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INTERPRETATION OF THE AMERICAN CONVENTION IN LATIN AMERICA: THE IMPACT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS' DECISION IN *VÉLEZ LOOR V. PANAMA* ON IRREGULAR MIGRANT RIGHTS

Ashley Mason

I. INTRODUCTION

THE case of *Vélez Loor v. Panama* represents the first decision by the Inter-American Court of Human Rights (hereinafter “Inter-American Court”) that addressed the human rights of irregular migrants.¹ Irregular migrants have been defined as individuals who “lac[k] legal status in a transit or host country.”²

The Inter-American Court’s holding that Panama’s migration policies violated the American Convention of Human Rights (hereinafter “American Convention”) will prohibit mandatory punitive detention of irregular migrants, invoke scrutiny toward detention center standards, and apply the due process protections of the American Convention to migrants.³ This emerging change in international law is timely because human rights committees have recently documented arbitrary detention of migrants as a pervasive concern in Latin American countries such as Argentina.⁴ By extending the American Convention’s protections to irregular migrants, the court has contributed toward international reform efforts to protect this marginalized group.

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1. Carson Osberg, Inter-American Court of Human Rights Rules Against Panama for Torture and Wrongful Detention of Ecuadorian Migrant, Human Rights Brief (Apr. 23, 2011), <http://hrbrief.org/2011/04/inter-american-court-of-human-rights-rules-against-panama-for-torture-and-wrongful-detention-of-ecuadorian-migrant/>.
 2. GDP Glossary, Global Detention Project, <http://www.globaldetentionproject.org/resources/glossary.html> (last updated Mar. 2009).
 3. *See id.*
 4. *See* United Nations, Econ. & Soc. Council, Comm. on Human Rights, Civil & Political Rights, Including the Question of Torture & Detention, Report of the Working Group on Arbitrary Detention, U.N. Doc. E/CN.4/2004/3/Add.3 (2003).

II. FACTUAL BACKGROUND

The Police of Tupiza arrested Vélez Loor (hereinafter “Loor”) in Darién Province in Panama on November 11, 2002 and transferred Loor to La Palma detention center, where the Director of the National Migration Office sentenced him to two years of imprisonment for violation of previous deportation orders.⁵ Panama did not provide Loor with counsel or permit him to establish a defense under the administrative procedure.⁶ Further, Panama notified Ecuador’s consulate of Loor’s detention, without informing Loor of his individual right to consular assistance.⁷ After sentencing, Loor was transferred to La Joyita Penitentiary, where the facility was overcrowded, had inadequate drinking water, and provided only basic medical treatment.⁸ Despite the doctor’s diagnosis that Loor was suffering from a fractured skull, the prison did not provide a CAT scan because of the cost.⁹

Loor’s complaint alleged ill treatment and torture throughout his ten-month detention, particularly resulting from his persistent requests for greater access to rights.¹⁰ During his arrest, the officers fired weapons, threatened his life, and left him restrained to a pole with handcuffs and shackles for eight hours.¹¹ In La Palma, Loor organized a hunger strike to insist on deportation, and prison officials reacted by fracturing his head with a stick.¹² In La Joyita, Loor organized another hunger strike by sewing his mouth shut to communicate the urgency of his requests for medical assistance.¹³ The officers responded by transferring Loor to the high security portion of La Joyita, beating him while nude, pouring teargas on his face, eyes, and body, and inserting burning powder in his rectum after his refusal to engage in homosexual activity.¹⁴ After Loor’s deportation, he filed a complaint with the Commission on Human Rights of the National Congress of Ecuador and the Ombudsman’s Office of Ecuador in 2003, alleging human rights violations.¹⁵ Panama received the briefs in 2004 and initiated a summary investigation in 2006.¹⁶ A visual inspection of La Joyita did not occur, however, until April 2010.¹⁷

5. Vélez Loor v. Panama, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 218, ¶¶ 92, 94 (Nov. 23, 2010).

6. *Id.* ¶ 144.

7. *Id.* ¶ 149.

8. *Id.* ¶¶ 197, 218.

9. *Id.* ¶¶ 218, 221.

10. *Id.* ¶ 232.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* ¶ 234.

16. *Id.* ¶ 237.

17. *Id.* ¶ 242.

III. LEGAL BACKGROUND

The court seized an opportune time to initiate reform in Latin America because the Organization of American States had already acknowledged the vulnerability of irregular migrants and the need for alternatives to punitive detention.¹⁸ Further, numerous states were debating “put[ting] more teeth” into migration procedures, including criminalizing irregular migration.¹⁹ The court’s holding responds to these international concerns through its analysis of the American Convention, which was ratified by Latin American countries belonging to the Organization of American States.²⁰ Prior to *Loor*, Mexico requested an advisory opinion in 2003 on the treatment of migrants under the American Convention.²¹ The Inter-American Court’s advisory opinion set the stage for *Loor* by initiating progress toward regional development of migration law, asserting that migrants should be accorded the same international rights.²² The advisory opinion affirmed that any “interpretation [by a state] that violates or restricts human rights ‘subordinating them to the attainment of any objective[,] violates the obligation to protect such rights’” under the American Convention.²³ A subsequent opinion, which discussed the rights of children of irregular migrants, also demonstrated the court’s intent to apply the American Convention to irregular migrants.²⁴

IV. CRITICAL ISSUES

The Inter-American Court identified three areas of human rights violations raised by *Loor*’s detention: 1) the right to personal liberty, a fair trial, freedom from ex post facto laws, and judicial protection; 2) the right to humane treatment; and 3) the right to equal protection.²⁵ As to the first area, the court held that Panama violated Article 7, including 7(3), 7(4), 7(5), and 7(6) and Article 8, including 8(1), 8(2)(b-f), and 8(2)(h) partially due to the state’s admissions of their failure to provide due process rights.²⁶ Article 7’s subsections guarantee liberty without arbitrary

18. U.N. High Comm’r for Refugees, Back to Basics: The Right to Liberty and Security of Person and ‘Alternatives to Detention’ of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants, Div. of Int’l Protection, PPLA/2011/01.Rev.1 (Apr. 2011).

19. Franzebert, Inter-American Court of Human Rights Rules on Irregular Migrants’ Rights, Int’l Law Observer (Dec. 30, 2010), <http://internationallawobserver.eu/2010/12/30/inter-american-court-of-human-rights-rules-on-irregular-migrants-rights/>.

20. Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

21. See Juridical Condition and Rights of Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18/03, ¶ 1 (Sept. 2003).

22. See Ryszard Cholewinski, Human Rights of Migrants: The Dawn Of A New Era?, 24 Geo. Immigr. L.J. 585, 593 (2010).

23. Juridical Condition, *supra* note 21, ¶ 47.

24. See Cholewinski, *supra* note 22, at 594 (citing *Girls Bosico v. Dominican Republic*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 130 (Sept. 8, 2005)).

25. *Vélez Loor*, Inter-Am. Ct. H.R. (ser. C) No. 218, ¶¶ 91-101, 196-205, 246-54.

26. *Id.* ¶ 191.

detention, notice of the reasons for detention and the charges, judicial authority over the detention decision, reasonable duration of detention, and the right to challenge the validity of the arrest.²⁷ With regard to the right to humane treatment, the court held that Panama violated that right under Article 5(1) and 5(2) of the American Convention and the prohibitions against torture in Articles 1, 6, and 8 of the Convention Against Torture.²⁸ The court reasoned that Panama failed to comply with its duty to investigate Loor's allegations of mistreatment, demonstrating a deprivation of his personal integrity that could amount to torture.²⁹ With regard to equal protection, the court found violations of Articles 8(1) and 25 of the American Convention because Panama deprived Loor of legal assistance to dispute the sentence against him, thereby interfering with his "access to justice."³⁰

V. LEGAL ANALYSIS OF PANAMA'S HUMAN RIGHTS VIOLATIONS

A. RIGHT TO PERSONAL LIBERTY

The court analyzed Loor's arrest warrant, finding that an arrest for "security and public order" must conform with Article 7 of the American Convention, and decisions by domestic bodies that inhibit the right of personal liberty are arbitrary.³¹ While the court does not enumerate the factors used to determine whether arbitrary detention has occurred, it cites *Neptune v. Haiti* for its four-factor analysis.³² Further, the court followed the guidance of a U.N. report regarding arbitrary detention, which provided that in cases involving irregular migrants "[a] maximum period [of detention] should be set by law and the custody may in no case be unlimited or of excessive length."³³ Considering that Panama failed to provide justifications for Loor's arrest, the arrest was arbitrary under Article 7(3), particularly because Panama "automatically issued" an arrest warrant after the first arrest.³⁴

B. RIGHT TO JUDICIAL PROTECTION

The court's interpretation of the standard under Article 7(5) of the American Convention exceeds the European Convention's standard, which only requires a prompt appearance before the judge in limited cir-

27. *Id.* ¶ 190.

28. *Id.* ¶ 245.

29. *Id.*

30. *Id.* ¶ 254.

31. *Id.* ¶ 116.

32. *Id.* (citing *Neptune v. Haiti*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 180, ¶ 98 (May 6, 2008)).

33. *Id.* ¶ 117 (citing U.N., Working Group on Arbitrary Detention, Group Report, Annex II, Deliberation No. 5: Situation Regarding Immigrants and Asylum-Seekers, U.N. Doc. E/CN.4/2000/4 (1999)).

34. *Id.* ¶ 118.

cumstances.³⁵ The Inter-American Court requires that domestic law provide for a hearing before “the officer authorized by law to carry out judicial functions,” relying on its decision in *Tibi v. Ecuador*.³⁶ In *Tibi*, the court concluded a judge’s knowledge of the case or receipt of a police report does not satisfy judicial review under Article 7 when the detainee testified in the presence of a “notary public” approximately six months after his detention.³⁷ The court established that a migrant must not only appear before a judicial officer, but also that the authority “must hear the detained person personally and evaluate all the [detainee’s] explanations.”³⁸ Under Panama’s Decree Law 16 of 1960, in effect during Loor’s detention, foreigners were at the will of the immigration department of the Ministry of Interior and Justice, without access to judicial oversight.³⁹ Further, Panama refused to give Loor access to remedies that were formally available to contest the detention.⁴⁰ Therefore, Panama failed to comply with the Inter-American Court’s strict interpretation of the judicial review requirement, given that Panama’s procedure consisted of an unknown employee of the Office of Immigration and Naturalization filling out a form and noting Loor’s personal information.⁴¹ Moreover, Panama provided no record of whether Loor’s explanations for being in Panama were ever considered.⁴² In addition to the lack of judicial review, the court emphasized that Loor’s ignorance of how to seek relief from Panama’s legal system was exacerbated by his lack of legal counsel.

C. RIGHT TO LEGAL COUNSEL

Article 8 of the American Convention establishes an “inalienable right” to legal counsel, which is especially “imperative for the interests of justice” when immigration procedures could result in a punitive “deprivation of liberty.”⁴³ Relying on case law from the European Court of Human Rights, the Inter-American Court concluded that a fair hearing required legal representation where the law at issue is complicated and the defendant is facing a serious penalty.⁴⁴ Even though Loor was facing a punitive administrative procedure, Panama failed to provide written notice of the charges, sufficient time to establish a defense, legal counsel, or the right to defend himself against the punitive administrative procedure.⁴⁵ These facts provided sufficient evidence of violations of the right

35. *Id.* ¶ 107.

36. *Id.* (citing *Tibi v. Ecuador*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 114, ¶ 118 (Sept. 7, 2004)).

37. *Id.*

38. *Id.* ¶ 109.

39. *Id.*

40. *Id.* ¶ 119.

41. *Id.* ¶¶ 110-11.

42. *Id.* ¶ 110.

43. *Id.* ¶¶ 145-46.

44. *Id.* ¶ 146 n.150 (citing *Benham v. United Kingdom*, 22 Eur. Ct. H.R. 293, 308 (1996)).

45. *Id.* ¶ 144.

to a hearing under Article 8(1) and the right to counsel under Article 8(2)(d) and 8(2)(e).⁴⁶

D. RIGHT TO CONSULAR ASSISTANCE

Notwithstanding Panama's refusal to provide national judicial and legal resources, Panama also neglected to notify Loor of his right to use the consular resources of his home nation. Detainees have a right to consular assistance under Articles 7 and 8 of the American Convention.⁴⁷ The court relied on its own earlier advisory opinion, which stated that a detained foreign national has the right to consular assistance, as provided in Article 36 of the Vienna Convention on Consular Relations.⁴⁸ Three elements are necessary to satisfy the right to consular assistance: "1) the right to be informed of his rights under the Vienna Convention; 2) the right to have effective access to communication with the consular official; and 3) the right to the assistance itself."⁴⁹ In the present case, Panama failed to notify Loor of his right to consular assistance.⁵⁰ Although the court finds some evidence that consular officials visited Loor after sentencing, Panama deprived Loor of his right to consular assistance because Loor "could not exercise his right to defense with consular assistance . . . as part of due process of law."⁵¹

E. DETENTION UNDER ARTICLE 67 OF DECREE LAW 16 OF 1960

After reviewing the procedural deficiencies of Panama's system, the court analyzed the validity of Panama's Article 67 with the Decree Law 16 of 1960, which imposed punitive penalties for violation of immigration laws.⁵² The court relied on its prior precedent and a report by the United Nations Working Group on Arbitrary Detention, which asserted that "criminalizing an irregular entry into a country exceeds the legitimate interest of [s]tates to control and regulate illegal immigration and leads to unnecessary detention."⁵³ Adopting the Working Group's view, the court held that irregular migrants who violate immigration laws should not be exposed to mandatory detention for punitive objectives.⁵⁴ Rather, states must adopt alternatives other than detention that evaluate cases on an individual basis.⁵⁵ Moreover, the court determined that Article 67 of

46. *Id.* ¶ 148.

47. *Id.* ¶ 160.

48. *Id.* ¶ 151 (citing *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, Inter-Am. Ct. H.R. (ser. A) No. 16, ¶¶ 84, 124 (Oct. 1, 1999)).

49. *Id.* ¶ 153.

50. *Id.* ¶ 155.

51. *Id.* ¶ 159.

52. *Id.* ¶ 163.

53. *Id.* ¶ 169 (citing U.N. Human Rights Council, Working Group on Arbitrary Detention, Promotion and Protection of all Human Rights, Civil, Political, Economic, Social & Cultural Rights, Including the Right to Development, ¶ 53, U.N. Doc. A/HRC/7/4, (Jan. 10, 2008)).

54. *Id.*

55. *Id.* ¶ 171.

the Decree Law 16 of 1960 was arbitrary and disproportionate, amounting to a violation of Article 7(3) of the American Convention.⁵⁶ In addition to procedural and legal deficiencies, the Inter-American Court focused on Panama's inhumane treatment of detainees.

F. RIGHT TO HUMANE TREATMENT UNDER THE INTER-AMERICAN CONVENTION TO PREVENT AND PUNISH TORTURE

The court ordered that Panama provide facilities that were designated specifically for migrants or at least facilities that were not intended for criminals.⁵⁷ The court explained that the standards under Article 5(1) and 5(2) of the American Convention require the state to ensure that detainees live in detention conditions "compatible with her or his personal dignity."⁵⁸ The American Convention's personal dignity standard and the standard that the conditions must not "exceed the unavoidable level of suffering inherent in detention" are consistent with Article 3 of the European Convention.⁵⁹ Further, the court relied on the United Nations Committee Against Torture's description of what constitutes "cruel, inhuman, or degrading punishment": "overcrowding, . . . poor hygiene . . . lack of basic services and of appropriate medical attention . . . the inability of the authorities to guarantee the protection of detainees in situations involving violence."⁶⁰ The court substantiated its concerns about migrants' exposure to violence by inmates by emphasizing that numerous international courts and working groups have also advised that irregular immigrants should not be detained in prisons.⁶¹

After analyzing the totality of the conditions during Loor's ten-month detention, the court found Panama violated Article 5(1) and 5(2) of the American Convention.⁶² With regard to Loor's detention, the court emphasized that La Palma and La Joyita exceeded their capacity by thirty-five percent and sixty-four percent respectively; Loor was not isolated from other inmates serving time for criminal sentences; La Joyita lacked sufficient drinking water; and La Joyita deprived Loor of adequate treatment for his fractured skull.⁶³ What is more, Panama breached its duty to initiate a prompt investigation of Loor's complaints of torture by failing to investigate until July 2009, despite briefs presented by Loor in September and October of 2004.⁶⁴ But despite the gravity of Loor's allegations of inhumane treatment, reliability of the evidence was also a component of the court's equal treatment analysis.

56. *Id.* ¶ 172.

57. *Id.* ¶ 208.

58. *Id.* ¶ 198.

59. *Id.*; Neptune, Inter-Am. Ct. H.R. (ser. C) No. 180, ¶ 130.

60. Vélez Loor, Inter-Am. Ct. H.R. (ser. C) No. 218, ¶ 198 n.209 (citing Comm. Against Torture, Rep. on its 25th Sess., Nov. 13 -14, 2000, 26th Sess. Apr. 30 - May 18, 2001, U.N. Doc. A/56/44 (May 10, 2001)).

61. *Id.* ¶ 208.

62. *Id.* ¶ 227.

63. *Id.* ¶¶ 203, 206, 215.

64. *Id.* ¶¶ 241-42.

G. RIGHT TO EQUAL TREATMENT

The Inter-American Court explained that the state may treat groups differently as long as the treatment is “reasonable, objective, and proportionate and does not infringe upon human rights.”⁶⁵ But the court must review the “seriousness of the charge” and whether Loor has proven the truth of his allegations “in a convincing manner.”⁶⁶ Because the evidence presented relates to conduct outside of Panama and documents were prepared long after the detention occurred, the court found Loor did not meet his burden of proving discrimination.⁶⁷ But the court acknowledged that Panama did discriminate against Loor by infringing on his right of access to justice, as was previously discussed in relation to Articles 8(1) and 25 of the American Convention.⁶⁸

VI. PRACTICAL ANALYSIS OF LOOR’S INFLUENCE

The Inter-American Court’s approach in *Loor* will promote increased protection of migrant rights, but the court’s reliance on the European Court of Human Rights and global soft law, rather than “regional consensus,” will likely invoke problems with compliance.⁶⁹ The court’s reasoning in *Loor* represents a bold approach toward expanding the influence of the American Convention in Latin America. The Inter-American Court interprets the American Convention as a “living instrument,”⁷⁰ which has inspired criticism by international law commentators who assert that the court has “develop[ed] a life of its own which, at times, hardly finds a legal basis in the Convention.”⁷¹ But the *Loor* decision illustrates how the Inter-American Court’s methodology of assigning an independent meaning to the American Convention is effective, rather than allowing every state to apply its own domestic law.⁷²

The global increase in the criminalization of irregular migrants has posed a challenge of how to “mainstrea[m]” human rights into migration governance.⁷³ As the Inter-American Court often follows the authority of European courts and European human rights committees, comparisons with Europe’s human rights law are illustrative of the soft law that the

65. *Id.* ¶ 248 (citing Juridical Condition, *supra* note 21, ¶ 101).

66. *Id.* ¶ 249.

67. *Id.* ¶ 251.

68. *Id.* ¶ 254.

69. See Gerald L. Neuman, Import, Export, & Regional Consent in the Inter-American Court of Human Rights, 19 *EURJIL* 101, 107 (2008).

70. *Id.* at 106.

71. Christina Binder, The Prohibition of Amnesties By the Inter-American Court of Human Rights, 12 *German L.J.* 1203, 1204 (2011).

72. See Neuman, *supra* note 69, at 106.

73. Press Release, General Assembly, Past Trends Toward Increasing ‘Criminalization’ of Irregular Migration Continue: Migrants Face Racism, Abuse, Appalling Housing Conditions, Third Committee Told: Three UN Experts Address Migrant Issues; Others Speak on Extrajudicial Execution, Right to Development, Judicial Independence; Democratic People’s Republic of Korea, U.N. Doc. GA/SHC/3986 (Oct. 22, 2010), available at <http://www.un.org/News/Press/docs/2010/gashc3986.doc.htm>.

Inter-American Court will likely adopt regionally.⁷⁴ For instance, in 2008, the European Union Directive on Return codified limitations on arbitrary detention, limiting detention to exceptional cases where “less coercive measures can[not] be applied in the specific case.”⁷⁵ Although the Inter-American Court did not reference the European Union’s directive, the directive likely contributed to the court’s emphasis on alternatives to detention.

The court correctly decided in *Loor*, using an effective blend of reliance on global soft law and deference to domestic law, to justify its application of the American Convention to irregular migrants. Although the court addresses numerous human rights violations, *Loor* is noteworthy because of its analysis of whether punitive detention of migrants violates the American Convention. Despite the court’s rejection of Panama’s prior law, the court acknowledges that the American Convention does not “establish . . . the reasons, cases, or circumstances that shall be considered lawful in a democratic society.”⁷⁶ Though domestic law must dictate how to regulate migrant entry, the court uses soft law from the U.N. report to establish that criminalizing irregular migration is not a legitimate method of regulation.⁷⁷

While the Inter-American Court’s interpretation of the American Convention orders Panama to implement broad changes, Latin American countries will likely be reluctant to comply unless the court establishes rules with “specifications regarding the level of compliance demanded by each remedy in particular.”⁷⁸ The low rate of compliance with orders issued by the Inter-American Court illustrates a disconnect between the court and the Latin American countries who ratified the American Convention.⁷⁹ Notably, countries have only complied with the court’s orders to investigate and punish the officials who committed human rights violations in ten percent of cases.⁸⁰ Similarly, the compliance rate with legal reform orders is fourteen percent.⁸¹ Latin American countries’ recent rejection of the Inter-American Court’s decisions demonstrates the vulnerability of the Inter-American Court, casting doubt on whether Panama will comply fully with the Inter-American Court’s reparation orders.⁸² A

74. See Neuman, *supra* note 69, at 109.

75. U.N. High Comm’r for Refugees, Back to Basics: The Right to Liberty and Security of Person and ‘Alternatives to Detention’ of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants, ¶ 25, U.N. Doc. PPLA/2011/01.Rev.1 (Apr. 2011).

76. Vélez Loor, Inter-Am. Ct. H.R. (ser. C) No. 218, ¶ 168.

77. *Id.* ¶ 169.

78. Fernando Basch et al., Effectiveness of the Inter-American System of HR Protection: A Quantitative Approach to Its Functioning & Compliance With Its Decisions, Int’l J. Hum. Rts., June 2010, at 9, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1727399.

79. *Id.*

80. *Id.*

81. *Id.*

82. Alexandra Huneeus, Rejecting the Inter-American Court: Judicialization, National Courts, & Regional Human Rights, in *Cultures of Legality: Judicialization &*

case study of Chile and Argentina illustrates the wide spectrum of persuasive value associated with the Inter-American Court's decisions.⁸³ Chile regards the Inter-American Court's decisions as "advisory" or "soft law," but Argentina regards the authority of international treaties as being "equal in the hierarchy of laws," meaning that the Inter-American Court's decisions "can have a direct effect, subject to Supreme Court approval."⁸⁴ Further, high courts of Chile, Argentina, and Venezuela have recently contravened decisions by the Inter-American Court.⁸⁵

When compared with the European Court of Human Rights, the compliance rate with the Inter-American Court's orders is lower.⁸⁶ But in light of the grave human rights violations in Latin American countries, such as Chile, the decisions of the Inter-American Court may bolster legislative or judicial activists' arguments for domestic reform.⁸⁷ The lower compliance rates with the Inter-American Court may be attributed to the fact that the Inter-American system's jurisdiction is considerably broader than the European Court of Human Rights.⁸⁸ The Inter-American Court's jurisdiction includes substantive rights under the American Convention and other treaties adopted by the Organization of American States.⁸⁹

When the court exposed substantial gaps in Panama's compliance with the American Convention in *Loor*, Panama immediately expressed resistance toward legislative reform, arguing that the court's reform orders do not apply to their domestic law, as revised in 2008.⁹⁰ Panama asserted that "[i]t is not possible to request . . . the modification of the current immigration law given that the [a]pplication filed by the Inter-American Commission on Human Rights does not include any argument regarding Decree Law 3 of 2008."⁹¹ Panama objected to the court's expansive and vague order, which requires that Panama "adopt 'the necessary legislative or any other measures to uphold' the rights recognized in the American Convention."⁹² Nevertheless, the court's decision to order legislative reform was justified because its jurisdiction does not permit review of laws not at issue in *Loor*.⁹³

Political Activism in Latin America 112, 113-14 (Javier Couso et al. eds., 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1911383.

83. *Id.* at 130.

84. *Id.*

85. *Id.* at 113.

86. Neuman, *supra* note 69, at 104.

87. See Druscilla L. Scribner & Tracy H. Slagter, Domestic Institutions & Supranational Human Rights Adjudication: The ECTHR & IACTHR Compared 1, 29-30 (prepared for the Annual Meeting of the American Political Science Association, Working Paper, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1449192.

88. See Neuman, *supra* note 69, at 102.

89. *Id.* n.2.

90. Vélez Loor, Inter-Am. Ct. H.R. (ser. C) No. 218, ¶ 283.

91. *Id.*

92. See *id.* ¶ 286.

93. See *id.* ¶ 285.

Panama adopted Decree Law No. 3 of February 22, 2008 and Executive Decree No. 3 of August 8, 2008, which have invoked significant changes in their system.⁹⁴ Particularly, Decree Law No. 3 of 2008 disposed of the practice of imprisoning irregular migrants as punishment for unauthorized reentry after a deportation order.⁹⁵ Though it is unclear whether Loor's allegations motivated legislators to enact reform, the 2008 legislation has resulted in the development of two changes in leadership: 1) the appointment of the National Service of Migration as the authority over migrants and 2) the creation of the Consulting Council of Migration.⁹⁶

VII. CONCLUSION

The Inter-American Court's opinion is an influential decision within international human rights law because countries have regarded irregular migrants as a "residue" category with minimal rights.⁹⁷ The Inter-American Court's decision directly addressed Panama's subordination of international human rights standards to its own discriminatory treatment toward migrants, which the court had previously warned against in an advisory opinion.⁹⁸ The court's expansion of the American Convention was supported by the Inter-American Court's previous case law and advisory opinions interpreting the American Convention, the European Court of Human Rights' case law, and global soft law of human rights groups investigating detention conditions. The international impact of *Loor* has already been illustrated by a detainee arguing before the African Commission for Human & Peoples' Rights, who relied on the Inter-American Court's interpretation of Panama's requirement that detainees must exhaust domestic remedies before directly challenging the arbitrary detention.⁹⁹ Further, the *Loor* decision has enhanced the international development of mandatory procedural alternatives to punitive detention, which will ensure that countries protect vulnerable migrants from discrimination.

94. See Khatiya Asvat, Panama's New Migration Law, Patton, Moreno & Asvat ¶ 1, http://www.pmalawyers.com/pdf/newsletter_migration_law.pdf (last visited Feb. 20, 2012).

95. Vélez Loor, Inter-Am. Ct. H.R. (ser. C) No. 218, ¶ 284.

96. Asvat, *supra* note 94, ¶¶ 2-3.

97. See Alexander Betts, Soft Law & the Protection of Vulnerable Migrants, 24 Geo. Immigr. L.J. 533, 536 (2010).

98. Juridical Condition, *supra* note 21, ¶ 121.

99. Arguments on Admissibility ¶ 50, Saleh-Asad v. Djibouti, No. 383/2010, (African Comm'n for Human Rights Apr.-May, 2011), available at <http://www.chrgj.org/projects/docs/admissibilitybrief.pdf>.

