Document generated on 04/19/2024 11:13 a.m.

Revue québécoise de droit international
Quebec Journal of International Law
Revista quebequense de derecho internacional

THE EXTERNAL RECEPTION OF INTER-AMERICAN HUMAN RIGHTS LAW

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Special Issue, September 2011

Protecting Human Rights in the Americas: The Inter-American institutions at 60

URI: https://id.erudit.org/iderudit/1068395ar
DOI: https://doi.org/10.7202/1068395ar

See table of contents

Publisher(s)

Société québécoise de droit international

ISSN

0828-9999 (print)
2561-6994 (digital)

Explore this journal

Cite this article

Neuman, G. L. (2011). THE EXTERNAL RECEPTION OF INTER-AMERICAN HUMAN RIGHTS LAW. *Revue québécoise de droit international / Quebec Journal of International Law / Revista quebequense de derecho internacional*, 99–125. https://doi.org/10.7202/1068395ar

Article abstract

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THE EXTERNAL RECEPTION OF INTER-AMERICAN HUMAN RIGHTS LAW*

GERALD L. NEUMAN**

This article examines the ways in which Inter-American human rights law has been received and employed outside its own sphere. The Inter-American Court and Commission engage self-consciously in dialogue and borrowing from the global human rights system and the other regional human rights tribunals. Tracing the reciprocal influence of Inter-American developments is a complicated undertaking, because official texts may either understate or overstate the degree to which their authors have relied upon external sources. Examination of the jurisprudence of other human rights tribunals produces mixed results that require interpretation. The African and European regional tribunals have openly engaged with Inter-American precedents on procedure and substance from both the Court and the Commission, although less extensively than the Inter-American Court's methodology leads it to draw from Europe. The International Court of Justice and the UN Human Rights Committee have generally avoided open reference to regional precedent in their institutional opinions, while arguably some tacit influences can be traced. Some express discussion of Inter-American precedent does occasionally appear in concurring or dissenting opinions. The Inter-American Court has had less success, however, in exporting its views on *jus cogens*.

Cet article examine la manière dont le système interaméricain de protection des droits humains a été interprété et appliqué à l'extérieur de sa propre sphère. La Cour et la Commission interaméricaines s'engagent consciemment dans un dialogue avec le système universel des droits de l'homme ainsi qu'avec d'autres tribunaux régionaux de protection des droits de l'homme. Retracer l'influence réciproque des développements interaméricains est une tâche compliquée, car les textes officiels peuvent soit minimiser soit exagérer le degré d'appui de leurs auteurs sur des sources externes. L'étude de la jurisprudence des autres tribunaux des droits de l'homme produit des résultats mitigés et requiert un effort d'interprétation. Les tribunaux régionaux africains et européens se sont ouvertement référés aux précédents de la Cour et de la Commission interaméricaines, tant sur le fond que sur la forme, bien qu'à une fréquence moins importante que celle avec laquelle la Cour interaméricaine s'inspire des précédents européens. La Cour internationale de justice et le Comité des droits de l'homme de l'ONU ont en général évité d'évoquer le précédent régional dans leurs opinions institutionnelles, même si l'on dénote certaines influences. Le thème du précédent interaméricain survient de temps à autre parmi les opinions divergentes ou concordantes. Par contre, la Cour interaméricaine a connu moins de succès lorsqu'il s'agissait d'exporter ses opinions sur le *jus cogens.*

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* This article was prepared for the colloquium The Inter-American Human Rights System, held on November 14-15, 2008. The time frame of the research extends through the end of 2008, with the occasional addition of examples from 2009. The article consciously resists the tradition of varying the capitalization of "Inter-American" with context in English.

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This article examines the ways in which Inter-American human rights law has thus far been received and employed outside its own sphere, by actors in the global human rights system and the other regional systems. The Inter-American human rights system interacts closely with international law and international human rights law more generally. The Inter-American Court of Human Rights borrows heavily, though selectively, from other human rights regimes. The question here is what those regimes have borrowed in return.

The article begins with a brief description of the context of cross-system dialogue and the difficulty of demonstrating its effects. Then it discusses major examples in which other regional or global bodies have, or arguably have, drawn on the Inter-American system's contributions. Without trying to be comprehensive, it illustrates the range of direct and indirect, open and tacit ways in which Inter-American interpretations of human rights norms have been employed externally, as well as some instances in which they have been rejected. The article ends with some tentative conclusions.

I. The Inter-American System in the International Process of Norm Diffusion

The Inter-American human rights system includes both institutions and instruments. The focus in this chapter will be on the *American Convention on Human Rights* (the *Convention*),[1] the *American Declaration of the Rights and Duties of Man*,[2] and their principal interpreters, the Inter-American Court of Human Rights (the Court) and the Inter-American Commission on Human Rights.[3] The *Convention*, the Court and the Commission each have substantive and procedural dimensions—the individual human rights norms and their interpretations, and the structures and procedural rules for their implementation. As later examples will illustrate, bodies in other regions have taken notice of both the substance and the procedure of the Inter-American system.

The international human rights regime forms a loosely structured system of interrelated and mutually influencing global and regional subsystems, resting on different bases of political authority and producing a wide range of texts with varying

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1 *American Convention on Human Rights*, 22 November 1969, O.A.S.T.S. No. 36 (entered into force 18 July 1978) [*Convention*].

2 OAS, General Assembly, *American Declaration of the Rights and Duties of Man*, OR OEA/Ser.L/V/II.82/Doc. 6, rev. 1 (1992) at 25 [*Declaration*].

3 A fuller inquiry would extend to other instruments such as the *Protocol of San Salvador on Economic, Social and Cultural Rights*; the *Inter-American Convention to Prevent and Punish Torture*; the *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women*; the *Inter-American Convention on Forced Disappearance of Persons*; and the *Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities*. It would also address other OAS human rights bodies, such as the Inter-American Commission on Women and the Inter-American Council for Integral Development, and the principal political organs of the OAS. Outside the region, however, the best known components of the system are the *Convention*, the Inter-American Court and the Inter-American Commission.

normative force. Propositions about human rights appearing in one text may reappear, whether intact, modified, or discussed and rejected, in a later text issued by a different source. The later text may also have a different normative quality: binding "hard law" rules in one system may be repeated as persuasive "soft law" principles in another; "soft law" may be converted into "hard law"; and proposals or arguments may be adopted as either "soft law" or "hard law" by an actor authorized to do so.

In this process of diffusion and adaptation of norms certain actors are privileged, having been granted authority within a subsystem to raise the level of legal force ascribed to a norm. Their choices have *internal* consequences within their subsystem, and may also carry *external* influence in other systems. The endorsement of a norm by such an actor may increase the attention that it receives elsewhere; the reasons that the actor gives for endorsing the norm may help persuade others to adopt it; the demonstrated efficacy of the norm in one subsystem may inform the choices made in other subsystems; or the fact that the norm has been adopted within one subsystem may induce other actors who are pursuing a deliberate practice of coordination to adopt it as well.

Thus, an official body makes external "contributions" to the broader system both by originating ideas and by endorsing and amplifying the ideas proffered by others. The latter sort of contribution is more frequent in the densely populated world of human rights advocates and experts. Tracing these processes of diffusion is not a simple matter. Sometimes a court or body borrows a norm from another body and provides a citation to the source in its opinion or report. At other times the borrower omits the citation, whether in the belief that identifying the source would not add significantly to the persuasiveness of the opinion, or from concern that the legitimacy of its decision would be lessened for a relevant audience by the mention of the source. Conversely, sometimes the citation of a similar principle in a different system does not reflect a borrowing at all, but rather the marshalling of additional argumentation in favour of a norm that the author of the opinion has independently adopted on a prior occasion.

Inquiries like the present one therefore risk conflating citations with influence, and committing the fallacy *post hoc*, *propter hoc*. Citations may be decorative or rhetorical rather than causal; borrowings may be overdetermined in situations where multiple sources are cited; and the absence of express reference does not demonstrate lack of influence.[4]

Interpretation of overall patterns raises another difficulty due to the limited accessibility of documentation. When another tribunal fails to mention a relevant Inter-American precedent, it is usually unclear whether the tribunal made a deliberate choice to omit mention, or was unaware of the precedent. Systematic examination of parties' submissions to the tribunal might shed light on the rate of silent rejection, although it would not reach the tribunal's independent knowledge. Absent information of this kind, it is not possible to draw firm conclusions about the comparative rate of success of arguments from one system in another.

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[4] See e.g. Anne-Marie Slaughter, "A Typology of Transjudicial Communication" (1994) 29 U. Rich. L. Rev. 99 at 118-119.

Arguments of parties are only one means by which knowledge is transmitted from one subsystem to another. Relevant information may be actively sought through the independent research of tribunal members, or of their assisting legal staff. The Internet, of course, has facilitated this process. Human rights experts meet in a variety of forums, including some designed for interchange among regional tribunals.

Another possible vector of transmission involves the movement of personnel from the Inter-American system to other portions of the international human rights system, or of global governance more generally. Prominent examples involve the International Court of Justice (ICJ) and the United Nations Human Rights Committee (HRC), the expert treaty body that monitors compliance with the *International Covenant on Civil and Political Rights*.[5] For instance, Andrés Aguilar Mawdsley served on the Inter-American Commission (1972-1985) and on the HRC (1981-1988 —thus in part, simultaneously), before becoming a Judge of the ICJ (1991-1995). Thomas Buergenthal served on the Inter-American Court (1979-1991), and then on the HRC (1995-1999) before joining the ICJ in 2000; Marco Tullio Bruni Celli moved from the Inter-American Commission (1986-1993) to the HRC (1993-1996); Cecilia Medina Quiroga was an expert on the Inter-American system before she joined the HRC (1995-2002), and then the Inter-American Court (2004-2009); and Antônio Augusto Cançado Trindade was a dominant presence on the Inter-American Court (1995-2006) prior to joining the ICJ in 2009. Jurists who move from one system to another may bring both the specific knowledge that they acquired during their years of service and a more general receptivity to later developments in the system; any resulting transfer of norms may be explicit or unacknowledged.

Bearing in mind then that the significance of cross-system references and parallels may vary and may be difficult to demonstrate, one can find examples of external attention to Inter-American interpretations of human rights by a wide variety of global, regional, and national actors. These range from the regional human rights courts and commissions and the international criminal tribunals,[6] to United Nations

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[5] *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976) [ICCPR].

[6] See e.g. *Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman*, ICC-02/05-01/07, Decision on the Prosecution Application under Article 58(7) of the Statute (27 April 2007) at para. 28 and note 22 (International Criminal Court, Pre-Trial Chamber I), citing *European Convention on Human Rights*, article 5(1)(c), and Inter-American Court of Human Rights cases, including *Bámaca-Velásquez v. Guatemala* (2000), Inter.-Am. Ct. H.R. (Ser. C) No. 70 regarding reasonable grounds for pretrial detention. See also *Prosecutor v. Justin Mugenzi et al.*, ICTR-99-50-I, Decision on Justin Mugenzi's Motion for Stay of Proceedings or in the Alternative Provisional Release (Rule 65) and in Addition Severance (Rule 82(B)) (8 November 2002) at para. 33 (International Criminal Tribunal for Rwanda, Trial Chamber II), citing *Firmenich v. Argentina* (1989), Inter.-Am. Comm. H.R., No. 17/89, Annual Report of the Inter-American Commission on Human Rights: 1988-1989, OEA/Ser.L/V/II.76/doc.10.037, along with European Court of Human Rights and Human Rights Committee decisions on standards for evaluating unreasonable delay in a criminal trial. See also *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao (RUF Case)*, SCSL-04-15-T, Trial Judgment (2 March 2009) at para. 86 (Special Court for Sierra Leone, Trial Chamber I), citing the Inter-American Commission's decision in *Juan Carlos Abella v. Argentina* (1997), Inter.-Am. Comm. H.R. No. 55/97, Annual Report of the Inter-American Commission on Human Rights: 1997, OEA/Ser.L/V/II.98 Doc. 6 rev., for the proposition that under international humanitarian law, civilians who take a direct part in hostilities can lawfully be targeted only during the period of their

human rights experts,[7] individual judges of the ICJ,[8] the European Committee of Social Rights,[9] the Supreme Court of India,[10] and the Constitutional Court of South Africa.[11] The following discussion will focus primarily on the global and regional human rights regimes.

II. Formal Status and Regional Interaction

The Inter-American system enjoys a status of formal parity in the comprehensive global analysis of human rights standards and procedures. There are three regional systems, the African, Inter-American, and European, and (until the African regional court becomes fully operative) two regional human rights courts. As a matter of the sovereign equality of the states of all regions and the need for universality of human rights, the systems are equivalent.

At the same time, certain asymmetries are apparent. The European Court of Human Rights (European Court) delivered its 10 000th judgment in September 2008.[12] The Inter-American Court issued its 200th judgment in a contentious case in July 2009.[13] For many issues of human rights, the European Court had a significant body

direct participation. See below section IV(C).

7 See below sections III(B) and III(C).

8 *See infra* notes 116 and 132.

9 *Marangopoulos Foundation for Human Rights (MFHR) v. Greece*, No. 30/2005, Decision on the Merits, European Committee of Social Rights [2006] at para. 196, citing European, African, Inter-American, and UN sources for the right to a healthy environment, including the Inter-American Commission's *Report on the Situation of Human Rights in Ecuador*, OR OEA/Ser.L/V/II.96/doc.10 rev. 1 (1997). The European Committee on Social Rights is the monitoring body of the Council of Europe for the *European Social Charter*.

10 *A.P. Pollution Control Board II v. Prof. M.V Nayudu (Retd.) and Ors*. [2000] I.N.S.C. 679 (Supreme Court of India), citing *Coulter et al. v. Brazil* (1985), Inter.-Am. Comm. H.R. No. 12/85, Annual Report of the Inter-American Commission on Human Rights: 1984-1985, OEA/Ser.L/V/II.66/doc.10 rev. 1, along with European and other national sources, as support for the proposition that failure to take measures to prevent environmental damage violates the right to life. This case is discussed in Eyal Benvenisti, "Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts" (2008) 102 Am. J. Int'l L. 241 at 260.

11 See *Doctors for Life International v. Speaker of the National Assembly and Others* [2006] S. Afr. Law Report 416 at paras. 174, 204 (S Afr Const Ct) citing *Andres Aylwin Azócar et al. v. Chile* (1999), Inter.-Am. Comm. H.R. No. 137/99, at para. 536, Annual Report of the Inter-American Comission on Human Rights: 1999, OEA/Ser.L/V/II.106/doc.3 rev., for the principle that participation of citizens in government forms the basis of democracy. The United States Supreme Court has never done so, possibly because of the U.S. government's denial of the authority of the Inter-American system. *Cf. Juan Raul Garza v. Harley G. Lappin*, 253 F.3d 918 (7th Cir. 2001). I will defer to my Canadian colleagues on the reasons for the rarity of Inter-American references in Canadian courts.

12 See European Court of Human Rights, Press Release, No. 638, "European Court of Human Rights delivers its 10 000th judgment", (18 September 2008). The case was *Takhayeva v. Russia*, No. 23286/04 [2008] E.C.H.R.

13 See *Escher et al. v. Brazil* (2009), Inter.-Am. Ct. H.R. (Ser. C) No. 200. That enumeration overstates the number of contentious cases that the Court has resolved, as illustrated by the fact that the 199th and 201st judgments were both follow-ups to prior decisions. See *Valle-Jaramillo et al. v. Colombia* (2009), Interpretation of Judgment, Inter.-Am. Ct. H.R. (Ser. C) No. 201; *Ticona-Estrada et al. (Bolivia)* (2009), Interpretation of Judgment, Inter.-Am. Ct. H.R. (Ser. C) 199. The Court had also issued twenty advisory opinions by the end of 2009, and a substantial number of orders on provisional measures.

of case law before the subject was first raised before the Inter-American Court. That may provide one reason why the Inter-American Court's references to European decisions are more frequent than the European Court's references to Inter-American decisions. But another reason arises from the respective interpretive methodologies of the two Courts. The European Court pays far greater attention to "regional consensus" in interpreting and applying human rights than the Inter-American Court does; indeed, the notion of "regional consensus" rarely figures in the Inter-American Court's decisions.[14] This difference is an understandable response to the prevalence of systematic human rights violations in the Americas, but it leads the Inter-American Court to look outward for support that the European Court would seek within its own region.

The African Commission on Human and Peoples' Rights (African Commission), on the other hand, has evolved strikingly in its practice of external citation. As Frans Viljoen has observed, the African Commission avoided reference to United Nations (UN) and other regional sources in its first years, but began invoking them in 2000:

> This initial neglect may in part have been a deliberate attempt not to alienate states and to establish the Commission as an African institution, but in part also reflected the initial absence of reasoned and well-researched findings. This tendency has changed markedly since the publication of the 14th Annual Activity Report, covering the period 2000 to 2001. The Commission now refers to UN treaties and interpretations thereof, […] [and] has also made numerous references to 'soft' law […] The Commission refers to regional human rights instruments and decisions rendered under these instruments. This includes the three main institutions operating in Europe and the Americas, the European Court of Human Rights, the Inter-American Court of Human Rights, and the Inter-American Commission [on] Human Rights.[15]

Between 2000 and 2008, the African Commission cited interpretations of human rights law by the Inter-American Court or the Inter-American Commission as part of its reasoning in eight published cases. In some instances, the Inter-American source was the sole non-African material cited for a proposition,[16] while in others the

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[14] See Gerald L. Neuman, "Import, Export, and Regional Consent in the Inter-American Court of Human Rights" (2008) 19 E.J.I.L. 101 at 107-108.

[15] Frans Viljoen, *International Human Rights Law in Africa* (New York: Oxford University Press, 2007) at 345.

[16] See *Legal Resources Foundation v. Zambia* (2001), African Commission on Human and Peoples' Rights, Communication No. 211/98, at para. 59, *Fourteenth Annual Activity Report of the African Commission on Human and Peoples' Rights: 2000-2001*, citing *De los Santos Mendoza et al. v. Uruguay* (1992), Inter.-Am. Comm. H.R. No. 29/92, Annual Report of the Inter-American Commission on Human Rights: 1992-1993, OEA/Ser./L/V/II.83/doc.14 corr 1; for the proposition that the task of an international human rights body is to evaluate the conformity of national laws with the human rights treaty, not to rule on their domestic validity for its own sake; while also citing other sources for other propositions, see *Interights et al. (on behalf of Mariette Sonjaleen Bosch) v. Botswana* (2003), African Commission on Human and Peoples' Rights, Communication No. 240/2001, at para. 31, Seventeenth Annual Activity Report of the African Commission on Human and Peoples' Rights: 2003-2004, citing *McKenzie et al. v. Jamaica* (2000), Inter.-Am. Comm. H.R. No. 41/00, Annual Report of the Inter-American Commission on Human Rights: 2000,

Inter-American citation was coupled with citations to UN sources or European cases or both.[17] Numerically, the African Commission's references to European decisions exceed its references to Inter-American ones, but not dramatically so. Given the vastly larger body of European decisions, one might say that the African Commission invokes Inter-American decisions disproportionately often. The UN sources, including the HRC's views and general comments and international soft law standards, are cited more frequently than any regional system, perhaps because they are more directly relevant: the global instruments also apply to the African states, and Article 60 of the *African Charter on Human and Peoples' Rights*[18] directs the Commission to "draw inspiration" from such instruments in interpreting its

OEA/Ser./L/V/II.111/doc.20 rev.; for the proposition that the prohibition on cruel punishment requires the individualization of capital sentencing decisions, while finding that this principle had been respected, see *Liesbeth Zegveld and Mussie Ephrem v. Eritrea* (2003), African Commission on Human and Peoples' Rights Communication No. 250/2002, at para. 36, Seventeenth Annual Activity Report of the African Commission on Human and Peoples' Rights: 2003-2004, citing *Velásquez-Rodríguez v. Honduras* (1988), Judgment, Inter.-Am. Ct. H.R. (Ser. C) No. 4 [*Velásquez-Rodríguez*]; for its explanation of when inadequate domestic remedies need not be exhausted, see *Article 19 v. Eritrea* (2007), African Commission on Human and Peoples' Rights Communication No. 275/2003, at paras. 51, 75, Twenty-Second Activity Report of the African Commission on Human and Peoples' Rights, EX.CL/364 (XI), citing *Velásquez-Rodríguez* and *Judicial Guarantees in States of Emergency (Articles 27(2), 25 and 8 American Convention on Human Rights)* (1987), Advisory Opinion OC-9/87, Inter.-Am. Ct. H.R. (Ser. A) No. 9; for principles regarding exhaustion of inadequate domestic remedies.

[17] See *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria* (2001), African Commission on Human and Peoples' Rights Communication No. 155/96, at para. 57, Fifteenth Annual Activity Report of the African Commission on Human and Peoples' Rights: 2001-2002, citing *Velásquez-Rodríguez*, *supra* note 16; and *X and Y v. Netherlands* (1985), 91 E.C.H.R. (Ser. A), for the proposition that human rights treaties oblige states to prevent private actors from interfering with the enjoyment of protected rights, see *Law Office of Ghazi Suleiman v. Sudan* (2003), African Commission on Human and Peoples' Rights Communication No. 228/99, at paras. 48-50, Sixteenth Annual Activity Report of the African Commission on Human and Peoples' Rights, citing *Lingens v. Austria* (1986), 103 E.C.H.R. (Ser. A); *Thorgeir Thorgeirson v. Iceland* (1992), 239 E.C.H.R. (Ser. A); and *Compulsory Membership in an Association Proscribed 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, concerning the importance of freedom of political expression in a democratic society; *Zimbabwe Human Rights NGO Forum v. Zimbabwe* (2006), African Commission on Human and Peoples' Rights Communication No. 245/2002, at paras. 144-147, 153, Twenty-First Annual Activity Report of the African Commission on Human and Peoples' Rights [*Zimbabwe Human Rights NGO Forum*], citing *Velásquez-Rodríguez*, as well as UN and European sources, for the proposition that human rights treaties oblige states to exercise due diligence in preventing private actors from interfering with the enjoyment of protected rights, but ultimately finding no violation of this obligation; *ibid.* paras. 201-209, citing the *Barrios Altos v. Peru* (2001), Inter.-Am. Ct. H.R. (Ser. C) No. 75, as well as *Velásquez-Rodríguez* and other Inter-American Court cases, along with an Inter-American Commission report and UN and European sources, in finding that a clemency order barring prosecution of serious human rights abuses violated the victims' right to judicial protection; *ibid.* paras. 213-214, citing Inter-American Commission cases, reports and resolutions, as well as the *Canadian Charter of Rights and Freedoms*, in construing the scope of the right to effective judicial recourse for violation of a right. In *Civil Liberties Organization et al. v. Nigeria* (2001), African Commission on Human and Peoples' Rights Communication No. 218/98, at paras. 33-34, Fourteenth Annual Activity Report of the African Commission on Human and Peoples' Rights: 2000-2001, the African Commission quoted an unnamed Inter-American Commission decision from 1986 for the proposition that "the existence of a higher tribunal necessarily implies a re-examination of the facts presented in the lower court," and that due process requires such an appeal in a capital case, while also citing the right to an appeal under ICCPR art. 6(4) and *Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty*, ESC Res. 1984/50, UN ESCOR, 1984, Supp. No. 1, UN

provisions.

The Inter-American Court has reciprocated, citing the African Commission on several occasions. In its first major judgment on defamation law, the Court cited a decision of the African Commission, several European cases, and an HRC decision before concluding that "the different regional systems for the protection of human rights and the universal system agree on the essential role played by freedom of expression in the consolidation and dynamics of a democratic society".[19] More recently, the Court cited the African Commission's *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*,[20] along with UN soft law, in support of the conclusion that the independence of the judiciary prohibits the removal of a judge from office merely because one of his decisions has been reversed on appeal.[21]

The *Convention* itself has had demonstrable influence on the structure of the regional human rights system in Africa. In the drafting process for the *African Charter*, both substantive and procedural provisions of the *Convention* were taken into account. One early draft included civil and political rights modeled largely on the *Convention* and economic and social rights modeled largely on the *International Covenant on Economic, Social and Cultural Rights*,[22] along with procedural provisions from the *Convention* relating to a Commission but not a Court.[23] The effort to create a treaty reflecting African values and suitable for African social and political conditions resulted in a very different text,[24] but some traces of the *Convention* can be discerned, such as the provision prohibiting vicarious criminal punishment, the provision for recourse against acts that violate fundamental rights under domestic or international law, and the inclusion of provisions on asylum in the article on freedom of movement.[25]

Doc. E/1984/84, 33 at para. 6 [*Safeguards for the Rights of Those Facing Death Penalty*]. The language quoted appears actually to come from the Inter-American Commission's 1981 country report *Report on the Situation of Human Rights in the Republic of Nicaragua*, OR OEA/Ser.L/V/II.53/Doc. 25 (1981) at chapter IV, para. 21.

18 *African Charter on Human and Peoples' Rights*, 27 June 1981, 1520 U.N.T.S. 245 (entered into force 21 October 1986) [*African Charter*].

19 *Herrera-Ulloa v. Costa Rica* (2004), Inter.-Am. Ct. H.R. (Ser. C) No. 107, at paras. 113-116, citing *Media Rights Agenda et al. v. Nigeria* (1998), African Commission on Human and Peoples' Rights Communications Nos. 105/93, 128/94, 130/94 and 152/96, Twelfth Annual Activity Report of the African Commission on Human and Peoples' Rights: 1998-1999, AHG/215 (XXXV) 52. See also *Ricardo Canese v. Paraguay* (2004), Inter.-Am. Ct. H.R. (Ser. C) No. 111, at paras. 83-86.

20 OAU, African Commission on Human and Peoples' Rights, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, DOC/OS(XXX)247, online: African Commission on Human and Peoples' Rights <http://www.achpr.org/english/declarations/Guidelines_Trial_en.html>.

21 *Apitz-Barbera et al. ("First Court of Administrative Dispute") v. Venezuela* (2008), Inter.-Am. Ct. H.R. (Ser. C) No. 182, at para. 84.

22 *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 U.N.T.S. 4 (entered into force 3 January 1976).

23 See African Union, Meeting of Experts, "[Mbaye] Draft African Charter on Human and Peoples' Rights" (1979) OAU Doc. CAB/LEG/67/1, reprinted in Christof Heyns, *Human Rights in Africa 1999* (The Hague: Kluwer Law International, 2002) at 65.

24 See Nsongurua J. Udombana, "Toward the African Court on Human and Peoples' Rights: Better Late Than Never" (2000) III Yale Human Rts. & Dev. L.J. 45, at 59-60 ["Toward the African Court"].

The subsequent elaboration of a *Protocol to the African Charter on Human and Peoples' Rights Establishing an African Court on Human and Peoples' Rights*[26] built more on the regional systems, and several of its features reflect innovations of the *Convention*.[27] For example, the broad advisory jurisdiction of the African Court, the broadly defined remedial authority, and the express authorization to order provisional measures follow the Inter-American model.[28] The *1998 ACtHPR Protocol* did improve on that model by borrowing the European practice of directing the Council of Ministers of the parent organization to monitor the execution of judgments.[29] To the regret of human rights advocates, the *1998 ACtHPR Protocol* did not make the access of individuals and NGOs to the contentious jurisdiction of the African Court compulsory, a state of affairs that resembled the text of the *Convention* more than the current practice of the Inter-American Commission or the normative commitment to individual access expressed in some opinions of the Inter-American Court.[30] Presumably the reluctance of African states to authorize individual access to the new African Court resulted from their own self-interest, rather than from any Inter-American influence. This optional jurisdiction was retained in the *Protocol on the Statute of the African Court of Justice and Human Rights* merging the human rights court into a new African Court of Justice and Human Rights.[31] At the same time, the *2008 ACtJHR Protocol* broadened the advisory jurisdiction even further in substantive terms,[32] and preserved the remedial powers of the court.[33] It also kept the

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25 Compare *African Charter*, *supra* note 18, art. 7(2) with *Convention*, *supra* note 1, art. 5(3); *African Charter*, *ibid.,* art. 7(1)(a) with *Convention*, *ibid.* art. 25(1); *African Charter*, *ibid.* art. 12(3) with *Convention*, *ibid.* art. 22(7).

26 OAU, General Assembly, *Protocol to the African Charter on Human and Peoples' Rights Establishing an African Court on Human and Peoples' Rights*, OAU Doc. OAU/LEG/AFCHPR/PROT (III) [*1998 ACtHPR Protocol*].

27 See e.g. Gina Bekker, "The African Court on Human and Peoples' Rights: Safeguarding the Interests of African States" (2007) 51 J. Afr. L. 151 at 161-69; Niko Krisch, "The Establishment of an African Court on Human and Peoples' Rights" (1998) 58 Heidelberg J. Int'l L. 713. ("The new Court, with jurisdiction over contentious cases and authority to issue advisory opinions as well, bears strong resemblance to the existing regional courts for the protection of human rights, especially the Inter-American Court."); Udombana, "Toward the African Court", *supra* note 24 at 82-98.

28 See *1998 ACtHPR Protocol*, *supra* note 26, art. 4, authorizing advisory opinions on "any legal matter relating to the Charter [of Human and Peoples' Rights] or other relevant human rights instruments"; *1998 ACtHPR Protocol*, *ibid.*, art. 27(1), authorizing court to make "appropriate orders to remedy the violation, including the payment of fair compensation or reparation"; *1998 ACtHPR Protocol, ibid.* art. 27(2), authorizing provisional measures.

29 *1998 ACtHPR Protocol*, *ibid.* art. 29(2).

30 See *1998 ACtHPR Protocol*, *ibid.* art. 5, permitting only the African Commission and the complaining or responding state to submit contentious cases to the Court, unless the state made an optional declaration of acceptance of individual access).

31 See OAU, General Assembly, *Protocol on the Statute of the African Court of Justice and Human Rights*, OAU Doc. Assembly/AU/13 (XI), art. 8 [*2008 ACtJHR Protocol*]; *Statute of the African Court of Justice and Human Rights*, 1 July 2008, OAU Doc. Assembly/AU/13 (XI) Annex, art. 30(f) [*ACtJHR Statute*]. The *ACtJHR Statute* is an Annex to the *2008 ACtJHR Protocol*.

32 See *ACtJHR Statute*, *ibid.* art. 53(1), authorizing the court to "give an advisory opinion on any legal question at the request of the Assembly, […] or any other organ of the [African] Union as may be authorized by the Assembly." In contrast to the *1998 ACtHPR Protocol* and the *Convention*, this provision apparently does not permit member states to request an advisory opinion.

33 See *ACtJHR Statute*, *ibid.* art. 35, authorizing the court to "require any provisional measures which ought to be taken to preserve the respective rights of the parties."; *ibid.* art. 45, "the Court may, if it considers that there was a violation of a human or peoples' right, order any appropriate measures in

European-style provision for monitoring the execution of judgments.[34]

III. Reference to Characteristic Inter-American Doctrines

This section examines the external reception of four elements of Inter-American human rights law that have developed in response to characteristic human rights problems of the region. The first example involves the practice of forced disappearances, and the Inter-American Court's adoption of fact-finding methods that counteract governments' systematic efforts to conceal their violations. The second elaborates the *Convention*'s specific provisions limiting abuse of states of emergency, in particular by establishing the non-derogability of judicial remedies for unlawful detention. The third example concerns the Court's reaction against widespread impunity for serious human rights violations, invalidating amnesties and time limitations that prevent later prosecutions. The fourth consists in the Court's distinctive body of case law addressing indigenous peoples and their collective and individual rights.

Each of these four elements has attracted external attention at the regional or global level. In some instances they have been invoked openly and directly; in other instances their contribution has been subtle or indirect.

A. Forced Disappearances

The analysis of forced disappearances and the means of combating them rank among the most important contributions of the Inter-American Court and Commission to the broader human rights regime. The phenomenon of forced disappearances—detentions that are unacknowledged and/or in an undisclosed location,[35] and which are often fatal—has not been unique to the Americas, but they were especially prevalent there in the 1970s and 1980s. Forced disappearances provided the subject matter of the Inter-American Court's first cases in the 1980s, and many of its cases since. The Court's first judgment, in the well-known *Velásquez-Rodríguez* case, accepted the Commission's argument that "the policy of disappearances, supported or tolerated by the Government, is designed to conceal and destroy evidence of disappearances", and that therefore the standards of proof needed to be arranged in a manner that could reach the truth despite such obstacles.[36] International human rights tribunals are not criminal courts, and should not apply the high standards of proof applicable in criminal proceedings, particularly since the respondent state has primary control over

order to remedy the situation, including granting fair compensation."

34 See *ACtJHR Statute*, *ibid.* art. 43(6), requiring monitoring by the Executive Council of Ministers of the African Union.

35 See e.g. *Declaration on the Protection of All Persons from Enforced Disappearance*, GA Res. 47/133, UN GAOR, 47th Sess., UN Doc. A/RES/47/133 (1992), preamble, referring to enforced disappearances as including arrest, detention or abduction "followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty".

36 See *Velásquez-Rodríguez*, *supra* note 16 at paras. 124 and 129.

the investigation of acts occurring within its territory.[37]

The Inter-American Court's flexible approach to standards of proof contrasted with the more demanding approach of the European Court, which has called for proof beyond reasonable doubt of human rights violations, even if not in the strict criminal law sense. This willingness to give states the benefit of the doubt led to difficulties when the European Court had occasion to confront claims of forced disappearance in Turkey in the 1990s. The European Court first considered the Inter-American Court's case law in *Kurt v. Turkey*, but continued to place a high evidentiary burden on victims;[38] it concluded that although a person last seen in the custody of security forces four years earlier had suffered a grave violation of the right to liberty, he had not been shown to have suffered loss of life or inhuman treatment.

As disappearance cases accumulated, the European Court became more receptive to shifting burdens and presumptions based on circumstances. Only two years later, in *Timurtaş v. Turkey*, it distinguished the *Kurt* case on various points of detail and held that a suspected PKK member last seen six years earlier "must be presumed dead following an unacknowledged detention by the security forces" in the absence of contrary evidence from the state.[39] The European Court noted the (exceptional) participation of "the Center for Justice and International Law (CEJIL), a non-governmental human rights organization in the Americas" in the litigation, and summarized CEJIL's account of Inter-American case law on the violation of the right to life by forced disappearances from *Velásquez-Rodríguez* to *Blake*, immediately before beginning its own similar analysis.[40]

The European Court did not simply follow the Inter-American Court's lead in this area, but rather was converted to a similar approach as its own experience confirmed the Inter-American Court's analysis. Nonetheless, it appears likely that the rapid evolution in the European practice was facilitated by knowledge of the Inter-American situation.

The European Court subsequently invoked the practice of the Inter-American Court (as well as the HRC) with regard to forced disappearances in the 2009 Grand Chamber decision *Varnava and Others v. Turkey*.[41] The Inter-American cases from *Blake* to *Heliodoro Portugal*[42] lent support to the derivation of a continuing procedural obligation to investigate disappearances that had begun before the respondent state recognized the Court's jurisdiction.[43]

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37 *Ibid.* at paras. 134-136.

38 *Kurt v. Turkey* (1998), 74 E.C.H.R. (Ser. A) 1152 at paras. 67-70, 101 and 106-107 [*Kurt*].

39 *Timurtaş v. Turkey*, No. 23531/94 [2000], VI E.C.H.R. at paras. 82-86. The PKK (Workers Party of Kurdistan) is a terrorist organization pursuing separatist aims in southeastern Turkey. The sole dissenting judge dismissed the significance of these distinctions, finding them superficial excuses for a major departure from precedent. *Timurtaş v. Turkey: Partly Dissenting Opinion of Judge Gölcüklü*, *ibid.* at paras. 2-4.

40 *Ibid.* at paras. 7, 79-80 and note 1, citing *Blake v. Guatemala* (1998), Inter.-Am. Ct. H.R. (Ser. C) No. 36 [*Blake*].

41 *Varnava and Others v. Turkey*, No. 16064/90, [2009] E.C.H.R. at para. 147.

42 *Heliodoro Portugal v. Panama* (2008), Inter.-Am. Ct. H.R. (Ser. C), No. 186.

B. Non-Derogability of *Habeas Corpus*

Article 27 of the *Convention* contains a list of nonderogable provisions including the rights to life and to humane treatment, along with "the judicial guarantees essential for the protection of such rights." Interestingly enough, the addition of that language was urged by the United States,[44] despite the fact that the *U.S. Constitution* itself provides for suspension of *habeas corpus*, though only in cases of rebellion or invasion.[45] In a pair of important early advisory opinions, the Inter-American Court explained that this language should be understood as making the right to a judicial remedy for unlawful detention, such as *habeas corpus*, as elaborated in Article 7(6) of the *Convention* nonderogable, although that provision is not expressly enumerated on the list.[46] The Inter-American Court justified this inclusion partly by its interpretation of the phrase about "judicial guarantees," and partly by its elaboration of why habeas corpus was essential for the protection of life and bodily integrity:

> [H]abeas corpus performs a vital role in ensuring that a person's life and physical integrity are respected, in preventing his disappearance or the keeping of his whereabouts secret and in protecting him against torture or other cruel, inhumane, or degrading punishment or treatment.
>
> This conclusion is buttressed by the realities that have been the experience of some of the peoples of this hemisphere in recent decades, particularly disappearances, torture and murder committed or tolerated by some governments. This experience has demonstrated over and over again that the right to life and to humane treatment are threatened whenever the right to habeas corpus is partially or wholly suspended. […] Those who drafted the Convention were aware of these realities, which may well explain why the [American Convention] is the first international human rights instrument to include among the rights that may not be suspended essential judicial guarantees for the protection of the non-derogable rights.[47]

The Inter-American Court's conclusion contrasts with the interpretation given by the European Court, which has held that derogation from the corresponding

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43 *Varnava et al.*, *supra* note 41 at paras. 93-98, 147. The Grand Chamber distinguished the ongoing character of an unresolved disappearance from the context of a known, suspicious death. See *ibid.* at paras. 148-149. It cited an earlier Grand Chamber decision in 2009, *Šilih v. Slovenia* [GC], No. 71463/01, [2009] E.C.H.R. at paras. 111-118, 160, which had also drawn on Inter-American Court and HRC case law while attempting to iron out inconsistencies in the European treatment of *ratione temporis* objections to jurisdiction over substantive and procedural violations of the right to life resulting from known deaths (in that case, alleged medical malpractice).

44 See e.g. OAS, Conference of San Jose, *Summary Version of the Minutes of the Second Plenary Session* (1969), reprinted in Thomas Buergenthal and Robert E. Norris, *Human Rights: The Inter-American System*, looseleaf (Dobbs Ferry: NY Oceana, 1982) at 243, 254.

45 U.S. Const. art. I, § 9, cl 2.

46 *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 [OC-8/87]; *Judicial Guarantees in States of Emergency Arts. 27(2), 25 and 8 American Convention on Human Rights* (1987) Advisory Opinion OC-9/87, Inter.-Am. Ct. H.R. (Ser. A) No. 9 [OC-9/87].

47 OC-8/87, *ibid.* at paras. 35-36.

provision of the *Convention for the Protection of Human Rights and Fundamental Freedoms* may sometimes be permissible and justified.[48]

Neither the *European Convention* nor the ICCPR contains the additional reference to "judicial guarantees" in its derogation provision, but the HRC has adopted the Inter-American Court's approach rather than the European one. In its *General Comment 29 on States of Emergency (Article 4)*, the HRC endorsed the concept of implied nonderogable rights. One example of implied nonderogability involved *habeas corpus*: "[i]n order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention must not be diminished by a State party's decision to derogate from the Covenant."[49]

Characteristically, *General Comment 29* did not make direct mention of Inter-American case law. The HRC has a general practice of not openly citing regional human rights precedents. As Scott Davidson has noted,

> While the decisions of [the European and Inter-American Courts] could be used to support an interpretation of the ICCPR and to develop an horizontally integrated international human rights jurisprudence, it seems tolerably clear that the HRC is not interested in pursuing this line of development. Could it be that the HRC has distanced itself from the regional human rights bodies because it wishes to forge a corpus of truly universal human rights law or because it is afraid to open the door to argument based on relativity of one kind or another?[50]

Nonetheless, *General Comment 29* did include among its references the 1997 report of the Special Rapporteur on human rights and states of emergency, Leandro Despouy (of Argentina).[51] In that report, Professor Despouy had set forth the reasoning of the Inter-American Court in its advisory opinions OC-8/87 and OC-9/87, and had reasoned similarly that *habeas corpus* should be regarded as a nonderogable remedy essential for the protection of nonderogable rights within the global human rights system. He had recommended that the HRC draft a new general comment on derogation in states of emergency, taking into account intervening developments in international law and "the extension resulting from precedents of non-derogable rights, in particular *habeas corpus*".[52] Although the Inter-American Court's advisory

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48 *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 222 (entered into force 3 September 1953), as amended by Protocols Nos. 3, 5, 8, and 11 which entered into force on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 respectively [*European Convention*]. See *Ireland v. United Kingdom* (1978), 25 E.C.H.R. (Ser. A) at paras. 212, 220.

49 Human Rights Committee, *General Comment No. 29 States of Emergency (Article 4)*, UN CCPROR, 2001, UN Doc. CCPR/C/21/Rev1/Add.11, at para. 16 [*General Comment 29*].

50 Alex Conte et al., eds., *Defining Civil and Political Rights: The Jurisprudence of the United Nations Human Rights Committee* (Farnham: Ashgate, 2004) at 11.

51 *General Comment 29*, *supra* note 49 at para. 10, note 6, citing Leandro Despouy, Special Rapporteur, *The Administration of Justice and the Human Rights of Detainees: Question of Human Rights and States of Emergency*, UN ESCOR, 49th Sess., UN Doc. E/CN.4/Sub.2/1997/19 (1997) [*Human Rights of Detainees*].

52 Despouy, *Human Rights of Detainees*, *supra* note 51 at paras. 107-114, 187. A few years earlier, the Human Rights Committee had recommended against drafting a new optional protocol that would add

opinions did not supply the sole basis for the HRC's interpretation, it may well have aided proponents in overcoming the obstacles presented by the text of the ICCPR and the contrary interpretation in Europe.

C. Barriers to Impunity

The Inter-American Court and Commission have played a significant role in the development of international norms concerning impunity for serious human rights violations. The widespread refusal of states in the Americas to investigate or punish human rights abuses has motivated the Court to enunciate doctrines against impunity, such as the due process rights of victims (including survivors) to access criminal remedies.[53] The Court's early insistence, in the *Velásquez-Rodríguez* case, on the state's implied duty under the *Convention* to investigate and punish violations lent support to the efforts of experts at the global level to establish norms against impunity.[54] In a trio of 1992 cases, the Inter-American Commission found amnesties accompanying transitions to democracy in El Salvador, Uruguay, and Argentina inconsistent with this obligation.[55]

These regional determinations contributed to the formulation of the *Joinet principles* for the protection and promotion of human rights through action to combat impunity, a soft law set of guidelines at the global level.[56] Meanwhile, the South

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habeas corpus and related procedural guarantees to the list of non-derogable rights, expressing the concern that such a protocol would implicitly encourage derogation by non-ratifying states. See Human Rights Committee, *Report of the Human Rights Committee (Volume I): Recommendation submitted by the Committee to the Subcommission on Prevention of Discrimination and Protection of Minorities Concerning a Draft Third Optional Protocol to the International Covenant on Civil and Political Rights*, UN ESCOR, 1994, UN Doc. A/49/40(VOL.I) (Supp) Annex XI. The proposed optional protocol would have added Article 9(3), Article 9(4), and Article 14 of the ICCPR to the list of non-derogable provisions. The Committee wrote that "States parties generally understand that the right to habeas corpus and *amparo* should not be limited in situations of emergency," and also cautioned that some derogation from some sub-provisions of Article 14 on fair trial might be required in some emergencies.

53 *"Street Children" (Villagrán-Morales et al.) v. Guatemala* (1999), Inter.-Am. Ct. H.R. (Ser. C) No. 63.

54 See e.g. Theo van Boven, Special Rapporteur, *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms*, UN ESCOR, 45th Sess., UN Doc. E/CN.4/Sub.2/1993/8 (1993) at paras. 87-91, 128; Diane F. Orentlicher, "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime" (1991) 100 Yale L.J. 2537 at 2576-2579.

55 See *Masacre Las Hojas v. El Salvador* (1992), Inter.-Am. Comm. H.R. No. 26/92, Annual Report of the Inter-American Commission on Human Rights: 1992-1993, OEA/Ser.L./V/II.83/doc.14/corr 1, quoting from *Velásquez-Rodríguez*; *Mendoza et al. v. Uruguay* (1992), Inter.-Am. Comm. H.R. No. 29/92, Annual Report of the Inter-American Commission on Human Rights: 1992-1993, OEA/Ser.L./V/II.83/doc.14/corr 1; *Herrera et al. v. Argentina* (1992), Inter.-Am. Comm. H.R. No. 28/92, Annual Report of the Inter-American Commission on Human Rights: 1992-1993, OEA/Ser.L./V/II.83/doc.14/corr 1.

56 See Louis Joinet, *The Administration of Justice and the Human Rights of Detainees: Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political)*, UN ESCOR, 49th Sess., UN Doc. E/CN.4/Sub.2/1997/20/rev. 1 (1997) at para. 5. "The Inter-American Court of Human Rights, for example, in a ground-breaking ruling, found that amnesty for the perpetrators of serious human rights violations was incompatible with the right of every individual to a fair hearing before an impartial and independent court." Principle 25 set forth limits, but not a complete prohibition on amnesty.

African Truth and Reconciliation Commission was providing an alternative model of response to the systematic abuses of a prior regime, and an increasingly complex literature on transitional justice arose. The Inter-American Commission's condemnation of amnesties has expanded "over time to encompass not only self-amnesties enacted by military dictatorships themselves, but also those adopted by subsequent civilian governments whether in response to direct or indirect pressure from the military or security forces or for political purposes to achieve peace and reconciliation".[57]

The Inter-American Court expressed its strong condemnation of amnesties in the *Barrios Altos* case of 2001, holding that the Fujimori regime's amnesty laws could not limit the obligations of Peru.[58] Although some references to the concept of "self-amnesty" in *Barrios Altos* might leave doubt, subsequent decisions have confirmed that the effect of an amnesty in obstructing punishment, and not which government enacted it, determines its invalidity.[59] Language in *Barrios Altos* also condemned the barring of prosecution for serious human rights violations through the passage of time under the doctrine of prescription; the Court adopted a holding to this effect in *Bulacio v. Argentina*.[60] These "hard law" precedents have had important consequences within the region, inducing some national courts to invalidate amnesties without waiting for their particular situations to be brought before the Inter-American Court.[61]

They have also attracted attention in other regions. In *Zimbabwe Human Rights NGO Forum v. Zimbabwe*,[62] the African Commission concluded that a clemency order relieving government supporters of criminal responsibility for politically motivated violence infringed the rights of victims to judicial protection under the African Charter. After referring to the *Joinet principles* and the HRC's views on amnesty, the African Commission added:

> Importantly, the international obligation to bring to justice and punish serious violations of human rights has been recognized and established in all regional human rights mechanisms. The Inter-American Commission and Court of Human Rights have also decided on the question of amnesty legislation.[63]

It then discussed Inter-American precedents at length, before briefly alluding to European cases on the duty to investigate violations and the African Commission's own prior criticisms of amnesties.[64] Some observers have suggested that pressure from Zimbabwe made the African Commission unduly timid in this case, applying a

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57 Brian D. Tittemore, "Ending Impunity in the Americas: The Role of the Inter-American Human Rights System in Advancing Accountability for Serious Crimes Under International Law" (2006) 12 Sw. J. Trade Am. 429 at 446.

58 *Barrios Altos v. Peru* (2001), Inter.-Am. Ct. H.R. (Ser. C) No. 75 [*Barrios Altos*].

59 See *Almonacid-Arellano et al. v. Chile* (2006), Inter.-Am. Ct. H.R. (Ser. C) No. 156, at para. 121.

60 *Bulacio v. Argentina* (2003), Inter.-Am. Ct. H.R. (Ser. C) No. 100; Joinet's Principle 24 addresses the question of prescription, *supra* note 56.

61 See Brian D. Tittemore, *supra* note 57.

62 *Zimbabwe Human Rights NGO Forum*, *supra* note 17.

63 *Ibid.* at para. 204.

64 *Ibid.* at paras. 205-208.

high standard of proof to conclude that the victims had not demonstrated greater responsibility of the government for the violence.[65] If so, then the support of Inter-American precedent may have aided the Commission in criticizing that government at all.

The European Court has also referred in dictum to the *Barrios Altos* and *Bulacio* cases approvingly, as stating international law and practice regarding the impermissibility of amnesty or statutory time-bars preventing prosecution for torture or inhuman or degrading treatment.[66]

D. Rights of Indigenous Peoples

Another distinctive contribution of the Inter-American system involves its case law on the rights of indigenous peoples. Neither the *Convention* nor the *Declaration* expressly addresses the question of indigenous rights, and in the drafting of the *Convention* the minority rights provision of the ICCPR was omitted. An OAS Draft Declaration on the Rights of Indigenous Peoples has long been under negotiation. Mobilization of indigenous rights advocates at the UN level has produced a variety of soft law standards, culminating in the 2007 adoption by the General Assembly of the *United Nations Declaration of the Rights of Indigenous Peoples*.[67] Meanwhile, the Inter-American Commission, and—since 2001—the Inter-American Court,[68] have developed a considerable body of law concerning both collective rights and individual rights of indigenous peoples and their members.[69] The Inter-American Court has based its jurisprudence on such sources as the right to property (construed as embracing communal property), a highly substantive understanding of equality, the right to political participation, freedom of religion, the right to life, and the right to juridical personality. The Court sometimes adopts global soft law principles on indigenous rights as regional hard law, and sometimes contributes original formulations. The Court has also construed the *Convention* in light of the International Labor Organization's *Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO No. 169)*,[70] a treaty that has been ratified by

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65 See Bronwen Manby, "Civil and Political Rights in the African Charter on Human and Peoples' Rights: Articles 1-7" in Malcolm Evans & Rachel Murray, eds., *The African Charter on Human and Peoples' Rights: The System in Practice, 1986-2006* (Cambridge: Cambridge University Press, 2008) 175.

66 *Lexa v. Slovakia*, No. 54334/00, [2008] E.C.H.R. at paras. 97-98 and 139. The European Court also cited *Abdülsamet Yaman v. Turkey*, No. 324446/96, [2004] E.C.H.R., holding that Turkey had violated the right to an effective remedy under *European Convention* art. 13 by failing to prosecute police for torture before the charges were time-barred. The actual holding of the *Lexa* decision, however, was that regardless of whether an amnesty had been improperly granted to the applicant, his detention was unlawful when the amnesty was irrevocable under domestic constitutional law.

67 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res. 61/295, UN GAOR, 61st Sess., UN Doc. A/RES/61/295 (2007) [*UN Declaration*].

68 See *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (2001), Inter.-Am. Ct. H.R. (Ser. C) No. 79.

69 See e.g. Jo M. Pasqualucci, "The Evolution of International Indigenous Rights in the Inter-American Human Rights System" (2006) 6 Human Rights Law Review 281.

twenty countries, most of them in Latin America.[71] This jurisprudence extends both to indigenous peoples descended from the pre-colonial population and to similarly situated "tribal" minority communities.[72]

The 2008 report of UN Special Rapporteur S. James Anaya (who participated significantly in these developments) observed:

> At the regional level, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights have played a path-breaking role in developing a distinct body of jurisprudence concerning the rights of indigenous peoples in the Americas, with an important normative effect in other regions. These bodies have interpreted the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights in a way that takes account of the specific circumstances of indigenous peoples and tribal communities, affirming for them the right to life, including a dignified collective existence; the right of property over lands, territories and natural resources, including the rights to consultation and consent; and the right to political participation in accordance with their cultural patterns.[73]

Professor Anaya also notes as exemplary the Inter-American Court's recent use of the newly adopted *UN Declaration* to aid in the interpretation of rights under the *Convention*.[74]

It may be too early to predict the role that the Inter-American case law will play in other human rights systems, or in facilitating the conversion of provisions of the *UN Declaration* from soft law into customary international law. One example may be seen in the explicit invocation by the UN CERD Committee, which monitors compliance with the *International Convention on the Elimination of All Forms of Racial Discrimination*,[75] of an Inter-American Commission ruling against the United States relating to land claims of the Western Shoshone peoples.[76] The Committee expressed concern about encroachments on Western Shoshone ancestral lands, and further objected

> that the State party's position is made on the basis of processes before the [U.S.] Indian Claims Commission, 'which did not comply with contemporary international human rights norms, principles and standards that govern determination of indigenous property interests', as stressed by

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70 *Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO No. 169)*, 72 ILO Official Bull 59 (entered into force 5 September 1991).

71 See e.g. *Yakye Axa Indigenous Community v. Paraguay* (2005), Inter.-Am. Ct. H.R. (Ser. C) No. 125.

72 See Pasqualucci, *supra* note 69 at 291.

73 S. James Anaya, Special Rapporteur, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, UN GAOR, 9th Sess., UN Doc. A/HRC/9/9 (2008) at para. 28 [footnotes omitted].

74 *Ibid.* at para. 64., citing *Saramaka People v. Suriname* (2007), Inter.-Am. Ct. H.R. (Ser. C) No. 172.

75 *Convention on the Elimination of All Forms of Racial Discrimination*, 7 March 1966, 660 U.N.T.S. 195 (entered into force 4 January 1969).

76 See Committee on the Elimination of Racial Discrimination, *Early Warning and Urgent Action Procedure*, CERD Dec 1(68), UN CERDOR, 68th Sess., UN Doc. CERD/C/USA/DEC/1 (2006).

the Inter-American Commission on Human Rights in the case of *Mary and Carrie Dann versus United States* (Case 11.140, 27 December 2002).[77]

The Committee reiterated its recommendations in its concluding observations on the Sixth Periodic Report of the United States.[78]

IV. Other Examples of External Reference

This section provides some additional instances of the external discussion of Inter-American case law, on subjects less specific to the human rights situation in the Americas. They include the binding character of provisional measures, the extraterritorial application of human rights norms, the recognition of rape as a form of torture, and the right of detained foreign nationals to notice of consular assistance.

In each of these examples, the Inter-American institutions contributed to ongoing international dialogue on human rights norms and practice. In the first three, the Inter-American interpretations were expressly taken into account by other tribunals in resolving similar issues.[79] In the fourth example, the customary silence of the ICJ about regional case law increases uncertainty about the effect.

A. Provisional measures

One further example of the European Court's invocation of Inter-American case law occurred in that court's 2005 decision in *Mamatkulov and Askarov v. Turkey*.[80] There, the Grand Chamber abandoned its prior practice and held, over the dissent of three judges, that states were obliged to comply with its interim measures orders, and that failure to comply violates Article 34 of the *European Convention*.[81] Before reaching that conclusion, the Grand Chamber surveyed the practices of other comparable tribunals that issue "interim," "provisional," or "precautionary" measures to preserve the rights of litigants while their cases are being decided. It cited several provisional measures decisions of the Inter-American Court expressing in varying

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77 *Ibid.* at para. 6. See also the discussion of this matter by the United States in United States of America, *Report Submitted by States Parties Under Article 9 of the Convention: Sixth Periodic Reports of Parties due in 2005*, UN CERDOR, 2007, UN Doc. CERD/C/USA/6 at paras. 342-349.

78 Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: United States of America*, UN CERDOR, 72d Sess., UN Doc. CERD/C/USA/CO/6 (2008) at para. 19.

79 See also *Opuz v. Turkey*, No. 33401/02, [2009] 169 E.C.H.R. at paras. 83-86 [*Opuz*], where a Chamber of the European Court cited the Inter-American Commission's leading decision in *Maria da Penha v. Brazil* (2000), Inter.-Am. Comm. H.R. No. 54/01, Annual Report of the Inter-American Commission on Human Rights 2000, OEA/ser.L/V/II.111/Doc. 20 rev., on the duty of the state to exercise due diligence to protect women against domestic violence. The Chamber also wrote that, in interpreting states' obligations, it would "giv[e] heed to the evolution of norms and principles in international law through other developments such as the Belém do Pará Convention, which specifically sets out States' duties relating to the eradication of gender-based violence." See *Opuz*, *ibid.* at para. 164.

80 *Mamatkulov and Askarov v. Turkey* [GC], No. 46827/99, [2005] E.C.H.R. [*Mamatkulov*].

81 *Mamatkulov*, *ibid.* at paras. 128-129.

language the view that states were obliged to comply with provisional measures in order to ensure the effectiveness of the Court's ultimate decisions.[82] It added:

> The [European] Court observes that the ICJ, the Inter-American Court of Human Rights, the Human Rights Committee and the Committee against Torture of the United Nations, although operating under different treaty provisions to those of the Court, have confirmed in their reasoning in recent decisions that the preservation of the asserted rights of the parties in the face of the risk of irreparable damage represents an essential objective of interim measures in international law. Indeed it can be said that, whatever the legal system in question, the proper administration of justice requires that no irreparable action be taken while proceedings are pending.[83]

Accordingly, the Grand Chamber concluded that the duty of states not to hinder the effective exercise of the right of petition included the obligation to comply with interim measures orders.

The *Mamatkulov* case was part of a series of activist decisions of tribunals asserting binding character for their interlocutory efforts to maintain the status quo during the pendency of their proceedings. The most prominent of these formed part of the ICJ's 2001 decision in *LaGrand (Germany v. United States)*.[84] The Inter-American Court's case law was surely not the principal influence on the reasoning in *Mamatkulov*, yet the fact that the other regional human rights court regarded its interlocutory orders as binding may well have made it easier for the Grand Chamber to reverse the prior European practice and join an apparent consensus.

B. Extraterritorial Application

The Inter-American Commission has on several occasions discussed the extraterritorial application of the *Declaration* to OAS member states that are not parties to the *Convention*[85]. Originally drafted as a nonbinding aspirational instrument, the *Declaration* does not contain any provision delineating its scope of application. Both the Commission and the Inter-American Court have since come to regard the *Declaration* as defining human rights obligations made binding by the OAS Charter.[86]

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82 *Ibid.* at para. 53, citing, *inter alia*, *Haitians and Dominicans of Haitian Origin in the Dominican Republic (Dominican Republic*) (2001), Provisional Measures 26-05-01, Inter.-Am. Ct. H.R. (Ser. E); *James et al. v. Trinidad and Tobago* (1999), Provisional Measures 25-05-99, Inter.-Am. Ct. H.R. (Ser. E); *Hilaire et al. v. Trinidad and Tobago* (2002), Inter.-Am. Ct. H.R. (Ser. C) No. 94, at para. 116.

83 *Ibid.* at para. 124 (precisions added).

84 *LaGrand Case (Germany v. United States of America)*, [2001] I.C.J. Rep. 466 at para. 109 [*LaGrand*]. Neither *LaGrand* nor the Human Rights Committee's decision in Human Rights Committee, *Views of the Human Rights Committee Under Article 5 Paragraph 4 of the Optional Protocol to the International Covenant on Civil and Political Rights*, CCPR Communication No. 869/1999, UN CCPROR, 70th Sess., UN Doc. CCPR/C/70/D/869/1999 (2000) [*Piandiong et al. v. the Philippines*] cited any Inter-American case law; that is consistent with the general practice of those bodies.

85 See e.g. Christina M. Cerna, "Extraterritorial Application of the Human Rights Instruments of the Inter-American System", in Fons Coomans & Menno T. Kamminga, eds., *Extraterritorial Application of Human Rights Treaties* (Antwerp: Intersentia, 2004) at 141.

86 See *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* (1989), Advisory Opinion OC-10/89,

Absent any express geographical limitation, the Commission has felt free to elaborate the extraterritorial scope of the *Declaration*. In two prominent decisions in 1999, *Coard et al. v. United States*,[87] and *Armando Alejandre Jr. et al. v. Cuba*,[88] the Commission found violations of the *Declaration* in actions taken by the United States with regard to persons detained during its 1983 invasion of Grenada, and in Cuba's 1996 destruction of two civilian aircraft in international airspace off its coast. The Commission drew in part on European human rights case law and interpretations of the ICCPR as supporting its conclusion that the extraterritorial exercises of authority in these cases were limited by the *Declaration*.[89]

The Grand Chamber of the European Court rejected reliance on the Inter-American Commission's *Coard* decision in its well-known inadmissibility decision regarding the NATO bombing of Serbia, *Banković et al. v. Belgium et al.*[90] The Grand Chamber pointed to the absence of limiting language in the *Declaration*:

> [The Court] notes that Article 2 of the American Declaration on the Rights and Duties of Man 1948 referred to in the above-cited *Coard* Report of the Inter-American Commission of Human Rights […] contains no explicit limitation of jurisdiction. […] While the text of Article 1 of the American Convention on Human Rights […] contains a jurisdiction condition similar to Article 1 of the European Convention, no relevant case law on the former provision was cited before this Court by the applicants.[91]

As a result, the Grand Chamber took no Inter-American decisions into account in analyzing the extraterritorial effect of a regional human rights instrument.

Other panels of the European Court have sometimes cited *Coard* more favorably when distinguishing *Banković*, or moving beyond it. In *Issa et al. v. Turkey*,[92] a Chamber considered the state's responsibility for deaths allegedly caused by its troops during operations in the Kurdish region of northern Iraq. The Chamber cited two European Commission cases, *Coard*, and two early HRC decisions involving Uruguay, all applying human rights treaties to persons under the authority and control of a state's agents in another state's territory.[93] Ultimately, however, the Chamber found insufficient evidence that the deaths occurred within the area of Turkish operations.[94] In *Isaak v. Turkey*,[95] a different chamber repeated the same citations in rejecting the state's objections to the admissibility of claims concerning a Greek Cypriot demonstrator allegedly beaten to death in the UN buffer zone adjoining the region of Cyprus occupied by Turkey.

Inter.-Am. Ct. H.R. (Ser. A) No. 10.

87 *Coard et al. v. United States* (1999), Inter.-Am. Comm. H.R. No. 109/99, Annual Report of the Inter-American Commission on Human Rights: 1999, OEA/Ser.L/V/II.106/Doc.6 rev. [*Coard*].

88 *Armando Alejandre Jr. et al. v. Cuba* (1999), Inter.-Am. Ct. H.R., No. 86/99, Annual Report of the Inter-American Commission on Human Rights, OEA/Ser.L/V/II.106/Doc.6 rev. [*Alejandre*].

89 *Coard*, *supra* note 87 at paras. 37, 6; *Alejandre*, *supra* note 88 at paras. 23-24, 14, 16.

90 *Banković et al. v. Belgium et al.* (dec.) [GC], No. 52207/99, [2001] XII E.C.H.R. at paras. 23-24, 78.

91 *Ibid.* at para. 78 [*Banković*].

92 *Issa et al. v. Turkey*, No. 31821/96, [2004] E.C.H.R..

93 *Ibid.* at para. 71.

94 *Ibid.* at para. 81.

95 *Isaak et al. v. Turkey* (dec.), No. 44587/98, [2006] E.C.H.R..

The respectful citation of *Coard* suggests the European Court's perception of external support for its cautious efforts to expand human rights constraints to some forms of extraterritorial government action. Thus far, at least, these cases have not cited the more radical interpretation in *Alejandre*, finding an exercise of authority in the firing of a missile, a conclusion more fundamentally inconsistent with *Banković*.[96]

C. Rape as Torture

The Inter-American Commission was one of the first international tribunals to hold that rape as a form of mistreatment inflicted by government agents meets the elements of an international definition of torture.[97] In its February 1995 report on Haiti, the Commission described the use of rape as a method of retaliation against supporters of President Aristide, and concluded that "rape represents not only inhumane treatment that infringes upon physical and moral integrity under Article 5 of the [American] Convention, but also a form of torture in the sense of Article 5(2) of that instrument".[98] Referring to the elements of the Inter-American and UN conventions against torture, the Commission observed: "From the testimonies and expert opinions provided in the documentation to the Commission, it is clear that in the experience of torture victims, rape and sexual abuse are forms torture which produce some of the most severe and long-lasting traumatic effects."[99] The Commission reached a similar conclusion in an individual case, *Raquel Martí de Mejía v. Peru*, the following year.[100] The Commission relied on the physical and mental suffering experienced by rape victims, and also cited the longstanding conclusion of the UN Special Rapporteur on Torture that rape was a form of physical torture.[101]

A few days later, the European Commission on Human Rights issued its report in *Aydin v. Turkey*,[102] involving rape and other mistreatment of a young woman in police custody. The Commission concluded that rape by persons in authority over a detained victim inflicted "acute physical and psychological suffering" and must be regarded as torture within the meaning of the European Convention. The Commission then referred the case to the European Court, which observed:

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96 See e.g. John Cerone, "Human Dignity in the Line of Fire: The Application of International Human Rights Law During Armed Conflict, Occupation, and Peace Operations" (2006) 39 Vand. J. Transnat.'l L. 1447 at 1479-1481, 1485.

97 See Louis Henkin et al., *Human Rights* (New York: Foundation Press, 1999) at 372-383.

98 OAS, Inter-American Commission, *Report on the Situation of Human Rights in Haiti* OR OEA/Ser.L/V/II.88/Doc.10 rev. (1995).

99 *Ibid.* at para. 134.

100 *Raquel Martí de Mejía v. Peru* (1996), Inter.-Am. Comm. H.R. No. 5/96, at 157, Annual Report of the Inter-American Commission on Human Rights, OEA/Ser.L/V/II.91/Doc.7 (1996) [*Mejía*].

101 *Ibid.* at 46, citing the first report of P. Kooijmans, Special Rapporteur, *Torture and Other Cruel, and inhuman or degrading treatment or punishment*, UN ESCOR, 42d Sess., Doc. E/CN.4/1986/15 (1986) para. 119, listing methods of physical torture and methods of psychological torture.

102 *Aydin v. Turkey* (1996) 50 Eur. Comm'n. H.R. D.R. at para. 189. Given the close proximity of dates, the European Commission had no opportunity to cite the Inter-American Commission's decision in *Mejía*.

> Rape of a detainee by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim. Furthermore, rape leaves deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence. The applicant also experienced the acute physical pain of forced penetration, which must have left her feeling debased and violated both physically and emotionally.[103]

The Court's earlier summary of the international law background relevant to its decision noted that Amnesty International had called its attention to the *Mejía* decision of the Inter-American Commission,[104] but the Court made no further mention of *Mejía* in its own analysis.

The Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) engaged at length with both the *Mejía* and *Aydin* cases in its explication of rape as the war crime of torture, in the *Čelebići Camp* case.[105] The court pointed out that the Inter-American Commission's decision had invoked the standards of the *Inter-American Convention on the Prevention and Punishment of Torture*,[106] which omits the element of "severe" suffering from its definition of torture, unlike the UN *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* or customary international law, but suggested that a finding of severe suffering could be implied from the Inter-American Commission's description of the consequences.[107] A different ICTY Trial Chamber followed this analysis shortly thereafter in the *Furundžija* case; this judgment referred in passing to *Mejía* as a decision of "the Inter-American Court of Human Rights," which may suggest that the panel was not overly concerned with the distinction between the Court and the Commission.[108]

Thus the Inter-American Commission contributed to the formation of a consensus among international tribunals that the harms resulting from rape rose to a level that should be characterized legally as torture (assuming that any other elements of the operative definition, such as government involvement, were met). This recognition was not original, but rather endorsed an argument that UN experts and feminist advocates had been making in the preceding years. The eventual acceptance

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[103] *Aydin v. Turkey* (1997) VI Eur. Ct. HR. (Ser. A) at para. 83 [*Aydin*]. Aydin had been subjected to a series of forms of mistreatment, but the Court also observed that "the especially cruel act of rape" amounted to torture if regarded separately. *Ibid.* at para. 86.

[104] *Ibid.* at para. 51. Amnesty had also referred to reports of the UN Special Rapporteur and pending indictments for rape as a form of torture at the International Criminal Tribunal for the former Yugoslavia.

[105] *Čelebići Camp Case (Prosecutor v. Delalić et al.)*, IT-96-21-T, Judgment (16 November 1998) at paras. 480-89 (International Criminal Tribunal for Former Yugoslavia, Trial Chamber) [*Čelebići Camp*].

[106] *Inter-American Convention to Prevent and Punish Torture*, 9 December 1985, O.A.S.T.S. No. 67 (entered into force 28 February 1987) [*Inter-American Convention Against Torture*].

[107] *Čelebići Camp*, *supra* note 105 at para. 486.

[108] *Prosecutor v. Furundžija*, IT-95-17/1-T, Judgment (10 December 1998) at para. 163 (International Criminal Tribunal for Former Yugoslavia, Trial Chamber).

of this proposition as international law represented a significant accomplishment. The Inter-American Court itself later had the opportunity to express its agreement in the *Castro-Castro Prison Case*,[109] citing the European Court's *Aydin* decision and other international materials—but not *Mejía*—in support of the conclusion that rape constituted torture within the meaning of the *Convention* and the *Inter-American Convention Against Torture*.

D. Consular Assistance

Judges of the Inter-American Court have identified as one of their contributions to international legal discourse the recognition of an individual right to notice of consular assistance under Article 36 of the *Vienna Convention on Consular Relations*. The Court was the first international tribunal to elaborate this interpretation, as part of a lengthy advisory opinion requested by Mexico, *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*.[110] The request arose from objections by Mexico and other states to procedures employed in capital cases involving their nationals in the United States, an OAS state that has not ratified the *Convention*. The Court exercised its advisory jurisdiction under Article 64 of the *Convention*, which extends to "other treaties concerning the protection of human rights in the American states." The Court construed Article 36 as not only granting an individual right but serving to protect human rights, bringing it within the range of advisory jurisdiction, and also construed Articles 6 and 14 of the ICCPR as requiring compliance with this individual right. Subsequently, the ICJ adopted the theory that Article 36 confers an individual right to notice of consular assistance, in the *LaGrand* case, and applied it again in the *Avena* case.[111]

Judge Cançado Trindade has praised the Inter-American Court's "truly pioneering Advisory Opinion No. 16, […] [which] has acted as a source of inspiration for international jurisprudence *in statu nascendi* regarding this matter".[112] It is probable that the Inter-American Court's advisory opinion contributed to the *LaGrand* decision, but it would be difficult to calibrate the contribution. Germany's initial Memorial in *LaGrand* was completed before the advisory opinion issued, and that Memorial may have been persuasive enough. The advisory opinion did figure significantly in the subsequent briefing and argument.[113] The ICJ had already taken its first step in its confrontation with the United States by issuing a provisional measures

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109 *Miguel Castro-Castro Prison v. Peru* (2006), Inter.-Am. Ct. H.R. (Ser. C) No. 160, at paras. 310-313.

110 *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.

111 *LaGrand*, *supra* note 84 and *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States)*, [2004] I.C.J. Rep. 12 [*Avena*].

112 *Acosta-Calderon v. Ecuador* (2005), Concurring opinion of Judge A. Cançado Trindade, Inter.-Am. Ct. H.R. (Ser. C) No. 129, at para. 14.

113 See e.g. *LaGrand Case (Germany v. United States of America)*, Public Sitting (13 November 2000 at 10 a.m.) [2001] ICJ Pleadings at 23: "[N]one of these judgments is anything like as relevant to the problem before you, Mr. President, as is the Advisory Opinion of the Inter-American Court."

order in the Breard case in April 1998.[114] The ICJ did not cite the advisory opinion in the *LaGrand* judgment, though that may simply illustrate its general habit of not citing European or Inter-American Court decisions.[115] No separate opinion in *LaGrand* cited the advisory opinion; regional human rights decisions have occasionally featured in separate concurring or dissenting opinions of ICJ judges.[116]

The advisory opinion was cited for a broader proposition, the need for strict observance of procedural fairness in death penalty trials, by the European Court in the *Öcalan* case. The Chamber that initially heard that case cited the advisory opinion, the Inter-American Court's decision in the *Hilaire* Case,[117] the UN *Safeguards for the Rights of Those Facing Death Penalty* ,[118] and three HRC decisions on individual communications, as steps in its reasoning toward the conclusion that the passing of a death sentence after an unfair trial inflicts inhuman or degrading treatment on a defendant, even if the sentence is never executed.[119] Upon referral, the Grand Chamber repeated these citations and quoted the original Chamber's discussion, reaching the same conclusion.[120]

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114 *Case Concerning the Vienna Convention on Consular Relations (Paraguay v. United States of America),* Request for the Indication of Provisional Measures, [1998] I.C.J. Rep. 248. The order sought to prevent the execution of a Paraguayan national in Virginia pending resolution of a dispute about the meaning and effect of Article 36. Paraguay and the United States ultimately settled the case after Virginia carried out the execution.

115 See Gentian Zyberi, *The Humanitarian Face of the International Court of Justice: Its Contribution to Interpreting and Developing International Human Rights and Humanitarian Law Rules and Principles* (Antwerpen: Intersentia, 2008) at 395-399, 405-406, discussing the failure of the ICJ to engage with the case law of the regional human rights courts.

116 See *ibid.* at 396-397; *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, Separate opinion of Judge Higgins, [2003] I.C.J. Rep. 161 at 234, para. 33, citing *Velásquez-Rodríguez*, *supra* note 16, on the desirability of specifying a standard of proof; *Application for Revision of the Judgment of 11 September 1992 in the Case Concerning the Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras, Nicaragua intervening)*, Dissenting opinion of Judge *ad hoc* Paolillo, [2003] ICJ Rep. 392 at 423, note 8., citing *Genie-Lacayao v. Nicaragua* (1997), Application for Judicial Review of the Judgment, Inter.-Am. Ct. H.R. (Ser. C) No. 45, on the requirements for revision of a judgment. Not surprisingly, Judge Cançado Trindade began citing Inter-American Court decisions, as well as ideas he had previously expressed in his separate opinions, in his first dissenting opinion on the ICJ. See *Case Concerning Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Request for Indication of Provisional Measures: Dissenting opinion of Judge Cançado Trindade, [2009] I.C.J. Rep. at para. 67, citing ICTY and Inter-American Court cases for the proposition that the prohibition of torture is *jus cogens*.

117 *Hilaire et al.*, *supra* note 82.

118 *Safeguards for the Rights of Those Facing Death Penalty*, *supra* note 17 at 33.

119 *Öcalan v. Turkey*, No. 46221/99, [2003], E.C.H.R. at paras. 59-64, 203.

120 *Öcalan v. Turkey* [GC], No. 46221/99, [2005] IV E.C.H.R., paras. 60, 166, 175.

V. *Jus cogens* as Counter example

Finally, mention should be made of a major theme in the Inter-American Court's jurisprudence that has not had wide influence, despite the Court's evident desire to exert it. In recent years, the Inter-American Court and individual judges have taken an interest in characterizing certain norms relating to human rights as peremptory norms of international law, or *jus cogens*. Recognizing norms as *jus cogens* can serve purposes internal to the system, such as intensifying the condemnation of a violation or justifying a more extensive remedy.[121] But the Court has also employed the concept in the hope of obliging states not subject to its jurisdiction and contributing directly to global international law, indeed, to defining "the basic principles of the international legal order," and identifying obligations binding on "all States, as members of the international community".[122]

This project is associated particularly, though not exclusively, with the Court's former President, Judge Cançado Trindade, who has explained *jus cogens* as "an open category, which expands itself to the extent that the universal juridical conscience (material source of all Law) awakens for the necessity to protect the rights inherent to each human being in every and any situation".[123] He has observed:

> The Inter-American Court has probably done for such identification of the expansion of *jus cogens* more than any other contemporary international tribunal. It is important that it continues doing so, in the gradual construction, at the beginning of this XXIst century, of a new *jus gentium*, the international law for humankind.[124]

The Court's list of *jus cogens* norms includes both familiar candidates and discoveries of its own. Prohibitions on slavery, physical and psychological torture, forced disappearance, and extrajudicial execution,[125] resonate with the examples proposed in the 1980s by the American Law Institute.[126] More innovative identifications include the apparent suggestion that crimes against humanity inherently violate *jus cogens*,[127] the finding that statutes of limitations for crimes against humanity violate *jus cogens*,[128] and the conclusion that failure to punish perpetrators of crimes against humanity violates *jus cogens*, because "[a]ccess to

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121 It can also perform its original function under the *Vienna Convention on the Law of Treaties*, by invalidating a treaty that violates *jus cogens*. See *Aloeboetoe et al. v. Suriname* (1993), reparations and costs, Inter.-Am. Ct. H.R. (Ser. C) No. 15.

122 *Juridical Condition and Rights of the Undocumented Migrants* (2003), Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (Ser. A) No. 18, at paras. 99-100 [OC-18/03].

123 *Ibid.*, concurring opinion of Judge Cançado-Trindade at para. 68.

124 *Caesar v. Trinidad and Tobago* (2005), Separate Opinion of Judge Cançado Trindade, Inter.-Am. Ct. H.R. (Ser. C) at para. 92.

125 See *Aloeboetoe et al.*, *supra* note 121, at para. 57; *Maritza Urrutia v. Guatemala* (2003), Inter.-Am. Ct. H.R. (Ser. C) No. 103, at para. 92; *Goiburú et al. v. Paraguay* (2006), Inter.-Am. Ct. H.R. (Ser. C) No. 153, at para. 93 [*Goiburú et al.*]; *Gómez-Paquiyauri Brothers v. Peru* (2004), Inter.-Am. Ct. H.R. (Ser. C) No. 110, at para. 76.

126 See American Law Institute, "Restatement of the Law: Foreign Relations Law of the United States" (St-Paul: American Law Institute Publishers, 1987) at sec. 702 and comment n.

127 See *Almonacid-Arellano et al.*, *supra* note 59 at para. 99.

128 *Ibid.* at para. 153.

justice is a peremptory norm of international law".[129] Most potent of all, however, is the Inter-American Court's *jus cogens* prohibition on discrimination, which encompasses all forms of discrimination in all matters affecting human rights, including both direct and indirect discrimination, and entailing a *jus cogens* responsibility of states to prevent such discrimination by private actors.[130]

Thus far, at least, these latter contributions have not received much external confirmation of their universal validity. The European Court has not looked to the Inter-American Court for identification of *jus cogens* norms.[131] The ICJ is very sparing in its use of *jus cogens*, and strikingly even the concurring opinion of Professor Dugard, as judge *ad hoc* in *DRC v. Rwanda*,[132] did not mention Inter-American jurisprudence in his examination of the concept. The African Commission, in a short detour on *jus cogens* in the *Zimbabwe Human Rights NGO Forum* case,[133] did not mention the Inter-American Court's views, although other passages in the same decision discussed Inter-American jurisprudence on other issues.

Some European authors have expressed concern about the methodology and results of the Inter-American Court's efforts to expand *jus cogens*. For example, Andrea Bianchi, otherwise favorable to the concept, has written:

> one of the major threats posed to the concept of *jus cogens* is the tendency by some of its most fervent supporters to see it everywhere. To illustrate this risk, reference could aptly be made to the Inter-American Court of Human Rights' Advisory Opinion on the juridical condition and rights of undocumented migrants. […] [T]he somewhat axiomatic reasoning of the Court, linked with fairly vague notions of natural law, is unlikely to foster the cause of *jus cogens*, particularly among the sceptics.[134]

On the other hand, Andrew Clapham has praised the same advisory opinion as a "breakthrough" on the human rights obligations of individuals, while noting

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129 *Goiburú et al.*, *supra* note 125 at para. 131.

130 See *YATAMA v. Nicaragua* (2005), Inter.-Am. Ct. H.R. (Ser. C) No. 127, at para. 184; OC-18/03, *supra* note 122.

131 See e.g. *Jorgic v. Germany*, No. 74613/01, [2007] IX E.C.H.R. at para. 68, recognizing the prohibition of genocide as a *jus cogens* norm; *Al-Adsani v. United Kingdom*, No. 35763/97, [2001] XI E.C.H.R. at paras. 60-61, recognizing the prohibition of torture as a *jus cogens* norm.

132 *Case Concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Separate opinion of Judge *ad hoc* Dugard, [2006] I.C.J. Rep. 6 at 86-91. In contrast, the Joint Separate Opinion of Judges Higgins, Kooijmans, Elaraby, Owada and Simma, addressing a different issue in the same case, cited the Inter-American Court along with the European Court and the HRC on the subject of the power of a tribunal to decide upon the compatibility of reservations with a treaty; *Ibid.* at 69, citing *The Effect of Reservations on the Entry into Force of the American Convention (Arts 74 and 75)*, Advisory Opinion OC-2/82, Inter-Am. Ct. H.R. (Ser. A) No. 2; and *Restrictions to the Death Penalty*, Advisory Opinion OC-3/83, Inter.-Am. Ct. H.R. (Ser. A) No. 3.

133 *Zimbabwe Human Rights NGO Forum*, *supra* note 17 at para. 149 and note 58. See section III(C), above.

134 Andrea Bianchi, "Human Rights and the Magic of *Jus Cogens*", (2008) 19 E.J.I.L. 491 at 506 [footnotes omitted]; See also Hélène Tigroudja, "La Cour interaméricaine des droits de l'Homme au service de 'l'humanisation du droit international public.' Propos autour des récents arrêts et avis" (2006) 52 A.F.D.I. 617, at 628-630. The author's own reservations are expressed in Neuman, *supra* note 14 at 117-22.

without comment its treatment of the obligations as "even" *jus cogens*.[135]

It could be argued that the Inter-American jurisprudence on this subject is relatively young, and that it is too soon to evaluate its influence. Now that Judge Cançado Trindade has joined the ICJ, the Inter-American approach to *jus cogens* may acquire greater visibility.[136] Only time will tell whether external bodies will find it persuasive on fuller acquaintance.

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Although the foregoing survey is not comprehensive, and some of its readings are speculative, several tentative conclusions can be proposed. The endorsement of a proposition about human rights as regional hard law by the Inter-American Court or the Inter-American Commission can add to its persuasive force outside their region. Litigants cite these interpretations to other tribunals, and some tribunals occasionally mention them in their decisions. There is reason to believe that Inter-American interpretations have sometimes assisted external bodies in reaching similar conclusions, either with or without acknowledgement.

Citation of the Inter-American Commission appears to be as common as citation of the Inter-American Court, despite the fact that the Court's interpretations are more authoritative within the Inter-American system itself. In part, this may reflect the fact that the Commission has an earlier opportunity to express a view on issues of first impression, and that cross-system comparisons are especially helpful with regard to such issues. Or it may reflect a casual attitude toward the sources of citations that are intended to bolster a conclusion reached for other reasons.

External references often involve iconic precedents, such as *Velásquez-Rodríguez*, or *Barrios Altos*—the landmarks rather than the most recent decisions working out their consequences. Such precedents can provide a general orientation that empowers the body that cites it, rather than detailed coordination of results. But more obscure items have also gained attention.[137]

In short, the Inter-American Commission and the Inter-American Court are participants in the complex global conversation on human rights. They have made contributions to both hard law and soft law, but they have not exerted as strong an influence on the European and global regimes as those regimes have exerted on the Inter-American system. In at least some instances, such as *jus cogens*, that may result from the intrinsic lack of persuasiveness of the Court's approach.

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[135] Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford: Oxford University Press, 2006) at 430-432.

[136] In his first dissenting opinion on the ICJ, Judge Cançado Trindade argued for his conception of *jus cogens* as a principle that "repeals all that shocks the universal juridical conscience;" apparently it includes a "right to the realization of justice" that requires the actual exercise of universal jurisdiction to prosecute torture and other crimes. See *Belgium v. Senegal*, *supra* note 116 at paras. 98-105.

[137] See, e.g., notes 9, 42, 66, and 82 above.