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978-1-107-00658-4 - The Practice and Procedure of the Inter-American Court of Human Rights: Second Edition

Jo M. Pasqualucci

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**THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT
OF HUMAN RIGHTS**
Second Edition

In this thoroughly revised second edition that incorporates the major changes made in the procedures and practice of the Inter-American Court since the original publication of this book, Jo M. Pasqualucci provides a comprehensive critique that is at once scholarly yet practical. She analyzes all aspects of the Court's advisory jurisdiction, contentious jurisdiction, and provisional measures orders through June 2012. She compares the practice and procedure of the Inter-American Court with that of the European Court of Human Rights, the International Court of Justice, and the United Nations Human Rights Committee. She discusses changes in the Rules of Procedure of the Inter-American Court that entered into force on January 1, 2010, and that substantially change the role of the Inter-American Commission in contentious cases before the Court. She also evaluates the challenges and means of State compliance with the Court's innovative reparations orders and describes several instances of State compliance and noncompliance.

Featuring revisions to every chapter to address the numerous new judgments, provisional measures, and orders adopted by the Court, this book will provide an important and updated resource for scholars, practitioners, and students of international human rights law.

Jo M. Pasqualucci is Professor of Law at the University of South Dakota. She earned an SJD in International and Comparative Law from George Washington University Law School and was affiliated with the Inter-American Court of Human Rights as a Fulbright scholar in Costa Rica. She lived in Central America for several years. Pasqualucci's articles on the Inter-American Court have been published in journals such as the *Stanford Journal of International Law*, *Michigan Journal of International Law*, *Virginia Journal of International Law*, *Wisconsin International Law Journal*, and the *Human Rights Law Review*.

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who sparked and nurtured my love of learning*

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Foreword

In 1978, when the American Convention on Human Rights entered into force, much of Central America and South America was ruled by dictatorships of either the right or the left. Of the eleven States whose ratifications had brought the Convention into force, fewer than one-half had democratically elected governments at the time. The remainder ratified for a variety of political reasons, including the pressure brought to bear by the Carter administration and the fact that some of these States were convinced that ratification posed no serious risks to them because the system established by the Convention would never be implemented. Effective human rights institutions were not something many governments in the region believed in at the time, but they were not opposed to a little window dressing for propaganda purposes. The attitude of these regimes toward human rights was graphically demonstrated when, shortly after the Convention entered into force, the General Assembly of the Organization of American States (OAS) failed to adopt a budget for the newly created Inter-American Court of Human Rights. Had it not been for funds provided by Costa Rica, the Court would have been paralyzed even before it began to perform its functions.

Over the years, however, the political climate in the Americas changed gradually, making it possible for the Inter-American system for the protection of human rights to play an increasingly important role. The fact that today all Latin American governments in the region, with the exception of Cuba, have been democratically elected has produced significant improvements in the human rights situation in these countries. These states have now also ratified the Convention and accepted the jurisdiction of the Court. This leaves only a small number of OAS member states – some Commonwealth Caribbean countries as well as the United States and Canada – out of the system established by the Convention.

The increase in the number of ratifications of the Convention and acceptances of the Court's jurisdiction has made it possible for more and more cases to be referred to the Court. Today the Court can point to a significant body of law that

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has evolved from its judgments in contentious cases, its advisory opinions, as well as its provisional measures. In her book, Professor Jo M. Pasqualucci provides the first truly comprehensive and up-to-date analysis of this practice. Here we have a book that needed to be written. It puts all of us interested in the work and role of the Inter-American Court in her debt for writing it and for the fine scholarship it represents.

Scholars and practitioners will find in this book a valuable review of all relevant elements of the Court's practice, including issues relating to admissibility, fact-finding, provisional measures, oral and written proceedings, and scope of judgments. Also discussed are those aspects of the practice of the Inter-American Commission on Human Rights that bear on the work of the Court. The author discusses the new Rules of Procedure of the Court and the Commission and the legal consequences they have for the interrelationship between these two institutions. In addition to providing the reader with a practical guide to the Court's procedure and *modus operandi* that practitioners should find particularly useful, Professor Pasqualucci succeeds in carefully analyzing the Court's practice in a creative and sound critical manner.

There is a great deal of material in these pages that scholars will find of value in seeking to understand the Court's jurisprudence and how it has evolved over the years. The book contains important insights about the Court's methodology and its transformation of the American Convention into an effective tool for the protection of human rights in the Americas, as well as various examples of the Court's contribution to international human rights law in general. No one trying to understand the manner in which the Court functions can afford to be without this book.

Professor Pasqualucci had been working on this book, which started as a doctoral dissertation, on and off for more than a decade. This led me and my successors as her dissertation supervisors to become increasingly concerned that the book would never see the light of day. Now it is clear, however, that at the time when we encouraged her to get on with the job, the Court's practice had not reached the level of judicial maturity or ripeness that would have enabled her to produce the truly valuable work she has now published. An impatient former professor herewith admits his error and expresses his delight with his former student's wisdom and patient scholarship that have resulted in the publication of this outstanding work.

Thomas Buergenthal
*Former President of the Inter-American
Court and Judge, International Court of
Justice*

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Preface to the Second Edition

Since the first edition of this book was published in 2003, the Inter-American Court of Human Rights has made major changes in its procedure and practice. In November 2009, as a result of a participatory and transparent communication process among all Inter-American human rights system participants, including Inter-American Court judges, commissioners, States, and civil society, the Inter-American Commission and the Inter-American Court modified their procedures relating to individual cases. The revised procedures make the Inter-American human rights system more efficient and transparent and further enhance the role of the victim. This second edition of the book incorporates the changes made in the procedures and practice of the Inter-American Court from 2003 through May 2012. During that time period, that Court has issued more than 135 new judgments, more than 300 provisional measures orders, and approximately 285 orders monitoring compliance with its judgments, which have allowed the Court to further develop its procedures in dealing with individual cases.

Chapter 1 provides a background of the Inter-American Court and introduces the changes made by the Commission and the Court since they redrafted their Rules of Procedure effective as of 2001. It also sets forth the stages of a sample case that was processed under the new procedures. The chapter concludes with a breakdown of the limitations and threats currently confronting the Inter-American Court in particular and the Inter-American human rights system in general.

Chapter 2 on Advisory Procedures needed little updating. The Court has issued only three advisory opinions since the first edition of this book was published in 2003. Most of the Court's activity has been in the area of its contentious jurisdiction and orders of provisional measures.

The former Chapter 3 on Preliminary Objections, which included jurisdictional challenges to the Court and complaints that the Commission had not followed the American Convention's admissibility procedures, has been divided into two chapters. The current Chapter 3 deals with proceedings before the Commission.

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All contentious cases must first be dealt with by the Commission before they can be referred to the Court. For those States that are not parties to the American Convention or have not accepted the jurisdiction of the Court, the proceeding before the Commission is the final stage in the Inter-American system. This chapter is relevant in that it sets forth the procedures with which the petitioners and the Commission are to comply if the Court is to reach the merits of the case. It is also the chapter that is most relevant for complaints brought against the United States, Canada, Belize, and some English-speaking Caribbean States because those complaints are handled solely by the Commission.

The current Chapter 4 deals with jurisdictional issues before the American Court. The Court must have jurisdiction *ratione materiae*, *personae*, *temporis*, and *loci* to consider a case. The Court has particularly refined its jurisprudence in the area of jurisdiction *ratione temporis* for continuing violations, which are those violations that began before the State was subject to the Court's jurisdiction but that continued thereafter.

Chapter 5 describes and analyzes changes to the Court's procedures in contentious cases, particularly the revised role of the Inter-American Commission, which no longer represents victims before the Court. The Commission now represents the Inter-American public order of human rights. An Inter-American public defender is assigned to represent alleged victims who cannot afford legal representation, and the Victims' Legal Assistance Fund may pay for the production of evidence. The Court has also established expedited procedures to deal with the increased number of cases forwarded to it by the Commission, and it has further developed its evidentiary criteria.

Chapter 6 on Reparations has been completely reorganized to reflect the Court's well-developed jurisprudence in the area of reparations. In the last decade, the Court has honed its sweeping orders of victim-centered and community-centered equitable remedies, including measures of restitution, satisfaction, rehabilitation, and guarantees of nonrepetition. The Court has dealt with many multi-victim cases, some involving hundreds of victims who have been affected by massacres. These cases have required innovative forms of reparations. The Court has also rendered decisions in indigenous land rights cases in which it has ordered States to return ancestral lands to the indigenous people or to demarcate and grant them title to the lands on which they live. The Court's remedial orders may require compliance not only by the executive branch of the domestic government but also by the legislative and judicial branches.

Chapter 7 on Provisional Measures includes the modified grounds and procedures developed by the Court in ordering provisional measures. It evaluates the Court's standards for gravity, urgency, and irreparable damage to persons and sets forth the types of conditions in which the Court is likely to order or maintain provisional measures and when it is likely to terminate them. The chapter also analyzes State compliance and noncompliance with various orders of provisional measures.

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Chapter 8 on State compliance sets forth those areas of Court-ordered reparations with which States have high, medium, and low rates of compliance. It focuses on the Court's monitoring of its reparations orders, evaluates the reasons that States do not comply with specific types of reparations, analyzes difficulties hindering State compliance, offers some resolutions, and provides examples of State compliance with every type of reparations ordered by the Court.

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Preface

This work is the culmination of fifteen years of study of the Inter-American Court of Human Rights. I did not set out to study the Inter-American Court. In 1986, during my final year of law school, I was in the office of Professor Richard Bilder at the University of Wisconsin. I had decided to apply for a Fulbright fellowship, and he was helping me formulate my proposal. At that moment, Professor Bilder received a telephone call from his longtime friend Thomas Buergenthal, a judge on the Inter-American Court of Human Rights. In their conversation Professor Bilder mentioned that there was a student in his office who spoke Spanish and who was applying for a Fulbright to Central America. Judge Buergenthal immediately saw the possibility of having assistance with legal research. He offered to write a letter to the Fulbright Commission inviting me to be affiliated with the Court. That serendipitous telephone call led to my long-term relationship with the Inter-American Court and to the focus of my subsequent scholarship.

I began my tenure at the Court in 1986 when it was considering its first contentious cases, the *Honduran Disappearance Cases*. The experience opened my eyes to the realities of human rights abuse. I cried over letters in the file from the father of Francisco Fairén Garbí, a Costa Rican youth who disappeared on a trip through Central America. I vacillated between despair at the cruelty reflected in the facts of the cases, and excitement and awe at being present and involved in this historic stage of the Court's evolution. The Court was only beginning to set its jurisdictional parameters and to establish its rules on practice and procedure. It was like clerking for the U.S. Supreme Court in the days of John Marshall.

I remember long talks with Judge Buergenthal in which he expressed his absolute faith that we were slowly, step by step, building a system that would some day function effectively to protect human rights in the Western hemisphere. At that time there was little evidence that his faith would be fulfilled. Even the mention of human rights in many Latin American countries could result in the speaker being labeled a "communist." The Inter-American system was not functioning optimally.

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Preface

The Commission, which had been in existence since 1960, did not refer contentious cases to the Court for several years after the Court's formation. As a result, in the Court's first seven years of existence, the Court handed down only advisory opinions. Judge Buergenthal's quiet optimism and his belief in a positive future had a profound influence on my outlook. He explained the basis for his attitude in a speech that he delivered in 1986, when he, a Jewish survivor of Auschwitz and Sachsenhausen, accepted an honorary doctorate from the University of Heidelberg Faculty of Law in Germany. In it he asked,

Who would have thought in 1939, for example, that I would be standing here today; who would have believed in 1940 that there would exist a European Community composed of democratic nations, a European Parliament and a European Commission and Court of Human Rights, and that a new Germany would be a very important part of it all? Who would have believed then that at least a part of the Europe of old, with its nationalistic animosities and military rivalries, would undergo this transformation? Certainly no realist, and probably not even your average idealist. For an international lawyer who works in the field of human rights, these developments and the many others I could cite are a strong medicine against the loss of faith and a strong incentive for believing that what may appear impossible today may well come true tomorrow or the day after.

In every State, even those that appear to be the most recalcitrant human rights offenders, there are those who are attempting to enforce the rule of law. Those persons and organizations take great risks promoting democracy and human rights. Most others, although not active out of fear or malaise, would prefer to live in a State where human rights are observed. When the domestic institutions do not have the will or are not capable of prosecuting human rights violations and bringing human rights violators to justice, resort to international enforcement organs, such as the Inter-American Commission and Court, may be the only avenue to strengthen and support those on the domestic plane who are fighting for justice.

It is my hope that this study of the practice and procedure of the Inter-American Court will contribute to making possible the effective protection of human rights in the Americas. Procedural transparency, effectiveness, and efficiency are essential to the enforcement of substantive human rights. As such, the procedural evolution and the practice of the Inter-American Court have direct bearing on the fulfillment of individual human rights in the Americas.

This book includes, when relevant, an analysis of the cases and opinions rendered by the Court through May 2012, and of the Rules of Procedure of the Court and Commission that came into effect in 2010. Portions of earlier versions of chapters of this book have been published as "Advisory Practice of the Inter-American Court of Human Rights: Contributing to the Evolution of International Human Rights Law," 38 *Stanford Journal of International Law*, 241 (2002); "Preliminary Objections Before the Inter-American Court of Human Rights," 40 *Virginia Journal of International*

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It seems to me and to most people who know me that I have been writing this book for my entire professional life. No sooner did I finish a chapter than the Inter-American Court would render a judgment or update its Rules of Procedure that would necessitate rewriting and updating it. Throughout this ordeal, my friends and colleagues have remained supportive, always asking the obligatory question, “How is your book coming along?” and then listening to the recital of my latest insight or frustration. I would like to thank them for their interest and understanding.

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