
Import, Export, and Regional Consent in the Inter-American Court of Human Rights

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Abstract

The Inter-American Court of Human Rights has elaborated a significant body of human rights jurisprudence through interpretation of regional human rights conventions and the adaptation of European and global precedents and global soft law. The Inter-American Court has also aspired to influence outside its region by offering innovative interpretations of human rights and by identifying norms as jus cogens. The Court's methodology in recent years has appeared to give insufficient consideration to the consent of the regional community of states as a factor in the evolutive interpretation of a human rights treaty. The article illustrates and criticizes that trend, and contends that greater attention to indicia of regional consent could improve the acceptance and effectiveness of the inter-American human rights system.

1 Introduction

The Inter-American Court of Human Rights, like the European Court of Human Rights, engages in binding adjudication of claims of human rights violations under a regional human rights convention. The obstacles to enforcement of human rights in the Americas have been enormous. They include extreme poverty, divided societies ravaged by brutal internal conflicts, weak national courts, and, more recently, fragile democracies. Other challenges result from the inadequate participation of the regional parent organization, the Organization of American States.

This article questions one important feature of the Inter-American Court's method of operating in the face of these problems. Given the lack of regional support, the Court has looked outward, to Europe and to global human rights discourse as major reference

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points for its interpretation of the regional convention. In the process, the Court has come to undervalue the consent of the relevant community of states as a factor in the interpretation of a human rights treaty. This neglect distorts the Court's elaboration of human rights norms, and risks damage to the effectiveness of the regional human rights system.

The article proceeds by first giving a brief institutional description of the Inter-American Court of Human Rights, then exploring its methodology of regional interpretation. The practice of importing European and global interpretations is illustrated and problematized in Parts 4 and 5. The article then turns to the Inter-American Court's effort to export innovative interpretations, including its determinations of *jus cogens*, which obviate state consent altogether. The most vivid product of this methodology, the Court's ambitious version of a non-discrimination norm, is then examined and critiqued (Parts 6 and 7).

2 The Institutional Context of the Inter-American Court

The Inter-American Court of Human Rights (the Inter-American Court, or just Court) is the judicial organ created by the American Convention on Human Rights (ACHR) for the binding adjudication of contentious cases and for issuing advisory opinions on human rights under the auspices of the Organization of American States (OAS).¹ The Court corresponds to the European Court of Human Rights within the regional system of the Council of Europe. Indeed, the drafters of the ACHR substantially modelled the Court and its relationship with the Inter-American Commission on Human Rights on the structure of the European human rights system as it existed in the 1960s. Several variations from that formal model, however, remain significant. First, the Inter-American Court possesses advisory jurisdiction vastly broader than that of the European Court.² Secondly, the Inter-American Court's contentious jurisdiction relates mainly to the application of the ACHR itself, but has also been extended to a few other regional human rights treaties. Thirdly, the Inter-American Court has wider authority in contentious cases where it has found a violation.³

Fourthly, and quite importantly, the Inter-American Commission on Human Rights (the Inter-American Commission) only partly resembles the former European Commission on Human Rights. The Commission predates the adoption of the ACHR, and serves a broader range of promotional, monitoring, and quasi-judicial functions

¹ See J.M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (2003).

² The advisory jurisdiction of the Inter-American Court under ACHR Art. 64 extends not only to the interpretation of substantive rights under the Convention itself (a power that the European Court lacks), but also to interpretation of other human rights treaties ratified by OAS member states. The Court has construed the latter category generously. See 'Other Treaties' Subject to the Advisory Jurisdiction of the Court (Article 64 American Convention on Human Rights), Advisory Opinion OC-1/82, Inter-American Court of Human Rights, Series A No. 1 (1982).

³ ACHR Art. 63(1). The ACHR also grants the Court express authority to order provisional measures for the protection of individuals, a power that the Court exercises at early stages of contentious cases that may never come before it on the merits: ACHR Art. 63(2); Pasqualucci, *supra* note 1, at 293.

than the European Commission did. The Inter-American Commission also retains its pre-ACHR quasi-judicial responsibilities with regard to OAS member states that have not ratified the ACHR, evaluating their human rights records in light of the 1948 American Declaration of the Rights and Duties of Man.⁴

The Commission acts as gatekeeper to the Court in contentious cases. Under the ACHR, contentious cases cannot be brought before the Court without first being processed by the Commission.⁵ Moreover, the ACHR permits only states parties and the Commission itself to refer a case from the Commission to the Court; individuals have no power to do so. In recent years, the Commission has adopted a practice of presumptively referring cases in which it has found at least one violation of the ACHR to the Court, but it retains the option of refusing. The Commission's rules do not contemplate referral of cases in which it has found no violation.⁶

Rivalry between the Court and the Commission marred the Court's early years, and some elements of competition still operate. The long-established Commission did not welcome a new Court that might impair its autonomy and undermine its prestige. At first, the Commission refused to refer contentious cases to the Court at all, and the Court's activities were limited to advisory opinions. Relations improved in the 1990s, and the case load grew modestly, although the Court sometimes rejected the Commission's interpretation of its own powers.⁷ The Court also asserted its independence by disagreeing with the Commission on matters of fact or substantive law.⁸

⁴ The degree to which the American Declaration has remained an aspirational document like the Universal Declaration of Human Rights, or has become legally binding by absorption into the OAS Charter, is a disputed issue, especially as between the Inter-American Commission and the US. The Inter-American Court sided with the Commission on this point in *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights*, Advisory Opinion OC-10/89, Inter-American Court of Human Rights, Series A No. 10 (1989). Currently, 24 OAS states are parties to the ACHR; 11 (counting Cuba) are not. Trinidad and Tobago was previously a party, but denounced the Convention in 1998.

⁵ Contentious cases include cases brought by individuals against a state party and interstate cases (though the latter are extremely rare). Under the ACHR, states parties must accept the competence of the Commission to receive petitions from individuals, but states parties have the option whether or not to accept the competence of the Court. By now, the great majority of states parties have done so. By contrast, the Court's advisory jurisdiction may be invoked, either by OAS member states or by OAS organs, without resort to the Commission.

⁶ Moreover, individuals have no avenue to the Court in the majority of cases where the Commission fails to process the petition to a definite conclusion.

⁷ See, e.g., *Las Palmeras Case* (Preliminary Objections), Inter-American Court of Human Rights, Series C, No. 67 (2000), at para. 34 (holding that the Commission lacks competence to apply international humanitarian law as such in contentious cases); *Genie Lacayo Case*, Inter-American Court of Human Rights, Series C, No. 30 (1997), at para. 93 (holding that the Commission's recommendations are not binding).

⁸ See, e.g., *Five Pensioners Case*, Inter-American Court of Human Rights, Series C, No. 98 (2003) paras. 146–148 (rejecting Commission's claim that reduction in pensions violated ACHR Art. 26); *Castillo Petruzzi Case*, Inter-American Court of Human Rights, Series C, No. 52 (1999), at paras. 102–103 (rejecting the Commission's theory that trying foreign nationals for treason violated the right to nationality under ACHR Art. 20); *Las Palmeras Case*, Inter-American Court of Human Rights, Series C, No. 90 (2001), at para. 47 (finding the Commission's evidence that state forces executed one of the alleged victims insufficient).

The Court also exercises the authority to find different violations from those the Commission has alleged on the same facts, formulating its own legal theories on the principle of *iura novit curia*.⁹ The Court has been willing to find multiple violations in the same case, apparently in order to make optimal use of the opportunity to develop its jurisprudence despite its small case load.¹⁰ (The Court had issued judgments in fewer than 100 contentious cases by the end of 2006.¹¹)

The rate of compliance with the remedial orders in the inter-American system is lower than in the European system. In part, however, that fact reflects the wider remedial powers of the Inter-American Court and its enthusiastic exercise of those powers. Depending on the circumstances, the Court may order compensation to the principal victims and their family members (who are also victims), grant of new trials, reform of legal structures, promotional activities such as human rights training, development projects for massacred villages, public apologies, and commemoration of victims.¹² Some of these memorial orders have been quite specific: to name an educational centre after the victims,¹³ or a street,¹⁴ to erect a monument,¹⁵ or to inscribe the victims' names in an existing monument.¹⁶ When the remains of murdered victims have been hidden, the Court orders the state to search for them and return them for burial. Very often, the Court orders the state to investigate the violation, to identify and punish those responsible. Recently the Court has ordered states to seek the extradition of high

⁹ *Godínez Cruz Case*, Inter-American Court of Human Rights, Series C, No. 5 (1989), at para. 172; *Ituango Massacres Case*, Inter-American Court of Human Rights, Series C, No. 148 (2006), at para. 191.

¹⁰ E.g., in the *Ricardo Canese Case*, Inter-American Court of Human Rights, Series C, No. 111 (2004), at paras 128, 131, 134, the Court found that restrictions on a politician's travel abroad, resulting from a slander conviction, violated both his right to freedom of expression under ACHR Art. 13 and his right to freedom of movement under ACHR Art. 22; the challenged orders violated Art. 22 in several respects, because they lacked a statutory basis, and were not 'necessary', and were not proportionate.

The Court does not always analyse every conceivable violation raised by the facts. When it wishes, it employs the European Court's typical practice of treating one finding of violation as making an examination of alternative characterizations of the same actions unnecessary. See, e.g., *García Asto and Ramírez Rojas Case*, Inter-American Court of Human Rights, Series C, No. 137 (2005), at para. 245 (no need to consider violation of family rights under Art. 17 where separation and the suffering of the family were taken into account in evaluating conditions of detention under Art. 5).

¹¹ See Inter-American Court of Human Rights, *Annual Report 2006* (2007), at 71. The higher numbering of the Court's judgments reflects decisions at multiple stages of some cases. The Court had also issued 19 advisory opinions: *ibid.*

¹² The Court has also ordered states to honour the memory of law enforcement officers who were killed in retaliation for investigating the violation: *Moiwana Village Case*, Inter-American Court of Human Rights, Series C, No. 124 (2005), at para. 216; *Carpio Nicolle Case*, Inter-American Court of Human Rights, Series C, No. 117 (2004), at para. 137; *Mack Chang Case*, Inter-American Court of Human Rights, Series C, No. 101 (2003), at para. 279.

¹³ *Villagrán Morales Case* (Reparations), Inter-American Court of Human Rights, Series C, No. 77 (2001); *Gómez Paquiyauri Brothers Case*, Inter-American Court of Human Rights, Series C, No. 110 (2004), at para. 236.

¹⁴ *Mack Chang Case*, Inter-American Court of Human Rights, Series C, No. 101 (2003), at para. 286.

¹⁵ *19 Tradesmen Case*, Inter-American Court of Human Rights, Series C, No. 109 (2004), at para. 273.

¹⁶ *Miguel Castro Castro Prison Case*, Inter-American Court of Human Rights, Series C, No. 160 (2006), at para 454.

government officials who have fled responsibility for their crimes.¹⁷ Over time, the Court has achieved substantial success in inducing states to pay money judgments. Ambitious reform orders are less frequently followed, and the greatest compliance problems concern the punishment of those responsible for violations.¹⁸

The ACHR does not assign to a political body of the OAS the duty to ensure compliance with the Court's orders, and the Court has attempted to oversee compliance itself. The political organs do not exert pressure on particular states to implement decisions.¹⁹ Lack of support from the OAS on enforcement mirrors chronic underfunding of the Court,²⁰ which depends on supplementation by voluntary contributions from such sources as individual member states, the European Union, and the UN High Commissioner for Refugees.²¹ In the past decade, as formally democratic regimes have become the pattern for Latin America, the Court and Commission have faced institutionalized resistance within the OAS from elected governments uncomfortable with 'the notion that the Commission can spend its time examining individual communications on matters that do not seem as serious as summary executions, disappearances, and torture for political reasons'.²²

3 Regional Interpretation of Human Rights Norms

The activity of a regional human rights court involves several interrelated functions. The court makes findings of fact relevant to alleged human rights violations; it articulates legal interpretations of human rights norms; it applies law to fact in determining whether rights have been violated; and it orders remedies for violations that it has found.

The principal focus in this article will be on the interpretive activity of the Inter-American Court. That choice is not intended to underestimate the importance of

¹⁷ *Goiburú Case*, Inter-American Court of Human Rights, Series C, No. 153 (2006), at paras 130–132; *La Cantuta Case*, Inter-American Court of Human Rights, Series C, No. 162 (2006), at para. 227.

¹⁸ See *Caesar Case*, Inter-American Court of Human Rights, Series C, No. 123 (2005) (separate opinion of Judge Ventura Robles), at para. 19.

¹⁹ See Pasqualucci, *supra* note 1, at 344; Gómez, 'The Interaction between the Political Actors of the OAS, the Commission and the Court', in D. Harris and S. Livingstone (eds), *The Inter-American System of Human Rights* (1998), at 173, 196–197.

²⁰ See Pasqualucci, *supra* note 1, at 346–348.

²¹ E.g., *Annual Report 2006*, *supra* note 11, at 64. One finds such striking annotations as the following: '[t]he European Union was the main source of financing for the seventieth regular session': *ibid.* at 6 n. 2.

²² Medina, 'Toward Effectiveness in the Protection of Human Rights in the Americas', 8 *Transnat'l & Contemporary Problems* (1998) 337, at 353. Several years later, the critical dialogue within the OAS continues to generate such observations as that 'there can be no talk of increasing the resources of the system's organs without first implementing necessary mechanisms to avoid abuse of the protection offered by the system', and that the OAS should 'devote less time to finding those responsible for violations and more time to educating the youth to prevent human rights violations from occurring': OAS Permanent Council, Committee on Juridical and Political Affairs, *Dialogue on the Workings of the Inter-American Human Rights System Among Member States and the Members of the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights*, Report on the Meeting, OEA/Ser.G/CP/CAJP-2311/05 add. 2 (15 May 2006), at 5.

other functions. Indeed, the maintenance of regional human rights regimes alongside the UN-based regimes may serve several purposes.²³ Regional enforcement could have advantages even if the rights were understood identically at both levels. Favourable conditions within a region may lead states to trust their neighbours more, and to be more willing to empower regional bodies to adjudicate human rights disputes – finding facts, evaluating them against the governing legal standard, and ordering appropriate remedies – in comparison with more distant global institutions. Interdependence within a region may make human rights implementation more effective, by giving other participating states more levers to influence the conduct of a state found to be in violation. Regional institutions may be regarded as possessing local expertise, better able to perceive the significance of historical and juridical facts in evaluating human rights claims or in designing remedial orders.

Other advantages of regional regimes arise if rights are not understood identically at the global and regional levels. The relatively greater cultural and ideological homogeneity of a region may permit agreement on a fuller list of human rights, or their more detailed definition, than the ‘universal’ processes have achieved. For example, although the American Convention was drafted against the background of the Universal Declaration of Human Rights and the two Covenants, its enumeration of rights goes beyond them both by including the right of reply against injurious statements in the media, and beyond the Covenants by protecting the right to property.²⁴ As a regional body, the Inter-American Court may thus serve the additional purpose of articulating regionally specific conceptions of shared human rights concepts, or interpreting locally identified human rights norms.

The Inter-American Court, like the European Court, engages in an ‘evolutive interpretation’ of its Convention as a ‘living instrument’.²⁵ The Court invokes general methods of treaty interpretation such as those expressed in the Vienna Convention on the Law of Treaties, but also stresses that human rights treaties have a distinct character, establishing objective norms for the protection of individuals rather than reciprocal obligations benefiting states.²⁶ The terms used by the treaty must be given an autonomous meaning in their context, and should not be left to each state to decide in accordance with its domestic law.²⁷ The *travaux préparatoires* of the Convention sometimes

²³ See, e.g., J. Donnelly, *Universal Human Rights in Theory and Practice* (2nd edn, 2003) at 141; Weston *et al.*, ‘Regional Human Rights Regimes: A Comparison and Appraisal’, 20 *Vanderbilt J Transnat’lL* (1987) 585, at 589–590.

²⁴ ACHR Arts. 14, 21. On the other hand, the American Convention omitted the minority rights provision of ICCPR Art. 27.

²⁵ *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, Inter-American Court of Human Rights, Series A, No. 16 (1999), at paras 114–115 (citing, *inter alia*, *Tyrer v United Kingdom*, ECHR (1978) Series A, No. 26).

²⁶ *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights*, Advisory Opinion OC-2/82, Inter-American Court of Human Rights, Series A, No. 2 (1982), at paras 29–31 (citing App No. 788/60, *Austria v. Italy*, 4 YB (1961) 116 (European Commission)).

²⁷ *The Word ‘Laws’ in Article 30 of the American Convention on Human Rights*, Advisory Opinion OC-6/86, Inter-American Court of Human Rights, Series A, No. 6 (1986), at paras 19–21.

provide guidance for the interpretation of a provision, although the Inter-American Court uses them more frequently in construing the procedures of the Convention itself than in elaborating the content of individual human rights.²⁸

To say that the interpretation of a human rights treaty evolves leaves open the question of *how* that evolution takes place. In Inter-American jurisprudence, progressive elaboration of rights is supported partly by the Court's own normative reasoning, partly by invocation of subsequent OAS human rights instruments,²⁹ and quite often by references to the global and European human rights regimes.

The notion of a 'regional consensus' has played a much smaller role in the evolving jurisprudence of the Inter-American Court than in that of the European Court. Within the European system, the criterion of 'regional consensus' serves both affirmative and negative functions. The largely consistent treatment of a human rights issue among member states may indicate the presence of an underlying European value that guides a more specific interpretation of a treaty right, or its stricter application. A parallel commitment expressed through the Council of Europe sometimes substitutes for comparison of national practices, and may provide elements of political consent along with evidence of normative consensus. On the other hand, the absence of 'regional consensus' may demonstrate unresolved conflicts of values, or that policy regarding new social conditions is in flux. Such a conclusion makes it more likely that the European Court will await future evolution within broader boundaries for national variation.

One evident reason for the less frequent reliance on 'regional consensus' in the Americas is the comparative prevalence of systematic human rights abuses directed against the core of the protected rights. Setting international standards by reference to actual national practice would risk the adoption of very low targets. Another contributing factor is the relative absence of the OAS from participation in the elaboration of human rights standards. The interlocking networks of regional cooperation and harmonization in the Council of Europe and the European Union have produced many more common benchmarks than the thinner efforts in the Americas yet afford. The Inter-American Court has understandably seized on recent progress in OAS support for democratization, particularly as expressed in the Inter-American Democratic Charter of 2001.³⁰ The Court's resulting invocation

²⁸ See, e.g., *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights*, Advisory Opinion OC-2/82, Inter-American Court of Human Rights, Series A, No. 2 (1982), at paras 23–25 (drawing on *travaux* to construe ACHR Art. 75 on reservations); *Baena Ricardo Case* (Competence), Inter-American Court of Human Rights, Series C, No. 104 (2003), at para. 89 (drawing on *travaux* to construe ACHR Art. 65 with regard to post-judgment procedures); but see *YATAMA Case*, Inter-American Court of Human Rights, Series C, No. 127 (2005) (separate opinion of Judge Jackman) (drawing on *travaux* to construe ACHR Art. 23 as protecting the candidacy of individuals not affiliated with any political party).

²⁹ See, e.g., *Maritza Urrutia Case*, Inter-American Court of Human Rights, Series C, No. 103 (2003), at para. 91 (construing ACHR Art. 5 in light of the Inter-American Convention to Prevent and Punish Torture, OAS Treaty Series No. 67 (1985), 25 ILM (1986) 519, as well as global norms).

³⁰ Inter-American Democratic Charter, 11 Sept. 2001, OAS Doc. OEA/Ser.P/AG/RES.1 (XXVIII-E/01), 40 ILM (2001) 1289. The Charter is a resolution of the General Assembly of the OAS, setting forth principles of democracy and a framework for political action by the OAS when the democratic order of a member state is at risk or unconstitutionally interrupted: see Rudy, 'A Quick Look at the Inter-American

of a ‘regional consensus [on] the importance of access to public information’³¹ is striking for its rarity.

Ironically, the Court cannot easily borrow legitimation for its interpretations of the ACHR from the one OAS institution most heavily engaged in human rights promotion, the Inter-American Commission. The Commission is an expert body, not an inter-governmental body, and it cannot express political consent on behalf of the member states. Moreover, the Court’s opinions generally treat the Commission as a hierarchical subordinate that proposes arguments for the Court’s consideration, rather than as an independent source of expertise on the elaboration of human rights norms.³²

A different form of regional specificity arises through the development of doctrines in reaction *against* practices that have been prevalent in the Americas and in the Court’s case load: forced disappearances, impunity, and military privilege. The Inter-American Court and Commission pioneered the analysis of forced disappearances, and the Court adopted legal and evidentiary theories for dealing with abuses designed to evade detection and to dissemble state responsibility.³³ The Court’s early informality about standards of proof, which contrasted with the more restrictive approach then taken by the European Court, has become a permanent feature of its jurisprudence. The widespread refusal of states to investigate or punish human rights violations has motivated the Court to enunciate doctrines against impunity, including the due process rights of victims (including survivors) to access criminal remedies.³⁴ The Court has expressed rigid disapproval of amnesties for human rights violations.³⁵ Although at times its language may have focused primarily on self-amnesties by the regime that commits the violations,³⁶ the Court has also emphasized that the result, rather

Democratic Charter of the OAS: What Is It and Is It “Legal”?, 33 *Syracuse J Int’l L and Commerce* (2005) 237. For use of the Charter by the Inter-American Court see, e.g., *Herrera-Ulloa Case*, Inter-American Court of Human Rights, Series C, No. 107 (2004), at para. 115; *YATAMA Case*, Inter-American Court of Human Rights, Series C, No. 127 (2005), at paras 193, 207, 215 and the separate opinion of Judge García-Sayán, at paras 15–17 (emphasizing the effect of the Charter on evolutive interpretation of political rights).

³¹ *Claude Reyes Case*, Inter-American Court of Human Rights, Series C No. 151, at paras 78–79 (citing a 2006 resolution of the OAS General Assembly urging states to ‘respect and promote respect for everyone’s access to public information’, as well as more general provisions on transparency and participation in the Democratic Charter).

³² This attitude does not inevitably follow from the respective roles of the Court and the Commission, and may be a legacy of earlier tensions in their relationship. The European Court was more openly attentive to the case law of the European Commission: see J.G. Merrills, *The Development of International Law by the European Court of Human Rights* (1993), at 15–16.

³³ *Velásquez Rodríguez Case*, Inter-American Court of Human Rights, Series C, No. 4 (1988).

³⁴ *Villagrán Morales Case*, Inter-American Court of Human Rights, Series C, No. 63 (1999), at paras 225–227.

³⁵ See Tittimore, ‘Ending Impunity in the Americas: The Role of the Inter-American Human Rights System in Advancing Accountability for Serious Crimes under International Law’, 12 *Southwestern J L and Trade in the Americas* (2006) 429.

³⁶ Compare, e.g., *Barrios Altos Case*, Inter-American Court of Human Rights, Series C, No. 75 (2001), at para. 41 (‘This Court considers that all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations’), with *ibid.*, at para. 44 (‘Owing to the manifest incompatibility of self-amnesty laws and the American Convention on Human Rights, the said laws lack legal effect’).

than the source of the amnesty, is what matters.³⁷ The absoluteness of the rule also coheres with the Court's corresponding condemnation of prescription as a defence to human rights violations, expressed in a case where a youth died of injuries caused by police brutality.³⁸ The misuse of military justice as a repressive tool against political opponents and as a vehicle of impunity for soldiers has led the Court to set narrow limits on the circumstances in which military tribunals may lawfully try offences. The Court has denied that military jurisdiction may ever be exercised over civilians, and has defined 'civilian' for this purpose as extending to a recently retired naval officer working as a civil contract employee for the naval intelligence service.³⁹ Even active soldiers should not be tried by military courts for crimes committed against civilians, because doing so deprives the victims of their right to an independent and impartial tribunal.⁴⁰

4 The Importation of European and Global Interpretations

The Inter-American Court is a major, though selective, importer of human rights interpretations. The Court often cites decisions of the European Court of Human Rights on comparable issues.⁴¹ In some instances, European precedent provides the major support for a progressive interpretation of a provision of the Convention.⁴² Of course, the decisions of the European Court have binding authority within the Council of Europe, but not within the OAS.

Another frequent source is the Human Rights Committee, including its General Comments on the ICCPR (International Covenant on Civil and Political Rights), its views on individual communications, and even its Concluding Observations on

³⁷ See *Almonacid-Arellano Case*, Inter-American Court of Human Rights, Series C, No. 154 (2006), at para. 121 ('To conclude, the Court, rather than the process of adoption and the authority issuing [the Chilean self-amnesty], addresses the ratio legis: granting an amnesty for the serious criminal acts contrary to international law that were committed by the military regime').

³⁸ *Bulacio Case*, Inter-American Court of Human Rights, Series C, No. 100 (2003), at para. 116. The Court cannot really mean, however, that every human rights violation requires criminal sanctions for the individuals who can be identified as responsible. The range of positive and negative duties implied from the Convention is too wide to justify such a generalization. And, in fact, the Court does not order investigation and punishment of individual actors in every case: see, e.g., *Herrera-Ulloa Case*, Inter-American Court of Human Rights, Series C, No. 107 (2004), at para. 207 (defamation case against journalist); *YATAMA Case*, Inter-American Court of Human Rights, Series C, No. 127 (2005), at para. 275 (electoral restrictions).

³⁹ *Palamara Iribarne Case*, Inter-American Court of Human Rights, Series C, No. 135 (2005).

⁴⁰ *Las Palmeras Case*, Inter-American Court of Human Rights, Series C, No. 90 (2001).

⁴¹ See, e.g., *Last Temptation of Christ Case*, Inter-American Court of Human Rights, Series C, No. 73 (2001), at para. 69 and n. 18 (re freedom of expression) (citing *Handyside v. United Kingdom*, ECHR Series A, No. 24 (1976), and later cases); *Five Pensioners Case*, Inter-American Court of Human Rights, Series C, No. 98 (2003), at para. 103 and n. 50 (re pension benefits as property) (citing Case 39/1995/545/631, *Gaygusuz v. Austria*, 1996-IV ECHR 1129).

⁴² See, e.g., *Lori Berenson Mejía Case*, Inter-American Court of Human Rights, Series C, No. 119 (2004), at paras 159–161 (quoting the European Court for the proposition that the presumption of innocence can be violated by statements made by the police to the media asserting a defendant's guilt before trial).

country reports.⁴³ Currently, all parties to the ACHR are also parties to the ICCPR, although not necessarily to the First Optional Protocol. At the same time, neither the HRC's General Comments nor the interpretations contained in its views on individual communications and Concluding Observations formally bind the parties to the Covenant.⁴⁴ The Court relied quite heavily on the HRC's views, for example, in construing the right to appeal a criminal conviction as requiring review of factual as well as legal issues by a higher court.⁴⁵

The Court also draws on a wide variety of global soft law documents, either alone or in combination with other sources. For example, in the *Moiwana Village Case*, the Court invoked UN Guiding Principles on Internal Displacement,⁴⁶ which 'illuminate the reach and content of Article 22 of the Convention in the context of forced displacement', as a major basis of its conclusion that the state had violated the rights of the Moiwana community members by not doing enough to facilitate their return to their traditional lands.⁴⁷ In the *Tibi Case*, the Court made repeated reference to the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment,⁴⁸ particularly in finding that the right to humane treatment under Article 5 requires the state to provide adequate and timely treatment of injuries suffered by prisoners.⁴⁹ In the *Juan Humberto Sánchez Case*, the Court relied on the United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions,⁵⁰ as setting forth minimum requirements for the serious and effective investigation of a suspected extra-legal execution, in compliance with Articles 8 and 25 of the ACHR.⁵¹ On occasion, the Court has also

⁴³ See, e.g., *Ricardo Canese Case*, Inter-American Court of Human Rights, Series C, No. 111 (2004), at paras. 115–135 (relying on HRC General Comment 27); *Velásquez Rodríguez Case* (Compensatory Damages), Inter-American Court of Human Rights, Series C, No. 7 (1989), at para. 28 (citing HRC views); *YATAMA Case*, Inter-American Court of Human Rights, Series C, No. 127 (2005), at para. 208 (quoting from HRC General Comment 25); *Raxcacó Reyes Case*, Inter-American Court of Human Rights, Series C, No. 133 (2005), at para. 69 and n. 47 (citing HRC Concluding Observations on reports of Iran and Iraq).

⁴⁴ M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn, 2005), at p. xxvii, 894.

⁴⁵ See *Herrera-Ulloa Case*, Inter-American Court of Human Rights, Series C, No. 107 (2004), at paras 166–167 and n. 117. Although the Court did not mention the fact, this interpretation diverges from that of the corresponding provision in the Seventh Protocol to the ECHR, which postdates the ACHR: see Nowak, *supra* note 44, at 348–352; App. No. 29731/96, *Krombach v. France*, 2001-II ECHR 35, at 64, para. 96.

⁴⁶ E/CN.4/1998/53/Add.2 (1998).

⁴⁷ *Moiwana Village Case*, Inter-American Court of Human Rights, Series C, No. 124 (2005), at paras 111, 120. This portion of the opinion also referred to generalities in the Human Rights Committee's General Comment 27 (in para. 110) and to a somewhat analogous decision on an individual communication, *Jiménez Vaca v. Colombia*, UN Human Rights Committee, Communication No. 859/1999, UN Doc CCPR/C/74/D/859/1999 (2002) (in para. 116).

⁴⁸ Adopted by GA Res. 43/173, 9 Dec. 1988.

⁴⁹ *Tibi Case*, Inter-American Court of Human Rights, Series C, No. 114 (2004), at para. 154. The Court also quoted for this principle (para. 155) a passage from App. No. 30210/96 *Kudła v. Poland*, 2000-XI ECHR 197 (Grand Chamber) (finding no violation of the right).

⁵⁰ UN Doc E/ST/CSDHA/12 (1991).

⁵¹ *Juan Humberto Sánchez Case*, Inter-American Court of Human Rights, Series C, No. 99 (2003), at para. 127; see also *ibid.*, at para. 128 n. 144 (referring to a Council of Europe recommendation on the harmonization of rules for forensic medical autopsies).

invoked guidelines adopted by wholly private organizations of international civil society.⁵²

In some decisions of this kind, the Court is converting global soft law into regional hard law.⁵³ More precise and elaborate standards articulated through non-binding UN-based processes supply content to give effect to less determinate but binding Convention norms. They become subsidiary inter-American obligations, and failure to fulfil them results in a violation of the Convention.

5 Three Perspectives on Importation

In examining the Inter-American Court's strategy of importation, it would be useful to distinguish between three aspects of an international human rights treaty provision: the consensual, suprapositive, and institutional aspects.⁵⁴ Treaty provisions derive positive force as international law from the consensual acts of states, including the originating acts of drafting and ratification, and possibly later acts of express or implicit consensual revision. Human rights provisions in particular may also call upon a suprapositive, moral authority independent of or prior to their embodiment in positive law; the preamble to the American Convention arguably expresses this aspect in recognizing the 'essential rights of man' as 'based upon attributes of the human personality' and asserting that they 'justify' the Convention itself.⁵⁵ Finally, treaty provisions set forth positive legal rules that must operate in an institutional context. They may be drafted or interpreted in a manner that takes into account institutional realities, facilitating compliance by duty-holders and oversight by supervisory organs. All three of these aspects properly influence the interpretation of human rights treaty provisions.

The importation of an interpretation from an external source might be justified from any of these three perspectives, individually or in combination. In consensual terms, states could have expressed the intention to define an obligation under the American Convention by reference to other treaties, or they could ratify the practice of doing so. In suprapositive terms, the Court could borrow on those occasions when it found the external body's exposition especially persuasive. In institutional terms, the Court might have a number of pragmatic reasons for adopting a pre-existing interpretation

⁵² See *Ximenes-Lopes Case*, Inter-American Court of Human Rights, Series C, No. 149 (2006), at paras 130 and n. 117, 133 and n. 118, 135 and n. 120 (citing standards adopted by the World Psychiatric Association, the American Hospital Association, the American Geriatrics Society, and the American Medical Association).

⁵³ See J. Alvarez, *International Organizations as Law-makers* (2005), at 504 ('In some cases, [adjudicative entities] are the principal vehicle by which soft law hardens').

⁵⁴ For fuller discussion see Neuman, 'Human Rights and Constitutional Rights: Harmony and Dissonance', 55 *Stanford L Rev* (2003) 1863.

⁵⁵ ACHR Preamble, para. 2 ('Recognizing that the essential rights of man are not derived from one's being a national of a certain state, but are based upon attributes of the human personality, and that they therefore justify international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American states').

of a norm: for example, the Court might conclude that the protection of human rights would benefit from coordinating the content of states' obligations at the regional and global levels; importation of an interpretation might decrease the Court's own burden of independent argumentation; or the Court might believe that invocation of objective external standards helped to fortify adverse decisions against state resistance.

Elements of all three perspectives may be found in the Court's description of its borrowing practices. From the consensual perspective, the Court has written that a 'certain tendency to integrate the regional and universal systems for the protection of human rights can be perceived in the Convention'.⁵⁶ At times the Court has supported its interpretive strategy by reference to Article 29(b) of the American Convention, which provides that:

No provision of this Convention shall be interpreted as:

...

(b) restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party[.]

The Court has sometimes asserted that this provision 'prohibits a restrictive interpretation of rights' in comparison with international standards.⁵⁷ Even so, any consent expressed in this provision would appear to be limited to actual treaty obligations of OAS member states, and would not extend to the importation of European regional norms or global soft law.⁵⁸

In suprapositive terms, the Court has emphasized that 'Mankind's universality and the universality of the rights and freedoms which are entitled to protection form the core of all international protective systems'.⁵⁹ It has drawn upon the normative

⁵⁶ 'Other Treaties' Subject to the Advisory Jurisdiction of the Court (Article 64 American Convention on Human Rights), Advisory Opinion OC-1/82, Inter-American Court of Human Rights, Series A, No. 1 (1982), at para. 41.

⁵⁷ *Mapiripán Massacre Case*, Inter-American Court of Human Rights, Series C, No. 134 (2005), at para. 188. How this understanding of Art. 29(b) arose is unclear – at first glance, its language seems to be merely a version of the standard savings clause contained in many human rights treaties, indicating that the treaty defines a minimum, not a maximum, of protection for human rights: see, e.g., ECHR Art. 60. The early commentary on the ACHR also described Art. 29(b) in savings clause terms. See, e.g., Cançado Trindade, 'Co-existence and Co-ordination of Mechanisms of International Protection of Human Rights (At Global and Regional Levels)', [1987-II] *RdC* 11, at 115–117; Gros Espiell, 'Los Metodos de Interpretación Utilizados por la Corte Interamericana de Derechos Humanos en su Jurisprudencia Contenciosa', in R. Nieto Navia, *La Corte y el Sistema Interamericano de Derechos Humanos* (1994), at 223, 228.

⁵⁸ The same could be said about reliance on Art. 31(3)(c) of the Vienna Convention on the Law of Treaties as a basis for actual or constructive consent of the parties to the ACHR. That provision requires interpreters to take into account 'relevant rules of international law applicable in the relations between the parties'. It is doubtful whether the pertinent category of 'rules' includes soft law instruments, and it is clear that European regional norms are not 'applicable' within the OAS: see McLachlan, 'The Principle of Systematic Integration and Article 31(3)(c) of the Vienna Convention', 54 *Int'l Comp LQ* (2005) 279, at 290–291.

⁵⁹ 'Other Treaties' Subject to the Advisory Jurisdiction of the Court (Article 64 American Convention on Human Rights), Advisory Opinion OC-1/82, Inter-American Court of Human Rights, Series A, No. 1 (1982), at para. 40.

reasoning of other tribunals, and incorporated their arguments into its own explanation of rights protected by the ACHR. Thus, for example, in the *Herrera Ulloa Case*, the Court summarized the jurisprudence of the European Court on the subject of defamation, before concluding that it was 'logical and appropriate that statements concerning public officials ... should be accorded ... a certain latitude', so that their honour would be protected, but only 'in accordance with the principles of democratic pluralism'.⁶⁰ Similarly in the *Ricardo Canese Case*, the Court drew on European jurisprudence in emphasizing that political candidates must be subject to a higher degree of public scrutiny and criticism in the course of an electoral campaign.⁶¹

Often, however, the Court borrows global or European standards in a more conclusory fashion that suggests an institutional purpose, employing external landmarks as means of providing specificity to ACHR obligations. For example, ACHR Article 19 contains a vaguely worded provision on protection of children: '[e]very minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the State'. In a prominent decision involving the extra-judicial execution of Guatemalan street children, the Court observed that '[b]oth the American Convention and the Convention on the Rights of the Child form part of a very comprehensive international corpus juris for the protection of the child that should help this Court establish the content and scope of the general provision established in Article 19 of the American Convention'.⁶² The Court made more extensive use of the Convention on the Rights of the Child (CRC) and related soft law instruments in its advisory opinion on the *Juridical Condition and Human Rights of the Child*.⁶³ Responding to a request from the Inter-American Commission focusing on the procedural rights of children deprived of their liberty or separated from their families on either criminal or non-criminal grounds, the Court discussed a wide range of states' obligations to children. The Court quoted from a variety of sources, including European Court decisions and Human Rights Committee materials, but especially the CRC, its interpretation by the pertinent treaty body,⁶⁴ and soft law instruments such as the Beijing Rules⁶⁵ and Riyadh Guidelines.⁶⁶ The Court subsequently reiterated its reliance on the CRC and the Beijing Rules in determining the effect of Article 19 in a contentious case, *Children's Rehabilitation Institute*.⁶⁷

⁶⁰ *Herrera-Ulloa Case*, Inter-American Court of Human Rights, Series C, No. 107 (2004), at para. 128.

⁶¹ *Ricardo Canese Case*, Inter-American Court of Human Rights, Series C, No. 111 (2004), at paras 98–104.

⁶² *Villagrán Morales Case*, Inter-American Court of Human Rights, Series C, No. 63 (1999), at para. 194.

⁶³ *Juridical Condition and Human Rights of the Child*, Advisory Opinion OC-17/02, Inter-American Court of Human Rights, Series A, No. 17 (2002). Note that all parties to the ACHR have also ratified the CRC.

⁶⁴ Moreover, in several footnotes, the Court concentrated its citations on Reports of the Committee on the Rights of the Child relating to particular OAS member states, including both states that had ratified the ACHR and states that had not done so: see, e.g., *ibid.*, at para. 79 n. 84 (Costa Rica, and St Kitts and Nevis, respectively).

⁶⁵ See, e.g., *ibid.*, at para. 120 (citing UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) (1985)).

⁶⁶ See, e.g., *ibid.*, at para. 111 (citing UN Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines), adopted by GA Res 45/112, 14 Dec. 1990).

⁶⁷ Inter-American Court of Human Rights, Series C, No. 114 (2004), at para. 211.

The rapid incorporation of blocks of global hard and soft law into the regional convention spares the Court considerable effort in working out and justifying the consequences of Article 19, and demands major improvements in the conditions suffered by impoverished children in the Americas. In part, this advance may be supported on the ground that all parties to the American Convention have also ratified the Convention on the Rights of the Child.⁶⁸ However, that consensual argument would not extend further to the incorporation of non-binding elaborations of CRC provisions or to other soft law instruments concerning children. The formulations contained in soft law might turn out to coincide with the most convincing suprapositive analysis of children's human rights, but the bare appearance of a proposition in a UN resolution or an expert body's recommendation does not *ipso facto* carry conclusive normative force. Thus, the importation of soft law standards more likely results from pragmatic, institutional considerations.

In fact, the Inter-American Court has repeatedly explained:

the *corpus juris* of international human rights law comprises a set of international instruments of varied content and juridical effects (treaties, conventions, resolutions and declarations). Its dynamic evolution has had a positive impact on international law in affirming and building up the latter's faculty for regulating relations between States and the individuals within their respective jurisdictions. This Court, therefore, must adopt the proper approach to consider this question in the context of the evolution of the fundamental rights of the individual in contemporary international law.⁶⁹

This notion of an ever-expanding '*corpus juris*' of binding and non-binding norms available for consideration in the regulation of states underlies much of the Court's practice in interpreting the ACHR.

The Inter-American Court appears to treat all the processes that generate these norms as equally valid forms of 'evolution' capable of influencing the interpretation of states' obligations under the American Convention. This generous notion of 'evolution' bypasses the consensual aspect of human rights without necessarily ensuring that the resulting interpretation is justified in institutional terms.⁷⁰

The Court's easy resort to non-binding external sources discounts the will of OAS member states as a factor relevant to the interpretation of their obligations. This attitude

⁶⁸ It might be objected on realist grounds that the states ratified the CRC taking into account its weak enforcement mechanisms, without the intention of subjecting their compliance to binding adjudication before the Inter-American Court. But that is a risk that they took, in light of Art. 19 and the interpretive practices of the Court.

Consideration of the CRC in construing Art. 19 may be directly justifiable under Art. 31(3)(c) of the Vienna Convention on the Law of Treaties; that does not mean that any given provision of the CRC automatically amounts to a 'measure of protection required' under ACHR Art. 19.

⁶⁹ *Ituango Massacres Case*, Inter-American Court of Human Rights, Series C, No. 148 (2006), at para. 157 n. 177; *Yakye Axa Indigenous Community Case*, Inter-American Court of Human Rights, Series C, No. 125 (2005), at para. 67; *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03, Inter-American Court of Human Rights, Series A, No. 18 (2003), at para. 120.

⁷⁰ Nor does it ensure that borrowed interpretations are justified in suprapositive terms, given that the conclusions of an expert body or the products of a European regional consensus need not be normatively correct.

is expressed most clearly in concurring opinions condemning 'state voluntarism',⁷¹ but does appear to inform the decisions that these opinions accompany. Unfortunately, the critique of 'state voluntarism' tends to conflate two different problems. To be sure, letting each state be the judge of its own human rights obligations, free to redefine or retract prior commitments, would negate the effect of the American Convention. But that observation does not entail that the substantive evolution of the regional human rights regime must be independent of the regional *community of states*.

Ignoring the role of the states raises issues both of legitimation and of effectiveness. The character of a positive human rights treaty entails the involvement of states (jointly) in the design of the system, including the choice of rights to be protected and the means of enforcement. The OAS states went to considerable effort to negotiate and adopt their own regional human rights treaty. They did not reduce the treaty to a local enforcement mechanism for the global Covenants,⁷² and they did not simply delegate to the Court the task of adopting whatever standards it chooses from a future corpus of soft law texts. Ongoing partnership between the Court and the member states bolsters the Court's authority to define state obligations. The 'humanization' of international law has not proceeded so far as to make international human rights tribunals self-legitimizing on the basis of their direct relationship with individual human beings.

Moreover, accepting state influence on the evolution of human rights norms is important for the effectiveness of the system, a major factor in institutional interpretation. Making a human right more 'effective' does not necessarily mean giving the right a broader meaning. It means making the enjoyment of the right more of a reality,⁷³ and that may require defining the positive content of the right in a manner that facilitates its implementation at a particular historical moment within the particular region. At times this may suggest the need for a broader or more categorical interpretation,⁷⁴ at times for a more tailored interpretation. When states within the region participate in the progressive evolution of a right, their actions make national enforcement more feasible and provide insights into the methods of implementation that may succeed. States will also be more likely to assist the Court in influencing a fellow member state to comply with standards to which they themselves already subscribe.

To the extent that the Court is pursuing the institutional goal of coordinating states' global and regional obligations, prematurely hardening global soft law at the regional level does not necessarily serve that goal. The dispersed set of processes that produce

⁷¹ See, e.g., *Caesar Case*, Inter-American Court of Human Rights, Series C, No. 123 (2005) (separate opinion of Judge Cançado Trindade), at para. 64.

⁷² Again, the American Convention includes some rights omitted in the ICCPR (e.g., the right to property) and omits or modifies other rights that the ICCPR includes (e.g. ICCPR Art. 27 on minority rights); the sketchy treatment of economic and social rights in ACHR Art. 26 was followed by a Protocol that contemplates only a limited role for the Court: Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) (adopted 17 Nov. 1988, entered into force 16 Nov. 1999) OAS Treaty Series No. 69 (1988), 28 ILM (1989) 156.

⁷³ The Inter-American Court has expressed this view. See, e.g., *Herrera-Ulloa Case*, Inter-American Court of Human Rights, Series C, No. 107 (2004), at para. 161.

⁷⁴ Compare *supra* the text to notes 34–40.

non-binding global texts may result in contradictions, and may not accurately foreshadow the content that would later be adopted as a binding human rights obligation. Soft law formulations often assert categorical claims that would require qualifications and exceptions to take into account countervailing interests, including other rights and resource constraints.

These considerations do not entail that importation of global soft law norms and European doctrines that lack a regional basis in the Americas could never be instrumentally justified. Nor do they imply that adding more detailed explanations of its borrowing practices would solve the Court's compliance problems.⁷⁵ But they do suggest that greater caution may be required in evaluating the suitability of imported norms as interpretations of the American Convention.

6 The Exportation of Inter-American Interpretations

The Inter-American Court is not, of course, merely a passive importer of human rights interpretations. Even as an importer, the Court is selective, but the Court also engages in innovative interpretations of its own, sometimes specifically based in regional realities,⁷⁶ and sometimes based on universalist considerations.⁷⁷ The Court aspires to be an exporter of human rights interpretations.

The separate opinions of the Judges of the Court sometimes express their visible pride in the Court's contributions to the wider human rights discourse. A prominent example involves the Court's interpretation of the right to information on consular assistance as an individual right of arrested persons, adopted in an advisory opinion and subsequently confirmed by the International Court of Justice in the *LaGrand* and *Avena* cases.⁷⁸ One judge has identified the Court's contributions to international human rights law as including the recognition of a positive obligation to ensure a dignified life

⁷⁵ Cf. Viljoen and Louw, 'Compliance with the Recommendations of the African Commission on Human and Peoples' Rights', 101 *AJIL* (2007) 1, at 16 (concluding empirically that compliance with the African Commission's recommendations does not correlate with the 'depth and width' of the reasoning supporting them).

⁷⁶ See *supra* the text to notes 33–40.

⁷⁷ To some degree, the desire of the Court to innovate is in tension with the objective of coordinating states' regional obligations with their global obligations, but if the Court is successful in exporting an interpretation the congruence can be restored.

⁷⁸ See, e.g., *Fermín Ramírez Case*, Inter-American Court of Human Rights, Series C, No. 126 (2005) (separate opinion of Judge García Ramírez) ('This affirmation, originally made by the Inter-American Court in the *OC-16*, was later collected in the solution of cases before the International Court of Justice...'). The references are to *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, Inter-American Court of Human Rights, Series A, No. 16 (1999); *LaGrand Case (Germany v. United States)* [2001] ICJ Rep 466; and *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States)* [2004] ICJ Rep 12. The ICJ did not confirm or deny the Inter-American Court's characterization of this right to information as a human right: *ibid.*, at 61. When the Inter-American Court subsequently found a violation of this right in a contentious case, a concurring opinion emphasized the 'truly pioneering Advisory Opinion No. 16... [which] has acted as a source of inspiration for international jurisprudence in statu nascendi regarding this matter, – as has been acknowledged in great length by contemporary judicial doctrine': *Acosta Calderon Case*, Inter-American Court of Human Rights, Series C, No. 129 (2005) (separate opinion of Judge Cançado Trindade), at para. 14.

(*vida digna*) as inhering in the right to life; the recognition of the right to a life project; the broadening of the concept of victim; the aforementioned right to consular assistance; and the recognition of the labour rights of undocumented migrants.⁷⁹ A passage in another opinion stressed the Court's achievements regarding the rights of members of indigenous communities, and the expansion of their legal capacity as subjects of international law.⁸⁰

Opinions also assert the parity of the Court with the European Court of Human Rights, the other regional human rights court: '[t]he work of the Inter-American and European Courts of Human Rights has indeed contributed to the creation of an international *ordre public* based upon the respect for human rights in all circumstances'.⁸¹

The Inter-American Court's contributions also include its numerous references to *jus cogens*. The concept of *jus cogens* plays several different roles in the Court's jurisprudence. It can serve its classical function as stated in the Vienna Convention on the Law of Treaties, invalidating a treaty provision.⁸² Often it appears as an intensifying attribute in a contentious case: characterizing a violation of the ACHR by a state subject to the Court's contentious jurisdiction as infringing a *jus cogens* norm increases the condemnation of the violation, and may justify a more extensive remedy.⁸³ Discussing the *jus cogens* character of an ACHR provision can also represent an assertion by the Court of normative authority with regard to an OAS state that has *not* ratified the ACHR (e.g., the United States).⁸⁴ More broadly, the identification of *jus cogens* rules is the ultimate form of norm export, asserting the universal applicability of the rule worldwide.

The universally binding effect of a *jus cogens* norm is the antithesis of 'state voluntarism'. States cannot exempt themselves from such a norm by declining to ratify a treaty, or by persistent objection. Nor can a region of states contract to modify a *jus cogens* norm. To be sure, the effect of the Inter-American Court's declaration of

⁷⁹ *Yakye Axa Indigenous Community Case*, Inter-American Court of Human Rights, Series C, No. 125 (2005) (separate opinion of Judge Abreu Burelli), at para. 6. On the 'life project', understood as an individual's chosen vision of complete personal achievement, which may be disrupted or destroyed by human rights violations, see *Gutiérrez Soler Case*, Inter-American Court of Human Rights, Series C, No. 132 (2005) (separate opinion of Judge Cançado Trindade), at paras 2–7; but see *ibid.* (separate opinion of Judge Jackman) (criticizing the concept).

⁸⁰ *Moivana Village Case*, Inter-American Court of Human Rights, Series C, No. 125 (2005) (separate opinion of Judge Cançado Trindade), at para. 10 ('the unprecedented decision (the first pronouncement of the kind by an international tribunal) ... which safeguarded the right to communal property of their lands'), at para. 12 ('International Human Rights Law in general, and this Court in particular, have contributed to such development').

⁸¹ *Caesar Case*, Inter-American Court of Human Rights, Series C, No. 123 (2005) (separate opinion of Judge Cançado Trindade), at para. 7.

⁸² *Aloeboetoe Case (Reparations)*, Inter-American Court of Human Rights, Series C, No. 15 (1993), at para. 57.

⁸³ *Goiburú Case*, Inter-American Court of Human Rights, Series C, No. 153 (2006), at paras 128–132, 166; *Gómez Paquiyauri Brothers Case*, Inter-American Court of Human Rights, Series C, No. 110 (2004), at para. 76.

⁸⁴ See *infra* the text to note 100.

jus cogens outside its hemisphere depends on its persuasiveness to others; but those others may be tribunals and not states.

The Court has been quite active in identifying *jus cogens* norms in recent years. These peremptory rules include prohibitions on slavery,⁸⁵ physical and psychological torture,⁸⁶ forced disappearance,⁸⁷ extrajudicial execution,⁸⁸ inhumane treatment (including corporal punishment),⁸⁹ discrimination,⁹⁰ crimes against humanity,⁹¹ statutes of limitations for crimes against humanity,⁹² and failure to punish perpetrators of crimes against humanity (also described as a right of ‘access to justice’).⁹³ Other possibilities have been raised but not decided, including the right of access to justice for all violations of rights,⁹⁴ minimum guarantees of international humanitarian law,⁹⁵ and ‘failure to respect personal honor and beliefs (including those related to the relations between the living and the dead)’.⁹⁶

As one separate opinion observed, ‘[t]he Inter-American Court has probably done for such identification of the expansion of *jus cogens* more than any other contemporary international tribunal’.⁹⁷ How the Court has managed to see so much more than others will be explored in the next section.

7 Exporting a Principle of Universal Non-discrimination

The Inter-American Court’s most ambitious effort thus far in expanding *jus cogens* was its advisory opinion on the *Juridical Condition and Rights of Undocumented Migrants*.⁹⁸

⁸⁵ *Aloeboetoe Case* (Reparations), Inter-American Court of Human Rights, Series C, No. 15 (1993), at para. 57.

⁸⁶ *Maritza Urrutia Case*, Inter-American Court of Human Rights, Series C, No. 103 (2003), at para. 92.

⁸⁷ *Goiburú Case*, Inter-American Court of Human Rights, Series C, No. 153 (2006), at para 93.

⁸⁸ *Gómez Paquiyauri Brothers Case*, Inter-American Court of Human Rights, Series C, No. 110 (2004), at para. 76.

⁸⁹ *Ximenes-Lopes Case*, Inter-American Court of Human Rights, Series C, No. 149 (2006), at para. 126; *Caesar Case*, Inter-American Court of Human Rights, Series C, No. 123 (2005), at para. 70. Note that versions of these first 5 items were described as *jus cogens* human rights norms in the 1987 Restatement of US foreign relations law: see *Restatement (Third) of the Foreign Relations Law of the United States* (1987), ii, at para. 702 and comment n (at 163 and 167 respectively).

⁹⁰ *YATAMA Case*, Inter-American Court of Human Rights, Series C, No. 127 (2005), at para 184

⁹¹ *Almonacid-Arellano Case*, Inter-American Court of Human Rights, Series C, No. 154 (2006), at para. 99.

⁹² *Ibid.*, at para. 153.

⁹³ *Goiburú Case*, Inter-American Court of Human Rights, Series C, No. 153 (2006), at para. 131.

⁹⁴ *Ximenes-Lopes Case*, Inter-American Court of Human Rights, Series C, No. 149 (2006) (separate opinion of Judge Cançado Trindade), at paras 19–21.

⁹⁵ *Serrano Cruz Sisters Case* (Preliminary Exceptions), Inter-American Court of Human Rights, Series C, No. 118 (2004) (separate opinion of Judge Cançado Trindade), at para. 40 (citing Common Art. 3 of the 1949 Geneva Conventions, Art. 75 of Additional Protocol I, and Arts 4–6 of Additional Protocol II).

⁹⁶ *Plan de Sanchez Massacre Case*, Inter-American Court of Human Rights, Series C, No. 105 (2004) (separate opinion of Judge Cançado Trindade), at para. 30.

⁹⁷ *Caesar Case*, Inter-American Court of Human Rights, Series C, No. 123 (2005) (separate opinion of Judge Cançado Trindade), at para. 92.

⁹⁸ *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03, Inter-American Court of Human Rights, Series A, No. 18 (2003) (hereinafter OC-18).

There the Court asserted in sweeping terms the *jus cogens* character of an international norm of 'non-discrimination' applying to discriminatory action and inaction, *de jure* or *de facto*, public or private. The process of explanation and omission by which the Court justified this conclusion deserves close attention. It operates by a technique of over-generalization that neglects the consensual aspect of positive human rights norms.

The advisory opinion arose from a request by Mexico for a ruling in response to a series of questions concerning discrimination against undocumented migrant workers by OAS states, in the light of the Universal Declaration, the American Declaration, the ICCPR, the ACHR, and general international law.⁹⁹ The request was apparently prompted by developments in the United States, most prominently a then-recent decision of the US Supreme Court restricting the remedies available for labour law violations committed against undocumented employees.¹⁰⁰

The Court clarified its terminology by articulating a dichotomy between two kinds of differentiation: 'distinction' and 'discrimination'.¹⁰¹ 'Distinction' refers to forms of differentiation that are 'reasonable, proportionate and objective', and therefore permissible. 'Discrimination', in contrast, refers to 'any exclusion, restriction or privilege that is not objective and reasonable, and which adversely *affects* human rights'.¹⁰²

The Court treated the three concepts of 'equality', 'non-discrimination', and 'equal protection of the law' as essentially inseparable elements of a single basic principle.¹⁰³ It found this principle reflected in numerous international human rights instruments, citing more than 30 examples in a footnote.¹⁰⁴ The Court's opinion did not take the time to investigate the different forms in which this principle was articulated in those instruments, binding or non-binding, addressing the state or private actors, focusing on particular bases of discrimination or discrimination in particular contexts, with or without exceptions.

The Court then concluded that this principle was not only general, but peremptory: 'this Court considers that the principle of equality before the law, equal protection before the law, and non-discrimination belongs to *jus cogens*, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws. Nowadays, no legal act that is in conflict with this fundamental principle is acceptable ...'.¹⁰⁵ The normative basis of this principle

⁹⁹ *Ibid.*, at paras 1–4.

¹⁰⁰ Cleveland, 'International Decisions', 99 *AJIL* (2005) 460; see *Hoffman Plastic Compounds v. NLRB*, 535 US 127 (2002).

¹⁰¹ OC-18, *supra* note 98, at para. 84 (*distinción y discriminación*).

¹⁰² *Ibid.* (emphasis added) ('*que redunde en detrimento de los derechos humanos*'). Somehow in this clarification the Court omitted the factor of proportionality from the definition of 'discrimination', but it returned later as if synonymous: *ibid.*, at paras 91, 119, 168. The relevant concept of discrimination that 'adversely affects' human rights is extremely broad, as illustrated by the fact that the Court considered all rights arising in the employment relationship, whether internationally protected or defined by domestic law or collective bargaining agreements, as 'labor rights' that the employer must be prevented from disproportionately infringing with respect to undocumented workers.

¹⁰³ *Ibid.*, at para. 83.

¹⁰⁴ *Ibid.*, at para. 86 n. 33.

¹⁰⁵ *Ibid.*, at para. 101.

‘derives “directly from the oneness of the human family and is linked to the essential dignity of the individual”’.¹⁰⁶ As a consequence, ‘the State, both internationally and in its domestic legal system, and by means of the acts of any of its powers or of third parties who act under its tolerance, acquiescence or negligence, cannot behave in a way that is contrary to the principle of equality and non-discrimination, to the detriment of a determined group of persons’.¹⁰⁷

Powerful consequences followed from this conclusion: ‘States must abstain from carrying out any action that, in any way, directly or indirectly, is aimed at creating situations of de jure or de facto discrimination’ against any group of persons.¹⁰⁸ Moreover, states were required to ‘take affirmative action to reverse or change discriminatory situations that exist in their societies to the detriment of a specific group of persons’.¹⁰⁹ For example, specifically in the case of employment relationships between private parties, the requirement of non-discrimination applied as between the employer and the employee, because ‘the positive obligation of the State to ensure the effectiveness of the protected human rights gives rise to effects in relation to third parties (*erga omnes*)’.¹¹⁰ Accordingly, ‘States must ensure strict compliance with the labor legislation that provides the best protection for workers, irrespective of their ... migratory status; ... and to eradicate discriminatory practices against migrant workers by a specific employer or group of employers ...’.¹¹¹

The breadth of these conclusions might make one pause to inquire whether they could be justified on either consensual or suprapositive grounds. That is, has the international community adopted a peremptory norm of the scope the Court identified, or should it do so?¹¹² Why is non-discrimination in all matters affecting human rights a *jus cogens* norm? The Court cited a wide range of international instruments prohibiting discrimination in a variety of contexts, or on the basis of a number of different criteria. But, even taking these instruments at face value, the fact that many forms of discrimination are internationally forbidden does not demonstrate that all forms of discrimination violate a fundamental value of the international community. Consider, for example, unequal treatment of coastal fishermen and open-sea fishermen,¹¹³ or of drug traffickers in comparison with other criminal defendants.¹¹⁴ If positive evidence

¹⁰⁶ *Ibid.*, at para. 100.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*, at para. 103.

¹⁰⁹ *Ibid.*, at para. 104.

¹¹⁰ *Ibid.*, at para. 140.

¹¹¹ *Ibid.*, at para. 149.

¹¹² One could also inquire whether a peremptory norm of this scope would be justified pragmatically on institutional grounds. I leave that complex inquiry for another day.

Another possible explanation for the *jus cogens* character of the general norm of non-discrimination might be that all human rights norms are peremptory, *ipso facto*. But the Court did not put forward this argument, and I will not pursue it here.

¹¹³ App. No. 27824/95, *Posti and Rahto v. Finland*, 2002-VII ECHR 301.

¹¹⁴ *Acosta Calderon Case*, Inter-American Court of Human Rights, Series C No. 129 (2005) (separate opinion of Judge Cançado Trindade), at paras 2–9 (objecting to the Court’s failure to find that a procedural rule distinguishing between defendants accused of drug trafficking and other defendants violated the principle of non-discrimination).

of *opinio juris* is required, what supports the conclusion that *de jure* unequal treatment of those categories must peremptorily comply with a proportionality test in order to be tolerable by the international community, let alone *de facto* unequal treatment of them, or failure to prevent private discrimination among them? On the other hand, if positive evidence of international condemnation is unnecessary because *jus cogens* determinations are considered inherently normative, then what is the normative argument in favour of elevating so broad and deep a prohibition of 'discrimination' to the level of *jus cogens*? The Court had remarkably little to say about this, treating it as self-evident that '[n]owadays, no legal act that is in conflict with this fundamental principle is acceptable'.¹¹⁵ The Court did assert that the norm of non-discrimination derives 'from the oneness of the human family' and the 'essential dignity of the individual',¹¹⁶ but those principles are more directly relevant to discrimination on the basis of race or gender than to the myriad differentiations among actors and actions arising within the spectrum of states' regulatory policies.

The Court's discussion of non-discrimination norms in human rights instruments is also noteworthy for what it omitted. The Court cited Article 2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), but failed to quote or describe it. In particular, the Court glossed over Article 2(3), which provides:

Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.¹¹⁷

That provision may not have been desired by the countries of Latin America, but its presence in the International Bill of Rights surely has some relevance to the scope of a *jus cogens* norm of non-discrimination. The Court also failed to discuss Article 22 of the ACHR, which expressly limits certain aspects of the right to freedom of movement to persons 'lawfully within the territory of a State Party'.¹¹⁸

The reader will no doubt have observed that the Court has re-construed the *erga omnes* obligations resulting from peremptory norms of international law, which originally were obligations owed by the state to all other states (or to the international community at large), but which the Court additionally considered obligations owed by all individuals to the holder of a human right. Moreover, the obligations of individuals were modelled on the obligations of the state: just as the state is forbidden to discriminate against individuals, so is the employer forbidden to discriminate against individuals; just as the state must treat individuals as equal before the law, so must

¹¹⁵ OC-18, *supra* note 98, at para. 101.

¹¹⁶ *Ibid.*, at para. 100 (quoting from prior Advisory Opinions).

¹¹⁷ ICESCR Art. 2(3); see M.C.R. Craven, *The International Covenant on Economic, Social, and Cultural Rights: A Perspective on its Development* (1995), at 172–174; Dankwa, 'Working Paper on Article 2(3) of the International Covenant on Economic, Social and Cultural Rights', 9 *Human Rts Q* (1987) 230.

¹¹⁸ See ACHR Art. 22(1), limiting the right to 'move about' and to reside in state territory to those lawfully present; ACHR Art. 22(6), providing the right to a decision reached in accordance with law before expulsion, only for aliens lawfully present. Does ACHR Art. 22 violate a *jus cogens* norm, and if so what are the consequences?

each individual treat every other individual as equal before something other than the law. The Court's deduction proceeded very swiftly. In part, it resulted from the assumption of a general '*Drittwirkung*' theory, according to which fundamental rights must be respected by both the public authorities and by individuals with regard to other individuals'.¹¹⁹ The Court did not inquire whether this theory of third party effect applied to some human rights but not others, or applied differently to different rights or to different aspects of particular rights.¹²⁰ Additionally, the Court invoked the example of the Convention on the Elimination of all Forms of Racial Discrimination, and its interpretation by the relevant treaty body.¹²¹ The Court did not inquire whether the application of international norms regarding racial discrimination to the actions of individuals differed from the application of international norms regarding discrimination on bases that have not been singled out for special condemnation. The best support the Court invoked for its position was a glancing reference to the Human Rights Committee's General Comment 18 on the obligation of non-discrimination under the ICCPR,¹²² but the Court did not analyse the reasoning and limits of that General Comment, and even merged its mention of the General Comment with another General Comment on the right not to be subjected to torture and cruel, inhuman, or degrading treatment.¹²³

In one sense, the Court's characterization of the general principle of non-discrimination as *jus cogens* might be considered harmless, because a tribunal always has the option of restraining itself from invalidating some desirable form of differential treatment by finding it to be a reasonable and proportionate 'distinction' rather than an act of 'discrimination'. Moreover, it would be unrealistic to view the Court's action as a substantial reallocation of power to its own advantage, given the minimal likelihood that any particular issue would reach the Court, in light of the resource constraints of the inter-American system and the Commission's control of access to the contentious jurisdiction. Nonetheless, the indeterminacy of the non-discrimination standard does confer substantial discretionary authority upon whatever courts or bodies have the opportunity to apply it, and elevating that standard above all merely consensual treaty provisions could lead to unpredictable and detrimental consequences across the entire range of international law.

¹¹⁹ OC-18, *supra* note 98, at para. 140.

¹²⁰ E.g., the right to political participation does not yet entail that all private organizations must be governed democratically, and the right to personal liberty does not yet require parents to bring their children before a judge when confining them to their rooms.

¹²¹ *Ibid.*, at para. 145.

¹²² The Human Rights Committee's interpretation of ICCPR Art. 26 as requiring states to protect individuals against some forms of private discrimination reflects the separate mandate in the second sentence of that provision, to 'guarantee to all persons equal and effective protection against discrimination'. See Nowak, *supra* note 44, at 630–634. It might be of historical interest to observe that, in the course of the negotiation of the ACHR, a similar mandate was expressly deleted from Art. 24, and replaced by a guarantee of the 'equal protection of the law'. Compare ACHR Art. 24 with Draft Inter-American Convention on Protection of Human Rights, Art. 22, in T. Buergenthal and R. Norris (eds), *Human Rights: The Inter-American System* (1982), ii, booklet 13, at 10. That is not the kind of factor, however, that would be likely to influence the Inter-American Court's interpretation of a substantive right in the ACHR.

¹²³ OC-18, *supra* note 98, at para. 144.

8 Conclusion: Revaluing Regional Consent

The jurisprudence of the Inter-American Court has expanded rapidly in the past decade, and it may be entering a period of consolidation. A few separate opinions have noted with regret the prospect of changes in the Court's doctrines.¹²⁴ Sympathetic observers might believe that some reorientation in the Court's methodology would improve its performance as part of a system for the protection of human rights within the OAS.

The rights embodied in human rights conventions have suprapositive bases, but as embodied they also have consensual and institutional aspects. Ideally, interpretation draws on all three of these aspects in a manner that makes the convention system justifiable, politically acceptable, and effective. There is reason for concern that the Inter-American Court of Human Rights has become too divorced from the consensual aspect of a regional human rights convention in its interpretive practices, and that this departure is not compensated for by compelling normative analysis or strategic institutional design. The Court should not bow to the will of individual violators, but it needs to induce, and not merely exhort, the support of the regional community of states.

Inattention to regional consent is undoubtedly not the principal cause of the Court's compliance difficulties, which also extend to cases involving grave and incontestable violations of rights to life and bodily integrity. Nonetheless, it presents a problem that may impede efforts to strengthen the system.

¹²⁴ E.g., *Yean and Bosico Children Case*, Inter-American Court of Human Rights, Series C, No. 130 (2005) (separate opinion of Judge Cançado Trindade), at para. 22 ('I would greatly regret it if, in future (*tempus fugit*), the Court moved away from this case law'); *La Cantuta Case*, Inter-American Court of Human Rights, Series C, No. 162 (2006) (separate opinion of Judge Cançado Trindade), at para. 61 ('this Court cannot let itself stop or regress its own jurisprudence regarding imperative law (*jus cogens*) within the scope of protection of the human being, regarding both substantive and procedural law').