

Inter-American Court of Human Rights—American Convention on Human Rights—Vienna Convention on the Law of Treaties—jurisdiction—estoppel—internal law as justification for failure to perform treaty obligation

IN RE DIRECT ACTION OF UNCONSTITUTIONALITY INITIATED AGAINST THE DECLARATION OF ACCEPTANCE OF THE JURISDICTION OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS. Judgment No. TC/0256/14. At <http://www.tribunalconstitucional.gob.do/Sentencias>. Constitutional Tribunal of the Dominican Republic, November 4, 2014.

The Dominican Republic (DR) filed its declaration accepting the jurisdiction of the Inter-American Court of Human Rights (Inter-American Court or Court) on March 22, 1999, and since then has been the subject of four judgments¹ and a series of provisional measures. On November 4, 2014, however, the Constitutional Tribunal of the Dominican Republic (Tribunal) declared unconstitutional the government's declaration accepting jurisdiction, implying that the Dominican Republic is not now, and perhaps never has been, under the Inter-American Court's jurisdiction.²

The case arose when a group of Dominican citizens filed suit, arguing that without congressional approval the acceptance declaration lacked legal effect. Like many constitutions in the Americas, the Dominican Constitution prescribes that the national Congress must approve treaties negotiated by the executive.³ Congress approved ratification of the American Convention on Human Rights (American Convention or Convention) in 1978, but the Dominican president did not seek further congressional approval before accepting the Inter-American Court's jurisdiction in 1999. The Tribunal's ruling turned on whether the declaration accepting jurisdiction is itself a "treaty."

The attorney general and three amici curiae⁴ argued before the Tribunal that a declaration accepting the jurisdiction of the Inter-American Court is not a treaty requiring congressional approval because the American Convention itself empowers state parties to accept the Court's jurisdiction by declaration at the time of ratification or any time thereafter.⁵ They contended that any such acceptance therefore "results from the exercise of authority contained in an international treaty that has been approved by Congress, as is

¹ Expelled Dominicans and Haitians v. Dominican Republic, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 282 (Aug. 28, 2014); Nadege Dorzema v. Dominican Republic, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 251 (Oct. 24, 2012); González Medina v. Dominican Republic, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 240 (Feb. 27, 2012); The Girls Yean v. Dominican Republic, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 130 (Sept. 8, 2005).

² Relativo a la acción directa de inconstitucionalidad incoada contra el Instrumento de Aceptación de la Competencia de la Corte Interamericana de Derechos Humanos [*In re* Direct Action of Unconstitutionality Initiated Against the Declaration of Acceptance of the Jurisdiction of the Inter-American Court of Human Rights], Judgment No. TC/0256/14 (Trib. Const. Dom. Rep. 4 de noviembre de 2014), at <http://www.tribunalconstitucional.gob.do/Sentencias>. Translations from the Spanish are by the authors.

³ CONSTITUCIÓN, el 25 de julio de 2002, Arts. 37(14), 55(6) (corresponding to the provisions in force at the time of acceptance in 1999).

⁴ Amicus briefs were submitted by the Consejo Latinoamericano de Estudiosos de Derecho Internacional y Comparado, Capítulo República Dominicana (COLADIC-RD), a local scholarly nongovernmental organization, and by renowned lawyers and legal academics.

⁵ American Convention on Human Rights, Art. 62, Nov. 22, 1969, OASTS No. B-32, 1144 UNTS 123.

the case of the American Convention.”⁶ It is a unilateral act of a state party acting within the framework of the American Convention.⁷ The nonautonomous legal nature of the declaration is shown by the fact that a state party can withdraw from the Inter-American Court’s jurisdiction only by denouncing the Convention.⁸

The Dominican Tribunal viewed the declaration from a different perspective. It elided the argument that the declaration is not a treaty by focusing on the instrument’s domestic consequences rather than the international definition of a treaty. The declaration, it observed, has “the capacity to produce juridical effects on the international plane,” which in turn have repercussions “in internal law and affect Dominicans directly” (para. 9.18). Therefore, such an act should require the participation of Congress beyond the initial vote ratifying the underlying Convention. This reasoning was especially apt here, where the instrument “could harm national sovereignty, the principle of separation of powers, and the principle of nonintervention in the country’s internal affairs” (para. 9.19). The Tribunal thus concluded that the instrument by which the Dominican Republic accepted the jurisdiction of the Inter-American Court was unconstitutional.

In its analysis, the Tribunal acknowledged that the Dominican Republic had followed the procedure set forth in the American Convention for accepting the Inter-American Court’s jurisdiction. The Tribunal further acknowledged that, under the Vienna Convention on the Law of Treaties, a state must uphold its treaty obligations in good faith and may not invoke a provision of internal law to justify a failure to perform its treaty obligations.⁹ Finally, perhaps as a signal to the executive about the preferred course of action, the judges acknowledged that the only way to escape the Inter-American Court’s jurisdiction, once accepted, is by denouncing the Convention. Nonetheless, they relied on Article 46 of the Vienna Convention to argue that a state may invoke the fact that its consent to be bound was expressed in violation of internal law if “that violation was manifest and concerned a rule of its internal law of fundamental importance.”¹⁰ The Tribunal concluded that “a simple reading” of the relevant articles in the Vienna Convention “immediately reveals” the applicability of Article 46 because the declaration of acceptance was submitted “in violation of our Constitution, supreme norm and foundation of the judicial order of the Dominican State” (paras. 9.5–.6).

The Tribunal considered, but dismissed, arguments based on acquiescence and reliance. For example, it did not matter that in the interim years the Dominican Republic had actively litigated cases before the Inter-American Court, or that the executive, Congress, Supreme Court, and Constitutional Tribunal itself had each acknowledged the Inter-American Court’s jurisdiction by law and in their actions and declarations. Nor did the Tribunal accept the argument that the Dominican Republic is estopped from changing a legal posture on which another party has relied in good faith.

⁶ Brief of Amicus Curiae COLADIC-RD at 15, Judgment No. TC/0256/14 (2014), at http://www.coladic-rd.org/images/Esrito_de_Amicus_Curiae_COLADIC-RD_-_Inconstitucionalidad_Competencia_Corte_IDH_depositado.pdf [hereinafter COLADIC-RD Brief].

⁷ *Id.* at 14.

⁸ Constitutional Court v. Peru, Competence, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 55, paras. 49–50 (Sept. 24, 1999).

⁹ Vienna Convention on the Law of Treaties, Arts. 26, 27, May 23, 1969, 1155 UNTS 331 [hereinafter Vienna Convention].

¹⁰ *Id.*, Art. 46(1).

The present judgment leaves the DR government in a quandary. Under international law, the Dominican Republic remains subject to the Inter-American Court's jurisdiction, bound to appear before the Court and to comply with its rulings. Internally, however, the effect of the judgment may be to bar authorities in the Dominican Republic from domestic actions to implement the Court's judgments.

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The Constitutional Tribunal's judgment on the Dominican declaration of acceptance represents the latest salvo in the ongoing and tense interaction between the Dominican Republic and the inter-American human rights system over the status of Dominican-born residents and citizens of Haitian descent. The Tribunal made international headlines in 2013 by ordering the executive to review and rescind retroactively the citizenship of tens of thousands of Dominican-born citizens.¹¹ The judgment potentially rendered this group of individuals stateless and left them unable to access schooling, social security, medical care, and other benefits afforded to Dominican nationals. Less than a year later, the Inter-American Court issued a judgment in which it determined that the Dominican Republic had violated the human rights of twenty-six people—among them fifteen children—as a result of discrimination, forcible expulsions, denationalization policies, and breach of duty to prevent statelessness. The Court found the existence of a “systematic pattern of expulsions . . . that were based on a discriminatory concept.”¹² The Dominican government almost immediately issued a statement rejecting the Inter-American Court's 2014 judgment.¹³ The findings of racism and discrimination against those of Haitian descent are a highly contentious matter in Dominican politics and are construed by nationalists as striking at the heart of Dominican identity and autonomy.

The Tribunal's ruling that the Dominican Republic is not under the Inter-American Court's jurisdiction came just two months after the Inter-American Court's 2014 judgment.¹⁴ It is particularly troubling because it potentially denies protection of convention rights to a highly vulnerable minority group within the country. The judgment and its reasoning could also pose a more widespread challenge to generally accepted executive powers with respect to foreign affairs, including reservations to treaties, optional clauses in agreements, and termination of acceptance of optional clauses.¹⁵ The Dominican Tribunal appears to have sought an easy way for high courts to contrive an escape route from the Inter-American Court's oversight.

¹¹ Relativo al recurso de revisión constitucional en materia de amparo incoado contra la Sentencia núm. 473/2012 dictada por la Cámara Civil, Comercial y de Trabajo del Juzgado de Primera Instancia del Distrito Judicial de Monte Plata [*In re* Recourse to Constitutional Revision in the Matter of Protection Initiated Against Judgment No. 473/2012 by the Civil, Commercial and Labor Chamber of the Tribunal of First Instance of the Monte Plata District], Judgment No. TC/0168/13 (Trib. Const. Dom. Rep. 23 de septiembre de 2013), at <http://tribunalconstitucional.gob.do/node/1764> [hereinafter Judgment No. TC/0168/13].

¹² *Expelled Dominicans and Haitians*, *supra* note 1, para. 171.

¹³ Presidencia República Dominicana, El Gobierno dominicano rechaza la sentencia de la Corte Interamericana de Derechos Humanos (Oct. 23, 2014), at <http://presidencia.gob.do/noticias/el-gobierno-dominicano-rechaza-la-sentencia-de-la-corte-interamericana-de-derechos-humanos>.

¹⁴ The perception that the Constitutional Tribunal was acting politically was enhanced by the revelation that the majority judges originally published the opinion without two of the dissenting opinions. The dissents were appended only later.

¹⁵ President Ronald Reagan terminated United States acceptance of the optional clause accepting compulsory jurisdiction of the International Court of Justice on October 7, 1985, without referring the matter to Congress. See United States: Department of State Letter and Statement Concerning Termination of Acceptance of I.C.J. Compulsory Jurisdiction, 24 ILM 1742 (1985).

The judgment is problematic as a matter of international law for several reasons. It does not discuss the Vienna Convention's requirement that a violation of domestic law relating to the acceptance of a treaty be manifest, or "objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith."¹⁶ This omission is notable because each branch of the DR government has taken action confirming the Inter-American Court's jurisdiction since the Court's jurisdiction was accepted in 1999. As previously mentioned, the Dominican Republic has been the subject of four contentious judgments¹⁷ and a series of provisional measures issued by the Inter-American Court. In each instance, the DR executive branch participated in the litigation, appeared before the Court, and at least partly implemented the Court's orders. Although the executive "rejected" the most recent judgment against it in October 2014, its statement reiterated the Dominican Republic's commitment to the inter-American system.¹⁸

For its part, the Dominican Congress in 2011 wrote the Inter-American Court into the law regulating the Constitutional Tribunal by mandating that the Tribunal implement judgments of the Inter-American Court.¹⁹ The Tribunal, in turn, declared in 2013 that "the judgments of the Inter-American Court of Human Rights are of a binding character" in the Dominican Republic.²⁰ The Supreme Court had earlier introduced the doctrine of the "constitutional block" to the Dominican Republic. According to this doctrine, the constitutional system is made up not only of national law, but also of international law, including human rights treaties and "the decisions that emanate from the Inter-American Court of Human Rights."²¹ Indeed, Dominican judges often cite the Inter-American Court in their own judgments interpreting local rights and laws.²²

The Tribunal reasoned that estoppel does not apply because these many instances of acquiescence were based on the mistaken assumption that the declaration accepting jurisdiction was valid (para. 9.9). The finding that the declaration was unconstitutional "introduced a new factor that could entirely change the situation" (*id.*). The Tribunal did not consider either the doctrine of unilateral commitments or the "extent to which those to whom the obligations are owed have relied on such obligations."²³ Thus, it was able to conclude that neither the doctrine of estoppel nor the Vienna Convention on the Law of Treaties binds the Dominican Republic to the jurisdiction of the Inter-American Court. This conclusion ignored that although the Tribunal has the final word on matters of constitutional law,²⁴ the Dominican Republic's responsibility under the American Convention is a matter for inter-American institutions and the law of state responsibility.

¹⁶ Vienna Convention, *supra* note 9, Art. 46(2).

¹⁷ See *supra* note 1.

¹⁸ See Presidencia República Dominicana, *supra* note 13.

¹⁹ Ley No. 137-11 Orgánica del Tribunal Constitucional y de los procedimientos constitucionales, Gaceta Oficial No. 10622, 15 de junio de 2011, considerando [operative clause] 13 ("That among the constitutional procedures to be regulated are precautionary control of international treaties and regulation of the execution of judgments of the Inter-American Court of Human Rights").

²⁰ Judgment No. TC/0168/13, *supra* note 11, para. 1.2.3.5.1.

²¹ Suprema Corte de Justicia, Dios, Patria y Libertad, Resolución 1920-2003 (13 de noviembre de 2003).

²² COLADIC-RD Brief, *supra* note 6, at 52.

²³ Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations, princ. 10(2), in Report of the International Law Commission, Fifty-Eighth Session 367, 380, UN GAOR, 61st Sess., Supp. No. 10, UN Doc. A/61/10 (2006) [hereinafter Guiding Principles].

²⁴ Ley No. 137-11, *supra* note 19, considerando 7 ("That the decisions of the Constitutional Tribunal are definitive and irrevocable and constitute binding precedents for all the public authorities and organs of the state").

The Tribunal was also mistaken to treat the unilateral declaration accepting the Inter-American Court's jurisdiction as a treaty, rather than as an option afforded to the government within and pursuant to the ratified American Convention. It is relevant that the International Court of Justice has referred to similar declarations accepting its compulsory jurisdiction as "facultative, unilateral engagements" adding, however, that "the unilateral nature of declarations does not signify that the State making the declaration is free to amend the scope and the contents of its solemn commitments as it pleases."²⁵ Such declarations, when filed, establish a network of engagements in which the principle of good faith plays an important role.²⁶

Several states in the inter-American system, but not the Dominican Republic, had previously sought to reserve a right to withdraw at will from the Court's contentious jurisdiction,²⁷ but the Court rejected such efforts in the Peruvian *Constitutional Court* case. In its judgment, the Court distinguished unilateral acts carried out in the context of purely interstate relations from those carried out within the framework of treaty law, "such as acceptance of an optional clause recognizing the binding jurisdiction of an international court. That acceptance is determined and shaped by the treaty itself and, in particular, through fulfillment of its object and purpose."²⁸ The Inter-American Court's constant jurisprudence on the object and purpose of the Convention as one for the effective protection of human rights suggests that it would most likely disagree with the Tribunal about the invalidity of the government's declaration of 1999.

Further, even if the declaration were considered a treaty under domestic constitutional law, that quality would not invalidate the instrument or its effect in international law. As noted above, a state may not challenge a treaty's validity owing to a conflict with internal law *unless* the conflict is "objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith."²⁹ The Tribunal seemed to conclude that the requirement of congressional approval was manifest because it forms part of the Constitution, yet the Dominican Republic's executive, Congress, Supreme Court, and Constitutional Tribunal failed to question the declaration's validity for fifteen years, strongly suggesting that the legal impediment was not "objectively evident."

In addition, heads of state and foreign ministers clearly have the inherent capacity to bind the state internationally.³⁰ Thus, even if a unilateral declaration were to be considered under domestic law to be a treaty separate from the American Convention, the deposit of this declaration by the Dominican president would be understood as expressing the consent of the state to be bound internationally. It would therefore hardly be manifest to anyone outside the country that the head of state lacked internal power to make such a declaration.

Finally, the Tribunal misconstrued the doctrine of estoppel, which is "a means of excluding a denial that might be *correct*—irrespective of its correctness,"³¹ and it should have addressed

²⁵ Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Jurisdiction and Admissibility, 1984 ICJ REP. 392, 418, para. 59 (Nov. 26) [hereinafter Military and Paramilitary Activities].

²⁶ *Id.*, para. 60.

²⁷ The declarations by Colombia, Ecuador, El Salvador, and Mexico include statements reserving the right to withdraw from the Court at any time; the Court has not had occasion to rule on any of these statements. See American Convention on Human Rights, General Information of the Treaty: B-32, at http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm.

²⁸ Constitutional Court v. Peru, *supra* note 8, para. 48.

²⁹ See text at note 16 *supra*.

³⁰ Vienna Convention, *supra* note 9, Art. 7(2).

³¹ Temple of Preah Vihear (Cambodia v. Thai.), 1962 ICJ REP. 6, 63 (June 15) (sep. op. Fitzmaurice, J.).

the question of detrimental reliance.³² In this instance Dominican governmental bodies, other state parties, inter-American institutions, and, most important, the individuals whose human rights are protected by the inter-American system all relied on the declaration of acceptance. The International Court of Justice has held that the “constant acquiescence” of a state in affirmations of its acceptance of compulsory jurisdiction “constitutes a valid mode of manifestation of its intent to recognize the compulsory jurisdiction” of the court even if the actual mode of acceptance was defective.³³

The government of the Dominican Republic now finds itself bound under international law to obey a court whose jurisdiction the Constitutional Tribunal has held unconstitutional. There is no easy way forward. The Dominican government could follow Venezuela and denounce the American Convention. As Venezuela has found, however, denouncing the Convention does not serve to remove scrutiny for human rights violations; as long as the state remains a member of the Organization of American States, it falls within the jurisdiction of the Inter-American Commission on Human Rights (Commission), to which individuals may continue to bring complaints under the American Declaration on the Rights and Duties of Man. Further, cases opened before the denunciation would continue to be processed. Consequently, denouncing the treaty will neither insulate the Dominican Republic from its substantive human rights obligations nor shield it from international scrutiny. Moreover, denunciation would come with significant political costs.

Alternatively, but as a dangerous precedent from the perspective of executive powers, the Dominican Republic could formally submit an instrument accepting the jurisdiction of the Inter-American Court to Congress, with retroactive effect. Finally, the government could choose to take a strictly dualist approach and litigate cases at the Commission and the Court, accepting that the judgments would lack domestic legal effect without implementing laws in each instance.

Whatever choice the Dominican Republic makes, the inter-American system will continue to monitor the situation there. The Commission has long had the treatment of Haitian residents of the Dominican Republic under consideration, having carried out several on-site visits since 1961.³⁴ Following the 2013 judgment, for example, the Commission immediately sought and received permission to conduct an on-site visit to the Dominican Republic, which took place on December 2–5, 2013. The plenary Commission participated, reflecting the importance of the matter. In an unprecedented procedure, the Commission delivered a preliminary report on its findings to a meeting of the Permanent Council in February 2014.³⁵ In addition, the Commission has processed petitions and requests for precautionary measures from the Dominican Republic.

³² Guiding Principles, *supra* note 23, princ. 10(2).

³³ Military and Paramilitary Activities, *supra* note 25, para. 47.

³⁴ The 2013 report was unpublished as of September 2015. For the most recent published report, see Inter-Am. Comm'n Hum. Rts., Report on the Situation of Human Rights in the Dominican Republic, OEA/Ser.L/V/II.104, doc. 49 rev.1 (1999). Earlier reports are available in Spanish only at <http://www.oas.org/en/iachr/reports/country.asp>.

³⁵ Press Release E-054/14, Organization of American States, OAS Permanent Council Debates Situation in Venezuela and Receives Preliminary Report on IACHR Visit to Dominican Republic (Feb. 19, 2014), at <http://www.oas.org>.

The Dominican Republic is not the first state to have challenged the Inter-American Court's authority.³⁶ The inter-American human rights system recently survived a reform process led by various states seeking to curb the powers of the regional bodies. But backlash and rejection are only part of the picture and must be set against the larger canvas of constitutional ferment in the region, and of emerging judicial dialogue on rights issues, with primacy of place afforded to the Inter-American Court. Even as the Dominican Republic and a few other states question the authority of the Court, many others comply with its orders, change their laws in response to its rulings, and, increasingly, use its jurisprudence as a lens for interpreting their own constitutional commitments. In many judicial systems in the region—including that of the Dominican Republic—litigants may directly challenge laws and state action under the American Convention, as interpreted by the Inter-American Court.³⁷ Further, the states that engage proactively with the inter-American system increasingly criticize those that do not, including through discussions in the political bodies of the Organization of American States. In this context, the Dominican Republic is going against the grain of regional norms and policies, with potentially devastating results for the human rights of those within the country.

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³⁶ Trinidad and Tobago and Venezuela denounced the American Convention because of disagreement with judgments of the Inter-American Court, and the Fujimori government of Peru tried unsuccessfully in 1998 to escape the Court's jurisdiction without making such a denunciation.

³⁷ See, e.g., Christina M. Cerna, Case Report: Unconstitutionality of Article 57, Section II, Paragraph a) of the Code of Military Justice and Legitimation of the Injured Party and His Family to Present an Appeal for the Protection of Constitutional Rights, 107 AJIL 199 (2013).