

MOIWANA VILLAGE: THE INTER-AMERICAN COURT AND THE “CONTINUING VIOLATION” DOCTRINE

INTRODUCTION

In *Moiwana Village v. Suriname*,¹ the Inter-American Court of Human Rights asserted indirect jurisdiction over a state violation of human rights, even though the violation occurred before Suriname accepted jurisdiction and before that State even became a party to the American Convention on Human Rights (the international treaty from which the Court derives its authority).² In exercising jurisdiction, the Inter-American Court of Human Rights technically managed to stay within the limits its founding documents imposed by rejecting *direct* adjudicatory authority over the incident while still exercising *de facto* power to remedy violations occurring prior to the signing of the American Convention on Human Rights.

This Recent Development proceeds in four Parts. I begin by explaining the Inter-American adjudicatory system in the context of *Moiwana Village v. Suriname*. In the second Part, I both define and put forth arguments for asserting jurisdiction based on the doctrine of “continuing violation” and describe the limitations placed on that doctrine by the Court. I then outline the reasons many oppose the doctrine, and in the last section, I discuss the practical limitations to this substantial power that the Inter-American Court of Human Rights has put in place.

I. INTER-AMERICAN ADJUDICATORY SYSTEM

On November 29, 1986, “members of the armed forces of Suriname attacked the N’djuka Maroon village of Moiwana.”³ Those “[s]tate agents . . . massacred over 40 men, women and children, and razed the village to the ground. Those who escaped the attack . . . fled into the surrounding forest, and then into exile or internal displacement.”⁴ On November 12, 1987, almost a year later and under a new democratically elected government, Suriname simultaneously ratified the American Convention on Human Rights (“American Convention”) and recognized the jurisdiction of the Inter-American Court of Human Rights.⁵

Almost ten years later, on June 27, 1997, a petition was filed with the Inter-American Commission on Human Rights (“Inter-American Commission”).

1. *Moiwana Village v. Suriname*, Inter-Am. Ct. H.R. (ser. C) No. 124, at 1 (June 15, 2005).

2. American Convention on Human Rights (“Pact of San Jose, Costa Rica”), Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter American Convention].

3. *Moiwana Village*, *supra* note 1, at 2.

4. *Id.*

5. Basic Documents—Ratifications of the Convention, <http://www.cidh.org/Basicos/basic4.htm> (last visited Jan. 29, 2006).

After almost three years of back and forth fact-finding between the State and the petitioners, the Inter-American Commission decided to admit the claims concerning Articles 25,⁶ 8,⁷ and 1(1)⁸ of the American Convention. After two years, the Inter-American Commission published a report with a series of recommendations for Suriname. Above all, the Commission recommended opening a “serious, impartial, and effective investigation . . . so that an official report can be produced . . . and [so that the perpetrators may be] duly tried and punished.”⁹ At this point, the Inter-American Commission could decide whether or not to refer the case to the other enforcement organization within the Inter-American system, the Inter-American Court of Human Rights (“Inter-American Court”). The Inter-American Court acts as an independent body that often receives referrals from the Inter-American Commission, even while it conducts its own investigations in other unrelated cases. When Suriname contested both the final report’s findings and the admissibility of the case, the Inter-American Commission referred the case to the Inter-American Court in a last effort to secure compliance.

The Court asserted jurisdiction by holding that Suriname’s failure “to investigate . . . starting from the date when Suriname recognized the Tribunal’s competence”¹⁰ formed the basis for the Court’s jurisdiction. After repeating the fact-finding process, the Court agreed with the Commission, holding that Suriname had violated its citizens’ rights under the American Convention—discounting the fact that Suriname had not signed the Convention until after the incident—and followed the Commission in condemning the State’s failure to conduct an adequate investigation of the massacre. “[N]o one had been prosecuted or punished and the survivors remained displaced from their lands.”¹¹

Considered in conjunction with a State’s obligation to “respect” and “ensure” the rights detailed in the American Convention,¹² the Inter-American Court essentially held that a State is obligated to investigate and prosecute all violations of human rights, even if that violation occurred before ratification of the Convention. This textual interpretation of its founding documents allows the Court to use the “continuing violation” doctrine to remedy almost *any* violation that occurs in a given Latin American country.

II. DOCTRINE OF “CONTINUING VIOLATION”

“[I]n the case of a continuing or permanent violation, which begins before the acceptance of the Court’s jurisdiction and persists even after that acceptance, the Tribunal is competent to examine the actions and omissions oc-

6. American Convention, *supra* note 2, art. 25.

7. *Id.* art. 8.

8. *Id.* art. 1(1).

9. *Moiwana Village*, *supra* note 1, at 3.

10. *Id.* at 10.

11. *Id.* at 2.

12. American Convention, *supra* note 2, art. 1(1).

curring subsequent to the recognition of jurisdiction, as well as their respective effects.”¹³ This doctrine of “continuing violation” has been used by the Inter-American Court or Inter-American Commission to exert authority over any failure to investigate a past violation on grounds that an ongoing failure violates victims’ Convention-protected right to judicial protection.¹⁴ Essentially, this allows the Court to exercise *de facto* jurisdiction over any past violations of human rights that received what the Court deems an inadequate investigation. Indeed, a failure to investigate also constitutes a failure to “ensure”¹⁵ a citizen’s rights to judicial protection and to a fair trial as long as that failure continues.

That logic held sway here. In that sense, the violations did continue to occur after the signing of the American Convention. The Inter-American Court ultimately decided that in every moment Suriname failed to investigate the massacre after signing the Convention, the State violated many of the victims’ rights,¹⁶ including the right to a fair trial¹⁷ and to judicial protection.¹⁸

With this holding the Inter-American Court did not ignore its past decisions. In *Blake v. Guatemala*,¹⁹ for instance, the Court found that once Guatemala accepted the Court’s jurisdiction, any of its subsequent actions or inactions were subject to review, even if those actions arose out of an event that occurred prior to acceptance. Guatemala’s own failure to investigate had begun at the moment of the victim’s murder and continued until his body was discovered, five years after Guatemala’s acceptance of jurisdiction.

III. ARGUMENTS AGAINST THE DOCTRINE OF “CONTINUING VIOLATION”

The American Convention states:

The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, *provided that the States Parties to the case recognize or have recognized such jurisdiction*, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement.²⁰

Suriname made a compelling claim that the “continuing violation” doctrine goes beyond the Court’s power.²¹ Elaborating on that argument, the Court’s purpose “is the application and interpretation of the American Convention on Human Rights,” as long as that power is “exercised in accordance with the

13. *Moiwana Village*, *supra* note 1, at 10.

14. American Convention, *supra* note 2, art. 25.

15. *Id.* art. 1(1).

16. *Moiwana Village*, *supra* note 1, at 65.

17. American Convention, *supra* note 2, art. 8.

18. *Id.* art. 25.

19. *Blake v. Guatemala*, Inter-Am. Ct. H.R. (ser. C) No. 36, at 1 (July 2, 1996).

20. American Convention, *supra* note 2, art. 62(3) (emphasis added).

21. See *Moiwana Village*, *supra* note 1, at 7.

provisions of the . . . Convention.”²² Thus, the adjudicatory system is required to “consider inadmissible any petition . . . [if it] does not state facts that tend to establish a violation of the rights guaranteed by this Convention.”²³

The Moiwana massacre took place before Suriname signed the American Convention and before it recognized the jurisdiction of the Inter-American Court. Suriname has argued that these protections, therefore, did not extend to the victims at that time. While justice does call for some resolution, holding the perpetrators accountable by applying those rights to the victims in 1986 means applying the Convention, signed in 1987, to the State *ex post facto*. If states begin to believe that the Court is extending its jurisdictional grasp beyond the scope of the instrument that grants it judicial power, they could retract their recognition of jurisdiction and other states that have yet to join the adjudicatory system could be discouraged from doing so.²⁴

In addition, if one considers the main goal of the American Convention as ensuring that current sitting governments respect human rights, punishing a state for actions taken by previous regimes fails to advance that goal and could conceivably destabilize that government. The Moiwana Village case is a perfect example. The massacre occurred under a previous undemocratic regime, whereas today Suriname has a democratically elected government.

Although enforcing the doctrine of “continuing violation” would achieve the admirable goal of finally granting justice to the victims of human rights violations, it could do so at the expense of a still-fragile democracy. Were it not for the promise in Amnesty Act 1989²⁵ to protect the leaders of the undemocratic regime from any future retribution for crimes against humanity, Suriname could continue to be ruled by an authoritarian fist. The Amnesty Act may be applauded for bringing a halt to further human rights violations by allowing the citizens of Suriname to live under a democratic government. The perpetrators of similar past incidents could react violently to the functional recanting of the Act that compliance with the Inter-American system requires, with the consequences of driving Suriname back into years of brutality.

IV. “CONTINUING VIOLATION” DOCTRINE’S IMPACT AND LIMITATIONS

In the past, the Inter-American Court has used the “continuing violation” doctrine to assert jurisdiction over a violation even if the direct event itself is beyond the scope of the Court. With this tool, the Inter-American system can force every signatory to fulfill its obligation to provide justice and “make the remedy truly available, and applicable in accordance with the rules of due process.”²⁶ Thus, until a state has actually provided a remedy to the vic-

22. Statute of the Inter-American Court of Human Rights, art. 1, OEA/Ser.P/IX.0.2/80, Vol. 1 at 98.

23. American Convention, *supra* note 2, art. 47.

24. Canada, Grenada, Jamaica, and the United States have not yet accepted the jurisdiction of the court. Basic Documents—Ratifications of the Convention, *supra* note 5.

25. *Moiwana Village*, *supra* note 1, at 9.

26. *Ovelário Tames v. Brazil*, Case 11.516, Inter-Am. C.H.R., Report No. 60/99, OEA/Ser.L./V/II.95,

tim or the victim's family, the Court could find that the state has not met its obligations under the American Convention and can therefore be held responsible. For instance, in *Serrano Cruz Sisters v. El Salvador*,²⁷ the State was held guilty of violating the right to judicial protection by failing to conduct an investigation into the kidnapping of two girls by military officers. In *Blake v. Guatemala*,²⁸ Guatemala still had the victim on a missing-persons list, but had failed to vigorously investigate his whereabouts.

On its face, such a doctrine makes sense. The Court reinforced its position in *Moiwana Village* by holding that a failure to investigate a twenty-year-old event is a human rights violation. But what happens if the event occurred forty years ago? Sixty years ago? Certainly, few people would hold a present government liable for its actions in the late 1800s.

While the Inter-American Court evaded this question in *Moiwana Village*, it did erect a limitation on the "continuing violation" doctrine by deciding "it did not have competence to [directly] examine the events of November 29, 1986."²⁹ It did, however, assert "jurisdiction over the State's fulfillment of its obligation to ensure the right to humane treatment, which results in the obligation to investigate possible violations of Article 5 of the Convention."³⁰ This effectively allows the Court to force indirect examination of most past violations and still bring justice to the victims.

The Court's most notable self-imposed limitation on the doctrine of "continuing violation" is its continued refusal to assert a similarly indirect jurisdiction in claims based on the right to life secured by Article 4 of the American Convention.³¹ It has found that it lacks competence to hear such a claim in every case where the death occurred prior to the acceptance of the Inter-American Court's jurisdiction by the state.³² In *Blake*, for instance, the Court decided "that the acts of deprivation of Mr. Blake's liberty and his murder were indeed completed in March, 1985 . . . and that those events cannot be considered *per se* to be continuous. The Court therefore lacks competence to rule on the Government's liability."³³ In another case, *Genie-Lacayo*, the Inter-American Court also ruled that it could not hear the claim based on Article 4 for the same reason; it lacked direct jurisdiction over an incident that occurred before the State recognized the Court.³⁴ The Court followed those precedents in *Moiwana Village* and ruled that there was no basis for an Article 4 claim.

doc. 7 rev. ¶ 51 (1998).

27. *Serrano-Cruz Sisters v. El Salvador*, Inter-Am. Ct. H.R. (ser. C) No. 120, at 1 (Mar. 1, 2005).

28. *Blake*, *supra* note 19.

29. *Moiwana Village*, *supra* note 1, at 44.

30. *Id.*

31. American Convention, *supra* note 2, art. 4.

32. *See, e.g., Blake*, *supra* note 19, at 1; *Genie-Lacayo v. Nicaragua*, Inter-Am. Ct. H.R. (ser. C) No. 30, at 1 (Jan. 29, 1997); *Moiwana Village*, *supra* note 1, at 1.

33. *Blake v. Guatemala: Preliminary Objections*, Inter-Am. Ct. H.R. (ser. C) No. 27, ¶ 33 (July 2, 1996).

34. *See Genie-Lacayo*, *supra* note 32.

Even today some countries are hesitant to recognize the Inter-American Court's jurisdiction.³⁵ Rather than make those nations even less likely to surrender their sovereignty by painting the adjudicatory system in a power-hungry light, the Inter-American body has carefully avoided pushing the "continuing violation" doctrine too far. To expand jurisdiction to include rights beyond that of judicial protection could stretch the jurisprudential tool beyond its logical basis, and at this early stage reason is one of the few tools the Inter-American Court has to keep its members inside the system.

CONCLUSION

The Inter-American adjudicatory system has repeatedly considered certain violations to have a "continuing" nature, thus falling under the Inter-American Court's domain even if the event began before the State recognized jurisdiction. For all its self-imposed limitations, this doctrine of "continuing violation" has allowed the Court to assert a *de facto* right to force countries to remedy violations that occurred prior to the signing of the American Convention by forcing an investigation that the Court alone can deem valid.³⁶

While this doctrine now allows for restitution for the countless violations of human rights that occurred prior to the ratification of the American Convention, it must be limited to violations that indeed continue to occur after ratification to avoid overstepping the boundaries of the Court's power. Otherwise, the Court could erode the foundation of the Inter-American Court of Human Rights—the American Convention and the rights it protects—and undermine the authority that the Inter-American system has so painstakingly created over the past decades. Nations could conceivably rescind their recognition of the jurisdiction of the Court.

Fortunately, the Court has realized this and has refused to use the "continuing violation" doctrine to extend the reach of the right to life, while still using the doctrine in cases such as *Moiwana Village* to remind states that the obligation to provide a fair trial and judicial protection extends from the time the initial act has occurred until those obligations have been fulfilled.

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35. Basic Documents—Ratifications of the Convention, *supra* note 5. See *supra* text accompanying note 24.

36. The Commission in *Moiwana Village* argued that "no one had been prosecuted or punished and the survivors remained displaced from their lands." *Moiwana Village*, *supra* note 1, at 2.

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