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THE INTER-AMERICAN COURT OF HUMAN RIGHTS: THE AMBASSADOR OF UNIVERSALISM

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Article abstract

The Inter-American Court of Human Rights has developed an original, creative, avant-garde and even “legally non-conformist” jurisprudence. The Court takes certain liberties with regard to the way in which it interprets the *American Convention*, treating the State-centric paradigm and voluntarism with disdain and consequently risks displeasing member States and internationalist scholars. However, the Court adopts this attitude intentionally and asserts the Inter-American distinctiveness through its own construction of legal universalism. In order to analyse it, the paper will describe the Court's work through the prism of a number of problems, emphasizing the most salient characteristics of this “Inter-American doctrine”: individualization; criminilization; constitutionalization; humanization; and moralization of inter-American law.

THE INTER-AMERICAN COURT OF HUMAN RIGHTS: THE AMBASSADOR OF UNIVERSALISM[*]

LUDOVIC HENNEBEL[**]

The Inter-American Court of Human Rights has developed an original, creative, avant-garde and even "legally non-conformist" jurisprudence. The Court takes certain liberties with regard to the way in which it interprets the *American Convention*, treating the State-centric paradigm and voluntarism with disdain and consequently risks displeasing member States and internationalist scholars. However, the Court adopts this attitude intentionally and asserts the Inter-American distinctiveness through its own construction of legal universalism. In order to analyse it, the paper will describe the Court's work through the prism of a number of problems, emphasizing the most salient characteristics of this "Inter-American doctrine": individualization; criminilization; constitutionalization; humanization; and moralization of inter-American law.

La Cour interaméricaine des droits de l'homme a développé une jurisprudence originale, créative, d'avant-garde et même « juridiquement non-conformiste ». La Cour prend certaines libertés dans son interprétation de la Convention américaine, en rupture avec le paradigme Stato-centré et le volontarisme étatique, au risque de déplaire aux États parties et aux internationalistes. Toutefois, la Court adopte cette posture de manière intentionnelle et affirme le particularisme interaméricain des droits de l'homme grâce à sa construction d'un universalisme juridique. Ce particularisme est identifiable à travers la jurisprudence de la Cour. Cet article analyse, identifie et évalue les traits saillants de ce particularisme interaméricain et tente d'en mesurer la portée : individualisation; criminalisation; constitutionalisation; humanisation; et moralisation du droit interaméricain.

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Along with the European and African systems, the Inter-American system of human rights is one of the three principal regional human rights protection mechanisms. It was established by the Organization of American States (OAS) and, over the past decades, has undergone considerable changes. Given the way it was conceived, the system as such is atypical. It is based on two principal instruments: the *American Declaration of the Rights and Duties of Man* (1948)[1] and the *American Convention on Human Rights* (1969).[2] In addition, it is institutionally dual: member States' respect for their human rights obligations is monitored by the Inter-American Commission on Human Rights (which has its seat in Washington, D.C.) and by the Inter-American Court of Human Rights (based in San José, Costa Rica). The Inter-American system is the result of a form of institutional design in which provisional arrangements have been permanently maintained due to political considerations and regional strategies.[3]

Adopted in 1969, the *American Convention on Human Rights* has, to date, been ratified by 25 of the 35 States which make up the OAS. However, Trinidad and Tobago's denunciation of the treaty reduced the number of member States to 24.[4] The

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1 OAS, General Assembly, 3rd Sess., *American Declaration of the Rights and Duties of Man*, OR OEA/AG/RES.1591 (XXVIII-O/98) (1998) [*Declaration* or *American Declaration*].

2 *American Convention on Human Rights*, 22 November 1969, O.A.S.T.S. No. 36 (entered into force 27 August 1978) [*Convention* or *American Convention*].

3 On the Inter-American system, see generally H. Faundez Ledesma, *The Inter-American System for the Protection of Human Right:, Institutional and Procedural Aspects* (San Jose: Inter-American Institute of Human Rights, 2007); David Harris & Stephen Livingstone, eds., *The Inter-American System of Human Rights* (Oxford: Clarendon Press, 1998); Scott Davidson, *The Inter-American Human Rights System* (Dartmouth: Aldershot, 1997); A. A. Cançado Trindade, "El Sistema Interamericano de Protección de los Derechos Humanos (1948-1995): Evolución, Estado Actual y Perspectivas", in D. Bardonnet & A. A. Cançado Trindade, eds., *Derecho Internacional y Derechos Humanos* (San Jose: Inter-American Institute of Human Rights, 1996) 47; Thomas Buergenthal & Dinah Shelton, *Protecting Human Rights in the Americas: Cases and Materials* (Kehl: Engel, 1995); C. Medina Quiroga, *The Battle of Human Rights: Gross Systematic Violations and the Inter-American System* (The Hague: Kluwer, 1988); Thomas Buergenthal & Robert Norris, Human Rights: The Inter-American System (Dobbs Ferry: Oceana, 1982). See also A. A. Cançado Trindade, "Le système inter-américain de protection des droits de l'homme: état actuel et perspectives d'évolution à l'aube du XXIème siècle" (2000) 46 A.F.D.I. 547; David Harris, "Regional Protection of Human Rights: The Inter-American Achievement", in David Harris & Stephen Livingstone, eds., *The Inter-American System of Human Rights* (Oxford: Clarendon Press, 1998) 1; A. A. Cançado Trindade, "Current State and Perspectives of the Inter-American System of Human Rights Protection at the Dawn of the New Century", (2000) 8 Tul. J. Int'l & Comp. L. 5; A. A. Cançado Trindade, The Evolution of the Organization of American States (OAS) System of Human Rights Protection: An Appraisal, (1982) 26 German Yearbook of International Law 498. See also the following chapters: Thomas Buergenthal, Dinah Shelton & David Stewart, *International Human Rights in a Nutshell* (St-Paul: Westgroup, 2004) at 221; Henry Steiner, Philip Alston & Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals* (Oxford: Oxford University Press, 2007) at 1020.

4 N. Parassran Concepcion, "The Legal Implications of Trinidad & Tobago's Withdrawal from the American Convention on Human Rights", (2001) 18 Am. U. Int'L L. Rev. 847, at 849. See also *Hilaire, Constantine and Benjamin et al. Case (Trinidad and Tobago)* (2002), Inter-Am. Ct. H.R. (Ser. C) No. 94, *Annual Report of the Inter-American Court of Human Rights: 2002*, OEA/Ser.L/V/III.57/doc.5 (2003) 20 [*Hilaire, Constantine and Benjamin et al. Case*]; *Caesar Case (Trinidad and Tobago)* (2005), Inter-Am. Ct. H.R. (Ser. C) No. 123, *Annual Report of the Inter-American Court of Human Rights: 2002*, at 10 online: Inter-Am. Ct. H.R. <http://www.corteidh.or.cr/docs/informes/Inf%20anua%202005%20diag%20ingles.indd.pdf> [*Caesar Case*].

United States, Canada, and the majority of English-speaking Caribbean countries have not ratified the *Convention*, which may therefore be referred to as a primarily Latin American instrument.[5] The Inter-American Commission and Court are in charge of the interpretation and the application of the *Convention*. The Inter-American Court was created by the *Convention* and became operational in 1979, after the OAS's General Assembly elected its first judges.[6] It exercises a contentious function towards the 22 member States which have expressly accepted its contentious jurisdiction. The *Convention*'s petition system allows individual victims of violations to lay charges before the Inter-American Commission, which will attempt to settle the case with the State. Should this process fail, the Commission may, under conditions, refer the matter to the Court which, if necessary, will give a ruling ascertaining the violation and possibly ordering reparatory measures. Between the beginning of its activities and the end of the 2010 legal year, the Court had judged about 120 contentious cases.[7] In addition to its contentious function, the Court exercises an advisory jurisdiction with regard to all OAS member States (not only to those which are party to the Convention). To date the Court has published 20 advisory opinions.[8]

It is in this institutional framework that the Court exercises its functions and interprets and develops Inter-American human rights law. This small regional Court, made up of seven judges, which only sits a few sessions a year and produces a modest case load, has its own original jurisprudence which is based on a very distinctive

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5 The States party are: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, The Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay, and Venezuela.

6 On the Inter-American Court, see Ludovic Hennebel, *La Convention américaine des droits de l'homme: mécanismes de protection et étendue des droits et libertés* (Brussels: Bruylant, 2007); Jo M. Pasqualucci, The Practice and Procedure of the Inter-American Court of Human Rights (Cambridge: Cambridge University Press, 2003); Hélène Tigroudja & K. Panoussis, *La Cour interaméricaine des droits de l'homme: Analyse de la jurisprudence consultative et contentieuse* (Brussels: Bruylant, 2003); A. A. Cançado Trindade, "The Operation of the Inter-American Court of Human Rights" in David Harris & Stephen Livingstone, eds., *The Inter-American System of Human Rights* (Oxford: Clarendon Press, 1998) 133; Scott Davidson, *The Inter-American Court of Human Rights*, *supra* note 3; A. A. Cançado Trindade, "Formación, Consolidación y Perfeccionamiento del Sistema Interamericano de Protección de los Derechos Humanos" in *XVII Curso de Derecho Internacional Organizado por el Comité Jurídico Interamericano* (Washington, D.C.: Secretaria General Asuntos Jurídicos O.E.A, 1990) ; Christina Cerna, "The Structure and Functioning of the Inter-American Court of Human Rights (1979-1992)" (1992) 63 Brit. Y. B. Int'l L. 135.

7 The Court's contentious activities are increasing significantly. The Court judged 55 cases between 1987 and 2003, and 40 between 2004 and 2007.

8 See Jo M. Pasqualucci, "Advisory Practice of the Inter-American Court of Human Rights: Contributing to the Evolution of International Human Rights Law" (2002) 38 Stan. J. Int'L. 241; Thomas Buergenthal, "The Advisory Practice of the Inter-American Human Rights Court" (1985) 79 Am. J. Int'l L. 1, 25; M. Pacheco Gómez, "La Competencia Consultiva de la Corte Interamericana de Derechos Humanos" in *Memoria del Seminario Noviembre de 1999*: *El Sistema Interamericano de Protección de los Derechos Humanos en el Umbral del Siglo XXI*, T. I, 2nd ed., (San Jose: Inter-Am. Ct. H.R., 1999); P. Nikken, "La Función Consultiva de la Corte Interamericana de Derechos Humanos" in *Memoria del Seminario Noviembre de 1999*: *El Sistema Interamericano de Protección de los Derechos Humanos en el Umbral del Siglo XXI*, T. I, 2nd ed., (San Jose: Inter-Am. Ct. H.R., 1999) 161; Manuel E. Ventura & Daniel Zovatto, *La Función Consultiva de la Corte Interamericana de Derechos Humanos: Naturaleza y Principios 1982-1987* (Madrid: Civitas, 1989); Thomas Buergenthal, "The Advisory Practice of the Inter-American Human Rights Court" (1985) 79 Am. J. Int'l L. 1.

conception of international human rights law. It is this Inter-American distinctiveness that this paper seeks to comprehend and analyse.

I. Some atypical features of Inter-American human rights law

The Inter-American Court of Human Rights is frequently considered an atypical, unique institution which may be observed from afar without being truly understood. Europeans and North Americans are generally unaware of its work, and it remains insufficiently mastered by Latin American doctrine.[9] It is not always clear what to make of its original, creative, avant-garde or even "legally non-conformist" jurisprudence. The Court takes certain liberties with regard to the way in which it interprets the *American Convention*, treating the State-centric paradigm and voluntarism with disdain and consequently risks displeasing member States and internationalist scholars.[10] However, the Court adopts this attitude intentionally and asserts the Inter-American distinctiveness through its own construction of legal universalism. This distinctiveness may be perceived in the Inter-American Court's contentious and consultative jurisprudence. In order to analyse it, the paper will describe the Court's work through the prism of a number of problems,[11] emphasizing the most salient characteristics of this "Inter-American doctrine".

A. The individualization of Inter-American law

The Inter-American Court places the human being at the very centre of Inter-American law. However, the human being is not seen *in abstracto*. For the Court, the human being that needs the protection of human rights is the one that is vulnerable. Some target groups are weaker than others and therefore deserve stronger protection: children, women, indigenous people, disabled persons. To a certain extent, the standard of "vulnerability" defines – or specifies – the right-holder. Following the

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9 European doctrine is not interested in an Inter-American system which seems far removed from its primary interest, European human rights law. North American doctrine has long come up against a linguistic problem given that the Inter-American Court's judgments were, until recently, published exclusively in the Spanish language, which considerably limited the field of academics who were able to study its jurisprudence. Latin American doctrine has not always disposed of the means to systematically analyse the functioning and work of the Inter-American institutions.

10 See especially, the criticisms of G. Neuman, "Import, Export, and Regional Consent in the Inter-American Court of Human Rights" (2008) 19 Eur. J. Int'l L. 101.

11 See the analyses of and reports on Inter-American jurisprudence by Judge Cançado Trindade, especially from a comparative perspective: A. A. Cançado Trindade, "Approximations and Convergences in the Case-Law of the European and Inter-American Courts of Human Rights", in G. Cohen-Jonathan & J.-F. Flauss, eds., *Le rayonnement international de la jurisprudence de la Cour européenne des droits de l'homme* (Brussels: Bruylant-Nemesis, 2005) 101; A. A. Cançado Trindade, "The Development of International Human Rights Law by the Operation and the Case-Law of the European and Inter-American Courts of Human Rights" (2004) 25 H.R.L.J. 157; A. A. Cançado Trindade, "The Inter-American Court of Human Rights at a Crossroads: Current Challenges and Its Emerging Case-Law on the Eve of the New Century" in P. Mahoney & al., eds., *Protection des droits de l'homme: la perspective européenne. Mélanges à la mémoire de Rolv Ryssdal* (Berlin: Carl Heymanns, 2000) 167.

Court's jurisprudence, it seems that human rights are tailored to suit the needs for protection of the most vulnerable individuals. This interpretative method may be coined as "sociological", centred on the right-holder. In other words, the rights and liberties are interpreted from the perspective of the victim.

The *American Convention* recognizes the rights and liberties of *persons*, which may be *any human being* (Article 1(2) of the *Convention*). This determines the status of the right-holder of the *Convention* right. It is both (negatively) precise because it excludes legal persons from the benefit of *Convention* rights, as well as excluding groups and communities, and (positively) vague because it allows the Inter-American bodies to conceptually determine the owner of the rights by applying their own perception of the human being. In contrast to the European Convention, which protects legal persons (Article 1 of the First Protocol),[12] the *American Convention* is exclusively centred on the individual. While the Inter-American bodies have, until now, refused to extend protection to legal persons (which could be done via an extensive interpretation), this is probably not because they intend to conform to a strict literal interpretation, but rather due to their very particular interpretation of the "human" in human rights. For the Court, it seems that a "legal person" incarnates a certain form of "Power" – like the State does – against which the "vulnerable" human being must be protected. In this sense, the Court considers that though legal persons cannot be victims in Inter-American contentious cases, the physical individuals who make them up, be they shareholders, associates, or labourers, must be able, as individuals, to benefit from the protection of the *American Convention*, and especially of its Article 21, which protects the right to property.[13] The Court explains that, while a rich landowner who has the financial capacity to buy himself a combine harvester with his personal funds in order to cultivate his land would benefit from the *Convention*'s protection, modest farmers who, lacking sufficient financial power, are restricted to buying this type of tool collectively by forming a legal person, whether societal or associative, would be deprived of such protection.[14] The Court cites this

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12 *First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms*, 20 March 1952, 213 U.N.T.S. 262, Eur. T.S. 9 (entered into force 18 May 1954) [*Protocol No. 1 to the European Convention on Human Rights*].

13 *Ivcher Bronstein Case (Peru)* (2001), Inter-Am. Ct. H.R. (Ser. C) No. 74, *Annual Report of the Inter-American Court of Human Rights: 2001*, OEA/Ser.L/V/III.54/doc.4 (2000) 21 [*Ivcher Bronstein Case*]. The Inter-American Commission, which is in charge of the initial examination of admissibility, has a more ambiguous position. See *Banco de Lima v. Peru* (1991), Inter-Am. Comm. H.R., No.10/91, *Annual Report of the Inter-American Commission on Human Rights: 1990-1991*, OEA/Ser.L/V/II.79.rev.1, (1991); *Tabacalera Boquerón S.A. v. Paraguay* (1997), Inter-Am. Comm. H.R., No. 47/97, *Annual Report of the Inter-American Commission on Human Rights: 1997*, OEA/Ser.L/V/II.98/doc.6 rev. (1997) c.III; *Carlos Alberto López Urquía v. Honduras* (2005), Inter-Am. Comm. H.R., No. 83/05, *Annual Report of the Inter-American Commission on Human Rights: 2005*, OEA/Ser.L/V/II.124/doc.5 (2006) c.III.

14 *Cantos Case (Argentina)* (2001), Inter-Am. Ct. H.R. (Ser. C.) No. 85, at para. 29, *Annual Report of the Inter-American Court of Human Rights: 2001*, OEA/Ser.L/V/III.54/doc.4 (2000) 26 [*Cantos Case*]: "This Court considers that, although the figure of legal entities has not been expressly recognized by the *Convention*, as it is in *Protocol No. 1 to the European Convention on Human Rights*, this does not mean that, in specific circumstances, an individual may not resort to the Inter-American system for the protection of human rights to enforce his fundamental rights, even when they are encompassed in a legal figure or fiction created by the same system of law. However, it is worth making a distinction in order to identify which situations could be examined by this Court within the framework of the

example as one of the absurd consequences of a rigid and formalist position which would exclude legal persons from any type of protection, even indirect. The combine harvester example demonstrates that, according to the Court, the modest farmer, due to his vulnerability, must be able to benefit from protection which, if not superior, is at least equal to that of the well-off. The example is not chosen randomly and emphasizes the importance that the Court places on this "vulnerability" standard which frequently reappears, implicitly or explicitly, in its reasoning.

To effectively protect human beings – and take into account the vulnerability standard – the Court seeks to interpret the rights and freedoms of the *Convention* from the point of view of the particular individual concerned, applying what might be referred to as a "sociological interpretation".[15] One of the best examples of the use of

American Convention." See also at para. 25: "It is also worth examining Article 21 of the *American Convention* with regard to private property, which is the subject of this case. According to the interpretation suggested by Argentina, which the Commission appears to share, if a landowner acquires a harvesting machine to work his fields and the Government confiscates it, he would be protected by Article 21. But if, instead of a landowner, it was a case of two poor farmers who formed a company to buy the same harvester and the Government confiscated it, they would not be able to invoke the *American Convention* because the harvester in question would be owned by a company. Now, if these same farmers, instead of constituting a company, bought the harvester in co-ownership, the *Convention* could protect them because, according to a principle that goes back to Roman law, co-ownership does not constitute a legal entity."

[15] The notion of the "human being" is relative and likely to depend on each individual's own interpretation (and beliefs). Could a "sociological" interpretation of the *Convention* and, in particular, of the right to life, not lead to qualifying the temporal extent of the ownership of the rights, before or after death? This raises questions with regard to abortion and euthanasia. Interpreting the right to life from the right-holder's point of view would force the Court to protect the right to life from the moment of conception, or to adopt the right-holder's philosophical or religious interpretations of rights related to spiritual life, depending on the case at hand. Thus, the Court could potentially place greater importance on the right-holder's subjective perception of his rights than on the objective protection guaranteed by the Court, in conformity with its interpretative methodology, thus modifying the temporal extent of the right to life depending on the victim in question and on the victim's philosophical or religious beliefs. Given that there is no Inter-American case law on the issues of abortion or euthanasia, it is difficult to confirm this hypothesis. However, it is safe to say that these issues will sooner or later be laid before the Inter-American Court and that they will provoke passionate debate. The formulation of the right to life in Article 4(1) of the *Convention* has already caused heated discussions. The article protects life "in general, from the moment of conception", which distinguishes the *American Convention* from other generalist human rights texts, and in particular from the *European Convention* and the *International Covenant on Civil and Political Rights*. In a preliminary version of the article which was debated and then ruled out during preparatory work, this protection of the human being before birth extended to the chronically and mentally ill, which would have led to the exclusion or limitation of legislation which decriminalizes euthanasia. The proposed amendments only allowed the temporal extension of the right to life "from the moment of conception", to which the *Convention* drafters wished to add a margin of interpretation by including "in general". This "interpretative valve" was aimed at ensuring that Article 4(1) would not render OAS States' legislation decriminalizing abortion in certain circumstances incompatible with the *Convention*. In *Baby Boy v. United States*, in which the communication's authors questioned the legality of abortion in Inter-American law, the Commission maintained that this Convention article does not, under any circumstances, guarantee the absolute right to life and that, therefore, legislation decriminalizing abortion was compatible with the *Convention*. *Baby Boy v. United States* (1981),Inter-Am. Comm. H.R., No. 23/81, *Annual Report of the Inter-American Commission on Human Rights: 1980-1981*, OEA/Ser.L/V/II.54/doc.9 rev. 1 (1981) c.III. In its ruling, the Commission particularly emphasized the vulnerability criterion afforded to the right-holder by reiterating that the legislation authorizing abortion considered by the *Convention*'s authors regarded cases in which the mother's life would be in

such a method can be found in *Moiwana Community v. Suriname*, in which an indigenous village had been attacked by members of the military, leading the remaining survivors to flee into exile. The survivors had not been able to carry out their religious mourning ceremonies. According to N'djuka culture, the death of a member of the community must be accompanied by a particular, complex set of rites which involve disposing of the deceased's mortal remains in order to allow the traditional funeral ceremonies and burial in an appropriate place to occur. Only those who are considered unworthy are refused traditional honourable burials.[16] The disregard of such funereal rights is considered to be an extreme moral infringement that rekindles the deceased's spiritual anger, and also awakens that of the descendant's ancestors. The deceased's family members are tormented by these spirits and suffer "illnesses of spiritual origin" marked by real physical pathologies which are likely to affect all descendants. These illnesses can only be cured through cultural and ceremonial means.[17] The Court considered that one of the principal sources of suffering for the members of the community resided in the disrespect for the treatment of the deceased's mortal remains, preventing the traditional funeral ceremonies from being carried out. In addition, community members were severely shocked and emotionally affected when they learned that the bodies of some of the deceased had been burned, as cremation is strictly forbidden in N'djuka culture.[18] In its reasoning, the Court places great importance on the victims' spiritual integrity with regard to the damage suffered due to their religious beliefs, as well as on the link that unites the living with the dead. A similar reasoning may be found in the Court's jurisprudence related to the case of forced disappearances or violent deaths. The Court generally emphasizes that the impossibility of retrieving the body considerably affects the victims' families' grief and, in addition, contravenes the cultural values of those who attach particular importance to the need to offer a dignified burial to the dead.[19] The

danger if the pregnancy was carried to its full term, where abuse of minors or rape was involved, or where there was a risk of transmission of a disease to the foetus. See also Senatorial Committee on the Rights of the Person (Canada), Report, "Enhancing Canada's Role in the OAS: Canadian Adherence to the American Convention on Human Rights" (May 2003) part 1, online: Parliament of Canada <http://www.parl.gc.ca/37/2/parlbus/commbus/senate/com-e/huma-e/rep-e/rep04may03-e.htm>: "The Committee also recommends that Canada consider making a reservation to Article 4(1) in order to address concerns related to the preservation of the status quo, in Canadian law, with respect to abortion. This reservation should be drafted so as to make it clear that Canada does not seek to deprive the right to life as a whole of its basic purpose, but merely to restrict certain aspects of it, as suggested by the Inter-American Court of Human Rights."

16 *Moiwana Community Case (Suriname)* (2005), Inter-Am. Ct. H.R. (Ser. C), No. 124, at para. 98, *Annual Report of the Inter-American Court of Human Rights: 2005*, at 15 online: Inter-Am. Ct. H.R. <http://www.corteidh.or.cr/docs/informes/Inf%20anua%202005%20diag%20ingles.indd.pdf> [*Moiwana Community Case*].

17 *Ibid*. at para. 99.

18 *Ibid.* at para. 100.

19 See *Bámaca-Velásquez Case (Guatemala)* (2000) Inter-Am. Ct. H.R. (Ser. C) No.70, at para. 197, *Annual Report of the Inter-American Court of Human Rights: 2000*, OEA/Ser.L/V/III.50/doc.4 (2000) 28 [*Bámaca-Velásquez Case No. 70*]: "In its final arguments, the Commission alleged that, as a result of the disappearance of Bámaca Velásquez, the State violated the right to the truth of the next of kin of the victim and of society as a whole. In this respect, the Commission declared that the right to the truth has a collective nature, which includes the right of society to "have access to essential information for the development of democratic systems",and a particular nature, as the right of the victims' next of kin to know what happened to their loved ones, which permits a form of reparation. The Inter-American

question directly relates to the protection of the deceased's right to benefit from a dignified burial, even if, in practice, this right is protected through the family's right to the truth and results from the combination of *Convention* Articles 8 and 25. Although, at death, the individual ceases to benefit from his rights, his body remains legally protected. The respect of the dead is an obligation owed to the living, which are the rights-holders.[20]

A similar reasoning based on the vulnerability standard reappears in a series of judgments regarding various categories of beneficiaries of rights and freedoms. The Court systematically deduces a special need for protection tailored according to the vulnerabilities of certain groups which are particularly targeted. Children, indigenous peoples, women, and migrants are all such groups through whose lens the Court will interpret the extent and nature of the *Convention*'s rights. The Court protects their "best interest". Thus, the protection of the right to life from the perspective of vulnerable individuals is emphasized by the Inter-American Court when it rules on the rights of disabled individuals who, according to the Court and due to their vulnerability, should benefit from special protection in order to preserve their dignity.[21] Beyond the State's special responsibility, rights and freedoms are generally defined according to their subject: the right to property protects indigenous communities' collective property,[22] the "family" extends to an individual's various

Court has established the obligation of the State to investigate the facts while there is uncertainty about the fate of the person who has disappeared, and the need to provide a simple and prompt recourse in the case, with due guarantees. Following this interpretation, the Commission stated that this is a right of a society and that it is emerging as a principle of international law under the dynamic interpretation of human rights treaties and, specifically, Articles 1(1), 8, 25 and 13 of the *American Convention*."

20 *Ibid*., A. A. Cançado Trindade, Separate opinion, at para. 12: "Even though the juridical subjectivity of an individual ceases with his death (thus no longer being, when having died, a subject of law or *titulaire* of rights and duties), his mortal remains–containing a corporeal parcel of humanity,–continue to be juridically protected […]. The respect to the mortal remains preserves the memory of the dead as well as the sentiments of the living (in particular his relatives or persons close to him) tied to him by links of affection,–this being the value juridically protected. In safeguarding the respect of the dead, also penal law gives concrete expression to a universal feeling of the human conscience. The respect for the dead is thus due–at the levels of both internal and international legal orders,–in the persons of the living." See also at para. 13: "In fact, the respect for the dead is not an element entirely alien to the international judicial practice. It may be recalled that, in the Advisory Opinion of the International Court of Justice of 16 October 1975 on the *Western Sahara*, the Hague Court took into account the *modus vivendi*, the cultural practices of the nomad populations of the *Western Sahara*, in affirming the right of these latter to self-determination. One of the elements, pointed out by the Tribunal, proper to the culture of the nomad tribes of the *Western Sahara*, was precisely the cult of the memory of the dead. In sum, the respect for the dead is due in the persons of the living, *titulaires* of rights and duties." On this issue, see also A. A. Cançado Trindade, Separate opinion annexed to the *Bámaca-Velásquez Case (Guatemala)* (2002), Inter-Am. Ct. H.R., (Ser. C) No. 91, *Annual Report of the Inter-American Court of Human Rights: 2002*, OEA/Ser.L/V/III.57/doc.5 (2003) 20 [Separate opinion annexed to the *Bámaca-Velásquez Case*]; A. A. Cançado Trindade, Separate opinion annexed to the *Moiwana Community Case*, *supra* note 16.

21 *Ximenes Lopes Case (Brazil)* (2006) Inter-Am. Ct. H.R. (Ser. C) No. 149, at para. 63, *Annual Report of the Inter-American Court of Human Rights: 2006*. at 21 online: Inter-Am. Ct. H.R. <http://www.corteidh.or.cr/docs/informes/20063.pdf>.

22 *Indígena Yakye Axa Community Case (Paraguay)* (2005), Inter-Am. Ct. H.R. (Ser.C) No. 125, *Annual Report of the Inter-American Court of Human Rights: 2005*, at 8 online: Inter-Am. Ct. H.R. <http://www.corteidh.or.cr/docs/informes/Inf%20anua%202005%20diag%20ingles.indd.pdf> [*Indigenous Yakye Axa Community Case*]. See also a very similar case: *Girls Yean and Bosico Case*

wives in polygamous communities,[23] the rights of the child include the concepts of personal development and "life projects",[24] and so on. Based on these categories, the Court interprets the Inter-American law by following the lines of the sub-groups' characteristics, identifying, for example, the interests, vulnerabilities and rights of street children, the particular history or culture of indigenous tribes, the rights of detained women[25] and so on. The wheel of Inter-American human rights law is composed of many spokes corresponding to specific needs.

B. The criminalization of Inter-American law

The Inter-American Court is inclined to "criminalize" Inter-American law. This is revealed not only by the Court's frequent use of concepts of international criminal law, such as those that can be found in the international criminal tribunals' jurisprudence,[26] but also by the "criminal tone" of the Inter-American procedure itself.

According to the *Convention* and the Court's jurisprudence, the State is held responsible for violations committed either by its agents or by private actors wherever it can be shown that the State "lacked diligence in its preventative role of the violation or in the handling of such violation".[27] Having had to deal primarily with grave and systematic human rights violations concerning forced disappearances, acts of torture, and summary executions, the Court has highlighted the States' duty to investigate and sanction the State being responsible for identifying the perpetrators of such crimes and for criminally punishing them. The Court controls the effectiveness of the investigations and supervises the States' criminal procedure, placing criminal law in a key position in its judgments. Above all, the Court has established a duty to put an end to impunity.[28] The Court binds human rights to criminal law and forces the State

(Dominican Republic) (2005), Inter-Am. Ct. H.R. (Ser. C) No. 130, *Annual Report of the Inter-American Court of Human Rights: 2005*, at 35 online: Inter-Am. Ct. H.R. <http://www.corteidh.or.cr/docs/informes/Inf%20anua%202005%20diag%20ingles.indd.pdf>. See also the comments made by A. A. Cançado Trindade, Separate opinion annexed to *Indigenous Yakye Axa Community Case*.

23 *Aloeboetoe et al.Case (Suriname)* (1991) Inter-Am. Ct. H.R. (Ser. C) No. 11, at para. 59, *Annual Report of the Inter-American Court of Human Rights: 1991*, OEA/Ser.L/III.25/doc.7 (1992) [*Aloeboetoe et al.Case*].

24 "*Street Children*" *(Villagrán-Morales et al.) Case (Guatemala)* (1999), Inter-Am. Ct. H.R. (Ser. C) No. 63, at para. 59, 79, *Annual Report of the Inter-American Court of Human Rights: 1999*, OEA/Ser.L/V/III.47/doc.6 (2000) 31 [*Street Children Case No. 63*].

25 *Miguel Castro-Castro Prison Case (Peru)* (2006), Inter-Am. Ct. H.R. (Ser. C) No. 160, at para. 313, *Annual Report of the Inter-American Court of Human Rights: 2006*, at 18 online: Inter-Am. Ct. H.R. <http://www.corteidh.or.cr/docs/informes/20063.pdf> [*Miguel Castro-Castro Prison Case*].

26 To mention only one example, in the *Miguel Castro-Castro Prison Case*, *ibid*. at para. 313, the Inter-American Court uses the definition of "rape" as determined by international criminal tribunal jurisprudence to interpret the *American Convention* and to qualify sexual violence experienced by detainees' wives at the hands of their wardens.

27 *Velásquez-Rodriguez Case (Honduras)* (1988), Inter-Am. Ct. H.R. (Ser. C) No. 4, at para. 170, *Annual Report of the Inter-American Court of Human Rights: 1988*, OEA/Ser.L/V/III.19/doc.13 (1988) 35 [*Velásquez-Rodríguez Case*].

28 On the issue of the duty to fight impunity, see W.A. Schabas, "Sentencing by International Tribunals: A Human Rights Approach" (1997) 7 Duke J. Comp. & Int'l L. 461. See also *"White Van" Case (Paniagua-Morales et al.) (Guatemala)* (1998), Inter-Am. Ct. H.R. (Ser. C) No. 37, at para. 173,

to bring the perpetrators of violations, who are often identified in the Court's rulings, to trial. Moreover, the Court analyses the factual details of violations by making generous use of witness testimonies and expert opinions, similar to a fourth instance appeal. The detailed descriptions of violations, usually related to atrocious, violent crimes carried out in a context of terror, go in line with the "criminalization" pattern. Inquisitorial examination, inspired from criminal law, drives the fact-finding procedure.

The "criminalization" of Inter-American human rights law reduces the artificial barrier which separates international criminal law from international human rights law, the first of which involves the judgment of individuals, and the second of which involves the judgment of States.[29] However, despite this apparent unity and the convergence of the protection mechanisms for the human being, the Court must settle with judging States (and has no power to judge individuals) and return verdicts on their international responsibility for the violation of the *Convention*. It is at this stage that the criminalization of Inter-American law must be analysed, for it results, in particular, from the incorporation of criminal legal concepts into the Inter-American law, changing the traditional conception of international law and responsibility. References to international criminal law appeared in the Inter-American Court's very first judgment, which described forced disappearances as crimes against humanity.[30] Later, the Court increasingly avoided the neutral language of classic international responsibility concepts in order to refer, in some cases, to concepts such as *State crimes* or *State terrorism*. Since the Court has no jurisdiction to judge individuals for their crimes, it integrates a criminal procedural tone and criminal legal language in its litigation, thus criminalizing the State's conduct. The State is not only responsible for the violation of an international obligation, but is also guilty of *crimes against humanity* and of *terrorist acts*. This pattern is illustrated, for example, in the *Goiburú et al. Case*, whose background was the forced disappearances and extrajudicial executions of Operation Condor carried out by a number of Latin American States in the 1970s. The Court referred to several documents to make its case, in particular the International Criminal Court's Statute, and concluded that the violation of a number of *American Convention* articles had taken place. However, according to the Court, the inter-state organization of a policy of systematic and grave human rights violations amounts to what the Court described as *State terrorism*, which justifies why the State is held to have "aggravated" or "exacerbated" responsibility.[31] The concept of "aggravated" responsibility is not new and the Court has referred to it in a number of cases[32] in which the State was held to have directly committed grave

Annual Report of the Inter-American Court of Human Rights: 1998, OEA/Ser.L/V/III.43/doc.11 (1999) 16 [*White Van Case*].

29 On the convergence of human rights protection systems, see A. A. Cançado Trindade, *International Law For Humankind: Towards a New Jus Gentium*, vol. II (Leiden: Martinus Nijhoff Publishers, 2005) at 150.

30 *Velásquez-Rodríguez Case*, *supra* note 27 at para. 155, 158.

31 *Goiburú et al. Case (Paraguay)* (2006), Inter-Am. Ct. H.R. (Ser. C) No. 153, at para. 153, *Annual Report of the Inter-American Court of Human Rights: 2006*, at 30 online: Inter-Am. Ct. H.R. <http://www.corteidh.or.cr/docs/informes/20063.pdf> [*Goiburú et al. Case* or *Goiburú*].

32 On this issue, see *Plan de Sánchez Massacre Case (Guatemala)* (2004), Inter-Am. Ct. H.R. (Ser. C) No. 105, *Annual Report of the Inter-American Court of Human Rights: 2004*,

violations, planned by the highest ranks of power, with the aim of obstructing processes of justice and ensuring impunity for the perpetrators. *Myrna Mack Chang Case (Guatemala)* (2003) may be cited as an example. Here, the Court held that the State had engaged its "aggravated international responsibility" due to the fact that Mack Chang's execution had taken place in a context of extrajudicial executions ordered by the State in conformity with a specific method, and that, at the time of the execution, no mechanisms were in place for the investigation of the facts or the pursuit of those responsible for the killing.[33] The Court confirmed this point of view in *Caso de los Hermanos Gómez-Paquiyauri v. Peru*, where it held that the State's responsibility was aggravated due to the fact that, at the time of the violation, a systematic practice of human rights violations was in place, which included the extrajudicial execution of those individuals suspected by State agents of belonging to armed groups. These agents acted upon orders from police and military commanders. According to the Court, these violations undermined international *jus cogens*. To determine the State's aggravated responsibility, the Court also emphasized that it duly took into account the fact that the victims in this particular case were minors.[34] Further, the Court condemned the State for "aggravated responsibility" in *Molina Theissen v. Guatemala*, given that the forced disappearance in this case had taken place in a context of a policy of systematic forced disappearances where many of the victims were children.[35] Finally, in its judgment of 29 April 2004, the Court

OEA/Ser.L/V/III.65/doc.1 (2004) 6 [*Plan de Sánchez Massacre Case*]; *Myrna Mack Chang Case (Guatemala)* (2003), Inter-Am. Ct. H.R. (Ser. C) No. 101, *Annual Report of the Inter-American Court of Human Rights: 2003*, OEA/Ser.L/V/III.61/doc.1 (2004) 20 [*Myrna Mack Chang Case*]; *19 Tradesmen Case (Colombia)* (2004), Inter-Am. Ct. H.R. (Ser. C) No. 109, *Annual Report of the Inter-American Court of Human Rights: 2004*, OEA/Ser.L/V/III.65/doc.1 (2004) 6 [*19 Tradesmen Case*]; *Moiwana Community Case*, *supra* note 16; *Mapiripán Massacre Case (Colombia)* (2005), Inter-Am. Ct. H.R. (Ser. C) No. 134, *Annual Report of the Inter-American Court of Human Rights: 2005*, at 8 online: Inter-Am. Ct. H.R. <http://www.corteidh.or.cr/docs/informes/Inf%20anua%202005%20diag%20ingles.indd.pdf> [*Mapiripán Massacre Case*].

[33] *Myrna Mack Chang Case*, *ibid.* at para. 139: "The Court deems that, pursuant to what was established in the chapter on proven facts, the State is responsible for the extra-legal execution of Myrna Mack Chang committed through actions of its agents, carrying out orders issued by the high command of the Presidential General Staff, which constitutes a violation of the right to life. This circumstance was worsened because at the time of the facts there was in Guatemala a pattern of selective extra-legal executions fostered by the State, which was directed against those individuals who were considered "internal enemies". Furthermore, since then and still today, there have not been effective judicial mechanisms to investigate the human rights violations nor to punish those responsible, all of which gives rise to an aggravated international responsibility of the respondent State."

[34] *Gómez-Paquiyauri Brothers Case (Peru)* (2004), Inter-Am. Ct. H.R. (Ser. C) No. 110, at para. 76, *Annual Report of the Inter-American Court of Human Rights: 2004*, OEA/Ser.L/V/III.65/doc.1 (2004) 8 [*Gómez-Paquiyauri Brothers Case*]: "The Court also deems that, in accordance with what was set forth in the chapter on proven facts, the responsibility of the State is exacerbated by the existence in Peru, at the time of the facts, of a systematic practice of human rights violations, extra-legal executions, of persons suspected of belonging to armed groups, carried out by agents of the State following orders of military and police commanders. Said violations violate international *jus cogens*. Likewise, the fact that the alleged victims in this case were children must be taken into account in establishing aggravated responsibility." See also A. A. Cançado Trindade, Separate opinion annexed to *Plan de Sánchez Massacre Case*, *supra* note 32.

[35] *Molina-Theissen Case (Guatemala)* (2004), Inter-Am. Ct. H.R. (Ser. C) No. 108, at para. 41, *Annual Report of the Inter-American Court of Human Rights: 2004*, OEA/Ser.L/V/III.65/doc.1 (2004) 7 [*Molina-Theissen Case*].

condemned the State for its aggravated international responsibility by referring to the concept of genocide, on the one hand, and on the other by holding that the massacres and other violations committed against the Maya achí people had "gravely affected the members of the Maya achí people" and "constitute[d] an aggravated impact that entails international responsibility of the State, which this Court will take into account when it decides on reparations."[36]

With this case law, the Inter-American Court of Human Rights endorses, implicitly at least, the "State crime" concept.[37] More precisely, the Court seems to wish to rehabilitate the "international crime" theory of the former Article 19 of the International Law Commission's *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*. Paragraph 2 of the Draft Articles sets out that "An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by the community as a whole constitutes an international crime".[38]

The Article's third paragraph provides a list of international crimes including aggression, slavery, genocide, the maintenance by force of colonial domination, apartheid, and a serious breach of an international obligation of essential importance for the preservation of the human environment. Finally, paragraph 4 describes those internationally wrongful acts that do not rise to the level of international crimes as international "delicts". This Article, though adopted in the first reading, was highly controversial and eventually abandoned. It was criticized for introducing criminal vocabulary, for being based on subjective criteria which did not allow a clear definition of the various notions, and for its lack of significant practical consequences.[39] However, the concept of the degree of illegality has not been entirely abandoned, as Chapter III of the second part of the *Draft Articles on the Responsibility of States for Internationally Wrongful Acts* sets out the legal rules for "grave violations of obligations following from imperative norms of general international law". Thus, the concept of grave violations explicitly refers to imperative norms of general international law.[40] Article 40(2) specifies that "[the] breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation."[41] This brief detour via general

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36 *Plan de Sánchez Massacre Case*, *supra* note 32 at para. 51. See also the comments made by A. A. Cançado Trindade in his Separate opinion annexed to the *Plan de Sánchez Massacre Case*.

37 A. A. Cançado Trindade, Separate opinion annexed to the *Myrna Mack Chang Case, supra* note 32, at para. 41: "Aggravated responsibility is, precisely, that which is consistent with a crime of State. The renowned Article 19 of the State Responsibility Project (1976) of the ILC […], in its provision regarding 'international crimes', precisely had in mind the determination of an *aggravated* degree of responsibility for certain violations of international law."

38 International Law Commission, G.A., 53th Sess., *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, Official Records of the General Assembly, 56th session, Supp. No. 10 (A/56/10), chp.IV.E.1 (2010), online: <www.javier-leon-diaz.com/humanitarianIssues/

39 State_Resp.pdf>. at 472; J. Crawford, *International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge: Cambridge University Press, 2002).

40 P. Daillier, A. Pellet, *Droit international public*, (Paris, L.G.D.J., 2002) at 472.

41 *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, *supra* note 38, art. 40(2).

international law allows us to better understand the Inter-American Court's jurisprudence regarding the aggravated responsibility of the State. This kind of responsibility corresponds to a particularly grave violation of the *Convention* which may be described, in theory at least, as a "State crime".[42] The *Goiburú* case moves from implicit to explicit by expressly referring to the notion of State terrorism. From the overall jurisprudence of the Court, it appears that a grave violation seems to require two elements in order for it to be identified as a "State crime": it must demonstrate a flagrant or systematic breach of required obligations and must also concern imperative norms.[43] In practice, the aggravated nature of the violation essentially depends on the circumstances in which it is committed: governmental planning, systematisation, and impunity seem to be common denominators of this type of violation. Therefore, *Goiburú* confirms that the Court distinguishes between "simple" and "aggravated" violations of the *American Convention*.

The consequences of such a distinction are, above all, political. In referring to the aggravated responsibility, the Court indeed condemns a political regime, a criminal government, and its practices in order to contribute to the consolidation of democratic transitions operating in the majority of the States in question by means of international justice. The legal consequences themselves are more difficult to identify and current Inter-American jurisprudence does not allow them to be clearly defined. It might be suggested that the acknowledgement of aggravated responsibility should naturally justify the Court's imposition of punitive reparations. However, since its early judgments, the Inter-American system has avoided ordering such reparations.[44] The Court has designed its reparations system according to general international law

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[42] A. A. Cançado Trindade, Separate opinion annexed to the *Myrna Mack Chang Case, supra* note 32 at para. 27-32, outlines his position on the issue by referring explicitly to the old Article 19 of the *Draft Articles on the Responsibility of States for Internationally Wrongful* Acts, and by describing the illegal act as an "international crime" or a "crime of State", implying aggravated responsibility. See also the comments in A. A. Cançado Trindade, Separate opinion annexed to the *Plan de Sánchez Massacre Case*, *supra* note 32.

[43] Consequently, it is unlikely that the Court would condemn a State for aggravated responsibility for the systematic violation of a right such as the right to property or to freedom of assembly, as these rights do not generally form part of *jus cogens*. Similarly, the Court would not, in our opinion, uphold the State's aggravated responsibility for an isolated violation of the prohibition of torture, although this does form part of *jus cogens*. For an analysis of this issue from the angle of public international law, see Tigroudja, H., "La Cour interaméricaine des droits de l'homme au service de l'humanisation du droit international. Propos autour d'avis et d'arrêts récents", (2006) 52 A.F.D.I. 617.

[44] In its first judgment on reparations, the Court deemed that the reparation aimed at by Article 63(1) of the *Convention* is of a compensatory and not a punitive nature. It emphasized in this context that, although certain national tribunals, especially Anglo-American ones, impose punitive damages with a view to deterrence, this principle is not currently applicable to international law. *Velásquez-Rodríguez Case*, *supra* note 27 at para. 37-38. The Court deemed that, amongst other things, the nature and extent of the reparation depend on the material and mental damage inflicted. Reparations may lead to neither the enrichment nor the impoverishment of the victims or of their successors. *White Van Case*, *supra* note 28 at para. 79; *Blake Case (Guatemala)* (1999) Inter-Am. Ct. H.R. (Ser. C) No. 48, at para. 34, *Annual Report of the Inter-American Court of Human Rights: 1999*, OEA/Ser.L/V/III.47/doc.6 (2000) 19 [*Blake Case*]; *Castillo-Páez Case (Peru)* (1998) Inter-Am. Ct. H.R. (Ser. C) No. 43, at para. 53, *Annual Report of the Inter-American Court of Human Rights: 1999*, OEA/Ser.L/V/III.47/doc.6 (2000) 41 [*Castillo-Páez Case*]; *Garrido and Baigorria Case (Argentina)* (1998) Inter-Am. Ct. H.R. (Ser. C) No. 39, at para. 43, *Annual Report of the Inter-American Court of Human Rights: 1999*, OEA/Ser.L/V/III.47/doc.6 (2000) 39 [*Garrido and Baigorria Case*].

and to the hierarchy of reparation measures which it institutes. Nevertheless, this does not prevent *punitive damages* which do not necessarily have to take the form of punitive damages, from being considered. In addition to compensatory damages, which aim to *compensate* the damage suffered by the victim and the victim's next of kin, in certain circumstances the Inter-American Court's jurisprudence imposes a different type of reparation which takes the form of a *duty to act* imposed upon the State. This may be part of the *fulfilment of the obligation*, *suspension and non-fulfilment* or part of the reparation of non-pecuniary loss. The Court's experience shows that States more easily fulfil the obligation to indemnify than the obligation to act.[45] Duties to act may, in fact, be considered to be aimed at two objectives: the compensation of the damage on the one hand, and the punishment of the State on the other. Indeed, in requiring for example that the State names a school after victims of a violation or that it publicly apologises for its violation, the Court seems to go beyond full compensation. According to Antonio A. Cançado Trindade, these *types of punitive damages* may be considered to be an appropriate response to State crimes.[46] Moreover, in cases where the aim is to cease a violation or prevent its repetition, non-pecuniary damages have, in practice, proved to be more effective and useful.[47] In the *Myrna Mack Chang Case*, for example, the Court ordered the State to create an educational grant named the *Mack Chang Award*, covering the full cost of one year's anthropological study in a national university. This grant was to be awarded annually. In addition, the State was required to name a street or a public place in a Guatemalan town after the victim, as well as to place a commemorative plaque in an area close to where she died.[48] The Court applied a similar approach in the *Gómez-Paquiyauri Brothers Case*, in which it required the State to name a school after the two victims and to allocate a full grant for university study to the victims' sister.[49] These reparations complemented the usual compensation as well as the duty to investigate the disputed facts and to identify and punish the perpetrators of the crime. While the Court tends to resort to this type of reparative measure in cases of grave violations, it does not limit them to cases in which it has established the aggravated responsibility of the State.[50] It is also important to note that, in Inter-American jurisprudence, the theory of aggravated responsibility developed by the Court is difficult to perceive due to the "home-made" and progressive process that led to its establishment. Indeed, this theory evolved over the course of case law and "judicial opportunities" and was constructed bit by bit. It was guessed at rather than understood, which reduces its analytical perspectives. However, it makes sense and even though its legal consequences remain uncertain, the influence of criminal law, and in this sense the criminalization of Inter-American human rights law, is amply demonstrated. At this stage, its consequences must be analysed from the perspective of the political role that

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45 A. A. Cançado Trindade, Separate opinion annexed to the *Myrna Mack Chang Case*, *supra* note 32 at para. 47. See also A. A. Cançado Trindade, Separate opinion annexed to the *Gómez-Paquiyauri Brothers Case*, *supra* note 34.

46 A. A. Cançado Trindade, Separate opinion annexed to the *Myrna Mack Chang Case*, *ibid*. at para. 52.

47 *Ibid*. at para. 48.

48 *Myrna Mack Chang Case*, *supra* note 32 at para. 285-86.

49 *Gómez-Paquiyauri Brothers Case*, *supra* note 34 at para. 236-37.

50 See the comments by A. A. Cançado Trindade, Separate opinion annexed to the *Plan de Sánchez Massacre Case*, *supra* note 32.

Inter-American justice plays in the region.

The criminalization of Inter-American law does not end here. Indeed, it fosters the Inter-American contentious procedure itself. The State's role before the Inter-American Court is comparable to the position of an accused before the Inter-American Commission in its role of public ministry and before the victims' representatives. The Inter-American process is inquisitorial in nature, with the Court seeking to bring the relevant facts to light and to reveal "the truth". The hearings are lengthy and meticulous, and place great importance on emotionally charged testimonies. The judgments render detailed accounts of factual events and expert reports. A substantial part of the reparations may be described as "measures of general interest" rather than as individual reparations seeking to restore the wronged party's rights. The State is invited to "admit" the violating acts and to recognize its international responsibility. Such an admission is perceived positively by the Court, which, however, does not deny itself the right to publish a judgment detailing the facts and the mechanisms of imputability in such cases. Finally, the parties may negotiate a friendly settlement at any time, though its terms must be compatible with Inter-American human rights law. Amicable settlements in the Inter-American procedure are comparable to plea bargaining in common law. The petitioner – the prosecutor in our analogy – may negotiate an appropriate reparation which will be obtained more quickly than if the full procedure had to be followed.[51] The State in question – the accused in our analogy – avoids the lengthy Inter-American procedure, the publicity of an "embarrassing" public trial, the Commission's enquiries – the judge as well as the prosecutor in our analogy – and, depending on the case, a conviction contained in a jurisdictional decision by the Inter-American Court. This criminal aspect of the Inter-American procedure naturally goes in line with the nature of the violations dealt with: massive and systematic. Thus, it may be argued that the criminalization of Inter-American law is not simply limited to the interpretation of the law, but that it defines Inter-American litigation itself.

C. The "constitutionalization" of Inter-American law

The Inter-American Court of Human Rights does not limit itself to interpreting or controlling whether the American Convention is respected. Its mandate, or at least the way in which it interprets its mandate, is significantly wider than this and assists in contributing to the establishment of a real human rights and justice culture in the region. Thus, it works towards what might be referred to as the "constitutionalization" of the *American Convention* and of Inter-American law in general. It is not surprising that the Inter-American Court more and more often holds sessions not at its headquarters in San José, but in other member States, symbolically occupying the prestigious courtrooms of their various palaces of justice for the

[51] See e.g. "*Caloto*" *Massacre v. Colombia* (2000), Inter-Am.Comm. H.R. No. 36/00, *Annual Report of the Inter-American Commission on Human Rights: 1999*, OEA/Ser.L/V/II.106/doc.6 rev. (2000) c. III; *"Los Uvos" Massacre v. Colombia* (2000), Inter-Am. Comm. H.R. No. 35/00, *Annual Report of the Inter-American Commission on Human Rights: 1999*, OEA/Ser.L/V/II.106/doc.6 rev. (2000) c. III.

duration of an itinerant session.

It may be noted that the interpretation of the *Convention*'s obligations allows the Court, much like a constitutional court, to "invite itself" into the member States' legal systems in order to force them to conform with the *Convention*. The *American Convention on Human Rights* imposes a number of general obligations upon the States aimed at respecting and guaranteeing rights and liberties.[52] There are three such obligations, forming the matrix of the *Convention*: the obligation to respect and guarantee *Convention* rights (Article 1(1)); the obligation to adopt national legislative measures (Article 2); and the obligation to develop judicial remedies against violations of fundamental rights (Article 25(2)). The Inter-American Court has interpreted these measures in a wide and liberal manner, thus extending the impact of conventional obligations beyond their literal meaning. It is in the light of these general obligations that the alleged violations are evaluated. The *American Convention*'s obligations system – a genuine "octopus" system – is based on these three series of obligations which, in theory, are each addressed to a different branch of power: the obligation to respect and guarantee is addressed to the executive, the obligation to adopt national measures to the legislature, and the obligation to organize remedies to the judiciary. These obligations create a coherent system and, to a certain degree, depend upon each other. In conformity with the *Convention*, therefore, the State must prevent violations of rights from taking place (notably by adopting appropriate national provisions), positively guarantee the exercise of all rights (and carry out investigations as well as punish perpetrators thereof), and permit victims to assert their rights before the primary guarantor of these rights and liberties: the national judge. This obligations system is highly successful and its effects are important not only at the national, but also at the international level.

Nationally, an examination *in abstracto* or an "aerial" perspective of the State system is not enough for the Court to control whether these obligations are being respected. Instead, the Court conducts a detailed analysis aimied at evaluating the nature of the measures put into place by the executive, of the laws adopted by the legislature, and of the recourse heard by the judiciary. Thus, it interferes with the State's legal system in order to better guide the State on the path of international lawfulness. The Court is somewhat paternalistic and guides the State in its choice of methods to effectively fight violations. It checks the means of implementation chosen by the State in an objective and detailed manner in order to guarantee the *Convention*'s rights and freedoms and to give full effect to the duties to prevent, investigate, sanction, and compensate which follow from the general guarantee obligation. The methods are assessed in terms of their "reasonableness". Thus, it is not sufficient for national authorities to have carried out an investigation, but the investigation must also have been of reasonable quality. At times, depending on the type of violation, the Court will encourage recourse to certain scientific investigative techniques, such as an autopsy in the case of an extrajudicial execution. The Court defines the criminological framework which must be respected by the State in order to

[52] On the general obligations of the *Convention*, see L. Hennebel, *supra* note 6 at 343 and the cited examples.

conform to the *Convention*. A serious, impartial, effective, and diligent investigation must be conducted particularly in the context of grave human rights violations, which include violent deaths or disappearances. The duty to investigate, then, takes the form of a legal duty imposed upon the State to investigate the truth, which responds to the victims' right to the truth. Similarly, when the Court evaluates whether a State is respecting its duty to punish perpetrators, it analyses the quality of the procedures that have been carried out and of the trials that have taken place. In certain cases, this takes the form of a fourth instance criminal appeal, even though the Court itself denies this. For example, the Court may require a State to review a criminal trial which ended in a dismissal or an acquittal due to a procedural objection such as an amnesty law or a limitation of the action by lapse of time which was successfully invoked by the accused during the initial trial.

According to the Court, these procedural obstacles to the effective implementation of the duty to punish must be minimized by the national judge so that justice may be done. The Inter-American Court uses the same reasoning when examining national legislative measures or the conformity of a national practice to the *Convention*, in accordance with Article 2 of the *Pact of San José*. Acting somewhat like a constitutional court, the Inter-American Court seizes the opportunity of contentious control to scrutinize national legislation, including constitutional law and, if necessary, to declare it incompatible with the *Convention*, thus forcing the State to amend it. Amnesty laws, security legislation in the fight against terrorism, death penalty legislation, legislation permitting corporal punishment, and constitutional measures providing for censorship of cinematographic works are all examples of measures which may be subject to the Court's control, depending on the case in question. Consequently, the Court has adopted a clear position with regard to amnesty laws by declaring them incompatible with the *Convention*. This has been the case since *Barrios Altos v. Peru* (2001) in which the Court substantially held that all amnesty measures, limitations of criminal action, or measures designed to prevent the enforcement of responsibilities are incompatible with the *Convention* as they aim to prevent the exercise of the duties to investigate and punish the perpetrators of grave violations of intangible human rights (torture, executions, forced disappearances).[53] The Inter-American Court added that no national legal measure may contravene the execution in national law of a decision by the Inter-American Court ordering a State to investigate a violation or to punish the perpetrators of that violation.[54] Here, the Court acts precisely as would a constitutional court.

Despite controlling the conformity of national law to the *Convention*, the Inter-American Court's consultative function must not be forgotten.[55] Indeed, States

[53] *Barrios Altos Case (Peru)* (2001), Inter-Am. Ct. H.R. (Ser. C) No. 75, at para. 41, *Annual Report of the Inter-American Court of Human Rights: 2001*, OEA/Ser.L/V/III.54/doc.4 (2000) 22 [*Barrios Altos Case*].

[54] *Bulacio Case (Argentina)* (2003), Inter-Am. Ct. H.R. (Ser. C) No. 100, at para. 117 , *Annual Report of the Inter-American Court of Human Rights: 2001*, OEA/Ser.L/V/III.61/doc.1 (2004) 25 [*Bulacio Case*].

[55] See e.g. *Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica* (1984), Advisory Opinion OC-4/84, Inter-Am Ct. H.R. (Ser. A) No.4, *Annual Report of the Inter-American Court of Human Rights: 1984*, OEA/Ser.L/V/III.10/doc.13 (1984) 40.

have the option to request the Court's opinion concerning the compatibility of national legislation with the *Convention* or with other human rights treaties.[56] The Court interprets the notion of "national legislation" in the widest possible sense and indicates that the concept refers to all types of legal norms, including constitutional measures.[57] It emphasizes that government bills and constitutional reform bills may also be subject to requests relating to their compatibility with the American *Convention* and other human rights treaties.[58] To support this position, the Court highlights that its consultative function should be viewed as a type of service offered by the Court which should benefit all Inter-American actors and whose ultimate aim is to support States in order to ensure that they respect their international human rights obligations. It considers that too strict an interpretation of the notion of "national legislation" as mentioned in Article 64(2), understood as "legislation currently in place" would, in some cases, confine the State to adopting and enforcing legislation which is contrary to the *American Convention* (which is in itself a violation of the *Convention*) and/or other treaties concerned with human rights before being able to consult the Court on its compatibility[59]. In order to prevent this type of situation, the Court agrees to deliver opinions on the compatibility of proposed bills or constitutional reforms. A State may also consult the Court on a government bill's compatibility with its international human rights obligations by formulating the question to fit into Article 64(1) of the *American Convention*. It must be noted that, though individuals and groups are unable to request consultative opinions, they may nevertheless serve the Inter-American Court of Human Rights an individual petition alleging the incompatibility of a national provision of a State party which has accepted the Court's adjudicatory competence. The Court will ensure that national law complies with the *American Convention in abstracto*, as long as the petition identifies a specific potential victim. While this mechanism differs greatly from the consultative function's philosophy (which, by nature, is non-contentious), it may concern only States which are party to the *Convention* and which have accepted the Court's litigious competence, and may only relate to the law's conformity with the *Convention* itself (and not with other treaties set out in Article 64(2) of the *Convention*). Ensuring the conformity of a law through adjudicatory means can be

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[56] Article 64 of the *American Convention*, *supra* note 2 at para. 2: "The Court, at the request of a member State of the Organization, may provide that state with opinions regarding the compatibility of any of its domestic laws with the aforesaid international instruments." Article 82 of the *Rules of Procedure of the Inter-American Court of Human Rights*: at para. 1 "A request for an advisory opinion presented pursuant to Article 64(2) of the *Convention* shall indicate the following: a. the provisions of domestic law and of the Convention or of other treaties concerning the protection of human rights to which the request relates." OAS, Inter-American Court of Human Rights, 85th Sess., *Rules of Procedure of the Inter-American Court of Human Rights*, OR OEA/Ser.L/V/III.25 doc.7 (1992) 18.

[57] *Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica*, *supra* note 55 at para. 14.

[58] *Ibid*. at para. 26-28. See also *Compatibility of Draft Legislation with Article 8(2)(h) of the American Convention on Human Rights* (1991), Advisory Opinion OC-12/91, Inter-Am. Ct. H.R. (Ser. A) No.12, at para. 20-22, *Annual Report of the Inter-American Court of Human Rights: 1991*, OEA/Ser.L/V/III.25/doc.7 (1992) 115. The Inter-American Court distinguished clearly between the term "legislation" used in Article 64(2) of the *Convention*, which it interprets widely, and the term "law" in Article 30 of the *Convention* where it proposes a particularly strict interpretation.

[59] *Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica*, *supra* note 55 at para. 18.

particularly effective to prevent the consequences of a legislative measure that is contrary to the *Convention*. In any event, the Inter-American Court exercises control of the "conventionality" of national law, whether via its litigious or its consultative function. In so doing, the Court acts like a constitutional court, and its consultative powers seem to confirm this, at least in principle.

Internationally, the *American Convention*'s general obligations have an impact beyond member States' borders and, even here, a strong tendency toward the "constitutionalization" of the treaty may be observed. The Court relies upon the *Convention* obligations to establish a principle of collective guarantee of human rights across the region. Thus, according to the Court, the general obligation to respect and to guarantee human rights is *erga omnes* in nature. It links all States for the benefit of all individuals in their jurisdiction. For the Court, the *erga omnes* obligation to respect and guarantee human rights goes beyond the question of consent and is unrelated to questions regarding the ratification or adhesion to treaties or to State voluntarism in general. Nevertheless, the Court distinguishes between those assertions which reveal a certain philosophical *jus naturale* perception of human rights and the concrete functioning of conventional mechanisms which, in order to be implemented, require the State's consent. In this sense, the Court ensures access to justice (Articles 8 and 25 of the *Convention*) as an imperative norm, requiring States to extradite or try the perpetrators of crimes against humanity, even if the perpetrators are former Heads of State.[60] This duty to try, in the logic of the collective guarantee of the *Convention*, is also *erga omnes* in nature.[61] In reality, this tendency to affirm the *erga omnes* nature of the obligation and the collectivization of guarantees equally conforms to the logic of the "constitutionalization" of Inter-American law in the sense that the Court attempts to establish conventional Inter-American law as a fundamental norm, superior to national law in the globality and fundamental values which it enshrines. Thus, the Court considers that States have a duty to respect the superior hierarchy of human rights treaties over that of other treaties, including, notably, bilateral agreements.[62] To justify this supremacy of the *American Convention* (and of

60 *Miguel Castro-Castro Prison Case*, *supra* note 25 at para. 158-60.

61 *Goiburú et al. Case*, *supra* note 31 at para. 153.

62 *Saramaka People Case (Suriname)* (2007), Inter-Am. Ct. H.R. (Ser. C) No. 172, at para. 140, *Annual Report of the Inter-American Court of Human Rights: 2007*, at 25 online: Inter-Am. Ct. H.R. <http://www.corteidh.or.cr/docs/informes/Inf%20anua%202007%20ING.pdf>. Amongst the justifications listed by the State to explain why the land had not been given back to the victims' community, it indicated the existence of a bilateral treaty relating to investments concluded with Germany which formed part of the "law of the nation" by virtue of its Constitution and which authorized the State to nationalize or expropriate any land for public use, including land belonging to indigenous communities. However, the Inter-American Court rejected this argument by underlining that "the enforcement of commercial bilateral treaties does not justify the disrespect of the State's obligations under the *Convention*" and by adding that, on the contrary, "the application [of these agreements] must always be compatible with the *American Convention*, multilateral human rights treaties being endowed with their own specificity which gives rights in favour of individuals and which does not depend on reciprocity between States." The Inter-American jurisdiction requires States and, in particular, national judges to establish a hierarchy in favour of human rights treaties and to avoid any application of international law which would contradict such instruments. Some States already have an interpretation clause in their constitutions which states that interpretation must occur "in the light of" the *Convention*, but the Court makes it into a conventional obligation which follows from the obligation to protect *Convention* rights.

international human rights law in general), the Court frequently resorts to the *erga omnes* concept and extends the field of imperative law, considered to be an open category comprising equality and non-discrimination as well as access to justice. Thus, the *American Convention* itself is not far from being established as imperative law.

D. The humanization of Inter-American law

For the Inter-American Court, the *Convention* rights and freedoms form a systematic whole which responds to a certain balance and dialectical logic. The rights are the threads which make up the fabric of the *Convention*, whose base is made up of the general obligations and whose outlines are the principles of equality and non-discrimination. The violation of a right has an impact upon the whole and it is the Court's responsibility to re-establish the balance and preserve the system. The centre of this balance is the human being, and it is around the human being that the system is organized and structured. The individual is the source of the protectionist system as the beneficiary of rights and the victim of violations. His role, then, is central as he is both the subject of the law as well as an actor. With this in mind, the individual must be able to benefit from tools which may be used to activate the mechanisms that guarantee his rights and liberties. These tools take the form of the right to access to justice. By providing it, the Inter-American Court of Human Rights has contributed to conceptualizing an Inter-American dimension of justice with regard to human rights. This forms part of the logic according to which the State is nothing more than a fiction composed of individuals and which affirms that every right is aimed fundamentally at the human being and nothing other than the human being. This logic appeared in Politis' *Les nouvelles tendances du droit international* published in 1927, in which he stated that "it would be useless to insist upon it if the haze of sovereignty had not obscured the most fundamental truths"[63] [Author's translation] before pleading for individuals to be given access to international authorities.[64] It is this idea which is implicit in Inter-American jurisprudence and which is expressed in particular by Cançado Trindade.[65] Thus, the Court makes an effort to humanize Inter-American law by placing the individual at the centre of the game. This "humanization" of Inter-American law may be illustrated by two important aspects of the Court's work which again highlight the Inter-American distinctiveness. First, the Court has forged a very broad "right to effective recourse" which constitutes one of the key concepts of Inter-American jurisprudence. Second, in its own procedural law, the Court of San José advocates a liberal conception of justice centred on the individual. This has led it to redefine its own procedural rules in order to permit victims to benefit from access, albeit limited, to the Court.

The right to effective remedy (Article 25(1) of the *Convention*) seeks to

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63 The original text appears as: "serait inutile d'y insister si les brumes de la souveraineté n'avaient pas obscurci les vérités les plus élémentaires."

64 N. Politis, *Les nouvelles tendances du droit international*, (Paris: Hachette, 1927) at 69, 76-77.

65 *International Law for Humankind: Towards a New Jus Gentium*, *supra* note 29 at 285.

protect individuals from violations, including those committed by para-state agents, of those fundamental rights recognized by the Constitution or the law of the State concerned, or by the *Convention*.[66] In contrast to Article 2(3) of the *International Covenant on Civil and Political Rights*[67] and Article 13 of the *European Convention on Human Rights*,[68] which relate to effective recourse against violations of rights included in international instruments (respectively, the *International Covenant* and the *European Convention*), the effective remedy in Article 25(1) of the *American Convention* is enforceable in cases of violations of fundamental rights recognized not only by the *American Convention* but also by national law. Thus, its field of application is distinctly wider than that of the *European Convention* and the *International Covenant*. In practice, this gives Article 25 a veritable autonomy of application. In fact, in order to invoke the article, it is not necessary to demonstrate in advance that a violation of a substantial *Convention* measure has taken place. The characteristics of the recourse in Article 25(1) (simple, prompt, and effective) apply to any recourse aimed at protecting an individual's fundamental rights.[69] The protection offered by this recourse is complemented by the right to *habeas corpus* enshrined in Article 7(6) of the *American Convention* which aims, in the classical sense of the term as it is enshrined in American legal instruments, to guarantee the right of every person deprived of his liberty to address himself to a judge such that the latter may establish the lawfulness of the detention.[70] The Court considers these two guarantees to be fundamental, thus ensuring the protection of *Convention* rights, including the intangible rights listed in Article 27(2) of the *Convention*. For this reason, the Court specifies that *amparo* and *habeas corpus* are indispensable legal guarantees for the

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66 *Habeas Corpus in Emergency Situations (Arts.27(2), 25(1) and 7(6) American Convention on Human Rights)* (1987), Advisory Opinion OC-8/87, Inter-Am. Ct. H.R. (Ser. A) No.8, *Annual Report of the Inter-American Court of Human Rights: 1987*, OEA/Ser.L/V/III.17/doc.13 (1987) [*Habeas Corpus in Emergency Situations*].

67 *International Coventnant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (entered into force 23 March 1976) [*International Covenant*].

68 *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 221 at 223, Eur. T.S. 5 (entered into force 3 September 1953) [*European Convention on Human Rights* or *European Convention*].

69 In the majority of Latin America's national legal systems, this type of recourse is referred to as *amparo*. *Amparo* recourse is enshrined at the heart of the constitutional systems in Argentina, Bolivia, Costa Rica, El Salvador, Equador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay, and Venezuela. It also exists in Brazil as "*mandado de segurança*", in Chile as "*recurso de protección*", and in Colombia as "*acción de tutela*". On these issues, see C.M. Ayala Corao, "Del Amparo Constitucional al Amparo Interamericano como Institutos para la Protección de los Derechos Humanos" in *Liber Amicorum, Héctor Fix-Zamudio* (San Jose: CIDH, 1998) 341-74. It aims at an extraordinary and exceptional recourse of a constitutional nature against any act emanating from public authorities which is likely to affect the fundamental rights recognized by the Constitution. Given that Article 25 obliges the State to provide for this type of recourse in its domestic law in order to permit individuals to protect themselves against any act which violates their fundamental rights, it is not surprising that the Court deems Article 25 to be a general provision which enshrines the *institution of amparo recourse*. However, *amparo* is one of the recourses aimed at by Article 25, but it would be erroneous to suggest that it is limited to the *amparo* recourse as organized in the domestic legal systems of Latin American States. In fact, Article 25 has its own substantial content and, as such, offers an effective recourse which is additional to existing domestic recourse.

70 See *Tibi Case (Ecuador)* (2004), Inter-Am. Ct. H.R. (Ser. C) No. 114, at para. 130, *Annual Report of the Inter-American Court of Human Rights: 2004*, OEA/Ser.L/V/III.65/doc.1 (2004) 11 [*Tibi Case*]; *Habeas Corpus in Emergency Situations*, *supra* note 66 at para. 33.

protection of all Convention rights, and particularly of the intangible ones, and that they are effectively non-derogable.[71] In the *Goiburú et al. Case* (2006), the Court was not far from moving from intangible to imperative law.[72] According to the Court, the right to access to justice for victims of forced disappearances and their next of kin constitutes an imperative norm of international law. This includes investigation and punishment and requires States to extradite the perpetrators of crimes against humanity (such as forced disappearances) or to try them.[73]

While access to justice is established as an imperative norm, it must also be of sufficient quality. The Court ensures this every time it exercises its control. To be considered effective, the recourse enshrined in Article 25(1) must facilitate the clear ascertainment of whether a violation has taken place, and whether measures to remedy the violation may be implemented.[74] The formal recognition of this type of recourse by the Constitution or by State legislation is insufficient.[75] In addition, recourses which are illusory due to a general situation affecting the State or due to the particular circumstances of the case are considered to be ineffective.[76] The

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71 *Habeas Corpus in Emergency Situations*, *ibid*. at para. 35.

72 *Goiburú et al. Case*, *supra* note 31 at para.131-32.

73 *Miguel Castro-Castro Prison Case*, *supra* note 25 at para. 404. See also *La Cantuta Case (Peru)* (2006), Inter-Am. Ct. H.R. (Ser.C) No. 162, at para. 158-160, *Annual Report of the Inter-American Court of Human Rights: 2006*, at 34 online: Inter-Am. Ct. H.R. <http://www.corteidh.or.cr/docs/informes/20063.pdf>.

74 *White Van Case*, *supra* note 28 at para. 164; *Cesti-Hurtado Case (Peru)* (1999) Inter-Am. Ct. H.R. (Ser. C) No. 56, at para. 125, *Annual Report of the Inter-American Court of Human Rights: 1999*, OEA/Ser.L/V/III.47/doc.6 (2000) 20 [*Cesti-Hurtado Case*]; *Bámaca-Velásquez Case No. 70*, *supra* note 19 at para. 191.

75 See especially *Juan Humberto Sánchez Case (Honduras)* (2003), Inter-Am. Ct. H.R. (Ser. C) No. 99, at para.1, 21, *Annual Report of the Inter-American Court of Human Rights: 2003*, OEA/Ser.L/V/III.61/doc.1 (2004) 24 [*Juan Humberto Sánchez Case*]; "*Five Pensioners "Case.(Peru)* (2003) Inter-Am. Ct. H.R. (Ser. C) No. 98, at para. 126, *Annual Report of the Inter-American Court of Human Rights: 2003*, OEA/Ser.L/V/III.61/doc.1 (2004) 24 [*Five Pensioners Case*]; *Las Palmeras Case (Colombia)* (2001), Inter-Am. Ct. H.R. (Ser. C) No. 90, at para. 58, *Annual Report of the Inter-American Court of Human Rights: 2001*, OEA/Ser.L/V/III.54/doc.4 (2000) 26 [*Las Palmeras Case*]; *Mayagna (Sumo) Awas Tingni Community Case (Nicaragua)* (2001) Inter-Am. Ct. H.R. (Ser. C) No. 79, at para. 111-113, *Annual Report of the Inter-American Court of Human Rights: 2001*, OEA/Ser.L/V/III.54/doc.4 (2000) 29 [*Mayagna (Sumo) Awas Tingni Community Case*]; *Constitutional Court Case (Peru)* (2001), Inter-Am. Ct. H.R. (Ser. C) No. 71, at para. 89-90 and 93, *Annual Report of the Inter-American Court of Human Rights: 2001*, OEA/Ser.L/V/III.54/doc.4 (2000) 19 [*Constitutional Court Case*].

76 *Baldeón-García Case (Peru)* (2006), Inter-Am. Ct. H.R. (Ser. C) No. 147, at para. 144-45, *Annual Report of the Inter-American Court of Human Rights: 2006*, at 16 online: Inter-Am. Ct. H.R. <http://www.corteidh.or.cr/docs/informes/20063.pdf> [*Baldeón-García Case*]: "Article 25(1) of the *Convention* provides for the obligation of States to guarantee the right of all persons under its jurisdiction to an effective judicial remedy against violations of their fundamental rights. Mere availability of said remedies will not suffice; these remedies must be effective; i.e. they must be suitable to offer results or answers to violations of the rights protected under the *Convention*. This safeguard is one of the cornerstones of the *American Convention* and the democratic Constitutional State itself, as set forth in the *Convention*." See also at para. 145: "To that respect, this Court has stated that any remedy that is illusory due to the general conditions of the country or the specific circumstances of a given case cannot be deemed an effective remedy." See also *Acevedo-Jaramillo Case et al. (Peru)* (2006), Inter-Am. Ct. H.R. (Ser. C) No. 144, at para. 213, *Annual Report of the Inter-American Court of Human Rights: 2006*, at 10 online: Inter-Am. Ct. H.R. <http://www.corteidh.or.cr/docs/informes/20063.pdf>; *López-Álvarez Case (Honduras)* (2006), Inter-

Article 25(1) recourse must respect the procedural guarantees of fair trial as defined by Article 8(1) of the *American Convention*.[77] Linking Article 25 to Article 8(1), the Court considers that the bias and independence of tribunals responsible for dealing with the recourse or of judicial power in general may affect the effectiveness thereof.[78] The denial of justice,[79] unjustified delays in decision-making and obstacles to access to judicial remedy are all elements which are linked to the level of independence and impartiality of the tribunal responsible for dealing with the recourse, and they all but confirm the violation of Article 25, for they affect its effectiveness.[80] Similarly, this is the case in situations in which the alleged victim does not have access, whatever the reason, to legal remedy.[81] The Court will hold that the recourse is illusory and does not satisfy the criterion of effectiveness if the decision is made with unjustified delay. Again, in order to evaluate the reasonableness

Am. Ct. H.R. (Ser. C) No. 141, at para. 137, *Annual Report of the Inter-American Court of Human Rights: 2006*, at 8 online: Inter-Am. Ct. H.R. <http://www.corteidh.or.cr/docs/informes/20063.pdf> [*López-Álvarez Case*]; *García-Asto and Ramírez-Rojas Case (Peru)* (2005), Inter-Am. Ct. H.R. (Ser. C) No. 137, at para. 113, *Annual Report of the Inter-American Court of Human Rights: 2005*, at 13 online: Inter-Am. Ct. H.R. <http://www.corteidh.or.cr/docs/informes/Inf%20anua%202005%20diag%20ingles.indd.pdf>.

77 *Baldeón-García Case*, *ibid*. at para. 146: "The effective remedy of Article 25 must be processed in accordance with the rules of due process of law contained in Article 8 of the *Convention*. This Article provides that the victims of human rights violations or their next of kin must enjoy ample possibilities of being heard and participating in the related proceedings, in order to clearly establish the facts and the punishment applicable to the perpetrators of those acts, and to seek an appropriate relief." The application of criteria (and qualitative demands) of Article 8(1) to Article 25(1) remedies is not unanimous. Judge Medina Quiroga, current President (since 2008) of the Court, has frequently expressed her scepticism regarding certain aspects of the Inter-American Court's jurisprudence on this issue. She believes that Article 25 enshrines a substantial right – the right to judicial remedy, essentially for the violation of national law – while Article 8 is a procedural provision relating to aspects of trials. She holds that it is erroneous to confuse these two provisions by applying Article 8 to Article 25. In fact, she continues, the "prompt" recourse of Article 25 is likely to require an immediate decision in the hours or days following the litigation, while Article 8's reasonable delay may easily exceed one year. She believes that the Court should enumerate specific criteria in order to evaluate the conditions of the exercise of Article 25. C. Medina Quiroga, Separate opinion annexed to the *19 Tradesmen Case*, *supra* note 32 at para. 3: "I consider that it is very important to preserve the distinction between the two articles. If we examine Article 25 with the parameters of Article 8 – for example, the reasonable time limit – the meaning of the former article is nullified, because it requires, not a reasonable time limit, which could easily exceed a year in the terms of Article 8, but promptness; namely, resolution within a matter of days probably." We believe that the Article 8 rules, appreciated as part of the procedure as a whole and applied *in concreto*, may be applied to the Article 25 remedy. Thus, it does not seem necessary for the Court to develop specific rules and criteria applicable to the Article 25 remedy. If the matter is urgent, the reasonable delay may be interpreted as necessarily needing to be prompt.

78 *Habeas Corpus in Emergency Situations*, *supra* note 66 at para. 24. In this context, see also *Corumbiara v. Brazil* (2004), Inter-Am. Comm. H.R. No. 32/04, *Annual Report of the Inter-American Commission on Human Rights: 2004*, OEA/Ser.L/V/II.122/doc.5 rev. 1 (2005) c. III at para. 261.

79 See also *Gustavo Carranza v. Argentina* (1997), Inter-Am. Comm. H.R. No. 30/97, *Annual Report of the Inter-American Commission on Human Rights: 1997*, OEA/Ser.L/V/II.98/doc.6 rev. c. III.

80 *Ivcher Bronstein Case*, *supra* note 13 at para. 137. See also *Guy Malary v. Haiti* (2002), Inter-Am. Comm. H.R. No. 78/02, *Annual Report of the Inter-American Commission on Human Rights: 2002*, OEA/Ser.L/V/II.117/doc.1 rev. 1 (2003) c. III at para. 57.

81 *Habeas Corpus in Emergency Situations*, *supra* note 66 at para. 24; *White Van Case*, *supra* note 28 at para. 164; *Juan Humberto Sánchez Case*, *supra* note 75 at para. 121.

of the delay, the Court applies the Article 8(1) principles.[82] The national legal process is scrupulously analysed by the Court, which carries out a "quality control" and evaluates whether the process may be "certified" according to the *Inter-American norm*.[83]

These assertions of an imperative right to access to justice and these qualitative demands explain why some critics anticipate the emergence of a *right to the truth* from the Court's jurisprudence. When the Commission first invoked the violation of a right to the truth in a case of forced disappearances in 1997, the *Castillo-Páez Case*,[84] the Court held that this right did not exist in the *American Convention*, although it admitted that it corresponded to a concept which was currently being developed in the Court's doctrine[85] and jurisprudence and which was frequently confused with the State's duty to investigate contentious facts.[86] While refusing to integrate the right to the truth *per se* in its jurisprudence, the Court held that the State had an obligation to investigate the alleged facts at the origin of the violation and that the victim's next of kin had the right to know what had happened to the victim, including where the victim's remains had been disposed of.[87] The *Bámaca-Velásquez Case* added a new dimension to this *right to the truth*. On the one hand, the Court offered its own analysis in Section XVI ("Right to the truth"), where it was defined as the right of victims or their next of kin to be assured by authoritative bodies that the contentious facts would be investigated and that those responsible would be brought to trial according to Articles 8 and 25 of the *American Convention*.[88] On the other hand, the right to the truth was now perceived as an indispensable prerequisite of the victims' families' effective access to national and

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82 *Case of the Mayagna (Sumo) Awas Tingni Community*, *supra* note 75 at para. 134; *Ivcher Bronstein Case*, *supra* note 13 at para. 137.

83 See also *"X" and "Z" v. Argentina* (2000), Inter-Am. Comm. H.R. No. 71/00, *Annual Report of the Inter-American Commission on Human Rights: 2000*, OEA/Ser./L/V/II.111/doc.20 rev. (2001) c. III at para. 39: here, the Commission analyzed the conformity of a procedure relating to the execution of a decision concerning the guardianship of a child (taking principles of private international law into account) with the requirements of Articles 8 and 25 of the *American Convention*. See also *Myrna Mack Chang Case*, *supra* note 32 at para. 164; *Constitutional Court Case*, *supra* note 75 at para. 96.

84 *Castillo-Páez Case*, *supra* note 44. In a previous case regarding the right of the next of kin of a victim of a forced disappearance to see the State investigate the facts and pursue the perpetrators, the Court had already based itself on Article 8(1) of the *Convention* and Article 1(2) of the *United Nations Declaration for the Protection of All Persons from Enforced Disappearances*, GA Res. 47/133, UNGAOR, 61st Sess., UN Doc. A/61/488 (1996), online: OHCHR <http://www2.ohchr.org/english/law/disappearance-convention.htm>. See *Blake Case*, *supra* note 44 at para. 97.

85 In a 1988 publication on the Inter-American human rights protection system, Rafael Nieto Naria, former President of the Inter-American Court, already refers to "*el derecho a buscar la verdad*" (the right to search for the truth) as a fundamental right. See R. Nieto Navia, *Introducción Al Sistema Interamericano de Protección a los Derechos Humanos* (Cali: Pontificia Universidad Javeriana, 1988) at 14.

86 *Castillo-Páez Case*, *supra* note 44 at para. 86.

87 *Ibid*. at para. 90.

88 *Bámaca-Velásquez Case No. 70*, *supra* note 19 at para. 201: "Nevertheless, in the circumstances of the instant case, the right to the truth is subsumed in the right of the victim or his next of kin to obtain clarification of the facts relating to the violations and the corresponding responsibilities from the competent State organs, through the investigation and prosecution established in Articles 8 and 25 of the *Convention*."

international justice.[89] According to the Court, there is no autonomous right to the truth,[90] but it frequently refers to the concept in cases regarding violent deaths.[91] The right to the truth has a "collective character"[92] which comprises society's right to access to essential information for the development of democratic systems, as well as an "individual character"[93] comprising the victims' families' right to know what became of their relatives, which is also a form of reparation.[94] Without enshrining the right to the truth as a substantial autonomous right, the Court is inspired by the concept, which serves to emphasize its conception of Inter-American justice as not only individual but also collective justice. This renders it as much a right for victims as an obligation of the State, leading to the investigation of the circumstances of

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[89] See Separate opinion annexed to the *Bámaca-Velásquez Case*, *supra* note 20 at para. 32; *Bámaca-Velásquez Case No. 70*, *ibid.* at para. 200: "As has already been established in this judgment […], several judicial remedies were attempted in this case to identify the whereabouts of Bámaca Velásquez. Not only were these remedies ineffective but, furthermore, high-level State agents exercised direct actions against them in order to prevent them from having positive results. These obstructions were particularly evident with regard to the many exhumation procedures that were attempted; to date, these have not permitted the remains of Efraín Bámaca Velásquez to be identified […]. It is undeniable that this situation has prevented Jennifer Hanbury and the victim's next of kin from knowing the truth about what happened to him."

[90] However, the Court suggests that, strictly legally, the question of the right to the truth is included in the obligations of Articles 8 and 25 of the *Convention*. *Bámaca-Velásquez Case No. 70*, *ibid.* at para. 201-202. Similarly, see *Barrios Altos Case*, *supra* note *53* at para. 49; *Pueblo Bello Massacre Case (Colombia)* (2006), Inter-Am. Ct. H.R. (Ser. C) No. 140, at para. 219, *Annual Report of the Inter-American Court of Human Rights: 2006*, at 7 online: Inter-Am. Ct. H.R. <http://www.corteidh.or.cr/docs/informes/20063.pdf>; *Blanco-Romero et al. Case (Venezuela)* (2005), Inter-Am. Ct. H.R. (Ser. C) No. 138, at para. 62, *Annual Report of the Inter-American Court of Human Rights: 2005*, at 20 online: Inter-Am. Ct. H.R. <http://www.corteidh.or.cr/docs/informes/Inf%20anua%202005%20diag%20ingles.indd.pdf> [*Blanco-Romero et al. Case*]: "The Court does not consider the right to know the truth to be a separate right enshrined in Articles 8, 13, 25 and 1(1) of the *Convention*, as alleged by the representatives, and, accordingly, it cannot find acceptable the State's acknowledgement of responsibility on this point. The right to know the truth is included in the right of the victim or of the victim's next of kin to have the relevant State authorities find out the truth of the facts that constitute the violations and establish the relevant liability through appropriate investigation and prosecution."

[91] *Serrano-Cruz Sisters Case (El Salvador)* (2005), Inter-Am. Ct. H.R. (Ser. C) No. 120, at para. 62, *Annual Report of the Inter-American Court of Human Rights: 2005*, at 23 online: Inter-Am. Ct. H.R. <http://www.corteidh.or.cr/docs/informes/Inf%20anua%202005%20diag%20ingles.indd.pdf> [*Serrano-Cruz Sisters Case*] : "The Court has also referred on many occasions to the right of the next of kin of the alleged victims to know what happened and who was responsible for the respective facts. The Court has reiterated that everyone, including the next of kin of the victims of serious human rights violations, has the right to know the truth. Consequently, the next of kin of the victims, and society as a whole, must be informed of everything that happened in relation to the said violations. International human rights law has been developing this right to the truth; when it is recognized and exercised in a specific situation, it constitutes an important measure of reparation. Therefore, in this case, the right to know the truth gives rise to an expectation of the next of kin of the alleged victims that the State must satisfy." See also *Baldeón-García Case*, *supra* note 76 at para. 139; *Durand and Ugarte Case (Peru)* (2000), Inter-Am. Ct. H.R. (Ser. C) No. 68, *Annual Report of the Inter-American Court of Human Rights: 2000*, OEA/Ser.L/V/III.50/doc.4 (2000) 26; *Street Children Case No. 63*, *supra* note 24; *Neira-Alegría et al. Case (Peru)* (1995), Inter-Am. Ct. H.R. (Ser. C) No. 20, *Annual Report of the Inter-American Court of Human Rights: 1995*, OEA/Ser.L/V/III.33/doc.4 (1996) 41. See also J.E. Méndez, "Derecho a la verdad frente a las graves violaciones a los Derechos Humanos" in M. Abregú, ed., *La Aplicación de los Tratados sobre Derechos Humanos por los Tribunales locales* (Buenos Aires: CELS, 1997) 517. On the right to the truth, see also the comments and summary by A. A. Cançado Trindade, Separate opinion annexed to the *Blanco-Romero et al. Case*, *supra* note 90.

violations.

This humanization logic guides the Court in the Inter-American contentious context itself. Access to justice does not end before the national judge, and the Court, or at least a number of its members, seem to regret that victims of Convention violations do not have direct access to the Court, as they currently do in the European system. Only the Commission and States themselves may refer matters to the Court (Article 61(1) of the *Convention*). In order to confer *locus standi* to victims, the *Convention* would have to be amended, which is no simple feat given that such an amendment would be passionately contested by some States. Failing this, the Court has once again been forced to design its own procedural mechanism in order to place the victim at the centre of the process, as far as is possible. This initially occurred informally,[95] and later in a more regulated manner (i.e., the rule adopted by the Court in 2000 which entered into force on 1 June 2001). The Court conferred *locus standi* to the victims, permitting them to now defend their own positions and claims, which may differ from those of the Inter-American Commission. The Court thereby clearly shows its desire for openness and demonstrates its legal position (on the issue of *locus standi*) and its political position on the role of Inter-American justice, justice which seems to protect an ever greater number of individuals. The Inter-American Court is now obliged to hear mass litigation cases, accounting for hundreds of victims of massacres, violence, expropriations, and so on.[96] This same "humanization" logic appears in the provisional measures mechanism which the Court frequently applies to benefit an ever greater number of threatened individuals or groups. In some decisions, the Court has extended the benefit of provisional measures to apply to all those working within specific non-governmental organizations, all those belonging to a particular community,[97] and to all detainees of a particular penitentiary,[98] without requiring that every individual beneficiary be specified by name.[99] The Inter-

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92 See e.g. *Mapiripán Massacre Case*, *supra* note 32 at para. 298; *Carpio-Nicolle et al.Case (Guatemala)* (2004), Inter-Am. Ct. H.R. (Ser. C) No. 117, at para. 128, *Annual Report of the Inter-American Court of Human Rights: 2004*, OEA/Ser.L/V/III.65/doc.1 (2004) 10 [*Carpio-Nicolle et al.Case*]; *Myrna Mack Chang Case*, *supra* note 32 at para. 274; *Trujillo-Oroza Case (Bolivia)* (2002), Inter-Am. Ct. H.R. (Ser. C) No. 92, at para. 114, *Annual Report of the Inter-American Court of Human Rights: 2002*, OEA/Ser.L/V/III.57/doc.5 (2003) 21 [*Trujillo-Oroza Case*].

93 See e.g. *Gómez-Paquiyauri Brothers Case*, *supra* note 34 at para. 229-30; *Molina-Theissen Case*, *supra* note 35 at para. 80-81; "*Street Children*" *(Villagrán-Morales et al) Case (Guatemala)* (2001), Inter-Am. Ct. H.R. (Ser. C) No. 77, at para. 100, *Annual Report of the Inter-American Court of Human Rights: 2001*, OEA/Ser.L/V/III.54/doc.4 (2000) 22 [*Street Children Case No. 77*].

94 *Bámaca-Velásquez Case No. 70*, *supra* note 19 at para. 197.

95 See *International Law For Humankind: Towards a New Jus Gentium*, *supra* note 29 at 305.

96 See e.g. *Miguel Castro-Castro Prison Case*, *supra* note 25.

97 *Matter of the Peace Community of San José de Apartadó regarding Colombia* (2000), Provisional Measures, Inter-Am. Ct. H.R. (Ser.E) Order of 24 November 2000, *Annual Report of the Inter-American Court of Human Rights: 2000*, OEA/Ser.L/V/III.50/doc.4 (2000) 35 [*Matter of the Peace Community of San José de Apartadó regarding Colombia*].

98 *Matter of Urso Branco Prison regarding Brazil* (2002), Provisional Measures, Inter-Am. Ct. H.R. (Ser.E) Order of 18 June 2002, *Annual Report of the Inter-American Court of Human Rights: 2002*, OEA/Ser.L/V/III.57/doc.5 (2003) 25.

99 However, in its resolution *Matter of Haitians and Dominicans of Haitian-origin in the Dominican Republic regarding Dominican Republic*, the Court limited the benefit of provisional measures whose adoption it ordered to only the named individuals and explicitly refused to protect people who could

American Court uses provisional measures as a method of preventive jurisdictional guarantee. The objective is not only to maintain the status quo in waiting for the authority's results, but to effectively protect human rights.[100] The humanization of Inter-American law, then, takes the form of this very extensive conception of justice which, according to the Court, must effectively and concretely protect threatened individuals and offer them useful and effective recourse in the case of a violation.

E. The "moralization" of Inter-American law

The final aspect of Inter-American distinctiveness which merits analysis is its "moralization", which is a large part of the criminalization and humanization dynamics of Inter-American law, and to a lesser extent is part of the constitutionalization dynamic as well. It must be analysed in the context of the reparative duties which the Court imposes upon the State.

Article 63(1) of the *American Convention* authorizes the Court, when it establishes that a *Convention* right or freedom has been violated, to order that the wronged party be guaranteed the right to benefit from the infringed right or freedom. In addition, it may order the reparation of the consequences of the measure or of the situation at the origin of the violation, as well as the payment of a just sum to the injured party. The term "reparation" is generic and covers a number of methods applied in different situations as well as various types of damages.[101] According to the

not be clearly identified. In this case, the government of the Dominican Republic carried out a policy of collective expulsion of Haitians and Dominicans of Haitian origin living in its territory. The Commission estimated the number of expulsions and deportations that took place in November 1999 at 20,000. It was materially impossible for the Commission to identify each potential victim of this policy. Recognizing that the management of the migratory policy lay with the Dominican State, the Court could, by referring to the provisional measure mechanism, order the suspension of the expulsion of Haitian immigrants. It is true that it is difficult to imagine the Court ordering the adoption of provisional measures aimed at the protection of a large and abstract category of persons against potential violations. The limit designated by the Court in this case seemed to be that of concrete and determinable cases. The mechanism of provisional measures risks, by default, being diverted from its initial objective and could lead to the calling into question of global policies developed by certain States such as, for example, the access to health services for AIDS carriers or measures relating to immigration policies. *Matter of Haitians and Dominicans of Haitian-origin in the Dominican Republic regarding Dominican Republic* (2000), Inter-Am. Ct. H.R. (Ser. E), Provisional Measures, Order or 7 August 2000, *Annual Report of the Inter-American Court of Human Rights: 2000*, OEA/Ser.L/V/III.50/doc.4 (2000) 28.

[100] *Matter of the Peace Community of San José de Apartadó regarding Colombia*, *supra* note 97.

[101] See especially F.H. Paolillo, "Derechos Humanos y Reparación (con especial referencia al sistema interamericano)" in *Amicorum Liber Hector Gros Espiell* (Bruxelles: Bruylant, 2001) 983; Albrecht Randelzhofer and Christian Tomuschat, eds., *State Responsibility and the Individual: Reparation in Instances of Grave Violations of Human Rights* (The Hague: Martinus Nijhoff, 1999); W.M. Reisman, "Compensation for Human Rights Violations: The Practice of the Past Decade in the Americas" in Albrecht Randelzhofer and Christian Tomuschat, eds., *State Responsibility and the Individual: Reparation in Instances of Grave Violations of Human Rights* (The Hague: Martinus Nijhoff, 1999) 63; Dinah Shelton, "Reparations in the Inter-American System" in David Harris & Stephen Livingstone, eds., *The Inter-American System of Human Rights* (Oxford: Clarendon Press, 1998) 151; Monica Pinto, "La réparation dans le système interaméricain des droits de l'homme, à propos de l'arrêt *Aloeboetoe*" (1996) 42 A.F.D.I. 733; P. Frumer, "La réparation des atteintes aux droits de l'homme internationalement protégés" (1996) 27 Revue Trimestrielle des Droits de l'Homme

Court, all aspects of reparation obligations ordered by international tribunals are governed by international law.[102] Under no circumstances may the State invoke its national law to modify the extent, nature, terms, or status of the beneficiaries of the reparation.[103] According to the Court, Article 63(1) enshrines only one fundamental customary rule at the heart of contemporary international law regarding State responsibility:[104] the commission of a wrongful act contrary to international law attributed to the State engages that State's international responsibility which, by extension, implies the duty to compensate and to put an end to the violation's consequences.[105] In other words, the violation of an international obligation gives rise to a new obligation which consists in having to repair the damage caused.[106] This necessarily implies that in order to impose reparatory measures, the Court must first establish a violation which is attributable to the State and which engages its international responsibility. This conventional prerogative which authorises the Court to order reparatory measures has led it to develop an original and ambitious jurisprudence which forms an autonomous reparatory system. The beneficiaries of these reparations include not only the direct victims of violations, but also those who have suffered their extended consequences. In order to identify these individuals, and to determine the extent of the damage that is to be compensated, the Court considers the emotional bonds linking relatives to the victim.[107] The Inter-American Court interprets *relative* liberally. In the *Myrna Mack Chang Case*, the Court held that the

329; Scott Davidson, "Remedies for Violations of the American Convention on Human Rights" (1995) 44 I.C.L.Q. 405.

102 C*astillo-Páez Case*, *supra* note 44 at para. 49; *Garrido and Baigorria Case*, *supra* note 44 at para. 42; *White Van Case*, *supra* note 28 at para. 77.

103 *Maritza Case (Guatemala)* (2003), Inter-Am. Ct. H.R. (Ser. C) No. 103, at para. 143, *Annual Report of the Inter-American Court of Human Rights: 2003*, OEA/Ser.L/V/III.61/doc.1 (2004) 22 [*Maritza Case*]; *Bulacio Case*, *supra* note 54 at para. 72; *Juan Humberto Sánchez Case*, *supra* note 75 at para. 149; *Cantos Case (Argentina)* (2002), Inter-Am. Ct. H.R. (Ser. C.) No. 97, at para. 68, *Annual Report of the Inter-American Court of Human Rights: 2002*, OEA/Ser.L/V/III.57/doc.5 (2003) 23; *Las Palmeras Case*, *supra* note 75 at para. 38; *El Caracazo Case (Venezuela)* (2002), Inter-Am. Ct. H.R. (Ser. C) No. 95, at para. 77, *Annual Report of the Inter-American Court of Human Rights: 2002*, OEA/Ser.L/V/III.57/doc.5 (2003) 28; *Hilaire, Constantine and Benjamin et al.*, *supra* note 4 at para. 203; *Trujillo-Oroza Case*, *supra* note 92 at para. 61; *Bámaca-Velásquez Case (Guatemala)* (2002), Inter-Am. Ct. H.R., (Ser. C) No. 91, at para. 39, *Annual Report of the Inter-American Court of Human Rights: 2002*, OEA/Ser.L/V/III.57/doc.5 (2003) 20 [*Bámaca-Velásquez Case No. 91*]; *Cantoral-Benavides Case (Peru)* (2001), Inter-Am. Ct. H.R. (Ser. C) No. 88, at para. 41, *Annual Report of the Inter-American Court of Human Rights: 2001*, OEA/Ser.L/V/III.54/doc.4 (2000) 32 [*Cantoral-Benavides Case*]; *Cesti-Hurtado Case*,, *supra* note 74 at para. 34; *Street Children Case No. 77*, *supra* note 91 at para. 61; *White Van Case*, *supra* note 28 at para. 77; *Blake Case*, *supra* note 44 at para. 32; *Castillo-Páez Case*, *supra* note 44 at para. 49; *Garrido and Baigorria Case*, *supra* note 44 at para. 42.

104 *Baldeón-García Case*, *supra* note 76 at para. 175; *Blake Case, supra* note 44 at para. 33; *Usine de Chorzów Case (Germany v. Poland)* (1928), P.C.I.J. (Ser. A) No.17, at 29; *Reparation for Injuries Suffered in the Service of the United Nations Case*, Advisory Opinion, [1949] I.C.J. Rep. 174 at para. 184; jurisprudence cited especially in *Velásquez-Rodríguez Case*, *supra* note 27 at para. 25.

105 *Maritza Case*, *supra* note 103 at para. 142; *Bulacio Case*, *supra* note 54 at para. 71; *Juan Humberto Sánchez Case*, *supra* note 75 at para. 148; *Five Pensioners Case*, *supra* note 75 at para. 174; *Blake Case*, *ibid*. at para. 33.

106 *Maritza Case*, *ibid*. at para. 141; *Bulacio Case*, *supra* note 54 at para. 70; *Juan Humberto Sánchez Case*, *ibid*. at para. 147; *Five Pensioners Case*, *ibid*. at para. 173.

107 *Maritza Case*, *ibid*. at para. 149; *Myrna Mack Chang Case, supra* note 32 at para. 264; *Bulacio Case*, *ibid*. at para. 98; *Juan Humberto Sánchez Case*, *ibid*. at para. 175; *Las Palmeras Case*, *supra* note 75 at para. 54-55.

victim's cousin could be considered to be her brother by taking into account the fact that the cousin had been brought up by the Mack Chang family as one of their own.[108] In the *Bulacio Case*, the victim's paternal grandmother was also recognized as a beneficiary of compensation.[109] Further, in *Carpio-Nicolle et al. Case*, the Court treated one of the victim's employees as his daughter by taking into account the fact that Mr. Carpio Nicolle was "like a father to her".[110]

However, in *Aloeboetoe et al. Case*, the Commission argued that, in traditional Saramaca society, a person is not only a member of a family but also of the village community and of a tribal group. According to the Commission, the *villagers*[111] constituted a family in itself, implying that damage caused to one of the villagers would affect the whole community.[112] The Court refused to accept this argument, holding that every individual, in addition to being a family member and a citizen of a State, is generally also a member of an intermediate community. Nevertheless, this does not prevent a community from claiming compensation for damage it has suffered directly,[113] as was the case in later judgments.[114] In applying this liberal interpretation of *relative*, the Court attempts to benefit the victim's entire family circle with reparatory measures and gives responsibility to the violating State with regard to the violation's consequences. The reparation may consist of returning the situation to its original state, where this is possible, or of compensation or *measures of satisfaction*. It is in this type of measure that the moralization of Inter-American law becomes most apparent. The *measures of satisfaction* facilitate the reparation of non-pecuniary loss,[115] in addition to possible compensation. The Court maintains that the judgment detailing the violation itself and the State's recognition of its responsibility are forms of reparation of non-pecuniary loss.[116] For example, in *Cantos v. Argentina*, the Court ordered the State to abstain from asking the victim to pay disproportionate costs amounting to 140,000,000 USD. It held that the judgment

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108 *Myrna Mack Chang Case, ibid*. at para. 244.

109 *Bulacio Case*, *supra* note 54 at para. 79.

110 *Carpio-Nicolle et al. Case*, *supra* note 92 at para. 98: "Karen Fischer, former daughter-in-law of the victim, Jorge Carpio Nicolle, shall also be the beneficiary of reparation equal to that of a daughter of Mr. Carpio Nicolle, since it was proved that, emotionally, she was like [a] daughter for the victim and that she had worked at his side from when she was young […]. In addition, Mrs. Fischer furthered Mr. Carpio Nicolle's judicial proceeding during several years, so that she endured threats and an attack on her life […]. It has equally been proved that Mrs. Fischer's children, Daniela and Rodrigo Carpio Fischer, were very affected by the death of their grandfather, Mr. Carpio-Nicolle […], and had close ties to him. Subsequently, Mrs. Fischer and her two children were forced to go into exile".

111 "Aldeanos" in the original text. *Aloeboetoe et al. Case*, *supra* note 23 at para. 83.

112 *Ibid*. at para. 83.

113 *Ibid*. See also: *Case of the Mayagna (Sumo) Awas Tingni Community*, 2001 Inter-Am. Ct. H.R.

114 *Yatama Case (Nicaragua)* (2005), Inter-Am. Ct. H.R. (Ser. C) No. 127, *Annual Report of the Inter-American Court of Human Rights: 2005*, at 9 online: Inter-Am. Ct. H.R. <http://www.corteidh.or.cr/docs/informes/Inf%20anua%202005%20diag%20ingles.indd.pdf>; *Moiwana Community Case*, *supra* note 16.

115 On satisfaction, see Pierre André Bissonnette, *La satisfaction comme mode de réparation en droit international* (Genève : Annemasse, 1952).

116 *Baldeón-García Case*, *supra* note 76 at para. 189; *Maritza Case*, *supra* note 103 at para. 166; *Bulacio Case*, *supra* note 54 at para. 96; *Juan Humberto Sánchez*, *supra* note 75 at para. 172; *Five Pensioners Case*, *supra* note 75 at para. 180.

in this case was sufficient to repair the non-pecuniary loss.[117] The State's public recognition of its responsibility is also considered to be a form of reparation and may be ordered by the Court.[118] Similarly, the Court may order the State to publish extracts of its judgment in the State's official newspaper and in various other national newspapers.[119] Moreover, the Court has developed an original case law of reparatory measures appropriate for different cases which go beyond the reparations limited to covering the victims' non-pecuniary loss. Satisfaction ordered by the Court may include the obligation to re-open a school;[120] the creation of a non-profit foundation designed to assist the beneficiaries of reparation in the management of the sums handed out;[121] the exhumation of the victims' bodies in order to allow the families to carry out appropriate funerals according to their traditions and religious beliefs;[122] the obligation to establish an educational grant for the victim to encourage the achievement of his or her "life project";[123] to name an educational centre in reference to the victims and to install a commemorative plaque listing the names of all victims;[124] to improve conditions for detainees;[125] to reform criminal law;[126] to name a school after a victim;[127] to organize an official and public ceremony to be attended by

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117 *Cantos Case*, *supra* note 14 at para. 70-71.

118 *Maritza Case*, *supra* note 103 at para. 178; *Myrna Mack Chang Case, supra* note 32 at para. 278.

119 *Myrna Mack Chang Case,ibid*. 280; *Bulacio Case*, *supra* note 54 at para. 145; *Juan Humberto Sánchez Case*, *supra* note 75 at para. 188. On this issue, see also the comments by Sergio García Ramírez, Separate opinion annexed to *Bámaca-Velásquez Case (Guatemala)* (2002), Inter-Am. Ct. H.R. (Ser. C) No. 91, *Annual Report of the Inter-American Court of Human Rights: 2002*, OEA/Ser.L/V/III.57/doc.5 (2003) 20: "In my opinion, the decision to publish the chapter on proven facts and the operative paragraphs of the judgment in the official gazette and another newspaper with nationwide circulation is pertinent. The former relates to the formal character of the jurisdictional decision and the latter to the advisability that public opinion should learn about the conclusions and the meaning of the jurisdictional decision in this case, as it did–or could have–of the facts that constituted the violation. Thus, the range of reparations that the Court can award is broadened, in accordance with the circumstances of each case. The purpose of publication and compensation is three-fold: a) on the one hand, the moral satisfaction of the victims or their successors, the recovery of honor and reputation that may have been sullied by erroneous and incorrect versions and comments; b) on the other, the establishment and strengthening of a culture of legality in favor, above all, of the coming generations; and c) lastly, serving truth, to the advantage of those who were wronged and of society as a whole. The foregoing is inserted in the broad regime of recognition and protection of rights and in the corresponding preservation of the values of a democratic society. In brief, the reparation of the harm in this case has compensatory and preventive effects; as regards the latter, it considers the need to prevent the repetition of conduct such as that which gave rise to the proceedings before the international instances."

120 *Aloeboetoe et al. Case*, *supra* note 23 at para. 5.

121 *Ibid*. at para. 103-08.

122 *Street Children Case No. 77*, supra note 93 at para. 102. See Separate opinion annexed to *Bámaca-Velásquez Case*, *supra* note 20.

123 *Cantoral-Benavides Case*, *supra* note 103 at para. 80. In this context, see also *"Juvenile Reeducation Institute" Case.(Paraguay)* (2004), Inter-Am. Ct. H.R. (Ser. C) No.112, at para. 321, *Annual Report of the Inter-American Court of Human Rights: 2004*, OEA/Ser.L/V/III.65/doc.1 (2004) 14 [*Juvenile Reeducation Institute Case*].

124 *Street Children Case No. 77*, *supra* note 93 at para. 103.

125 *López-Álvarez Case*, *supra* note 76 at para. 209; *Raxcacó-Reyes Case (Guatemala)* (2005), Inter-Am. Ct. H.R. (Ser. C) No. 133, at para. 134, *Annual Report of the Inter-American Court of Human Rights: 2005*, at 25 online: Inter-Am. Ct. H.R. <http://www.corteidh.or.cr/docs/informes/Inf%20anua%202005%20diag%20ingles.indd.pdf> [*Raxcacó-Reyes Case*].

126 *Blanco-Romero et al. Case*, *supra* note 90 at para. 105; *Raxcacó-Reyes Case*, *ibid*. at para. 132.

127 *Baldeón-García Case*, *supra* note 76 at para. 205.

the victim's family;[128] to create an online database to facilitate research on victims of armed conflicts;[129] to create an information system containing genetic information facilitating the identification of kidnapped children;[130] to create and update a register of all detained individuals as well as of information regarding the reasons for detention and the criminal procedure to which they are subject; to organize a Chair or a course in human rights;[131] to dedicate a national holiday to the memory of children who disappeared during armed conflict which has taken place in the State in question;[132] and to erect a bust in memory of a deceased victim[133]. Finally, in *Barrios Altos Case (Peru)* (2001), the agreement made by the parties and approved by the Court included, alongside pecuniary compensation, the State's commitment to carry out a series of "educational services" (educational grants, distribution of educational material and so on)[134] and of "health services"[135] (free access to healthcare and so on) for the beneficiaries.[136] In another case, a similar type of agreement included a duty imposed on the State to publicly apologise to the victims for the violations committed and the damage caused, and the duty to co-finance the construction of a building belonging to the beneficiaries.[137] These examples show that, with these reparatory measures, the Court intends to give the State responsibility in the context of its public policies or to enforce symbolic measures with a moral connotation. Again, the Court shows itself to be paternalistic and pedagogical by giving, to an extent, a moral lesson to the violating State with a view to educating it on human rights and reprimanding it for its bad conduct.

II. Inter-American Universalism

These different aspects of the Inter-American distinctiveness render the conventional Inter-American system *exceptional*, and, in our opinion, *remarkable* in both senses of the word. They attest to the fact that the Court has established case law and a "system" which are based on a very particular conception of international human rights law. This design was not planned, but rather results from a "hand-

128 *Trujillo-Oroza Case*, *supra* note 92 at para. 122.

129 *Serrano-Cruz Sisters Case*, *supra* note 91 at para. 191.

130 *Ibid*. at para. 191-92.

131 *Huilca-Tecse Case (Peru)* (2005), Inter-Am. Ct. H.R. (Ser. C) No.121, at para. 113 *Annual Report of the Inter-American Court of Human Rights: 2005*, at 8 online: Inter-Am. Ct. H.R. <http://www.corteidh.or.cr/docs/informes/Inf%20anua%202005%20diag%20ingles.indd.pdf> [*Huilca-Tecse Case*].

132 *Serrano-Cruz Sisters Case*, *supra* note 91 at para. 196.

133 *Huilca-Tecse Case*, *supra* note 132 at para. 115.

134 *Juvenile Reeducation Institute Case*, *supra* note 123 at para. 321.

135 In this context, see also *Durand and Ugarte Case (Peru)* (2001), Inter-Am. Ct. H.R. (Ser. C) No. 89, at para. 36-27, *Annual Report of the Inter-American Court of Human Rights: 2001,* OEA/Ser.L/V/III.54/doc.4 (2000) 26 [*Durand and Ugarte Case*].

136 *Barrios Altos Case (Peru)* (2001), Inter-Am. Ct. H.R. (Ser. C) No. 87, at para. 41-43, *Annual Report of the Inter-American Court of Human Rights: 2001,* OEA/Ser.L/V/III.54/doc.4 (2000) 22. See also *Plan de Sánchez Massacre Case (Guatemala)* (2004), Inter-Am. Ct. H.R. (Ser. C) No. 116, at para. 110-111, *Annual Report of the Inter-American Court of Human Rights: 2004*, OEA/Ser.L/V/III.65/doc.1 (2004) 6.

137 *Durand and Ugarte Case*, *supra* note 135 at para. 38-39.

made", "bits-and-pieces" attitude to jurisprudential construction (without being pejorative), from lucky or unlucky "punches" thrown by actors in the system, and from the intellectual and technical influence which certain judges exercised during their mandates in order to forge this Inter-American jurisprudence which is so strongly tainted by a particular ideology. The Inter-American distinctiveness is the expression of the Inter-American human rights doctrine. To identify it is a complex feat, as it must be recognized that the Inter-American jurisprudence remains theoretically uncertain.

Having identified the characteristics, we must now attempt to understand them. In order to achieve this, we must understand the role played by the Inter-American Court, by Inter-American law, and by the relationship between these and other human rights protection systems. Inter-American law is the regional intermediary for the universalism of human rights. Further, the arguments must be explored from the perspective of the development of Inter-American law. We will discuss three themes in this context: exceptionalism, voluntarism, and the new *jus gentium*.

A. The regional universalism

The institutional perspective invites us to better understand the relationships that the Inter-American Court entertains with other legal systems and especially, but not solely, with other human rights protection mechanisms. It must be noted that, following the example of European States, the American States had decided to draft a regional convention without having anticipated the adoption of a "universal convention", which was replaced by the two United Nations covenants. When the international covenants were finally adopted, two questions were asked: first, was it desirable to pursue the adoption of a regional instrument or were the two international covenants sufficient; and second, if the first option was chosen, was the *American Convention* to be limited to the establishment of a Commission and a Court responsible for the respect of the laws defined in the international covenants or was an American convention with substantially its own content to be drafted? After consultation amongst the States, it was eventually decided that work towards the adoption of an autonomous regional convention, which was compatible with and complementary to the universal system, would continue.[138] The main reason invoked in favour of the establishment of a regional system was the desire to put adequate protection measures in place. Thus, the *American Convention* was, even before its

[138] C.A. Dunshee de Abranches, *Comparative Study of the United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and of the Draft Inter-American Conventions on Human Rights*, OEA/Ser.L/V/II.19/Doc.18 (1968), also published in the Anuario Interamericano de Derechos Humanos of 1968 (1973) at p. 168. During the preparatory work for the *American Convention*, the drafters of the text duly took into consideration the content of the two *International Covenants*, and especially of the *International Covenant on Civil and Political Rights*. The stated objective consisted in ensuring the compatibility of the *American Convention* with universal instruments. This comparative activity was carried out by Mr. Dunshee De Abranches and was the subject of a publication in the form of an official OAS report.

adoption, a regional intermediary for the universal system. It is not surprising, then, that there are a number of similarities between the *American Convention* and the *International Covenant on Civil and Political Rights*, and that more sophisticated protection mechanisms were put in place here than in the universal system. The drafters of the *American Convention* could take the *International Covenant* as a model and avoid moving away from it, except in order to enrich it, or they could decide that the regional instrument was to be compatible with the covenants. The first approach, adopted by the drafters of the *American Convention*, is necessarily accompanied by a universalist perception of human rights. In reality, compatibility was envisaged from the maximum perspective, implying that the regional text was not to offer less advantageous protection than the universal instrument. Thus, with regard to the content of the rights and liberties, the drafters of the *American Convention* "regionalised" the *International Covenant* and put into place a system of "regional guarantees of universal law".[139] The Inter-American Court resumes this logic itself, while extrapolating it even further. It holds that the unity of human nature and the universal character of guaranteed rights and liberties form an international protection system, such that it is inappropriate to distinguish between those State obligations which originate in a regional instrument and those that do not.[140] The Court underlines that "[a] certain tendency to integrate the regional and universal systems for the protection of human rights can be perceived in the *Convention*. The Preamble recognizes that the principles on which the treaty is based are also proclaimed in the *Universal Declaration of Human Rights* and that 'they have been reaffirmed and refined in other international instruments, worldwide as well as regional in scope.'"[141] The Court adds that "[t]he need of the regional system to be complemented by the

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[139] As was envisaged at one point, the drafters of the *Convention* could also have settled with installing Inter-American protection mechanisms permitting the control of respect of the rights and liberties of the *International Covenant*. The interest in regional promulgation in an autonomous instrument essentially resided in the possibility to enrich the catalogue of rights and liberties contained in the *International Covenant* with more protective provisions. The enshrinement of the right to asylum, the formulation of the freedom of expression, and the right to effective recourse attest to this.

[140] *"Other treaties" subject to the advisory jurisdiction of the Court (Art. 64 American Convention on Human Rights)* (1982), Advisory Opinion OC-1/82, Inter-Am. Ct. H.R. (Ser. A) No.1, at para. 40, *Annual Report of the Inter-American Court of Human Rights: 1983*, OEA/Ser.L/V/III/9/doc.13 (1983): "The nature of the subject matter itself, however, militates against a strict distinction between universalism and regionalism. Mankind's universality and the universality of the rights and freedoms which are entitled to protection form the core of all international protective systems. In this context, it would be improper to make distinctions based on the regional or non-regional character of the international obligations assumed by States, and thus deny the existence of the common core of basic human rights standards. The Preamble of the *Convention* gives clear expression to that fact when it recognizes that the essential rights of man 'are based upon the attributes of the human personality and that they therefore justify international protection in the form of a convention.'"

[141] *Ibid.* at para. 41: "A certain tendency to integrate the regional and universal systems for the protection of human rights can be perceived in the *Convention*. The Preamble recognizes that the principles on which the treaty is based are also proclaimed in the *Universal Declaration of Human Rights* and that 'they have been reaffirmed and refined in other international instruments, worldwide as well as regional in scope.' Several provisions of the *Convention* likewise refer to other international treaties or to international law, without speaking of any regional restrictions. (See e.g., *Convention*, Arts. 22, 26, 27 and 29). Special mention should be made in this connection of Article 29, which contains rules governing the interpretation of the *Convention* and which clearly indicates an intention not to restrict the protection of human rights to determinations that depend on the source of the obligations."

universal finds expression in the practice of the Inter-American Commission on Human Rights and is entirely consistent with the object and purpose of the *Convention*, the *American Declaration* and the Statute of the Commission."[142] Thus, since its first consultative opinion, the Court has encouraged this "convergence" of the two systems.

Human rights protection mechanisms form a whole, without consideration for *borders*, *States*, j*urisdictions* or, in a word, *systems*. According to the Court, it is not only the different human rights protection mechanisms (regional and universal) which form a whole, but also the different branches of law which artificially distinguish between international humanitarian law, international criminal law, and international human rights law. In certain cases, the Commission invites the Court to express its opinion on other human rights treaties. Indeed, apart from its contentious competence, which allows it to deal with individual petitions alleging the violation of *Convention* rights committed by States which are party to the *American Convention* and which have accepted the Court's litigious competence, the Court exercises an extremely wide advisory function. In contrast to its contentious function, all OAS States (not only States party to the *Convention*) may submit requests for the Court's consultative opinion. In conformity with Article 64 of the *American Convention*, such requests may concern the interpretation of the *Convention* "or of other treaties concerning the protection of human rights in American States";[143] as well as the compatibility of OAS States' legislative measures with the *Convention* or with any other treaty concerning the protection of human rights in the OAS.[144] The first aspect of this competence (the interpretation of other treaties) is essential to understanding the relationship between the Court and other protection systems, particularly the United Nations treaties which the OAS is likely to ratify. According to the Court, its consultative function constitutes a parallel mechanism to its contentious competence, thus offering an alternative legal method of a consultative nature aimed at helping States to enforce and apply the treaties which link them in the human rights context, while avoiding the formalism and sanctions of the contentious procedure.[145] For the Court, the aim of the advisory function is to assist OAS States to respect their human rights obligations and to help the OAS institutions accomplish their human rights

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[142] *Ibid*. at para. 43: "The need of the regional system to be complemented by the universal finds expression in the practice of the Inter-American Commission on Human Rights and is entirely consistent with the object and purpose of the *Convention*, the *American Declaration* and the Statute of the Commission. The Commission has properly invoked in some of its reports and resolutions 'other treaties concerning the protection of human right in the American states,' regardless of their bilateral or multilateral character, or whether they have been adopted within the framework or under the auspices of the Inter-American system."

[143] *American Convention*, *supra* note 2, art. 64(1).

[144] *Ibid*. art. 64(2).

[145] *Restrictions to the Death Penalty (Arts.4(2) and 4(4) American Convention on Human Rights)* (1983), Advisory Opinion OC-3/83, Inter-Am. Ct. H.R. (Ser. A) No. 3,, at para. 43, *Annual Report of the Inter-American Court of Human Rights: 1983*, OEA/Ser.L/V/III/9/doc.13 (1983): "Here it is relevant merely to emphasize that the *Convention*, by permitting member States and OAS organs to seek advisory opinions, creates a parallel system to that provided for under Article 62 and offers an alternate judicial method of a consultative nature, which is designed to assist states and organs to comply with and to apply human rights treaties without subjecting them to the formalism and the sanctions associated with the contentious judicial process."

competence.[146] Thus, in response to a request for an advisory opinion, the Court may clarify the object, aim, or significance of relevant international human rights provisions[147] and may guide States in interpreting instruments or particular provisions.[148]

Far from limiting itself to Inter-American treaties, the Court interprets the "other treaties"[149] towards which it can exercise its consultative competence very widely. The notion is aimed at Inter-American human rights treaties, human rights treaties concluded between OAS member States, universal human rights treaties to which OAS States are party,[150] and finally, bilateral and multilateral treaties whose principal object need not necessarily be human rights. In fact, the Court interprets the "other treaty" expression so widely that its interpretation allows it to express an advisory opinion on any treaty applicable to American States on the condition that it contains one provision related to the protection of human rights.[151] In Opinion No.16, the Court considered that it had competence to interpret Article 36 of the *Vienna Convention on Consular Relations*.[152] According to the Court, a treaty may concern

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146 *Other treaties" subject to the advisory jurisdiction of the Court (Art. 64 American Convention on Human Rights)* (1982), *supra* note 140 at para. 25.

147 Judge Oliver Jackman criticized the Court's decision to render an opinion on questions which he considers too general and which cover a number of hypotheses which are neither urgent nor legally complex. By so doing, the Court enters into considerations which, according to Jackman, amount to *academic speculation* and which are likely to weaken the *American Convention*'s protection system and distort the Court's consultative competence. O. Jackman, Separate opinion annexed to *Juridical Condition and Human Rights of the Child,* Advisory Opinion OC-17/02, Inter-Am. Ct. H.R. (Ser. A) No. 17, *Annual Report of the Inter-American Court of Human Rights: 2002*, OEA/Ser.L/V/III.57/doc.5 (2003) 27.

148 *Other treaties" subject to the advisory jurisdiction of the Court (Art. 64 American Convention on Human Rights)* (1982), *supra* note 140 at para. 40; *The Right to Information on Consular Assistance. In the Framework of the Guarantees of the due Process of Law* (1999), Advisory Opinion OC-16/99, Inter-Am. Ct. H.R. (Ser. A) No. 16, at para. 47, *Annual Report of the Inter-American Court of Human Rights: 1999*, OEA/Ser.L/V/III.47/doc.6 (2000) 26.

149 The issue of the clarification of "other treaty" was the subject of the first request for the Court's advisory opinion made by Peru. Peru formulated its request as follows: "How should the phrase 'or of other treaties concerning the protection of human rights in the American States' be interpreted? With respect to this matter, the Government of Peru requests that the opinion cover the following specific questions. Does this aforementioned phrase refer to and include: a) Only treaties adopted within the framework or under the auspices of the Inter-American system? or b) The treaties concluded solely among the American States, that is, is the reference limited to treaties in which only American states are parties? or c) All treaties in which one or more American states are parties?" *Other treaties" subject to the advisory jurisdiction of the Court (Art. 64 American Convention on Human Rights)* (1982), *supra* note 140 at para. 8.

150 *The Right to Information on Consular Assistance. In the Framework of the Guarantees of the due Process of Law* (1999), *supra* note 148 at para. 109 (1 Oct. 1999): "With the exception of Antigua and Barbuda, the Bahamas, St. Kitts and Nevis and Saint Lucia, the member States of the OAS are parties to the *International Covenant on Civil and Political Rights*. It is the opinion of this Court that all the above-cited provisions of the *International Covenant on Civil and Political Rights* do *concern* the protection of human rights in the American States."

151 *"Other treaties" subject to the advisory jurisdiction of the Court (Art. 64 American Convention on Human Rights)* (1982), *supra* note 140 at para. 52.

152 *The Right to Information on Consular Assistance. In the Framework of the Guarantees of the due Process of Law*, *supra* note 148 at para. 86-87: "Should the sending State decide to provide its assistance and in so doing exercise its rights under Article 36 of the *Vienna Convention on Consular Relations*, it may assist the detainee with various defence measures, such as providing or retaining

the protection of human rights, regardless of its principal object.[153] In the framework of Opinion No.16, the United States of America maintained that the Court did not have competence to interpret the *Vienna Convention on Consular Relations* given that it was neither a human rights treaty nor a treaty conferring rights to individuals.[154] The Court rejected this argument by emphasizing that Article 36 of the *Vienna Convention* attributed individual rights which the Court considered to be human rights to detainees, albeit via a State obligation.[155] The treaty's origin, objective, and its bilateral or multilateral nature are factors which are not taken into consideration in the Court's consultative function.[156] The Court may express its opinion on any aspect of a treaty which is subject to a request for an opinion,[157] including, for example, the validity of an alteration.[158] This extended competence linked to the generous interpretation of "other treaties" allows the better understanding of the Inter-American Court's role at the heart of the OAS with regard to international human rights law in general. These "other treaties", then, are not entirely alien to the Inter-American system given that the Court has the competence to express consultative opinions on them. According to the Court, the general obligation to respect and guarantee rights for which OAS States are responsible extends to *American Convention* rights as well as to rights contained in the *International Covenant on Civil and Political Rights*.[159]

While the Inter-American Court expresses itself on the interpretation of other treaties as part of its consultative competence, and especially on the interpretation of treaties outside the Inter-American system, it also draws on these other treaties and their universal and regional human rights protection jurisprudence to interpret the

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legal representation, obtaining evidence in the country of origin, verifying the conditions under which legal assistance is provided and observing the conditions under which the accused is being held while in prison." See at para. 87: "Therefore, the consular communication to which Article 36 of the *Vienna Convention on Consular* [*sic*.] does indeed concern the protection of the rights of the national of the sending State and may be of benefit to him. This is the proper interpretation of the functions of 'protecting the interests' of that national and the possibility of his receiving 'help and assistance', particularly with arranging appropriate 'representation…before the tribunals'. The relationship between the rights accorded under Article 36 and the concepts of 'the due process of law' or 'judicial guarantee' is examined in another section of this Advisory Opinion".

153 *"Other treaties" subject to the advisory jurisdiction of the Court (Art. 64 American Convention on Human Rights)* (1982), *supra* note 140 at para. 1.

154 *The Right to Information on Consular Assistance. In the Framework of the Guarantees of the Due Process of Law* (1999), *supra* note 148 at para. 24, 26.

155 *Ibid*. at para. 82-87.

156 *"Other treaties" subject to the advisory jurisdiction of the Court (Art. 64 American Convention on Human Rights)* (1982), *supra* note 140 at para. 11.

157 *Ibid*. at para. 14.

158 *Restrictions to the Death Penalty (Arts.4(2) and 4(4) American Convention on Human Rights)* (1983), *supra* note 145 at para. 45.

159 *Juridical Condition and Rights of the Undocumented Migrants* (2003), Advisory Opinion OC-18/03, Inter-Am. Ct. H.R.. (Ser. A) No. 18, at para. 109 *Annual Report of the Inter-American Court of Human Rights: 2003*, OEA/Ser.L/V/III.61/doc.1 (2004) 31: "This general obligation to respect and ensure the exercise of rights has an *erga omnes* character. The obligation is imposed on States to benefit persons under their respective jurisdictions, irrespective of the migratory status of the protected persons. This obligation encompasses all the rights included in the *American Convention* and the *International Covenant on Civil and Political Rights*, including the right to judicial guarantees. In this way, the right of access to justice for all persons is preserved, understood as the right to effective jurisdictional protection."

American Convention on Human Rights itself. Thus, it emphasizes its universalist conception of international human rights law by referring to the *European Convention* and Strasbourg jurisprudence, the *African Charter*,[160] or international criminal tribunals in its consultative and contentious jurisprudence. Thus, when it is invited to express an opinion in the context of its consultative function on a general problem related to international human rights law or on the interpretation of a right, the Court examines the state of universal, European, and sometimes African human rights law. For example, in Opinion No.18, where the Court analysed the principle of equality and non-discrimination, it referred explicitly and in detail to the definitions of non-discrimination proposed by the European Court of Human Rights, the United Nations Human Rights Committee, and the African Commission on Human and Peoples' Rights.[161] While the external referencing technique is methodical and quasi-systematic in its consultative opinions, it is also very frequent in the Inter-American Court's contentious judgments, even if its use here is more casual and less regular. In concrete terms, the Inter-American Court frequently refers to European jurisprudence and, to a lesser extent, to jurisprudence from the United Nations Human Rights Committee in its contentious case law. For example, the Court may refer to external texts in order to define a phrase contained in the *American Convention*.

Thus, given that the *American Convention* does not define the notion of the "child" enshrined in Article 19, the Court draws on the *United Nations Convention on the Rights of the Child*, according to which a child is any human being below the age of 18, unless the national legislation applicable to that individual provides for a younger age of majority.[162] The Court applies a similar technique to define the notion of torture. Indeed, although neither the Court nor the Commission have given a generic definition of "torture" or of "cruel, inhuman or degrading treatment",[163] they both refer[164] to the *Inter-American Convention for the Prevention and Repression of Torture* and the *United Nations Convention against Torture and Other Cruel,*

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160 *African Charter on Human and Peoples' Rights*, 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (entered into force 21 October 1986).

161 *Juridical Condition and Rights of the Undocumented Migrants* (2003), *supra* note 159 at para. 82-96.

162 *Street Children Case No. 77*, *supra* note 93 at para. 188; *Juridical Condition and Human Rights of the Child* (2003), *ibid*. at para. 39-40. Citing The Beijing Rules, The Tokyo Rules, and the Riyadh *United Nations Guidelines on the Prevention of Juvenile Delinquency*, the Court notes that these texts also refer to the notion of "minors" but do not distinguish between "minors" and "children", distinguishing merely between "majors" and "minors (below the age of 18)". Globally, for the Inter-American Court, international norms and its own contentious jurisprudence taken into account, "child" must be understood as any individual who has not yet reached 18 years of age. See also *Juridical Condition and Human Rights of the Child,* Advisory Opinion OC-17/02, Inter-Am. Ct. H.R., (Ser. A) No. 17, at para. 42, *Juridical Condition and Human Rights of the Child*, Advisory Opinion OC-17/02, Inter-Am. Ct. H.R. (Ser. A) No. 17, *Annual Report of the Inter-American Court of Human Rights: 2002*, OEA/Ser.L/V/III.57/doc.5 (2003) 27.

163 But see *Tibi Case*, *supra* note 70 at para. 146; *Maritza Case*, *supra* note 103 at para. 104.

164 See especially *Gómez-Paquiyauri Brothers Case*, *supra* note 34; *Maritza Case*, *ibid*.; *Cantoral-Benavides Case (Peru)* (2000), Inter-Am. Ct. H.R. (Ser. C) No. 69, *Annual Report of the Inter-American Court of Human Rights: 2000*, OEA/Ser.L/V/III.50/doc.4 (2000) 26; *Street Children Case No. 63*, *supra* note 24. See also *Jailton Neri da Fonseca v. Brazil* (2004), Inter-Am. Comm. H.R. No. 33/04, *Annual Report of the Inter-American Commission on Human Rights: 2004*, OEA/Ser.L/V/II.122/doc.5 rev. 1 (2005) c. III at para. 63.

Inhuman or Degrading Treatment or Punishment.[165] In fact, these definitions repeat the criteria set out by the European Commission of Human Rights in "*The Greek Case*" and developed by the European Commission and European Court in *The Republic of Ireland v. The United Kingdom*.[166] The Inter-American Court also refers to other systems as a method of interpretation for the extent of the rights and liberties of the American Convention. For example, with regard to torture, the Inter-American Court refers, *inter alia*, to the European Court's case law and to the Human Rights Committee to affirm that there is a "veritable international legal regime of absolute prohibition of all forms of torture" (*verdadero régimen jurídico internacional de prohibición absoluta de todas las formas de tortura*). The Court also used external referencing to affirm, for example, that prolonged solitary confinement amounted to a form of ill-treatment[167] or that physical punishments are contrary to the prohibition of torture;[168] to establish that the "death row phenomenon" is a form of ill-treatment;[169] to define freedom of movement;[170] and the extent of the right to a fair trial;[171] to determine the possible restrictions on freedom of expression[172] and so on. The use of the external referencing technique in the Inter-American system, and in particular by the Inter-American Court, links two complementary objectives. First, external referencing appears in Inter-American jurisprudence as a method of persuasion, authority, and legitimacy.[173] By referring to European and universal systems, the Court emphasizes the convergence of jurisprudence in order to reinforce the authority, but also the legitimacy, of its decisions, for it essentially cites the Strasbourg Court which occupies a historic central role (whose authority or legitimacy is undisputed) in this subject, and the *International Covenant*'s protection body which, as a UN authority, may also lay claim to a certain degree of legitimacy and authority. In addition, these external references are likely to convince those States that are party to the *American Convention* and which are aware of the authority of the United Nations and the European example with regard to human rights protection. Second, it allows the Court to practically reaffirm its universalist conception of international human

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165 The definitions of these two texts are substantially similar. However, it will be noted that the *American Convention* includes methods which do not provoke suffering, but which affect the victim's personality, while the United Nations Convention does not mention this point. *Inter-American Convention to Prevent and Punish Torture*, 12 September 1985, O.A.S.T.S. 1985 No. 67 A-51 (entered into force 28 February 1987); *United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, GA Res. 39/46, UN GAOR, 39th Sess., Supp No. 51, UN Doc. A/39/51, (1984) 197.

166 *Ireland v. United Kingdom* (1978), 25 Eur. Ct. H.R. (Ser. A) 1. 2 E.H.R.R 25; *"The Greek Case"* (1969), 1969 Eur. Comm'n. on H.R. 1, 12 Y.B. Eur. Conv. on H.R. 1.

167 *Suárez-Rosero Case (Ecuador)* (1997), Inter-Am. Ct. H.R. (Ser. C) No. 35, at para. 90-92, *Annual Report of the Inter-American Court of Human Rights: 1998*, OEA/Ser.L/V/III/doc.11 (1999) 18.

168 *Caesar Case*, *supra* note 4 at para. 58.

169 *Hilaire, Constantine and Benjamin et al. Case*, *supra* note 4 at para. 166-67.

170 *Moiwana Community Case*, *supra* note 16 at para. 107.

171 *Tibi Case*, *supra* note 70 at para. 186.

172 *Compulsory Membership in an Association prescribed by Law for the Practice of Journalism (Arts.13 and 29 American Convention on Human Rights)* (1985), Advisory Opinion OC-5/85, Inter-Am. Ct. H.R. (Ser. A) No.5, at para. 46, *Annual Report of the Inter-American Court of Human Rights: 1985*, OEA/Ser.L/V/III.12/doc.13 (1985).

173 On this type of argument, see A.-M. Slaughter, "A Typology of Transjudicial Communication", (1994) 29 U. Rich. L. Rev. 99 at 119.

rights law. In fact, by referring to different systems, the Court's objective is above all to give the *American Convention* maximum protective effect.

The Court draws the most protective principles and interpretations from international jurisprudence. In principle, human rights treaties prevent their measures from being interpreted in a way which could restrict the protection they confer upon individuals by virtue of other international agreements or national law.[174] In practice, this implies that the individual may claim the *most favourable clause*.[175] Thus, confronted with the concurrent application of the *International Covenant on Civil and Political Rights* and the *European* or *American Convention*, national judges must apply the most favourable clause. It may be argued that the Inter-American Court applies a similar principle to that of "the most favourable clause" as a general interpretative method by basing itself on other international texts and on the jurisprudence of authorities of control and thus devoting its time to *cherry-picking*, retaining only the most protective elements from each system. In fact, external referencing allows it to examine the *corpus juris* of human rights and to draw from it the most protective interpretations possible.

B. The emergence of a new *jus gentium*

While the Inter-American distinctiveness is now clear, questions regarding its development in the sense of (theoretical) influence or (practical) export remain. Is it an exportable model? Or is it destined, precisely because of its distinctiveness which seems to relate to specifically Latin American requirements, to remain confined to the Inter-American human rights system? The Court's method of reasoning (sociological interpretation) or its jurisprudential constructions aiming to subjectivize, criminalize, "constitutionalize", humanize, and moralize international human rights law can be perfectly applied by other international human rights protection bodies or by any judge dealing with questions related to the interpretation or application of human rights law. Ideologically, the question of knowing whether such an influence is desirable depends, above all, on each individual's doctrinal position. Nevertheless, it is clear that this Inter-American doctrine disputes the validity of State voluntarism and the positivist legal doctrine to maintain *jus naturalism* in human rights. Three main themes – or doctrinal positions – oppose this Inter-American distinctiveness: scepticism; idealism or universalism (of the new *jus gentium*); and realism (or pragmatism).

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[174] Article 5(2) of the *International Covenant on Civil and Political Rights*, *supra* note 67; Article 5(2) of the *International Covenant on Economic, Social and Cultural Rights*, GA Res. 2200A, UN GAOR, 21st Sess., Supp. No. 16, UN Doc. A/6316 (1966); Article 5 of the *Convention relating to the Status of Refugees*, 189 U.N.T.S. 150 (entered into force 22 April 1954) online: UNHCR <http://www.unhcr.org/3b66c2aa10.html>; Article 53 of the *European Convention on Human Rights*, *supra* note 68; Article 32 of the *European Social Charter*, 529 U.N.T.S. 89 (entered into force 26 February 1965) online: U. Minn. H.R. Library <http://www1.umn.edu/humanrts/euro/z31escch.html>.; Article 29(b) of the *American Convention*, *supra* note 2.

[175] On this issue, see A.A. Cançado Trindade, "Co-existence and Co-ordination of Mechanisms of International Protection of Human Rights (At Global and Regional Levels)", (1987) 202 *The Hague Academy Collected Courses* 9 at 113, and cited references.

The scepticism argument is critical of Inter-American distinctiveness which is seen as undermining State voluntarism. Inter-American judges' methods, solutions, and jurisprudential constructions as well as the effectiveness of Inter-American law are directly questioned. As has been seen, access to the Inter-American system is limited, especially due to the exclusive publication, until recently, of documents in the Spanish language. It is, therefore, not surprising to see few critical publications which adhere to the scepticism argument. However, there is no doubt that those internationalists who have had enough of "human rightists" risk becoming irritated with the Inter-American doctrine. By publishing an article which criticizes the Inter-American Court in a recent edition of the *European Journal of International Law*, Gerald Neuman, a professor of international law at Harvard University, declared his scepticism.[176] His argument, which criticized the external references made by Inter-American judges (which involves, in particular, taking into account soft law in the interpretation of the *Convention*), and the desire to export Inter-American interpretations (by extension of *jus cogens*), warned against the effect that this contempt of State consent could have on the fulfilment of judgments and on the respect of the Court's authority. However, in his analysis, the author did not so much demonstrate his argument as assume it. Nevertheless, it is merely an initial study which may be credited with posing the problem of the Inter-American doctrine's compatibility with the principles of classic international law.

The idealist argument is best formulated by the ex-judge and president of the Court, Antonio A. Cançado Trindade. This Brazilian magistrate exercised considerable *jus naturalist* influence on the Inter-American Court's jurisprudential design and systematically clarified the Court's jurisprudential attitude and doctrinal developments in his separate opinions annexed to judgments or consultative opinions. For this jurist, the inter-State conception of international law is outdated and it is time to start allowing the interests of humanity to prevail over those of the State. The conditions are appropriate for the construction of a new *jus gentium* based on humanity and *civitas maxima gentium*.[177] He is particularly inspired by the works of Francisco de Vitoria for whom this law, based on *recta ratio*, was to govern the relations between all peoples and individuals from a universalist perspective. The conception of an international body of law originating from the concept of humanity is, according to Cançado Trindade, in line with the works of the founders of international law (amongst whom reside, notably, Suarez, Gentili, and Grotius). Like a reversal of history, this conception is destined to replace the voluntarist paradigm of State-based international law which had previously rendered it obsolete. The new *jus gentium* must reaffirm and restore the ideal of justice, based on general principles of law. Inter-American law, or at least some of its aspects, illustrate the signs of a law in transition and it is notably in this privileged laboratory that Cançado Trindade drew up the equations which governed the construction of the new *jus gentium.*

The realist or pragmatic argument of Inter-American exceptionalism consists

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[176] G. Neuman, "Import, Export, and Regional Consent in the Inter-American Court of Human Rights" (2008) 19 E.J.I.L. 101.

[177] This thesis was developed in the general course taught by Cançado Trindade at the Hague Academy in 2005. *International Law For Humankind: Towards a New Jus Gentium*, *supra* note 29.

in appreciating the Inter-American doctrine in its own political context. Some have argued that in adopting an *American Convention* in 1969, a regional Court with limited prerogatives was created in a political context (of grave human rights violations) which made the judicial path impracticable. Could the Court play a role in such a context, and did the *Convention* have any chance of imposing itself in the region? In the end, it must be questioned whether this Inter-American distinctiveness cannot be explained, to a large extent, by the Court's need to respond precisely to this political context characterised by Latin American dictatorships and politics of massive and systematic human rights violations. Individualization and humanization, which place the human being at the heart of the system and which pave the way for Inter-American justice, call into question, implicitly at least, the State paradigm of international law. It might be questioned whether it is not legitimate that, in a political context such as the one in Latin America in the 1970s and 1980s, the Inter-American human rights doctrine proposed such detachment from sovereign States. Inter-American law was constructed in this very particular political context. States party to it are young democracies which have not yet finished settling the accounts of the dictatorial regimes that controlled them for years. The Argentine dictatorship (1976-1983) was responsible for 15,000 disappearances (30,000 according to humanitarian organizations); Pinochet's dictatorship in Chile (1973-1990) was responsible for thousands of victims; an extermination campaign of members of the Maya community in Guatemala, classified as a civil war (1960-1996) but variously described as genocide, led to 150,000 deaths and 45,000 disappearances, to give but some examples. The violations are massive, systematic, and grave, occurred in contexts of civil war and dictatorial governmental policies, gave a central role to the culture of secrecy (as demonstrated by Operation Condor), and affected primarily the most vulnerable individuals, including indigenous peoples. Clearly, it is in this context that the Inter-American Court's work must be understood, as it plays an important political role in the region. Its role goes far beyond the guarantees of the *Pact of San José* and it becomes, as has been seen, constitutional. Inter-American distinctiveness is, then, a response adapted to the region's political context and could be considered to be law's Trojan horse.