringed necessarily implies that Article 1 (1) of the Convention has also been violated." ⁽²⁾.

The Court pointed out that while the Commission had not accused Honduras of having violated Article 1(1) of the American Convention, that did not preclude the Court from applying it by the principle *iura novit curia*.

Later in the judgment the Court spells out what obligations Article 1(1) of the American Convention imposes upon a State party, and writes that:

"The first obligation assumed by the States Parties under Article 1 (1) is 'to respect the rights and freedoms' recognized by the Convention ... The second obligation of the States Parties is to 'ensure' the free and full exercise of the rights recognized by the Convention to every person subject to its jurisdiction. This obligation implies the duty of States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation." ⁽³⁾

Reasoning thus and from the evidence produced, the Court concluded that Honduras had violated, in the case of Angel Manfredo Velásquez Rodríguez, the obligations to respect and to ensure the rights recognized in Articles 7, 5 and 4 of the American Convention, "read in conjunction with Article 1 (1) thereof."⁽⁴⁾

5. In Chapter II (Articles 3 through 25), the American Convention enumerates the civil and political rights that States undertake to respect and ensure. Article 2, for its part, establishes the States parties' obligation to adopt into their legal systems such legislative measures as may be necessary to give effect to those rights and freedoms. Article 1(1) provides that the rights and guarantees recognized in the Convention shall be respected 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) *LAC/HR*, Series C, N° 4, pp. 66-67, par. 162.

(3) *LAC/HR*, Series C, N° 4, pp. 67-69, paragraphs 165 and 166.

(4) *LAC/HR*, Series C, N° 4, pp. 79 and 80, par. 194.

6. Whereas in Advisory Opinion OC-4, the Inter-American Court interpreted Article 1(1) of the Convention as the obligation not to discriminate, since then – primarily since the Velásquez Rodríguez case- it has adopted a different interpretation and held that the provision establishes a generic obligation to comply with each and every one of the Convention’s provisions. In its judgments in the Velásquez Rodríguez and Godínez Cruz cases, the Court wrote that Article 1(1) of the American Convention

“specifies the obligation assumed by the States Parties in relation to each of the rights protected. Each claim alleging that one of those rights has been infringed necessarily implies that Article 1 (1) of the Convention has also been violated”⁽⁵⁾.

In its January 19, 1995 Judgment in the Neira Alegría case, the Court cited the above-quoted text and added that Article 1(1) is a general provision and its violation is always related to the violation of a provision that establishes a specific human right.⁽⁶⁾ In other words, by the Court’s interpretation, every time a right or guarantee protected under the Convention is violated, so, too, is its Article 1(1).

Article 1(1) is something of a paradox: it is an obligation that, by itself, can be neither violated nor fulfilled. In effect, Article 1(1) can only be violated if another article of the Convention is violated, and is not observed unless the Convention is being fully observed.

7. The Court’s interpretation of Article 1(1) means that the Convention contains a provision making the Convention mandatory; in other words, a clause wherein the Convention declares itself to be binding.

Let us take some examples to better understand the situation. Let us suppose that a country enacts a penal code in which each article describes the “offense,” i.e. the prohibited human behavior and the penalty that goes with it. Under Article 20 of this penal code, for example, burglary carries a penalty of one month to two years in prison; under Article 62, arson carries a penalty of one to four years’ imprisonment. Let us also suppose, for the sake of argument, that this penal code has an article 1 stating that “every inhabitant of the country shall be bound by this Code.” In such a situation, it could happen that when a person steals a chicken, the judge convicts him of violating Articles 1 and 20 of the penal code. Another person is accused of setting fire to his neighbor’s house; once the facts are proved, the judge convicts him of violating Articles 1 and 62 of the penal code. As one can clearly tell, the article 1 of our example would only be violated if another article of the code has been violated. By itself, the article prescribes nothing, and does not have the sense of a norm. All that it establishes is that the penal code is binding upon everyone. Such a provision might make sense in the country’s constitution, as it is understandable that a constitution would provide that laws are binding. However, what can be said in “constitutional” language cannot be said in “legislative” language because it is not normative in nature.

As a rule, civil codes contain a provision to the effect that validly negotiated contracts are binding upon the contracting parties. The rule is perfectly understandable. But if two people sign a contract to state that the contracts are binding upon them, this provision will seem superfluous and even meaningless. The

⁽⁵⁾ *LAC/HR*, Series C, N° 4, pp. 66-67; Series C, N° 5, p. 70.

⁽⁶⁾ *LAC/HR*, Series C, N° 20, p. 34.

rule that has one meaning in "legislative" language does not have the same meaning in "contractual" language. The obligation to perform the contracts cannot be expressed in "contractual" language; but if it is, it does not carry the meaning of a rule. At best, it will be a clause wherein the two parties declare that the contracts are binding upon them.

In general, in domestic legal systems a norm of superior rank can dictate that a norm of lesser rank is binding. Thus, a constitution can stipulate that a law is binding, and a law, in turn, can stipulate that contracts are binding. But a norm cannot stipulate to its own binding nature because such a clause is not normative.

8. An analogous situation occurs in international law. Let us take the example of Article 26 of the Vienna Convention on the Law of Treaties. The first part of that article states that "[E]very treaty in force is binding upon the parties to it". A clause of a convention stating that treaties are binding is not normative in nature; it is simply recognition of a norm that exists on another plane. The clause "every treaty is binding upon the parties to it" may carry the meaning of a norm in the realm of "customary" language; however, such a clause does not carry normative meaning in "treaty" language.

9. The inference here is that Article 1(1) of the American Convention should be interpreted as the Court interpreted it in its Advisory Opinion OC-4, that is to say as an obligation not to discriminate. The interpretation of Article 1(1) as a rule imposing a generic obligation to abide by the Convention robs that provision of any normative meaning. Therefore, as it has no normative meaning, I have had no difficulty contributing my vote to make this Judgment of the Court unanimous. However, because I believe that everything said should have meaning, I wanted to add this explanation. To say that "the State violated the right of access to the courts recognized in Articles 8(1) and 25 of the American Convention on Human Rights, in relation to Article 1(1) thereof" means the same as "the State violated the right of access to the courts recognized in Articles 8(1) and 25 of the American Convention on Human Rights."

Julio A. Barberis
Judge *ad hoc*

Manuel E. Ventura-Robles
Secretary