ADDRESS BY JUDGE THOMAS BUERGENTHAL PRESIDENT, INTER-AMERICAN COURT OF HUMAN RIGHTS BEFORE A SPECIAL SESSION OF THE OAS PERMANENT COUNCIL

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Mr. President, Distinguished Members of the Permanent Council, Mr. Secretary General.

It is a great honor for me to appear at this special session of the Permanent Council to speak about the Inter-American Court of Human Rights. I am profoundly grateful to you, Mr. President, and to your colleagues for giving me this opportunity. This is the first time that a judge of the Court has been invited to talk with you in this setting about the role of the Court and about the functions it does and could perform in the inter-American system. The fact that the initiative for this interchange of ideas came from you, Mr. President, and from your colleagues adds special significance to this event, and is a particular honor for the Court and for me, for which I wish to thank you in a most heartfelt manner.

May I also note, Mr. President, that in a formal sense I speak here only for myself because I have not cleared these remarks with my fellow judges. As the current president of the Court –the term of the president runs two years– I am merely a temporary **primus inter pares** with all the institutional limitations such a position implies. I have, however, served on the Court from its very inception –I am one of only two judges left on the Court who have this distinction– and this gives me some confidence that what I have to say also reflects the thinking of my colleagues in a general way.

The Court, as you know, consists, of seven judges who are elected by the States Parties to the American Convention on Human Rights in the OAS General Assembly. The Convention has to date been ratified by 19 OAS Member States. The judges are Dr. Rafael Nieto Navia of Colombia, who is the vice president of the Court, Dr. Rodolfo Piza Escalante of Costa Rica, Dr. Pedro Nikken of Venezuela, Dr. Héctor Fix-Zamudio of México, Dr. Héctor Gros Espiell of Uruguay, and Dr. Jorge Ramón Hernández Alcerro of Honduras. I am sure that most, if not all, of these names are familiar to many of you, because these individuals all have distinguished records as legal scholars and practitioners, with fine international reputations. I for one have never worked with a better and more serious group of lawyers.

The Court is one of two organs established by the Convention to supervise the enforcement of the rights which the Convention guarantees. The other organ is, as you know, the Inter-American Commission on Human Rights. The Commission is the successor organ to a body of the same name that dates back to 1959.

The Court was formally established in 1979. In addition to the Convention, which entered into force in 1978 and is a treaty adopted under the auspices of the OAS, the Court's powers are regulated by its Statute and its Rules of Procedure. The Statute of the Court was adopted in October 1979 in the form of an OAS General Assembly resolution and entered into force on January 1, 1980. The adoption of the Statute formally establishes and confirms the institutional link that exists between the Court and the OAS. That link has its constitutional basis in the language of Article 112 (2) of the OAS Charter and the Convention itself. The Court's Rules of Procedure were adopted by the Court itself pursuant to the authority vested in it by the Convention and the Statute.

The Convention and the Statute confer on the Court two types of jurisdiction. The Court has contentious jurisdiction, that is, jurisdiction to decide specific cases or disputes in which it is alleged that a State Party to the Convention has violated a right which the Convention guarantees. The Court's judgments in these cases are final and binding.

Here I should call your attention to three points that bear on the Court's contentious jurisdiction. First, and most important, in order for the Court to exercise its contentious jurisdiction in a case, the state being charged with the violation must not only have ratified the Convention, it must, in addition, have accepted the contentious jurisdiction of the Court, which is regulated by Article 62 of the Convention. Second, individual victims of a violation of the Convention have no legal right or legal standing to take their case to the Court. Only the Inter-American Commission on Human Rights or another state may do so. The state may do so, moreover, only if it has itself also accepted the Court's jurisdiction. Third, no contentious case may be brought to the Court until the Commission has dealt with it first.

As you can see, the Court's contentious jurisdiction is surrounded by many hurdles which in turn explains why few such cases have to date come to the Court. The biggest obstacle is, of course, that only eight States Parties have thus far accepted the Court's contentious jurisdiction. These states are: Argentina, Colombia, Costa Rica, Ecuador, Honduras, Perú, Uruguay and Venezuela.

The Court is proud of the confidence which these countries have reposed in it by subscribing to its contentious jurisdiction. You will have noted that of the five Andean Pact nations, four have accepted the Court's jurisdiction and that two Central American and two Southern Cone nations have done so. Guatemala recently announced that it will do so shortly. I do not need to tell you what an occasion for rejoicing it would be if the remaining 10 nations that are parties to the Convention –Barbados, Bolivia, Dominican Republic, El Salvador, Grenada, Haití, Jamaica, México, Nicaragua and Panamá– would do the same. Let me hasten to add, in this connection, that under the Convention these nations are under no legal obligation to accept the Court's jurisdiction if they do not wish to do so, although this action would certainly strengthen the inter-American human rights system. Of course, the system would be strengthened even further if the re-

maining OAS Member States, which have to date not even ratified the Convention, would do so and if they also accepted the Court's jurisdiction. The OAS General Assembly has consistently urged such action in its annual resolutions. This would place the OAS human rights effort on a much sounder juridical footing and greatly strengthen the inter-American human rights system.

Let me turn now to the Court's other jurisdiction. In addition to its contentious jurisdiction, the Court also has so-called advisory jurisdiction. The Convention and the Court's Statute empower it to render advisory opinions interpreting the Convention and various other human rights treaties applicable in American states. The right to request these advisory opinions is granted to all OAS Member States (and not only to the States Parties to the Convention). It is also granted to all OAS organs. This enables the Permanent Council, the General Assembly or, for that matter, any other OAS organ, to seek an advisory opinion from the Court on a legal question relating to the interpretation of the Convention or other human rights treaties, including the human rights provisions of the OAS Charter itself.

Permit me to make two points in connection with the subject I have just discussed. The first point has to do with the fact that by adopting the Court's Statute in the form in which the OAS General Assembly adopted it, the Assembly has authorized all OAS organs to utilize the Court's advisory jurisdiction, if they wish to do so.

The second point I would like to make relates to the usefulness of the Court's advisory jurisdiction. It is inherent in the nature of advisory opinions as a judicial technique that they are not legally binding in a formal sense and that the ruling in an advisory proceeding does not contain a formal determination charging a state with a violation of the Convention or any other human rights treaty. In a formal sense, there are no defendants and no plaintiffs in advisory proceedings. The sole legal effect of the opinion is that it constitutes an authoritative interpretation by a judicial body whose value derives from the institutional legitimacy the Court enjoys as an independent, impartial and non-political judicial body.

It is obvious, and I do not need to belabor this point in a room full of experienced diplomats and lawyers, that the mere fact that an opinion is not legally binding in a formal sense does not mean that it is necessarily less effective than a legally binding opinion. Politically, moreover, an advisory opinion has the great advantage that it does not stigmatize a government as a violator of human rights, it does not accuse the government and it does not determine its guilt. At the same time, however, it makes the abstract legal issue perfectly clear for any government wishing to avoid being held in violation of its international legal obligations. By resolving the legal issue, it can also change the tenor and character of the political debate in the body that asked for the opinion. The advisory opinion route can therefore provide a politically and diplomatically useful technique for OAS organs wishing to avoid over-politicizing an issue and giving governments a graceful way to comply with their obligations.

As you know, much of the Court's jurisprudence up to now has consisted of advisory opinions, and some of these have had a beneficial impact. Here I should note that all OAS Member States have the right to submit their written and oral observations in any advisory proceeding pending before the Court. Unfortunately, very few states have thus far availed themselves of this opportunity, which is an opportunity to affect the interpretation of the international human rights law of our hemisphere. Here each permanent representative could help. You have no doubt seen the various notices for observations by governments that the Court sends out whenever it receives an advisory opinion request. A note from you to your foreign ministries in appropriate cases suggesting that someone consider the advisability of a written or oral comment would have an impact and would, I am sure, enable the Court to have a better understanding of the legal considerations deemed significant by individual governments.

Allow me to return now for a minute to the Court's contentious jurisdiction. In my opinion, the Court's advisory role will only perform its function if the contentious jurisdiction is also utilized. The mere existence of a contentious system provides states with the incentive to comply with the Court's advisory rulings. In short, it does not help much to tell a state what the law is, if it knows that it can go on violating it with impunity, that is, if there is no risk that it will be called to account in a contentious proceeding. It is clear, therefore, that the Court's two jurisdictions are intertwined and that one cannot function without the other also being operational.

As you know, this past April the Inter-American Commission referred its first three contentious cases to the Court. There are various reasons why the Commission did not do so earlier, but the more important point is that the step has been taken and that the Commission, under the very imaginative chairmanship of Dr. Luis Siles-Salinas of Bolivia, has adopted an unambiguous policy decision that it will, in the future, refer appropriate cases to the Court. This position of the Commission is of critical importance to the effective functioning and proper evolution of the inter-American human rights system. I should note, in this connection, that the Court and Commission recently held their first joint meeting to exchange ideas on common problems and to establish a mechanism for the coordination and resolution of procedural issues to facilitate the work of each organ. This is an exciting development that has been greeted with enthusiasm by the Court and the Commission alike.

Let me say too, Mr. Chairman, that your invitation that I address this special session of the Permanent Council also marks an important and most encouraging development. It would probably not have been possible all that many years ago, when a significant number of government representatives on this Council were not great friends of human rights. The fact that this is no longer true today, that we have in this regard witnessed a dramatic change in our region, is good reason for rejoicing and offers hope for the future. It also provides this Organization –the OAS– with a great opportunity to overcome

what some have characterized as its increasing political marginalization. Today, as never before, it should be possible, it is possible, to put the OAS in the forefront of the struggle for human rights and human dignity in our hemisphere. It is an historic opportunity for the Organization and for its Member States. The machinery exists, the normative basis exists, the institutions exist to grasp this opportunity. What is needed is the political will and imagination to make the promotion and protection of human rights a high priority policy of the Organization.

The fact that you, Mr. President, invited me to meet with you today, suggests that you and your colleagues are way ahead of me in recognizing the wisdom and necessity of strengthening the human rights mission of the OAS. The yearning for human rights and human dignity, and all which that implies in political, economic and social terms, has never been greater and more promising in our hemisphere than it is today. What the OAS does in this area can make a difference; it can make a difference for our region and for the OAS.

Here the experience of the Council of Europe is worth recounting. Not all that long ago, that Organization was undergoing a serious identity crisis because the expansion of the European Common Market and because other geopolitical developments threatened to marginalize the Council of Europe. Its decision to give top priority to human rights issues produced an expansion of its human rights program, the flourishing of its Human Rights Court and Commission, and of its educational and social programs, all of which dramatically strengthened the prestige of the Council of Europe and, with it, its political standing and institutional relevance. The renaissance of the Council of Europe provides a useful lesson for the OAS, which is only now in a position to act with imagination in the field of human rights because of the political changes that our region has undergone in recent years.

As far as the Inter-American Court of Human Rights is concerned, you have a perfect opportunity to contribute to this development almost immediately. Since Cartagena, the issue of the transformation of the Court into an OAS Charter organ has been before you. I don't know whether the issue is of real or of symbolic importance only, although I cannot help but feel that a very special message would be sent to the people of our hemisphere if the OAS Charter were to be amended and the Inter-American Court of Human Rights were elevated to the status of an organ of the Organization. The failure to take that action, the delay in resolving this issue, also sends a message. I am, of course, somewhat biased, but I have no doubt whatsoever that the formal designation of the Court as an OAS Charter organ would honor the OAS no less than the Court.

The Court is an OAS institution, it was established under the auspices of the OAS, its Statute was adopted by the OAS General Assembly, its budget comes from the OAS, its judges are elected in the OAS General Assembly, it is the only judicial institution in the inter-American system charged with the protection of human rights. The Court is not expressly mentioned in Article 51 of the OAS Char-

ter for the following very simple reason: when the Protocol of Buenos Aires, which amended the 1948 Charter and which added the Inter-American Commission to the list of OAS organs, was drafted, the American Convention on Human Rights had not as yet been adopted. It was adopted in 1969. The Protocol was signed in 1967. In 1967 it was by no means clear that a human rights court would eventually be created. That the Commission would be established was a given, if only because such a body already existed. Moreover, and this is particularly relevant, the drafters of the Protocol of Buenos Aires, anticipating the possibility that a Court or some other institution might emerge from the future Convention, did the only thing smart lawyers could do under the circumstances: they drafted Article 112, paragraph 2, in the following terms: "An inter-American convention on human rights shall determine the structure, competence and procedure of this Commission, as well as those of other organs responsible for these matters." The Commission, of course, is the body listed in Article 51 (e) of the OAS Charter and the "other organs responsible for these matters" can reasonably be deemed to refer to the Court –for there is no other organ mentioned in the Convention that fits this description. What we have here is what in the law is known as an incorporation by reference, which suggests, at the very least, an intention by those who drafted the Protocol of Buenos Aires to treat the organs that would emerge from the Convention as equals. They could not do it any more expressly than they did, since no one had any assurance in 1967 that the 1969 Convention would establish a Court.

I have engaged in this little bit of legal analysis only to demonstrate that the elevation of the Court to an OAS organ would be an action constituting a rectification merely of an unavoidable omission and that it should not therefore be equated with other full scale Charter amendments that may or may not raise issues of substance or principle. It would also be an act of great symbolic importance to the OAS.

One final word on this subject, Mr. President. It has to do with the fact that the formal designation of the Court as an OAS organ cannot, and would not, change the Court's jurisdiction with regard to states that have not ratified the Convention or accepted the tribunal's jurisdiction. The Court's jurisdiction would continue to be governed by the Convention and its Statute, which makes clear beyond any doubt that no state is subject to the Court's jurisdiction which (a) has not ratified the Convention **and** (b) expressly accepted its jurisdiction as well. The fears voiced on this subject by some representatives on this Council are therefore not justified.

Permit me now to turn to a different subject of great importance to the Court at this time. As I already had occasion to note in my presentation to the General Assembly in Guatemala, the Court currently confronts a very serious financial crisis. I realize, of course, that the Organization as whole faces serious financial problems, but the 20% across-the-board budget cuts mandated by the OAS (10% this year and 10% next year) hit the Court particularly hard. This is

due to the fact that the Court's 1980-81 start-up budget and those that followed were very small, and rightly so, because the Court did not have much work. Now that our work load has significantly increased, our already small budget is being automatically reduced to a level that has a paralyzing effect on the Court and its ability to properly discharge its obligations. The General Assembly, in its resolution on the Court, has recognized the seriousness of this problem and concluded that high priority should be given to addressing the Court's financial needs. I am sure that you can understand the Court's concern in this matter and hope that you will be able to give it the sympathetic consideration it deserves.

The Court, Mr. President, is an instrument that can contribute immensely not only to the promotion of human rights in our hemisphere, but also to the depolitization of a great many human rights issues that now unnecessarily stir discord in the political bodies of this Organization, sometimes before the legal issues have been finally adjudicated by the judicial body competent to do so. Now that the level of massive violations of human rights has been significantly reduced in our hemisphere, it is important to increase dramatically the flow of individual cases from the Commission to the Court, thereby reducing the number of cases involving violations that now go to the General Assembly from the Commission before the Court has dealt with them. This will require, of course, that more countries ratify the Convention and that more of them accept the jurisdiction of the Court. But the failure of many states to do so at this moment has to do less with their internal human rights conditions than with sheer bureaucratic inertia. The Council representatives from those countries could play an important role in overcoming some of these bureaucratic obstacles merely by sending appropriate reminders from time to time.

Of course, as I have already noted, the depolitization of the human rights debate within the Organization could also be significantly advanced if some of the political organs were to utilize the advisory jurisdiction of the Court in appropriate situations.

Mr. President, distinguished representatives: My fellow judges and I are neither so naive nor inexperienced as to think that the Court or, for that matter, any judicial institution, can solve all or even most human rights problems confronting our hemisphere. The causes giving rise to these problems are many –they are political, social, economic, etc.– and courts, whether national or international, are institutionally and constitutionally ill-equipped to deal with causes of societal ills. They deal with symptoms instead. Like medical doctors, who also treat mainly symptoms, courts can do a great deal of good without being able to affect the underlying causes. For example, there is a great need, in our hemisphere, to legitimize the human rights debate, to give the people of our region some tangible examples of international human rights justice, and to demonstrate that it is possible to resolve many human rights issues without resort to violence. I have no doubt whatsoever that the Inter-American Court of Human Rights can make a significant contribution to the effort of

legitimizing the human rights debate in our hemisphere, depoliticizing the enforcement process and creating a climate in which justice and fairness can prevail. This is no easy task, and we certainly cannot do it without your help and without this Organization's recognition that it has a vital institutional role to play in the field of human rights. The opportunity is now, with so many democratic governments represented at this table. Let us grasp this opportunity, if only to make this a better world for our children and for their children. We have so little to lose by giving it a try, and so much to gain if we succeed.