EQUALITY AND NON-DISCRIMINATION

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III

Interdisciplinary Brazilian Course on Human Rights

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EQUALITY AND NON-DISCRIMINATION

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PREFACE

The four books that we are making public this year of 2014, on the occasion of the III Interdisciplinary Brazilian Course on Human Rights[1], cover the central theme of the event: *Equality and Non-Discrimination.* The books are written in different idioms (Portuguese, Spanish, English and French) and gather articles of scholars in human rights, from Brazil and abroad, who have acceded our convocation to participate in this project, unique in its characteristics and dimension, and that we intend to repeat on the subsequent versions of the Course. Several authors of this collection have taken part on the pieces published by both Institutes (IBDH and IIDH) about the themes of the previous courses[2].

We trust that the present texts come to constitute an important reference for the study and debate around *Equality and Non-Discrimination*, indicating ways to face of the main challenges to its application and and effectiveness, in the permanent search for the harmonious conjugation of knowledge and action. As from the theoretical knowledge and critical reflection, away from any negative or skeptical position, the authors agree on proclaiming the need to stimulate public policies that grant the construction of a more solidary and equitable society.

The fundamental principle of equality and non-discrimination has been proclaimed in declarations and treaties, and has guided the constant jurisprudence of national and international tribunals, permeating the *corpus juris* of the International Law and Human Rights. However, it has not been sufficiently studied, despite its importance.

That principle marks presence in the Universal Declaration of Human Rights itself, adopted by the General Assembly of the United Nations on 10 December 1948. The recognition ensues therefrom

1 Held in Fortaleza, Ceará, by the Brazilian Institute of Human Rights and by the Inter-American Institute of Human Rights, through its Regional Office for South America in Montevideu, with the support of the Center of Studies and Training of the Attorney General's Office of Ceará State and University of Fortaleza.

2 Namely: *Victmology and Human Rights since the Dimension of Poverty* (coord. César Barros Leal and Emilio José García Mercader, 2012) and *Access to Justice and Citizen Security"* (coord. César Barros Leal and Soledad García Muñoz, 2013).

of the dignity, inherent to all persons and their equal and inalienable rights comes to be the foundation of freedom, justice and peace in the world, all being equal before the law and having the right, without any distinction, to equal protection of the law.

In editing these four books, we deem it fit to to register the contribution of the Vice-President of the IBDH, Dr. Paulo Bonavides, and of the former President of IIDH, Dr. Sonia Picado Sotela, to the promotion and safeguard of human rights in our region; we thank both for their dedication, along the years, to the discipline that congregates us. Furthermore, we express out academic appreciation also to the authors of the articles that compose the volumes.

Antônio Augusto Cançado Trindade and César Barros Leal
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UPROOTEDNESS AND THE PROTECTION OF MIGRANTS IN THE INTERNATIONAL LAW OF HUMAN RIGHTS[1]

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I. PRELIMINARY OBSERVATIONS

May I start this inaugural lecture of the 2007 Annual Study Session by evoking my historical and sustained links of deep affection with the International Institute of Human Rights here in Strasbourg. Precisely here, in this same auditorium *Carré de Malberg* of the University of Strasbourg, I had the honour to receive, in 1974, from the hand of René Cassin himself, my Diploma of the Institute. Again in this same auditorium, I was welcomed, in 1997, as newly-elected member of the *Institut de Droit International*. I have had the privilege to have known, and to have accompanied the work, along more than the last three decades, of all the successive Presidents and Secretaries-General of the International Institute of Human Rights, of whom I remained a faithful and constant collaborator from the other side of the Atlantic. One of them has recently passed away (last 22 March 2007), Professor Alexandre-Charles Kiss, a visionary and inspiring jurist, to the memory of whom I allow myself to render tribute on this occasion. This auditorium being full of history of the

1 Inaugural Lecture delivered by the Author, at the opening of the XXXVIII Annual Study Session of the International Institute of Human Rights, in Strasbourg, France, on 02 July 2007; originally published, in English, *in*: *in Dossier Documentaire/ Documentary File - XXXVIII Sessiond'Enseignement* (2007), vol. I, Strasbourg, IIDH, 2007, pp. 3-47; and, in French, *in*: 19 *Revue trimestrielle des droits de l'homme* - Bruxelles (2008) n. 74, pp. 289-328.

Strasbourg Institute, and of my own academic life, it is not without emotion that I deliver this inaugural lecture.

May I at first express a firm warning against the negative effects of the fact that, in a "globalized" world - the new euphemism *en vogue*, - frontiers are opened to capitals, goods and services, but regrettably not to human beings. National economies are opened to speculative capitals, at the same time that the labour conquests of the last decades erode. Increasing segments of the population appear marginalized and excluded from material "progress". Lessons form the past seem forgotten, the sufferings of previous generations appear to have been in vain. The current state of affairs appears devoid of a historical sense. To this *de-historization* of the lifetime are added the idolatry of the market, reducing human beings to mere agents of economic production (ironically, amidst growing unemployment in distinct latitudes).

As a result of this new contemporary tragedy - essentially a man-made one, - perfectly avoidable if human solidarity were to have primacy over individual egoism, there emerges and intensifies the new phenomenon of massive flows of forced migration, - of millions of human beings seeking to escape no longer from individualized political persecution, but rather from hunger and misery, and armed conflicts, - with grave consequences and implications for the application of the international norms of protection of the human person.

One decade ago, in a study I prepared for the Inter-American Institute of Human Rights (in Costa Rica, in 1998), published in 2001 in Guatemala, I propounded a human rights approach for the phenomenon of forced migratory fluxes, - distinctly from the classic studies on the subject (pursuant to a strictly historical, or else economic, approach), - and with attention focused on human beings experiencing great vulnerability[2]. On the occasion, I saw it fit to warn that

> "The advances [in this domain] will only be achieved by means of a radical change of mentality. In any scale of values, considerations of a humanitarian order ought to prevail over those of an economic or financial order, over the alleged protectionism of the market of work and over group rivalries.

2 A.A. Cançado Trindade, *Elementos para un Enfoque de Derechos Humanos del Fenómeno de los Flujos Migratorios Forzados* (Study of July 1998 prepared for the IIHR), Guatemala City, OIM/IIDH, Sept. 2001, pp. 1-57.

> There is, definitively, pressing need to situate the human being in the place that corresponds to him, certainly above capitals, goods and services. This is perhaps the major challenge of the `globalized' world in which we live, from the perspective of human rights"[3].

In this inaugural lecture of the current Annual Study Session of 2007 of the International Institute of Human Rights here in Strasbourg, I shall retake the subject, which has become a topical one, with the purpose of identifing and gathering the elements, accumulated in recent years, that would allow to advance further the aforementioned new approach, proper to human rights, to the consideration of the contemporary phenomenon of forced migrations. To this end, I shall seek to portray the drama of uprootedness and the growing need of protection of migrants, and to identify the basic principles applicable in this new domain of protection of the human person; and shall review the growing international case-law on the matter (of both the European and the Inter-American Courts of Human Rights, as well as other initiatives of protection at the United Nations and regional levels, the implications of the whole issue for the responsibility of States, and its importance for the international community as a whole. The path will then be opened for the presentation of my final reflections on the matter.

II. THE DRAMA OF UPROOTEDNESS AND THE GROWING NEED OF PROTECTION OF MIGRANTS

It has been rightly warned that humankind can only achieve true progress when it moves forward in the sense of human emancipation[4]. It is never to be forgotten that the State was originally conceived for the realization of the common good[5]. No State can consider itself to be above the Law, the norms of which have as ultimate addressees

3 *Ibid*., p. 26.

4 J. Maritain, *Los Derechos del Hombre y la Ley Natural*, Buenos Aires, Ed. Leviatán, 1982 (reimpr.), pp. 12, 18, 38, 43, 50, 94-96 and 105-108. To J. Maritain, "the human person transcends the State", for having "a destiny superior to time"; *ibid*., pp. 81-82. On the "human ends of power", cf. Ch. de Visscher, *Théories et réalités en Droit international public*, 4th. rev. ed., Paris, Pédone, 1970, pp. 18-32 *et seq*..

5 By State it is here meant the State in a democratic society, that is, the State which respects and ensures respect for human rights, is turned to the common good, and the public powers of which, separated, abide by the Constitution and the rule of law, with effective procedural guarantees of human rights and fundamental freedoms.

the human beings; in sum, the State exists for the human being, and not *vice versa*.

Paradoxically, the expansion of "globalization" has been accompanied *pari passu* by the erosion of the capacity of the States to protect the economic, social and cultural rights of the persons under their jurisdictions; hence the growing needs of protection of refugees, displaced persons and migrants, in this first decade of the XXIst. century, - what requires solidarity at universal scale[6]. This great paradox appears rather tragic, bearing in mind the considerable advances in science and technology in the last decades, which, nevertheless, have not been able to reduce or erradicate human egoism[7].

Tragically, the material progress of some has been accompanied by the closing of frontiers to human beings and the appearance of new and cruel forms of human servitude (clandestine traffic of persons, forced prostitution, labour exploitation, among others), of which undocumented migrants are often victims[8]. The increasing controls and current hardships imposed upon migrants have led some to behold and characterize a contemporary situation of "crisis" of the right of asylum[9].

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6 S. Ogata, *Challenges of Refugee Protection* (Statement at the University of Havana, 11.05.2000), Havana/Cuba, UNHCR, 2000, pp. 7-9 (internal circulation); S. Ogata, *Los Retos de la Protección de los Refugiados* (Statement at the Ministry of External Relations of México, 29.07.1999), México City, UNHCR, 1999, p. 11 (internal circulation). - It has recently been pointed out that *early warning* systems (originally devised and used in the domain of International Refugee Law) has disclosed some shortcomings, used at times as they have been, simply to coerce people under stress not to migrate; S. Schmeidl, "The Early Warning of Forced Migration: State or Human Security?", *in Refugees and Forced Displacement - International Security, Human Vulnerability, and the State* (eds. E. Newman and J. van Selm), Tokyo, United Nations University, 2003, pp. 140, 145 and 149-151. From the perspective of the international civil society as a whole, the argument has been propounded in favour of securing full and effective citizenship to law-abiding migrants; M. Frost, "Thinking Ethically about Refugees: A Case for the Transformation of Global Governance", *in ibid*., pp. 128-129.

7 On the need of "revaluing" what is human and humanitarian nowadays, cf. J.A. Carrillo Salcedo, "El Derecho Internacional ante un Nuevo Siglo", 48 *Boletim da Faculdade de Direito da Universidade de Coimbra* (1999-2000) p. 257, and cf. p. 260.

8 M. Lengellé-Tardy, *L'esclavage moderne*, Paris, PUF, 1999, pp. 26, 77 and 116, and cf. pp. 97-98.

9 Ph. Ségur, *La crise du droit d'asile*, Paris, PUF, 1998, pp. 110-114, 117, 140 and 155; F. Crépeau, *Droit d'asile - De l'hospitalité aux contrôles migratoires*, Bruxelles, Bruylant/Éd. Université de Bruxelles, 1995, pp. 306-313 and 337-339.

Migrations and forced displacements, increased and intensified from the nineties onwards[10], have been characterized particularly by the disparities in the conditions of life between the country of origin and that of destination of migrants. Their causes are multiple, namely: economic collapse and unemployment, collapse in public services (education, health, among others), natural disasters, armed conflicts generating fluxes of refugees and displaced persons, repression and persecution, systematic violations of human rights, ethnic rivalries and xenophobia, violence of distinct forms[11]. In recent years, the so-called "flexibility" in labour relations, amidst the "globalization" of the economy, has also generated mobility, accompanied by personal insecurity and a growing fear of unemployment[12].

Migrations and forced displacements, with the consequent uprootedness of so many human beings, bring about traumas. Testimonies of migrants give account of the sufferings of the abandonment of home, at times with family separation or disaggregation, of loss of property and personal belongings, of arbitrarinesses and humiliations on the part of frontier authorities and security agents, generating a permanent feeling of injustice[13]. As Simone Weil warned already in the mid-XXth century,

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10 Cf. UNHCR, *The State of the World's Refugees - Fifty Years of Humanitarian Action*, Oxford, UNHCR/Oxford University Press, 2000, p. 9.

11 N. Van Hear, *New Diasporas - The Mass Exodus, Dispersal and Regrouping of Migrant Communities*, London, UCL Press, 1998, pp. 19-20, 29, 109-110, 141, 143 and 151; F.M. Deng, *Protecting the Dispossessed - A Challenge for the International Community*, Washington D.C., Brookings Institution, 1993, pp. 3-20. And cf. also, e.g., H. Domenach and M. Picouet, *Les migrations*, Paris, PUF, 1995, pp. 42-126.

12 N. Van Hear, *op. cit. supra* n. (11), pp. 251-252. As it has been pointed out, "the ubiquity of migration is a result of the success of capitalism in fostering the penetration of commoditization into far-flung peripheral societies and undermining the capacity of these societies to sustain themselves. Insofar as this `success' will continue, so too will migrants continue to wash up on the shores of capitalism's core"; *ibid*., p. 260. Cf. also R. Bergalli (coord.), *Flujos Migratorios y Su (Des)control*, Barcelona, OSPDH/Anthropos Edit., 2006, pp. 138, 152 and 244-248. - For a study of cased, cf., e.g., M. Greenwood Arroyo and R. Ruiz Oporta, *Migrantes Irregulares, Estrategias de Sobrevivencia y Derechos Humanos: Un Estudio de Casos*, San José of Costa Rica, IIHR, 1995, pp. 9-159.

13 *Ibid*., p. 152.

> "To be rooted is perhaps the most important and least recognized need of the human soul. It is one of the hardest to define"[14].

At the same time and in the same line of thinking, Hannah Arendt warned for the sufferings of the uprooted (the loss of home and of the familiarity of day-to-day life, the loss of profession and of the feeling of usefulness to the others, the loss of the mother tongue as spontaneous expression of feelings), as well as the illusion to try to forget the past[15]. Also in this line of reasoning, in his book *Le retour du tragique* (1967), J.-M. Domenach observed that one can hardly deny the *roots* of the human spirit itself, since the very form of aquisition of knowledge on the part of each human being, - and consequently his way of seeing the world, - is to a large extent conditioned by factors such as the place of birth, the mother tongue, the cults, the family and the culture[16].

In his novel *Le temps des déracinés* (2003), Elie Wiesel[17] remarked the former refugees continue somehow to be refugees for the rest of their lives; they escape from one exile to project themselves into another, everything looking provisional, and without feeling at home anywhere. They always keep on remembering where they originally come from[18], cultivating their memories as a means of defending themselves of their adverse condition of uprooted persons. But the "celebration of memory" has also its limitations, as the uprooted are deprived of horizons, and of the sense of belonging to somewhere[19]. They always need help from others. The drama of the victimized seems to be overlooked and forgotten as time passes by,

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14 Simone Weil, *The Need for Roots*, London/N.Y., Routledge, 1952 (reprint 1995), p. 41. - On the contemporary drama of uprootedness, cf. A.A. Cançado Trindade, "Reflexiones sobre el Desarraigo como Problema de Derechos Humanos Frente a la Conciencia Jurídica Universal", *in La Nueva Dimensión de las Necesidades de Protección del Ser Humano en el Inicio del Siglo XXI* (eds. A.A. Cançado Trindade and J. Ruiz de Santiago), 4th. rev. ed., San José of Costa Rica, UNHCR, 2006, pp. 33-92.

15 Hannah Arendt, *La tradition cachée*, Paris, Ch. Bourgois Ed., 1987 (orig. ed. 1946), pp. 58-59 and 125-127. And cf. also, on the matter, e.g., C. Bordes-Benayoun and D. Schnapper, *Diasporas et nations*, Paris, O. Jacob Ed., 2006, pp. 7, 11-12, 45-46, 63-65, 68-69, 129 and 216-219.

16 J.-M. Domenach, *Le retour du tragique*, Paris, Éd. Seuil, 1967, p. 285.

17 Nobel Peace Prize in 1986, who himself suffered the drama of uprootedness.

18 E. Wiesel, *O Tempo dos Desenraizados* (*Le temps des déracinés*, 2003), Rio de Janeiro, Edit. Record, 2004, pp. 18-19.

19 *Ibid*., pp. 21, 32, 181 and 197.

and the uprooted end up by having to learn to live with the slow and ineluctable diminution even of their own memories[20].

In my Separate Opinion in the case of the *Moiwana Community versus Suriname* before the Inter-American Court of Human Rights (Judgment of 15.06.2005), I dwelt upon precisely the projection of human suffering in time of the migrants of that Community (some of whom had fled to French Guyana) who survived a massacre (perpetrated on 29.11.1986 in the N'djuka Maroon village of Moiwana, in Suriname). I charaterized the harm they suffered as

> "a spiritual one. Under their culture, they remain still tormented by the circumstances of the violent deaths of their beloved ones, and the fact that the deceased did not have a proper burial. This privation, generating spiritual suffering, has lasted for almost twenty years, from the moment of the perpetration of the 1986 massacre engaging the responsibility of the State until now. The N'djukas have not forgotten their dead" (par. 29).

Only with the aforementioned Judgment of 2005, almost two decades later, they at last found redress, with the judicial recognition of their suffering and the reparations ordered. In the framework of these latter stands the securing by the State of their voluntary and safe return to their native lands[21]. This was not the first time that I addressed the issue of the projection of human suffering in time and the growing tragedy of uprootedness; earlier on, I had also done so in my Concurring Opinion (pars. 1-25) in this Court's Order of Provisional Measures of Protection (of 18.08.2000) in the case of the *Haitians and Dominicans of Haitian Origin in the Dominican Republic*, as well in my Separate Opinion (pars. 10-14) in the *Bámaca Velásquez versus Guatemala* case (Reparations, Judgment

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20 *Ibid*., pp. 212, 235, 266 and 278. On his concern with the need of preservation of memory, cf. also Elie Wiesel, *L'oublié*, Paris, Éd. Seuil, 1989, pp. 29, 63, 74-77, 109, 269, 278 and 336.

21 For the full text of my Separate Opinion in the case of the *Moiwana Community versus Suriname*, cf. A.A. Cançado Trindade, *Derecho Internacional de los Derechos Humanos - Esencia y Trascendencia* (Votos en la Corte Interamericana de Derechos Humanos, 1991-2006), México, Edit. Porrúa/Universidad Iberoamericana, 2007, pp. 539-567.

of 22.02.2002)[22], and retook the point at issue the more recent *Moiwana Community* case[23].

In fact, the projection of human suffering in time (its temporal dimension) has been properly acknowledged, e.g., in the final document of the U.N. World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (Dunbar, 2001), its adopted Declaration and Programme of Action. In this respect, it began by stating that

> "We are conscious of the fact that the history of humanity is replete with major atrocities as a result of gross violations of human rights and believe that lessons can be learned through remembering history to avert future tragedies" (par. 57).

It then stressed the "importance and necessity of teaching about the facts and truth of the history of humankind", with a view to "achieving a comprehensive and objective cognizance of the tragedies of the past" (par. 98). In this line of thinking, the Durban final document acknowledged and profounding regretted the "massive human suffering" and the "tragic plight" of millions of human beings caused by the atrocities of the past; it then called upon States concerned "to honour the memory of the victims of past tragedies", and affirmed that, wherever and whenever these occurred, "they must be condemned and their recurrence prevented" (par. 99).

The Durban Conference final document attributed particular importance to remembering the crimes and abuses of the past, in emphatic terms:

> "We emphasize that remembering the crimes or wrongs of the past, wherever and whenever they occurred, unequivocally condemning its racist tragedies and telling the truth about history, are essential elements for international reconciliation and the creation of societies based on justice, equality and solidarity" (par. 106).

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22 For the full text of my aforementioned Concurring and Separate Opinions, cf. *ibid*., pp. 876-883 and 321-330, respectively.

23 It is significant that, in its Judgment on the case of the *Moiwana Community versus Suriname*, the Inter-American Court, on the basis of the American Convention and in the light of the principle *jura novit curia*, devoted a whole section of the present Judgment to forced displacement - a *malaise* of our times - and established a violation by the respondent State of Article 22 of the American Convention (on freedom of movement and residence) in combination with the general duty of Article 1(1) of the Convention (pars. 101-119).

It at last recognized that "historical injustices" had undeniably contributed to the poverty, marginalization and social exclusion, instability and insecurity affecting so many people in distinct parts of the world (par. 158).

As well pointed out by Jaime Ruiz de Santiago, the drama of refugees and migrants, - of the uprooted in general, - can only be properly dealt with in a spirit of true human solidarity towards the victimized[24]. Definitively, only the firm determination of reconstruction of the international community[25] on the basis of human solidarity[26] can lead to mitigating or alleviating some of the sufferings of the uprooted (whether refugees, internally displaced persons, or migrants).

III. BASIC PRINCIPLES ON INTERNAL DISPLACEMENT

In the last three decades, the problem of internal displacement has challenged the very bases of the international norms of protection, demanding an *aggiornamento* of these latter and new responses to a situation not originally foreseen at the time of the drafting or elaboration of the relevant international instruments. These latter have revealed flagrant insufficiencies, such as, for example, the original lack of norms expressly directed to overcome the alleged non-applicability of the norms of protection no non-State actors, the non-tipification of internal displacement under the original norms of protection, and the possibility of restrictions or derrogations undermining protection in critical moments. Such insufficiencies have generated initiatives of protection at both global (United Nations) and regional (Latin American) levels, - initiatives which

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24 Jaime Ruiz de Santiago, "Derechos Humanos, Migraciones y Refugiados: Desafios en los Inicios del Nuevo Milenio", *in III Encuentro de Movilidad Humana: Migrante y Refugiado - Memoria* (September 2000), San José of Costa Rica, UNHCR/IIHR, 2001, pp. 37-72; and cf. Jaime Ruiz de Santiago, *Migraciones Forzadas - Derecho Internacional y Doctrina Social de la Iglesia*, México, Instituto Mexicano de Doctrina Social Cristiana, 2004, pp. 9-82.

25 Cf., e.g., A.A. Cançado Trindade, "Human Development and Human Rights in the International Agenda of the XXIst Century", *in Human Development and Human Rights Forum* (August 2000), San José of Costa Rica, UNDP, 2001, pp. 23-38; cf. also, e.g., L. Lippolis, *Dai Diritti dell'Uomo ai Diritti dell'Umanità*, Milano, Giuffrè, 2002, pp. 21-23 and 154-155.

26 On the meaning of this latter, cf., in general, L. de Sebastián, *La Solidaridad*, Barcelona, Ed. Ariel, 1996, pp. 12-196; J. de Lucas, *El Concepto de Solidaridad*, 2nd. ed., México, Fontamara, 1998, pp. 13-109; among others.

have sought a conceptual framework which allows the development responses, at operative level, to the new needs of protection. It is quite proper to move on to a brief review of those initiatives.

1. Global (United Nations) Level

At global (U.N.) level, one decade ago, in the first trimester of 1998, the former U.N. Commission on Human Rights, bearing in mind the reports by the U.N. Secretary-General's Representative on Internally Displaced Persons (F.M. Deng)[27], at last adopted the so-called Guiding Principles on Internal Displacement[28], despite the persistence of the problem of internal displacement along mainly the last two decades. The basic purpose of the *Guiding Principles* is that of reinforcing and strengthening the already existing means of protection; to this effect, the proposed new principles apply both to governments and insurgent groups, at all stages of the displacement. The basic principle of *non-discrimination* occupies a central position in the aforementioned document of 1998[29], which cares to list the same rights, of internally displaced persons, which other persons in their country enjoy[30].

The aforementioned 1998 Guiding Principles determine that the displacement cannot take place in a way that violates the rights to life, to dignity, to freedom and security of the affected persons[31]; they also assert other rights, such as the right to respect for family life, the right to an adequate standard of living, the right to equality before the law, the right to education[32]. The basic idea underlying the whole document[33] is in the sense that the internally displaced persons do not lose their inherent rights, as a result of displacement, and

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27 Those reports stressed the importance of prevention (e.g., reinforcing the protection of the rights to life and personal integrity, as well as the rights to property of lands and goods); cf. F.M. Deng, *Internally Displaced Persons* (Interim Report), N.Y., RPG/DHA, 1994, p. 21; and cf. U.N., doc. E/CN.4/1995/50/Add.1, of 03.10.1994, p. 34.

28 For comments, cf. W. Kälin, *Guiding Principles on Internal Displacement - Annotations*, Washington D.C., ASIL/Brookings Institution, 2000, pp. 1-276.

29 Principles 1(1), 4(1), 22, 24(1).

30 It affirms, moreover, the prohibition of the "arbitrary displacement" (Principle 6).

31 Principles 8 and following.

32 Principles 17, 18, 20 and 23, respectively.

33 On a "comprehensive approach" to displacement so as to address as well the problem of forced migration as a whole, bearing in mind the U.N. *Guiding Principles on Internal Displacement*, cf. C. Phuong, *The International Protection of Internally Displaced Persons*, Cambridge, University Press, 2004, pp. 54-55 and 237.

can invoke the pertinent international norms of protection (of both International Human Rights Law and International Humanitarian Law) to safeguard their rights.

In a significant resolution adopted in 1994, the then U.N. Commission on Human Rights, bearing in mind in particular the problem of internally displaced persons, recalled the relevant norms of, altogether, International Human Rights Law and International Humanitarian Law, as well as International Refugee Law, of pertinence to the problem at issue[34]. Resolution 1994/68, adopted by the Commission on 09.03.1994, further recalled the 1993 Vienna Declaration and Programme of Action (adopted by the II World Conference on Human Rights), which called for "a comprehensive approach by the international community with regard to refugees and displaced persons"[35].

It stressed the "humanitarian dimension" of "the problem of internally displaced persons and the responsibilities this poses for States and the international community"[36]. It further drew attention to "the need to address the root causes of internal displacement"[37], as well as "to continue raising the level of *consciousness* about the plight of the internally displaced"[38]. More than a decade later, its considerations are likewise valid, nowadays, to migrants (cf. *infra*), who add an even greater dimension to the sufferings of the uprooted in our so-called and improperly called "globalized" world.

2. Regional Level

In the American continent, the 1984 Declarations of Cartagena on Refugees, the 1994 San José Declaration on Refugees and Displaced Persons, and the 2004 Mexico Declaration and Plan of Action to Strengthen the International Protection of Refugees in Latin America, are, each of them, product of a given historical moment. The first one, the Declaration of Cartagena, was motivated by urgent needs generated by a concrete crisis of great proportions; to the extent that this crisis was being overcome, due in part to that

34 2nd. preambular paragraph.
35 7th preambular paragraph.
36 5th. preambular paragraph.
37 12th. preambular paragraph.
38 Paragraph 3 (emphasis added).

Declaration, its legacy began to project itself to other regions and subregions of the American continent.

The second Declaration was adopted amidst a distinct crisis, a more diffuse one, marked by the deterioration of the socio-economic conditions of wide segments of the population in distinct regions. In sum, Cartagena and San José were product of their time. The *aggiornamento* of the Colloquy of San José gave likewise a special emphasis on the identification of the *needs of protection* of the human being in any circumstances[39]. There remained no place for the *vacatio legis*[40]. The 1994 Declaración of San José gave a special emphasis not only on the whole problem of internal displacement, but also, more widely, on the challenges presented by the new situations of human uprootedness in Latin America and the Caribbean, including the forced migratory movements originated by causes differents from those foreseen in the Declaration of Cartagena.

The 1994 Declaration recognized that the violation of human rights is one of the causes of forced displacements and that therefore the protection of those rights and the strengthening of the democratic system constitute the best measure for the search of durable solutions, as well as for the prevention of conflicts, the exoduses of refugees and the grave humanitarian crises[41]. Recently, at the end of consultations, with a wide public participation, undertaken at the initiative of the UNHCR, the 2004 Mexico Declaration and Plan of Action to Strengthen the International Protection of Refugees in Latin America was adopted[42], on the occasion of the twentieth anniversary of the Cartagena Declaration (*supra*). For the first time in the present process, a document of the kind was accompanied by a Plan of Action. This can be explained by the aggravation of the humanitarian crisis in the region, particularly in the Andean subregion.

As the *rapporteur* of the Committee of Legal Experts of the UNHCR observed in his presentation of the final report to the

39 Instead of subjective categorizations of persons (in accordance with the reasons which led them to abandon their homes), proper of the past, nowadays the objective criterion of the needs of protection came to be adopted, encompassing thereby a considerably greater number of persons (including the internally displaced persons) so vulnerable as the refugees, or even more than these latter.

40 *Ibid*., pp. 14-15.

41 *Ibid*., pp. 431-432.

42 Cf. text reproduced *in*: UNHCR, *Memoria del Vigésimo Aniversario de la Declaración de Cartagena sobre los Refugiados (1984-2004)*, México City/San José of Costa Rica, UNHCR, 2005, pp. 385-398.

Mexico Colloquy, at its first plenary session, on 15 November 2004, although the moments of the 1984 Cartagena Declaration and the 1994 San José Declaration are distinct, their achievements "cumulate, and constitute today a juridical patrimony" of all the peoples of the region, disclosing the new trends of the development of the international safeguard of the rights of the human person in the light of the needs of protection, and projecting themselves into the future[43]. Thus,

> "the Declaration of Cartagena faced the great human drama of the armed conflicts in Central America, but furthermore *foresaw* the aggravation of the problem of internally displaced persons. The Declaration of San José, in turn, dwelt deeper upon the issue of protection of, besides refugees, also of internally displaced persons, but moreover foresaw the aggravation of the problem of forced migratory fluxes.
>
> Ever since anachronical compartmentalizations were overcome, proper of a way of thinking of a past which no longer exists, and one came to recognize the *convergences* between the three regimes of protection of the rights of the human person, namely, the International Law of Refugees, International Humanitarian Law and the International Law of Human Rights. Such convergences - at normative, hermeneutic and operative levels - were reaffirmed in all preparatory meetings of the present Commemorative Colloquy of Mexico City, and have repercussions nowadays in other parts of the world, conforming the most [more] lucid international legal doctrine on the matter"[44].

Those convergences[45] were, not surprisingly, further reflected in the 2004 Mexico Declaration and Plan of Action to Strengthen the

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43 Cf. "Presentación por el Dr. A.A. Cançado Trindade del Comité de Consultores Jurídicos del ACNUR" (México City, 15.11.2004), *in UNHCR, Memoria del Vigésimo Aniversario de la Declaración de Cartagena*..., *op. cit. supra* n. (41), pp. 368-369.

44 *Ibid*., p. 369.

45 Cf. A.A. Cançado Trindade, "Derecho Internacional de los Derechos Humanos, Derecho Internacional de los Refugiados y Derecho Internacional Humanitario: Aproximaciones y Convergencias", *in 10 Años de la Declaración de Cartagena sobre Refugiados - Memoria del Coloquio Internacional* (San José of Costa Rica, Dec. 1994), San José of Costa Rica, IIDH/UNHCR, 1995, pp. 77-168; A.A. Cançado Trindade, "Aproximaciones y Convergencias Revisitadas: Diez Años de Interacción entre el Derecho Internacional de los Derechos Humanos, el Derecho Internacional de los Refugiados, y el Derecho Internacional Humanitario (De Cartagena/1984 a San

International Protection of Refugees in Latin America itself. Thus, as the *rapporteur* of the Committee of Legal Experts of the UNHCR at last warned at the Mexico Colloquy of November 2004,

> "there is no place for the *vacatio legis*, there is no legal vacuum, and *all* (...) persons are under the protection of the Law, in all and any circumstances (also in face of security measures)"[46].

These developments are significant for addressing the issue of forced internal displacement, and the guarantee of voluntary and safe return. Yet, the problem of forced migrations has a wider dimension, and presents a considerable challenge nowadays to the international community as a whole. Only along the nineties the larger problem of the fluxes of forced migrations was identified and began to be dealt with as such, in a systematized way.

IV. BASIC PRINCIPLES ON MIGRATIONS

By then, while the refugee population surpassed 18 million persons, and the displaced population surpassed that total in seven more million people (totalling 25 million persons)[47], the migrants in search of better living and working conditions, in turn, totalled 80 million human beings by the end of the XXth. century[48], and - according to IOM recent data - reach nowadays roughly 100 to 120 million migrants all over the work[49].Yet, the suffering of migrants has been known for many years[50].

The causes of forced migrations are not fundamentally distinct from those of populational forced displacement: natural disasters,

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José/1994 y México/2004)", *in Memoria del Vigésimo Aniversario de la Declaración de Cartagena sobre Refugiados (1984-2004)*, San José of Costa Rica, UNHCR, 2005, pp. 139-191.

46 *Ibid*., p. 369.

47 F.M. Deng, *Protecting the Dispossessed*..., *op. cit. supra* n. (11), pp. 1 and 133.

48 A.A. Cançado Trindade, "Preface" to: V.O. Batista, *União Europeia: Livre Circulação de Pessoas e Direito de Asilo*, Belo Horizonte/Brasil, Edit. Del Rey, 1998, p. 9.

49 Jaime Ruiz de Santiago, *El Problema de las Migraciones Forzosas en Nuestro Tiempo*, México, IMDSC, 2003, p. 10; and cf. projections *in*: S. Hune and J. Niessen, "Ratifying the U.N. Migrant Workers Convention: Current Difficulties and Prospects", 12 *Netherlands Quarterly of Human Rights* (1994) p. 393.

50 On the adversities suffered by (foreign) migrant workers (e.g., discrimination on the basis of race, nationality, among others), cf., *inter alia*, S. Castles and G. Kosack, *Los Trabajadores Inmigrantes y la Estructura de Clases en Europa Occidental*, México, FCE, 1984, pp. 11-565.

chronic poverty, armed conflicts, generalized violence, systematic violations of human rights[51]. In the former U.N. Commission on Human Rights, it was pointed out that, in the mid-nineties, the challenge presented by this new phenomenon should be examined in the context of the reality of the post-cold war world, as a result of the multiple internal conflicts, of ethnic and religious character, repressed in the past but irrupted in recent years precisely with the end of the cold war[52].

To these latter is added the growth of chronic poverty[53]. To face this new phenomenon of forced migrations, the U.N. General Assembly approved, on 18.12.1990, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families. Such important Convention, which at last entered into force on 01.07.2003, has, however, received very few ratifications, - 36 so far (beginning of April 2007), - and has not yet been sufficiently dwelt upon by contemporary doctrine, despite its considerable significance. The 1990 Convention established the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families as its supervisory organ (Article 72), entrusted with the examination of State reports (Articles 73-74) as well as inter-State and individual communications or complaints (Articles 76-77).

In the mid-nineties, the then U.N. Centre for Human Rights identified the caused of contemporary fluxes of migrant workers in extreme poverty (below subsistence level), search for work, armed conflicts, personal insecurity or persecution derived from discrimination (on the ground of race, ethnic origin, colour, religion,

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51 *Cit. in* F.M. Deng, *Protecting the Dispossessed...*, *op. cit. supra* n. (11), p. 3.

52 *Ibid*., p. 4. - It has been warned that, in relation to migrants, the receiving State is always keen to display its power, and the distinct attitudes of Western European countries, of assimilation or else segregation of migrants, have had conflictive implications; E. Todd, *El Destino de los Inmigrantes - Asimilación y Segregación en las Democracias Occidentales* (transl. of *Le destin des immigrés - Assimilation et ségrégation dans les démocraties occidentales*), Barcelona, Tusquet Edit., 1996, pp. 147, 347, 351 and 353. The drama of migrants - their longing for roots and their own cultural identity - has thus persisted.

53 Which, in accordance with figures of the U.N. Development Programme (UNDP), only in Latin America victimizes today more than 270 million persons (compared to the 250 million of the eighties), who could soon get close to some 300 million people.

language or political opinions)[54]. The basic idea underlying the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families is that *all* migrant workers - thus qualified thereunder - ought to enjoy their human rights irrespective of their legal situation[55].

Hence the central position occupied, also in this context, by the principle of *non-discrimination* (as set forth in its Article 7). Not surprisingly, the list of protected rights follows a necessarily holistic or integral vision of human rights (comprising civil, political, economic, social and cultural rights). The Convention took into account both the international labour standards (derived from the experience of the ILO - cf. *infra*), as well as those of the U.N. Conventions against discrimination[56].

The protected rights are enunciated in three of the nine parts which conform the Convention: Part III (Articles 8-35) lists the human rights of *all* migrant workers and the members of their families (including the *undocumented ones*); Part IV (Articles 36-56) covers other rights of migrant workers and members of their families "who are documented or in a regular situation"; and Part V (Articles 57-63) contains provisions applicable to "particular categories" of migrant workers and members of their families[57].

The basic principle of *non-discrimination*, which has a rather long history and to which so much importance was ascribed in the drafing process of of the 1948 Universal Declaration of Human Rights[58], and which subsequently became the main object of two important Conventions of the United Nations (CERD, 1966, and CEDAW, 1979), - which cover only some of its aspects, - has, only in recent years, been dwelt upon to a greater depth in its wide potential of application, as in the Advisory Opinions ns. 16 and 18 of the Inter-American Court of Human Rights, on *The Right to Information on*

54 U.N./Centre for Human Rights, *Los Derechos de los Trabajadores Migratorios* (Foll. Inf. n. 24), Geneva, U.N., 1996, p. 4.
55 *Ibid*., pp. 15-16.
56 Cf. *ibid*., p. 16.
57 That is, frontier workers, seasonal workers, itinerant workers, project-tied workers, with concrete employment, on their own, - in the terms of the definitions of Article 2(2) of the 1990 Convention. Article 2(1) defines "migrant worker" as "a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national".
58 Cf. A. Eide *et alii*, *The Universal Declaration of Human Rights - A Commentary*, Oslo, Scandinavian University Press, 1992, p. 6.

Consular Assistance in the Framework of the Guarantees of the Due Process of Law (1999), and on *The Juridical Condition and Rights of the Undocumented Migrants* (2003), respectively.

As, in the view of States, there is no human right to immigrate, the control of migratory entries is made subject to their own "sovereign" criteria, also to "protect" their internal markets[59]. Furthermore, instead of devising and applying true population policies bearing in mind human rights, most States have been exerting the strictly police function of "protecting" their own frontiers and controlling migratory fluxes, and sanctioning the so-called "illegal" migrants. The whole issue has been unduly and unnecessarily "criminalized".

It is thus not surprising that inconsistencies and arbitrarinesses ensue therefrom. These latter are manifested in "democratic regimes", the administration de justice of which, nevertheless, does not achieve to free itself from old prejudices against immigrants, even more so when they are undocumented and poor. The programs of "modernization" of justice, with international financing, do not dwell upon this aspect, as their main motivation is to ensure the security of investments (capitals and goods).

This provides a revealing picture of the (reduced) dimension which public authorities have conferred upon human beings at this beginning of the XXIst century, placed in a scale of priority inferior to that attributed to capitals and goods, - in spite of all the struggles of the past, and all the sufferings of previous generations. The area in which most incongruencies appear manifest nowadays is in effect the one pertaining to the guarantees of the due process of law.

Yet, the reaction of Law has become prompt and manifest in our days, as demonstrated, for example, by the pioneering Advisory Opinions ns. 16 and 18 of the Inter-American Court of Human Rights, on *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* (1999), and on *The Juridical Condition and Rights of the Undocumented Migrants* (2003), respectively. The Advisory Opinion n. 16 has placed the right to consular notification, set forth in Article 36(1)(b) of the 1963 Vienna Convention on Consular Relations in the conceptual universal of International Human Rights Law. It has indeed conferred a human rights dimension to some postulates of classic consular

59 M. Weiner, "Ethics, National Sovereignty and the Control of Immigration", 30 *International Migration Review* (1996) pp. 171-195.

law, as I pointed out in my Concurring Opinion (pars. 1-35)[60] in the Court's aforementioned 16th. Advisory Opinion.

Since it was issued by the Court, the 16th. Advisory Opinion, besides inspiring the international case-law *in statu nascendi*, has had a considerable impact on international practice in the American continent (more particularly, in Latin America[61]. Yet, there is much need of greater and genuine international cooperation to secure assistance to, and protection of, all migrants and members of their families. Legal norms can hardly be effective without the corresponding and underlying values, and, in the present domain, the application of the relevant norms of protection does require a fundamental change of mentality.

In relation to the subject at issue, the norms already exist, but the proper acknowledgment of values seem to be still lacking, as well as a new mentality. It is not mere casuality that the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, despite having entered into force on 01.07.2003, as already pointed out, has not many ratifying States so far[62] (cf. *supra*). Despite the identity of the basic principles and of the applicable law in distinct situations, the protection of migrants requires, nevertheless, a special emphasis on one and the other aspect in particular. The starting-point seems to lie on the recognition that every migrant has the right to enjoy all the fundamental human rights, as well as the rights derived from the employments occupied in the past, irrespective of his juridical situation (whether irregular or not).

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60 Cf. text *in*: A.A. Cançado Trindade, *Derecho Internacional de los Derechos Humanos - Esencia y Trascendencia* (Votos en la Corte Interamericana de Derechos Humanos, 1991-2006), México, Edit. Porrúa/Universidad Iberoamericana, 2007, pp. 15-27.

61 Cf. A.A. Cançado Trindade, "The Humanization of Consular Law: The Impact of Advisory Opinion n. 16 (1999) of the Inter-American of Human Rights on International Case-Law and Practice", 4 *Chinese Journal of International Law* (2007) pp. 1-16.

62 In some cases, the insufficiencies of the instruments of protection result from the very formulation of some of their norms. For example, in so far as the protection of statesless persons is concerned, the 1954 Convention Relating to the Status of Stateless Persons (and, implicitly, also the 1961 Convention of the Reduction of Statelessness) only refers to stateless persons *de jure*, so as to avoid statelessness as of birth, but failing to prohibit - what would perhaps be more relevant - the revocation or loss of nationality in given circumstances; C.A. Batchelor, "Stateless Persons: Some Gaps in International Protection", 7 *International Journal of Refugee Law* (1995) pp. 232-255.

Here, once again, a necessarily holistic or integral vision of all human rights (civil, political, economic, social and cultural) applies. Just as the principle of *non-refoulement* constitutes the cornerstone of the protection of refugees (as a principle of customary law and, furthermore, of *jus cogens*), applicable in other situations as well, in the matter of migrants (mainly the undocumented ones) it assumes special importance, beside the due process of law (*supra*); thus, the fundamental human rights and the dignity of irregular or undocumented migrants ought to be preserved also in face of threats of deportation and/or expulsion[63]. Every person in such a situation has the right to be heard by a judge and not to be detained ilegally or arbitrarily[64].

The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families prohibits measures of collective expulsion, and determines that each case of expulsion ought to be "examined and decided individually" (Article 22(1)), in accordance with the law. Given the great vulnerability which accompanies the migrants in situation of irregularity, the countries of both origin and admission should take positive measures to ensure that all migrations take place in a regular way[65]. This is a

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63 For a compelling argument against arbitrariness in the deportation of migrants, and in support of treating all migrants (including the undocumented ones) with fairness, and a sense of worth and humanity, cf. B.O. Hing, *Deporting Our Souls - Values, Morality and Immigrantion Policy*, Cambridge, University Press, 2006, pp. 1-215. On the provisions of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families against unfair and arbitrary expulsion of migrants, pursuant to humanitarian considerations, cf. R. Cholewinski, *Migrant Workers in International Human Rights Law - Their Protection in Countries of Employment*, Oxford, Clarendon Press, 1997, pp. 182-184. And, on the prohibition of massive expulsion of foreigners, cf. A.A. Cançado Trindade, "El Desarraigo como Problema de Derechos Humanos frente a la Conciencia Jurídica Universal", *in Movimientos de Personas e Ideas y Multiculturalidad* (Forum Deusto), vol. I, Bilbao, University of Deusto, 2003, pp. 82-84; H.G. Schermers, "The Bond between Man and State", *Recht zwischen Umbruch und Bewahrung - Festschrift für R. Bernhardt* (eds. U. Beyerlin *et alii*), Berlin, Springer-Verlag, 1995, pp. 192-194; H. Lambert, "Protection against *Refoulement* from Europe: Human Rights Law Comes to the Rescue", 48 *International and Comparative Law Quarterly* (1999) pp. 515-518.

64 Resettlement, within a reasonable time, in a third country, should also be considered; cf. "Los Derechos y las Obligaciones de los Migrantes Indocumentados en los Países de Acogida / Protección de los Derechos Fundamentales de los Migrantes Indocumentados", 21 *International Migration / Migraciones Internacionales* (1983) pp. 135-136.

65 Cf. *ibid*., p. 136.

challenge to all countries, and even more forcefully to those which purport to be "democratic". Last but not least, the 1990 Convention ought to be properly appreciated in conjunction with the 1966 U.N. Covenant on Civil and Political Rights, as well the relevant I.L.O. Conventions on the matter[66].

V. THE PROTECTION OF MIGRANTS IN INTERNATIONAL CASE-LAW

1. European Human Rights System

The theme of aliens or migrants has marked its presence in the normative and operational levels of the European system of human rights protection. Thus, Protocol n. 4 (of 1963) to the European Convention on Human Rights effectively prohibits the collective expulsion of foreigners (Article 4). And even in individual cases, if the expulsion of a foreigner generates a separation of the members of the family unit, it brings about a violation of Article 8 of the European Convention of Human Rights; accordingly, the States Parties to this latter no longer have total discretionality to expell from their territory foreigners who already have established a "genuine link" with them[67].

The limits of State discretionality as the treatment of any persons under the jurisdiction of the States Parties to human rights treaties were stressed, e.g., in the well-known early cases of the *East African Asians*. In those cases, the old European Commission of Human Rights concluded that 25 of the complainants (who had retained their status of British citizens after the independence of Kenya and Uganda to see themselves free from migratory controls) had been victimized by a new British law which put an end to the right of entry of British citizens who did not have ancestral links with the United Kingdom. In the understanding of the old European Commission (Report of 1973), this law constituted an act of racial

66 Namely, the 1949 Migration (n. 97) for Employment Convention (Revised), and the 1975 Convention (n. 143) concerning Migrant Workers, as well as Recommendation n. 151 concerning Migrant Workers (of 1975). For a contextual discussion, cf., e.g., B. Boutros-Ghali, "The U.N. and the I.L.O.: Meeting the Challenge of Social Development", *in Visions of the Future of Social Justice - Essays on the Occasion of the I.L.O.'s 75th Anniversary*, Geneva, I.L.O., 1994, pp. 51-53.

67 H.G. Schermers, "The Bond between Man and State", *Recht zwischen Umbruch und Bewahrung...*, *op. cit. supra* n. (63), pp. 192-194.

discrimination which characterized a "degrading treatment" in the terms of Article 3 of the European Convention of Human Rights[68].

Years later, the same European Commission confirmed its position on the matter, in the case *Abdulaziz, Cabales and Balkandali versus United Kingdom* (1983), wherein it warned the State discretionality in the matter if immigration has its limits, as a State cannot, e.g., implement policies based upon racial discrimination[69]. The case was referred to the European Court by the Commission, as the three applicants (Mrs. Abdulaziz, Mrs. Cabales and Mrs. Balkandali, lawfully and permanently settled in the United Kingdom, had been refused to join their husbands in that country). On its turn, the European Court, in its Judgment (1985) found a violation, not of Article 8 *per se*, but of Article 8 (respect for private and family life) together with Article 14 (prohibition of discrimination), by reason of discrimination on the ground of sex[70].

In addition, in the case *Abdulaziz, Cabales and Balkandali*, the Court further established a violation of 13 of the Convention, for lack of access to justice; the Court pondered that

> "the discrimination on the ground of sex of which Mrs. Abdulaziz, Mrs. Cabales and Mrs. Balkandali were victims was the result of norms that were in this respect incompatible with the Convention. In this regard, since the United Kingdom has not incorporated the Convention into its domestic law, there could be no `effective remedy' as required by Article 13"[71].

In his Concurring Opinion in the *Abdulaziz, Cabales and Balkandali* case, Judge R. Bernhardt aptly argued that

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68 Despite the fact that the case was never lodged with the European Court of Human Rights, and that the Committee of Ministers did not pronounce on such violation of the European Convention, it awaited until all the complainants were admitted to the United Kingdom to conclude that if was no longer necessary to take any other measure. D.J. Harris, M. O'Boyle and C. Warbrick, *Law of the European Convention on Human Rights*, London, Butterworths, 1995, pp. 81-82 and 695.

69 *Cit. in ibid*., p. 82. - The old European Commission cared to characterize the "collective expulsion of foreigners", for the purpose of application of the prohibition contained in Article 4 of Protocol n. 4 to the European Convention, as illustrated, e.g., by its considerations in the case *A. et alii versus The Netherlands* (1988), interposed by 23 applicants of Surinamese nationality; cf. European Commission of Human Rights, application n. 14209/88 (decision of 16.12.1988), in *Decisions and Reports*, vol. 59, Strasbourg, C.E., 1989, pp. 274-280.

70 Paragraphs 83 and 86, and resolutory point n. 3.

71 Paragraph 93, and resolutory point n. 6.

> "Article 13 must, in my view, be given a meaning which is independent of the question whether any other provision of the Convention is in fact violated. Whenever a person complains that one of the provisions of the Convention itself or any similar guarantee or principle contained in the national legal system is violated by a national (administrative or executive) authority, Article 13 is in my view applicable and some remedy must be available"[72].

In spite of the fact that the European Convention itself did not contemplate the right not to be expelled from on the the States Parties, very soon in the operation of the European Convention it was accepted that there were limits to the faculty of the States Parties to control the entry and departure of foreigners, virtue of the obligations contracted under the Convention itself, as illustrated, e.g., by those pertaining to Article 8 (on the right to respect for private and family life). Thus, although there does not exist a general definition of "family life", very soon a protecting case-law was developed in this respect, in the light of the circumstances of each concrete case. Such case-law, bearing in mind, *inter alia*, the principle of proportionality, has stipulated restrictively the conditions of expulsion[73].

A study of the protection of migrant workers in the International Law of Human Rights has recalled that, on several occasions, the European Court found "an infringement of the right to respect for family life in cases involving second-generation migrants, who had either been expelled, or were under threat of expulsion, because they had been convicted of criminal offences in their country of residence"[74]. Although in each case the expulsions, or threatened expulsions, aimed at preventing disorder or crime, they constituted - the study went on, recalling *inter alia* the Court's Judgments in the

72 ECtHR, case of *Abdulaziz, Cabales and Balkandali*, Judgment (28.05.1985), Strasbourg, C.E., 1985, Concurring Opinion of Judge R. Bernhardt, p. 41.

73 Bearing in mind the provision of Article 8 of the European Convention; cf. M.E. Villiger, "Expulsion and the Right to Respect for Private and Family Life (Article 8 of the Convention) - An Introduction to the Commission's Case-Law", *in Protecting Human Rights: The European Dimension - Studies in Honour of G.J. Wiarda / Protection des droits de l'homme: La dimension européenne - Mélanges en l'honneur de G.J. Wiarda* (eds. F. Matscher and H. Petzold), Köln/Berlin, C. Heymanns Verlag, 1988, pp. 657-658 and 662.

74 R. Cholewinski, *Migrant Workers in International Human Rights Law - Their Protection in Countries of Employment*, Oxford, Clarendon Press, 1997, p. 341.

cases of *Beldjoudi versus France* (of 26.03.1992) and *Moustaquim versus Belgium* (of 18.02.1991), - "a disproportionate means of achieving this aim given that the affected individuals had spent most of their lives, together with their immediate families, in the countries concerned and had little or no ties with their country or origin"[75].

The *Beldjoudi* and the *Moustaquim* cases, together with the *Lamguindaz versus United Kingdom* case (1992), are nowadays regarded as leading cases in this particular respect. As forcefully argued in another study on the matter, given the links (such as family and social ties, schooling, understanding of culture and language) between second-generation migrants and their (new) country of residence, they are *de facto* citizens, and their deportation or expulsion would amount to a violation of their right to private and family life (Article 8 of the European Convention)[76]. The protection of the human rights of migrants, under given circumstances, has thus found judicial recognition in the European human rights system. It has done so also in the inter-American human rights system, which has gone even further than the European one in this respect, as it will be indicated next.

2. Inter-American Human Rights System

The protection of or migrants has likewise marked its presence in the normative and operational levels of the Inter-American system of human rights protection. It has, in fact, been remarkably present in the case-law of the Inter-American Court of Human Rights in recent years. I have already referred to the Court's Judgment (of 15.06.2005) on the case of the *Moiwana Community versus Suriname*, as well as the Court's Order of Provisional Measures of Protection (of 18.08.2000) in the case of the *Haitians and Dominicans of Haitian Origin in the Dominican Republic*. In this latter, in my Concurring Opinion, I saw it fit to warn as to the pressing need to face the contemporary tragedy of uprootedness, and I further argued that

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75 *Ibid*., pp. 341-342.

76 R. Cholewinski, "Strasbourg's `Hidden Agenda'?: The Protection of Second-Generation Migrants from Expulsion under Article 8 of the European Convention of Human Rights", 12 *Netherlands Quarterly of Human Rights* (1994) pp. 287-306. - For the *obiter dicta* of the European Court of Human Rights on the question of "long-term immigrants", despite the fact that it found no violation of Article 8 of the European Convention in the *cas d'espèce*, cf. ECtHR, case of *Uner versus Netherlands*, Judgment of 18.10.2006, pars. 55-60.

> "the principle of *non-refoulement*, cornerstone of the protection of refugees (as a principle of customary law and also of *jus cogens*), can be invoked even in distinct contexts, such as that of the collective expulsion of (...) migrants or of other groups. Such principle has been set forth also in human rights treaties, as illustrated by Article 22(8) of the American Convention on Human Rights"[77].

The relevance of this approach to the point at issue, in relation to the Court's Order of Provisional Measures of Protection in the aforementioned case of the *Haitians and Dominicans of Haitian Origin in the Dominican Republic*, has been promptly acknowledged in expert writing[78].

As for the already mentioned Judgment of the Inter-American Court, of 15.06.2005, on the case of the *Moiwana Community versus Suriname*, it was followed by an Interpretation of Sentence (of 08.02.2006), to which I appended a Separate Opinion, wherein I dwelt upon the following points: a) the delimitation, demarcation and titling and return of land (to the surviving members of the Moiwana Community and their relatives) as a form of reparation); b) the State's duty of guarantee of voluntary and sustainable return; and c) the need of reconstruction and preservation of the cultural identity of the members of the Moiwana Community[79].

Furthermore, the great adversity undergone by migrants was properly addressed, and duly emphasized, in the course of whole advisory proceedings before the Inter-American Court of Human Rights conducive to the adoption of its historical 16th. and 18th. Advisory Opinions, of 1999 and 2003, respectively. Both Opinions were pioneering in contemporary international case law (*infra*), and represent the reaction of Law to situations of violations of human rights in large scale, of persons who at times find themselves in

77 Paragraph 7 n. 5 of my Concurring Opinion (my own translation), text *in*: A.A. Cançado Trindade, *Derecho Internacional de los Derechos Humanos - Esencia y Trascendencia* (Votos en la Corte Interamericana de Derechos Humanos, 1991-2006), México, Edit. Porrúa/Universidad Iberoamericana, 2007, p. 878.

78 Cf. Jaime Ruiz de Santiago, *El Problema de las Migraciones Forzosas en Nuestro Tiempo*, México, Instituto Mexicano de Doctrina Social Cristiana, 2003, pp. 27-30.

79 For the full text of my Separate Opinion in the case of the *Moiwana Community versus Suriname* (Interpretation of Sentence, of 08.02.2006), cf. A.A. Cançado Trindade, *Derecho Internacional de los Derechos Humanos - Esencia y Trascendencia* (Votos en la Corte Interamericana de Derechos Humanos, 1991-2006), México, Edit. Porrúa/Universidad Iberoamericana, 2007, pp. 683-693.

total defenselessness. It is thus proper to review, at this stage, the contribution of those two remarkable Advisory Opinions to the safeguard of the human rights of undocumented migrants.

a) The Advisory Opinion on the *Right to Information on Consular Assistance in the* Framework of the Due Process of Law (1999)

The Inter-American Court delivered, on 01.10.1999, the sixteenth Advisory Opinion of its history, on the *Right to Information on Consular Assistance in the Framework of the Due Process of Law*. In that sixteenth Advisory Opinion, of transcendental importance, the Court held that Article 36 of the 1963 Vienna Convention on Consular Relations recognizes to the foreigner under detention individual rights, - among which the right to information on consular assistance, - to which correspond duties incumbent upon the receiving State (irrespective of its federal or unitary structure) (pars. 84 and 140).

The Inter-American Court pointed out that the evolutive interpretation and application of the *corpus juris* of the International Law of Human Rights have had "a positive impact on International Law in affirming and developing the aptitude of this latter to regulate the relations between States and human beings under their respective jurisdictions". The Court thus adopted the "proper approach" in considering the matter submitted to it in the framework of "the evolution of the fundamental rights of the human person in contemporary International Law" (pars. 114-115). The Court stated that "human rights treaties are living instruments, whose interpretation ought to follow the evolution of times and the current conditions of life" (par. 114). The Court made it clear that, in its interpretation of the norms of the American Convention on Human Rights, it should aim at extending protection in new situations on the basis of preexisting rights.

The Court expressed the view that, for the due process of law to be preserved, "a defendant must be able to exercise his rights and defend his interests effectively and in full procedural equality with other defendants" (par. 117). In order to attain its objectives, "the judicial process ought to recognize and correct the factors of real unequality" of those taken to justice (par. 119); thus, the notification, to persons deprived of their liberty abroad, of their right to communicate with their consul, contributes to safeguard their

defence and the respect for their procedural rights (pars. 121-122). The individual right to information under Article 36(1)(b) of the Vienna Convention on Consular Relations thus renders effective the right to the due process of law (par. 124).

The non-observance or obstruction of the exercise of this right affects the judicial guarantees (par. 129). The Court in this way linked the right at issue to the evolving guarantees of due process of law, and added that its non-observance in cases of imposition and execution of death penalty amounts to an arbitrary deprivation of the right to life itself (in the terms of Article 4 of the American Convention on Human Rights and Article 6 of the International Covenant on Civil and Political Rights), with all the juridical consequences inherent to a violation of the kind, that is, those pertaining to the international responsibility of the State and to the duty of reparation (par. 137)[80].

This 16th. Advisory Opinion of the Court, truly pioneering, has served as inspiration for the emerging international case-law, *in statu nascendi*, on the matter[81], and is having a sensible impact on the practice of the States of the region on the issue[82]. Its advisory proceedings counted on a considerable mobilization (with 8 intervening States, besides several non-governmental organizations and individuals)[83]. This historical Advisory Opinion

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80 And cf. Concurring Opinions of Judges A.A. Cançado Trindade and S. García Ramírez, and Partially Dissenting Opinion of Judge O. Jackman.

81 As promptly acknowledged by expert writing; cf., e.g., G. Cohen-Jonathan, "Cour Européenne des Droits de l'Homme et droit international général (2000)", 46 *Annuaire français de Droit international* (2000) p. 642; M. Mennecke, "Towards the Humanization of the Vienna Convention of Consular Rights - The *LaGrand* Case before the International Court of Justice", 44 *German Yearbook of International Law/ Jahrbuch für internationales Recht* (2001) pp. 430-432, 453-455, 459-460 and 467-468; L. Ortiz Ahlf, *De los Migrantes - Los Derechos Humanos de los Refugiados, Asilados, Desplazados e Inmigrantes Irregulares*, México, Ed. Porrúa/Univ. Iberoamericana, 2004, pp. 1-68; Ph. Weckel, M.S.E. Helali and M. Sastre, "Chronique de jurisprudence internationale", 104 *Revue générale de Droit international public* (2000) pp. 794 and 791; Ph. Weckel, "Chronique de jurisprudence internationale", 105 *Revue générale de Droit international public* (2001) pp. 764-765 and 770.

82 Cf. A.A. Cançado Trindade, "The Humanization of Consular Law: The Impact of Advisory Opinion n. 16 (1999) of the Inter-American of Human Rights on International Case-Law and Practice", 4 *Chinese Journal of International Law* (2007) pp. 1-16.

83 In the public hearings (on this 16th. Advisory Opinion) before the Court, apart from the 8 intervening States, several individuals took the floor, namely: 7 individuals representatives of 4 national and international non-governmental organizations (active in the field of human rights), 2 individuals of a non-governmental organization working for the abolition of the death penalty, 2 representatives of a (national) entity of lawyers,

n. 16, furthermore, reveals the impact of the International Law of Human Rights in the evolution of Public International Law itself, specifically for having the Inter-American Court been the first international tribunal to warn that, if non-compliance with Article 36(1)(b) of the Vienna Convention on Consular Relations of 1963 takes place, it occurs to the detriment not only of a State Party but also of the human beings at issue[84].

In the same line of thinking, Advisory Opinion n. 18 opens new ground for the protection of migrants, in acknowledging the character of *jus cogens* of the basic principle of equality and non-discrimination, and the prevalence of the rights inherent to human beings, irrespective of their migratory States. Its advisory proceedings counted on an even greater mobilization (with 12 accredited States, in addition to the UNHCR, several non-governmental organizations, academic institutions and individuals), the greatest in the whole history of the Court to date. This more recent Opinion n. 18 is likewise having an impact on the theory and practice of International Law in the present domain of protection of the human rights of migrants[85].

b) The Advisory Opinion on the *Juridical Condition and Rights of Undocumented Migrants* (2003)

On 10 May 2002 Mexico requested the Inter-American Court of Human Rights its 18th Advisory Opinion, on the juridical condition and rights of undocumented migrants. In the course of the corresponding advisory proceedings, which counted on the greatest

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4 University Professors in their individual capacity, and 3 individuals in representation of a person condemned to death.

84 As the ICJ has subsequently also admitted, in the *LaGrand* case.

85 As also promptly acknowledged by expert writing; cf., e.g., L. Hennebel, "L`humanisation' du Droit international des droits de l'homme - Commentaire sur l'Avis Consultatif n. 18 de la Cour Interaméricaine relatif aux droits des travailleurs migrants", 15 *Revue trimestrielle des droits de l'homme* (2004) n. 59, pp. 747-756; S.H. Cleveland, "Legal Status and Rights of Undocumented Migrants - Advisory Opinion OC-18/03 [of the] Inter-American Court of Human Rights", 99 *American Journal of International Law* (2005) pp. 460-465; C. Laly-Chevalier, F. da Poïan and H. Tigroudja, "Chronique de la jurisprudence de la Cour Interaméricaine des Droits de l'Homme (2002-2004)", 16 *Revue trimestrielle des droits de l'homme* (2005) n. 62, pp. 459-498. And cf. also, on the impact of the Advisory Opinion n. 18 of the IACtHR in the United States, R. Smith, "Derechos Laborales y Derechos Humanos de los Migrantes en Estatus Irregular en Estados Unidos", *in Memorias del Seminario Internacional `Los Derechos Humanos de los Migrantes'* (México, June 2005), México, Secretaría de Relaciones Exteriores, 2005, pp. 299-301.

public participation in the whole history of the Court, the Court celebrated two public hearings, the first in its headquarters in San José of Costa Rica, in February 2003, and the second outside its headquarters (for the first time in its history), in Santiago of Chile, in June 2003. The advisory procedure counted with the participation of twelve accredited States (among which five States intervening in the hearings), the Inter-American Commission on Human Righs, one agency of the United Nations (the U.N. High Commission for Refugees - UNHCR), and nine entities of the civil society and academic circles of several countries of the region, besides the Central American Council of Human Rights Ombudsmen [Attorneys-General].

On 17 September 2003 the Inter-American Court of Human Rights delivered its 18th Advisory Opinion (requested by Mexico), on the *Juridical Condition and Rights of Undocumented Migrants*, wherein it held that States ought to respect and ensure respect of human rights in the light of the general and basic principle of equality and non-discrimination, and that any discriminatory treatment with regard to the protection and exercise of human rights generates the international responsibility of the States. In the view of the Court, the fundamental principle of equality and non-discrimination has entered into the domain of *jus cogens*.

The Court added that States cannot discriminate or tolerate discriminatory situations to the detriment of migrants, and ought to guarantee the due process of law to any person, irrespective of her migratory status. This latter cannot be a justification for depriving a person of the enjoyment and exercise of her human rights, including labour rights. Undocumented migrant workers have the same labour rights as the other workers of the State of employment, and this latter ought to ensure respect for those rights in practice. States cannot subordinate or condition the observance of the principle of equality before the law and non-discrimination to the aims of their migratory or other policies.

In addition, Individual Opinions were presented by four Judges, all of them being, significantly, Concurring Opinions. In his extensive Concurring Opinion, the President of the Court, Judge A.A. Cançado Trindade, dwelt upon nine points, namely: a) the *civitas maxima gentium* and the universality of the human kind; b) the disparities of the contemporary world and the vulnerability of the migrants; c)

the reaction of the universal juridical conscience; d) the construction of the individual subjective right of asylum; e) the position and the role of the general principles of Law; f) the fundamental principles as *substratum* of the legal order itself; g) the principle of equality and non-discrimination in the International Law of Human Rights; h) the emergence, the content and the scope of the *jus cogens*; and i) the emergence and the scope of the obligations *erga omnes* of protection (their horizontal and vertical dimensions).

The 18th. Advisory Opinion of the Inter-American Court, on the *Juridical Condition and Rights of Undocumented Migrants*, has already had, for all its implications, a considerable impact in the American continent, and its influence is bound to irradiate elsewhere as well, given the importance of the matter. It propounds the same the dynamic or evolutive interpretation of International Human Rights Law heralded by the Inter-American Court, four years ago, in its historical 16th. Advisory Opinion, on *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* (1999).

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86 In that 16th and pioneering Advisory Opinion, of major importance, the Inter-American Court clarified that, in its interpretation of the norms of the American Convention, it should extend protection in new situations (such as that concerning the observance of the right to information on consular assistance) on the basis of preexisting rights (*supra*).

VI. THE PROTECTION OF MIGRANTS IN *RAPPORTEUR* SYSTEMS

The protection of the human rights of migrants has indeed become a key issue in the international human rights agenda of this first decade of the XXIst. century. This is hardly surprising, given the growing awareness of the relationships between the intensification of migratory fluxes (from the late eighties onwards), the speedy internationalization of capitalism, and the growing labour exploitation (generated by the "requirements of capital", and with the high human costs of unemployment and underemployment, "informality" in labour relations, search for cheap manpower, impoverishment of livig conditions of large segments of the population, and concentration of wealth and income in world scale)[87].

It was all too expected that, in the nineties, the theme was to become object of increased attention on the part of international organizations at both universal (United Nations) and regional (Organization of American States) levels. At global level, lucid voices from within the Office of the U.N. High Commissioner for Refugees (UNHCR) warned that the UNHCR could no longer work for the protection only of refugees, but should also take into account the denial of human rights of internally displaced persons as well as migrants, and work for their protection, together with that of refugees[88]. In this connecion, it should not pass unnoticed that the UNHCR actually intervened in the oral hearings before the Inter-American Court of Human Rights, in the advisory proceedings that led to the adoption by the Inter-American Court of its Advisory Opinion n. 18 on *The Juridical Condition and Rights of the Undocumented Migrants* (of 17.09.2003)[89].

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87 Cf., e.g., A.M. Aragonés Castañer, *Migración Internacional de Trabajadores - Una Perspectiva Histórica*, México, Edit. Plaza y Valdés, 2004 [reimpr.], pp. 21, 23, 54, 62, 71-73, 115-120, 125-126, 148 and 154-157.

88 Jaime Ruiz de Santiago, "El Impacto en el Refugio de la Nueva Dinámica Migratoria en la Región - Retos para Asegurar la Protección de Refugiados", *in* IIHR, *Primer Curso de Capacitación para Organizaciones de la Sociedad Civil sobre Protección de Poblaciones Migrantes* (June 1999), México/San José of Costa Rica, UNHCR/ Universidad Iberoamericana/IIHR, 2002, p. 43; Juan Carlos Murillo, "La Declaración de Cartagena, el Alto Comisionado de Naciones Unidas para los Refugiados y las Migraciones Mixtas", *in Migraciones y Derechos Humanos* (August 2004), San José of Costa Rica, IIHR/PRODECA, 2004, pp. 174-176.

89 For the pleadings of the UNHCR before the Inter-American Court, cf. IACtHR, Series B (Pleadings, Oral Arguments and Documents), n. 18 (2003), pp. 211-223 (oral argument of 04.06.2003).

Moreover, international organizations, prompted by the new phenomenon of the intensification of fluxes of forced migrations, have decided - both the United Nations and the Organization of American States - to insert it into the scheme of work of their respective *rapporteur* systems. The mandate of the U.N. Special *Rapporteur* on the Human Rights of Migrants was created in 1999, by resolution 1999/44 of the former U.N. Commission on Human Rights (par. 3). The resolution entrusted the Special *Rapporteur* with the tasks of elaboration of reports and undertaking of country visits, and further requested the Special *Rapporteur* to examine "ways and means to overcome the obstacles existing to the full and effective protection of the human rights of migrants"[90].

Resolution 1999/44 drew attention to the "large and increasing number of migrants in the world" in a "situation of vulnerability", and stressed "the need for a focused and consistent approach towards migrants as a specific vulnerable group"[91]. In pursuance of that mandate, a series of reports have been prepared and presented by the Special *Rapporteur*, who, in the period 2000-2005, has also undertaken country visits to Canada, Ecuador, Philippines, border Mexico/United States, Mexico, Spain, Morocco, Iran, Italy, Peru and Burkina Faso.

In 2005, the then U.N. Commission on Human Rights enlarged the mandate of the Special *Rapporteur*, foreseeing the adoption of appropriate policies on migrants, - having as a priority the protection of the human rights of migrants, - stressing the duty of States to prevent and sanction acts of private individuals attempting against the life and personal integrity of migrants, and securing the recognition by the international community of the situation of *vulnerability* faced by migrants[92]. This is an important aspect of the matter at issue; in fact, recent and substantial studies on migrations have focused on the framework of legislative initiatives on a comparative

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90 U.N., *Special Rapporteur of the [U.N.] Commission on Human Rights on the Human Rights of Migrants*, doc. www.ohchr.org, 2nd. paragraph.

91 4th., 6th. and 7th. preambular paragraphs.

92 Cf. comments *in*: E.D. Estrada Tanck, "Legislación y Políticas Públicas Mexicanas: Armonización con el Régimen Jurídico Internacional sobre Derechos Humanos de los Migrantes", *in Memorias del Seminario Internacional `Los Derechos Humanos de los Migrantes'*, (México, June 2005), México, Secretaría de Relaciones Exteriores, 2005, pp. 330-331; C. Villán Durán, "Los Derechos Humanos y la Inmigración en el Marco de las Naciones Unidas", *in ibid*., pp. 95-98.

law basis[93], or in a regional ambit (e.g., that the European Union)[94], - focusing on the regulatory or normative structure, but without portraying sufficiently the dramatic situation of *vulnerability* of migrants (whether documented or undocumented), all in pressing need of protection.

In fact, still at global (U.N.) level, resolution 2005/47 of the former U.N. Commission on Human Rights, adopted on 19.04.2005, expressed concern, in its preamble, at "the increasing number of migrants worldwide", a worrisome phenomenon with a "global character" (par. 6), and called upon States to revise their immigration policies with a view to eliminate all discriminatory practices against migrants and their families (par. 4). It urged States to put an end to arbitrary arrests and deprivation of liberty of migrants (par. 15), to prevent the violation of the human rights of migrants while in transit (par. 18), and to combat and prosecute international trafficking and smuggling of migrants (endangering their lives and entailing "different forms of servitude or exploitation" - par. 19)[95]. Resolution 2005/47, recalled, in its preamble, the contributions of the pioneering Advisory Opinions ns. 16 and 18 of the Inter-American Court of Human Rights, on *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* (1999), and on *The Juridical Condition and Rights of the Undocumented Migrants* (2003), as well as the Judgments of the International Court of Justice in the *LaGrand* (2001) and the *Avena and Other Mexican Nationals* (2004) cases[96].

At regional level, the Inter-American Commission on Human Rights (IAComHR), pursuant to a request of the General Assembly of the Organization of American States (OAS)[97], established the

93 Cf., *inter alia*, Federación Iberoamericana de Ombudsman, *I Informe sobre Derechos Humanos - Migraciones* (coord. G. Escobar), Madrid, Ed. Dykinson/Depalma, 2003, pp. 47-420.

94 Cf., e.g., P.A. Fernández Sánchez, *Derecho Comunitario de la Inmigración*, Barcelona, Atelier, 2006, pp. 15-325.

95 The resolution further encouraged States Parties to implement fully the U.N. Convention against Transnational Organized Crime and the two Additional Protocols thereto, namely, the Protocol against the Smuggling of Migrants by Land, Sea and Air, and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, and urged States that had not done so to ratify them (par. 33).

96 6th. preambular paragraph.

97 OAS, G.A. resolutions AG/RES.1404/XXVI-O/96 (of 1996) and AG/RES.1480/XXVII-0/97 (of 1997).

mandate of its Special *Rapporteur* on Migrant Workers and their Families in 1997, with due emphasis on their situation of "special vulnerabilities". From 1997 onwards, the Special *Rapporteur* has been engaged on the work of monitoring of the situation of migrants and their families in the region, so as to "general awareness" of the States' duty to protect them and "to act promptly" on petitions or communications on their part. The Special *Rapporteur* has issued recommendations to States, has prepared reports and special studies, and has carried out visits to countries of the region, including the United States, Mexico, Guatemala and Costa Rica. The research topics examined so far, in order "to enhance the awareness" of the adversities faced by migrant workers and their families, include discrimination in general, racism and xenophobia, due process of law, detention conditions, smuggling of migrants and trafficking in persons, migratory practices and their economic consequences[98].

VII. SOCIAL JUSTICE AND THE PREVENTION OF FORCED MIGRATIONS: THE LEGACY OF UNITED NATIONS WORLD CONFERENCES

A trend of contemporary European legal writing has invoked the doctrine of the international responsibility of the State in order to declare the State practice generating refugees - and displace persons - as constituting an internationally wrongful act (mainly in the presence of the element of *culpa lata*)[99]. The conceptual basis for this doctrinal construction can be found in the work of the U.N. International Law Commission on the theme of State responsibility[100]. A justification for this doctrinal elaboration lies in the fact that the international instruments of protection of refugees have limited the provision of obligations only on the part of receiving States, but not in relation to States of origin, of refugees; as from this finding, a customary norm of Humanitarian Law prohibiting the generation of fluxes of

98 OAS, *Special Rapporteurship on Migrant Workers and Their Families*, Washington D.C., IAComHR, document *www.cidh.oas.org/ migrants*, 2007, pp. 1-10.

99 P. Akhavan and M. Bergsmo, "The Application of the Doctrine of State Responsibility to Refugee Creating States", 58 *Nordic Journal of International Law - Acta Scandinavica Juris Gentium* (1989) pp. 243-256.

100 Cf. R. Hofmann, "Refugee-Generating Policies and the Law of State Responsibility", 45 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1985) pp. 694-713.

refugees is invoked[101]. Therefrom the consequences are established of the internationally wrongful act of generating fluxes of refugees - which would apply *a fortiori* to sudden migratory fluxes, - also for the effects of reparations.

Such doctrinal endeavours disclose, in my view, both positive and negative aspects. On the one hand, the enlarge the horizon for the examination of the matter, comprising at a time both the receiving State as well as that of origin, and seeking protection of human rights in both. On the other hand, they move on to the ambit of reparations with a private law approach, attempting to justify sanctions to States that are not the only responsible for forced migratory fluxes. In a "globalized" world such as that of our days, full of profound iniquities among and within States, how to identify the origin of so much socio-economic cruelty, how to draw the dividing line, how to single out States (precisely the poorer) responsible for forced migrations, so as to justify sanctions or reprisals?

This, in my understanding, does not appear to be the path to follow. The problem of forced population fluxes ought to be treated as a truly *global* issue, concerning the international community as a whole. It cannot be properly approached from an outdated and strict bilateral outlook (focusing only on the receiving State and the State of origin) or a merely inter-State perspective. Being a *global issue*, it brings to the fore the obligations *erga omnes* of protection of the victimized migrants. The conceptual development of such obligations - and of the juridical consequences of their breach - remains a high priority of contemporary legal science.

Is has been argued that, in face of the contemporary phenomenon of forced migrations, the responsibility of individual States cannot be dissociated from the (subsidiary) responsibility of the international community of States as a whole[102]. As the causes of such forced migrations may, in certain circumstances, amount to gross and massive violations of human rights, a reassessment of the conceptual basis of refuge may lead to a needed and gradual configuration of the right to survival of the affected or endangered segments of the

101 W. Czapliski and P. Sturma, "La responsabilité des États pour les flux de réfugiés provoqués par eux", 40 *Annuaire français de Droit international* (1994) pp. 156-169.
102 L. Peral Fernández, *Éxodos Masivos, Supervivencia y Mantenimiento de la Paz*, Madrid, Ed. Trotta, 2001, pp. 208.

population[103]. More than survival only, what is here at issue is the *right to live* with dignity[104].

The whole issue brings to the fore the imperatives of social justice, at universal level. And a special emphasis ought to fall upon the prevention of forced migrations. In this connection, at United Nations level, the system of *early warning* may be recalled: it was born out of a proposal, in the early eighties, by the Special *Rapporteur* on the question of human rights mass exoduses. Subsequently the theme was related to that of internally displaced persons[105]. In 1997, the U.N. High-Commissioner for Human Rights observed that, in the context of mass exoduses and human rights,

> "the term `prevention' is not to be interpreted in the sence of impeding that persons abandon a zone or a country but rather in the sense of impeding that the situation of human rights deteriorates itself to such a point that the abandonment is the only option and also of impeding (...) the deliberate adoption of measures to displace by force great numbers of persons, such as mass expulsions en mass, internal displacements and house eviction, forced resettlement or repatriation"[106].

Furthermore, the final documents of the recent cycle of World Conferences of the United Nations of the nineties contain additional elements, which allow us to approach adequately the issue of population fluxes as a truly global issue, situated in the conceptual universe of human rights[107]. Thus, e.g., the 1993 Vienna Declaration

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103 *Ibid*., pp. 72 and 79-81.

104 For general studies, cf. J.G.C. van Aggelen, *Le rôle des organisations internationales dans la protection du droit à la vie*, Bruxelles, E. Story-Scientia, 1986, pp. 1-89; D. Prémont *et alii* (eds.), *Le droit à la vie quarante ans après l'adoption de la Déclaration Universelle des Droits de l'Homme: Évolution conceptuelle, normative et jurisprudentielle*, Genève, CID, 1992, pp. 5-91.

105 Cf. U.N., document E/CN.4/1995/CRP.1, of 30.01.1995, pp. 1-119.

106 U.N., *Derechos Humanos y Éxodos en Masa - Informe del Alto Comisionado para los Derechos Humanos*, document E/CN.4/1997/42, of 14.01.1997, p. 4, par. 8, and cf. pp. 4-5, pars. 9-10.

107 For a general account, cf. A.A. Cançado Trindade, "Relations between Sustainable Development and Economic, Social and Cultural Rights: Recent Developments", *in International Legal Issues Arising under the United Nations Decade of International Law* (eds. N. Al-Nauimi and R. Meese), Deventer, Kluwer, 1995, pp. 1051-1077; A.A. Cançado Trindade, "The Contribution of Recent World Conferences of the United Nations to the Relations between Sustainable Development and Economic, Social and Cultural Rights", *in Les hommes et l'environnement: Quels droits pour le vingt-et-unième siècle? - Études en hommage à Alexandre Kiss* (eds. M. Prieur and

and Programmed of Action, adopted by the II World Conference of Human Rights, urged all States to guarantee the protection of human rights of all migrant workers and members of their families (part II, par. 33). The final document of the Vienna Conference further asserted the importance to create conditions that promote greater harmony and tolerance among migrant workers and the rest of the society of the receiving State (par. 34). At last, it urged States to ratify as soon as possible the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (par. 35).

The International Conference on Population and Development (Cairo, 1994) approached of course the matter at issue, having called for a global approach to the migratory phenomenon at world level (chapter X of the 1994 Cairo Programmed of Action). The Cairo Conference examined the causes of migrations, and urged the adoption of provisions relating to documented and undocumented migrant workers[108].

One year later, the 1995 Programme of Action of Copenhagen, adopted by the World Summit on Social Development, in approaching the creation of productive employment and reduction of unemployment, warned as to the need of greater attention at national level to the situation of migratory workers and members of their families (chapter III). In approaching the issue of social integration social, it urged the fostering of equality and social justice, widening *inter alia* basic education, - encompassing also of the children of migrant parents, - and promoting the equitable treatment and integration of documented migratory workers and the members of their families (chapter IV).

C. Lambrechts), Paris, Éd. Frison-Roche, 1998, pp. 119-146; A.A. Cançado Trindade, "Sustainable Human Development and Conditions of Life as a Matter of Legitimate International Concern: The Legacy of the U.N. World Conferences", *in Japan and International Law - Past, Present and Future* (International Symposium to Mark the Centennial of the Japanese Association of International Law), The Hague, Kluwer, 1999, pp. 285-309; A.A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, vol. III, Porto Alegre/Brazil, S.A. Fabris Ed., 2003, pp. 235-299; M.G. Schechter, *United Nations Global Conferences*, London, Routledge, 2005, pp. 95-100 and 134-139.

108 For an assessment of the work of the 1994 Cairo Conference on the issue of international migrations, cf., e.g., S. Johnson, *The Politics of Population - The International Conference on Population and Development, Cairo 1994*, London, Earthscan, 1995, pp. 165-174.

The Copenhagen World Summit, moreover, urged States to cooperate "to reduce the causes of undocumented migration" and to safeguard "the fundamental human rights of undocumented migrants, impeding their exploitation" and providing them domestic remedies[109]. It urged, at last, the States to ratify and apply the international instruments concerning migrant workers and the members of their families[110].

The particular situation of women migrant workers (victimized by violence on the basis of sex) was object of considerable attention of the Part of the IV World Conference on Women (Beijing, 1995). The 1995 Beijing Platform of Action, adopted by the Conference, called upon States to recognize the vulnerability in face of violence and other forms of ill treatment of migrant women, including women migrant workers (chapter IV.D)[111].

On its turn, the II World Conference on Human Settlements (Habitat-II, Istambul, 1996) pointed out the relevant role of human settlements in the realization of human rights, in particular, *inter alia*, the human right to adequate housing and the right to development. In this respect, the 1996 Habitat-II Programme formulated recomendations pertaining to "the legal security of tenancy, the prevention of expulsions, the fostering of refuge centres and of support rendered to basic services and to the units education and health in favour of displaced persons, among other vulnerable groups"[112].

Last but not least, the U.N. World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (Dunbar, 2001) also devoted special attention to migrant workers, in particular to the discrimination they suffer. The 2001 Declaration and Programme of Action adopted by the Dunbar Conference urged States to fight against manifestations of generalized marginalization of migrants, of xenophobia and racist prejudices, thus abiding by their obligations pursuant to international instruments of human rights, irrespective of the situation in which migrants find themselves (pars. 24 and 26).

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109 U.N./Centre for Human Rights, *Los Derechos de los Trabajadores Migratorios* (Foll. Inf. n. 24), Geneva, U.N., 1996, pp. 19-20.
110 *Ibid*., p. 19.
111 Cf. *ibid*., p. 20.
112 U.N., *Derechos Humanos y Éxodos en Masa...*, *op. cit. supra* n. (106), p. 21, par. 61.

Recently, the aforementioned resolution 2005/47 (of 19.04.2005) of the former U.N. Commission on Human Rights reaffirmed the provisions concerning the protection of the rights of migrants and their families enshrined into the final documents adopted by the U.N. World Conferences on Human Rights (1993), on Population and Development (1994), on Social Development (1995), on Women (1995), and against Racism, Racial Discrimination, Xenophobia and Related Intolerance (2001)[113]. The Office of the U.N. High Commissioner for Human Rights has also been attentive to some of the aspects of the adversities undergone by migrants and their pressing need of protection[114].

On its part, the U.N. Committee on the Elimination of Racial Discrimination (CERD), - supervisory organ of the U.N. Convention on the Elimination of All Forms of Racial Discrimination, - in its *general recommendation* n. 30, of 2005, warned that "under the Convention, differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim" (par. 4). The recommendation devotes a whole section (IV) to "access to citizenship" (pars. 13-17), and further addresses the issues of prevention and redress of problems faced by "non-citizen workers" (par. 34), as well as of ensuring "the access of victims to effective legal remedies" and their "right to seek just and adequate reparation" for the wrongs suffered (par. 18).

VIII. FINAL REFLECTIONS ON THE MATTER

As a true global issue, the phenomenon of forced migrations requires greater concertation at universal level to secure the prevalence of the rights of migrants and their families. A relevant role is reserved to public policies, as well as to mobilization of entities of the civil society to mitigate their sufferings and improve their conditions of day-today life. Such entities can, at first, help the organs of assistance and protection in the identification itself of

113 4th. preambular paragraph.

114 Cf. U.N., *Recommended Principles and Guidelines on Human Rights and Human Trafficking - Report of the U.N. High Commissioner for Human Rights to the Economic and Social Council*, U.N document E/2002/68/Add.1, of 20.05.2002, pp. 3-16.

the distinct characteristics assumed by the migratory phenomenon in different countries[115]. Secondly, they can denounce situations of flagrant violations of the human rights of migrants[116].

Thirdly, they can assist in emergency action. Fourthly, they can help to foster the institutional strengthening to face the migratory phenomenon, and to empower the persons affected[117]. And fifthly, by means of the education in human rights, they can help to erradicate xenophobia and other existing prejudices in national societies. Advances in this domain will be achieved, as already pointed out, in an atmosphere of human solidarity. Under this perspective, recent "constructions" of the type of "irregular" - or, worse still, "illegal" - migrants are quite negative[118], and do not assist at all in seeking durable solutions to the problems faced by migrants worldwide.

Human beings are not deprived of the rights inherent to them as such, as a result of their migratory status or any other circumstance; one can envisage the human rights of the uprooted, and, - contrary to what some would appear to try to make one believe nowadays, - the principle of non-refoulement belongs to the domain of *jus cogens*[119]. The discretionality of States has its limits, and their policies on deportation and expulsion ought to abide by the imperative norms of international law.

On the positive side, there is nowadays a greater *consciousness* of the pressing needs of protection of migrants worldwide. The United Nations World Conferences along the nineties and in the passage of the century have contributed decisively to create this new awareness. They have placed due emphasis on the needs of protection of persons

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115 On such distinct characteristics, e.g., in some Latin American countries, cf. IIHR, *Balance y Perspectivas del Fenómeno Migratorio en América Latina: Punto de Aproximación desde la Perspectiva de la Protección de los Derechos Humanos*, San José of Costa Rica, IIHR, 1998, p. 2 (restricted circulation).

116 Cf., e.g., J.E. Méndez, *A Proposal for Action on Sudden Forced Migrations*, San José of Costa Rica, IIHR, 1997, p. 10 (restricted circulation).

117 Cf. IIHR, *Papel Actual de las Organizaciones de la Sociedad Civil en Su Trabajo con las Poblaciones Migrantes en el Continente*, San José of Costa Rica, IIHR, 1998, pp. 1-14 (restricted circulation).

118 L. Ortiz Ahlf, "Derechos Humanos de los Migrantes", 35 *Jurídica - Anuario del Departamento de Derecho de la Universidad Iberoamericana* (2005) pp. 14, 19, 23 and 26-29.

119 A.A. Cançado Trindade, "El Desarraigo como Problema de Derechos Humanos frente a la Conciencia Jurídica Universal", *in Movimientos de Personas e Ideas y Multiculturalidad* (Forum Deusto), vol. I, Bilbao, University of Deusto, 2003, pp. 87-103.

and segments of the population in situations of *vulnerability*. Nowadays, seminars and meetings of non-governmental and governmental experts are convened more and more often, in the search for solutions bearing in mind the imperatives of protection of migrants[120]. Yet, greater concertation at universal level is much needed, as the protection of migrants, in increasing numbers from distinct parts of the world, has become a *legitimate concern of the international community as a whole*.

It is reassuring that the 2000 United Nations Millenium Declaration was attentive enought to include (par. 25) a call

> "to take measures to ensure respect for and protection of the human rights of migrants, migrant workers and their families, to eliminate the increasing acts of racism and xenophobia in many societies and to promote greater harmony and tolerance in all societies".

Half a decade later, in September 2005, the U.N. document 2005 World Summit Outcome, also in a reassuring way, enlarged the express reference to the issue of migrations (pars. 61-63), relating migration to development (par. 61), and reaffirming "our resolve to take measures to ensure respect for and protection of the human rights of migrants, migrant workers and members of their families" (par. 62).

Advances in this domain, however, will only be achieved amidst a radical change of mentality, and a greater consciousness of the pressing needs to protect the basic rights of migrants. In any scale of values, considerations of a humanitarian order ought to prevail over those of an economic or financial order, over the alleged "protectionism" of the "work market", over group rivalries. There is, definitively, a pressing need to situate the human beings in the place that corresponds to him, certainly above capitals, goods and services. This is one of the major challenges of the "globalized" world wherein we live, from the perspective of human rights.

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120 Cf., e.g., among many other initiatives: International Institute of Humanitarian Law (IIHL), *Conflict Prevention - The Humanitarian Perspective* (Proceedings, August/September 1994), San Remo, IIHL, 1994, pp. 7-185; Universidad de Sevilla, *La Asistencia Humanitaria en el Derecho Internacional Contemporáneo*, Sevilla, Univ. de Sevilla, 1997, pp. 1-74 (internal circulation); XVI Cumbre Iberoamericana, *Compromiso de Montevideo sobre Migraciones y Desarrollo*, of 05.11.2006, pp. 1-10 (internal circulation).

May I conclude this inaugural lecture here at the International Institute of Human Rights in Strasbourg by reasserting what I have sustained, two years ago, in my *General Course on Public International Law*, delivered at the Hague Academy of International Law, to the effect that, in my understanding, advances in Law are ultimately due to *human conscience*, the ultimate *material* source of all Law[121]. It took many centuries for human beings to become aware of the problem of time, for them to acquire a "historical conscience"[122]. And, since the heroic times of *The Iliad* of Homer in ancient Greece, it took a few more centuries for human beings to acquire an "ethical conscience", that is, to realize that they were responsible for their own conduct (each one being the inner "judge" of his own conduct) and for the way they treated others, their fellow human beings.

In this connection, in the XXVIII Immanuel Kant used to conceptualize "conscience" as the "internal tribunal" of each person as a "moral being"[123]. Centuries earlier, the emergence of human conscience helped to face with some reason the so-called "struggle for existence"[124], the old struggle for survival. The *recta ratio* present in the writings of the so-called "founding fathers" of the Law of Nations in the XVI and XVII centuries (such as F. de Vitoria, F. Suárez, H. Grotius, among others), in envisaging the *civitas maxima gentium*, in supporting the *jus communications* worldwide, and in propounding the essential *unity of the humankind*, - such *recta ratio* of scholastic thinking and writing, had its roots going back to the ancient Greeks (Plato and Aristotle), corresponding to their *orthos logos*[125].

It is human conscience which best governs the relations among human beings, whether inter-individually or in groups. It is the *universal juridical conscience* that guides universal international law, as its ultimate material source[126], that moves it forward, to

121 A.A. Cançado Trindade, "International Law for Humankind: Towards a New *Jus Gentium* - General Course on Public International Law - Part I", 316 *Recueil des Cours de l'Académie de Droit International de la Haye* (2005) pp. 177-202.
122 Ernst Cassirer, *Essai sur l'homme*, Paris, Éd. de Minuit, 1975, pp. 243-244.
123 Particularly in his *Fondements de la métaphysique des moeurs* (1785); an cf. I. Kant, *[Critique de] la raison pratique*, Paris, PUF, 1963 [reed.], p. 201.
124 Karl Popper, *In Search of a Better World*, London, Routledge, 2000 [reprint], p. 28.
125 A.A. Cançado Trindade, "International Law for Humankind: Towards a New *Jus Gentium*...", *op. cit. supra* n. (121), Part I, pp. 40-42 and 179-184.
126 *Ibid*., pp. 177-202.

respond to changing needs of protection of the human person and to fulfil the basic aim of the realization of justice. I am confident that this 2007 Annual Study Session of the beloved International Institute of Human Rights here in Strasbourg will contribute to the *prise de conscience* to fulfil the pressing need of securing the human rights of migrants worldwide.

THE CONJUGAL VISIT: A RIGHT OF PRISIONERS UNDER THE SIGN OF EQUALITY

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1. THE SEXUAL MATTER

The sexual matter, about which there is extensive literature, is one of the most serious problems affecting the everyday routine in prisons. Away from his family and social environment, immersed in a promiscuous world, different, cemented in own rules, imposed by the population group, the prisoner has different options: he can repress his impulses, make sexual assaults or, even, voluntarily or under coercion, get involved in homosexual practices.

In prison, a closed environment, sex is substantial for the mental health of its dwellers. In the book *Mulheres Encarceradas*, Maud Fragoso de Albuquerque Perucci sustains that the sexual activity is "a natural need of the human being", just like "the act of breathing, feeding or sleeping…"[1]

The *extra* sex privation, in a special grade when it happens for prolonged lapses (Sigmund Freud studies are conclusive about that), engenders, inside, problems in the individual plan – causing psychological imbalances and stimulating reprehensible behaviors – and in the collective plan, giving course to a stressful environment and consequent disorders.

The list of anomalous behaviors is huge. Besides homosexuality and numerous perversions (such as exhibitionism, fetishism, frotteurism, masochism, pedophilia, sadism, transvestism, voyeurism, and zoophilia), it includes onanism (masturbation), violations (rapes), and pimping (ruffianism).

Violations are current and have much to do with the exercise of power, which happens to be one of the despicable manifestations.

1 PERUCCI, Maud Fragoso de Albuquerque. *Mulheres Encarceradas*. São Paulo: Editora Global, 1983, p. 117.

In the banditry law, the ones convicted for rape (specially, the minors) suffer a retaliation revenge ("an eye for an eye and a tooth for a tooth" or "like for like"). It is in the Mosaic law: one pays with the same currency (*par pari refertur*).

When entering the prison, the young, mainly the first offender, is usually harassed by prisoners that sexually assault him and often transform him, with the consent of jailers, into merchandise for the vile carnal trade. It is one of the worst aberrations of enclosure.

When one of the inmates decides to protect the novice, he does not do that for charitable reasons; the intention is to become his *godfather*, which means to have him as property for exclusive use. Without any homosexual inclination, but coerced by circumstances, the prisoner submits himself to his master.

Among the ones who are violated, some of them begin to appreciate the homosexual practices; for others, the *proven males*, who have not been pleased, see those practices with evil eyes.

Ruffianism, on the other hand, thrives by the initiative of prisoners, and prison officers who sell the women (daughters, sisters, wives, companions) in an underworld that nourishes the breeding ground of sordid perversions.

2. THE CONJUGAL VISIT

In harmony with the assertion from Astor Guimarães Dias that there is "a legal castration against the prisoner, on depriving him from the other sex"[2], the intimate visit (or conjugal visit)[3] is allowed in many countries of Latin America (Brazil, Mexico, Chile, Peru, Nicaragua, Venezuela, Argentina) as a way to solve the problem of the "Chained Eros"[4], to interrupt the abstinence, seen as an accessory or additional punishment, to keep the affective and matrimonial nexus of assuring the compliance of the penalty personality principle, once it avoids punishing the innocent spouse or partner.

Elías Neuman comments about the advantages:

> "A considerable group of authors such as Jiménez de Asúa, Muzquis Blanco, Juan Agustín Martínez, Altmann Smith

2 DIAS, Astor Guimarães. *A Questão Sexual das Prisões*. São Paulo: Editora Saraiva, 1995, p. 15.

3 In Spain it is called *vis-à-vis*.

4 Sergio García Ramírez's statement is cited in CARRANCÁ Y RIVAS, Raúl. *Derecho Penitenciario.* México: Editora Porrúa, 2005, p. 499.

> and Guimarães Dias, Lemos Britto, César Salgado, among others, are in favor of the heterosexual conjugal visits for the largest possible number of prisoners. The advantages would be the following: a) avoid the sexual aberrations and perversions produced in the enclosure; b) keep the discipline in prisons, because, as they warn, most of those disorders are due to problems whose root has a sexual and jealousy nature; c) grant a reward to the good conduct of the convict in the penal establishment; d) strengthen the marital bond, because it would prevent the woman seeking sexual satisfaction from solving it by mistake, and at the same time, the prisoner would not have a fit of jealousy. These and other similar considerations – maybe it could be said it would avoid the spread of Aids in prisons – constitute the support of arguments that, ordinarily, are found in projects and regulations in force in different countries where the experience takes or has taken place."[5]

Despite its advantages, the conjugal visit is criticized by authors such as Eugenio Cuello Calón[6] and Beltrán, and it is not allowed in many European countries. We have found out it is prohibited in the United kingdom.[7] When visiting the biggest Austrian prison in

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5 In NEUMAN, Elías. *El Problema Sexual en las Cárceles*, 3ª ed. Buenos Aires: Editora Universidade, 1997, p. 142.

6 Regarding that, see: "…Bertrand in his *Leçons pénitentiaries*, on a direct allusion to the sexual matter in prisons, he refers that in the early nineteenth century, there used to be a chamber where the prisoners could receive female visits in the New Gate prison (London). In the same prison, V. Henting refers that, around 1724, the jailer used to allow the prostitutes to enter the sector devoted to higher ranked persons, *Die Strafe*, II, pg. 187. Fishman also reports that Tgomas Mott Osborne, when he was the director of Sing-Sing, he introduced the system of female visits." (CALÓN, Eugenio Cuello.*La Moderna Penología [Represión del Delito y Tratamiento de los Delincuentes. Penas y Medidas.Su Ejecución]*, Tomo I. Barcelona: Bosch, Casa Editora, 1958, p. 503)

7 In the United Kingdom (comprising the Great Britain Island – England, Scotland and Wales – and Northern Ireland, besides smaller islands), besides the Tower of London, I visited three prisons in 2001:
Bulwood Hall – one among the sixteen female prisons in the United Kingdom, has 180 women, young and adult, including foreigners and condemned to life sentence. Their cells are single, and exceptionally double (it is the case of prisoners with suicidal tendency, who remain with partners to whom it is assigned the mission of observing and advising them). It has a library (an extension of the local community library, with a librarian who comes once a week); workshops (where all of them work and get paid); classrooms for regular learning and for vocational training (painting, ceramics, fashion design, and barber shop); sports courts; gymnasium for bodybuilding and aerobic exercises; medical and dental assistance; canteen, ecumenical church (decorated with

2000, the mention that it is allowed in Brazil, once or twice a week, was followed by a loud laugh of astonishment and mockery from my hosts.[8] In the USA, it is prohibited in most of the States, and in federal prisons.

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murals made by male prisoners), besides some spaces for sunbathing and eating in a restaurant. In the prison, we have found men working as jailers, a common practice in United Kingdom, where women equally work at the male penal establishments. The visits are held once a week, for two hours at the most; prisoners sit down on yellow chairs while visitors do that on blue chairs.

Grendon – A high security prison, with a population of 220 convicted, half of them are sentenced to life imprisonment, kept in single cells, it is a therapeutic prison (with a research department, a library, workshops, and recreation areas), where prisoners with behavior problems and psychological disorders go voluntarily, and are kept under intensive treatment (*community therapy*) for three years at the most, when they have access to a varied guidance program, and attend therapy sessions, in groups of five to eight people, followed by an assistant, in a very quiet environment. Together with Alda Miranda Gant, who lives in London, we met with three prisoners, when we had the chance to listen to them and ask questions.

Belmarsh – One of the biggest prisons in the United Kingdom, also with high security, holds 800 prisoners, the majority serving life sentence. Before entering, we were at the *visitor center*, a facility with information desk, cafeteria, telephone, etc. A highlight is the diversity of work and recreation options, as well as the cleanness and total order and discipline atmosphere. At the visit pavilion, where prisoners and visitors also sit on chairs with different colors, there is a rigorous security scheme: the chairs are numbered, and an employee holds a document with the prisoner's photograph and his seat number. Since its inauguration, in 1901, there have been only two escapes, the last one under peculiar conditions: the fugitive pretended he was a visitor and could fool everybody then reaching freedom.

8 From April 10th to 17th in 2000, I was a member of the official delegation from the Ministry of Justice to attend the UN Tenth Congress on Crime Prevention and Treatment of the Offender, in Vienna. On Sunday, April 16th, when a great part of the Congress activities had been interrupted, we visited, together with Prof. Igor Metzeltin and Dr. Otto Müller, former General Attorney of the Republic (1987-1994) and President of the Austrian Chapter within the International Association of Penal Law, the biggest Austrian prison, the *Bundesjustizanstalt*, in the eighth district of Vienna, with 1050 prisoners, 45% of them are foreigners, being 600 provisional and 150 women. Founded in 1987, well equipped and clean, it is located downtown and it has 355 employees, among which there are 290 correctional officers, social assistants, doctors (practioners, gynecologists, surgeons) and nurses. Kept in collective cells (the single ones are reserved for the high risk inmates), the prisoners develop remunerated labor activities, they eat in their own cells, there are canteens where they can purchase food products every day, and have the right to (1) sunbathe for one hour. The visits take place every week, for a maximum period of half an hour, in visitation areas with glasses separating the prisoners from the visitors, and the intimate encounters being forbidden. According to information provided by the chief of the correctional officers, there is the record of only one escape, which happened during the construction of the penal establishment. Regarding the female

If the propensity is to consider it a right, in spite of being limited (this is how it is in Spain, one of the European countries that adopts it, according to Art. 53 of the General Penitentiary Law), in some legislations it is seen as a reward, a privilege (the Criminal Enforcement Code in Peru provides for in its Art. 52: the conjugal visit is a benefit given to the inmate who has fulfilled the requirements established by the Regulation. Its main objective is the maintenance of the relations between the inmate and his spouse or, in the absence of such, the person he keeps a permanent marital relationship with).

The mentioned requirements are: to have fulfilled the observation period; to have a favorable medical report; to show good behavior recognized by the treatment technical team; not to be serving any disciplinary sanction.

2.1. In Brazil

Although many consider it a right granted by the Federal Constitution (according to its Art. 5 "all are equal before the law, without distinction of any kind…"), the right to conjugal visit (which was already allowed at the Central Penitentiary of Rio de Janeiro in 1942) is neither provided for in the Minimal Rules for the Prisoner Treatment in Brazil nor in the Penal Enforcement Law (Art. 41), which refers only to the visit of the spouse, companion, relatives, and friends on certain days; and it can be suspended or restricted by the director of the penal establishment.

On a broader interpretation of the law, it has been understood that the visit referred in Art. 41, includes the conjugal visit, mostly when it is considered that all rights, which the sentence of conviction or law does not literally reach, according to the content of Art. 3, are ensured to the convict and inmate.

In the bulletin of the Brazilian Institute of Criminal Science (IBCCrim), Pedro Armando Egydio de Carvalho argues:

> "The Penal Enforcement Law (LEP), from July/1984, affirms in its Art. 2 that the Penal Process Code is also a rule for the enforcement process. However, in such Code, precisely in Art. 3, the extensive interpretation is admitted, whereby, to our case, a precept of Penal Law may comprise a situation

prisoners, kept in a sector isolated from the men, they can keep their children up to three years old, in a specific area, assisted by a specialized team.

not explicitly considered by the legislator, since the exegesis does not restrict the rights of the convicted or aggravates the constraint to which he is already subject to.

In summary, such interpretation can only be evoked for the benefit of the prisoner, never against his favor.

Thus: Art. 41, X, of the LEP, reads:

The prisoners' rights are: visit of the spouse, companion, relatives, and friends on certain days.

We see, by that, that the evoked rule, of extending to a non-expressed situation what it is attributed to a similar one, allows without much effort to establish the right to conjugal visit based on the general faculty that the prisoner has the right to receive the visit of his/her spouse or companion. In fact, once sexuality is something inherent to the human being, it would not be conceivable that the right to receive visits from the person with whom he/she shares intimacy would be restricted to the own liturgy of meeting with a relative or friend, in which the affections of body and soul never reach the nature or degree of secret and mystery that enlace spouses and companions.

On the other hand, if the legislator, when stating that the prisoner has the right to receive the visit of the spouse or companion, has not distinguished between common and conjugal visit, it does not concern to the interpreter to limit that faculty to the first hypothesis, labeling the other one as a mere privilege, otherwise consecrating the principle, no longer accepted by the penitentiary philosophy of the Democratic States, of understanding the rules that govern the prisoner-State relationship as prone to the systematic restriction of the rights and guarantees of the one who suffers the enforcement of a penalty that restricts freedom."[9]

2.1.1. Bill and CNPCP Resolution

Being duly processed in the National Congress, Bill No. 107, from 1999, authored by Congresswoman Maria Elvira, alters Art. 41 from the LEP, includes item XI (conjugal visit), and modifies the subsequent numbering. On the justification, it asserts that such visit must be seen

9 CARVALHO, Pedro Armando Egydio de. Visita Íntima: Direito ou Regalia? (Intimate Visit: Right or Privilege?), *BoletimIBCCrim*, number43, jul./96, p. 3.

as a right and not as a reward, and adduces that sexual abstention, on being forced, causes damages and can generate an imbalance in the individual, increase violence, bellicosity, the disruptive behaviors, and the tension atmosphere in the penal unit.

In 1999, The National Council of Criminal and Penitentiary Policy, recommended, by Resolution, that "the right to conjugal visits for individuals from both sexes, kept in penal establishments, was ensured." After considering that the conjugal visit is a "right constitutionally assured to prisoners", it established:

Art. 1**.** The conjugal visit is understood as a reception by the prisoner, national or foreign, man or woman, of a spouse or other partner, in the penal establishment where he/she is kept, in a reserved environment, whose privacy and inviolability are assured.

Art. 2. The right to conjugal visit is, also, ensured to prisoners married to each other or under a stable union.

Art. 3. The board of the penal establishment must assure the prisoner the conjugal visit, at least, once a month.

Art. 4. The conjugal visit cannot be prohibited or suspended as a disciplinary sanction, except in cases where the disciplinary infraction is related to its exercise.

Art. 5. The prisoner, when admitted into the penal establishment, must inform the name of the spouse or other partner for his conjugal visit.

Art. 6. To be enabled for the conjugal visit, the spouse or other indicated partner must register at the suitable sector of the prison.

Art. 7. The board of the penal establishment is responsible for the administrative control of the conjugal visit, such as the visitor's registration, making the visit schedule whenever possible, and the preparation of an appropriate place for its accomplishment.

Art. 8. The prisoner cannot have two concomitant indications, and can only nominate the spouse or new partner of his conjugal visit after a formal canceling of the previous indication.

Art. 9. The board of the penal establishment is responsible for informing the prisoner, spouse or other partner of the conjugal visit about issues regarding drug use prevention, sexually transmitted diseases and, particularly, Aids.[10]

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10 *Resolutions of the National Council of Criminal and Penitentiary Policy*. Brasília: CNPCP, 2001, pp. 77-78.

Note that the Resolution deals with the conjugal visit of male and female prisoners, aiming to oppose to discriminations that, despite the principle of equality, may still exist regarding women. However, not all Brazilian States authorize the conjugal visit in female penitentiaries, since there is the fear that the inmates can become pregnant. On the other hand, the sexual choice is not mentioned. I explain myself: it is not specified that the spouse or other partner is from the opposite sex, allowing the interpretation that the Resolution does not prohibit the visit between homosexuals.

Some pederasts, ostensibly feminine, are looked down upon the other prisoners. They provide sexual services, wash and iron clothes, sew, cook, etc. Other prisoners, victims of the sexual violence, feminize in prison. There are also the discrete, most of the times married, with children, who do not declare themselves openly, and the ones that allow to be abused only by one single prisoner (who becomes his *godfather*) to better serve his sentence.

Nothing avoids that the picture of institutional victimization extends to the ones submitted to security measure or to a psychiatric treatment, even because it would constitute a mark on its therapeutic progress, and on the preservation of affection bonds and households.

2.1.2. The cares and risks

Requirements are established for the access to conjugal visits, and it is recommended to provide bed linen, towels, soap, and toilet paper, besides ensuring good ventilation, and the absence of bad odors, humidity, and harmful fauna.

It is common to inspect inmates and visitors in order to prevent the entry of weapons, ammunition, and drugs.

Regularly, initiatives are taken to advise about the risks caused by the non-adoption of practices of safe sex. Videos, exhibitions, and manuals are used for that end, with valuable information about the use of preservatives (facilitated by de centers), contraceptive methods, and sexually transmitted diseases.

Although the visits are normally reserved to the married inmates or to the ones under stable union (the partner must be previously registered), exceptions are open for the single, and the admission of prostitutes is authorized in some places, when there is no stable relationship.

2.1.3. The place

Not less important is the issue of the place where the conjugal encounters shall take place. Although it is preferable in enclosures specially designated for that end *(visit houses*), called *venustérios, motéis or parlatórios* in Brazil, *conyugales* or *recámaras* in Mexico (the Spanish legislation points out that the conjugal visit shall happen "in an independent establishment and under good conditions"[11]), many of those places are the cells themselves (including the ones for punishment), destitute of adequate light and ventilation.

It is illusory to imagine the possibility of building or adapting, in all prisons, special units (*love parlors*), which are similar to a normal house, with familiar aspect, as some claim it to be like; nothing prevents conjugal visits to happen inside the cells, even inside the collective accommodations, saving the values that must guide such procedure.

Oncologista Dráuzio Varela reports in *Estação Carandiru:*

> "In jail, if only one inmate is visited, all the time available is his: if there are several, the time is shared in equal parts. There is no need to knock at the door; the punctuality is British. In the bigger cells, with twenty, thirty men, where there is no other possibility rather than the concomitant use, they improvise private spaces with hanged blankets. To cover up the most exalted manifestations of the female ecstasy, they turn on the radios loudly."[12] And he adds: "If there is economic availability, it is even possible to receive the visit in another pavilion, procedure used to receive the wife in the original jail, on Saturday, and the girlfriend's visits on Sundays. The number of employees is insignificant to avoid infidelity."[13]

There are reports from inmates who pay public officers to have sex with their own wives or companions (or prostitutes) in the administrative offices.

Elías Neuman tells us that, in some prisons in Argentina, prisoners have sexual relations in the patio, on visiting days. A kind of human folding screen is set up, behind which the couple makes

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11 BITTENCOURT, Cezar Roberto. *Falência da Pena de Prisão: Causas e Alternativas*. São Paulo: Revista dos Tribunais Editor, 1993, p. 200.
12 VARELLA, Dráuzio. *Estação Carandiru*. São Paulo: Companhia das Letras, 1999, pp. 61-62.
13 *Ibidem*, p. 62.

love, what can be seen from the upper floors.[14] I witnessed a similar situation, many years ago, at the Detention House of São Paulo (the conjugal visit was not legally allowed at that time). It was an effigy of degradation witch I still keep in my mind.

2.2. In Mexico

The conjugal visit in Mexico (the pioneer Latin-American country to implement it) is a benefit (granted when there is merit, and extended to prisoners from both sexes, being either prosecuted or convicted), but not a right.

In many social reintegration centers, only the visit of relatives is allowed, which takes place in specific areas or parlors, where the conjugal visit is not permitted; which is provided for in Art. 12 of the Minimal Standards concerning the Social Rehabilitation of the Sentenced, of Rules 90 to 94 of the Regulation of the Federal Centers for Social Rehabilitation, and in Art. 81 of the Regulation of Prisons and Federal Centers for Social Rehabilitation of the Federal District, where they have existed since 1924.

In *Las Mujeres Olvidadas*, published by the National Human Rights Commission, and by the School of Mexico, Elena Azaola and Cristina José Yacamán explain, reiterating the terms of Art. 12 of the Law establishing the Minimal Standards concerning the Social Rehabilitation of the Sentenced, that the conjugal visit aims to keep "the marital relations of the inmate in a sound and moral way", and it shall not be granted "on a discretionary way unless after being submitted to medical and social studies, whereby the possibility of situations that make the intimate contact inadvisable are discarded."[15]And they alert:

> "It is necessary to notice the difference of criteria that, regarding the conjugal visit, applied in male and female prisons, because while one usually recognizes this right in the former, one tends to limit it in the latter as if, unconsciously, but effectively, the penal institution did that sometimes, it assumed as the depositary of the woman's guardianship who often, for being a

14 NEUMAN, Elías. *Victimología y Control Social. Las Víctimas del Sistema Penal.* Buenos Aires: UniversidadeEditor, 1994, p. 269.

15 AZAOLA, Elena e YACAMÁN, Cristina José.*Las Mujeres Olvidadas. Un Estudio sobre la Situación Actual de las Cárceles de Mujeres en la República Mexicana*. México: Editor O Colégio do México, 1996, p. 53.

delinquent, is considered not only as a bad mother… but also unable to solve her affective life, to act in such field without the advice, vigilance, and guidance from the institution."[16]

2.2.1. The place and other aspects

In very few social rehabilitation centers, there are proper facilities for the conjugal visit. That is why it usually takes place in the dormitories, by improvising cardboard, brass or tin dwellings, when blankets are not used for the wished privacy.

Jorge Fernández Fonseca gives us some details:

> "The *conjuyal* used to be, at a certain point, like a transit hotel, but with very low quality. The dwellings used to consist of a bedroom without any furniture but a wooden bed, and instead of a mattress wooden grid, clapboards, without bed sheets, bedspreads, blankest or pillows; a hanger to hang clothes, a lavatory, and a toilet bowl. Each prisoner had to bring his own blanket and pillow, and they were allowed to stay for two hours… There were disputes for jealousy or other reasons, and women were often beaten and sometimes injured. The prisoners used to sell their wives, friends, daughters and even their mothers. Most of the times, in agreement with them, because there are prisoners who never receive visitors or occasionally buy women from the ones who have them… Those visitors also showed up to deliver some smuggling, such as drugs, guns, and other forbidden articles. They were given to them after being hidden in their vagina or rectum, or inside the food they were allowed to pass with, or as sometimes they used to pass that with their minor children, as it happened once when a 5-year old child who was moaning and crying insistently while the mother was waiting for the visit; when he drew the attention, he was taken to the ward when it was found out that the child had a cartridge of drug inside his rectum. There was also the exchange of partners, when two prisoners would exchange their own wives between each other. For all those actions, they had to pay for "a little grocery shopping"; that is, give some banknotes to the ones in charge of watching the place…"[17]

16 *Ibidem*, p. 55.

17 FONSECA, Jorge Fernández. *La Vida en los Reclusorios: Espeluznantes Sucesos Ocurridos en las Cárceles de México.* México: EditoraEdamex, 1992, pp.51-52.

The Social Work Office is in charge of a set of actions related to the conjugal visit, such as, for instance: assistance to the ones who claim it; guidance and information about its proceedings; drafting petitions; receiving and reviewing the corresponding documents, forwarding the petition to the medical center; evaluating the case; preparing credentials; permanent supervision of the list of authorized prisoners, and its forwarding to the institutional authorities; daily review of the facilities, movement of the population; update the office tasks, etc.[18]

2.2.2. The distortions

Regardless of what is provided for in the Minimal Rules about the Social Rehabilitation of the Sentenced, the conjugal visit has been converted into a mere business trade in many prisons.

Restrictions are imposed for the authorization to be granted, but extortion is the rule, with rumors that such authorization is only granted to inmates who "give the permission in return of a certain amount of money, which varies between 50 and 150.000 new *pesos*", and out of that sum, a monthly quota must be given to the vice-director, and "it varies according to the size of the population the penal establishment holds. He is called the "conjugal visit coordinator."[19]

Serious obstacles have also been noticed in the visit among the prisoners,[20] which gave rise to recommendation 10/2002, of the Human Rights Commission of the Federal District (CDHDF), sent to the Government Secretary, which has a number of complaints from those who did not have access to conjugal visits based on "discriminatory, illegal, and subjective criteria".

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18 ANDRADE, Irma García. *Sistema Penitenciario Mexicano: Retos y Perspectivas*. México: Sista Editor, 2000, p. 89.

19 BRINGAS, Alejandro H. and QUIÑONES, Luis F. Roldán. *Las Cárceles Mexicanas. Una Revisión de la Realidad Penitenciaria*. México: GrijalboEditor, 1998, p. 157.

20 That is how the visit is called when both spouses are incarcerated. It is also said about ordinary visits (when the free spouse attends the penal establishment), extraordinary (when the benefit is granted due to his good behavior) and forane (when the partner lives in another city).

2.2.3. The prohibition of discriminations and the observance of principles

In the prisons of the capital, according to Art. 8 of its new Regulation, any kind of discrimination based on race, religion or sexual orientation is prohibited, through which, one understands to be admissible that homosexuals may claim the benefit of the conjugal visit for their partners.

By understanding that such prohibition among *gays* would hinder the rights of prisoners, and the principle of nondiscrimination for sexual orientation, bailed in federal law, the Human Rights Commission of the Federal District has expressly admitted it in a recent recommendation.

For Antonio Sánchez Galindo, some basic principles must be complied:

a) "It must be conceded only to the wife or, in her absence, to the concubine, or at most, to a stable friend;
b) It should be sought that the spouses are physically and mentally healthy;
c) The dwellings shall be individual, amiable, and welcoming;
d) The greatest respect shall be given to the partner, specially, the wife. The jailer shall not allow himself to a minimum familiarity with her;
e) Under no circumstances, sex professionals or occasional friends shall participate in that kind of visit;
f) The access of infants to the same *recámara* shall only be allowed if they have to be breastfed by the wife, but adequately separated from the conjugal parlor;
g) For older children, there should be a completely separate day care center or dormitory;
h) The female inmate shall have the same right, being subject to the family planning."[21]

3. A TESTIMONY

Sexual aggression, homosexuality, solitary (or collective) practice of masturbation, byproducts of the lack of conjugal visits, suggest

21 GALINDO, Antonio Sánchez. *Cuestiones Penitenciarias*. México: Edições Delma, 2005, pp. 78-79.

that such visits should be adopted in both male and female prisons. In this sense, here is the testimony of an anonymous prisoner:

> "It is important for the convict to feel free with his wife. To have a sexual relation for some hours. He feels like a jailed animal… this way he will be able to forget many things loitering his mind. He feels more valued, more comforted. A more normal and human life."[22]

Undeniably, it is a breakthrough that, despite the deviations raised by the antagonists, it shall be preserved for the sake of an ideal pursued by penitentiary experts, with the obstinacy of a shadow: respect for the human rights of prisoners.

Note: Fragment (preserved in its original form) from the book *A Execução Penal na América Latina à Luz dos Direitos Humanos: Viagem pelos Caminhos da Dor.* Curitiba: Editor Juruá, 2012.

22 OLIVEIRA, Odete Maria de. *Prisão*: *Um Paradoxo Social*. Florianópolis: UFSC/ Assembléia Legislativa do Estado de Santa Catarina Editor, 1984, p. 213.

THE APPLICATION OF INTERNATIONAL HUMANITARIAN LAW BY A REGIONAL HUMAN RIGHTS BODY: THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

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I. INTRODUCTION

Sir Hersch Lauterpacht once wrote: "If international law is, in some ways, at the vanishing point of law, the law of war is, perhaps even more conspicuously, at the vanishing point of international law."[1] There is a tendency to think of IHL not as "hard law" but rather as "soft law" – good deeds carried out for reasons of humanity, not pursuant to any categorical legal imperative. The implementation of humanitarian norms in war situations is absurd and anachronistic in a world, which, in its international legal regime has outlawed war. Since wars continue to rage, however, humanitarian norms, imposed more as a result of ethical than legal considerations, attempt to "humanize" these conflicts and the treatment of the victims of these conflicts, in spite of the fact that the evolution of warfare reveals a frightening tendency towards a state of inhumanity in which no one is protected.

It is an irony and commentary on the present state of international law that the Geneva Conventions of 1949 (GCs)[2] have been ratified by more states than any other treaty in the world

1 H. Lauterpacht, 'The Problem of the Revision of the Law of War', 29 *BYIL* 360 (1952), at 372.

2 Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949), 75 UNTS 31 (entered into force 21 October 1950) [GC I]; Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (1949), 75 UNTS 85 (entered into force 21 October 1950) [GC II]; Convention relative to the Treatment of Prisoners of War (1949), 75 UNTS 135 (entered into force 21 October 1950) [GC III]; Convention relative to the Protection of Civilian Persons in Time of War (1949), 75 UNTS 287 (entered into force 21 October 1950) [GC IV],

including the UN Charter, yet the failure of states to implement these norms has served to render their provisions irrelevant to most victims of armed conflicts.

The international community failed to establish a supervisory body to monitor implementation of the laws of war or specifically, the Geneva Conventions, as compared to the supervisory bodies established by a number of international human rights treaties to monitor compliance with human rights. Beginning in the 1990s with the creation of the ad hoc International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993, the International Criminal Tribunal for Rwanda (ICTR) in 1994, and the International Criminal Court (ICC) in 2002, specific international tribunals were mandated to apply international criminal law, which incorporates IHL into the category of "war crimes".[3]

Some countries have openly objected to a regional human rights body applying IHL during a state of armed conflict, arguing that they did not consent to the human rights body applying this body of law.[4] Prior to the establishment of these *ad hoc* tribunals this objection made little sense because the international community did not authorize any jurisdictional body to apply the laws of war despite the universal ratification of these treaties.

The OAS member states, since at least 1980, have been urging the OAS human rights organs to consider violations committed by irregular armed groups against whom the states were engaged in armed conflict. Born of the conviction that the monitoring of

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3 Article 8 of the Rome Statute, for example, defines *"war crimes"* as *"grave breaches"* of the Geneva Conventions of 12 August 1949 (Rome Statute of the International Criminal Court, A/CONF.183/9, 17 July 1998).

4 The United States and Colombia, for example, are two countries that have taken this position before the IACHR (*infra*). As one commentator astutely observed: "[T]he main difficulty regarding the implementation of IHL is that States refuse to apply it even in situations where it is clearly applicable. Baxter has noted that 'the first line of defense against IHL is to deny that it applies at all.' H.S. Burgos, 'The Application of IHL as Compared to Human Rights law in Situations Qualified as Internal Armed Conflict, Internal Disturbances and Tensions or Public Emergency, with Special Reference to War Crimes and Political Crimes', in F. Kalshoven and Y. Sandoz (eds), *Implementation of IHL*, (1989) at 6. This position has been echoed: "Despite its presence in the Conventions and its status as customary law, breaches continually occur. When faced with internal difficulties, States tend to disregard the provisions of common Article 3, often denying that the situation is an armed conflict at all." Lindsay Moir, *The Law of Internal Armed Conflict* (2002), at 273-274.

human rights was biased against states, –since only states could be found responsible for human rights violations – the OAS member states repeatedly called upon the IACHR to condemn, as human rights violations, actions committed by irregular armed groups. The IACHR's inability to hold an insurgent group responsible for violations of IHRL, since under its governing instruments cases can only be presented against states, created a tension within the system, as the IACHR called upon the OAS political bodies to provide it with the legal means necessary to conduct such investigations. The failure of the OAS to provide such a mechanism was resolved in 1996 when the ICJ issued its Advisory Opinion in the Nuclear Weapons case and established that: 1) human rights law remains applicable even during armed conflict; 2) it is applicable in situations of armed conflict, subject only to derogation and 3) when both IHL and IHRL are applicable, IHL is the *lex specialis*. Hampson, in her 2008 study of the relationship between IHL and IHRL from the perspective of a human rights body, suggests that the IACtHR "has shown the way, at least as regards the manner in which IHL can be taken account."[5]

It is the argument of this article that it was the IACHR, and not the IACtHR, that took IHL into account, that the IACtHR effectively eliminated the consideration of IHL in situations of armed conflict by the human rights organs of the inter-American system. On the other hand, the ICJ, and UN reports such as *The Goldstone Report*, have shown how IHL and IHRL together may effectively be applied to situations of armed conflict by a supervisory body.[6]

II. OBLIGATIONS UNDER INTERNATIONAL HUMANITARIAN LAW IN CONTRAST TO INTERNATIONAL HUMAN RIGHTS LAW

The normative framework of IHRL centers obligations on the state and its agents, for the purpose of protecting the individual against abuses by the State. The normative framework of IHL, on the other hand, imposes obligations directly on the individual. The difference "rests on the fact that human rights law is centered, indeed built, on

5 *See* F. Hampson, 'The Relationship between IHL and Human Rights Law from the Perspective of a Human Rights Treaty Body,' 871 *IRRC* 549 (2008), at 572.

6 U.N. Human Rights Council, Human Rights in Palestine and Other Occupied Arab Territories: Report of the U.N. Fact-Finding Mission on the Gaza Conflict, A/HRC/12/48, 15 September 2009 [*The Goldstone Report*].

the granting of rights to the individual, while humanitarian law is focused on the direct imposition of obligations on the individual."[7]

IHRL grants rights to individuals and imposes obligations on the State. The State has an obligation of due diligence to protect the individual's enjoyment of his or her rights. The duty to ensure full enjoyment of these rights involves a duty to prevent, investigate and punish any violation, through the enactment of appropriate legislation and if necessary, the reorganization of the apparatus of the state.[8]

IHL, on the other hand, imposes obligations on the individual. Whereas most violations of the laws of war are carried out by members of the armed forces, who are state agents, some violations of IHL are carried out by individuals in a private capacity, in situations of internal armed conflict. The German industrialists, who manufactured and supplied poison gases to the SS, were private citizens, who were tried and found guilty of war crimes and sentenced to death. The law of war, unlike IHRL, binds individuals regardless of whether or not they are state agents.

Consequently, IHL applies not only to states but also to irregular armed groups in situations of internal armed conflict. International individual criminal responsibility for violations of IHL (war crimes) was until very recently only applicable in the context of international armed conflicts. Serious violations of common Article 3 GCs or violations of Protocol II[9] were not included in the list of "grave breaches and neither common Article 3 nor Protocol II contemplate the prosecution of offenders of these instruments."[10] Today, the duty to prosecute or extradite individual perpetrators of violations of IHL extends far beyond "grave breaches" to include the 1949 GCs, AP I and AP II and the laws and customs of war. The Goldstone Report recently noted that violations of fundamental humanitarian rules

7 R. Provost, *International Human Rights and Humanitarian Law*, (2002), at 13.
8 Judgment, *Velasquez Rodriguez v. Honduras Case*, IACtHR, 29 July 1988.
9 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non- International Armed Conflicts (1977), 1125 UNTS 609 (entered into force 7 December 1978) [AP II].
10 Provost, *supra* note 8, at 95. *See also* J. Dugard, "Bridging the Gap between Human Rights and Humanitarian Law: The Punishment of Offenders', 324 *IRRC* 445 (1998), at 446 ("With the exception of the Convention against Torture, human rights treaties do not contemplate enforcement by means of punishment of offenders.").

(e.g. war crimes, crimes against humanity and genocide), applicable in all types of conflict, entail individual criminal responsibility.[11]

Individual criminal responsibility for human rights violations remains "unusual." Most human rights treaties include no requirement or power to criminally sanction perpetrators of serious violations of human rights comparable to the "grave breaches" provisions incorporated into humanitarian law conventions and the establishment of the international criminal law tribunals designed to punish individual perpetrators.[12]

The "duty to punish" as it has been termed, or the duty of the state to prosecute human rights violations is not set forth in international human rights treaties as it is in IHL for "grave breaches."[13] International human rights bodies, however, find a "convergence" between IHL and IHRL, and increasingly recommend criminal prosecution for perpetrators of grave violations of IHRL, thereby blurring the difference between IHL and IHRL. In 1996, the International Law Commission's Draft Code of Crimes against the Peace and Security of Mankind expanded the definition of crimes against humanity as comprising acts such as murder, torture, enslavement and forced disappearance "when committed in a systematic manner or on a large scale and instigated or directed by a government or by any organization or group, without making reference to the nature of the conflict."[14] Initially crimes against humanity were considered to apply only during international wars, whereas subsequent developments have made it clear that crimes against humanity can also occur in times of peace.[15]

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11 *See, The Goldstone Report*, *supra* note 7, para. 287. *The Goldstone Report* is an example of the international community calling upon experts to investigate violations of IHL and IHRL, simultaneously, on the part of a State and non-State actors.

12 Provost, *supra* note 8, at 107.

13 For a contrary view, s*ee* D. Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime', 100 *Yale LJ* 2539 (1991). Dugard, *supra* note 11, suggested, in 1998, that the challenge for the next millennium will be to establish a viable international criminal court and effective domestic procedures for the prosecution of those who commit systematic or large-scale violations of human rights –whether in international or internal armed conflicts.

14 Report of the International Law Commission, 48th Session, UN Doc. A/CN.4/L.522, 31 May 1996, Art. 18 Draft Code.

15 Dugard, *supra* note 11, at pp. 447 and 450. The Statute of the International Criminal Tribunal for former Yugoslavia gives the Tribunal jurisdiction over crimes

The IACtHR, in its first decision on a contentious case, held that Honduras was obligated to "prevent, investigate and punish any violation of the rights recognized by the [American] Convention" but it did not include this obligation in the operative part of the merits judgment in this landmark case.[16] The IACtHR, in dictum, distinguished the nature of IHRL from criminal law and remarked on the absence of a duty to punish.[17]

The widow of Manfredo Velasquez, after the IACtHR's judgment on the merits, submitted a pleading in which she specifically requested the IACtHR to order Honduras to comply with the obligation to try and punish those responsible for the state practice of forced disappearances that led to the disappearance of her husband and others.[18] Citing as authority the classic *Chorzów* decision, that every violation of an international obligation creates a duty to make adequate reparation, the IACtHR elaborated in great detail on the monetary reparations to be paid.

As regards the duty to punish, however, the IACtHR briefly reiterated that the state has a continuing duty to investigate and that this duty is in addition to the duties to prevent involuntary disappearances and to punish those directly responsible.[19] Since Honduras was unable to prevent the disappearance of Manfredo Velasquez, the inclusion of the duty to punish the perpetrators appears as illusory in this paragraph as the duty to prevent his disappearance. In the five operative paragraphs of the Compensatory Damages judgment, however, only monetary damages are mentioned

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against humanity "when committed in armed conflict, whether international or internal in character, and directed against any civilian population." *Ibid.* at 450.

16 Judgment, *Velasquez Rodriguez Case*, *supra* note 9, para. 166. Dugard suggested that human rights violations have now been criminalized due to the blurring of the distinction between international and non-international armed conflicts and the expansion of the definition of international crimes, "particularly when they are committed in a systematic manner or on a large scale." *Dugard*, *ibid.* at 451.

17 Judgment, *Velasquez Rodriguez Case*, *ibid.* para. 134. ("The international protection of human rights should not be confused with criminal justice. States do not appear before the IACtHR as defendants in a criminal action. The objective of IHRL is not to punish those individuals who are guilty of violations, but rather to protect the victims and to provide for the reparation of damages resulting from the acts of the states responsible.").

18 Judgment (Compensatory Damages), *Velasquez Rodriguez Case,* IACtHR, 21 July 1989 (Art. 63(1) ACHR), para. 7.

19 *Ibid.* para. 34.

in each paragraph and the duty to punish is not even mentioned once.[20]

The practice of international human rights bodies reflects the emphasis on the state's duty to ensure rights and the individual's right to a remedy.[21] The obligation to prosecute perpetrators of human rights violations, it has been sugested, is driven by social and political forces rather than by human rights norms and whether or not to prosecute will remain at the discretion of the State.[22]

1. THE IACHR'S ON-SITE VISIT TO ARGENTINA (6-20 SEPTEMBER 1979)

Under pressure from the US Carter Administration, Argentina, under military rule, permitted the IACHR to carry out an on-site visit to examine the human rights situation in the country, characterized by an internal armed conflict between the Argentine military and irregular armed groups. Thousands of persons had been reported "disappeared" to the IACHR, a term of art meaning that they had been detained by security forces and that the authorities subsequently denied holding them in detention without providing an explanation as to their whereabouts.

The military government maintained that the problem of the observance of human rights in Argentina could not be given precedence over the situation caused by terrorism and subversion. The struggle against terrorism was invoked to justify its conduct as regards the violation of human rights. The IACHR was repeatedly asked by civilians and members of the military why it failed to investigate terrorist acts, why it concerned itself exclusively with actions attributable to governments and to what extent the IACHR takes terrorism and subversion into account when assessing the conduct of governments as regards human rights observance.

In its 1980 Report on the Situation of Human Rights in Argentina, the IACHR provided a detailed response to the above concerns raised by the military government, explaining that the OAS member states only granted it competence to examine human

20 *Ibid*. para. 60.
21 Provost, *supra* note 8, at 114.
22 *Ibid.* at 115. State practice in the inter-American system further indicates that approximately 10% of all States ordered to prosecute those responsible for human rights violations, in fact, comply.

rights violations committed by states. It suggested that to examine violations committed by non-state actors would place the irregular armed groups on the same level as the state, which would be unacceptable to states.[23] This position, by which it interpreted its mandate, would become the doctrinal position maintained by the IACHR for many years, despite repeated calls from the OAS member States for it to examine human rights violations committed by irregular armed groups.

The IACHR's rejection of denunciations concerning terrorist acts committed by irregular armed groups was grounded in its interpretation of the "legal norms applicable" to the IACHR, namely, that human rights violations could only be committed by states and not by non-state actors. It also implicitly dismissed any hint of possible competence to apply IHL, which would have required it to examine the acts of states as well as the actions of irregular armed groups during a situation of armed conflict. The existence of many states of emergency in the 1980s was an indication of the number of conflicts in the region.

2. The ICJ's Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons and Subsequent ICJ Decisions

In 1996, the ICJ was requested to render an advisory opinion on the legality of nuclear arms under international law and it issued its Opinion on 8 July 1996. Although without binding effect, the advisory opinions of the ICJ nevertheless carry great weight and moral authority.[24] This advisory opinion enabled the ICJ to undertake its first comprehensive analysis of the law of armed conflict. The ICJ emphasized that Hague and Geneva law and the Additional Protocols of 1977 had become closely interrelated and known as IHL or the

23 Cf., for example, R. Nieto Navia, 'Hay o no hay conflicto armado en Colombia?' *Anuario Colombiano de Derecho Internacional* 139 (2008), at 140. [Colombian President Uribe stated before the IACtHR that he did not recognize members of the guerrilla or paramilitaries as combatants since his government characterized them as terrorists.]

24 Rubin, member of the Inter-American Juridical Committee, noted that "if the ICJ issues a decision, advisory or otherwise, the IACtHR should regard that decision or opinion as being decisive." *See* Explanation of the vote of Seymour J. Rubin, in Advisory Opinion, "*Other Treaties" Subject to the Advisory Jurisdiction of the Court (Art. 64 American Convention on Human Rights*), IACtHR, OC-1/82, 24 September 1982, Series B. Pleadings, Oral Arguments and Documents, No. 1 at 46.

law of armed conflict. The law of armed conflict had so matured and was permeated with an "intrinsically humanitarian character" that the rules enjoyed universal acceptance and were "intransgressible" principles under customary international law.[25]

Although for many years IHRL was perceived as only applicable in peace time, in contrast to IHL which was perceived as the "law of war," in the *Advisory Opinion on Nuclear Weapons,* the ICJ rejected the popular contention that IHRL only applies during peace time and stated that "the protection of the ICCPR does not cease in times of war."[26] The laws of war, according to the ICJ, are the *lex specialis* of armed conflict, and an international human rights body, such as the UN Human Rights Committee, could not decide correctly whether a violation of IHRL had occurred in a situation of internal armed conflict without reference to the relevant norms of IHL.[27]

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25 Advisory Opinion, *Legality of the Threat or Use of Nuclear Weapons*, ICJ, 8 July 1996, paras. 79 and 86 [Nuclear Weapons Advisory Opinion]. ("It is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and 'elementary considerations of humanity' as the Court put it in its Judgment of 9 April 1949 in the *Corfu Channel* case (I. C. J. Reports 1949, p. 22), that The Hague and Geneva Conventions have enjoyed a broad accession.")

26 *Ibid*, para. 25. *See also The Goldstone Report*, *supra* note 7, para. 295 ("It is now widely accepted that human rights treaties continue to apply in situations of armed conflict."); L. Doswald-Beck, 'IHL and the Advisory Opinion of the ICJ on the Legality of the Threat or Use of Nuclear Weapons', 316 *IRRC* 35, at 51 (1997), ("This is a very significant statement, for it means that humanitarian law is to be used to actually interpret a human rights rule."), D. Stephens, 'Human Rights and Armed Conflict: The Advisory Opinion of the ICJ in the Nuclear Weapons Case,' 4 *Yale Hum Rts & Dev L J* 1 (2001); ("[T]he Court effectively settled a 50 year-old theoretical debate concerning the application of the law of armed conflict and IHRL to the battlefield and underscored the humanitarian principles that they both share."); J. Dugard, *supra* note 11, ("In 1948, when the Universal Declaration of Human Rights was adopted, human rights and humanitarian law were treated as separate fields. Since the 1968 Tehran International Conference on Human Rights, the situation has changed dramatically and the two subjects are now considered as different branches of the same discipline.").

27 Nuclear Weapons Advisory Opinion, *supra* note 26, para. 25:

> "The Court observes that the protection of the ICCPR does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. *Thus whether a particular*

The ICJ noted that in deciding whether there has been an "arbitrary" deprivation of the right to life during an armed conflict, where both IHL and IHRL are applicable, IHL is the *lex specialis*. The complete maxim is "*lex specialis derogat legi generali*."

According to the International Law Commission (ILC): the "special law may be used to apply, clarify, update or modify as well as set aside general law"[28] and "the general law will remain valid and applicable and will, in accordance with the principle of harmonization […], continue to give direction for the interpretation and application of the relevant special law and will become fully applicable in situations not provided for by the latter."[29] Using the example provided by the ICJ in the Nuclear Weapons Opinion, the UN Human Rights Committee is mandated to use the "law applicable in armed conflict," namely IHL, to determine whether article 6, the right to life provision of the ICCPR, has been violated. IHL is to be used as an interpretive tool to determine whether there is a violation of an IHRL norm. But if the Committee is invoking the "law applicable" to armed conflict, what does it mean to say that it is not "applying" the law, but only "interpreting" IHL? Is the only difference between application and interpretation the finding of a violation or not?

The ICJ, in 2004, revisited the issue of the relationship between IHL and IHRL and modified its earlier position set forth in the Nuclear Weapons Advisory Opinion.[30] The ICJ noted that it had addressed the issue in the earlier Advisory Opinion and that in the earlier proceedings it had been argued by certain States that "the Covenant was directed to the protection of human rights in peacetime, but that questions relating to unlawful loss of life in hostilities were governed by the law applicable in armed conflict."[31] The ICJ pointed out that

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loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself." (emphasis added)

28 *Ibid.* 2(8) Functions of *lex specialis*.

29 *Ibid*. 2(9) The effect of *lex specialis* on general law.

30 Advisory Opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* ICJ, 9 July 2004.

31 Nuclear Weapons Advisory Opinion, *supra* note 26, para. 24; Advisory Opinion, Wall, *supra* note 31, para. 105.

in the earlier opinion it rejected the argument that IHRL did not apply in situations of armed conflict.[32]

The ICJ reiterated that "the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict" except perhaps through the effect of provisions for derogation.[33] But as regards the relationship between IHL and IHRL, the ICJ stated that there are "three possible situations: some rights may be exclusively matters of IHL; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law."[34] Regrettably, there is no explanation as to why there are now three possible situations rather than simply the last,–"matters of both these branches of international law," nor is there any clarification provided as to which situations of armed conflict are 1) exclusively under the jurisdiction of IHL or 2) exclusively under IHRL.

The ICJ, however, in its analysis in the *Wall* (Advisory Opinion) proceeds to take into consideration *both* branches of law, as it did in the Nuclear Weapons Opinion, when considering the issue of the Israeli barrier in the Occupied Palestinian Territory. Also, significantly, the ICJ states that not only is IHRL applicable in situations of armed conflict but it is applicable even "in respect of acts done by a State in the exercise of its jurisdiction outside its own territory," and here the reference is to the Occupied Palestinian Territory.

Lastly, in a 2005 case, concerning the Democratic Republic of the Congo and Uganda, a case, *not* an Advisory Opinion, the ICJ for the third time dealt with the issue of the relationship between IHL and IHRL.[35] The ICJ recalled that it dealt with the issue of the relationship between IHL and IHRL in the two earlier advisory

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32 *Ibid.* Nuclear Weapons Advisory Opinion, *supra* note 26, para. 25.

33 Advisory Opinion, Wall, *supra* note 31, para. 106.

34 *Ibid.* One shares Iain Scobbie's lament that "One would have wished, having dealt with the issue three times that the Court might have been a little more candid and a bit more specific. Despite the poverty of these rulings, they have nevertheless entrenched the idea that legally there is some normative relationship between these two branches of law." I. Scobbie, 'Principle or Pragmatics? The Relationship between Human Rights Law and the Law of Armed Conflict" 14 *JCSL* 449 (2010), at 452. C. Tomuschat notes that "the language of the Court was much more differentiated, without, however, entirely clarifying the *problématique*." C. Tomuschat, 'Human Rights and IHL', 21 *EJIL* 1 (2010), at 18.

35 Judgment, *Case Concerning Armed Activities on the Territory of the Congo (DRC v. Uganda)*, ICJ, 19 December 2005.

opinions and concluded that both branches of international law, namely IHRL and IHL, would have to be taken into consideration, as well as acts committed by a State in the exercise of its jurisdiction but outside its own territory.[36]

In determining the responsibility of Uganda, the ICJ noted "that the following instruments in the fields of IHL and IHRL are applicable, as relevant, in the present case" to which both Uganda and the DRC are parties and identified the following instruments:

> Fourth Geneva Convention, Articles 27 and 32 as well as Article 53 with regard to obligations of an occupying Power; ICCPR, Articles 6, paragraph 1, and 7; First Protocol Additional to the Geneva Conventions of 12 August 1949, Articles 48, 51, 52, 57, 58 and 75, paragraphs 1 and 2; African Charter on Human and Peoples' Rights, Articles 4 and 5; Convention on the Rights of the Child, Article 38, paragraphs 2 and 3; Optional Protocol to the Convention on the Rights of the Child, Articles 1, 2, 3, paragraph 3, 4, 5 and 6."[37]

What is interesting about this list is the fact that unlike in the two earlier advisory opinions, the ICJ made no reference to "*lex specialis*", which some commentators suggest is an approach that the Court has now abandoned.[38] Further, the ICJ previously indicated that IHRL applies during a situation of armed conflict, but in this case it is demonstrating which human rights treaties apply to these facts and also that they apply simultaneously with the norms of IHL.

What is significant about this judgment is that the ICJ, in discussing the relationship between IHRL and IHL in a situation of armed conflict, decided that both bodies of law are applicable and then proceeded to apply them, despite the fact that specific bodies, named in the instruments themselves or in protocols, exist to supervise compliance with the Convention on the Rights of the Child, the ICCPR, and the African Charter on Human and Peoples' Rights. No specific body exists to supervise compliance with the AP I, although the AP I is generally accepted today as having become customary international law. The ICJ did not decline to exercise

36 *Ibid*. para. 216.
37 *Ibid*. para. 219.
38 *See* Scobbie, *supra* note 35, at 452, citing N. Prud'homme, 'Lex Specialis: Oversimplifying a More Complex and Multifaceted Relationship?' 40 *Israel L R* 355, at 385 (2007).

jurisdiction in order to defer to the UN Human Rights Committee, the international body specifically mandated to supervise compliance with the ICCPR. It determined that in order to resolve the case before it, the appropriate bodies of law to be applied were IHL and IHRL.

3. The IACHR Begins to Reference and then Apply IHL in Individual Cases – 1997

In the Advisory Opinion, "Other Treaties," issued September 24, 1982 Peru requested the IACtHR to specify which treaties, other than the ACHR, would fall within the scope of the IACtHR's advisory jurisdiction.[39] According to the Peruvian request, the narrowest interpretation would lead to the conclusion that only those treaties adopted within the framework or under the auspices of the inter-American system would be deemed to be within the scope of Article 64 of the Convention. By contrast, the broadest interpretation would include any treaty concerning the protection of human rights to which one or more American States is party. The IACtHR opted for the broad interpretation and the IACHR, subsequently, availed itself of this interpretation to support its application of IHL in the *Ribon Avilan* case.[40] The IACtHR's interpretation that treaties other than

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39 Colombia did not respond to the IACtHR's request for comments on the request for an Advisory Opinion on "Other Treaties", *see* Advisory Opinion, OC-1/82 of September 24, 1982, "*Other treaties" supra* note 25, para. 4.

40 *Arturo Ribón Avilán and 10 others ("The Milk")*, (Colombia), Report No. 26/97, Case 11.142, 30 September 1997. *Ibid. See* the IACtHR's dictum in the Advisory Opinion "*Other Treaties*"(*supra* note 25), where the IACtHR referred to the practice of the IACHR as follows:

43. […] The need of the regional system to be complemented by the universal finds expression in the practice of the IACHR and is entirely consistent with the object and purpose of the Convention, the American Declaration and the Statute of the IACHR. The IACHR has properly invoked in some of its reports and resolutions 'other treaties concerning the protection of human rights in the American states,' regardless of their bilateral or multilateral character, or whether they have been adopted within the framework or under the auspices of the inter-American system. […] 44. This practice of the IACHR which is designed to enable it better to discharge the functions assigned to it compels the conclusion that the States themselves have an interest in being able to request an advisory opinion from the IACtHR involving a human rights treaty to which they are parties but which has been adopted outside the framework of the inter-American system. Situations might in fact arise in which the IACHR might interpret one of these treaties in a manner deemed to be erroneous by the States concerned, which would then be able to invoke Article 64 to challenge the IACHR's interpretations.

the ACHR could be applied by the inter-American system opened the door to the IACHR's application, not simply interpretation, of IHL.

By 1997, the IACHR began systematically to apply IHL in its analysis of cases involving situations of armed conflict. The two most important cases were the following.

a) Arturo Ribón Avilán and 10 others ("The Milk"), (Colombia,) Report No. 26/97, Case 11.142, 30 September 1997

According to the petition, on 30 September 1985, a commando of the M-19 guerrilla movement took over a milk truck outside of Bogotá, and began to distribute free milk among the population. While the M-19 members were still distributing the milk, the area was cordoned off by members of the Army, Police and other members of State security in a joint operation that included approximately 500 men. The M-19 members fled in three different directions and were pursued by the security forces, resulting in armed confrontations in three different neighborhoods, resulting in the death of 11 persons. One individual, killed by the police, had nothing to do with the M-19, and was a passenger on a bus. All the deceased were between 19 and 27 years of age. The petitioners alleged violations of the right to life (Article 4 ACHR) and of due process and judicial protection (Articles 8 and 25).

Colombia responded to the facts alleged maintaining that the youths had been "killed in combat" during an armed confrontation.[41] Nonetheless, the expert ballistics exam refuted this account, as it was determined that one of the victims had eight gunshot wounds, five of which were from a distance of less than one meter. Similarly, it was found that the corpse of another victim had eight gunshot wounds, five of which were from a distance of less than one meter.[42]

Colombia in May 1995 acceded to AP II, the law applicable to an internal armed conflict. The IACHR, in this case, for the first time *applied* IHL and held that Colombia was responsible, *inter alia*, for violations of common Article 3 GCs. In its analysis of the applicable law, the IACHR found that Colombia was in a state of

41 *Ribón Avilán, supra* note 41, para. 22.
42 *Ibid.*

internal armed conflict and that Article 3 and AP II were applicable to the case by means of Article 29 ACHR.[43]

The IACHR recognized that Colombia had the right to defend itself against violent actions of irregular armed groups, since the individuals who had seized the milk truck were armed combatants and as such, legitimate military targets under IHL. The information provided by eyewitnesses, however, indicated that the 11 persons who were killed did not die as a result of combat and that the State had not proven its argument that its agents acted legitimately in the context of an armed conflict and in self-defense. In light of the fact that the 11 individuals were *hors de combat* and in the custody of the authorities, they were entitled to humane treatment and to the protections of IHL and IHRL. Consequently, the IACHR held: "The evidence submitted in this case supports the petitioners' claim that the victims were executed extrajudicially by state agents in a *clear violation of common Article 3 of the Geneva Conventions as well as the American Convention*."[44]

The IACHR also found a violation of common Article 3 as regards the youths on the mini-bus and the case of the young woman who surrendered with a revolver in hand and was shot when she let go of the weapon. The IACHR concluded that pursuant to common Article 3 GCs, "the state was under an obligation to provide humane treatment to defenseless individuals, treatment that was not provided to the victims in this case as they were *hors de combat*."[45]

Following the adoption of this report, the State argued that "it did not dispute that members of the police killed the victims named in this case. Nonetheless, the state considered that these deaths did

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43 *Ibid.* para. 132. ("Article 29 of the American Convention establishes that no provision of the Convention may be interpreted as "excluding or limiting the effect" of other international acts of the same nature, or of another convention, to which a State is party. Consequently, the IACHR is competent to directly apply norms of IHL, i.e. the law of war, or to inform its interpretation of the Convention provisions by reference to these norms. This position of the IACHR is confirmed in the IACtHR's advisory opinion on "Other Treaties" (*supra* note 25), where the IACtHR considered the precedents of the IACHR and noted with approval that it had made reference to treaties other than the ACHR, "regardless of their bilateral or multilateral character, or whether they have been adopted within the framework or under the auspices of the inter-American system.")

44 *Ibid*. para. 134. (Emphasis added)

45 *Ibid*. para. 141.

not involve violations of the victims' rights because they occurred as the result of the legitimate use of force by state agents."[46]

The IACHR, in response, defended its conclusion that the killings were "arbitrary" and not acts in legitimate self-defense or in the course of an armed confrontation. The IACHR provided an extensive justification for its invocation and application of IHL. It noted that the State, although it did not specifically invoke IHL, opened the door to, and required reference to humanitarian norms because it claimed specifically that the events occurred during an armed confrontation (not as an extrajudicial execution, as affirmed by the petitioner) in which the police made legitimate use of its authority in order to re-establish public order. In the opinion of the IACHR, the facts required the "application of humanitarian law if they are to be properly analyzed" and the IACHR has the power and the duty to apply the juridical provisions relevant to a case, even when the parties do not expressly invoke them. It is precisely pursuant to humanitarian law that certain actions, which perhaps would be considered violative of human rights if taken outside of an armed confrontation, are considered legitimate in the context of an armed conflict.[47]

The IACHR noted that "humanitarian law may be a defense available to a state to rebut charged violations of human rights during internal hostilities. For example, state agents who kill or wound armed dissidents in accordance with applicable laws and customs of warfare incur no liability under international law."[48] It noted that in cases where the State makes special reference to the armed conflict, "the IACHR should apply humanitarian law to analyze the actions of state agents in order to determine whether they have exceeded the limits of legitimate action."

In response to the State's argument, in its request for reconsideration, that the IACHR is not competent to apply IHL in individual cases, the IACHR contended that "human rights instruments were not designed to regulate situations of armed conflict and do not include norms that govern the means and methods of such conflicts," consequently, it is only through IHL, either as treaty based law or custom that the IACHR can address cases that occur

46 *Ibid*. para. 165.
47 *Ibid.* para. 167.
48 *Ibid.* para. 168.

during armed conflicts.[49] The IACHR suggested that IHRL and IHL "converge" in situations of internal armed conflict.[50]

The IACHR further justified its invocation of IHL in the fact that the Colombian Constitution recognizes the applicability of IHL. Article 25 ACHR obligates States to provide for remedies and to ensure that the authorities will enforce such remedies when they exist. Since Colombian domestic law provided for the recognition of IHL, the IACHR concluded that it was authorized to analyze IHL in cases where a violation of Article 25 had been alleged.[51]

The IACHR concluded that Colombia had violated Articles 4 (right to life), 5 (right to humane treatment), 8 (right to a fair trial), and 25 (on judicial protection), in conjunction with Article 1(1) ACHR, for the extrajudicial execution of these eleven individuals. From the point of view of the application of international law, however, the case was more significant, because it concluded that Colombia had violated not only IHRL (i.e. the ACHR) but also IHL: "*The extrajudicial execution of the 11 victims constituted a flagrant violation of common Article 3 of the Geneva Conventions* in that state agents were absolutely required to treat humanely all of the persons within their power due to injury, surrender or detention, whether or not they had previously participated in hostilities."[52]

In comparison, at that time, none of the UN human rights treaty bodies nor the European Commission or Court had ever applied IHL in determining whether there was a violation of IHRL during a situation of armed conflict, despite the ICJ's guidance in the Advisory Opinion on Nuclear Weapons.[53]

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49 *Ibid*. paras. 171-173.

50 *Ibid*. para. 174. ("174. It is precisely in situations of internal armed conflict that human rights and humanitarian law converge most precisely and reinforce one another. […] Both common Article 3 of the Geneva Conventions and the American Convention guarantee these rights and prohibit extrajudicial execution, and the IACHR should apply both bodies of law.")

51 *Ibid*., paras. 177-8.

52 *Ribón Avilán, supra* note 41, para. 202. (emphasis added)

53 *See* C. Byron, 'A Blurring of the Boundaries: The Application of IHL by Human Rights Bodies,' 47 *Va. J. Int'l Law* 839 (2007), who notes at 849, ("When dealing with individual applications, the HRC has never referred to or applied IHL"); and also at 851, ("With respect to the regional human rights bodies, the European Court of Human Rights on the whole has resolutely avoided applying IHL, even when dealing with cases which have arisen out of armed conflict or occupation."); A. Reidy, 'The Approach of the European Commission and Court of Human Rights to IHL,' 324 *IRRC* 513 (1998) who notes at 519, ("Certainly neither [European] Convention

One might ask, however, whether it was worth the trouble to look outside of IHRL to IHL, when, as the IACHR itself stated: "[…] *the provisions of common Article 3 of the Geneva Conventions are in essence also found in human rights treaties*, including the American Convention. Therefore, in practice *the application of common Article 3 to a state party to the American Convention does not impose additional burdens on the State*."[54] If the addition of IHL does not impose additional burdens on the State, is it worth invoking?

The finding of a violation of common Article 3, the IACHR explained, was not to increase the number of violations found, but was useful instead as the *lex specialis*, the appropriate analytical tool to determine whether the killings were a legitimate consequence of military operations" or not, and consequently, to determine whether the killing was "arbitrary" and thus a violation of human rights.[55]

The human rights supervisory body should invoke IHL because it is the *lex specialis*, the appropriate body of law to be applied in situations of armed conflict, accessible to the supervisory body as part of general international law because the Geneva Conventions are universally ratified or as customary international law.

b) Report 55/97, Case 11.137, Juan Carlos Abella et al, (Argentina), 18 November 1997[56]

On 23-24 January 1989, according to the petition, 42 armed persons launched an attack on the La Tablada military barracks in Buenos Aires province, to prevent what they believed was an imminent *coup d'état*. Petitioners further alleged that they were justified in launching the attack since Article 21 of the Argentine Constitution

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body has engaged in an extensive examination of the characterization of any public emergency in terms of humanitarian law (internal disturbances and tensions versus internal armed conflict) as was carried out recently by the IACHR in the *Abella* case."); Meron, on the other hand, refers to the many UN Special Rapporteurs, who have referred to IHL while examining issues of IHRL. *See* T. Meron, 'The Humanization of Humanitarian Law,' 94 *AJIL* 239 (2000) at 269. Meron notes that these references to IHL by human rights Rapporteurs have been challenged by Turkey and others. *But see also* D. O'Donnell, 'Trends in the Application of IHL by United Nations Human Rights Mechanisms,' 324 *IRRC* 481 (1998) on the inconsistent application of IHL by UN Rapporteurs.

54 *Ribón Avilán*, *supra* note 41, para. 172. (Emphasis added).

55 *Ibid*. para. 173.

56 *Abella et al*. (Argentina), Report 55/97, Case No. 11.137, 18 November 1997, para. 148. IACHR, 1997 Annual Report.

requires citizens to take up arms to defend the Constitution. The attackers were surrounded by 3,500 police who cordoned off the area and fired on them indiscriminately. Three hours after the attack, the attackers signaled their intention to surrender by waving white flags. The combat continued, however, for approximately 30 hours, resulting in the deaths of 29 of the attackers and several State agents.[57]

The petitioners, in contrast to the earlier Colombian case, specifically charged the State with violations of IHL during the recapture of the military barracks. The IACHR first sought to determine whether the situation was one of an internal armed conflict, in which case IHL would apply. The determination was relatively straightforward given that the petitioners and the State both agreed that there had been an "armed confrontation."[58]

The IACHR determined that "a proper characterization of the events at the La Tablada military base on 23-24 January 1989" was necessary to determine the sources of applicable law, given that "the legal rules governing an internal armed conflict vary significantly from those governing situations of internal disturbances or tensions."[59]

The IACHR determined that the situation was that of an internal armed conflict rather than simply an isolated and sporadic act of violence since it involved a military operation on the part of the armed forces and the existence of an organized armed group that was capable of and actually did engage in combat.[60] The IACHR concluded that "the attackers involved carefully planned, coordinated

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57 *Ibid*. According to the complaint 19 persons were killed, six were "disappeared" and four were unlawfully executed. The remaining 20 were tried and sentenced to prison terms.

58 *Abella et al., supra* note 58, at para. 147. ("147. In their complaint, petitioners invoke various rules of IHL, i.e. the law of armed conflict, in support of their allegations that State agents used excessive force and illegal means in their efforts to recapture the La Tablada military base. For its part, the Argentine State, while rejecting the applicability of interstate armed conflict rules to the events in question, nonetheless have in their submissions to the IACHR characterized the decision to retake the La Tablada base by force as a "military operation". The State also has cited the use of arms by the attackers to justify their prosecution for the crime of rebellion as defined in Law 23.077. Both the Argentine State and petitioners are in agreement that on the 23 and 24 of January 1989 an armed confrontation took place at the La Tablada base between attackers and Argentine armed forces for approximately 30 hours.").

59 *Ibid*. para. 148.

60 *Ibid*. paras. 149-152.

and executed an armed attack, i.e., a military operation, against a quintessential military objective- a military base" and that despite its brief duration, the violent clash between the attackers and the armed forces "triggered the application of common Article 3, as well as other rules relevant to the conduct of internal hostilities."[61]

The IACHR then proceeded to defend its competence "*to apply directly* rules of IHL *or to inform* its interpretations of relevant provisions of the American Convention by reference to these rules." This cautious approach, defending its competence to apply IHL or to use it as an interpretive tool for better applying IHRL, reveals a step backwards from the IACHR's confidence in directly applying IHL in the earlier cases.

The IACHR referred to a "common nucleus of non-derogable rights and a common purpose of protecting human life and dignity" found in both IHL and IHRL, and suggested, as it had in the earlier Colombian case, that the two branches of law "converge" and reinforce each other in situations of internal armed conflict.[62] The IACHR maintained that its competence to apply humanitarian law rules is supported by the text of the ACHR, by its own case law, and by the jurisprudence of the IACtHR. As States parties to the Geneva Conventions, the IACHR affirmed that O.A.S. member states are obliged as a matter of customary international law to observe these treaties in good faith and to bring their domestic law into compliance with these instruments.[63] The IACHR is required to look to and apply definition standards and relevant rules of IHL as sources of authoritative guidance in its resolution of claims alleging violations of the ACHR.[64] Failure to do so, the IACHR maintained, would mean that it "would have to decline to exercise its jurisdiction in many cases involving indiscriminate attacks by State agents resulting in a considerable number of civilian casualties."[65]

The IACHR looked to Articles 25, 29(b) and 27 ACHR to justify its competence to apply IHL. Article 25 provides the victim with a simple and effective remedy. The IACHR stated when the "claimed violation is not redressed on the domestic level and the source of the right is a guarantee set forth in the Geneva Conventions, which the

61 *Ibid*. paras. 155-156.
62 *Ibid*. para. 158-160.
63 *Ibid*. para. 162.
64 *Ibid.* para. 161.
65 *Ibid.*

state party concerned has made operative as domestic law" then the victim can file a complaint with the IACHR for failure to enforce the domestic remedy. As regards Article 29(b), which provides that "no provision of the American Convention shall be interpreted as restricting the enforcement or exercise of any right or freedom" recognized by a State party to another treaty, if that higher standard is a rule of IHL then the IACHR should apply it. And lastly, Article 27 prohibits derogations that are inconsistent with a State's other obligations under international law. Consequently, when reviewing the legality of derogation measures by virtue of the existence of an armed conflict, the IACHR should resolve the question by reference to IHL as well as with reference to the ACHR.[66]

Having established that it was competent to apply IHL, the IACHR reviewed the petitioners' claims to determine whether IHL was applicable. The IACHR noted that the petitioners claimed that their cause was "just" and lawful and that the State, by virtue of its "excessive and unlawful use of force in retaking the military base" violated IHL reflected certain fundamental misconceptions concerning the nature of IHL." The IACHR suggested that it was being asked "to assess and approve of the motives" for which the petitioners had taken up arms. The IACHR, reiterated its doctrine, expressed in the 1980 Argentina Report, to the effect that its jurisdiction does not extend to the conduct of private actors, which is not imputable to the State. The IACHR's role is not that of a "fourth instance" serving as an appellate court to examine alleged errors in the application or interpretation of national law; it is only mandated to review alleged violations of the ACHR.

As regards IHL, the IACHR indicated that the petitioners had misperceived the legal consequences of their attack on the La Tablada base. Whereas IHL protects persons who are captured or *hors de combat*, the petitioners, civilians, who assumed the role of combatants by directly taking part in the attack, became legitimate military targets. As such, they lost the benefits of the protections provided to civilians, although IHL continued to apply to those living in the vicinity of the base at the time of the hostilities. With regard to the claim that the armed forces used "excessive force" against them, the IACHR found that the fact "that the Argentine military had superior numbers and fire power and brought them to bear against

66 *Ibid*. paras. 163-170.

the attackers cannot be regarded in and of itself as a violation of any rule of IHL."[67] Consequently, the IACHR concluded that Argentina's actions in retaking the base did not violate the ACHR or IHL.[68]

Following the surrender of the attackers, however, the IACHR stated that the petitioners were entitled to the guarantees of humane treatment set forth in common Article 3 GCs and Article 5 ACHR. The petitioners alleged that the State carried out the forced disappearances of six persons and the extrajudicial executions of four others, The IACHR reiterated that the State, under Article 1(1) ACHR and under common Article 3 had a duty to treat the persons *hors de combat* humanely in all circumstances and to ensure their safety.[69]

Despite the justification of the IACHR's competence to apply IHL, the IACHR concluded that Argentina was responsible for violations of IHRL, namely, the right to life (Article 4), the right to physical integrity (Article 5), the right to appeal a conviction to a higher court (Article 8(2)(h)) and the right to a simple and effective remedy (Article 25(1)), all in relation to Article 1(1) ACHR. Despite the extensive effort by which the IACHR declared itself competent to apply IHL directly,[70] in fact, it found no violation of IHL in this case.

Zegveld was one of the first commentators to recognize the importance of the IACHR's defense of its invocation of IHL in the *Tablada* case and suggested that it might encourage other petitioners to allege violations of IHL and "may encourage other human rights treaty bodies, such as the United Nations Human Rights Committee […] and the European Commission and Court" to extend their supervisory functions to IHL.[71]

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67 *Ibid.* paras. 172-179.
68 *Ibid*. para. 188.
69 *Ibid*. para. 195.
70 See L. Zegveld, 'The IACHR and IHL: A Comment on the Tablada Case', 324 *IRRC* 505 (1998) at 508-510. Zegveld reviews five arguments presented by the IACHR for directly invoking IHL and rejects them all; regrettably she omits the most important one, which is the ICJ's decision on the relationship between IHL and IHRL to the effect that IHL is the *lex specialis*. For a similar view, *see* L. Moir, 'Law and the Inter-American Human Rights System', 25 *Hum Rts Q* 182 (2003). *But compare* F. Martin, 'Application du droit international humanitaire par la Cour interaméricaine des droits de l'homme', 83 *IRRC* 1037 (2001), at 1065. ("Pour l'heure, la Cour interaméricaine nous rappelle opportunément cette faiblesse d'un droit international en quête permanente de légitimation, en signifiant qu'elle ne peut, en l'absence de volonté clairement exprimée de la part des États, se substituer à eux pour imposer l'application du droit international humanitaire.")
71 *Ibid*. at 506.

4. The IACtHR Rejects the IACHR's Application of International Humanitarian Law - Judgment, (Preliminary Objections), *Las Palmeras* v. *Colombia*, Case No.11.237, 4 February 2000[72]

In *Las Palmeras*, as in several that preceded it, the IACHR found violations of both the ACHR and common Article 3 GCs and requested the IACtHR to do the same.[73] The petitioners alleged that on January 23, 1991, the Departmental Commander of the Putumayo Police Force had ordered members of the National Police Force to carry out an armed operation in Las Palmeras in the Department of Putumayo. Members of the Armed Forces provided support to the National Police Force. The operation resulted in the death of seven persons. The IACHR requested the IACtHR to "[C]onclude and declare that the state of Colombia had violated the right to life, embodied in Article 4 of the Convention, and *Article 3, common to all the 1949 Geneva Conventions,"* to the detriment of six, possibly seven persons.[74]

Colombia had argued, as it had in previous cases before the IACHR, that neither the IACHR nor the IACtHR was competent *to apply* IHL or any other treaty other than the ACHR on Human Rights. The IACHR stated that, in the instant case, it had first determined whether Article 3, GCs, had been violated and, once it had confirmed this, it then determined whether Article 4 ACHR had been violated.

The State in refutation of these arguments emphasized the importance of the principle of consent in international law. Without the consent of the State, Colombia argued, the IACtHR could not apply the Geneva Conventions. Lastly, Colombia established that there was a difference between "interpretation" and "application" of IHL. It suggested that the IACtHR may interpret the Geneva Conventions and other international treaties, but that it "may only apply the American Convention."[75] The IACHR reiterated that "the alleged violations of the right to life committed in a context of internal armed conflict may not always be resolved by the IACHR, solely by invoking Article 4 of the American Convention."[76]

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72 Judgment (Preliminary Objections), *Las Palmeras* v. *Colombia*, IACtHR, 4 February 2000.
73 *Ibid.* para. 12.
74 *Ibid.* (Emphasis added).
75 *Ibid.* para. 30.
76 *Ibid*. para. 31.

The IACtHR admitted Colombia's preliminary objection with regard to its competence to apply IHL, stating that the ACHR "has only given the IACtHR competence to determine whether the acts or the norms of the states are compatible with the Convention itself, and not with the 1949 Geneva Conventions." The IACtHR also accepted Colombia's preliminary objection to the effect that the IACHR also was not competent to apply IHL and other international treaties.[77] The State argued that the ACHR limits the competence *ratione materiae* of the IACHR to the rights embodied in that Convention and "does not extend it to those embodied in any other convention."[78] By accepting Colombia's preliminary objection, the IACtHR effectively declared that the IACHR is not competent to apply any other convention other than the ACHR on Human Rights, except in the case of treaties that are "excepted from this rule; these include, for example, the Inter-American Convention on Forced Disappearance of Persons."[79]

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77 *Ibid*. para. 34.

78 *Ibid.* In the most recent (1 August 2013) version of the IACHR's Rules of Procedure, available on the IACHR's website, www.cidh.oas.org., the IACHR, under Article 23, considers itself competent to consider petitions filed under the 1) American Declaration of the Rights and Duties of Man, 2) the American Convention on Human Rights, 3) the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador," 4) the Protocol to the American Convention on Human Rights to Abolish the Death Penalty, 5) the Inter-American Convention to Prevent and Punish Torture, 6) the Inter-American Convention on Forced Disappearance of Persons and 7) the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, not simply the American Declaration and the American Convention.

79 In the *Paniagua Morales et al. Case,* Judgment, 8 March 1998, para. 136 and the *Villagrán Morales et al. Case,* Judgment, 12 November 1999, para. 252, the IACtHR declared that the Inter-American Convention to Prevent and Punish Torture had been violated. Although Articles XIII and XIV of the Forced Disappearances Convention specifically authorize the IACHR to process petitions and requests for provisional measures presented to it under the Convention, the Inter-American Torture Convention confers no such competence on the IACHR or the IACtHR. In fact, Article 17 of the Torture Convention mandates the IACHR "to analyze the existing situation in the member states of the OAS in regard to the prevention and elimination of torture" in its annual report. Despite the fact that the Torture Convention entered into force on 28 February 1987, and despite this explicit mandate, the IACHR has never analyzed the situation of torture in the member States in its annual reports and both the IACHR and the IACtHR have declared violations of the Torture Convention in individual cases despite the absence of an explicit authorization in the Convention to do so. The IACtHR nonetheless

This reasoning is not dispositive of the issue since the provisions of the Geneva Conventions do not authorize any supervisory body to monitor compliance with IHL. Following the IACtHR's reasoning that the legal instrument must confer, expressly, in the text of the treaty, competence on the IACHR for it to apply IHL would render IHL unenforceable. IHL is part of general international law and Article 27 of the American Convention specifies that "in time of war" a state may take measures derogating from its obligations under the Convention "provided that such measures are not inconsistent with its other obligations under international law."

Despite the IACHR's invocation of the ICJ's Nuclear Weapons Opinion, the IACtHR fails to engage in any analysis of the relevance of the ICJ Opinion for the jurisprudence of the inter-American system – it simply ignores the ICJ decision.

The United Nations Fact-Finding Mission on the Gaza Conflict, established by the UN Human Rights Council in September 2009, was authorized to apply IHL and IHRL to the situation in Gaza. The UN Fact-Finding Mission was charged with finding violations of IHL and IHRL, despite the fact that the ICCPR in the text of the treaty has created a specific body (the UN Human Rights Committee), which is mandated to supervise compliance with the norms of the ICCPR with respect to the states parties. The Fact-Finding Mission was specifically authorized to apply IHRL and IHL to the situation of the armed conflict in Gaza and it proceeded to apply both bodies of law simultaneously to the facts, as the ICJ had in the *DRC* v. *Uganda* judgment.[80]

III. CONCLUSION

It is the thesis of this article that IHL, through universal ratification and custom, is part of general international law and is to be applied in situations of armed conflict. The ICJ has defined the relationship between IHRL and IHL in situations of armed conflict to the effect that IHL, as the applicable *lex specialis*, and IHRL, both branches of international law, have to be taken into consideration and applied simultaneously.

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defended its competence to apply the Inter-American Torture Convention in *Villagran Morales et al.*, paras. 247-252.

80 See, The Goldstone Report, *supra* note 7 and ICJ Judgment, *DRC v. Uganda*, *supra* note 36.

Following the IACtHR's judgment in the *Las Palmeras* case, the IACHR ceased *to apply* IHL.[81] But as suggested above, other than by a semantic sleight of hand, how can an international human rights body determine that there is a violation of IHL without *applying* IHL?

Judge Cançado Trindade, in his Dissenting Opinion in the *Sisters Serrano Cruz* case, suggested that IHL and the non-derogable rights of international human rights treaties "belong to the domain of *jus cogens*" and consequently the state's suggestion that the IACtHR had no jurisdiction *ratione materiae* had to be rejected.[82] The attempt to "disassociate the provisions" of human rights law from humanitarian law, he claimed, produces disastrous results, as in the case of the US claiming that the IACHR has no jurisdiction over the situation of the Guantanamo detainees because only IHL and not human rights law is applicable. In Judge Cançado Trindade's Separate Opinion in the *Plan de Sanchez Massacre* judgment, he boldly suggests that "instead of trying to identify provisions of the 1949 Geneva Conventions or the 1977 Additional Protocols that could be considered to express general principles, it would be preferable to consider these conventions and other humanitarian law treaties as a whole, as constituting the expression – and the development – of those general principles, applicable under any circumstances, so as to better ensure the protection of the victims."[83]

The practice of the UN Fact-Finding Mission on the Gaza Conflict under the mandate "to investigate all violations of IHRL and IHL that might have been committed at any time in the context of the military operations that were conducted in Gaza" could serve as a model for regional human rights bodies, such as the inter-

81 *Cf.* For example, in the case of *Serrano Cruz Sisters*, involving the forced disappearances of two young sisters by the military during the situation of internal armed conflict in El Salvador, the State argued that IHL was applicable but that the IACtHR in *Las Palmeras* was declared incompetent to apply IHL. The IACHR responded that: "It had not requested the IACtHR to apply IHL, but to apply the American Convention in order to establish the international responsibility of El Salvador. […] Consequently, the IACHR will refrain from referring to the arguments of the State on the applicability of IHL." Judgment, (Preliminary Objections), *Serrano Cruz Sisters* v. *El Salvador*, IACtHR, 23 November 2004, para. 109(b).

82 Preliminary Objections, *Serrano Cruz Sisters*, *supra* note 82, Dissenting Opinion of Judge Cançado Trindade.

83 *Plan de Sanchez Massacre* v. *Guatemala*, IACtHR, 29 April 2004, Separate Opinion of Judge Cançado Trindade, para. 18.

American system. The Fact-Finding Commission applied IHRL and IHL, finding violations of both bodies of law as the IACHR did when it applied both bodies of law in the *Ribon Avilan* case[84]. Recognizing the convergence of these two systems of law in situations of armed conflict and declaring violations of each, not simply using one system "to interpret" the other, follows the jurisprudence set forth by the ICJ in the *DRC* v. *Uganda* judgment that *both branches of international law, namely IHRL and IHL […] have to be taken into consideration*.

A longer version of this article appeared in 2 Journal of International Humanitarian Legal Studies 3-52 (2011).

84 *See* The Goldstone Report, *supra* note 7, cf. *Arturo Ribón Avilán* case, *supra* note 41.

MEXICO, A NON-INTERNATIONAL ARMED CONFLICT: DIFFICULTIES AND POSSIBLE ADVANTAGES OF THE CHARACTERIZATION, FOR THE EFFECTIVE PROTECTION OF THE VULNERABLE GROUPS

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I. INTRODUCTION

In 2006, Mexico was living the most peaceful time in its history. The homicide rate was below the world average[1]. Now, it is worldwide known that there is an internal violence situation in Mexico due to the so-called "war on drugs" initiated in 2006 by the ex President of Mexico Felipe Calderon. In an effort to fight the criminal organizations "drug cartels", Felipe Calderon in its executive power, authorized a military intervention in the country to help the Federal and local police in their fight against the drug cartels. At the end of its mandate, Felipe's Calderon government was called "The Presidency of Death,[2]" because as a fast reaction to the militarization in Mexico, the violence in the country increased, leaving over thousands of death people, disappearances and internal displacement, especially in rural areas.

The Mexican population has been caught up in the middle of this violence, being victim either of the drug cartels, de army or the police. The most vulnerable groups are those which have been previously marginalized by the government. Poor communities, indigenous people, immigrants and women, are often the principal targets of drug cartels´ violence or recruitment; they are ultimately

1 * Lucia Medina Suarez del Real, *"El Sexenio de la Muerte"*, La Jornada Zacatecas (Nov. 7. 2012), http://www.ljz.mx/secciones/opinion/67-opinion/32318-el-sexenio-de-la-muerte.html.

2 Several articles called it *"El sexenio de la muerte"* o *"El sexenio fúnebre"*, due to the amount of deaths during his mandate.

government´s invisible victims, by the abuse of the armed forces or the discrimination from governmental authorities.

Currently, the law applicable to the situation seems to not be enough to guarantee protection to the population against drug cartels and the government armed forces. Within five years, the so-called "war on drugs" left 101,199 murder people and 344,230 indirect victims (family members)[3]. The intensity of violence lived in the country can be comparable to other armed conflicts such as the Balkans (1992-1995) with 100,000 violent deaths and Iraq's war with 114,000 deaths.

Then as the violence situation keeps increasing, violations to human rights do it as well. A violent chaos keeps expanding all over the country. The questions this paper intends to answer are, whether or not the violent situation in Mexico constitutes a non-international armed conflict for the purposes of Common Article 3. Would the application of International Humanitarian Law provide better protection in this violent situation, to the people living within the Mexican territory, especially to those segments who have always been marginalized?

In order to answer these questions it is necessary to first determine if the war on drugs in Mexico has reached the threshold to be considered a non-international armed conflict (NIAC) for the purposes of Common Article 3. In order to do so, this paper would study whether the organization of the drug cartels meet the requirements to be considered as a party in the conflict, and it would analyze if the intensity of the violence in Mexico has reached the minimum level required for the characterization of non-international armed conflict under Common article 3 of the Geneva Conventions. Since the threshold to establish a non-international armed conflict for the purposes of Additional Protocol II is stricter, this paper would not go into its analysis.

This paper would provide a general overview of some of the differences and similarities with the Colombian armed conflict and

3 Raul Flores, *ONG da cifra de muertos en el sexenio de Calderon; suman mas de 100 mil* [NGO provides the number of deaths in Calderon's period; there are more tan 100 thousand], El Excelsior (Nov. 27, 2012), http://www.excelsior.com.mx/2012/11/27/nacional/871927. Taken from the report *"Indicadores de Victimas Visibles e Invisibles de Homicidio"*[Indicators visible and invisible of homicide], Centro de Análisis de Políticas Públicas México Evalúa, http://www.mexicoevalua.org/wp-content/uploads/2013/02/IVVI-H-20126.pdf.

the Mexican situation of violence. It would talk about some possible problems and political fears that stop the governments to recognize the application of international humanitarian law. Finally, it would intend to demonstrate that triggering the application of International Humanitarian Law under Common article 3 in Mexico would provide a greater protection to the people who are not taking part in the hostilities.

Currently, the cartels are committing violations to Mexican criminal law. The so-called "war on drugs" has turned extremely violent and cruel. The way the drug cartels kidnap, torture and murder people is inhumane. Therefore, there is an extreme necessity for the application of the basic humanitarian rules in the armed conflict. As a result, based on the analysis and research of this paper. It will be proved that even thought there are so many challenges to characterize the Mexican conflict; it could be characterized as a non-international armed conflict for the purpose of Common article 3 of the Geneva Conventions. This characterization is necessary to provide a better protection to civilians, by enforcing domestic law and human rights law. It will demonstrate that the application of international humanitarian law is necessary to provide humane treatment to the conflict, as much as to extend the protections for the victims under the international jurisdiction umbrella, providing a more effective protection in particular to vulnerable groups.

II. MEXICO'S WAR ON DRUGS: A NON-INTERNATIONAL ARMED CONFLICT UNDER COMMON ARTICLE 3?

The purpose of international humanitarian law (IHL) is to limit the effects of an armed conflict by regulating the conduct of the parties in an armed conflict. It pursues the protection of persons who are not, or are no longer participating in hostilities, and restricts the means and methods of warfare[4]. It may be recalled that International Humanitarian Law has two principal branches, namely: 1) the Hague Law, which establishes the rights and obligations of belligerents in the conduct of military operations, and limits the means of harming

4 ICRC, *The ICRC Advisory services on international humanitarian law*, ICRC (Oct. 29,2010), http://www.icrc.org/eng/what-we-do/building-respect-ihl/advisory-service/overview-advisory-services.htm.

the enemy[5]; and 2) the four Geneva Conventions of 1949, which are designed to protect people who is not, or it is not longer taking part of hostilities[6]. The four Geneva Conventions of 1949 establish the legal framework designated to protect people civilians. International humanitarian law is applicable whenever there is an existence of an armed conflict. So, in order to apply international humanitarian law to the situation in Mexico, the question to be addressed is whether the situation of violence in Mexico would constitute a non-international armed conflict.

To begin with, a situation of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature do not constitute an armed conflict[7]. The so-called "war on drugs" in Mexico, has turned to be extremely violent to the point that it has even been considered the deadliest conflict in the world in recent years,[8] and it continues growing. Therefore, it could be said that the acts of violence in Mexico are not sporadic or isolated. Then, what acts of violence constitute an armed conflict? Jurisprudence has established that "an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State[9]".

The ICRC taking in consideration the international humanitarian law treaties, the jurisprudence, and the doctrine, has proposed the following definition of what constitutes a NIAC: "non-international armed conflicts are protracted armed confrontation occurring between governmental armed forces and the forces of one or more armed groups, or between such groups arising in the territory of a State. The armed confrontation must reach a minimum level

5 ICRC, *Answers to your questions* 4, *available at* http://www.icrc.org/eng/assets/files/other/icrc_002_0703.pdf.

6 Id.

7 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 1.2, June 8, 1977.

8 Mark Karlin, *Fueled by War on Drugs, Mexican Death Toll Could Exceed 120,000 As Calderon Ends Six-Year Reign*, Truthout (Nov.28, 2012), http://truth-out.org/news/item/13001-calderon-reign-ends-with-six-year-mexican-death-toll-near-120000%20.

9 Prosecutor v. Tadic, Case No. IT-94-1-T, Judgment, ¶ 561(Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997)

of intensity and the parties involved in the conflict mush show a minimum of organization[10]."

Therefore there are two criteria deemed indispensable to classify a situation of violence as a non-international armed conflict for the purposes of Common article 3[11]. These elements are important, as they help to differentiate a NIAC from other acts of violence that are not subject to international humanitarian law[12]. Then the parties involved must demonstrate a certain level of organization[13], and the violence must reach a certain level of intensity[14].

According to the jurisprudence, the organization of the parties and the intensity of the conflict are factual matters that have to be decided on a case-by-case basis in light of the particular evidence[15]. Then, in order to determine the existence of a non-international armed conflict in Mexico, it is necessary to study the factual matters related to the act of violence in Mexico, to be able to determine whether the drug cartels have demonstrated to have certain level of organization in order to be considered a party in a non-international armed conflict; and if the level of violence originated by the armed confrontations between the drug cartels, between each other and between the drug cartels and the government have reach the intensity necessary to be considered an armed conflict.

1. Can the Drug Cartels Be Considered as a Party to a Non-International Armed Conflict?

When Common Article 3 refers to "each Party to the conflict", it implies the precondition that for its application is necessary the existence of at least two parties in the conflict[16]. In one hand, we have the State as a party, in which is implied that the army is considered the governmental armed forces. On the other hand it has to be determined

10 ICRC, *How is the Term "Armed Conflict" Defined in International Humanitarian Law?* 5, Opinion Paper (March 2008).
11 ICRC, *International Humanitarian Law and the challenges of contemporary armed conflicts 8*, 31/C/11/5.1.2 (Nov 28, 2011).
12 Tadic, *Supra* note 9 at ¶ 562.
13 Id. at 8
14 Id. Prosecutor v. Tadic, Case No. IT-94-1-T, Judgment, ¶ 561(Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997).
15 Prosecutor v. Limaj, Case No. IT-03-66-T, Judgment, ¶ 90 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005).
16 ICRC, *Supra note* 11 at 8.

whether a non-state armed group, in this case the drug cartels, could be consider as a party for the purposes of Common article 3.[17] The degree of organization of the armed group required for the purpose of Common Article 3 has not been specifically defined,[18] as only some degree of organization by the parties would be enough to establish the existence of an armed conflict[19]. However, the jurisprudence has elaborated certain elements of a minimal level of organization[20]. It is important to mention that the degree of organization required to establish a NIAC for the application of Common Article 3, does not need to be the at the level of organization required by Additional Protocol II[21].

If an armed group has some hierarchical structure and its leadership has the capacity to exert authority over its members, then it can be considered organized[22]. In consequence the leadership of the group must as minimum have the ability to exercise some control over its members so the obligations of Common Article 3 may be implemented[23]. Additionally, an interpretation to the organization criteria determined that the parties have to be sufficiently organized to confront each other with military means[24].

Then, to define the existence of a NIAC in Mexico is important to establish the existence of organization within the drug cartels. In Mexico two drug cartels that have shown enough organization, in which the criteria for the application of Common Article 3 could be established: the Sinaloa Cartel (Cartel de Sinaloa), and the Zetas (Los Zetas). These two cartels control over the 80% of the Mexican territory.[25]

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17 Id.

18 Prosecutor v. Ljube Boskoski, Case No. IT- 04- 82- T, Public Judgment, ¶ 194 (Int'l Crim. Trib. for the Former Yugoslavia Jul. 10, 2008).

19 Prosecutor v. Limaj, Case No. IT-03-66-T, Judgment, ¶ 89 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005).

20 Id. at ¶194.

21 Id. at ¶196.

22 Id. at ¶195.

23 Id. at ¶ 196

24 Id. at ¶ 198.

25 Alberto Najar, *El nuevo mapa del narcotrafico en M*éxico [the new map of the drug traffic in Mexico], bbc uk (10 October 2012), http://www.bbc.co.uk/mundo/noticias/2012/10/121010_mexico_mapa_guerra_narco_carteles_jp.shtml

The Sinaloa Cartel it is considered the largest and most powerful drug cartel in the Western Hemisphere[26]. This organization is lead by Joaquin "El Chapo" Guzman[27]. This drug cartel is also known as "the Sinaloa Federation" or "the Pacific Cartel". The way this cartel is organized is through a horizontal leadership that looks like a board of directors[28]. The structure of this cartel is based in family alliances and connections; therefore their code is based on family trust, and the discipline they exert over its member is through punishment, and not usually by assassination[29] as in other cartels.

In addition, "El Chapo" has his own army of killers[30], which is used to constantly fight other cartels, and the military. The organization of this cartel has shown to have a leader, and armed wings called "los Negros" and "los Pelones" which were created to fight other drug cartels[31]. Additionally, The Sinaloa Cartel is known by using advanced weaponry[32], which use requires military training. Their capacity and organization to confront military armed forces has shown that they are the most powerful drug cartel in Mexico.

The Zetas cartel has a military organization similar to any global business organization that can respond to any changing situation[33]. This cartel is a sophisticated armed group with a pyramidal hierarchical structure, which is common within military organizations, and horizontal concentric circles also constitute it[34]. At the top there is a small command structure that provides strategic

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26 *See* Sinaloa Cartel Profile, http://www.insightcrime.org/groups-mexico/sinaloa-cartel

27 Who was captured on 22 February 2014.

28 Jamie Dettmer, *Los Zetas no son tan Fuertes como el Cartel de Sinaloa de El Chapo* [The Zetas are not as strongas the Chapo's Sinaloa Cartel], Agora Revista, March 20, 2012, http://agorarevista.com/es/articles/rmim/features/online/2012/03/20/sinaloa-versus-zetas.

29 Id.

30 Id.

31 UCDP Conflict Encyclopedia, UPPSALA Universitet, Mexico, Non-state conflict information, Sinaloa Cartel, http://www.ucdp.uu.se/gpdatabase/gpcountry.php?id=107#

32 Id.

33 Manwaring, Max G, *New dynamic in the western hemisphere security environment: the Mexican Zetas and other private armies* 19. Strategic Studies Institute (Sept. 2009), http://www.strategicstudiesinstitute.army.mil/pubs/display.cfm?pubID=940

34 Id. at 19-20.

and operational level guidance and support to its network[35]. Then in the second circle of leadership they have a group to manage the guidance received from above in the areas of intelligence, operational planning, financial support, recruitment and training; They also manage and distribute "project teams[36]" to the other circles. The members of the third circle are involved in lower level activities of all kinds[37]. The fourth circle is integrated by series of groups that are constituted by aspirants or specialists, with specific subgroups: the "Hawks", who watch over the distribution zones; the "windows", who warn unexpected dangers in the operational area; the "Cunning Ones", who are in charge of acquiring arms, ammunitions and military equipment; the "Leopards", who are attached to the intelligence sections and extract information from people; and "Direccion", which are communications experts who intercept phone calls and identified suspicious persons[38].

The organizational structure of the Zetas has indicated that is more than an ordinary gang, this militarily structure has allowed them to convince people in the area that they are the real power, and not the government. Their organization and power is such, that they exert authority within its area, even if they are not physically present. Additionally, they have shown to have the organizational capacity and the weaponry sufficient to fight the army and other armed groups at the same time[39].

Due to the fact that the Zetas cartel has a well-structured military organization and the fact that they exert authority in the areas of their operation, it can be inferred that they have the capacity to exert authority within their organization. Therefore, based on the evidence presented above, it could likely be said that the Pacific Cartel and the Zetas could be considered parties to a NIAC in which Common Article 3 could take place. Even though only two drug cartels were mentioned in this work, there are at least seven big drug cartels, that control and fight over the Mexican territory; they

35 Id. at 20.
36 Id.
37 Id.
38 Id. at 21.
39 Id.

fight between each other and they fight against the Mexican armed forces[40].

In order to perform these armed confrontations, these cartels need and have shown, to have certain level of hierarchical organization and authority over their members. The armed confrontations between the drug cartels against each other and against the governmental armed forces have shown, due to its intensity, to be performed with military means. If we take in consideration that only "some degree of organization" could be sufficient to establish the existence of an armed conflict for purposes of Common Article 3, then it could be arguable that the drug cartels have shown to be organized enough to carry out protracted violence, therefore they could also be a considered a party for the purposes of Common Article 3.

2. The Level of Intensity Originated by the Violence of the "War on Drugs" in Mexico, is it enough to Constitute a Non-International Armed Conflict?

As it was mentioned before, the second requirement necessary to establish the existence of an armed conflict is the intensity of the conflict. However, the level of violence required to trigger the application of international humanitarian law within a non-international armed conflict is higher than international armed conflict[41]. Even though the ICRC has stated that it is only necessary to reach a minimum level of intensity;[42] the international Courts have pointed out that it is important to keep in mind the requirement "protracted armed violence" when evaluating the intensity of the violence.[43] Nevertheless, this does not mean that "protracted armed violence" is the key element to determine the intensity of the violence; the key element is the intensity of the force[44].

It is important to keep in mind that just as the organization of the parties, the intensity of the conflict is a factual matter decided

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40 Alberto Najar, *the new map of the drug trafficking in Mexico*, BBC Uk (Oct. 10, 2012), http://www.bbc.co.uk/mundo/noticias/2012/10/121010_mexico_mapa_guerra_narco_carteles_jp.shtml

41 Elizabeth Wilmshurst, *International Law and the Classification of Conflicts, Relevant Legal Concepts* 53, (OXFORD, 2012).

42 ICRC, *Supra note* 10 at 5.

43 Boskoski, *Supra note* 18 at ¶ 175.

44 Elizabeth Wilmshurst, *Supra note* 40 at 52.

on a case-by-case basis in light of the particular evidence.[45] There are several factors that have helped determine whether the violence had reached the "intensity" to be considered as an armed conflict.

Some of the factors used by the international tribunals that could be comparable and applicable to establish the intensity of the violence in Mexico[46] are: i) The seriousness of the attacks and whether there has been an increased in armed clashes; ii) the spread of clashes over territory and over a period of time; iii) Any increase in the number of government forces and mobilization and the distribution of weapons among both parties to the conflict; iv) The number of civilians forced to flee from the combat zone; v) The type of weapons used, in particular de use of heavy weapons, and other military equipment; vi) The blocking of the towns and villages, the deployment of government forces to the crisis area, and the closure of roads[47].

The violence in Mexico keeps expanding as the drug cartels continue to fight for their territory[48]. The violence increased from 8,874 murders in 2007 to 14,006 in 2008[49]. In July 2010 the official numbers of murders by reason of drug trafficking was 28,000, which increased by January 2011 to 33,797[50]. In June 2011, the government revealed the numbers of 40,000 death people by reason of the conflict. In January 2012 the government announced new numbers of deaths

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45 Limaj, *Supra Note* 19 at ¶90; Boskoski, *Supra note 18* at ¶ 175.

46 Due to the fact that the government does not want to acknowledge that the "war on drugs" went out of its control, plus the serious persecutions committed against journalists, or murders and kidnaps of people who report the situation of violence; only a minimal degree of information about the real situation prevails on the news media. The citizens are using social media to be informed and to inform about the real situation of violence. They report through social media whenever there is a SDR (Zones of Risk) so people could avoid going to that area. Some of the examples of the social media groups used to inform the population are: Valor por Tamaulipas [Courage for Tamaulipas], https://www.facebook.com/ValorPorTamaulipas?ref=ts&fref=ts. The most current news, videos and pictures regarding the violence in Mexico are found in www.blogdelnarco.com. Additionally, there are several videos in youtube.com in which people record shootings between the military and the drug cartel members.

47 Boskoski, *Supra note* 18 at ¶ 177.

48 *Maps of the Mexico Cartels, Drug Cartels Areas in Mexico*, Borderland Beat (April 3, 2009), http://www.borderlandbeat.com/2010/01/maps-of-mexico-cartels.html

49 Isabel Montoya Ramos, *Criminalidad Organizada y Conflicto Armado No internacional* 13, [article not published yet].

50 Id.

47,500, even though other statistics showed that the real numbers were 60,420[51]. It is worldwide known the continuous clashes between the drug cartels and the government forces in different areas of the country. The reaction from the Mexican Presidents whenever there is an armed confrontation, it is always to send more military forces to the areas of conflict in which the violence keeps increasing[52].

The violence in Mexico is reaching to a point where there are States that live in extreme violence occasioned by drug cartels. The Ministry of National Defense reported 2,944 attacks on military personnel in 6 years[53]. For example, in Michoacán State the violence is such that the Mexican navy's Vice Admiral and another member of the navy were killed when an armed group shot them[54]. The increment of the violence and abuse by drug cartels has pushed people from the marginalized zones in Michoacán to take arms and to create their own "self-defense" groups to fight against drug cartels members[55].

Continuously, as a strategy the drug cartel members would block the roads, highways, or the exits of the cities to attack government forces, or to stop them from coming into their territory[56] to help in an armed confrontation. To get a better picture of how the violence in Mexico has been increasing, it is important to mention that it has got some international attention. In 2009, the United States Department of State expressed some concerns regarding to the violence in the country originated by the drug cartels. It expressed that at the time, there was an estimated that between the Pacific Cartel and The Zetas had 100,000 foot soldiers to fight against the 130,000 Mexican armed forces, threatening Mexico to turn in a

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51 Id.

52 Tracy Wilkinson, *Mexico launches military push to restore order in Michoacán*, LA Times (May 21, 2013), http://articles.latimes.com/2013/may/21/world/la-fg-wn-mexico-military-push-2013052.

53 Paris Martinez, *En un sexenio, el Ejército mató a 45 civiles inocentes* [In six years the army killed 45 innocent civilians], Animal Politico (January 28, 2013), http://www.animalpolitico.com/2013/01/en-un-sexenio-el-ejercito-mato-a-45-civiles-inocentes/#axzz2ckW5U8Up.

54 Richard Fausset, *2 slain in Michoacán, including Mexican navy vice admiral*, Los Angeles Times (Jul. 28, 2013), http://articles.latimes.com/2013/jul/28/world/la-wn-fg-mexico-vice-admiral-dead--20130728.

55 Id.

56 As recent example, in Michoacán the drug cartels blocked the highway and attacked federal forces. *See* Elinor Comlay, *22 killed as armed gangs, police clash in Mexico*, NBC News (Jul. 24, 2013), http://worldnews.nbcnews.com/_news/2013/07/24/19651877-22-killed-as-armed-gangs-police-clash-in-mexico?lite.

"narco-state"[57]. By that time, the United States Department of State placed Mexico only behind Pakistan and Iran as a United States top national security concern, considering the violence in Mexico as a possible threat[58]. The Department of State pointed out that the deaths in the Mexican border were higher than the ones in Iraq and Afghanistan, reaching sometimes to 1,000 deaths in one month or 20 per week just in Ciudad Juarez[59].

The combat weapons and the amount of ammunition that the drug cartels have allows them to get in protracted armed confrontations with the governmental armed forces. It has been acknowledged, "the drug cartels sometimes have 10 times the ammunition of the federal forces."[60] The army has seized assault rifles, machine guns, high-caliber weapons and anti-tank rockets. Even the General of the Mexican army Antonio Erasto Monsivais, has recognized "they (the drug cartels) have weapons capable of high destruction. They can confront the armed forces, whereas before they used to flee."

As a consequence of the increment of the violence occasioned by the armed confrontations between the drug cartels, and between the drug cartels and the Mexican armed forces, people has been forced to abandon their houses because of the constant fear they live, this is turning towns and villages in Mexico into ghost towns[61]. By 2011, there was an estimated that around 160,000 displaced persons[62].

In addition, every day the Mexican news exposes new evidence about the violence lived in Mexico due to the so-called "war on drugs."

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57 The Washington Times, *EXCLUSIVE: 100,000 foot soldiers in Mexican cartels*, (Mar. 3, 2009), http://www.washingtontimes.com/news/2009/mar/3/100000-foot-soldiers-in-cartels/?page=all.

58 Id.

59 Id.

60 Tim Johnson, *Mexican cartels amass better arsenals, mostly bought in U.S*, McClatchy Newspapers (Nov. 18, 2010), http://www.mcclatchydc.com/2010/11/18/104010/mexican-cartels-amass-better-arsenals.html#.Uhx5sxbU7zI.

61 *México: se multiplican los pueblos fantasma por narcotráfico* [In Mexico, the ghost towns multiply for reasons of drug trafficking], Terra (Jun. 14, 2013) http://noticias.terra.com.pe/internacional/latinoamerica/mexico-se-multiplican-los-pueblos-fantasma-por-narcotrafico,1384669555f2f310VgnVCM20000099cceb0aRCRD.html

62 Silviar Otero, *ONU: Desplazó narco a 160 mil mexicanos* [UN: Narco displaced 160 thousand Mexicans], El Universal (April 20, 2012) http://www.eluniversal.com.mx/primera/39284.html.

When taking in consideration all the factors above mentioned, it could be said that the "minimum level of intensity" established in the ICRC definition would determine the existence of a NIAC. Even more, these factors meet the factual standards used by previous international tribunals to determine the existence of a NIAC.

Additionally, in Boskosky the ICTY used another element as an indicative factor of intensity that could establish in a "more systematic level" the existence of NIAC; it evaluated how the government armed forces were used against armed groups[63]. In Mexico, the strategy created by the former President Felipe Calderon, was the use of army forces to support the Federal Police to fight the organized crime. The former President decided to send 5,000 military and police members to confront "face to face" the criminal organization in the State of Michoacán[64]. This was the beginning to the so-called "war on drugs", and since then the violence in the country increases day by day[65].

Therefore, when taking in consideration the "more systematic level" to evaluate the existence of a non-international armed conflict, it could be said that the drug on wars between the governmental armed forces and the drug cartels could be considered as a non-international armed conflict. Moreover, the situation in Mexico also meets the standard of "protracted armed violence." The term "protracted" has been considered as the antonym of "isolated and "sporadic" violence defined in Additional Protocol II[66]. Additionally, intensity of short duration with a high scale of violence and destruction could also be considerate "protracted" and result in a non-international conflict.[67]

For example, the Inter-American Commission of Human Rights held that Common Article 3 applied to the confrontation between the Argentinian Military and the attackers, even thought the combat was about 30 hours of duration. Taking this in consideration, it

63 Boskoski, *Supra note 18* at ¶ 178.

64 *México: cuatro años de guerra contra los narcos.* ¿Con qué resultados? [Mexico: four years of war. What are the results?], RT Actualidad (Dec. 11, 2010), http://actualidad.rt.com/actualidad/view/20857-México-cuatro-años-de-guerra-contra-narcos.-Con-qué-resultados.

65 Id.

66 Yoram Dinstein, *Concluding Remarks on Non-International Armed Conflict*s 404, Watkin and Norris, *Non-international armed conflict in the twenty-first century*, US Naval War College, International Law Studies (Vol. 88).

67 Dapo Akande, *Classification of Armed Conflicts: Relevant Legal Concepts International Law and the Classification of Conflicts* 53 (OXFORD 2012).

could be plausible to say that the confrontations in Mexico, between the governmental armed forces and the drug cartels taking place since 2006, could meet the standard of prolonged violence. Therefore, after all the analysis of the evidence and the factors above mentioned, it is likely to say that the criterion of intensity necessary for the application of Common Article 3 of the Geneva Conventions is satisfied.

3. Conclusion

The situation of violence in Mexico meets the threshold of "organization of the parties" and "intensity" necessary for the application of international humanitarian law. The drug cartels in Mexico are sufficiently organized to be considered as a party under Common Article 3. They have hierarchical structure and a leadership that allows them to exert authority and control over their members and territory, being able to confront opposition forces with military means. Additionally, the intensity of the violence and the consequences reached by the armed confrontations between the drug cartels, and the drug cartels and the military is such that it can be considered as an armed conflict. Therefore, the acts of violence in Mexico between the drug cartels and the governmental armed forces constitute a non-international armed conflict for the purposes of Common Article.

II. COLOMBIA: AN EXAMPLE OF A NON-INTERNATIONAL ARMED CONFLICT

The situation in Colombia shows the difficulties to engage the government to recognize the existence of a non-international armed conflict. For several years, the government denied the existence of an armed conflict, even when the threshold for the application of Common Article 3 existed.

1. Similarities and Differences with Mexico

Today, Colombia has one of the longest armed conflicts in the world. Similar to what Mexico is currently living, the armed conflict in Colombia experienced for years, several issues in relation to the classification to the conflict. Different from the actors in the Mexican violence, the Colombian principal non-state actors are members

of the guerilla (FARC, ELN) and paramilitary groups (AUC)[68]. The FARC is considered the largest and oldest insurgent group in the Americas, and it claims to be a revolutionary, agrarian, anti-imperialist organization that represents the rural poor population[69]. Left-wing intellectuals influenced by the Cuban Revolution formed the ELN[70].

The AUC started as private security groups for protection, that later was supported by the government[71]. The AUC was based under the right of legitimate defense and had an anti-subversive character. These paramilitary groups served as protection from for the rich, and their strategy was a terror campaign; which was different from the political focus of the guerilla. Different from the guerilla groups in Colombia that started with a political reason and later started getting involved in criminal activities, the Drug Cartels in Mexico have always been constituted and considered criminal organizations.

The effects of the Colombian armed conflict have been devastating since the violence started in 1963[72]. The Colombian armed conflict has killed, injured and affected the civilian population, bringing as a consequence the internal displacement of millions of people[73]. Similar to Colombia, the effects of the situation of violence in Mexico have been devastating. In 7 years, hundred of thousands of people have been killed, injured, and displaced. Similar to the drug cartels in Mexico, the FARC, the ELN and the AUC, have an organization that allows them to conduct large operation against the Colombian authorities[74].

After so many years of denying the existence of a non-international armed conflict, finally the government of Colombia has acknowledge the existence of a non-international armed conflict, and has recognized that the armed forces are operating under the scope of international humanitarian law. Furthermore, the Colombian Supreme Court ruled that the conflict in "Colombia had crossed the threshold necessary to constitute an armed conflict,

68 Felicity Szesnat and Annie R. Bird, *Colombia* 203, International Law and the Classification of Conflicts (OXFORD 2012).
69 Id. at 205.
70 Id.
71 Id. at 209.
72 Id. at 214.
73 Id.
74 Id. at 211.

and recognized that for the last forty years Common Article 3 and Additional Protocol II were applicable"[75].

Similar to Mexico, now Colombia is experiencing and increment on the violence as new "illegal armed groups" are arising. Similar to the drug cartels in Mexico, these Colombian illegal armed groups have inherited a military-type structure and exert military control over their territory. These groups are primarily engaged in drug trafficking. In consequence, there is disagreement in the government in whether these groups constitute drug cartels or if they just collaborate with the FARC and ELN on drug trafficking[76]. With regards to the new "illegal groups", the government has categorized them as criminal gangs, and stated that it would not grant recognition under international humanitarian law to these groups, and that these groups would be prosecuted by law enforcement as common criminals[77]. Similar to the Colombian government position, the Mexican government has taken the same position, and declared that the drug cartels are considered mere criminals.

2. Conclusion

The armed conflict in Colombia exposes how governments can deny the application of a non-international armed conflict. The similarities of the effects in the Colombian armed conflict and the Mexican situation of violence expose that even when in Mexico exists a non-international armed conflict, the government could deny the application of International Humanitarian Law. The effects of the Colombian armed conflict are similar to the effects that the violence in Mexico is having in the country. The position of the Colombian government regarding its obligations of international humanitarian law over the "illegal groups" is similar to the position of the Mexican government and the drug cartels. It exposes and reveals the political fears that States face when dealing with criminal non-state actors.

The fact that the Colombian government denied for 40 years the existence of the conflict did not make the armed conflict disappeared. Instead, it only deprived civilians from the protection that only international humanitarian law could provide. In consequence, the effects of the conflict were devastating and detrimental to the civilian

75 Id. at 215.
76 Id. at 213.
77 Id. at 215.

population. Now, it seems that the Mexican government wants to follow the steps of the Colombian government, denying the obvious existence of an armed conflict, denying to the Mexican population the protections of international humanitarian law.

III. PROBLEMS AND DIFFICULTIES OF THE CHARACTERIZATION OF THE SITUATION OF MEXICO AS A NON-INTERNATIONAL ARMED CONFLICT

It has been shown that the organization of the parties and the intensity of the violence in Mexico meet the threshold to characterize the situation as an non-international armed conflict for the application of Common Article 3. It is also known that there has been a prolonged confrontation between the Mexican armed forces and drug cartels, and the drug cartels fighting for the territorial control against each other. However, even when the characterization of an armed conflict, originated by the so-called "war on drugs" in Mexico seems to be clear, there are several factors that make the situation difficult to characterize.

First, the situations of violence that arise as a consequence of the organized crime are not part of the traditional definition of a non-international armed conflict. These represent several challenges for the characterization and application of international humanitarian law. Secondly, some of those challenges exist due to the fact that the possible consequences and the applicable rules of international humanitarian law as a result of the characterization could not be easily defined when the parties in the conflict are organized criminal members. There are several questions regarding what would be the applicable law in the conflict, and whether the application of International Humanitarian Law would increase the violence. Would International Humanitarian Law effectively protect the victims in the conflict, or would it make them more vulnerable to the governmental armed forces abuse?

1. Political Fears

As it was mentioned before, governments generally hold that the groups involved merely in criminal activities that constitute organized crime, and organized criminal groups do not constitute a party in a non-international armed conflict because they are "illegal

groups" with no political purpose. Additionally, the government resists considering the drug cartels as a party in a non- international armed conflict because it has the idea that, the acknowledgment of being a party would grant them the status of legitimate combatants[78]. In these arguments, there are exposed two problems: 1) The idea that the parties in a non-international armed conflict need to have a political purpose, and 2) characterizing the situation of violence as a non-international armed conflict would grant legitimate status to the parties.

First, the idea that the drug cartels could not be considered a party for the purposes of Common Article 3, because their objective is criminal and not political is wrong. The political purpose of a party is not a part of the threshold required to the characterization of an armed conflict[79]. Secondly, the idea that recognition of a NIAC and the application of international humanitarian law would make the drug cartels member's lawful combatants is not correct. Common Article 3 states that "[T]he application of the preceding provisions shall not affect the legal status of the Parties to the conflict.[80]" Therefore, the application of international humanitarian law and the recognition of a non-international armed conflict in Mexico, would not grant a legal status to the drug cartels. The concept of combatant and the notion of belligerent in an international armed conflict do not exist in a non-international armed conflict[81]. The member of the drug cartels can be prosecuted for any acts that violate domestic law, which includes attacking the members of the armed forces. Furthermore, the drug cartels could not be granted a prisoner of war status, as this concept does not apply in a non-international armed conflict[82].

Another fear is related to the fact that International Humanitarian Law bounds both parties in the conflict. There is the assumption that the Government would be bound to the application of international humanitarian law and the drug cartels will not respect the rules of the conflict, just as they do not respect domestic law, because they are criminal organizations. The ICTY in Limaj case the court

78 ICRC, *Supra note 11*
79 Id.
80 Common Article 3 of the four Geneva Conventions of 1949.
81 Michael N. Schimitt, *The Status of Opposition Fighters in a Non-international Armed Conflict* 121, International Law and the Classification of Conflicts (OXFORD 2012).
82 Id.

dismissed the argument made by the defense, that the armed group in order to be considerate as party of the conflict, and to be bound by international humanitarian law, it must be able to implement international humanitarian law, to possess an understanding of the principle of Common Article 3, and to have a method to sanction its violations[83]. The Court argument was that the two elements required to determine the existence of an armed conflict, are used solely for the purpose of distinguishing a situation where international humanitarian law would be applicable[84]. Therefore, the argument the drug cartels should not be consider as party of the conflict because they would not follow the rules established under Common Article 3, should not be an excuse for a government to not recognize the violence situation in Mexico as a non-international armed conflict.

2. Increment of the Violence and Casualties

The ICRC in its report of international humanitarian law and the challenges of contemporary armed conflict has recognized the existence and the challenges of new types of non-international armed conflict. It has appointed that one of the problems is that the members of the armed groups are mixed with civilians. In consequence, the army uses this as an excuse to avoid its obligation of taking all the possible precautions to minimize risks for civilians, that international humanitarian law requires.[85]

This is one of the biggest concerns about the characterization of the situation in Mexico as an armed conflict. It is believed that the application of the standards of use of forced under international humanitarian law by the army, would increase the abuse against civilians instead of their protection. The use of force standard under human rights law and international humanitarian law is different. Human rights law restricts the usage of lethal force "(…) to what is no more than absolutely necessary and which is strictly proportionate to certain objectives[86]".

However, the Mexican armed forces have been committing several violations of human rights against the civil populations. They have performed direct attacks against civilians. There are reports in

83 Limaj, *Supra note* 19 at ¶90.
84 Limaj, *Supra note* 19 at ¶ 89.
85 ICRC, *Supra note* 11at 6.
86 Boskoski, *Supra note* 18 at ¶178.

which the military members have killed civilians for not stopping their cars when the army forces indicated it, victims of torture, and several disappearances[87]. Some of the fears are that once the state recognizes the application of international humanitarian law, the violence would increase. Currently, the idea that the state would have the right to use of lethal force to fight the drug cartels, suggests that in reality the governmental armed forces would commit abuses to the civilian population.

Yet, the fear that the use of force that the government would have to perform is equal that the one if could use in an international armed conflict might not be totally true. It had been noticed by international tribunals "(…) even in cases involving armed conflict some courts have assessed the use of force with reference to the proportionality principle under human rights standards. For example, the Israeli Supreme Court has held that a civilian who is directly participating in hostilities cannot be killed if less harmful means can be employed, such as arrest, interrogation, and trial (…)". Therefore, the governmental armed forces not necessarily would have to use the lethal force standard prescribed in international humanitarian law related to the international armed conflicts. Besides the principles of proportionality, distinctions of civilians, and other customary international rules of international humanitarian law related to the use of force would apply to ensure protection of civilians. In addition, the government would not only be bound by its obligations of human rights, the law of war would also bind it.

Another concern about characterizing the situation of violence in Mexico as a non-international armed conflict is the distinction between civilians from the members of the drug cartels[88]. For this concern, the ICRC would have to train the governmental armed forces regarding to who would be considered as a civilian, and a person taking direct part in hostilities. This represents a challenge, but it cannot constitute an excuse to deny the application of international humanitarian law. One of the rules of customary international

87 Paris Martinez, *Supra note* 52.

88 There are several challenges as to when a person would be considered a "taking direct part on hostilities", as to when could members of the drug cartels would be attack, but those will not be addressed in the present paper.

humanitarian law states, "in case of doubt whether a person is a civilian, that person shall be considered to be a civilian.[89]"

3. Conclusion

To define the situation in Mexico under international humanitarian law represents a challenge. Starting from the fact that the drug cartels are complex criminal organizations and do not have a legitimate purpose to fight the government. Characterizing the situation of violence in Mexico represents political challenges. The Mexican government has resisted admitting that the "war on drugs" has gone out of its hands and has turned into an armed conflict. Governments usually fear that the application of international humanitarian law would represent that they legitimize the parties in the conflict and the attacks directed against their governmental armed forces is wrong. However, these fear have been proven to be wrong.

It is true that a big effort would have to be made from the ICRC and the government to train the military forces and mistakes will be made. However, recognizing the existence of an armed conflict would be taking a step forward to its solution. The fact that the standards regarding the use of force in a non-international armed conflict, are lower than the standards in human rights law, would not constitute a green light for the government to commit violations of human rights law against civilians. It is important to remember that the purposes of international humanitarian law is to provide a better protection to the victims and to provide a set of rules that would make an armed conflict less violent, and inhumane.

IV. IMPORTANCE OF THE CHARACTERIZATION AND APPLICATION OF COMMON

ARTICLE 3

The provisions established in Common Article 3 of the Geneva Conventions constitute a little treaty that establishes the basic rules of the non-international armed conflicts. The protection established within Common Article 3 reflects the elementary considerations of humanity that should be taking in consideration in every

89 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 50.1, 8 June 1977.

armed conflict.[90] Even though different challenges will be face by the characterization of the Mexican situation of violence as a non-international armed conflict; there are several reasons for which it is important the recognition of the application of international humanitarian law.

First, the acts of violence committed in Mexico are cruel and inhumane. The way the drug cartels torture and dismember their rivals exposing their bodies in the streets is made to produce terror, intimidation and humiliation to the population and to the other parties. Therefore, it is necessary the application of the provisions established in Common Article 3, providing the elementary consideration of humanity in the conflict and binding both parties to respect their obligations under international humanitarian law.

Secondly, when a situation of violence reaches the threshold of a non-international armed conflict international humanitarian law applies bounding both parties of the conflict. Currently, only the Mexican government in bound by its obligations under international human rights, and the drug cartels are bound by the domestic law regulations.

Thirdly, an advantage of the characterization of the conflict would be that "customary international law imposes criminal liability for serious violations of Common Article 3 (…) for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife[91]". Therefore, the parties who breach their obligations established in Common Article 3 could be prosecuted for war crimes and crimes against humanity.

The International Criminal Court could have jurisdiction over the following acts committed by each party in the conflict in violation of Common Article 3:

> "… Committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:
>
> (i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

90 Tadic, *Supra note* 9 at ¶ 609.
91 Id. at ¶ 613.

(ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(iii) Taking of hostages;

(iv) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable"[92].

The drug cartels leaders and the governmental armed forces could face international criminal responsibility for any of the following acts established in the Rome Statute, Article 8(e):

"(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;

(vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;

(viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;

(ix) Killing or wounding treacherously a combatant adversary;

(xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

92 Rome Statute of the International Criminal Court art. 8 (c), July 17, 1998.

(xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict"[93].

Fourthly, currently only the Mexican government is bound by an international obligation to protect human rights. Therefore, only the government has an international obligation during the "war on drugs." Then, the drug cartels are not bound by international law, and they cannot be prosecuted for crimes that they actually commit, which constitute crimes of war and crimes against humanity (e.g. torture, mutilation, enlisting and training children to assassinate, attacking civil population, etc.)

Fifthly, when the Mexican government denies the application of international humanitarian law, it is denying a protection for civilians that can only be found under the application of international law. Additionally, it is closing the door for the victims of the armed conflict to seek justice in an international level. Usually, when a drug cartel leader is arrested, the crimes for what he is charged constitute crimes against health, or money laundering. Drug cartel leaders are not usually prosecuted for all the killings, torturing, and murdering they commit or the people under their control commit. Therefore, the victims of the conflict constantly have to be facing impunity.

Sixthly, the reciprocal influence between human rights law and international humanitarian law would provide a greater protection for the civilians in Mexico. The application of a more accurate set of rules designated specifically for the situations of armed conflicts would grant a more effective protection to civilians. Human rights law applies at all times and humanitarian law applies when there is an armed conflict (lex specialis)[94]. Both laws have the same aims and purposes, which are the protection to live, health and dignity of the people[95].

It is true that sometimes human rights law and international humanitarian law would not always interact perfectly, but when in situations of an armed conflict sometimes human rights law could fall short, and the standards of international humanitarian law would be more effective. One of the weaknesses of international human rights law is that under some explicit situations the State

93 Id. at Art. 8(e).
94 ICRC, *Supra note* 11 at 14.
95 Id.

could derogate some of their obligations[96]. Different from human rights law, the rules of international humanitarian law cannot be derogated[97].

Seventhly, when the government resist acknowledging the existence of an armed conflict in its territory it makes difficult a dialogue between the ICRC and the parties in the conflict, regarding their obligations under international humanitarian law[98]. Since international humanitarian law seeks the respect of the basic human rights law, then its application could solve an armed conflict situation. He believes that acknowledging the application of international humanitarian law would not substitute peace, neither would mean to legalize the war, it would only civilize the conflict creating a distinction between the parties and civilians, providing a better protection for the civil population.[99]

In sum, it is necessary to characterize the situation of violence in Mexico as a non-international armed conflict. In situations that have reached the intensity of violence that Mexico is living, it is important to have a norm that would effectively regulate an armed conflict, such as international humanitarian law. The interplay role that it would play with human rights law would create a better protection for civilians. The situation in Mexico has turned cruel and inhumane; therefore it is important that not only the governmental armed forces remain bound by international obligations. It is necessary for both parties in the conflict to be obligated to respect the elementary rules of humanity established in Common Article 3. When an obligation to respect international humanitarian law is entitled to a drug cartel, the international jurisdiction could be applicable to prosecute war crimes and crimes against humanity, providing another alternative of justice for the victims in the conflict.

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96 Id. at 15.
97 Id.
98 Id. at 6.
99 Alejandro Valencia Villa, *Derecho Internacional y Conflicto Interno: Colombia y el derecho de los conflictos armados* [International law and internal armed conflict: Colombia and the law of the armed conflicts], Revista Colombia Internacional (2006), http://colombiainternacional.uniandes.edu.co/view.php/40/view.php.

V. CONCLUSION

The situation of violence that Mexico started living since 2006 has all the characteristics that would likely constitute a non-international armed conflict. The threshold to determine the existence of a NIAC for the purposes of Common Article 3 of the Geneva Conventions such as the intensity of the conflict and the organization of the parties has to determined in a case-by-case basis. In the present case, the evidence shows that the drug cartels meet the organization requirement to be considered as a party of an armed conflict. Regarding to the intensity requirement, it can be said that the intensity of the violence in Mexico is sufficient to be considered as an armed conflict.

From the analysis of the Colombian armed conflict and the Mexican situation of violence, it can be inferred that Mexico is currently living an armed conflict. The difference is that the conflict in Colombia started from dissident groups with a political purpose. In Mexico, the conflict started with the so-called "war on drugs." It was analyzed that the political purpose of the parties in the conflict does not constitute a requirement for the characterization of a conflict. Therefore, it is taken in consideration all the other similarities, such as the organization of the parties in Colombia and the intensity of the violence, it can be said that Mexico is also living a non-international armed conflict.

It took 40 years for the Colombian governments to accept the application of international humanitarian law. That decision from the government cost millions of victims. The conflict in Colombia did not started as violent as the conflict in Mexico. Then there are possibilities that with the time the cost of the "war on drugs" could reach as many victims as in Colombia, or even more. It is true that the characterization of a non-international armed conflict is not easy, particularly in the case of Mexico. The drug cartels represent a challenge not only in Mexico. Their organization and structure is complex and has shown to be better than the organization of the government.

If the Mexican government acknowledged the application of international humanitarian law, it would open the possibility for the violence in Mexico to become less cruel and more humane. This does not mean that international humanitarian law is perfect and

that it would magically come to solve the problem of violence in Mexico.

However, the cruelty and the number of victims reached in 7 years have proven that human rights law and domestic law have not been efficiently applied.

There are fears regarding the application of international humanitarian law and uncertainty related to the question if the application of international humanitarian law would open the door for impunity and an increment in the violence against the Mexican population. However, the fact that these fears exist does not constitute reasons enough to deny the existence and application of international humanitarian law. If there is an armed conflict, then international humanitarian law should apply, as it is the law of the armed conflicts. It would be a matter of concern of the ICRC and the Mexican government to work to establish a better understanding of the law, and to create a plan and strategy to comply with its obligations under international humanitarian law.

Human rights law applies at all times, the fact that there are several violations of human rights law in the world, and that sometimes States fall short to comply with their obligations does not constitute an excuse to deny its application or to withdraw from their obligations. Therefore, why assuming that the application of international humanitarian law would not be sufficient to alleviate the situation of violence in Mexico, could represent and excuse for the Mexican State to not apply it. The present work does not intent to assume that with the application of international humanitarian law and the characterization of a non-international armed conflict would fix and solve the problems that the country is living. However, it would be really important if both parties in the conflict were bound by international law.

It is important to bring the victims of the violent situation in Mexico under the international umbrella. It would be significant if the victims could seek justice in the international courts. The application of international humanitarian law to the conflict in Mexico would provide a more effective standard of protection and justice to vulnerable and marginalized groups who are victims of the drug cartels´ war, and further protect them from discrimination and abuse from the government itself.

Under domestic law, when drug cartels members are arrested, they are usually not prosecuted. Either there were violations to due process during the arrest, or the corruption in the judicial system would set the criminals free. When, the drug cartels leaders are prosecuted, they are usually charged for crimes related to the drug trafficking and money laundering. Then they are never charged of prosecuted for all the crimes and atrocities committed against the civilian population. The violence and atrocities committed by the drug cartels need to be taken into account by the law that provides the basic humanitarian rules. It is necessary for the drug cartels to be bound by international humanitarian law. The situation in Mexico has reached the threshold of a non-international armed conflict for the purposes of Common Article 3. Therefore, the Mexican government should recognize it existence and allow the application of international humanitarian law.

THE STRUGGLE FOR LAWS OF FREE, PRIOR, AND INFORMED CONSULTATION IN PERU: LESSONS AND AMBIGUITIES IN THE RECOGNITION OF INDIGENOUS PEOPLES

Elizabeth Salmón G.[1]

I. INTRODUCTION

Peru has experienced a rate of sustained economic growth in recent years. This development is owed in part to the frenetic activity of the extractive industries, the expansion of foreign trade, and the signing of free trade pacts.[2] In 2009, as a response to the signing of a bilateral treaty with the United States, the interior of Peru witnessed one of its most significant indigenous social protests in recent times with demonstrations that left approximately thirty-three people dead and two hundred injured. [3]

The events that took place in the Bagua region exposed an undercurrent of cultural tensions amid the conflictive process of economic growth and the demands of indigenous peoples to acquire a political voice in Peru. The protests marked a turning point in legal regulations affecting Peru's indigenous community. Ollanta

1 The author would like to thank Diego A. Mauricio Ocampo, Shane Clauser, and Maria Fortino for their thorough preparatory research and for the revision of this article, and she is grateful to the editors of for their insightful comments and suggestions.

2 According to the statistics provided by the Ministry of Foreign Commerce and Tourism, Peru has ratified fifteen free trade agreements to date, thirteen of which were signed between 2009-2012. *See* MINISTERIO DE COMERCIO EXTERIOR Y TURISMO, CUADRO RESUMEN 1-3, available *at* http://www.acu erdoscomerciales.gob.pe/images/stories/varios/cuadro_resumen_10_07.pdf.

3 U.N. Office of the High Commissioner on Human Rights, Report of the situation of human rights and fundamental freedoms of indigenous people (Mission to Peru): Observations on the situation of the indigenous peoples of the Amazon region and the events of 5 June and the following days in Bagua and Utcubamba provinces, para. 21, U.N. Doc. A/HRC/12/34/add.8 (Aug. 18, 2009) (prepared by James Anaya).

Humala, the current president of Peru, addressed the Bagua issue during his campaign[4] and later enacted a law mandating free, prior, and informed consultation in efforts to recognize the needs of indigenous peoples.[5] Despite the adoption of the new law more than a year ago, the social process has not achieved the promise of collective accord implicit in the law. How might this situation be better understood? Is this setback indicative of an unfinished process in which the legal standards are still inchoate and reveal their limitations, or does it rather point only to the slightest hint of transformation that contrasts with actual state policy?

It must be taken into account that the Peruvian state adopted the law with a double motivation: to redress historical injustices of indigenous peoples and to pacify the social demonstrations carried out by the principal indigenous organizations.[6] However, the state's promotion for the secure extraction of natural resources located in indigenous territories was a clear priority. Traditionally in Peru, the regulation of indigenous rights has been characterized by legal invisibility and social exclusion; this includes the omission of the

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4 *Presidente Ollanta Humala promulga mañana en Bagua Ley de Consulta Previa*, PRESIDENCIA DE LA REPUBLICA DEL PERU, Sept. 5, 2011, http://www.presidencia.gob.pe/presidente-ollanta-humala- promulga-manana-en-bagua-ley-de-consulta-previa; *Humala promete aplicar Ley de Consulta Previa y respetar opinión de comunidades sobre proyectos*, ANDINA NOTICIAS, Apr. 6, 2011.

5 GOBIERNO DEL PERÚ, PERÚ EN 100 DIAS DE GOBIERNO 5 (2011); *Presidente Ollanta Humala llega A Macita para firmar la Ley de Derecho a Consulta Previa*, FLICKR, Sept. 6, 2011, http://www.flickr.com/photos/65990097@N03/sets/72157627612235266/ [hereinafter FLICKR].

6 At the International Day of Indigenous Peoples, President Humala tweeted that he would work for the inclusion of indigenous peoples. After congress' approval of the law on free, prior, and informed consultation, President Humala tweeted from his official account that this right is a sign of social inclusion that demonstrates that Ollanta is building a Peru for everyone. *Ley de Consulta Previa busca incluir a poblaciones indefensas*, PRESIDENCIA DE LA REPUBLICA DEL PERU, June 11, 2012, http://www.presidencia.gob.pe/ley-de-consulta-previa-busca-incluir-a-poblaciones-indefensas; *Humala afirma que Consulta Previa es un signo más de inclusión social*, RPP NOTICIAS, Aug. 24, 2011; *Ollanta Humala Mensaje a la Nación del Presidente de la República, Ollanta Humala Tasso, por el 191° Aniversario de la Independencia Nacional,* PRESIDENCIA DE LA REPUBLICA DEL PERU, Jul. 28, 2012, http://www.presidencia. gob.pe/mensaje-a-la-nacion-del-senor-presidente-de-la-republica-ollanta-humala-tasso-con-motivo-del-191d-aniversario-de-la-independencia-nacional.

legal denomination "indigenous" for categories such as "communal groups", "peasant and/or rural communities" and "natives." [7]

The current legal framework, however, adopts the legal denomination of "indigenous peoples" as a way to channel indigenous demands and eradicate violence in the defense of natural resources. Moreover, the increasing influence of regulatory standards issuing from international human rights law has been fundamental in this shift toward the rights of indigenous peoples.

In Peru, public opinion holds that the rules governing free, prior, and informed consultation are usually sufficient measures to remedy social conflict and to disrupt cyclical episodes of violence. [8] However, there are various contradictions in the way these objectives have been executed. The current administration recognizes collective rights of indigenous peoples but simultaneously disputes and restricts these rights. With markedly aggressive rhetoric, it has continued to promote the intensive extraction of natural resources in indigenous territories with the intent to sustain the economic boom amid the global financial crisis. [9] Meanwhile, indigenous peoples have demanded mechanisms for free, prior, and informed consultation, opposing the installation of large-scale development and investment projects, and have not ruled out options of sabotaging these processes if the consequences do not rule in their favor.[10] The

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7 Elizabeth Salmón, *Entre las promesas de consulta previa y la continuidad de la protesta social: las ambigüedades de la participación política indígena en el Perú*, *in* PARTICIPACIÓN POLÍTICA INDÍGENA Y POLÍTICAS PÚBLICAS PARA PUEBLOS INDÍGENAS EN AMÉRICA LATINA 279-281 (2011), *available at* http://www.kas.de/wf/doc/kas_30218-1522-1-30.pdf?120814170100.

8 *Ley de Consulta Previa evitará nuevos conflictos en el país*, LA REPÚBLICA, June 27, 2011; *Bancadas piden al Pleno aprobar Consulta Previa*, LA REPÚBLICA, May 31, 2011; *Perú: Exigen al Congreso aprobar Ley de Consulta Previa para evitar conflicto social*, AGENCIA CHASKI; *Promulgación de Ley de Consulta Previa ayudará a reducir el conflicto social, afirman*, ANDINA NOTICIAS, Sept. 06, 2011; *Florencio Flores: Consulta Previa ayudará a reducir el conflicto social*, DIARIO ÍMPETU, Sept. 07, 2011; GERARDO CASTILLO, CONSULTA PREVIA EN EL PERÚ: IMPLICANCIAS PARA LAS INDUSTRIAS EXTRACTIVAS, (Sept. 2011), *available at* http://www.societasconsultora.com/soc_eng/docs/Consulta_previa_Peru_ Gestion_Publica.pdf.

9 *China-Peru FTA to help Latin American countries face global financial crisis*, ANDINA, Apr. 23, 2009, *available at* http://www.andina.com.pe/english/NoticiaImprimir.aspx?id=229409.

10 *Perú: Comuneros de Cañaris en "permanente movilización" tras desencuentro con Gobierno*, SERVINDI, Feb, 5, 2013, *available at* http://servindi.

indigenous communities' historical frustration is a result of the state's failure to acknowledge their legal rights and demands and has incentivized acts of violence that can be identified as last resort tactics of survival to counteract projects adversely affecting their livelihood and subsistence. In response, the private sector and the state have branded indigenous peoples as extremists. [11] This, in turn, has incited the further polarization of demands and the absence of constructive dialogue. The threat or the use of violence has likewise reopened discussions supposedly settled *vis-à-vis* the application of regulatory procedures.

The present article evaluates the process of adopting a new regulatory framework in Peru, the influence of international law, and the limits of its implementation on public policies. It attempts to arrive at lessons concerning the role of law as an instrument for social transformation, recognition of indigenous resistance, and nurturing peace. Certainly, by their nature, laws possess multiple limitations in their ability to remedy violence, and it must be noted that legal changes in favor of the recognition of rights can also generate undesirable effects. This dynamic, in fact, has characterized the rights of indigenous peoples in Peru, as they have been shaped by the interrelatedness of legal reform with recurring acts of violence.

II. THE PERUVIAN STATE IN CONTEXT: THE EMERGENCE OF INDIGENOUS RIGHTS IN INTERNATIONAL LAW

Peru has ratified several human rights treaties including International Labour Organization ("ILO") Convention 169, which constrains Peruvian policy to the content of these international standards. The perpetual strengthening of these regulatory systems has similarly attracted indigenous peoples who have experienced gradual empowerment *vis-à-vis* the utilization of international instruments and legal models. All of this has changed the regulatory course in Peru while decidedly influencing legal interpretation and analysis. A clear result has emerged from international law regarding the rights of indigenous peoples: the indigenous issue has

org/actualidad/81610; *Luis* Hallazi Méndez, *Perú: El caso de la Comunidad de Cañaris y el Derecho a la Consulta Previa*, SERVINDI, enero 21, 2013.

11 *Ley de consulta previa: ¿Caos o inclusión social?*, *RSA*, Han. 6, 2012; Marco Sifuentes, La *Consulta Previa: una fuente de conflictos dentro y fuera del gobierno*, LA REPÚBLICA, Feb. 5, 2013.

reassumed its exigency. It is now, for instance, a regulated issue mandated by international human rights law and international environmental law.

a. Standards of Protection in Support of Indigenous Peoples: The ILO and the Systems of International Protection of Human Rights and the Environment

The regulation of indigenous populations in international human rights law is a relatively recent manifestation. However, these regulations have not been consolidated into one mechanism or singular legal apparatus, but are rather dispersed in several international bodies and diverse instruments that have generated multiple standards. [12]

It is understood that the American Declaration of the Rights and Duties of Man and the Universal Declaration of Human Rights did not seek to establish special measures for the reversal of inequalities or plights of indigenous populations, nor do they oblige state entities to explicitly address the needs of these groups. As Bartolomé Clavero has pointed out, the myopia of the Universal Declaration of Human Rights has been retained as a result of the structures of colonization that constitute the United Nations; the same can be said for the American Declaration of the Rights and Duties of Man. [13] The states of the Americas did not, in fact, consider the recognition of collective rights. There was a minor regulation, as part of the Universal Declaration of Human Rights, tangentially recognizing rights for racial and religious groups. [14] The problem lies in the fact that within various states the indigenous

12 Bartolomé Clavero, *Informe sobre el Perú tras la Ley de Consulta (Estándares internacionales, empresas extractivas, consentimiento indígena), BARTOLOMÉ* CLAVERO: ENSAYOS, OPINIONES Y ACTUALIDAD, at 3-4, Jan. 23, 2012, http://clavero.derechosindigenas.org/?p=11142.

13 Bartolomé Clavero, *La consulta en serio como mecanismo supletorio de la libre determinación,* BARTOLOMÉ CLAVERO: ENSAYOS, OPINIONES Y ACTUALIDAD, at 1-2, May 26, 2012, http://clavero.derechos indigenas.org/wp-content/uploads/2012/05/Consulta-en-Serio.pdf.

14 Universal Declaration of Human Rights art. 26, 26.2 G.A. Res. 217A (III), U.N. Doc A/810 at 71 (Dec. 10, 1948) ("Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.").

populations represent the majority; for this reason "discourse on minorities" is ineffectual in eliminating structural discrimination.[15] However, the indigenous issue has been incorporated in the discourse of ethnic and religious minorities as part of the adaptation of indigenous demands to modify the language of these forums. [16]

Prior to the adoption of ILO Convention 169 and its ratification by the Latin-American states, the development of the rights of indigenous persons was limited both in the Inter-American and the Universal Systems for the Protection of Human Rights. [17] An organization specializing in the area of labor rights eventually adopted a comprehensive treaty concerning the fundamental demands of indigenous groups.[18] It became increasingly understood that the indigenous issue had to be regulated due to the labor and social impacts in colonized countries. Thus during the first decades of the ILO, the terms for indigenous labor contracts posed significant international problems. Labor standards were adopted to challenge the extension of the workday, provide rules for non-monetary compensation, and abolish physical sanctions for infractions committed by indigenous workers. As a result of the new labor regulations, the Native Labor Code was established based on several treaties outlined in the ILO that are no longer in use today.[19] Later, however, ILO Convention 107–an agreement upholding the indigenous labor agenda to the permanence of forms of servitude–was passed, but it introduced concerns from the perspective of the progressive assimilation of

15 Bartolomé Clavero, *Para el Comité de Derechos Humanos los Pueblos Indígenas siguen siendo Minorías Étnicas,* BARTOLOMÉ CLAVERO: ENSAYOS, OPINIONES Y ACTUALIDAD, Sept. 10, 2009, *available at* http://servindi.org/actualidad/opinion/16515; Augusto Willemsen, *How indigenous peoples' rights reached the UN*, *in* MAKING THE DECLARATION WORK: THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 16, 22 (Claire Charters & Rodolfo Stavenhagen eds., 2009).

16 ELIZABETH SALMÓN, LA CONSULTA PREVIA, LIBRE E INFORMADA EN EL PERÚ: HACIA LA INCLUSIÓN DEL INTERÉS INDÍGENA EN EL MUNDO DE LOS DERECHOS HUMANOS 24-28 (2012).

17 ELIZABETH SALMÓN, LOS PUEBLOS INDÍGENAS EN LA JURISPRUDENCIA DE LA CORTE INTERAMERICANA DE DERECHOS HUMANOS 17-27 (2010).

18 Bartolomé Clavero, *supra* note 12, at 1.

19 DANIEL MAUL, HUMAN RIGHTS, DEVELOPMENT AND DECOLONIZATION: THE INTERNATIONAL LABOUR ORGANIZATION, 1940-70, 23-25 (2012).

the indigenous populations in the dominant societies.[20] From here, we can chart the perpetual displacement of indigenous peoples, the unique relationship of indigenous territories with legal regulation, and the eventual sale of their lands.[21]

ILO Convention 169, the Convention Concerning Indigenous and Tribal Peoples in Independent Countries, establishes compliance obligations and corroborates safeguards for its exercise with exceptions for the observance of indigenous rights with other legitimate ends. Article 8.1, for example, mandates that states modify their laws to suit the needs of indigenous groups while respecting their fundamental rights. In the same way, ILO Convention 169 prohibits the displacement of indigenous persons, yet recognizes extenuating circumstances when relocation ensures the protection of lives, as long there are reparations redressing damages for displacement from ancestral territories. Also, the Convention recognizes certain irrevocable assurances and guarantees such as the right to free, prior, and informed consultation and the acquisition of consent for the displacement of indigenous lands, or in respect to the alienation of their lands.[22]

ILO Convention 169 is a fundamental guarantee of the rights of indigenous peoples for the following reasons. First, it conditions the working methods of the supervisory bodies in the interpretation and application of other human rights treaties of the Inter-American Human Rights and Universal Systems.[23] Second, it compels the

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20 JÉRÉMIE GILBERT, INDIGENOUS PEOPLES' LAND RIGHTS UNDER INTERNATIONAL LAW: FROM VICTIMS TO ACTORS 143 (2006).

21 Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi- Tribal Populations in Independent Countries arts. 11 -12, June 16, 1957, 328 U.N.T.S. 247.

22 Convention Concerning Indigenous and Tribal Peoples in Independent Countries arts. 6, 16, 17, June 27, 1989, 28 I.L.M. 1382.

23 Case of the Yakye Axa Indigenous Community v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125, paras. 95-96 (June 17, 2005); Sawhoyamaxa Indigenous Community v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, para. 117 (Mar. 29, 2006); Case of the Saramaka People. v. Suriname, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, paras. 92-93 (Nov. 28, 2007); Case of the Xákmok, Kásek Indigenous Community. v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 214, para. 157 (Aug. 24, 2010); Pueblo Indígena Kichwa de Sarayaku v. Ecuador, Merits, and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 245, paras. 160-164, 201 (June 27, 2012).

content of the law of free, prior, and informed consultation adopted by Peru. Third, it establishes a mechanism of resistance for indigenous peoples in the face of free trade agreements like the PTPA. Finally, ILO Convention 169 limits the scope of state sovereignty because its provisions must be incorporated and employed within the design and execution of public policy.[24]

The Committee of Experts on the Application of Conventions and Recommendations ("CEACR"), the specialized supervisory body within the ILO, is an entity that advances constructive dialogue between states, employers, entrepreneurs, and associated trade unions. Despite the limitations of the ILO system, indigenous peoples have been able, in practice, to incorporate their demands. This has led to the drafting of alternative reports and partnering with trade unions in their respective countries. These partnerships grant indigenous peoples increasingly vital roles in the agenda of periodic reviews carried out by the CEACR.[25] The CEACR emphasizes the essential values contained in Article 6 of ILO Convention 169, which guarantees the right to free, prior, and informed consultation, especially as a viable means to resolve social conflict. [26] It has

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24 Christian Courtis, *Notes on the Implementation by Latin American Courts of the ILO Convention 169 on Indigenous Peoples*, 10 SUR INT'L J. ON HUM. RTS. 53, 56 (2009).

25 INTERETHNIC ASS'N FOR THE DEV. OF THE PERUVIAN RAINFOREST (AIDESEP) ET AL., PERU: ALTERNATIVE REPORT 2008 ON THE FULFILLMENT OF THE ILO CONVENTION NO. 169 PRESENTED BY THE GENERAL CONFEDERATION OF PERUVIAN WORKERS (CGTP) (2008); AIDESEP ET AL., PERU: ALTERNATIVE REPORT 2009 ON THE FULFILLMENT OF THE ILO CONVENTION NO. 169 PRESENTED BY THE GENERAL CONFEDERATION OF PERUVIAN WORKERS (CGTP) (2009); CONSEJO DE LONGKO DEL PIKUN WIJIMAPU ET AL., ALTERNATIVE REPORT 2010 REGARDING COMPLIANCE WITH THE CONVENTION 169: INDIGENOUS AND TRIBAL PEOPLES OF THE ILO, THE FIRST ANNIVERSARY OF ENTRY INTO FORCE IN CHILE (2010); GRUPO DE TRABAJO SOBRE PUEBLOS INDÍGENAS DE LA COORDINADORA NACIONAL DE DERECHOS HUMANOS (CNDDHH), PERÚ: INFORME ALTERNATIVO 2012 SOBRE EL CUMPLIMIENTO DEL CONVENIO 169 DE LA OIT (2012).

26 INT'L LAB. OFF. [ILO] REP. OF COMM. OF EXPERTS, REPORT OF THE COMMITTEE SET UP TO EXAMINE THE REPRESENTATION ALLEGING NON-OBSERVANCE BY ECUADOR OF THE INDIGENOUS AND TRIBAL PEOPLES CONVENTION, 1989 (NO. 169), MADE UNDER ARTICLE 24 OF THE ILO CONSTITUTION BY THE CONFEDERACIÓN ECUATORIANA DE ORGANIZACIONES SINDICALES LIBRES (CEOSL) 31, ILO Doc. GB.277/18/4, GB.282/14/2 (2000); ILO REP. OF THE DIRECTOR-GEN., REPORT OF THE

recommended that states fully read the provisions of the Agreement, underscoring the interdependence of the right of free, prior, and informed consultation with other rights as recognized in accordance with indigenous peoples and their legal rights and demands. [27]

The CEACR has adopted a methodology that draws on the pronouncements of other bodies of human rights organizations as a means to supplement its current policy framework. In Peru, the CEACR has referred to reports from the Inter-American Commission on Human Rights ("IACHR") to underscore those problems the country is experiencing. [28]

1. The Impact of ILO Convention 169 in the Universal System for the Protection of Human Rights

In the context of the United Nations, Professor Karen Engle summarizes that indigenous groups have transitioned from a position of disinterest and ambiguity towards legal mechanisms and forums to a more active position when the specialized bodies address their demands. [29]

COMMITTEE SET UP TO EXAMINE THE REPRESENTATION ALLEGING NON-OBSERVANCE BY BRAZIL OF THE INDIGENOUS AND TRIBAL PEOPLES CONVENTION, 1989 (NO. 169), MADE UNDER ARTICLE 24 OF THE ILO CONSTITUTION BY THE UNION OF ENGINEERS OF THE FEDERAL DISTRICT (SENGE/DF) 44, 45, ILO Doc. GB.295/17, GB.304/14/7 (2009); ILO COMM. OF EXPERTS ON THE APPLICATION OF CONVENTION AND RECOMMENDATIONS [CEACR], COMMENTS MADE BY THE COMMITTEE OF EXPERTS ON THE APPLICATION OF CONVENTION AND RECOMMENDATIONS, INDIVIDUAL OBSERVATION ON THE INDIGENOUS AND TRIBAL PEOPLES CONVENTION, 1989 (No. 169), Guatemala. Session 2005/76ª, at para. 6 (2005).

27 ILO CEACR, INTERNATIONAL LABOUR CONFERENCE 2009 REPORT OF THE COMMITTEE OF EXPERTS ON THE APPLICATION OF CONVENTIONS AND RECOMMENDATIONS 672 (2009) (Sess. 2009/98); ILO COMM. OF EXPERTS ON THE APPLICATION OF CONVENTION AND RECOMMENDATIONS, INDIVIDUAL OBSERVATION ON THE INDIGENOUS AND TRIBAL PEOPLES CONVENTION (NO. 169), para. 3 (2004) (Sess. 2004/75ª) (Ecuador).

28 ILO CEACR, INDIVIDUAL OBSERVATION ON THE INDIGENOUS AND TRIBAL PEOPLES CONVENTION, para. 4 (2002) (73rd Sess.) (Peru); ILO CEACR, INDIVIDUAL OBSERVATION ON THE INDIGENOUS AND TRIBAL PEOPLES CONVENTION (NO. 169), para. 6 (2005) (76th Sess.) (Peru).

29 Karen Engle, *On Fragile Architecture: The UN Declaration on The Rights of Indigenous Peoples, in The Context of Human Rights*, 22 EUR. J. INT. L. 141, 151-153 (2011).

One of the starting points of human rights for indigenous peoples in the United Nations was the creation of the Sub-Commission on Prevention of Discrimination and Protection of Minorities in which the indigenous issue was associated with the protection of minorities and their move toward greater independence. [30] In addition, the Committee on the Elimination of Racial Discrimination interpreted the right to collective property in Article 5 of the Convention for the Elimination of All Forms of Racial Discrimination to mandate the terms of free, prior, and informed consultation and consent in cases where major development or investment plans have a profound impact on indigenous communal property.[31] Within these bodies, indigenous demands have had to adapt to the language of established rights in the respective treaties and agreements; however, ILO Convention 169 has been particularly useful in rendering visible and endowing operational content and meaning to the demands and claims of indigenous groups. [32]

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30 Claire Charters & Rodolfo Stavenhagen, *The UN Declaration on the rights of indigenous peoples: How it became and what it heralds, in* MAKING THE DECLARATION WORK: THE UNITED NATIONS DECLARATION ON INDIGENOUS PEOPLE 9-21 (2009).

31 International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969); Committee on the Elimination of Racial Discrimination [hereinafter CERD], Report of the Committee on the Elimination of Racial Discrimination: Annex V-General Recommendation XXIII, at 4(d), U.N. Doc. Supp. No. 18 (A/52/18) (Sept. 26, 1997); CERD, Consideration of reports submitted by States parties under article 9 of the Convention: Guatemala (concluding observations), para. 11, U.N. Doc. CERD/C/GTM/CO/12-13 (May 19, 2010).

32 INDIGENOUS PEOPLES AND UNITED NATIONS HUMAN RIGHTS BODIES: A COMPILATION OF U.N. TREATY BODY JURISPRUDENCE AND THE RECOMMENDATIONS OF THE HUMAN RIGHTS COUNCIL 2-3 (Fergus McKay ed., 2011); CERD, Consideration of reports submitted by States parties under article 9 of the Convention: Concluding observations of the Committee on the Elimination of Racial Discrimination: Finland, para. 14, U.N. Doc. CERD/C/FIN/CO/19 (Mar. 13, 2009), *available at* http://www.unhcr.|org/refworld/country,,CERD,,FIN,,49e5ccfb2,0.html; CCPR Human Rights Comm., Consideration of reports submitted by States parties under article 40 of the Convention: Concluding observations: Chile, para. 9, U.N. Doc. CCPR/C/CHL/CO/5 (May 18, 2007); CCPR Human Rights Comm., Consideration of reports submitted by States parties under article 40 of the Convention: Concluding observations: Panama, at 21, U.N. Doc. CCPR/C/PAN/CO/3 (Apr. 17, 2008); CCPR Human Rights Comm., Consideration of reports submitted by States parties under article 40 of the Convention: Concluding observations: Nicaragua, para. 21, U.N. Doc. CCPR/C/NIC/CO/3, (Dec. 12, 2008); Comm. on Economic, Social

Another critical moment in the recent history of the rights of indigenous peoples was the 2007 adoption of the Declaration on the Rights of Indigenous Peoples by the General Assembly of the United Nations. This declaration widened the scope of rights of indigenous peoples as an effort to close the gap inherited by the Universal Declaration of Human Rights. [33]

Moreover, the Declaration on the Rights of Indigenous Peoples has served as a translational tool for making the demands of indigenous peoples compatible to the language of human rights, while complementing and facilitating the work of the agencies for the protection of human rights in support of the application of ILO Convention 169. [34]

Additionally, this process extends the provisions of ILO Convention 169 to states that have not ratified the treaty, contemporizing the demands of indigenous peoples in light of new social problems that have emerged since its entry into force. It also introduces related issues to the current international human rights law agenda (*i.e.*, the recognition of the need for free, prior, and informed consent preceding military operations and the installation of projects affecting their lands or territories and other resources, and the obligation of redressing the dispossession of cultural, intellectual, religious, and spiritual property, including restitution).[35]

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and Cultural Rights, Consideration of reports submitted by States parties under Articles 16 and 17 of the Covenant: Concluding observations: Ecuador, paras. 12, 35, U.N. Doc. E/C.12/1/Add.100 (June 7, 2004); Comm. on Economic, Social and Cultural Rights, Consideration of reports submitted by States parties under Articles 16 and 17 of the Covenant: Concluding observations: Colombia, paras. 9-11, U.N. Doc. E/C.12/COL/CO/5 (May 21,
2010); Comm. on Economic, Social and Cultural Rights, Consideration of reports submitted by States parties under Articles 16 and 17 of the Covenant: Concluding observations: Peru, para. 23, U.N. Doc. E/C.12/PER/CO/2-4 (May 30, 2012).

33 James Anaya, *Porqué no debería existir una Declaración de los derechos de los pueblos indígenas*, *in* DECLARACIÓN SOBRE DERECHOS DE LOS PUEBLOS INDÍGENAS 37 (2009).

34 Saramaka People. v. Suriname, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, paras. 131-138 (Nov. 28, 2007); Pueblo Indígena Kichwa de Sarayaku v. Ecuador, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 245, paras. 160-166, 180, 185, 201 (June 27, 2012).

35 U.N. Declaration on the Rights of Indigenous Peoples arts. 21, 30, Sept. 13, 2007, 46 I.L.M. 1013.

Moreover, a Special Rapporteur on the Rights of Indigenous Peoples has been appointed to ensure compliance with these provisions. [36]

2. The Response of the Inter-American Human Rights System

In the case of the Inter-American Human Rights System, the member states of the Organization of American States ("OAS") have not adopted a new instrument to revise and update the language of the American Declaration of Rights and Duties of Man despite the multiple negotiations comprising indigenous groups in the region. [37] In this regard, it would seem that the regulatory gap inherited by the American Declaration of the Rights and Duties of Man persists. Given the failure of the regulatory tool, the bodies of the Inter-American Human Rights System have established standards of protection for indigenous peoples, referring directly to ILO Convention 169 and the Declaration on the Rights of Indigenous Peoples of the United Nations.

The Inter-American Court of Human Rights has focused its case law on the protection of indigenous citizens against violence by repressive governmental regimes as well as during times of armed conflict. [38] The passing of regulations to circumvent violence

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36 U.N. Human Rights Council, Human rights and indigenous peoples: mandate of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, 6th Sess., at art. 1(g), U.N. Doc. A/GA/61/53 (Sep. 28, 2007) (Res. 6/12).

37 Proposed American Declaration on the Rights of Indigenous Peoples (approved by the Inter- American Commission on Human Rights on February 26, 1997 at its 133rd session, 95th Regular Session) OEA/Ser/L/V/.II.95 Doc.6 (1997); Organization of American States [hereinafter OAS], G. A. Res. AG/Res.610(XXIX O/99), OAS Doc. CP/doc.2878/97 corr. 1 (June 7, 1999).

38 Aloeboetoe et al. v. Suriname, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 11 (Dec. 4, 1991); Bámaca-Velásquez v. Guatemala, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 70, (Nov. 25, 2000); Plan de Sánchez Massacre v. Guatemala, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No.105 (Apr. 29, 2004); Moiwana Community v. Suriname, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 124 (June 15, 2005); "Las Dos Erres" Massacre v. Guatemala, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 211 (Nov. 24, 2009); Chitay Nech et al. v. Guatemala, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 212 (May 25, 2010); Fernández-Ortega et al. v. Mexico, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No.
215, (Aug. 30, 2010); Rosendo-Cantú et al. v. Mexico, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 216

continues to retain its urgency in Latin America; however, in recent years other imperative indigenous issues have been introduced (*i.e.*, cultural identity, communal property, free, prior, and informed consultation, and safeguards for the realization of megaprojects in indigenous territories). [39]

The IACHR proposed a draft text of a non-conventional mechanism in favor of indigenous peoples that has proven to be a topic of ongoing deliberation. Moreover, the first rapporteur of the IACHR has dedicated his work to the defense of rights of indigenous people since 1990. [40] From 1995 until now, the IACHR has granted approximately seventy precautionary measures in favor of indigenous peoples to protect them against violent acts and major development or investment plans that may have a profound impact on their property rights. [41] Finally, the IACHR has interpreted the standard in favor of indigenous peoples with respect to states that have not ratified the American Convention on Human Rights nor ILO Convention 169 through the processing of individual petitions and the reports on Human Rights in Bolivia, Paraguay, Peru and Venezuela. [42]

(Aug. 31, 2010); Cabrera-García and Montiel-Flores v. Mexico, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 220 (Nov. 26, 2010).

39 Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Preliminary Objections, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 66 (Feb. 1, 2000); Moiwana Community v. Suriname, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No.124 (June 15, 2005); Yakye Axa Indigenous Community v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125 (June 17, 2005); Yatama v. Nicaragua, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 127 (June 23, 2005); Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172 (Nov. 28, 2007); Xákmok Kásek Indigenous Community. v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 214 (Aug. 24, 2010); Pueblo Indígena Kichwa de Sarayaku v. Ecuador, Merits, and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 245 (June 27, 2012).

40 *Mandato*, ORG. OF AM. STATES, http://www.oas.org/es/cidh/indigenas/mandato/funciones.asp.

41 *Precautionary Measures*, ORG. OF AM. STATES, http://www.oas.org/en/iachr/indigenous/protection/precautionary.asp.

42 IACHR, Third Report on the Situation of Human Rights in Paraguay, Doc. OEA/Ser./L/VII.110, Doc. 52 (Mar. 9, 2001), *available at* http://www.cidh.org/countryrep/Paraguay01eng/TOC.htm; Mary and Carrie Dann v. United States, Case 11.140, IACHR, Report No. 75/02 (Dec. 27, 2002); Maya Indigenous

3. The Indigenous Issue in International Environmental Law

In the framework of international environmental law, indigenous demands are increasingly recognized in the laws, policies, and forums of international conferences.[43] The Declaration of the United Nations Conference on the Human Environment, which is analogous to the Universal

Declaration of Human Rights, recognized a universal right to the environment but failed to acknowledge the particularities for its exercise relating to indigenous peoples, among other groups. Twenty years elapsed before other environmental regulations had specified commitments to address the identity of indigenous peoples. Moreover, the Rio Declaration recognizes these environmental commitments and outlines the differences in their execution in accordance with the identities of indigenous communities.[44] There are tangential references to indigenous peoples throughout the Rio Declaration. For instance, Principle 22 raises issues with regard to the environmental needs of the "indigenous population."[45] Though the Rio Declaration offers a general reference without concrete obligations, it provides the first recognition of support for "indigenous population" as a chief constituent in the realm of international environmental regulations.

After the Rio Conference, the General Assembly of the United Nations adopted new commitments based on the needs of indigenous

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Communities of the Toledo District v. Belize, Case 12.053, IACHR, Report No. 40/04 (Oct. 12, 2004); IACHR, Access to Justice and Social Inclusion: The Road toward strengthening Democracy in Bolivia, Doc. OEA/Ser.L/V/II, Doc. 34 (June 28, 2007); IACHR, Follow-up Report–Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia, Doc. OEA/Ser/L/V/II.135, Doc. 40 (Aug. 7, 2009); IACHR, Democracy and Human Rights in Venezuela, Doc. OEA/Ser.L/V/II, Doc. 54 (Dec.30, 2009); IACHR, Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System, Doc. OEA/Ser.L/V/II, Doc. 56/09 (Dec. 30, 2009); IACHR, Preliminary Observations of the Inter-American Commission on Human Rights on its Visit to Honduras, May 15-18, 2010, Doc. OEA/Ser.L/V/II., Doc. 68 (June 3, 2010).

43 PHILIPPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 294-307 (2d ed. 2003).

44 *Id.*at 56.

45 Report of the U.N. Conference on Environment & Development, Rio de Janeiro, Brazil, June 3-14, 1992, Principle 12, U.N. Doc. A/CONF.151/26 (Vol. I), *available at* http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm.

groups and established leading standards for environmental protection. Recently, "The Future We Want," the outcome document produced at the latest United Nations Conference on Sustainable Development–the Rio+20–seeks to renew the international environmental commitments while explicitly referring to specific environmental demands of indigenous peoples. It establishes obligations in support of indigenous peoples, such as the eradication of poverty in light of the disproportionate impact globalization has had on destitute populations.[46] Also, signatory states to the Rio+20.

Conference have demanded that indigenous communities achieve representation in government and must be key participants in political processes.[47] Equally important to the agenda has been the issue of food security and safety measures regarding natural resources for indigenous peoples.[48]

In 1992, along with the Rio Declaration, two environmental treaties were adopted that specifically recognized special rights for indigenous communities. The Conference of the Parties, the supervisory bodies of these treaties, has acknowledged a range of socio-economic problems experienced by indigenous communities and have interpreted the provisions so as to ensure the compliance with environmental obligations to restore benefits in support of these populations.[49] The Convention on Biological Diversity establishes Articles 8(j), 10(c), and related provisions in order to obtain prior formal consent to the access of natural resources, mandating that indigenous communities are considered in terms of the sharing of the benefits derived from the utilization of traditional knowledge. [50] The Conference of Parties to this treaty has adopted a

46 Rio+20: U. N. Conference on Sustainable Development, June 20-22, 2012, The Future We Want, paras. 43, 49, 58(j), Res. 66/288, U.N. Doc. A/66/L.56 (Jul. 24, 2012) (outcome document adopted at Rio+20), *available at* http://www.uncsd2012.org/content/documents/727The%20Future%20We%20Want%2019%20June%201230pm.pdf.

47 *Id*. paras. 71, 109, 131.

48 *Id*. paras. 43, 49, 58(j), 71, 109, 131, 175, 197, 211, 229, 238.

49 Comm. on Economic, Social and Cultural Rights, Consideration of reports submitted by States parties under Articles 16 and 17 of the Covenant: Concluding observations: Australia, para. 27, U.N. Doc. E/C.12/AUS/CO/4 (June 12, 2009); Comm. on the Rights of the Child, Consideration of reports submitted by States parties under articles 44 of the Convention: Concluding observations: Grenada, para. 52, U.N. Doc. CRC/C/GRD/CO/2 (June 20, 2010).

50 Convention on Biological Diversity arts. 8(j), 10(c), and related provisions, June 5, 1992, 1760 U.N.T.S. 142, 31 I.L.M. 822.

complementary dictum, the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, which covers indigenous peoples and refers to them as indigenous and local communities. [51] This international instrument has made available a series of regulations and commitments designed to ensure indigenous peoples adequate participation in the consultation process and the sharing of benefits with indigenous peoples. [52] The institutional framework for the control of greenhouse gases has also been read in relation to the needs of indigenous peoples. Addressing the potential vulnerability of indigenous peoples in the face of climate change, projects on the mitigation and adaptation (offered in the Kyoto Protocol) of environmental hazards have been designed and implemented with the participation of indigenous communities. [53] These environmental regulations must be read in conformity with international human rights law which dictates the terms of free, prior, and informed consultation as a form of indigenous political

51 Rep. of the Seventh Conference of Parties to the Convention on Biological Diversity (Kuala Lumpur, Malaysia), Decision VII/16 UNEP/CBD/COP/7/21, paras. 253-279 (Apr. 13, 2004), *available at* http://www.cbd.int/doc/meetings/cop/cop-07/official/cop-07-21-part1-en.pdf; Malgosia Fitzmaurice, *Dilemma of Traditional Knowledge: Indigenous Peoples and Traditional Knowledge,* 10 INT'L COMM. L. REV. 255, 262-264 (2008).

52 Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity arts. 5-12, Oct. 29, 2010, U.N. Doc. UNEP/CBD/COP/DEC/X/.

53 INGRID BARNSLEY, UNU-IAS GUIDE REDUCING EMISSIONS FROM DEFORESTATION AND FOREST DEGRADATION IN DEVELOPING COUNTRIES (REDD): A GUIDE FOR INDIGENOUS PEOPLES 18-21 (2009), *available at* http://www.unutki.org/news.php?news_id=50&doc_id=106; Report of the 16th Sess. of the Conference of Parties to the U.N. Framework Convention on Climate, Decision 1/CP.16, paras. 7, 12, 72, 87, Appendix 1(c), 1(d), U.N. Doc. FCCC/CP/2010/7/Add.11 (Mar. 15, 2011), *available at* http://unfccc.int/resource/docs/2010/cop16/eng/07a01.pdf#page=12; SBSTA, Report of the Subsidiary Body for Scientific and Technological Advice on its thirty-fourth session, held in Bonn from 6 to 16 June, Annex I para 1, U.N. Doc. FCCC/SBSTA/2011/2 (Aug. 3, 2011) (Framework Convention on Climate Change subsidiary body report), *available at* http://unfccc.int/resource/docs/2011/sbsta/eng/02.pdf; Report of the Conference of the Parties on its seventeenth session, held in Durban from 28 November to 11 December 2011: Addendum: Part Two: Action taken by the Conference of the Parties at its seventeenth.

participation with the demands for the redistribution of derived benefits to indigenous peoples. [54]

International mechanisms of human and environmental rights must be valued as having the capacity to introduce and put pressure on indigenous issues brought before state agendas. These forums motivate discussion and dialogue between states and indigenous peoples, supplying and complementing the mechanisms and instruments of political participation established in domestic law. Moreover, international forums, while serving as spaces of discussion, are also important contexts for the recognition of indigenous peoples and their demands. These forums promote dialogue that can alter the historical structures of social exclusion. At the same time, however, the limits and parameters of law, in terms of their capacity to transform societies facing polarization by violence, must be acknowledged in the processes for evaluating the efficacy of legal reform in relation to indigenous peoples.

4. The Protection of Indigenous Rights in Peru with Regard to Free, Prior, and Informed Consultation

In Peru, there is an undeniable inconsistency between the standards of international law and domestic law in relation to the rights of indigenous peoples, and in particular the right to free, prior, and informed consultation. At the level of the ILO, the CEACR has examined complaints against Peru for the non-observance of ILO Convention 169 and has recommended that the right to free, prior, and informed consultation be guaranteed by law. [55]

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54 *See generally* EXPERT MECHANISM ON THE RIGHTS OF INDIGENOUS PEOPLES (4TH SESS.): GRAND COUNCIL OF THE CREES (EEYOU ISTCHEE) ET AL., NAGOYA PROTOCOL ON ACCESS AND BENEFIT SHARING: SUBSTANTIVE AND PROCEDURAL INJUSTICES RELATING TO INDIGENOUS PEOPLES' HUMAN RIGHTS (July 2011), *available at* http://quakerservice.ca/wp-content/uploads/2011/08/Expert-Mechanism-Study-re-IPs-Rt-to-Participate-Joint-Submission-on-Nagoya-Protocol-FINAL-GCC-et-al-July-6-11.pdf; LAL KURUKULASURIYA & NICHOLAS A. ROBINSON, TRAINING MANUAL ON INTERNATIONAL ENVIRONMENTAL LAW 151 (2006); FRANCESCO MARTONE AND JEN RUBIS, INDIGENOUS PEOPLES AND THE GREEN CLIMATE FUND: A TECHNICAL BRIEFING FOR INDIGENOUS PEOPLES, POLICYMAKERS AND SUPPORT GROUPS 7, 12 (2012).

55 ILO CEACR, DIRECT SOLICITATION ON THE INDIGENOUS AND TRIBAL PEOPLES CONVENTION, paras. 8, 15 (1999); ILO CEACR, INDIVIDUAL OBSERVATION ON THE INDIGENOUS AND TRIBAL PEOPLES

The CEACR refers directly to acts from previous decades that were executed without consultation and has recommended the suspension of mining concessions and major development or investment plans that may have a profound impact in indigenous territories. [56]

In the Inter-American Human Rights System, Peru has been regarded for decades as the state with the greatest number of condemnations by the Inter-American Court as well as having the most individual petitions currently pending. [57] The principal issues are directed toward anti-terrorist legislation and the state's repressive measures implemented during the internal armed conflict that continued even in the absence of open hostilities. In this context, the indigenous issue was not a priority nor was it actively promoted by human rights defenders and indigenous organizations. Barriers to access to international justice may have also contributed to the neglect of the indigenous people from Peru in the Inter-American Human Rights System.

Despite this reality, after the events of Bagua, there are now petitions and precautionary measures expressly stated in the Inter-American Human Rights System that support indigenous peoples in Peru. [58] Also, it should be noted that the role of the Inter-American

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CONVENTION, para. 9 (2000); ILO CEACR, DIRECT SOLICITATION ON THE INDIGENOUS AND TRIBAL PEOPLES CONVENTION, paras. 2-4 (2002), ILO CEACR, DIRECT SOLICITATION ON THE INDIGENOUS AND TRIBAL PEOPLES CONVENTION, paras. 3, 6-9, 13 (2005); ILO CEACR, INDIVIDUAL OBSERVATION ON THE INDIGENOUS AND TRIBAL PEOPLES CONVENTION, paras. 4, 6 (2005); ILO CEACR, INDIVIDUAL OBSERVATION ON THE INDIGENOUS AND TRIBAL PEOPLES CONVENTION, para. 3 (2007); ILO CEACR, INDIVIDUAL OBSERVATION ON THE INDIGENOUS AND TRIBAL PEOPLES CONVENTION (2008); ILO CEACR, DIRECT SOLICITATION ON THE INDIGENOUS AND TRIBAL PEOPLES CONVENTION (2009).

56 ILO CEACR, INDIVIDUAL OBSERVATION ON THE INDIGENOUS AND TRIBAL PEOPLES CONVENTION (2009).

57 Until November 2012, the highest number of judgments from the Inter-American Human Rights Court concerned Peru (12.75%), Colombia (7.5%), Argentina (7.5%), and Venezuela (7.5%). According to the IACHR, these three States account for the 46.45% of its current docket of petitions in admissibility and merits: the cases are directed to Peru (315), Colombia (231) and Argentina (222).

58 Community of San Mateo de Huanchor and its members (Peru), Report No. 69/04, Petition 504/03: Admissibility, Inter-Am. Comm'n H.R. (Oct. 15, 2004); IACHR, Events that occurred in the town of Cayara, Peru, Report on the Merits, No. 29/91, Cases 10.264, 10.206, 10.276 y 10.446, Inter-Am. Comm'n H.R. (Feb. 20, 1991); Indigenous peoples of Mashco Piro, Yora, and Amahuaca in voluntary

Human Rights System does not solely involve the process of petitions. In effect, the IACHR has continued in recent decades to address the issues and concerns of indigenous peoples in Peru. [59] In the period following the *Baguazo* (the colloquial title that refers to the manifestations of violence in Bagua), the IACHR implemented multiple public hearings to examine policies dealing with the exploitation of natural resources in indigenous territories. [60]

As a result of the regulatory aperture before the Inter-American Human Rights System, these public hearings–along with processes for precautionary measures, petitions, and contentious litigations–have led to the establishment of a forum for clear political advocacy. Moreover, these spaces of dialogue provide an opportunity for collective catharsis where there has historically been a dearth of national dialogue. The increasing use and implementation of the

isolation, Peru, Precautionary Measures, Inter-Am. Comm'n H.R. (Mar. 22, 2007); *Precautionary Measures*, ORGANIZATION OF AMERICAN STATES, *available at* http://www.oas.org/en/iachr/indigenous/prot ection/precautionary.asp.

59 IACHR, Second Report on the Situation of Human Rights in Peru, Chapter X para. 7, Doc. OEA/Ser.L/V/II.106, Doc. 59 rev. (June 2, 2000).

60 IACHR, *The Right to Water and Indigenous Peoples in the Andean Region*, ORG. OF AM. STATES, Sept. 6, 2007 (Sess. 129), *available at* http://www.oas.org/es/cidh/audiencias/TopicsList.aspx?Lang=en& Topic=17; *Situation of Indigenous Peoples in Voluntary Isolation in Peru–Precautionary Measures 102/07 (Kugpakori Nahua Nanti and others), 262/05 (Mashco Piro, Yora and Arahuaca) y 129/07 (Tagaeri, Taromenane),* ORG. OF AM. STATES, Oct. 12, 207 (Sess. 130), *available at* http://www.oas.org/es/cidh/audiencias/TopicsList.aspx?Lang=en&Topic=23; *Criminal Processes against Defenders of Indigenous Peoples in Countries in the Region*, ORG. OF AM. STATES, Mar. 20, 2009, (Sess. 134), *available at* http://www.oas.org/es/cidh/audiencias/TopicsList.aspx?Lang=en&Topic=17; *Situation of Indigenous Communities Affected by the Initiative Project for the Integration of Regional Infrastructure in South America (IIRSA),* ORG. OF AM. STATES. Nov. 2, 2009 (Sess. 137), *available at* http://www.oas.org/es/cidh /audiencias/TopicsList.aspx?Lang=en&Topic=17; *Human Rights Situation in the Peruvian Amazon & Right to Consultation of the Indigenous Peoples of Peru,* ORG. OF AM. STATES, Nov. 3, 2009 (Sess. 137), *available at* http://www.oas.org/es/cidh/audiencias/TopicsList.aspx?Lang=en&Topic=17; *Human Rights Situation of the Ashaninka People in Peru,* ORG. OF AM. STATES, Mar. 23, 2010 (Sess. 138), *Rights of Indigenous Peoples and Energy and Extractive Industry Policy in Peru,* ORG. OF AM. STATES, Oct. 26, 2010 (Sess. 140), *available at* http://www.oas.org/es/cidh/audiencias/TopicsList.aspx?Lang=en&Topic=17; *Indigenous Peoples in Voluntary Isolation in South America*, ORG. OF AM. STATES, Nov, 1, 2012 (Sess. 146), *available at* http://www.oas.org/es/cidh/audiencias/TopicsList.aspx?Lang=en&Topic=17; *Situation of the Achuar People of Pastaza, Peru,* ORG. OF AM. STATES (Sess. 146, Nov. 1, 2012), *available at* http:// www.oas.org/es/cidh/audiencias/TopicsList.aspx?Lang=en&Topic=17.

Inter-American Human Rights System's standards are due to the fact that the jurisprudence of the Inter-American Court holds legitimacy at the domestic level. Currently, various societal actors in Peru utilize the standards of the Inter-American Human Rights System: political groups, human rights defenders, conservationists groups, indigenous organizations, and scholars, among others. There has not been, however, a contentious case concerning Peru's indigenous peoples in which the standard has been consulted. [61] The current challenge existing for Peru lies in its ability to transform these standards into realities at the domestic level.

For its part, the Universal Human Rights System has also generated various standards in respect to the protection of indigenous peoples in Peru and their right to free, prior, and informed consultation. As in the Inter- American Human Rights System, the regulatory bodies have concentrated their efforts on addressing human rights violations during the armed conflict in Peru, and the indigenous issues have continued to be progressively incorporated in its agenda. For instance, only a few days after the events of Bagua, the UN Special Rapporteur on the Rights of Indigenous Peoples organized an immediate visit and confirmed the instability of the situation. Regarding the Amazonian indigenous peoples, the Special Rapporteur recommended a series of measures, including the implementation of a law for free, prior, and informed consultation as well as further investigation on the human rights violations. [62]

Other bodies of the Universal Human Rights System have shared the opinion that the events of Bagua must be redressed, commenting specifically on the role of free, prior, and informed consultation. The Committee on the Elimination of Racial Discrimination has commented on the community of Ancomarca and has subsequently interpreted that the regulations regarding racial discrimination must protect the Aymaras of Peru from the installation of hydric dams resulting from a lack of free, prior, and informed consultation. [63] Moreover, the Human Rights Committee, the supervisory body that monitors the implementation of the International Covenant

61 Salmón, *supra* note 15, at 29.

62 U. N. Office of the High Commissioner on Human Rights, *supra* note 2, paras. 33-41.

63 CERD, Consideration of reports submitted by States parties under article 9 of the Convention: Concluding observations: Peru, at 20, U.N. Doc. CERD/C/PER/CO/14-17 (Sept. 3, 2009); CERD, Early- Warning Measures and Urgent

on Civil and Political Rights, has recognized the right to free, prior, and informed consent in the opinion of the case of *Ángela Poma Poma v. Peru*, which considers Peru's obligation after the diverting of the Uchusuma River and its effects on the Aymara community. [64]

While the number of pronouncements has increased in the Universal Human Rights System, the legal standards are unknown because 1) the Peruvian state does not disseminate the recommendations of the supervisory bodies, and 2) the legal standards are not easily accessible to civil society due to the multiplicity of the rulings. [65] However, around the world and especially in Peru, the indigenous rights defenders and indigenous organizations have begun to participate in these international forums, appropriating the standards as a means to authorize and channel their demands within normative legal and governmental structures. [66]

Procedures, U.N. Doc. CERD/C/PER/CO/14-17 (Mar. 13, 2009*), available at* http://www2.ohchr.org/english/bodies/cerd/docs/early_warning/Peru130309.pdf.

64 CCPR Human Rights Committee, Report of the Human Rights Committee of the International Covenant on Civil and Political Rights, Angela Poma Poma v. Peru, para. 7.6, U.N. Doc. CCPR/C/95/D/1457/2006 (Mar. 27, 2009), *available at* http://www.worldcourts.com/hrc/eng/decisions/2009.03.27_Poma _Poma_v_ Peru.htm.

65 PIERRE-MARIE DUPUY, DROIT INTERNATIONAL PUBLIC 160 (1993).

66 CAOI, OBSERVACIONES AL INFORME OFICIAL DEL ESTADO PERUANO, OBSERVACIONES DE LAS ORGANIZACIONES INDÍGENAS AL INFORME DEL ESTADO PERUANO ANTE EL COMITÉ PARA LA ELIMINACIÓN DE TODAS LAS FORMAS DE DISCRIMINACIÓN RACIAL (July 23, 2004); COMISIÓN JURÍDICA PARA EL AUTODESARROLLO DE LOS PUEBLOS ORIGINARIOS ANDINOS, ALGUNAS CONSIDERACIONES RELATIVAS AL INFORME PRESENTADO POR EL GOBIERNO DE PERÚ AL "CERD" (June 21, 2009); CHIRAPAQ, ACTIONS OF THE PERUVIAN STATE IN RELATION TO THE ICERD (July 2009); AMNESTY INT'L, ET. AL., INFORME DE LA SOCIEDAD CIVIL DE CHILE CERD CON MOTIVO DEL EXAMEN DE LOS INFORMES PERIÓDICOS 15°, 16°, 17°, Y 18° DEL ESTADO DE CHILE (Aug. 2009); COMUNIDADES MAPUCHE, INFORME ALTERNATIVO SOBRE LA SITUACIÓN DE DISCRIMINACIÓN RACIAL QUE AFECTA AL PUEBLO MAPUCHE, RESPECTO DEL INFORME PRESENTADO POR EL ESTADO CHILENO ANTE EL CERD (Aug. 2009); MESA TRABAJO MAPUCHE SOBRE DERECHOS COLECTIVOS ET. AL., INFORME PARALELO DE LOS DENUNCIANTES RACISMO AMBIENTAL EN LA REGIÓN DE LA ARAUCANÍA, CHILE, POR LOS CASOS DE VERTEDEROS Y PLANTAS DE TRATAMIENTO DE AGUAS SERVIDAS LOCALIZADAS EN COMUNIDADES MAPUCHE (Aug. 2009); PHILIPPINES INDIGENOUS PEOPLES, SHADOW REPORT FOR THE CONSOLIDATED FIFTEENTH, SIXTEENTH, SEVENTEENTH, EIGHTEENTH, NINETEENTH AND TWENTIETH PHILIPPINE ICERD PERIODIC REPORTS (Aug. 2009); CAOI ET AL., ALTERNATIVE REPORT SUBMITTED BY THE ANDEAN COORDINATOR OF INDIGENOUS ORGANIZATIONS (CAOI) BEFORE THE

For several years, indigenous organizations along with the Peruvian state have shared the same discourse concerning the protection of the environment. Regarding the protection of biological diversity, the Peruvian state has actively supported the defense of traditional knowledge of indigenous peoples and has adopted various domestic regulations to establish this right. [67] In the case of climate change, the Peruvian state and indigenous organizations have turned to international law to raise the issue of indigenous vulnerability in the face of global warming and the necessity to incorporate a working perspective toward human rights in the compliance of environmental obligations.[68]

Notwithstanding, in recent years this confluence of interests has reached a turning point, particularly in relation to the implementation of REDD-plus, a term which describes "Reducing Emissions from Deforestation and Degradation" plus sustainable management of forests and the enhancement of forest carbon stocks. [69] Regarding climate change, Peru has proposed to accept remunerations to maintain

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CERD (July 2012); FIJI NATIVE TRIBAL CONGRESS, SUPPLEMENTARY REPORT TO THE CERD FOR THE REPUBLIC OF FIJI (July 2012); SAAMI COUNCIL, OBSERVATIONS WITH REGARD TO FINLAND'S 20TH, 21ST, AND 22ND PERIODIC REPORTS TO THE CERD (Aug. 13, 2012); SARSTOON TEMASH INSTITUTE FOR INDIGENOUS MANAGEMENT & MINORITY RIGHTS GROUP INTERNATIONAL REPORT TO THE CERD (Aug, 2012).

67 MANUEL RUIZ MULLER, UNA MIRADA AL DEBATE SOBRE ACCESO A LOS RECURSOS GENÉTICOS, PROPIEDAD INTELECTUAL Y CONOCIMIENTOS TRADICIONALES, A PROPÓSITO DEL PROTOCOLO DE NAGOYA 4-5 (2011); Manuel Ruiz Muller, *Peru: Seeking benefit sharing through a defensive approach– the experience of the National Commission for the Prevention of Biopiracy*, *in* THE CUSTODIANS OF BIODIVERSITY: SHARING ACCESS AND BENEFITS TO GENETIC RESOURCES 43, 44-45 (2011).

68 *Ministerio del ambiente renueva su compromiso de trabajo con los pueblos indígenas*, PERU: MINISTERIO DEL AMBIENTE, Feb. 5, 2013, *available at* http://www.minam.gob.pe/index.php?option=com_ content&view=article&id=2008: ministerio-del-ambiente-renueva-su-compromiso-de-trabajo-con-los- pueblos-in digenas&catid=1:noticias&Itemid=21; MINISTERIO DEL AMBIENTE, EL PERÚ Y EL CAMBIO CLIMÁTICO SEGUNDA COMUNICACIÓN NACIONAL DEL PERÚ A LA CONVENCIÓN MARCO DE LAS NACIONES UNIDAS SOBRE CAMBIO CLIMÁTICO 2010, 100-105 (2010).

69 U.N. Framework Convention on Climate Change Ad hoc Working Group on Long-term Cooperative Action under the Convention (5th Sess.), Fulfillment of the Bali Action Plan and components of the agreed outcome, U.N. FCCC/ AWGLCA/2009/4 (Pt. II) (Mar. 18, 2009), *available at* http://unfccc.| int/ resource/docs/2009/awglca5/eng/04p02.pdf; LOUIS V. VERCHOT & ELENA PETKOVA, EL ESTADO DE LAS NEGOCIACIONES REDD PUNTOS DE

the Amazon forest region intact and to provide other environmental services. Responding to this effort, the indigenous communities have expressed opposition to the state's commercialization of the Amazon and the jeopardizing of the region's forestry. Moreover, indigenous peoples reaffirmed that the adoption of these commercial mechanisms is inadequate, and several indigenous communities are still in dispute with the state over territories and its failure to implement effective demarcation of indigenous lands. Seen in this light, indigenous peoples fear that the state reaps a profit from the exploitation of the Amazon and has, therefore, demanded free, prior, and informed consent measures for nature conservation and the eventual transaction of environmental services. [70]

III. THE LEGAL INVISIBILITY OF INDIGENOUS PEOPLES IN PERU

Once the protection standards applicable to indigenous peoples in Peru have been established, it is pertinent to analyze the specific reasons why the rights of indigenous peoples have been violated. Peru was the epicenter of the Spanish colony. For centuries, the Spanish and their direct descendants enjoyed the benefits and access to power. Historical stereotypes, as a result, associated the dominant class as deriving from a particular race and national origin. These ideologies, in turn, were used as justification to subject indigenous peoples to the Spanish Royal Crown; they were required to seek accreditation for the property of their lands through the distribution of titles and forced to work. Officially, the indigenous peoples' right to property was recognized, but its exercise was essentially debilitated by the institutional structures of discrimination. [71]

With the independence of Peru, the republican discourse did not serve to eradicate the stereotypes of disparagement toward the indigenous peoples, but, on the contrary, contributed to these prejudices in order to institute new systems of labor exploitation that

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CONSENSO, OPCIONES PARA SEGUIR AVANZANDO Y NECESIDADES DE INVESTIGACIÓN PARA RESPALDAR EL PROCESO 8 (2010).

70 *Perú: Proyectos REDD+ violan derechos de pueblos indígenas y agudizarán conflictos por tierras*, SERVINDI, Dec. 1, 2011, *available at* servindi.org/actualidad/55284; FOREST PEOPLES, LA REALIDAD DE REDD+ EN PERÚ: ENTRE EL DICHO Y EL HECHO, ANÁLISIS Y ALTERNATIVAS DE LOS PUEBLOS INDÍGENAS AMAZÓNICOS 8 (2011).

71 Maribel Aróstegui Rodríguez, *La problemática sobre el derecho de propiedad de las poblaciones previstas en el Convenio,* 169 OIT 31 (2011).

solidified the servile condition of the indigenous peoples, providing the justification for the spoiling of their territories. On June 4, 1825, Simón Bolívar prohibited forced indigenous labor; three years later he adopted a decree recognizing the ownership of indigenous peoples to the lands they previously occupied. [72] Later, President Nicolás de Piérola was awarded the role of protector of the indigenous race, criminalizing abuses of indigenous peoples within the context of the War of the Pacific. [73] Successive governments recognized the symbolic value of the liberty and ownership of indigenous peoples, but in practice continued to subject indigenous communities to enslavement by contracts of engagement and to strip them from their property through unfair regulations and state mandates.

Peruvian legislation has regulated the indigenous issue from the moment of its independence; however, it has done so from a paternalistic and assimilationist ideology and not from a standpoint of intercultural dialogue. This has been a detriment to the identity of indigenous peoples and deleterious to the respect for their culture, as well as their entitlement to rights. [74]

With large-scale social reform at the end of the 1960s, marked by the famous slogan, "the land to the tiller, not for those who obtain profit without labor," the military government of Velasco Alvarado initiated one of the agrarian reform processes designed to award "social justice for rural demographics" and to overturn long-held prejudices directed at indigenous groups.[75] In a message to the nation, motivating the promulgation of Legal Decree 17716 (Law of Agrarian Reform) on June 24, 1969, General Velasco Alvarado justified the abandonment of the term "indigenous" as a legal category, substituting it with the more euphemistic denomination: "rural and peasant communities." [76]

Indigenous peoples had to adapt to identities created artificially by the law due to the fact that this transformation permitted them

72 *Id*. at 33.

73 ROMÁN ROBLES, LEGISLACION PERUANA SOBRE COMUNIDADES CAMPESINAS 57-58 (2002), *available at* http://sisbib.unmsm.edu.pe/bibvirtualdata/libros/2007/legis_per/cap01.pdf.

74 Carlos Contreras, *El impuesto de la contribución personal en el Perú del siglo XIX*, 29 HISTÓRICA 2, 81 (2005).

75 Juan Velasco, *Mensaje a la nación con motivo de la promulgación de la ley de la reforma agraria*, PROBLEMA AGRARIO, *available at* http://www.marxists.org/espanol/tematica/agro/peru/velasco1969.htm.

76 JUAN VELASCO, VELASCO: LA VOZ DE LA REVOLUCIÓN 49 (1968).

access to special measures conferred by the government in respect to their lands. Later, the government adopted Legislative Decree 20653 in 1974, known as the Law of Native Communities and Agricultural Promotion of the Jungle, which introduced another denominative heading for some indigenous groups:

> "native communities."[77] From this moment on, references in Peruvian legislation made attempts to circumvent the definition of "indigenous peoples" and adopted several qualifications among which were "rural communities," "peasants," "native communities," "isolated indigenous peoples," etc. In response to these legal taxonomies, indigenous peoples have preferred to refer to themselves as "*campesinos*" or "natives," as the adjective "indigenous" is widely perceived as racially connotative or an outright epithet. The Constitution of 1993, for example, does not recognize indigenous peoples, but rather refers to the group as "native and peasant communities."[78]

Peru ratified ILO Convention 169 on February 2, 1994 and in accordance with its provisions, the treaty entered into force one year later. In Article 6 the right to free, prior, and informed consultation is recognized in terms of all measures that affect indigenous peoples. However, since the ratification of the ILO Convention 169, there has existed in Peru what Rodolfo Stavenhagen has identified as a "gap in implementation between the legislation and the quotidian reality."[79] José Aylwyn has noted that this gap of implementation is prevalent in Latin America due to the "distance between the constitutional provisions and legal standards and domestic regulations and practices, the absence of mechanisms to constitutionally enforced recognized rights, and the lack of resources or will to develop public policy as a means to render those resources effective"–all of which has resulted in what might be referred to as a phenomenon of indigenous

77 Law Decree No. 20653 (Ley de Comunidades Nativas y de Promoción Agropecuaria de Regiones de Selva y Ceja de Selva), arts. 6-10, June 18, 1974 (Peru).
78 Constitución Política del Perú [CONSTITUTION], arts. 88-89 (Peru) [hereinafter Constitution of the Republic of Peru].
79 RODOLFO STAVENHAGEN, LOS PUEBLOS INDÍGENAS Y SUS DERECHOS: INFORMES TEMÁTICOS DEL RELATOR ESPECIAL SOBRE LA SITUACIÓN DE LOS DERECHOS HUMANOS Y LAS LIBERTADES FUNDAMENTALES DE LOS PUEBLOS INDÍGENAS DEL CONSEJO DE DERECHOS HUMANOS DE LA ORGANIZACIÓN DE LAS NACIONES UNIDAS 115 (UNESCO 2007).

frustration.[80] In the case of Peru, this gap of implementation is a result of the state and other entities' failure to incorporate these laws both in the design and the implementation of public policies focusing on communal property and the continued exploitation of natural resources. At the same time, this regulatory lag might be indicative of the state's deference to international instruments to establish rights for indigenous groups in Peru.

With respect to the question of legal denominations, the CEACR of the ILO has pointed out that the diverse legal categories in Peru generate confusion and that the concept of indigenous peoples is "broader than that of the communities to which such peoples belong and that, whatever such communities are called, it is irrelevant for the purposes of the application of the Convention, as long as 'native', 'rural' or other communities are covered by Article 1(1)(a) or (b), of the Convention."[81] Legal differences at the domestic level have created tensions between Peru's indigenous groups and the state in terms of the application and implementation of ILO Convention 169. These tensions have become even more manifest amid the installation of major development and investment plans that may have a profound impact in indigenous regions.

IV. THE *BAGUAZO* AND THE CONTENTION OVER DEVELOPMENTAL AND INVESTMENT PLANS IN PERU

The violence during the events of Bagua allowed indigenous peoples to abandon their disdain toward recognizing themselves as indigenous and to take ownership of the discourse on indigenous peoples' rights.

A. Violence in Bagua as Turning Point for Indigenous Rights

In his presidential speeches, Alan García introduced developmental policies that were particularly aggressive in macroeconomic terms without considering the social impacts of the state's projects.[82] The state granted concessions for hydrocarbon and

80 JOSÉ AYLWIN, DERECHOS TERRITORIALES DE PUEBLOS INDÍGENAS EN AMÉRICA LATINA: SITUACIÓN JURÍDICA Y POLÍTICAS PÚBLICAS 7 (2011).
81 ILO CEACR, PERU: INDIVIDUAL OBSERVATION ON THE INDIGENOUS AND TRIBAL PEOPLES CONVENTION, *1989*, 699 (2008) (Sess. 91, 2008).
82 For instance, in 2007, the press noticed the existence of the Mascho Piro, isolated indigenous peoples in the forest regions affected by mining and oil exploitation. A

forestation programs in territories inhabited by indigenous peoples or under the influence of communities belonging to the Amazonian regions. Moreover, the state supported mining projects in areas sharing close proximity and in regions under dispute with those zones inhabited by the rural communities of the sierra and the coast. State policy was defined by its determined promotion of economic development; the state opposed a group known by the moniker "farmer's dogs," a colloquial term meaning "those that neither eat nor allow others to eat," a faction defined by its defense of the rights of indigenous communities and isolated indigenous peoples. [83] In a scenario that was perceived by many as both an insult and a threat to Amazonian indigenous communities, the state witnessed the emergence of a series of social conflicts mobilized by indigenous peoples in various regions within the country.[84]

One of the most violent episodes occurred in the jungle province of Bagua in the Department of Amazonas. After a series of several international negotiations, the administration under Alan García passed the PTPA. The free trade treaty was met with the immediate rejection from the rural and native communities who felt that their livelihoods had been threatened with the imminent arrival of multinational firms from the United States. The state failed to assuage their fears and excluded these groups from the negotiation process of the treaty that outlined the terms of free trade in the region.[85] Moreover, the state did not provide valuable information regarding the legal safeguards involving traditional

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couple months later, President Alan García wrote an article where he questioned the existence of these citizens: "Against oil, they [the environmentalists] have created the figure of the 'uncontacted' native jungle dweller; that is, unknown but presumed, and thus millions of hectares cannot be explored, and Peru's petroleum must remain underground while the world is paying US $90 per barrel. They prefer that Peru continue importing its oil and getting poorer." Alan García, *El síndrome del perro del hortelano*, EL COMERCIO, Oct. 28, 2007; David Hill, *Who are the Mashco-Piro tribe and can they still hope to stay 'uncontacted'?*, THE ECOLOGIST Feb. 1, 2012.

83 *Id*.; Alan García, *El perro del hortelano contra el pobre*, EL COMERCIO, Mar. 2, 2008, at a4, *available at* http://www.scribd.com/fullscreen/16274544?access_key=key-2ndod0wq3zmcf4iyrs6l.

84 CONGRESO DE LA REPÚBLICA DEL PERÚ, INFORME EN MINORÍA DE LA COMISIÓN ESPECIAL PARA INVESTIGAR Y ANALIZAR LOS SUCESOS DE BAGUA 121-122 (2010), *available at* http://www.idl.org.pe/webpanel/informes/180411file_informeminoria.pdf.

85 U.N. Office of the High Commissioner on Human Rights, *supra* note 2, para. 8.

knowledge, biological diversity, and access to environmental justice contained in the treaty.[86]

Detached from the concerns expressed by the indigenous community, the Congress of the Republic delegated faculties to the Executive Power to implement, at the national level, obligations outlined by the commercial treaty in Law 29157 on December 19, 2007.[87] Between March and June of 2008, the government adopted a series of legislative decrees, including the Wildlife and Forestry Law[88] and the Law Establishing the Special Temporary Regime of the Formulation of Rural Property.[89] Indigenous people were not consulted according to international law, despite the fact that the decrees explicitly affected them.

The Executive Power adopted its own regulatory standards while several other state and international entities expressed their objections. The Ombudsman,[90] the Commission of Andean Peoples, Amazon and Afro- Peruvians, Environment and Ecology Commission of the Republic of the Congress,[91] and the CEACR of the

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86 United States-Peru Trade Promotion Agreement (with annexes, understandings, and related exchange of letters as amended by Protocol of Amendment to the United States-Peru Trade Promotion Agreement), arts. 18.1-18.5, US-Peru, Apr. 12, 2006; Manuel Ruiz Muller, *Biodiversidad, propiedad intelectual y el tratado de libre comercio con los Estados Unidos de América*, 2 REVISTA DE LA COMPETENCIA Y LA PROPIEDAD INTELECTUAL 48-51 (2006).

87 Law No. 29157 [Ley que delega en el Poder Ejecutivo la facultad de legislar sobre diversas materias relacionadas con la implementación del Acuerdo de Promoción Comercial Perú-Estados Unidos, y con el apoyo a la competitividad económica para su aprovechamiento], Dec. 20, 2007 (Peru).

88 Legislative Decree 1090 [Decreto Legislativo que aprueba la Ley Forestal y de Fauna Silvestre], June 28, 2008 (Peru).

89 Legislative Decree 1089 [Decreto Legislativo que Establece el Régimen Temporal Extraordinario de Formalización y Titulación de Predios Rurales], June 28, 2008 (Peru).

90 DEFENSORIA DEL PUEBLO, *EL DERECHO A LA CONSULTA DE LOS PUEBLOS INDÍGENAS*. INFORME DE ADJUNTÍA Nº 011-2009-DP/AMASPPI-PPI (May 2009); DEMANDA DE INCONSTITUCIONALIDAD CONTRA EL DECRETO LEGISLATIVO Nº 1064 QUE APRUEBA EL RÉGIMEN JURÍDICO PARA EL APROVECHAMIENTO DE LAS TIERRAS DE USO AGRARIO (June 4, 2009); ANÁLISIS DE LAS PRINCIPALES DISPOSICIONES DEL DECRETO LEGISLATIVO Nº 1090, QUE DEROGA LA LEY Nº 27308, LEY FORESTAL Y DE FAUNA SILVESTRE INFORME DE ADJUNTÍA Nº 027-2008-DP/ASPMA.MA (Oct. 20, 2008).

91 COMISIÓN DE PUEBLOS ANDINOS, AMAZÓNICOS Y AFROPERUANOS, AMBIENTE Y ECOLOGÍA, MEMORIA DE LA GESTIÓN PARLAMENTARIA PERÍODO LEGISLATIVO 2008-2009, *available at* http://www. congreso.gob.pe/comisiones/2008/pueblos_andinos/MEMORIA-2008-2009-CPAAAAE.pdf.

ILO[92] argued that these laws should be formulated in consultation with the indigenous groups prior to their implementation and be modified accordingly. At this juncture, the Interethnic Association for the Development of the Peruvian Rainforest ("AIDESEP"), one of the principal indigenous federations of the Amazon, held a conference to express their opposition to the new legislative decrees. Within a short period of time, the member organizations of AIDESEP overcame longstanding historical divisions and established a common agenda to resist the governmental policies under Alan García. [93]

As a result of these initiatives, in August 2008 various Amazonian organizations conducted demonstrations to publically challenge the decrees; these protests ultimately stalled the installation of oil companies in the regions and led to the kidnapping of several officials. For the first time in decades, indigenous organizations regrouped systematically and took collective action as an alternative to resist the privatization of the forests. Other protests resulted in the permanent blocking of a major conduit of national transport, where protestors used blockades to obstruct the major highway crossings. In response to this, the government declared a state of emergency in the regions affected by the social unrest, including Bagua.[94]

During a period of several months, the government established roundtable discussions with indigenous leaders that ultimately were deemed as generally unsatisfactory by several Amazonian Indigenous Peoples.[95]

These meetings were held while indigenous protesters were blocking major highways and taking hostages. As a result, AIDESEP retired from its negotiations with the state and called for resistance from all Amazon indigenous organizations.[96] On April 8, 2009 the

92 ILO CEACR, PERU: INDIVIDUAL OBSERVATION ON THE INDIGENOUS AND TRIBAL PEOPLES CONVENTION, 1989, 699 (Sess. 97, 2008); ILO CEACR, PERU: DIRECT SOLICITATION ON THE INDIGENOUS AND TRIBAL PEOPLES CONVENTION, 1989 (Sess. 80, 2009).

93 Juan Pablo Saavedra Limo, *Efectos post Bagua: el debilitamiento de la institucionalidad indígena de los pueblos Jibaros del Marañón en la región Amazonas-Perú*, Congreso Internacional de la Red Latinoamericana de Antropología Jurídica RELAJU-BOLIVIA, at 147-148.

94 U.N. Office of the High Commissioner on Human Rights, *supra* note 2, paras. 15-16.

95 *Id*. para. 18

96 Theodore Macdonald, *Amazonian Indigenous Views on the State*, 33 SUFFOLK TRANSNAT'L L. REV. 453, 455 (2010).

leaders of approximately 1,350 Amazon communities enacted an indefinite protest in the entirety of Peru's Amazonian region.

On June 5, 2009, after two months of massive indigenous protests, the Peruvian police force carried out an operation for the eviction of all protestors along the Fernando Belaúnde Terry highway in the provinces of Bagua and Utcubamba. The confrontation resulted in the deaths of approximately twenty-four members of the police and ten civilian protestors.[97] In Station 6 of Petroperú, out of vengeance for the earlier events, twelve policemen were assassinated after they were already handcuffed and in custody. Of the twenty-four members of the police that were murdered, there was at least one other policeman seized by a group of dissenters who is still missing.

Moreover, these events resulted in injuries to more than two hundred persons, eighty-two of which were injured by firearms.[98] Following the incident, police raided places in which the injured were receiving medical attention in order to make arrests.[99] The government prosecuted several leaders of AIDESEP for allegedly inciting violence. Ten days after the events of *Baguazo*, James Anaya, the UN Special Rapporteur on the Rights of Indigenous Peoples, visited the site in order to analyze the situation. He expressed the need for a process of free, prior, and informed consultation as a measure to prevent further outbreaks of violence.[100]

In response to this issue, the Congress of the Republic suspended and abolished the most controversial legislative decrees, such as the Wildlife and Forestry Law.[101] The Congress of the

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97 Wilfredo Ardito, *Bagua: doble espíritu de cuerpo, doble impunidad*, PUNTO EDU, June 8, 2010, *available at* http://puntoedu.pucp.edu.pe/entrevistas/bagua-doble-espiritu-de-cuerpo-doble-impunidad/.

98 U.N. Office of the High Commissioner on Human Rights, *supra* note 2, at 21.

99 DEFENSORIA DEL PUEBLO, ACTUACIONES HUMANITARIAS REALIZADAS POR LA DEFENSORÍA DEL PUEBLO CON OCASIÓN DE LOS HECHOS OCURRIDOS EL 5 DE JUNIO DEL 2009, EN LAS PROVINCIAS DE UTCUBAMBA Y BAGUA, REGIÓN AMAZONAS, EN EL CONTEXTO DEL PARO AMAZÓNICO, INFORME DE ADJUNTÍA Nº 006-2009-DP/ADHPD 26-27, *available at* http://www.defensoria.gob.pe/modules/Downloads/informes/varios/2009/informe-adjuntia-006-2009-DP-DHPD.pdf.

100 U.N. Office of the High Commissioner on Human Rights, *supra* note 2, at 1-7.

101 CONGRESO DE LA REPUBLICA, PROCESO DE CONSULTA PREVIA, LIBRE E INFORMADA A LOS PUEBLOS INDÍGENAS DEL PROYECTO DE LEY Nª 4141/2009-PE EN EL MARCO DEL CONVENIO 169 DE LA OIT DE LA COMISIÓN AGRARIA, *available at* http://www.congreso.gob.pe/comisiones/2010/agraria/ley_forestal/objetivos.htm.

Republic initiated a process of political participation of indigenous peoples in the drafting of a new forestry law. Likewise, the Congress adopted a legal project for the rule of free, prior, and informed consultation that was vetoed by President García, who justified the actions due to the need of the country's economic development. [102] Overall, however, the state argued that indigenous peoples did not possess significant nor sufficient reasons to limit state power and its objectives for sustained economic growth and development. In the press, the President made his aims explicit, showing prejudice toward indigenous peoples by stating:

> [O]rder is a basic principle, societies always demand that the state implements order... these persons are not in power; they are not citizens of the first class. Four hundred thousand natives cannot say to twenty-eight million Peruvians that "you do not have the right to come here." This is a grave error, and those who think like this want us to revert to the irrationality and primitivism of the past. [103]

In the most recent presidential elections, Ollanta Humala and his wife Nadine Heredia dressed as Incan descendants and natives during their electoral campaign activities in different regions around the country. Humala incorporated traditionally indigenous elements in his outfit, donning feathered headdresses, seed necklaces, fish scales, etc. In his speeches, he promised large-scale social improvement based on the recognition of the rights of natives.[104] During his final electoral meeting, Humala stated:

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102 JUAN CARLOS RUIZ MOLLEDA, LA IMPLEMENTACIÓN DEL DERECHO A LA CONSULTA PREVIA DE LOS PUEBLOS INDÍGENAS: UNA MIRADA CONSTITUCIONAL 107 (2011), *available at* http://www.justiciaviva.org. pe/webpanel/publicaciones/archivo20122011-150924.pdf.

103 *Conozca las "patinadas" verbales de Alan García*, LA REPÚBLICA, July 3, 2011, *available at* http://www.larepublica.pe/03-07-2011/conozca-las-patinadas-verbales-de-alan-garcia.

104 *Presidente Ollanta Humala promulga mañana en Bagua Ley de Consulta Previa*, PRESIDENCIA DE LA REPUBLICA DEL PERU, Sept. 5, 2011, http://www.presidencia.gob.pe/presidente-ollanta-humala-promulga-manana-en-bagua-ley-de-consulta-previa; *Ollanta Humala aplicará La ley de consulta previa*, LA PRIMERA, Apr. 7, 2011; *Humala promete aplicar Ley de Consulta Previa y respetar opinión de comunidades sobre proyectos*, ANDINA NOTICIAS, Apr. 6, 2011; GOBIERNO DEL PERÚ, PERÚ EN 100 DIAS DE GOBIERNO 5 (2011); FLICKR, *supra* note 4.

> [I]f the communities are not in agreement with projects that affect their environment and the development of human rights, such as the hydroelectric project of Inambari, those projects will not be carried out. The voice of the community is of essential importance; if I become President, it will be for your votes, and we will defend that voice. [105]

Humala's electoral campaign was in concordance with the social demonstrations demanding the implementation of a law for the right to free, prior, and informed consultation. Humala's "indigenous campaign" was, in large part, the reason that he was elected to the presidency. From his earliest speeches, he delivered a politics of social transformation, affirming "Peru as a multilingual and multicultural country." He likewise stated that this:

> [D]iversity constitutes, without doubt, [Peru's] greatest wealth. For a long time, a discourse and practice of exclusion has been prevalent as well as the rejection of difference, the idea that "you are not like me" that has harbored discrimination and intolerance. [106]

A new legislative process was created to introduce the law of free, prior, and informed consultation in efforts to welcome the initiatives proposed by indigenous peoples. The final text was a result of a parliamentary consensus and the expediencies of a recently installed government. The law was enacted on September 6, 2011 in the city of Imacita-Bagua as a symbolic gesture. On the day of the law's enactment, Humala declared the new regulatory standard as a cessation to the institutional exclusion of indigenous peoples. [107] He insisted that the new regulations be introduced in order to grant agency to indigenous peoples in the political decision-

105 *Ollanta cerró campaña electoral en Puno*, NOTICIAS SER, Apr. 6, 2011, *available at* http://www.noticiasser.pe/06/04/2011/puno/ollanta-cerro-campana-electoral-en-puno.

106 Ollanta Humala, *Discurso del Presidente*, PRESIDENCIA DE LA REPÚBLICA DEL PERÚ, July 28, 2011, *available at* http://www.presidencia.gob.pe/discurso-del-presidente-ollanta-humala-28-de- julio-2011.

107 Ollanta Humala, *Hoy damos un paso trascendental en la construcción de una Nación que respete a sus comunidades*, PRESIDENCIA DE LA REPÚBLICA DEL PERÚ, Sept. 6, 2011, *available at* http://www.pres idencia.gob.pe/presidente-ollanta-humala-hoy-damos-un-paso-trascendental-en-la-construccion-de-una-nacion-que-respete-a-sus-comunidades.

making process on issues affecting them (referring specifically to ILO Convention 169). [108]

B. Multiple Meanings of a Law of Free, Prior, and Informed Consultation

Humala's law was designed to recognize the identities of indigenous peoples while transitioning away from prior confrontational policy. On the one hand, the law acknowledges the legitimacy of the motivations behind the Amazonian indigenous demonstrations; on the other hand, it redresses the fatal and unjust consequences and the need to circumvent another uprising similar to Bagua. The law also confronts the symbolic violence that has been manifest in declarations made by President García, particularly in categorizing Amazonian natives as second-class citizens. It appears, therefore, that the law for free, prior, and informed consultation initiated a new form of relation between indigenous groups and the state based on the recognition of indigenous rights.

The law of free, prior, and informed consultation also aims to prevent the recurrence of violent acts, rechanneling conflicts through administrative measures, and proceedings between state entities and indigenous peoples.[109]

The law was established, therefore, as a new social pact to confront violence. The social pact serves as a reminder that all forms of violence are illegal and that free, prior, and informed consultation, dialogue, and other democratic forms of indigenous political participation are legally acceptable and essential parts of the political process of negotiation.[110] It should be affirmed, therefore, that the law for free, prior, and informed consultation has acted as a "spell against violence"[111] while providing hope[112]for indigenous peoples in the more equitable allocation of the legal apparatus,

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108 *Id*.

109 Law Decree No. 29785 [Ley del derecho a la consulta previa a los pueblos indígenas u originarios, reconocido en el convenio 169 de la organización internacional del trabajo (OIT)], art. 1, Sept. 7, 2011 (Peru).

110 JULIETA LEMAITRE RIPOLL, EL DERECHO COMO CONJURO: FETICHISMO LEGAL, VIOLENCIA Y MOVIMIENTOS SOCIALES 343-345 (2009).

111 *Id.* at 25-40.

112 Julieta Lemaitre Ripoll, *Derecho, violencia y movimientos sociales en Colombia*, *in* DERECHO Y CULTURA 16 (2007).

making available administrative procedures and judicial processes in an otherwise hegemonic system. In sum, from inside this system, the state revolutionized its public policy through the integration of an "ethnic focus." Moreover, the law reverses the gap of implementation of ILO Convention 169 and other international norms that require indigenous political participation through mechanisms of free, prior, and informed consultation. [113]

Immediately after the law was passed, public officials as well as representatives from the corporate sector believed that the measure would serve to reverse the effects of social unrest in the country.[114] Violent social demonstrations as those in the region of Bagua were not isolated events and were replicated in other territories where natives and indigenous communities had been affected by similar mining projects. According to Iván Degregori, in those systems in which political parties are institutionalized, the unmet demands of minorities are received by political parties serving as translators for proposals before the state.[115] However, in countries such as Peru, in which political parties have experienced crises of representation, disgruntled collectives resort to means of social protest to negotiate directly with the state. Negotiations addressing the recognition of indigenous rights have traditionally foregone institutional channels developed by the state and literally have taken to open-air protests. Due to the state's failure to effectively respond to the demands of protestors claiming historical debts, the collective indigenous frustration has espoused violent forms of remonstration to achieve a political voice, for example in the cases of the Project Minas Conga.[116]

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113 Law Decree No. 29785 [Ley del derecho a la consulta previa a los pueblos indígenas u originarios, reconocido en el convenio 169 de la organización internacional del trabajo (OIT)], arts. 2-4, Sept. 7, 2011 (Peru).

114 *Defensoría del Pueblo propone acciones para afrontar los conflictos sociales en el país*, ANDINA NOTICIAS, June 22, 2011, *available at* http://www.andina.com.pe/Espanol/video-defensoria-del-pueblo- propone-acciones-para-afrontar-los-conflictos-sociales-el-pais-20301.aspx; *Wola: Nuevo gobierno debe aprobar consulta previa y buscar sakudas negociadas a conflictos*, ANDINA NOTICIAS, July 13, 2011; *CCL espera que Ley de consulta previa contribuya a mantener la paz social*, ANDINA, Aug. 24, 2011; *Ley de consulta previa permitirá superar desencuentros con comunidades nativas*, ANDINA, Sept. 27, 2011.

115 Carlos Iván Degregori, *Lo indígena y representación política*, 169 IDEELE 32 (2005).

116 Pedro Sánchez Legrás, *Conga: Luces y sombras*, NOTICIAS SER, Dec. 26, 2013, at 43-44.

In August 2012, in accordance with the Ombudsman, 245 social conflicts were reported (169 in activity and 76 latent).[117] Of those active social conflicts, 148 were of an environmental character; this is to say that 60.4% of social conflicts in Peru are linked to environmental impacts resulting from projects for the exploitation of natural resources.[118] The most recent report of the Ombudsman details, in broad terms, the environmental conflicts in which various indigenous organizations and rural communities are in competition with extractive industries and state entities at the national, regional, and local levels.[119] In the majority of these socio-environmental conflicts, the debate on free, prior, and informed consultation and land rights have become the central axes for the polarization between indigenous communities, extractive industries, and the state. As a result, Peru has wielded its force to suppress several demonstrations, which, in turn, has led to more deaths and injuries emerging even after the adoption of the law for free, prior, and informed consultation. [120]

According to the Ombudsman, the terms of social conflict in Peru presuppose that economic growth has not in fact assuaged the conditions of poverty facing indigenous peoples. [121] On several occasions, extractive industries have outright threatened those means of subsistence for residents in conflict zones. It has also been pointed out that there has been insufficient intercultural dialogue between the state and indigenous peoples. [122] In many cases, negotiation processes result in false dialogue that becomes a justification for violence.[123] Such limitations become even more visible when culturally diverse actors intervene in the social conflict. The multicultural character

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117 DEFENSORÍA DEL PUEBLO, REPORTE DE CONFLICTOS SOCIALES N° 102, 5 (Aug. 2012), *available at* http://www.defensoria.gob.pe/conflictos-sociales/objetos/paginas/6/61reporte-sociales-n-101-julio-12.pdf

118 *Id*. at 5.

119 *Id*. at 11.

120 *Perú: A cinco se elevó cifra de muertos por protestas antimineras en Cajamarca*, SURTITULARES, July 6, 2012, *available at* http://surtitulares.com/noticia/39979/per%C3%BA-a-cinco-se-elev%C3%B3-cifra-de-muertos-por-protestas-antimineras-en-cajamarca.html.

121 Defensoría del Pueblo, *Violencia en los conflictos sociales*, INFORME DEFENSORIAL, Mar. 26, 2012, at 36, http://www.defensoria.gob.pe/modules/Downloads/informes/defensoriales/informe-156.pdf.

122 *Id.*

123 *Id.*

and multiplicity of interpretations that arise out of the processes of negotiation–following the particularity and cultural specificity of the community–determine events and discourses that constitute the subject and object of social conflict in the regions.[124]

Furthermore, the Ombudsman revealed that social conflicts and violence involving indigenous peoples are manifestations of cultural disagreements often historically neglected. It has expressed that the official discourse of the Peruvian state clearly privileges economic growth and is incompatible with the autonomous visions of the indigenous community. Thus, we have found ourselves in the same scenario as before the approval of Humala's law.

V. ONE YEAR AFTER THE LAW OF FREE, PRIOR, AND INFORMED CONSULTATION: CONSIDERABLE PROGRESS AND ADVERSE EFFECTS

The Peruvian state resorted to the law to guarantee the rights of indigenous peoples and to remove obstacles and structures of social exclusion resulting from social tensions and conflict especially in response to foreign investment interests. In only a year, there have been some notable reforms in favor of indigenous peoples. However, there are also structural concerns regarding the enforcement of the regulatory framework.

A. Achieving a Law of Free, Prior, and Informed Consultation: Building an Indigenous Agenda at the State and Social Level

The government acknowledged that it was necessary for the state to adopt laws and standards to guarantee the right to free, prior, and informed consultation. In this regard, the Congress of the Republic and other governmental bodies bear the onus to adopt rules and regulations to clarify the proceedings of consultation for national, regional, and local laws.[125]

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124 *Id.*

125 Mariella Balbi, *La ley de consulta previa tendrá varios reglamentos*, EL COMERCIO, Nov. 28, 2011, *available at* http://elcomercio.pe/politica/1340480/noticia-ley-consulta-previa-tendra-varios-reglamentos; *Perú: Proponen reglamento para consultar a indígenas medidas legislativas que los afecten*, SERVINDI, June 27, 2012, *available at* http://www.servindi.org/actualidad/67221; CONGRESO DE LA REPÚBLICA, PROYECTO DE LEY 1183/201-CR, RESOLUCIÓN LEGISLATIVA QUE MODIFICA EL REGLAMENTO DEL CONGRESO DE LA REPÚBLICA Y AGREGA COMO ANEXO EL PROCEDIMIENTO LEGISLATIVO

Furthermore, the technical bodies of each ministry must identify the measures under discussion for consultation. The Ministry of Energy and Mining has the responsibility to specify the measures of enquiry regarding the construction of hydroelectric projects as well as the awarding of mining concessions. Similarly, the Ministry of Transportation and Communication must include the participation of indigenous actors during the consultation process for the construction of the Trans-Oceanic Highway.

Additionally, for better implementation, the free, prior, and informed consultation law advocates for the creation of a database of indigenous peoples.[126] A database is vital for the development of public policies supporting these groups. Moreover, the state has conducted training of interpreters for assuring intercultural dialogue.[127] Finally, the state has the obligation to adopt educational measures for the protection of indigenous rights.

From this perspective, then, I argue that the law of free, prior, and informed consultation has in fact achieved a reformatory effect in shaping the state's public policy. Currently, each investment project directly involving indigenous communities must be immediately introduced in discussions on the right to free, prior, and informed consultation as a safeguard to protect indigenous peoples. Indigenous peoples view the legislation as a means to legitimize their demands and demonstrations, to strengthen their initiatives for resistance and political advocacy, and to ensure their active participation in the negotiations relating to the management of natural resources.

DE CONSULTA PREVIA A LOS PUEBLOS INDÍGENAS SOBRE MEDIDAS LEGISLATIVAS QUE LES AFECTEN *(*May 28, 2012).

126 MINISTERIO DE CULTURA, RESOLUCIÓN MINISTERIAL N° 202-2012-MC: APROBAR DIRECTIVA N° 03-2012/MC–DIRECTIVA QUE REGULA EL FUNCIONAMIENTO DE LA BASE DE DATOS OFICIAL DE PUEBLOS INDIGENAS U ORIGINARIOS (May 22, 2012).

127 *Preseleccionan intérpretes de lenguas indígenas para consulta previa en Amazonas*, ANDINA, May 13, 2012; Gianfranco Hereña, *Traductores aborígenes para Ley de consulta previa,* ANDINA, May 13, 2012; MINISTERIO DE CULTURA. RESOLUCIÓN VIVEMINISTERIAL N° 001-2012-VMI-MC: APROBAR DIRECTIVA N° 03-2012/MC CREAN, RESPECTO AL PROCESO DE CONSULTA PREVIA ESTABLECIDO EN LA LEY N° 29785, LOS REGISTROS DE INTÉRPRETES DE LENGUAS INDÍGENAS U ORIGINARIAS Y DE FACILITADORES, Aug. 20, 2012.

At the international level, the CEACR of the ILO,[128] the supervisory bodies of the Universal Human Rights System, [129] the UN Special Rapporteur on the Rights of Indigenous Peoples, [130] and IACHR[131] recognized this law as a significant step forward in Peruvian legislation dealing with the rights of indigenous peoples.[132] Despite the fact that international bodies did not make any pronouncements regarding the content of the domestic law, the Peruvian state acknowledged that these entities validated the specific regulations on the law for free, prior, and informed consultation.

While there was an upsurge in political voicing and support for the rights of indigenous peoples, the business and corporate sectors expressed concerns that the law would delay, if not inhibit, external investments and jeopardize their economic commitments valued in millions of dollars. [133]

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128 ILO CEACR, PERU: DIRECT SOLICITATION ON THE INDIGENOUS AND TRIBAL PEOPLES CONVENTION, (Sess. 101, 2012).

129 *Comité de ONU califica de positivo Ley de Consulta Previa en Perú*, MINJUS, May 22, 2012, *available at* http://www.minjus.gob.pe/ultimas-noticias/comite-de-onu-califica-de-positivo-ley-de-consulta- previa-en-peru/.

130 James Anaya, *Peru: Consultation law marks key step forward in the country and region, says UN expert,* JAMES ANAYA: SPECIAL RAPPORTEUR ON THE RIGHTS OF INDIGENOUS PEOPLES, Aug. 25, 2011, *available at* http://unsr.jamesanaya.org/statements/peru-consultation-law-marks-key-step-forward-in-the- country-and-region-says-un-expert.

131 Press Release, Inter-Amer. Comm'n on H. R., IACHR Welcomes Enactment of Prior Consultation Law in Peru (Sept. 12, 2011), *available at* http://www.oas.org/en/iachr/media_center/PReleases/2011/099.asp.

132 *OIT: Consulta previa es señal importante de respeto a derechos de los pueblos indígenas*, ANDINA, Aug. 24, 2011; *ONU señala que Ley de consulta previa es un logro clave para el país y la región*, COORDINADORA NACIONAL DE DERECHOS HUMANOS, Aug. 25, 2011, *available at* http://derechoshumanos.pe/2011/08/onu-senala-que-ley-de-consulta-previa-es-un-logro-clave-para-el-peru-y-la-region/.

133 *Perú caerá en ranking de competitividad minera con consulta previa,* ANDINA, Sept. 13, 2011, *available at* http://www.rpp.com.pe/2011-09-13-peru-caera-en-ranking-de-competitividad-minera-con- consulta-previa-noticia_403516.html; *Perumin debatió ley de consulta previa y aporte minero voluntario*, RPP NOTICIAS, Sept. 17, 2011, *available at* http://www.rpp.com.pe/2011-09-17-perumin-debatio-ley-de-consulta-previa-y-aporte-minero-voluntario-noticia_404621.html; *Mineros reclaman participación en reglamento de Ley de consulta previa*, RPP NOTICIAS, Sept. 17, 2011, *available at* http://www.rpp.com.pe/2011-09-17-mineros-reclaman-participacion-en-reglamento-de-ley-de-consulta- previa-noticia_404650.html; *Señalan que Ley de consulta previa retardará inversión minera,* RPP NOTICIAS, Sept. 13, 2011, *available at* http://www.rpp.com.pe/2011-09-13-senalan-que-ley-de-consulta- previa-retardara-

Quick to address these concerns, the state remarked that the law of free, prior, and informed consultation did not grant a right to veto in favor of an indigenous community.[134] This interpretation of the law proved invalid, for the obtaining of free, prior, and informed consent is explicitly recognized in cases referred to in ILO Convention 169 (the alienation of lands and indigenous displacement) or in other international instruments. The state therefore affirmed that the law of free, prior, and informed consultation does not make explicit, for example, that Asháninkas possess the right to suspend the phases of implementation of the major electric project, Paquitzapango. This project outlines the plans for the construction of a hydroelectric dam resulting in the displacement of various native communities, affecting their societies and compromising food security. Moreover, the state has not resolved the question of whether the law specifically refers to projects approved prior to the implementation of the law.

This conciliatory discourse between the state and the business sector has generated outright rejection and concern among indigenous peoples, for it invokes the aggressive economic policies of the former government in terms of foreign investments and unfettered industrial development in the region. Yet for the indigenous community, the law of free, prior, and informed consultation is regarded as an emancipatory tool that can be deployed as a means of subverting the aims of external interests.

B. Undesirable Effects of the Law of Consultation

A problem of origin relating to the law of free, prior, and informed consultation is the fact that the regulation itself was not derived from a process of consultation. In less than two months, the law was adopted based on the earlier submitted draft from the government of Alan García.[135]

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inversion-minera-noticia_403450.html; *PPK: La ley de consulta previa es un "obstáculo" a la minería*, LA REPÚBLICA, Oct. 30, 2011, *available at* http://www.larepublica.pe/30-10-2011/ppk-la-ley- de-consulta-previa-es-un-obstaculo-la-mineria.

134 Hans Huerta Amado, *Derecho a consulta no es derecho al veto, señala viceministro de Interculturalidad,* EL COMERCIO, Nov. 18, 2011, *available at* http://elcomercio.pe/politica/1335491/noticia-derecho-consulta-no-derecho-al-veto-senala-viceministro-interculturalidad.

135 CONGRESO DE LA REPÚBLICA DEL PERÚ, EXPEDIENTE DEL PROYECTO DE LEY 00089 (Aug. 2011), *available at* http://ht.ly/6b5HO.

However, certain indigenous organizations sacrificed the right to free, prior, and informed consultation due to time constraints. Moreover, indigenous organizations had validated the absence of the rule of free, prior, and informed consultation given that some measures adopted by the state were regarded as best faith efforts. For example, indigenous communities petitioned that a human rights defender for indigenous peoples be designated the chief of the Institute for the Development of Andean, Amazonian, and Afro-Peruvian Peoples ("INDEPA")–a state entity which is part of the Ministry of Culture. [136] INDEPA was the entity responsible for the further regulation associated with the new law for free, prior, and informed consultation.

INDEPA launched the implementation of the Unity Pact, an informal organization reuniting the principal indigenous organizations. It serves as one of the focal points during negotiations with the other public agencies involved in the process of regulation. Within this context, indigenous organizations believed that the technical insufficiencies of the law would be resolved through regulatory process. The adoption of the law of free, prior, and informed consultation would be the first advancement in accordance with ILO Convention 169, integrally reflecting the demands of indigenous peoples that had been long neglected.

In the first rounds of negotiation, the Unity Pact outlined a series of non-negotiable principles regarding the right to free, prior, and informed consultation while disclosing some problems in respect to the proposed text of the regulatory process. Among its demands, the Unity Pact critiqued the draft text for its failure to recognize the right to free, prior, and informed consent as referred to in international law.[137] For the indigenous organizations that made up the Unity Pact, the gap in implementation still persisted because the duty to

136 PACTO DE UNIDAD, CARTA DIRIGIDA A LA MINISTRA DE CULTURA, SUSANA BACA (Sept. 29, 2011), *available at* http://lamula.pe/barra/servindi.org/1791.

137 The Unity Pact drafted a document called "Minimal Principles for the Compliance of the Rights to Participation, Consultation and Free, Informed and Prior Consent" where the involved organizations based their demands in several international instruments including ILO Convention 169, the United Nations Declaration on the Rights of Indigenous Peoples, paragraph 137 of the Case of the Saramaka People v. Suriname of the Inter-American Court of Human Rights, and the views of supervisory bodies of the United Nations. *See* Pacto de Unidad, Principios mínimos para la aplicación de los derechos de participación, consulta y

obtain consent in the case of large-scale development or investment projects was not recognized, despite the passing of the law of free, prior, and informed consultation, and became accentuated during negotiations outlining the regulatory processes. In this context, the indigenous organizations claimed the unconstitutionality of the law of free, prior, and informed consultation, alleging the insufficient implementation of ILO Convention 169. [138]

Other problems emerged in the framework of the adoption of the regulations for the law of free, prior, and informed consultation. The Multi- Sectoral Commission failed to include several indigenous women's organizations and Aymaran organizations in its drafting of the regulations. [139]

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consentimiento previo, libre e informado at 2, Nov. 17, 2011, *available at* http://servindi.org/pdf/PACTO_DE_UNIDAD.pdf.

138 Giann Velásquez, *Solicitarán inconstitucionalidad de Ley de Consulta Previa,* ALERTA PERU, Apr. 4, 2012, *available at* http://www.alertaperu.pe/index.php/peru/item/186-solicitar%C3%A1n-inconstitucionalidad-de-ley-de-consulta-previa; Javier Ugaz, *Perú: Estados y pueblos indígenas: viejas prácticas con nuevo rostro,* SERVINDI, Feb. 23, 2012; *Perú: El borrador de reglamento de consulta no ayuda a resolver problemas y es provocador,* SERVINDI, Dec. 14, 2011, *Perú: regiones del sur presentan aportes a la ley de consulta previa y su reglamentación*, SERVINDI, Dec. 24, 2011.

139 PRESIDENCIA DE CONSEJO DE MINISTROS, RESOLUCIÓN SUPREMA N° 337-2011-PCM, CREAN COMISIÓN MULTISECTORIAL DE NATURALEZA TEMPORAL CON EL OBJETO DE EMITIR UN INFORME A TRAVÉS DEL CUAL SE PROPONGA EL PROYECTO DE REGLAMENTO DE LA LEY N° 29785, LEY DEL DERECHO A LA CONSULTA PREVIA A LOS PUEBLOS INDÍGENAS U ORIGINARIOS, RECONOCIDO EN EL CONVENIO 169 DE LA ORGANIZACIÓN INTERNACIONAL DEL TRABAJO (OIT) (Nov. 16, 2011); COMISIÓN MULTISECTORIAL DE NATURALEZA TEMPORAL CON EL OBJETO DE EMITIR UN INFORME A TRAVÉS DEL CUAL SE PROPONGA EL PROYECTO DE REGLAMENTO DE LA LEY N° 29785, LEY DEL DERECHO A LA CONSULTA PREVIA A LOS PUEBLOS INDÍGENAS U ORIGINARIOS, RECONOCIDO EN EL CONVENIO 169 DE LA ORGANIZACIÓN INTERNACIONAL DEL TRABAJO (OIT), ACTA SEGUNDA SESIÓN-COMISIÓN MULTICULTURAL (Jan. 9, 2012), *available at* http://www.indepa.gob.pe/PDF/comsion_multisectorial/Acta%202.pdf; Javier Ugaz, *Perú: El pueblo aymara y su derecho a participar en el reglamento de consulta previa*, SERVINDI, Jan. 12, 2012;

Niegan participación de aymaras en reglamentación de Ley de consulta previa, LOS ANDES, Jan. 10, 2012; Miluska Pizarro, *Aymaras en desacuerdo con la consulta previa,* LOS ANDES, Jan. 10, 2012; *Reglamento y ley de consulta previa fue rechazada por aymaras y más de 700 líderes indígenas reunidas en Cusco*, CONACAMI, Jan. 23, 2012.

The government adopted corrective measures,[140] but the Aymaras rejected the regulation while intending to sabotage the process of the implementation of the law and to radicalize their demands as a result of a partial participatory process.[141] An additional problem was that state officials were not flexible in the modification of the terms of the draft text submitted during the negotiations.[142]

The Aymaran and other indigenous organizations denounced the law and its regulations, contesting the fact that rural and native communities– considered distinct denominations among indigenous peoples–would only be consulted if they complied with the requirements, terms, and vocabularies defining these groups as set forth in international law. Moreover, the various indigenous organizations contested that the new law did not guarantee safeguards protecting regions from the major development or investment plans that may have a profound impact on their territories, thus being catalysts for cultural conflict. As a result of negotiations with the state, AIDESEP and other rural communities withdrew from the rounds of negotiation that dictated the terms of the regulatory processes. Only two indigenous organizations remained active: the Confederation of Amazonian Nationalities of Peru and the Rural Confederation of Peru.[143] In the end, the first processes of alleged

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140 FEMUCARINAP, INCORPORAN A LA FEMUCARINAP EN LA COMISIÓN MULTISECTORIAL QUE ELABORA EL REGLAMENTO DE LA LEY DEL DERECHO A LA CONSULTA PREVIA (Feb. 22, 2012), *available at* http://femucarinap.org/eventosacciones/115-incorporan-a-la-femucarinap-en-la-comision-multisectorial-que-elabora-el-reglamento-de-la-ley-del-derecho-a-la-consulta-previa-; FEMUCARINAP, APORTES DE LA FEMUCARINAP PARA LA REGLAMENTACIÓN DEL DERECHO A LEY DE CONSULTA PREVIA (Feb. 20, 2012), *available at* http://www.indepa.gob.pe/pdfconsultaprevia/01Agenda/aportes_org_ind_FEMUCARINAP_21%2002%202012/1.PDF.

141 Liubomir Fernández, *Aimaras marcharán en Lima por modificación de Ley de Consulta Previa*, LA REPUBLICA, Apr. 10, 2012, *available at* http://www.larepublica.pe/10-04-2012/aimaras-marcharan-en- lima-por-modificacion-de-ley-de-consulta-previa; Prensa Radio Pachamama, *Comunidades aymaras de Puno rechazan Ley de Consulta Previa,* RADIO PACHAMAMA, Apr. 2, 2012, *available at* http://www.pa chamamaradio.org/02-04-2012/comunidades-aymaras-de-puno-rechazan-ley-de-consulta-previa.html.

142 Leonidas Ramos, *El descontento con el reglamento de la Ley de Consulta Previa*, NOTICIAS SER, Apr. 13, 2012.

143 Presidencia del Consejo de Ministros, Secretaría General, Oficina de Prensa e Imagen Institucional, *Nota de prensa 107-PCM, Pueblos indígenas y poder ejecutivo suscriben proyecto de reglamento de ley de consulta previa*, Mar. 5, 2012, *available at* http://www.pcm.gob.pe/Prensa/

free, prior, and informed consultation resulted in the frustration of the majority of indigenous organizations as they felt that the promises of President Ollanta Humala had largely been unmet.

The Ministry of Culture approved the regulation of the law of free, prior, and informed consultation on April 3, 2012.[144] The state maintained its position with respect to indigenous rights: that it does not possess the power to overturn measures passed prior to the implementation of the law without the consultations of indigenous communities. Moreover, the text outlining the regulation incorporated several articles that were not part of the consultation processes and negotiations.[145] Similarly, the regulation did not expressly recognize the right to free, prior, and informed consent.

Nevertheless, following a comprehensive reading of the text, the regulation does in fact guarantee the right to consent in the circumstance of indigenous displacement and the transportation and storage of toxic wastes, as well as in situations where the lives of indigenous peoples are threatened or their means of subsistence compromised.[146] However, these notable achievements are generally unknown and, therefore, disregarded by indigenous organizations.

Despite notable advancements, the process for drafting regulations on the law for free, prior, and informed consultation had manifested into social conflict. Indigenous groups turned to social protest once again as a means to demand their rights. For these communities, it has been clear that violence serves as a political end for interrupting and suspending megaprojects in their

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ActividadesPCM/2012/Marzo/05-03-12-b.html; Javier La Rosa, *Ley de Consulta: Cuando la forma es tan importante como el fondo*, REVISTA DEL INSTITUTO DE DEFENSA LEGAL, Apr. 2012, *available at* http://www.revistaideele.com/ideele/content/ley-de-consulta-cuando-la-forma-es-tan-importante-como-el- fondo.

144 Ministerio de Cultura, *Decreto Supremo N° 001-2012-MC, Reglamento de la Ley Nº 29785, Ley del Derecho a la Consulta Previa a los Pueblos Indígenas u Originarios reconocido en el Convenio 169 de la Organización Internacional del Trabajo (OIT)*, DIARIO OFICIAL EL PERUANO, 463588-95.

145 PEDRO CASTILLO, REGLAMENTO DE LA LEY DE CONSULTA PREVIA NO RECOGE LAS OBSERVACIONES DE LAS ORGANIZACIONES INDÍGENAS, CEPES-RURAL (Apr. 10, 2012), *available at* http://lamula.pe/2012/04/10/ppedro-castillo-%E2%80%9Creglamento-de-la-ley-de-consulta-previa-no- recoge-las-observaciones-de-las-organizaciones-indigenas%E2%80%9D/cepesrural.

146 JUAN C. RUIZ MOLLEDA, INFORME JURÍDICO: LA CONSTITUCIONALIDAD DEL REGLAMENTO DE LA LEY DE CONSULTA 5 (Apr. 19, 2012), *available at* http://www.justiciaviva.org.pe/webpanel/doc_trabajo/doc 19042012-143556.pdf.

territories–and that the rule for free, prior, and informed consultation is largely incapable of achieving this end. Therefore, collective action expressed with violence remains an alternative when the state is unwilling to account for indigenous demands. Subsequently, the process of consultation for drafting the legal regulations has been disappointing for all parties involved.

As Ramón Pajuelo has made clear, the law of free, prior, and informed consultation does not meet the actual demands of indigenous peoples. [147]

Currently, indigenous communities not only demand proceedings for free, prior, and informed consultation, but additionally mandate the recognition of territorialities and a guarantee to free, prior, and informed consent. In this scenario, the law of free, prior, and informed consultation and the correlative regulations only serve as palliative measures and are not truly transformative mechanisms for indigenous peoples.

VI. CONCLUSION

How, then, can we assess the process of free, prior, and informed consultation in Peru? Rodríguez-Garavito's study on the case of the Colombian Embera indigenous peoples' challenging of the construction of a mining project serves as a significant precedent for analyzing the issue. [148] Rodríguez-Garavito determines that the right to free, prior, and informed consultation ultimately leads to ambivalent results concerning the relations of indigenous peoples. [149] In theory, the right to free, prior, and informed consultation mandates that participants and actors in the process, especially those with opposing ideological perspectives, enact inclusive measures to foster terms of negotiation, dialogue, and continued communication.[150]

However, in practice, the exercise of this right has the potential to frustrate the terms of negotiation and perpetuate the polarization

147 Javier Torres, *Ramón Pajuelo: La ley de consulta previa llegó tarde,* LA MULA, May 18, 2012, *available at* http://lamula.pe/2012/05/17/ramon-pajuelo-en-el-arriero/javierto; *Los campesinos piden que la consulta sea vinculante*, EL COMERCIO, Apr. 4, 2012, at A9.

148 César Rodriguez-Garavito, *Ethnicity.gov: Global governance, indigenous peoples, and the right to prior consultation in social minefield,* 18 IND. J. GLOBAL LEGAL STUD. 263, 268 (2011).

149 *Id.* at 304-305.

150 *Id.* at 292.

between the parties involved.[151] Moreover, the process of free, prior, and informed consultation can reinforce systems of domination as well as provoke demonstrations and acts of sabotage that are detrimental to all parties.

Upon examination, the process of regulation of the law of free, prior, and informed consultation in Peru is representative of the analysis rendered by Rodriguez-Garavito. The involvement of various sectors, including the government and multiple representatives from many of the indigenous communities in Peru, complicated the negotiation process. It was vital that the state maintain its good faith effort throughout the negotiations, but the initial exclusion of several indigenous organizations served to generate mistrust from the majority of indigenous representatives. Additionally, the right to free, prior, and informed consent was utilized by indigenous groups as a tool of negotiation and sabotage in which they compromised the obligations of the state with the private sector. Indigenous organizations demanded the modification of economic agreements that affected their territories, basing their claims in the right to free, prior, and informed consent.

The law of free, prior, and informed consultation, therefore, exposes the limitations of law in its capacity to address and prevent forms of violence. In each of the aforementioned cases, the process of legal implementation is a complex process with varying ideological perspectives. This has certainly been the case in the most unstable period of contemporary Peruvian history: the twenty-year period of internal armed conflict. According to the Truth and Reconciliation Commission:

The weight of an ethnic and racial component has loomed large in these histories of conflict–within contexts conducive to the continued emergence and propagation of confrontation–and resides at the most immediate level of those perceptions and quotidian behaviors demonstrated by the various actors directly and indirectly implicated in this history.

This racial and ethnic component, despite its latency, was present during the entirety of the conflict. Only in those moments where physical violence erupted was discrimination most explicit, resulting in murder, torture, violations, and demonstrations of symbolic violence. In many cases, ethnic and racial differences served

151 *Id.* at 295.

as the criteria for the institutionalization of social inequalities, invoked by the perpetrators as justification for their actions. [152]

In the case of Peru, a historical debt must be dealt with by a government that has been constructed on the basis of the subjugation of indigenous peoples. The unaccounted debt owed to the indigenous peoples has been the main factor contributing to multiple forms of social conflict. The state, therefore, must recognize that the resulting violence during social conflicts is not spontaneous in nature, but rather stems from processes of cultural disengagement and discord as well as frustrated negotiations.

The events of Bagua reveal this historical tension; in response, the law of free, prior, and informed consultation adopted a language for peace and reconciliation and was regarded as a self-sufficient formula against the social conflict associated with natural resources in the regions. Currently, indigenous groups and the state are disillusioned by the unsatisfactory results and the reality that the law has not generated social pacification. In response to these events, violent and undemocratic measures have been equally attractive to both the state and indigenous groups. The resolution of cultural tension is therefore dependent upon the capacity of both parties to interpret the right of free, prior, and informed consultation as only one integral part of the process for the resolution of violence that is not only exhausted in the domain of law, but that also encourages the adoption of mechanisms generating mutual trust and a culture of dialogue that, over time, may provide recourse to episodes of conflict.

Note: Elizabeth Salmón, The Struggle for Laws of Free, Prior, and Informed Consultation in Peru: Lessons and Ambiguities in the Recognition of Indigenous Peoples, en Pacific Rim Law & Policy Journal, vol. 22, No. 2, 2013, pp. 353-390.

152 COMISIÓN DE LA VERDAD Y RECONCILIACIÓN DEL PERÚ, INFORME FINAL, TOMO VIII SEGUNDA PARTE: LOS FACTORES QUE HICIERON POSIBLE LA VIOLENCIA 104 (2003).

VIOLATIONS OF INDIGENOUS PEOPLES' TERRITORIAL RIGHTS: THE EXAMPLE OF COSTA RICA

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I. INTRODUCTION

The multifaceted and fundamental nature of indigenous peoples' relationships to their traditional territories is well recognised by international human rights bodies and many governments.[1] Without secure and enforceable guarantees for their traditionally owned lands, territories and resources, including the right to control internal and external activities affecting them through their own institutions, indigenous peoples' means of subsistence, their identity and survival, and their socio-cultural integrity and economic security are permanently threatened. There is therefore a complex of interdependent human rights[2] converging on and inherent to indigenous peoples' various

1 For instance, the former UN Rapporteur on indigenous land rights, Erica-Irene Daes, explains that: "(i) a profound relationship exists between indigenous peoples and their lands, territories and resources; (ii) this relationship has various social, cultural, spiritual, economic and political dimensions and responsibilities; (iii) the collective dimension of this relationship is significant; and (iv) the intergenerational aspect of such a relationship is also crucial to indigenous peoples' identity, survival and cultural viability." *Indigenous people and their relationship to land. Final working paper prepared by Mrs. Erica-Irene A. Daes, Special Rapporteur*. UN Doc. E/CN.4/Sub.2/2001/21 (11 June 2001), at para. 20.

2 *See* Helen Quane, *A Further Dimension to the Interdependence and Indivisibility of Human Rights?: Recent Developments Concerning the Rights of Indigenous Peoples*, 25 Harvard Human Rights J. 49, at 51 (2012) (analyzing United Nations' treaty body practice "concerning the rights of indigenous peoples, which suggest[s] a further dimension to the interdependence and indivisibility of human rights. These developments suggest that human rights are interdependent and indivisible not only in terms of mutual reinforcement and equal importance, but also in terms of the actual *content* of these rights") (footnote omitted). *See also e.g., Xákmok Kásek Indigenous Community v. Paraguay, Merits, Reparations and Costs*, Judgment, 2010 Inter-Am.

relationships with their traditional lands and territories as well as their interrelated status as self-determining entities, all of which necessitates a high standard of affirmative protection.[3]

Despite this recognition, in 2012, the UN Special Rapporteur on the Rights of Indigenous Peoples observed, in the context of extractive

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Ct. H.R. (ser. C) No. 214, at para. 263 (29 March 2006) (relating territorial rights to the rights of the child as guaranteed by Article 19 of the American Convention on Human Rights and Article 30 of the Convention on the Rights of the Child; and stating that "the Court finds that the loss of traditional practices like male and female initiation ceremonies and the Community's languages, as well as the damage from the lack of territory, have a particularly negative effect on the development and cultural identity of the Community's children, who will never be able to develop a special relationship with their traditional territory and the way of life unique to their culture if the measures necessary to guarantee the enjoyment of these rights are not implemented"); and *Case of the Río Negro Massacres v. Guatemala Merits, Reparations and Costs*, Judgment, 2012 Inter-Am. Ct. H.R. (ser. C) No. 250, at para. 143-44 (4 Sept. 2012) (holding that the "Court considers it important to indicate that the special measures of protection that the States must adopt in favor of indigenous children include the promotion and protection of their right to live according to their own culture, their own religion and their own language … and that this right 'is an important recognition of the collective traditions and values in indigenous cultures'" and; "[f]or the full and harmonious development of their personality, indigenous children, in keeping with their cosmovision, need to grow and develop preferably within their own natural and cultural environment, because they possess a distinctive identity that connects them to their land, culture, religion, and language"); and *in accord Chitay Nech et al. v. Guatemala*, *Merits, Reparations and Costs*, Judgment, 2010 Inter-Am. Ct. H.R. (ser. C) No. 212, at para. 169 (25 May 2010).

3 *See inter alia* IACHR, *Report No. 96/03*, *Maya Indigenous Communities and their Members (Case 12.053 (Belize))* (24 October 2003), para. 111-19, 141; *Concluding observations of the Human Rights Committee: Australia,* CCPR/CO/69/AUS, at para. 10-11 (28 July 2000) (where the Human Rights Committee explains that Article 27 of the International Covenant on Civil and Political Rights requires that "necessary steps should be taken to restore and protect the titles and interests of indigenous persons in their native lands …" and; "securing continuation and sustainability of traditional forms of economy of indigenous minorities (hunting, fishing and gathering), and protection of sites of religious or cultural significance for such minorities … must be protected under article 27…") and; Gunther Handl, *Indigenous Peoples' Subsistence Lifestyle as an Environmental Valuation Problem*, *in* Environmental Damage in International and Comparative Law. Problems of Definition and Valuation (M. Bowman and A. Boyle eds., 2002), p. 85-110, at p. 95 (asserting "there can be little room for doubt that there exists today a general consensus among states that the cultural identity of traditional indigenous peoples and local communities warrants affirmative protective measures by states, and that such measures be extended to all those elements of the natural environment whose preservation or protection is essential for the groups' survival as culturally distinct peoples and communities").

industries, that "[m]ajor legislative and administrative reforms are needed in virtually all countries in which indigenous peoples live to adequately define and protect their rights over lands and resources."[4] Additionally, the UN Committee on the Elimination of Racial Discrimination ("UNCERD") explained that one of the reasons it adopted a General Recommendation on indigenous peoples in 1997 is because

> of the fact that in many regions of the world indigenous peoples have been, and are still being, discriminated against and deprived of their human rights and fundamental freedoms and in particular that they have lost their land and resources to colonists, commercial companies and State enterprises. Consequently, the preservation of their culture and their historical identity has been and still is jeopardized.[5]

Abundant evidence of widespread and persistent violations of indigenous peoples' internationally guaranteed human rights, especially with respect to rights to lands and territories, can be found in the jurisprudence of international human rights protection organs.[6] These violations occur regularly in developed and less developed countries alike and in countries regarded as having relatively good and bad general human rights records. For example, UN treaty bodies

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4 *Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya*, UN Doc. A/HRC/21/47 (6 July 2012), at para. 58.

5 UNCERD, *General Recommendation XXIII (51) concerning Indigenous Peoples,* UN Doc. CERD/C/51/Misc.13/Rev.4 (18 August 1997), at para. 3.

6 United Nations treaty body jurisprudence concerning indigenous peoples for the years 1993-2012 is compiled in Indigenous Peoples and United Nations Treaty Bodies: A Compilation of United Nations Treaty Body Jurisprudence, Volumes I-V (F. MacKay ed.), <www.forestpeoples.org/topics/un-human-rights-system/publication/2013/indigenous-peoples-and-united-nations-human-rights-bo>. *See also* Helen Quane, A Further Dimension to the Interdependence and Indivisibility of Human Rights?, *supra,* note 3. For Inter-American jurisprudence: *see Jurisprudencia sobre Derechos de los Pueblos Indígenas en el Sistema Interamericano de Derechos Humanos*, OEA/Ser.L/V/II.120, Doc. 43 (9 September 2004) and; *Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources,* OEA/Ser.L/V/II. Doc. 56/09 (30 December 2009) (hereinafter "IACHR Indigenous Lands"). In Africa: *see Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities* (Afr. Comm'n on Hum. and Peoples' Rts, 28th ordinary session) and; Centre for Minority Rts. Dev. (Kenya) v. Kenya, Comm. No. 276/2003 (Afr. Comm'n on Hum. & Peoples' Rts. Feb. 4, 2010), <www.minorityrights.org/9587/press-releases/landmark-decision-rules-kenyas-removal-of-indigenous-people-from-ancestral-land-illegal.html>.

routinely express serious concern about the treatment of indigenous peoples and the maintenance or adoption of discriminatory laws or laws that otherwise negate or hinder indigenous peoples' rights in New Zealand and Canada, both of which are regarded as having relatively good general human rights records and score high on development indices.[7] These bodies are also just as likely to find violations of indigenous peoples' rights, including basic due process rights, the right to judicial protection, and the right to equal protection of the law, in Scandinavian countries or the United States as they are in the poorest countries in the world.[8] A state's relative

7 See *inter alia*, UNCERD, *Decision 1 (66), New Zealand, (Early Warning & Urgent Action Procedure)*. CERD/C/DEC/NZL/1 (27 April 2005) (finding that the 2004 Foreshore and Seabed Act discriminates against indigenous peoples); *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen. Mission to New Zealand.* UN Doc. E/CN.4/2006/78/Add.3, at para. 13 (observing that "the underlying legal and political fragility of Maori rights translates into a human rights protection gap that seems not to be sufficiently covered by existing legislation"); *Concluding observations of the Human Rights Committee: Canada*, CCPR/C/CAN/CO/5 (20 April 2006), at para. 8 and 9 (explaining that it remains concerned about practices that "amount to extinguishment of aboriginal rights (arts. 1 and 27);" recommending that Canada "re-examine its policy and practices to ensure they do not result in extinguishment of inherent aboriginal rights;" and expressing concern "about information that the land of the [Lake Lubicon] Band continues to be compromised by logging and large-scale oil and gas extraction … (arts. 1 and 27)"); and, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen. Mission to Canada.* UN Doc. E/CN.4/2005/88/Add.3.

8 *Concluding observations of the Committee on the Elimination of Racial Discrimination: Denmark*, CERD/C/DEN/CO/17 (18 August 2006), para. 20 (finding that Denmark is denying indigenous peoples' right to identity); *Concluding observations of the Committee on the Elimination of Racial Discrimination: Norway*, CERD/C/NOR/CO/18 (18 August 2006), at para. 11 (recommending that Norway "adopt special and concrete measures" to ensure indigenous peoples the full and equal enjoyment of human rights and fundamental freedoms); UNCERD, *Decision 1(68), United States of America, (Early Warning & Urgent Action Procedure)*. CERD/C/USA/DEC/1 (11 April 2006) (finding "that past and new actions taken by the State party on Western Shoshone ancestral lands lead to a situation where, today, the obligations of the State party under the Convention are not respected, in particular the obligation to guarantee the right of everyone to equality before the law in the enjoyment of civil, political, economic, social and cultural rights, without discrimination based on race, colour, or national or ethnic origin; [and,] express[ing] particular concern about: (a) Reported legislative efforts to privatize Western Shoshone ancestral lands for transfer to multinational extractive industries and energy developers. (b) Information according to which destructive activities are conducted and/or planned on areas of spiritual and cultural significance to the Western Shoshone

wealth, its governance capacity and the effectiveness of its judicial system, or other rule of law indicators, therefore, are not necessarily the most pertinent factors in whether indigenous peoples' rights are respected or violated.[9]

Indeed, almost all states in which indigenous peoples live maintain discriminatory laws, policies and practices – some have adopted such laws in the very recent past – that negate or impede the exercise and enjoyment of indigenous peoples' rights.[10] Many states also continue to apply a presumption against the existence of indigenous peoples' right to own their traditional territories and resources and, often with the support of their domestic courts, have rejected indigenous land and resource rights by applying, *inter alia*, rigid evidentiary requirements based on colonial norms that exclude indigenous peoples' perspectives and traditions.[11] For example, the UNCERD has expressed concern about "the difficulties which may be encountered by Aboriginal peoples before the courts in establishing Aboriginal title over land" in Canada,

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peoples, who are denied access to, and use of, such areas. It notes in particular the reinvigorated federal efforts to open a nuclear waste repository at the Yucca Mountain; the alleged use of explosives and open pit gold mining activities … (d) The conduct and / or planning of all such activities without consultation with and despite protests of the Western Shoshone peoples").

9 *See in this respect* the view of the former United Nations Secretary General's Special Representative on the issue of human rights and transnational corporations and other business enterprises that many of the worst human rights abuses by transnational corporations occur in low to middle income countries characterized by weak governance, for instance, as classified on the World Bank's rule of law scale. *Interim Report of the Secretary General's Special Representative on the issue of human rights and transnational and other business enterprises*. UN Doc. E/CN.4/2006/97 (22 February 2006), para. 27 & 30.

10 *See e.g., Concluding observations of the Human Rights Committee: Canada*, CCPR/C/CAN/CO/5 (20 April 2006), at para. 22 (expressing "concern that the Canadian Human Rights Act cannot affect any provision of the Indian Act or any provision made under or pursuant to that Act, thus allowing discrimination to be practised as long as it can be justified under the Indian Act;") and, *Concluding observations of the Human Rights Committee: United States of America*. CCPR/C/USA/Q/3/CRP.4 (27 July 2006), at para. 27 (recommending that the "State party should review its policy towards indigenous peoples as regards the extinguishment of aboriginal rights on the basis of the plenary power of Congress regarding Indian affairs and grant them the same degree of judicial protection that is available to the non-indigenous population"). *See also* Indigenous Peoples and United Nations Treaty Bodies, *supra* note 7.

11 *See inter alia*, R. Williams, Like a Loaded Weapon: The Rehnquist Court, Indian Rights, and the Legal History of Racism in America (2005) and; *Indigenous people and their relationship to land, supra* note 2.

and noted that "to date no Aboriginal group has proven Aboriginal title."[12] Similarly, almost all states invoke the public or general interest in relation to extractive or other operations on indigenous lands, despite the fact that this is essentially a 'majority rules test' that is inherently biased against minority indigenous peoples and is generally not subject to judicial review. In relation to one such provision, the Inter-American Commission on Human Rights ("IACHR") has observed that the public interest doctrine

> substantially limit[s] the fundamental rights of the indigenous and Maroon peoples to their land *ab initio*, in favour of an eventual interest of the State that might compete with those rights. What is more, according to Suriname's laws, mining, forestry, and other activities classified as being in the general interest are exempted from the requirement to respect customary rights. In practice, the classification of an activity as being in the "general interest" is not actionable and constitutes a political issue that cannot be challenged in the Courts. What this does in effect is to remove land issues from the domain of judicial protection.[13]

Costa Rica, the subject of this article, is an upper middle income country that is widely regarded as having a generally positive human rights record. It has also avoided the violent conflicts and political instability that have characterised most of its closest neighbours in the last decades of the 20th century. However, as with almost all other countries considered to have good track records on human rights, the situation of indigenous peoples stands out as a major blemish. This is especially the case when the complex of rights that are interdependent with indigenous peoples' territorial rights is considered. This article details the history, legal background and current status of this situation in Costa Rica as well as the relevant international human rights law. Particular attention is paid to the

12 *Concluding observations of the Committee on the Elimination of Racial Discrimination: Canada*, 01/11/2002, UN Doc. A/57/18, para. 315-343, 330 (recommending that Canada "examine ways and means to facilitate the establishment of proof of Aboriginal title over land in procedures before the courts"). *See also Yorta Yorta* v. *Victoria*, 194 ALR 538 (2002) (an Australian case giving preference to the written accounts of white settlers over the oral history of aboriginal peoples in denying the existence of native title rights).

13 IACHR, *Report on Admissibility and Merits No. 09/06 on the Case of the Twelve Saramaka Clans (Suriname)* (2 March 2006), at para. 241-42.

jurisprudence of the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.

II. MASSIVE, PERSISTENT AND ILLEGAL OCCUPATION OF TITLED INDIGENOUS TERRITORIES IN COSTA RICA

According to the information received by the Special Rapporteur during his visit, one of the main priorities of the country's indigenous peoples is to recover their lands. The Special Rapporteur believes that decisive steps need to be taken urgently to find solutions that would allow indigenous peoples to recover the land in their territories.[14]

There are eight indigenous peoples in Costa Rica with a population of 104,143 persons, comprising approximately 2.4 percent of the national population.[15] Many of them live in 24 legally recognised and titled indigenous territories as well as in lands traditionally occupied but presently not included in these titled territories.[16] The legal recognition of indigenous territories commenced in the 1930s in the south Pacific region while others were recognised as late as 2001. These 24 territories are ostensibly protected by the 1977 *Ley Indígena*[17] and the law implementing International Labour Organisation Convention No. 169 ("ILO 169"), ratified by Costa Rica in 1993.[18] Contrary to the majority of other American states, there are no constitutional guarantees for

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14 *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya. The situation of the indigenous peoples affected by the El Diquís hydroelectric project in Costa Rica.* UN Doc. A/HRC/18/35/Add.8 (11 July 2011) (hereinafter "SRIP Report on El Diquís"), at para. 44, (in Spanish) <www.ohchr.org/Documents/Issues/IPeoples/SR/A-HRC-18-35-Add8_sp.pdf> (in English) <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/146/67/PDF/G1114667.pdf?OpenElement>.

15 *Instituto National de Estadística y Censos* (2011), <www.inec.go.cr/cgibin/RpWebEngine.exe/EasyCross?&BASE=2011&ITEM=CRUCEPOB&MAIN=WebServerMain.inl>, visited on 21 November 2012.

16 According to information submitted by Costa Rica, the ILO Committee of Experts on the Application of Conventions and Recommendations observes that of the total indigenous population, "42 percent live in indigenous lands, 18 percent live on the periphery of these lands and 40 percent in the rest of the country…". ILO CEACR, *Costa Rica: Observation*, adopted 2003, published 92nd ILC session (2004).

17 *Ley Indígena*, N° 6172, 29 November 1977.

18 Ley Nº 7316, 12 October 1992 and; International Labour Organisation, Convention Concerning Indigenous and Tribal Peoples in Independent Countries, Preamble, June 27, 1989, 72 ILO Official Bulletin 59, 1650 U.N.T.S. 383 (hereinafter "ILO Convention No. 169").

indigenous property or cultural rights, the only exception being the constitutional recognition of indigenous linguistic rights in 1999.[19]

Indigenous peoples are currently facing a series of substantial, discriminatory and debilitating obstacles to the exercise and enjoyment of their rights to own, possess and control their territories caused by Costa Rica's acts and omissions.[20] In particular, the vast majority of titled indigenous territories are massively and illegally occupied and this has been the case for many decades. In fact, studies document that almost three-quarters of these territories are at least 40 percent illegally occupied and a quarter of them are 80 to 98 percent illegally occupied.[21] Costa Rica itself informed the UN that its 2000 census revealed that "in the indigenous territories only 1 out of every 10 hectares is in conformity with the law…."[22] These

19 Human rights instruments ratified by Costa Rica have constitutional status and, thus, Inter-American and universal human rights norms are incorporated into domestic law. *See* Article 48 and Article 7 of the Constitution, the latter providing that "Public treaties, international agreements and concordats duly approved by the Legislative Assembly shall have a higher authority than the laws upon their enactment or from the day that they designate." The Constitutional Chamber of the Supreme Court of Costa Rica has recognised that international human rights treaties in some cases have supra-constitutional status placing them above constitutional norms. *See* Judgment No. 3435-92 and its Clarification No. 5759-93, and Judgment No. 2313-95.

20 *See Saramaka People v. Suriname, Merits and Reparations*, Judgment, 2007 Inter-Am. Ct. H.R. (ser. C) No. 172, at para. 194 (28 November 2007) (ordering that recognition of the Saramaka people's territorial rights must include recognition of "their right to manage, distribute, and effectively control such territory, in accordance with their customary laws and traditional collective land tenure system"). *See also Kichwa Indigenous People of Sarayaku. Merits and reparations*, Judgment, 2012 Inter-Am. Ct. H.R. (ser. C) No. 245, at para. 145 & 171 (June 27, 2012) (observing, respectively, that "[a]mong indigenous peoples there exists a communitarian tradition related to a form of collective land tenure, inasmuch as land is not owned by individuals but by the group and the community. This notion of land ownership and possession does not necessarily conform to the classic concept of property, but deserves equal protection under Article 21 of the American Convention" and; the "effective protection of indigenous communal property … imposes an obligation on States to adopt special measures to ensure that members of indigenous and tribal peoples enjoy the full and equal exercise of their right to the land that they have traditionally used and occupied").

21 *See inter alia*, G. Berger, M. Vargas & J. Carlos, Perfil de los Pueblos Indígenas de Costa Rica (San José: Costa Rica, 2000) and; Asociación Regional Aborígen de la Región del Dikes, *Land Tenure in Indigenous Territories in Costa Rica* (1999) (on file with authors).

22 *Reports submitted by States Parties: Costa Rica*, UN Doc. CERD/C/CRI/18 (30 August 2006), at para. 278. <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/

figures only account for the lands that have been titled to indigenous peoples and do not include areas of traditionally owned and presently occupied lands that were left out of these territories when they were delimited and titled and which currently have no legal protection under domestic law.

Illegal occupation of indigenous territories has been a serious problem since at least the 1960s. It is well known in Costa Rica, yet has not been, and is not now, the subject of any meaningful remedial action. Indeed, the state tacitly approves of this illegal occupation despite the fact that a draft law that is intended to correct this situation has been pending before the legislature since 1995.[23] This persistent and pervasive denial of indigenous peoples' property rights also has serious consequences for the exercise and enjoyment of a wide range of other interrelated rights and is extremely detrimental to indigenous peoples' well-being and integrity.[24] In this respect, the IACHR has observed that the special relationship between indigenous peoples and their territories means that "the use and enjoyment of the land

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G06/440/44/PDF/G0644044.pdf?OpenElement>, visited on 20 November 2012.

23 *See* Section IV *infra* discussing the *Proyecto de Ley de Desarrollo Autónomo de los Pueblos Indígenas* (the Bill for Autonomous Development of Indigenous Peoples), which was first submitted for debate in the Congress in 1995. It was subsequently modified and reconsidered by the Congress in 2002. The UNCERD observed in 2007 that "despite the recommendation contained in its final comments of 2002, the *Autonomous Development of Indigenous Peoples Bill* has not been adopted owing to legislative obstacles." It added that it was "disturbed to learn that the bill may once again be shelved" and recommended that Costa Rica "remove without delay the legislative obstacles preventing [its] adoption…." UNCERD, Costa Rica: CERD/C/CRI/CO/18 (17 August 2007), at para. 9. Most recently, the UNCERD expressed "its concern on information received about statements made by the State party on the situation of El Diquís hydroelectric dam as a reason for not adopting the Autonomy Bill of Indigenous Peoples, which has been waiting the approval in Congress for 16 years." *See Communication of the UNCERD to Costa Rica* (02 September 2011), <www2.ohchr.org/english/bodies/cerd/docs/early_warning/CostaRica02092011.pdf>, visited on 10 October 2012.

24 *See* IACHR Indigenous Lands, *supra,* note 7, at p. 63-70 (and, at para. 153 explaining that "The lack of granting of title, delimitation, demarcation and possession of ancestral territory, hampering or preventing access to land and natural resources by indigenous and tribal peoples, is directly and causally linked to situations of poverty and extreme poverty among families, communities and peoples. In turn, the typical circumstances of poverty trigger cross-cutting violations of human rights, including violations of their rights to life, to personal integrity, to a dignified existence, to food, to water, to health, to education and the rights of children") (footnotes omitted). *See also* Yakye Axa Indigenous Community. Merits, Reparations and Costs, Judgment 2005 Inter-Am. Ct. H.R. (ser. C) No. 125, para. 163 (17 June 2005).

and its resources are integral components of the physical and cultural survival of the indigenous communities and the effective realization of their human rights more broadly."[25] The Inter-American Court of Human Rights has held that this includes non-derogable rights, stating that the right to live in ancestral territory is interconnected with the right to (a dignified) life.[26]

The 1977 *Ley Indígena* prescribes that indigenous territories are "inalienable" and "exclusive" to indigenous peoples and that non-indigenous "persons cannot rent, lease, purchase or acquire by any other means" lands therein.[27] This has been a prominent principle of Costa Rican law since 1939.[28] In direct contravention of this law, studies reveal that 6,087 non-indigenous persons illegally occupy more than 43 percent of the total lands in the 24 titled indigenous territories.[29] In only two territories are indigenous peoples in possession of 100 percent of their lands.[30] In 20 percent of these territories, indigenous peoples are outnumbered by illegal occupants and, nationwide, the latter on average hold four hectares of land to every one hectare held by indigenous persons in their territories. Domestic remedies to address illegal occupation are ill-defined, unfunded and demonstrably ineffective. In this respect, the fact that more than 6,000 non-indigenous persons continue to possess

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25 Maya Indigenous Communities, *supra* note 4, at para. 114.

26 Yakye Axa, *supra* note 25, para. 168; and Xákmok Kásek, *supra* note 3, at para. 187-217.

27 *Ley Indígena* 1977, at Article 3, providing that "indigenous reserves are inalienable and imprescriptible, non-transferrable and exclusive for the indigenous communities that inhabit them. Non-indigenous persons may not rent, lease, purchase or acquire by any other means plots of land or estates on these reservations. Indigenous persons may only offer their land for sale to other indigenous persons. Any transfer, sale or bequest of land on indigenous reservations transacted between indigenous and non-indigenous persons shall be null and void, with all the legal consequences thereof."

28 *Ley de Terrenos Baldíos*, N° 13, 10 January 1939, Article 8 (which provided that "it is declared inalienable and of exclusive property of the indigenous, a prudential zone in the judgment of the Executive Power in the places where their tribes exist, with the aim of conserving our autochthonous roots and to free them of future injustice…" *See also* Executive Decree 45 of 1945, creating the Board for Protection of the Aboriginal Races, reaffirming Article 8 of the *Ley de Terrenos Baldíos*, and providing that the lands "that are awarded to the indigenous cannot be sold, mortgaged or leased or in anyway alienated without prior authorization of the Board, and only can be made to the members of their tribe."

29 Perfil de los Pueblos Indígenas de Costa Rica, *supra* note 22.

30 *Id*.

almost half of the area titled to indigenous peoples nationwide some 35 years after the *Ley Indígena* was adopted speaks for itself.

This massive and illegal occupation of indigenous lands has not escaped the attention of international human rights bodies. The UNCERD, for instance, has repeatedly expressed deep concern about the illegal occupation of indigenous lands in Costa Rica since 1999, most recently in 2010 and 2011 in connection with the situation of the Teribe people.[31] As noted by the UNCERD in 2007, this includes the failure to implement decisions of the Constitutional Chamber of the Supreme Court upholding indigenous peoples' property and associated rights.[32] In 2002, 2007 and 2010, the UNCERD emphasized that urgent action was required to address this long-standing problem.[33] The UN Special Rapporteur on the Rights of Indigenous Peoples has also highlighted the need for urgent action,[34] and observed that, although Costa Rica "has granted legal protection to the indigenous territories … these territories are in their majority inhabited by non-indigenous persons."[35] Likewise, the International Labour Organization, in its supervision of ILO 169, has repeatedly recommended that Costa Rica urgently addresses the illegal occupation of indigenous territories.[36]

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31 *See Communication of the UNCERD to Costa Rica* (27 August 2010), <www2.ohchr.org/english/bodies/cerd/docs/early_warning/CostaRica27082010.pdf>, visited on 11 October 2012 (expressing profound concern about the lack of guarantees for the Teribe in relation to the Diquís dam and reiterating prior recommendations that Costa Rica effectively secure and protect indigenous lands, and specifically mentioning the Teribe as requiring urgent attention in this respect).

32 UNCERD, Costa Rica, *supra* note 24, at para. 15 (recommending that "the State Party should take measures in order to carry out the ruling of the Constitutional Court (Vote N0. 3468-02) to delimit the lands of the Rey Curré, Térraba and Boruca communities, and to get back the indigenous lands wrongfully alienated"). *See also Concluding observations of the Human Rights Committee: Costa Rica. 08/04/99*. CCPR/C/79/Add.107, at para. 21 (stating that the Human Rights Committee "remains concerned at the lack of effective remedies for indigenous people in Costa Rica").

33 UNCERD, Costa Rica, *ibid.* at para. 15. *See also* UNCERD, Costa Rica: CERD/C/60/CO/3 (20 March 2002), at para. 11 and; *Communication of the UNCERD to Costa Rica*, *supra* note 32.

34 SRIP Report on El Diquís, *supra* note 15, at para. 24 (explaining that "the possession of large tracts of indigenous territories by non-indigenous persons is an underlying problem in Costa Rica and should be addressed by the Government as a matter of priority").

35 *Id*. at para. 43.

36 *See generally* <http://www.ilo.org/dyn/normlex/en>. *See also* ILO CEACR, *Costa Rica: Observation*, adopted 1999, published 88th ILC session (2000) (requesting "the

Despite clear and authoritative evidence that this situation constitutes a serious derogation of its international obligations, Costa Rica has done nothing to meaningfully address this situation and indigenous peoples continue to lose more lands each year and with it the enjoyment of related rights. For example, the indigenous territories of Boruca, (Rey) Curré and Térraba have on average lost an additional 40.5 percent of their titled lands to illegal occupation since 1964, when illegal occupation was already 37.2 percent.[37] The territory of China Kichá was 60 percent illegally occupied in 1964; today, it is between 97 and 98 percent illegally occupied. Costa Rica is well aware of this situation, yet indigenous peoples' rights continue to be violated with impunity and their cultural integrity continues to be undermined and threatened by the invasion and illegal alienation of their lands throughout the country.

Illegal occupation is also the cause of serious ethnic tension and violence and, in some cases, indigenous leaders have been subject to assassination attempts when they try to peacefully recover their lands or otherwise complain about encroachment thereon. Indigenous people have been killed in the Bribri and Cabécar peoples' Talamanca territories and there have been assassination attempts against a Teribe leader in 2012 for complaining about illegal logging in their territory.[38] This confirms the IACHR's observation that "the lack of resolution of indigenous communities' claims for territorial

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Government to indicate the progress made in returning lands to their indigenous owners in the light of the Government's statement in its previous report that there are large areas of indigenous lands in the hands of non-indigenous persons" and; "notes the Government's statement that provisions to prevent the penetration into indigenous lands by non-indigenous persons is laid down in Indigenous Act No. 6172 and other associated Acts. The Committee requests the Government to supply information on the manner in which this legislation has been applied in practice and on any measure taken to guarantee the safety of the peoples concerned, including examples of specific cases in which punishment has been imposed on non-indigenous persons who invade indigenous lands and reservations." The same or very similar requests are made in each and every observation and direct request adopted by the CEACR between 1998 and 2010. *See e.g.,* ILO CEACR, *Costa Rica: Observation, adopted 2009*, published 99th ILC session (2010) (reiterating the same concerns).

37 *See infra* notes 76-79 and accompanying text.

38 *See* IACHR, *MC-321-12, Costa Rica*, request for precautionary measures submitted on behalf of Pablo Sibas Sibas and Sergio Rojas, two indigenous leaders subject to assassination attempts in 2012. *See also* Costa Rica: CERD/C/304/Add.71. 07/04/99, at para. 10 (stating that the UNCERD "remains concerned at the situation with regard to the land rights of indigenous peoples in the State party. … Of special concern have been confrontations arising over the ownership of property,

restitution puts the integrity of their members in danger."[39] As discussed further below, the situation has so deteriorated that a Bribri indigenous leader from Salitre was even declared *persona non grata* in a formal resolution adopted in August 2012 by the Municipal Council of Buenos Aires, an official organ of the state of Costa Rica, because of his attempts to recover illegally occupied lands in his territory.[40] Empowered by this resolution, on the 17 September 2012, unknown assailants attempted to kill him, and, a few weeks later, riot police were deployed in Salitre to control a large and violent confrontation between indigenous people and illegal occupants.[41]

The massive, notorious and unmitigated occupation of indigenous lands in Costa Rica – contrary both to domestic law and Costa Rica's international obligations – undermines the foundations of indigenous territorial rights and is, by itself, reason enough for international human rights bodies to consider this an urgent situation. Indeed, the IACHR has explained that

> As part of the right to property protected under Inter-American human rights instruments, indigenous and tribal peoples have

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in the course of which indigenous people were killed and vandalism occurred, as in the case of Talamanca").

39 *See* IACHR Indigenous Lands, *supra* note 7, at para. 134 (stating that "The Court and the Commission have actively promoted respect for traditional authorities, leaders and other individual members of indigenous and tribal peoples and communities who undertake and head the initiatives, processes and actions of reclamation and recovery of ancestral territories. On numerous occasions, the IACHR has adopted precautionary measures and the Inter-American Court has adopted provisional measures to protect these indigenous leaders and persons. In a high number of these cases, the threats against the life or personal integrity of the members of indigenous communities are closely linked to their activities in defense of these communities' territorial rights, particularly in relation to the exploitation of the natural resources that exist in their territory. The IACHR has also pointed out that the lack of resolution of indigenous communities' claims for territorial restitution puts the integrity of their members in danger").

40 *See* 'Resolution adopted at the 11 August 2012 session of the Buenos Aires Municipal Council, Re. Sergio Rojas Ortiz', *Official Record of the Buenos Aires Municipal Council*, August 2012 (on file with authors).

41 *See* Section II(F) *infra*. *See also Líder indígena de Salitre recibe seis disparos*, <http://coecoceiba.org/lider-indigena-de-salitre-recibe-seis-disparos/>, visited 5 October 2012; *Intentan asesinar a líder indígena*, Revista Amauta, <http://revista-amauta.org/2012/09/intentan-asesinar-a-lider-indigena-costarricense/>, visited 5 October 2012; and *Indigenous leader survives assassination attempt in Costa Rica*, Costa Rica Star, <http://news.co.cr/indigenous-leader-survives-assassination-attempt-in-costa-rica/14806/>, visited 5 October 2012.

> the right to possession, use, occupation and inhabitation of their ancestral territories. This right is, moreover, the ultimate objective of the protection of indigenous or tribal territorial property: for the IACHR, the guarantee of the right to territorial property is a means to allow members of indigenous communities to possess their lands.[42]

Articles 14(2) and 18, respectively, of ILO 169, in force for Costa Rica, also emphasize that states parties shall "guarantee effective protection of rights of ownership and possession;" and that "[a]dequate penalties shall be established by law for unauthorised intrusion upon, or use of, the lands of the peoples concerned, and governments shall take measures to prevent such offences." As noted above, the ILO has long observed that illegal occupation in Costa Rica raises serious issues in relation to these and other provisions of ILO 169. Costa Rica's tolerance and tacit approval of the massive and illegal occupation and dispossession of indigenous peoples' territories, therefore, nullifies indigenous property rights and causes grave and irreparable harm on multiple levels, all in contravention of its international obligations.[43]

A. Persistent Denial of Indigenous Property and Related Rights in Costa Rica

While noting that domestic legislation protects indigenous peoples' right to ownership of their lands, the Committee is concerned that this right is not guaranteed in practice. The Committee shares the State party's concern at the trend towards the concentration of indigenous land in the hands of non-indigenous settlers.[44]

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42 *See* IACHR Indigenous Lands, *supra* note 7, at para. 90 (footnotes omitted).
43 *See* Moiwana Village Case, Merits and Reparations, Judgment, 2012 Inter-Am. Ct. H.R. (ser. C) No. 125, para. 101, 102-3 (15 June 2005) (observing that: "in order for the culture to preserve its very identity and integrity, [indigenous and tribal peoples] … must maintain a fluid and multidimensional relationship with their ancestral lands"). *See also* Yakye Axa, *supra* note 26, at para. 146, (where the Court observes that "indigenous territorial rights encompass a broader and different concept that relates to the collective right to survival as an organized people, with control over their habitat as a necessary condition for reproduction of their culture, for their own development and to carry out their life aspirations"); and IACHR, *Report 75/02, Case 11.140. Mary and Carrie Dann (United States)* (27 December 2002), at para. 128 (observing that "continued utilization of traditional collective systems for the control and use of territory are in many instances essential to the individual and collective wellbeing, and indeed the survival of, indigenous peoples").
44 UNCERD, Costa Rica, *supra* note 24, at para. 15.

In the quote above, the UNCERD highlighted in 2007 that domestic legal guarantees for indigenous property rights in Costa Rica are ineffective and, in particular, that these rights are "not guaranteed in practice". These rights are rendered ineffective not by the extant legal framework, but, rather, by the increasing alienation of indigenous lands to non-indigenous persons. This is a situation that Costa Rica agreed was a matter of serious concern in 2007[45] and 2011[46] but, to date, has done next to nothing to correct it. In this respect, Costa Rica's Office of the Ombudsman unambiguously observed in 2005 that "no steps have been taken to recover land for indigenous communities, which is one of the principal, as yet, unmet obligations of the Costa Rican State."[47] The IACHR has emphasized similar considerations as the UNCERD, stating that

> Ensuring the effective enjoyment of territorial property by indigenous or tribal peoples and their members is one of the ultimate objectives of this right's legal protection. … States have the obligation to adopt special measures to secure the real and effective enjoyment of indigenous peoples' rights to territorial property. For this reason, the IACHR has emphasized that "demarcation and legal registry of the indigenous lands is in fact only the first step in the establishment and real defense of those areas," given that the ownership and effective possession

45 *See also Reports submitted by States Parties*, *supra* note 23, para. 278 (stating that "it was discovered that there are non-indigenous families who own more than 5,000 hectares, which reflects a disturbing trend towards the concentration of indigenous land in the hands of non-indigenous individuals").

46 *See Note verbale dated 16 September 2011 addressed to the President of the Human Rights Council from the Permanent Mission of Costa Rica to the United Nations Office and other international organizations in Geneva*. UN Doc. A/HRC/18/G/8 (19 Sept 2011), at p.12 (stating that "The Government also has put on the table the need to seek joint solutions in an attempt to recover indigenous lands, as referred to by Mr. Anaya. For this purpose, the Government of Costa Rica is ready to enter into a process of dialogue with the country's indigenous communities so that jointly public institutions, and indigenous peoples may, together, build formulas to implement the recovery of the lands to which they aspire"), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/160/54/PDF/G1116054.pdf?OpenElement>, visited on 18 December 2012.

47 *Reports submitted by States Parties*, *supra* note 23, at para. 279 (quoting the report of the Ombudsman and stating that "The Office of the Ombudsman has been very critical of the State institutions concerned by this issue and expressed this in no uncertain terms in its 2005 annual report…").

> are constantly being threatened, usurped or eroded by various *de facto* or legal acts.[48]

While it is the issue that needs to be addressed most urgently, illegal occupation of indigenous lands is not the only matter of concern or the only cause of denying indigenous peoples' rights in Costa Rica. For example, indigenous property and other rights are severely undermined by laws that vest legal personality, self-governance powers and title to indigenous territories in local government bodies known as Integral Development Associations ("ADIs" in Spanish). The ADIs were created in the 1960s and operate throughout Costa Rica in indigenous and non-indigenous areas alike. They do not adequately represent indigenous peoples; they were not chosen by indigenous peoples as the means by which their rights and powers should be exercised; they are state-created bodies that often operate in non-transparent and unaccountable ways; and they have been overwhelmingly rejected by indigenous peoples as inappropriate to their circumstances, rights, customs and traditions.[49]

This section discusses the massive illegal occupation of indigenous territories and the applicable legal framework. To further illustrate the problem, it also provides more detailed information about three particular indigenous territories: Térraba, China Kichá and Salitre. The ADIs and associated issues are addressed in Section III below.

B. Documented Illegal Occupation and Dispossession of Titled Indigenous Territories

The land tenure situation of indigenous peoples in their titled territories in Costa Rica has been documented in a number of studies, the results of which are summarised below. Very little information, however, has been gathered about the situation of indigenous communities' lands that lie outside of a titled territory and which are not presently recognised or protected by domestic law. Costa Rica has reported to the ILO that 18 percent of indigenous persons reside on the "periphery" of indigenous territories and this

48 IACHR Indigenous Lands, *supra* note 7, at para. 86 (footnotes omitted).

49 *See inter alia* Swimming Against the Current: The Teribe Peoples and the El Diquís Hydroelectric Project in Costa Rica (University of Texas Law School Human Rights Clinic, July 2010) (hereinafter "Swimming Against the Current"), at p. 19-20, <www.utexas.edu/law/clinics/humanrights/docs/swimming-english-report.pdf>, visited 11 November 2012.

may provide some indication of the extent of this problem.[50] While not further discussed in detail herein, this issue is also fundamentally important to understanding the larger picture of indigenous property and related rights in Costa Rica.

Despite the provisions of the 1977 *Ley Indígena* prescribing that indigenous territories are inalienable and exclusive and cannot be occupied by or alienated in any way to non-indigenous persons, the available data demonstrates that some 6,087 non-indigenous persons illegally and notoriously occupy 142,386.77 hectares, or 43.17 percent, of the area that has been legally titled to indigenous peoples.[51] This illegal occupation, whether in place before or after the indigenous title was recognized, is now repugnant to the underlying title affirmed to the indigenous peoples. In only two of the 24 indigenous territories are indigenous peoples in possession of 100 percent of their titled lands;[52] in five (20.75 percent) they possess between 75 and 90 percent;[53] in four (16.66 percent) they possess between 58 and 60 percent;[54] and in six (25 percent) they possess between 32 and 50 percent.[55] The remaining seven territories (29.16 percent) possess less than one-quarter of their titled lands, and three of these possess less than 10 percent.[56]

Thus, in almost 30 percent of the indigenous territories in Costa Rica, indigenous peoples are in possession of a mere two to 22 percent of the lands legally titled to them and prescribed as inalienable and exclusive under extant Costa Rican law. The next 25 per cent possess between 32 and 50 percent of their titled lands while the next 16.66 percent possess between 58 and 60 percent of their titled territories.

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50 ILO CEACR, *Observation*, adopted 2003, *supra* note 17.

51 Perfil de los Pueblos Indígenas de Costa Rica, *supra* note 22.

52 *Id*. (identifying Tayní and Telire).

53 *Id*. (identifying the Ngöbe of Osa, Ngöbe of Coto Brus, Talamanca Cabécar, Cabécar of Nairi-Awari and Cabécar of Bajo Chirripó).

54 *Id*. (identifying the Ngöbe of Abrojos-Montezuma, the Ngöbe of Conte Burica, the Chorotega of Matambú, the Cabécar of Alto Chirripó and the Bribri of Cabagra).

55 *Id*. (the Ngöbe of Abrojos-Montezuma possess 50 percent; the Bribri of Salitre possess 40 percent; the Brunka of Boruca possess 39 percent; the Bribri of Keköldi have 38 percent; the Talamanca Bribri hold 35 percent; and the Cabécar of Ujarrás have 32 percent).

56 *Id*. (the Maleku possess 22 percent; the Brunca of Curré possess 16 percent; the Teribe possess 12 percent; the Huetar of Zapatón and Quitirrisí possess 20 and nine percent, respectively; the Cabécar of China Kichá possess three percent and; the Ngöbe of Altos de San Antonio possess two percent).

Consequently, 70.81 percent of the indigenous territories recognized by Costa Rica are, at the least, 40 percent illegally occupied.

This illegal occupation has drastically altered the demographics and traditional social systems in indigenous territories, undermined traditional institutions for governance and land management, and created substantial inequalities compared to the illegal occupants. In five territories (20.75 percent), indigenous peoples are outnumbered by illegal occupants, making them numerical minorities in their own lands. In five others, the non-indigenous population is between 10 and 50 percent of the total population. In the other 14 territories there are between 3 and 399 non-indigenous occupants, all of whom possess substantially more land per person than the indigenous owners. This disparity is not confined to these 14 territories however as, nationwide, the 6,087 illegal occupants hold on average 23.39 hectares per person compared to only 6.88 hectares for each of the indigenous persons residing in the territories, a ratio of almost 4:1. In some territories, the ratio is more than 90:1 in favour of the illegal occupants.

In the Coto Brus Ngöbe territory, for instance, three non-indigenous persons hold 500 hectares per person whereas 1,091 indigenous people hold a mere 5.5 hectares per person. For the Cabécar of Bajo Chirripó, nine illegal occupants hold 521.75 hectares per person while 363 indigenous persons possess 38.81 hectares per person; for the Cabécar of Alto Chirripó the number is 380.36 hectares for each of the 82 illegal occupants compared to 10.13 hectares for each of the 4,619 indigenous persons. This disparity in the amount of hectares per person is evident in all but three indigenous territories.[57] Two of these are 100 percent possessed by the indigenous title holders and in the third, the Huetar of Zapatón, the indigenous owners are outnumbered almost eight to one by the illegal occupants who possess 2,284 of the total of 2,855 hectares.

C. Ineffective domestic laws and remedies

When the Ley Indígena was adopted in 1977, Article 5 required the state to remove all persons in occupation of lands declared to be indigenous territories[58] whether they were 'good faith possessors' or

57 In two territories, there is no information available on this point.

58 *Ley Indígena,* Art. 5, provides, in relevant part, that "In the case of non-indigenous persons that are owners or good faith possessors within the indigenous reserves, IDA shall relocate them in other similar lands if they wish so; if it is not

otherwise.[59] The former were entitled to compensation from a fund established by the law.[60] The same article unambiguously states that "If afterwards there are invasions of non-indigenous persons in the reserves, the competent authorities immediately shall proceed with their eviction with no payment of compensation whatsoever." While a fund was established in 1977, Costa Rica has clearly failed to comply with these domestic legal requirements – and its corresponding international obligations – and the specified remedial process is ill-defined and ineffective. Discussing this situation, the UN Special Rapporteur on the Rights of Indigenous Peoples explains that

> Some of these people hold title deeds in good faith, with the corresponding rights to compensation under the Indigenous Act of 1977; but according to information received by the Special Rapporteur, most of them do not have legal deeds and acquired land in indigenous territories by settling there or through irregular transfers, sometimes with the tacit consent of the Government. Under the Indigenous Act, the land in indigenous territories is inalienable and imprescriptible. However, the inflow of non-indigenous persons to indigenous territories has affected the territories' demographics and landholding patterns, with large farms being established by non-indigenous persons….
>
> It is alleged that, in the vast majority of cases, no procedures have been followed to compensate those who occupy indigenous territories in good faith, nor have there been any efforts to recover land held by non-indigenous persons through settlements or irregular transfers. Although the Agrarian Development Institute, the Government agency responsible under domestic legislation for compensating non-indigenous persons who hold title deeds in good faith, has bought some land under procedures to recover indigenous lands, the Special

possible to relocate them or they do not accept the relocation, shall expropriate and compensate them in accordance with the procedures established in the Law of Expropriations. …"

59 The *Ley Indígena* defines 'good faith possessors' as non-indigenous persons that hold land in the reserves before they had any legal protection as such.

60 Article 5 of the *Ley Indígena* provides, in relevant part, that "The expropriations and compensations shall be financed with a contribution of one-hundred million *colones* in cash, that shall be consigned through four annual quotas of twenty-five million *colones* each, starting the first one in the year of 1979; such quotas shall be included in the general budgets of the Republic of the years 1979, 1980, 1981 and 1982. …"

> Rapporteur was informed that these procedures are slow and suffer from irregularities.[61]

The procedure for addressing illegal occupation by 'good faith possessors' is outlined in the *Ley Indígena*, but has not been further elaborated on in subsidiary legislation, creating uncertainty and substantial delays. The procedure concerning 'bad faith possessors' (essentially an action for trespass (*usurpación* in Spanish)), who are not entitled to compensation, is contained in the Code of Criminal Procedure but is rarely invoked by the relevant authorities. Judicial remedies have also proved to be ineffective. The Bribri of Keköldi, for instance, sought relief in the Contentious Administrative Tribunal, which found in September 2012 that the state was required to compensate and remove good faith possessors, evict the bad-faith possessors, and return the lands to the indigenous owners.[62] To date, Costa Rica has failed to comply with this ruling and has given no indication that it is even considering compliance. The situation is so bad that the Agrarian Development Institute ("IDA"), the state agency responsible for compensating 'good faith possessors', even challenged the constitutionality of the *Ley Indígena* due to its inability to comply with its mandate because, it claimed, it lacked the funds required to compensate illegal occupants. It explained in the national press that it faces lawsuits with a potential liability of up to 35,000 million *colones* (approximately USD70 million) in relation to land repossession.[63] The action filed by the IDA was only withdrawn following protests by indigenous peoples and the intervention of the Office of the Vice-President. To make matters worse, there are no procedures at all to address the claims that indigenous peoples may have over traditionally owned and occupied lands that were excluded from the titled territories. Existing law would have to be modified to accommodate many of these claims. Among other reasons, this is the case because many territories have boundaries adjacent to national parks (e.g., Ujarrás, Salitre, Cabagra, Osa and the majority of territories on the Atlantic Coast), which can only be modified through legislative amendments.

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61 SRIP Report on El Diquís, *supra* note 15, at para. 43-4.

62 Case N° 10-000275-01028-CA. *Asociación de Desarrollo Integral de la Reserva Indígena Bri Bri de Kekoldi contra El Estado y otros*, September 2012.

63 *See Pago para Devolver Tierras a Indígenas: IDA enfrenta demandas por ¢35.000 millones*, La Nacion, 18 May 2012, <www.nacion.com/2012-05-18/ElPais/ida-enfrenta-demandas-por--35-000-millones.aspx>, visited 14 October 2012.

Pursuant to, *inter alia*, Article 25 of the American Convention on Human Rights, which is closely related to the guarantees recognized in Articles 1 and 2 of the same,[64] indigenous peoples have the right to effective remedies for violations of their human rights, including effective domestic procedures for the recognition, restoration and protection of their property rights.[65] Moreover, "indigenous peoples who have been deprived of the possession of the territory they have traditionally occupied preserve their property rights, and have the right to restitution of their lands."[66] Costa Rica has the obligation to not only pass laws that provide a remedy for the violation of indigenous peoples' rights, but also to ensure their prompt application by state authorities, including through the organization of the institutions

64 Velasquez Rodriguez, Merits and Reparations, Judgment, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4 (29 July 1988); Fabien Garbi and Solis Corrales and Godinez Cruz, Preliminary Objections, Judgment, 1987 Inter-Am. Ct. H.R. (ser. C) No. 2, para. 90-92 (26 June 1987).

65 *See inter alia,* IACHR Indigenous Lands, *supra* note 7, at para. 86 (stating that "The right to legal certainty of territorial property requires the existence of special, prompt and effective mechanisms to resolve existing legal conflicts over the ownership of indigenous lands. States are, consequently, bound to adopt measures to establish such mechanisms including protection from attacks by third parties. Part of the legal certainty to which indigenous and tribal peoples are entitled consists in having their territorial claims receive a final solution. That is to say, once the claims procedures over their ancestral territories have been initiated, be it before administrative authorities or before the Courts, their claim should be given a final solution within a reasonable time, without unjustified delays") (footnotes omitted); and *Case of Tribunal Constitucional v. Perú, Merits, Reparations, and Costs,* Judgment, 2001 Inter-Am. Ct. H.R. (ser. C) No. 71, para. 90 (31 January 2001) (explaining that "effectiveness means that, in addition to their formal existence, the remedies must produce results or responses to violations of recognized rights, whether those rights are recognized by the Convention, the Constitution, or domestic law").

66 *Sawhoyamaxa Indigenous Community, Merits, Reparations and Costs*, Judgment, 2006 Inter-Am. Ct. H.R. (ser. C) No. 146, at para. 128 (29 March 2006) (observing that "possession is not a requisite conditioning the existence of indigenous land restitution rights"); and Xákmok Kásek, *supra* note 3, at para. 112 (summarizing its jurisprudence and stating that "[r]egarding the possibility of recovering traditional lands, on prior occasions the Court has established that the spiritual and physical foundation of the identities of indigenous peoples is based mainly on their unique relationship with their traditional lands. As long as that relationship exists, the right to recover those lands remains applicable"). *See also* IACHR Indigenous Lands, *supra* note 7, at para. 132 (explaining that "In relation to mechanisms for restitution, the IACHR has clarified that indigenous and tribal peoples have a right to legally established administrative mechanisms which are effective to solve definitively their territorial claims") (footnotes omitted).

responsible for administering justice.[67] This may include prompt due process and appropriate compensation to removed illegal occupiers as well as restitution and compensation to the offended indigenous communities.

In cases involving indigenous peoples' property rights, the Inter-American Court of Human Rights has examined both the existence of effective judicial remedies for the recognition, restoration and protection of indigenous property rights as well as whether the state has adopted a specific and effective legal or administrative procedure whereby indigenous peoples can seek restitution of their ancestral lands and/or have their communal lands identified, demarcated and titled.[68] Such a procedure must take into account indigenous peoples' specific characteristics, including their special relationship to their traditional territories.[69] With regard to the massive and persistent illegal occupation of indigenous territories, Costa Rica has failed to comply with these obligations. Its procedures for addressing illegal occupation are ill-defined, unfunded and demonstrably ineffective; the fact that more than 6,000 non-indigenous persons continue to possess almost half of the area titled to indigenous peoples nationwide, some 35 years after the *Ley Indígena* was adopted – in some cases, more than 50 years after the reserves were created – speaks for itself. Moreover, Costa Rica has no procedures for addressing the rights of indigenous peoples to lands that are not within a titled territory.

D. The situation of the Teribe people of the Térraba Territory

Not only has Costa Rica allowed the massive illegal occupation of indigenous territories to continue unabated since the *Ley Indígena* was adopted in 1977 (in fact, non-indigenous occupation of indigenous lands was illegal under Costa Rican law as far back as 1939), the intervening years have seen a substantial increase in

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67 *Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 American Convention on Human Rights)*, OC-9/87 of Oct. 6, 1987. Series A No. 9; *Tarcisco Madina Charry*, Report No. 3/98, *IACHR 1997 Annual Report*, OEA/Ser.L/V/II.98, Doc. 6 rev., 13 April 1998, p. 499, at para. 80; and, *Hector Felix Miranda*, Report No. 5/99, *IACHR 1998 Annual Report*, OEA/Ser.L/V/II.102 Doc.6 rev., 16 April 1999, p. 759, at para. 18.

68 Mayagna (Sumo) Awas Tingni Case, Merits and Reparations, Judgment, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79, para. 123-24 (31 August 2001); Yakye Axa, *supra* note 26, para. 65.

69 Sawhoyamaxa, *supra* note 67, para. 104; Mayagna, *id*.

illegal occupation as more non-indigenous persons acquire lands even to this day.[70] Rather than curb and remedy this situation and protect the integrity of the lands it has titled, Costa Rica has also removed lands from indigenous territories by reclassifying parts thereof as 'state lands'. The situation of the Teribe people illustrates both of these points.

The Teribe people's traditional economy is subsistence-based, primarily drawing on the resources of its forests and waters. In the 1970s, Costa Rica began clearing forests for conversion to agricultural and pastoral lands and much of the Teribe's forest was lost. Their ability to practice their traditional economy was further and drastically reduced in the following years due to increased and overwhelming illegal occupation of their lands. Today, the Teribe are essentially denied their ability to practice and benefit from their traditional economy and they have been forced into the cash economy. In short, they have been denied any security over their means of subsistence, their cultural identity, and their right to freely pursue their own economic, social and cultural development.

One consequence of the destruction of the Teribe's traditional economy and the illegal occupation of their lands is that their region has the highest incidence of poverty in the country. In 2007, for example, the percentage of households in this region in extreme poverty was 19.3 percent whereas nationally the figure was only 3.3 percent.[71] In this respect, the UNCERD observed in 2007 that extreme poverty among indigenous peoples was a problem nationwide, stating "that only 7.6 percent of indigenous people in the territories have their basic needs met".[72] It recommended (to date unimplemented) remedial measures to ensure that "indigenous

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70 *Programa Estado de la Nación, XVIII Informe. Estado de la Nación en Desarrollo Humano Sostenible – Capítulo Reconocimiento y exigibilidad de los derechos de los pueblos indígenas: su expresión en la Defensoría de los Habitantes*, (Government of Costa Rica: San José, 2012). *See also Report by the Office of the Ombudsman,* page 8, <www.estadonacion.or.cr/index.php/biblioteca-virtual/costa-rica/estado-de-la-nacion/informe-actual/informe-por-capitulo/derechos-indigenas/1250-xviii-informe-reconocimiento-y-exigibilidad-de-los-derechos-de-los-pueblos-indigenas-su-expresion-en-la-defensoria-de-los-habitantes>, visited 3 November 2012.

71 *Estado de la Nación, Estadísticas Sociales. Pobreza 2006-2007*, <www.estadonacion.or.cr/Compendio/soc_pobreza06_07.html>, visited 12 November 2012.

72 UNCERD, Costa Rica, *supra* note 24, at para. 12.

people do not find themselves compelled to leave their ancestral lands" in search of employment and better living conditions.[73]

The Teribe's territory of Térraba was recognised by Executive Decree 34 of 15 November 1956.[74] At that time, it was 9,355 hectares in size. For reasons that have never been explained, the Teribe community of Macho Montes was simply excluded from the territory and today enjoys no legal protection for its lands. When first created, the reserve comprised what are now three different territories, Térraba, Boruca and Rey Curré, and was 31,983 hectares.[75] In 1964, non-indigenous persons occupied 37.2 percent of the lands comprising this joint reserve.[76] Today, these three territories are illegally occupied as follows: Boruca, 61 percent; Curré, 84 percent; and Térraba, 88 percent.[77] On average then, in the past 48 years, these three territories have lost an additional 40.5 per cent of their total area to illegal occupation. Currently, the Teribe possess at the most 12 percent of their territory and they are a minority in their own lands.[78]

Within the territory, 804 non-indigenous persons are in control of many house lots as well as a number of large landholdings (e.g., *'fincas'*). Therefore, some individuals hold a considerable amount of the land within Térraba. Some persons also have established bars that openly sell alcohol even though this is illegal under the *Ley Indígena*. This massive encroachment on titled (and untitled) Teribe land has generated conflict among its residents, sometimes violent.[79] There also have been assassination attempts against one

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73 *Id*.

74 Executive Decree 34 of November 15, 1956 "Declares and Demarcates Zones as Indigenous Reserves" identifying 3 lots: Lot 1 (comprising what currently are the territories of Boruca, Térraba and Rey Curré); Lot 2 (comprising what currently are the territories of Cabagra, Salitre and Ujarrás); and, Lot 3 comprising the territory of China Kichá.

75 Instituto de Tierras y Colonización, Study of Indigenous Communities. Zones: Boruca-Térraba and China Kichá, (Government of Costa Rica, July 1964), p. 7.

76 *Id*. p.10.

77 Perfil de los Pueblos Indígenas de Costa Rica, *supra* note 22.

78 The 2000 Census data showed that there were 804 non-indigenous persons and 621 indigenous persons in the territory of Térraba. *See Tomado del Cuadro N°6 24 Pueblos indígenas según población, tenencia de la tierra y porcentaje de idioma hablado, in* Perfil de los Pueblos Indígenas de Costa Rica, *id*.

79 For example in February 2012, violent conflict erupted when a large number of illegal occupants attacked Teribe protesters who were demanding that the state comply with a 2009 agreement with the Teribe on adapting the education system to their culture. The illegal occupants attacked Teribe women, children, youth and

Teribe leader while others have been threatened and harassed on a regular basis.[80] The situation has so deteriorated that many Teribe are simply afraid to even enter various areas of their territory for fear of being attacked by illegal occupants.

To make matters worse, in 2003, the Attorney General's Office determined that 'public domain goods' should be removed from the territory and registered as belonging to the state. This resulted in a considerable reduction in the size of the territory, which was fractured into a series of discrete blocks because roads, school buildings, water springs, rivers and creeks were removed from the title and declared property of the state.[81] There was no discussion with the Teribe about excising these parts of their territory; it was done unilaterally by decree without any notice to, let alone consultation with, the Teribe.[82] Neither was any compensation granted for these takings of indigenous lands in violation of basic non-discrimination norms.[83] For these reasons and against the backdrop of the overall situation in Costa Rica, the UNCERD specifically identified Térraba as one situation where urgent action was required to address illegal occupation in

men with rocks, wooden sticks embedded with nails, and barb-wire among other weapons. *See Indígenas manejarán Liceo de Térraba*, La Nacion, 20 February 2012, <www.nacion.com/2012-02-22/ElPais/indigenas-manejaran--liceo--de-terraba.aspx>, visited 15 December 2012.

80 *See* Inter-Am. C.H.R., *MC-321-12, Costa Rica* (2012), precautionary measures requested on behalf of Pablo Sibas Sibas, a Teribe leader subjected to assassination attempts in 2012. These attempts on Pablo Sibas' life came about because of a legal action he filed with the Ministry of Environment in relation to illegal logging in Térraba.

81 Procuraduría General de la República, *Dictamen C-395-2003*, 16 December 2003.

82 The IACHR has explained that "Legal certainty also requires that indigenous peoples' titles to property be protected against arbitrary extinction or reduction by the State, and against trumping by third parties' property rights." *See* IACHR Indigenous Lands, *supra* note 7, at para. 90 (footnotes omitted).

83 *Id*. (explaining that the state must secure indigenous peoples "equality of treatment *vis-à-vis* non-indigenous persons, and comply with the general requirements established in international law for an expropriation, including fair compensation…") (footnotes omitted).

2007,[84] and it reiterated this call in 2010[85] and 2011,[86] as did the UN Special Rapporteur on the Rights of Indigenous Peoples in 2011.[87]

Despite this international scrutiny, Costa Rica has failed to take any action to deal with this situation and, instead, is currently seeking to further reduce Teribe territory by constructing a hydro-electric dam that will flood at least ten per cent of the titled area, an area that also contains hundreds of sites of crucial importance to Teribe identity, culture and spirituality.[88] It also has failed to ensure their participation in decision making about this dam[89] and argued extensively that consultation with the Teribe is not yet required, a position until recently endorsed by the Constitutional Chamber

84 UNCERD, Costa Rica, *supra* note 24, at para. 15 (recommending that "the State Party should redouble its efforts to ensure the right of indigenous peoples to land tenure. Also, the State Party should take measures in order to carry out the ruling of the Constitutional Court (Vote N0. 3468-02) to delimit the lands of the Rey Curré, Térraba and Boruca communities, and to get back the indigenous lands wrongfully alienated"). *See also* UNCERD, Costa Rica, *supra* note 34, at para. 11.

85 *Communication of the UNCERD, supra* note 32 (expressing profound concern about the lack of guarantees for the Teribe in relation to the Diquís dam and reiterating prior recommendations that Costa Rica effectively secure and protect indigenous lands, and specifically mentioning the Teribe as requiring urgent attention in this respect).

86 *Communication of the UNCERD*, *supra* note 24.

87 SRIP Report on El Diquís, *supra* note 15.

88 The Diquís dam will be located on the main tributary of the *Rio Térraba*, the *Rio General.* The river itself is culturally and spiritually significant to the Teribe as are a number of caves along the river that will be flooded. Burial grounds and archaeological sites will also be inundated. *See* Aproximaciones al Megaproyecto Hidroeléctrico El Diquís (University of Costa Rica: San Jose, March 2012), p.155-179 (concluding, at p. 179 that, "[i]n sum, this project contravenes the whole defense of cultural and other rights"), <http://kioscosambientales.ucr.ac.cr/documentos/EstudioDiquis.pdf.pdf>, visited on 19 November 2012. *See also* Sarayaku, *supra* note 21, para. 220 (stating that "there is no doubt that the intervention and destruction of their cultural heritage implied a grave lack of respect for their social and cultural identity, their customs, traditions, worldview and way of life, which naturally caused great anguish, sadness and suffering among them").

89 *See inter alia* SRIP Report on El Diquís, *supra* note 15, at para. 12 (concluding that "The design of the project is now at an advanced stage … and the Government has taken various decisions which commit it to researching and developing the project, without adequate consultation beforehand. It is clear to the Special Rapporteur that, although the hydroelectric project has not yet received final approval, the ability of the indigenous peoples to exercise their right to self-determination and establish their own priorities for development has been infringed").

of the Supreme Court.[90] Costa Rica has also ignored a September 2011 Constitutional Chamber decision (reversing a prior decision) requiring the state to consult with the Teribe about the proposed Diquís dam within a six month period after the judgment had been adopted, despite the fact that it is more than five years into the process of its design and construction.[91] The Diquís dam situation was examined in 2010 and 2011 by the UNCERD,[92] in a 2011 report by the Special Rapporteur on the Rights of Indigenous Peoples,[93] and

90 *See* Judgment 06045 (file:09-001709-0007-CO), 22/04/2009, Constitutional Chamber of the Supreme Court of Justice (holding that the action filed against the Costa Rican Electricity Institute ("ICE") is premature because (in 2009) ICE was still carrying out the impact assessments to determine whether the project is feasible. *See also* Swimming Against the Current, *supra* note 50, at p. 4 (stating that "The Costa Rican *Sala IV*, the nation's constitutional court, has rendered decisions responding to indigenous individuals' legal actions that refer to the correctly applicable international law but misconstrue the requirements of both international human rights instruments and the Inter-American Court of Human Right's interpretations of these instruments. Notwithstanding international law to the contrary, the *Sala IV* has concluded that consultation with the Teribe peoples about the PHED is unnecessary until a later phase, after ICE completes feasibility studies;" and, "ICE has moved forward with preliminary studies on the *El Diquís* project without the Teribe peoples' effective participation, operating under an incorrect and improper interpretation of international law's requirements. The *Sala IV* supplied ICE with this misinterpretation of international law in its conclusion that ICE has no obligation to consult with indigenous peoples during the feasibility studies").

91 Constitutional Court Judgment 12975-11, 23 September 2011 (requiring protection for Teribe lands and the completion of a consultation process within six months in relation to the Diquís dam project).

92 *See Communication of the UNCERD, supra* note 23; and *Communication of the UNCERD, supra* note 32.

93 SRIP Report on El Diquís, *supra* note 15, at para. 23 (explaining that "[i]t is estimated that at least 80 per cent of the Térraba territory is occupied by non-indigenous persons. In building the reservoir, the El Diquís project could mean the loss of 10 per cent of the Térraba territory. It is therefore understandable that the Teribe people see the project as a threat and fear that instead of recovering more of their territory, they may lose even more of it").

by numerous independent observers,[94] and is currently the subject of a petition submitted to the IACHR in March 2012.[95]

E. The situation of the indigenous territory of China Kichá

The Cabécar indigenous territory of China Kichá is also affected by the Diquís dam and provides another example of the consequences of Costa Rica's disregard for indigenous peoples' rights.[96] The territory today comprises an area of 1,100 hectares and the indigenous owners possess, at the most, a mere three per cent (33 hectares).[97] In 1956, their territory was recognised by Decree[98] and was 4,230 hectares in size.[99] A study carried out in 1964 by a state agency, the Institute of Lands and Colonization, found that non-indigenous occupation is "accentuated, especially in the China Kichá Reserve, where the white group, which comprises 53.48 percent of the families, possesses

94 *See* H. Needleman, K. Patterson and S. Di Lucca, *The Proposed PH Diquis and its compliance with International Law*, 23 July 2009 (analysing international environmental laws and some human rights principles and concluding that the Diquís project has failed to comply with applicable norms to-date), <www.law.ufl.edu/conservation/costarica/spotlight/diquis.shtml>, visited 23 August 2012; Swimming Against the Current, *supra* note 50, at p. 4 (explaining that "the state-created structures for indigenous governance have thwarted participation by indigenous peoples at a time when robust institutions have been most needed for the consideration and resolution of these issues [concerning the Diquís dam and lands]"); and D. Moscovici & C. Wenger, *Planning for Scale. Plan Puebla Panama and the Diquís Hydroelectric Project*, Panorama, (University of Pennsylvania, 2009), at p.63 (observing that the state-owned electricity company's (ICE) "social taskforce maintains that the indigenous groups have agreed to the newest plan; however, the natives have continued to hold numerous protests against the project. On another front, questions of corruption have surfaced during discussions of land acquisition. Many of the indigenous land holdings have changed hands illegally over the years and now non-native people have purchased the properties unlawfully. Therefore, much of the land ICE needs to purchase for the project is now claimed and owned by non-native persons; so, ICE sees no indigenous conflict"), <www.design.upenn.edu/files/panorama08-13_Moscovci.pdf>, visited 22 August 2012.

95 *Petition 448-12*, submitted to the IACHR on 22 March 2012 by the Teribe Indigenous People.

96 *See* SRIP Report on El Diquís, *supra* note 15, para. 2 (stating that "[t]he reservoir will also flood 97 hectares of the China Kichá indigenous territory of the Cabecar people").

97 During a meeting with the Special Rapporteur on the Rights of Indigenous Peoples, held in 2012, members of the community stated that they hold as little as 25 hectares (2.2 percent) of their territory.

98 Executive Decree 34 of 15 November 1956.

99 Study of Indigenous Communities, *supra* note 76, at p. 7.

60.30 percent of the total area occupied."[100] In 1976, an Executive Decree was issued, which, *inter alia*, required that a study be made "on the possibility of supressing the [China Kichá] reserve, as well as the feasibility of relocating the remaining indigenous inhabitants to other reserves of the country."[101] Because of this study, the reserve was not inscribed in the *Ley Indígena* in 1977, a process which culminated in 1982 with the adoption of an Executive Decree entitled 'Derogation of the Indigenous Reserve of China Kichá'.[102] In the years following the 'de-reserving' of the territory, non-indigenous occupation increased from 60 to 97 percent.

In 2001, following years of sustained protest by the Cabécar people of China Kichá, and after nineteen years of having no security of tenure over their traditional lands, Costa Rica issued Executive Decree 29447-G entitled, 'Re-establishment of the China Kichá Indigenous Reserve and redefinition of its boundaries'.[103] As its title states, the Decree also reconfigured the boundaries of the territory and made it smaller by some 3,300 hectares. This arbitrary diminishment of its territory was done without any notice or compensation to the Cabécar people, who continue to complain about it to this day, particularly as a number of its member families remain in occupation of lands that are now outside of the reserve. This same Decree also authorised state agencies to expropriate lands held by non-indigenous persons within the reserve, compensate them, and return the lands to the indigenous owners.[104] However,

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100 *Id.*

101 Executive Decree 6037 of 26 May 1976.

102 Executive Decree 13570 of 30 April 1982 (stating, in consideration 4, that "both the National Commission on Indigenous Affairs and the Institute of Lands and Colonisation (ITCO), agree that the indigenous Reserve of China Kichá no longer has an objective to exist, for the aforementioned reasons, and that, in these conditions, the Institute of Agrarian Development (IDA) requested the derogation of the Reserve of China Kichá, to include the respective terrains in their titling plan").

103 Executive Decree 29447-G of 21 March 2001 (Consideration 2, states that "The decree of derogation of the Indigenous Reserve of China Kichá, did not consider the interests of an important nucleus of indigenous population of the Cabécar ethnic group which remained within the boundaries of the mentioned reserve, leaving them out of the statute of reserve unprotected of the benefits that the indigenous legislation provided them as community and in unequal conditions with respect to the rest of indigenous communities").

104 The Decree states that "The National Commission on Indigenous Affairs, CONAI, is authorized to compensate, limiting terrains with the reserve, and include them within it, for their allotment to the indigenous community. Once they

since 2001, no lands have been returned to the Cabécar and they are now impoverished day labourers working on their own lands that are possessed by illegal occupants.[105] Their cultural integrity, traditional economy, social systems (such as their matrilineal clan system) have all been severely degraded. This situation was documented by a government agency in 2007, which bluntly states that "[t]hey have lost the material basis of reproduction of their cultural specificity, such as land, the forest and rivers. They live on donations by the State, working as labourers in cattle farms and coffee [plantations], and from small-scale subsistence farming."[106]

F. The Situation of the Bribri of Salitre

The Bribri territory of Salitre is located approximately 20 kilometers from Térraba and is 11,700 hectares in size. Of this area, some 118 illegal occupants possess 7,020 hectares or 60 per cent of the titled lands. They possess 59.49 hectares per person compared to 3.64 hectares for each indigenous owner. Given the ineffectiveness of domestic remedies for recovering indigenous lands and serious social and economic problems, the Bribri of Salitre began organising themselves in 2010 to peacefully recover lands in their territory. As happened with the Teribe, they have been subjected to violence and assassination attempts against their leaders when doing so. As

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are compensated in accordance to the Indigenous Law 6172, the terrains located within the defined boundaries of article 2 of this Decree…."

105 In this respect, *see* Xákmok Kásek, *supra* note 3, at para. 215 (where, finding a violation of the right to a dignified life, the Inter-American Court observed that "the Community's situation of social exclusion is closely tied to its loss of its traditional land. Because the Community members are not able to supply and support themselves using their ancestral traditions, they have to depend almost exclusively on the State's actions and are forced to live not just in a way that is different from their cultural guidelines, but in misery") and; Río Negro Massacres, *supra* note 3, para. 183 (explaining that the "Court has verified that the living conditions in Pacux have not allowed its inhabitants to return to their traditional economic activities. Instead, they have had to participate in economic activities that have not provided them with a stable income, and this has also contributed to the disintegration of the social structure and the cultural and spiritual life of the community. In addition, the facts of the case have proved that the inhabitants of Pacux live in very precarious conditions, and that their basic needs in the areas of health, education, electricity and water are not being fully met").

106 C. Borge Carvajal, Consulta en los territorios Indígenas del pacífico de Costa Rica, (1st. Ed.) (San José: Unidad Ejecutora Programa de Regularización del Catastro y Registro, 2007), at p. 8.

noted above and discussed further below, this violence was in part prompted by a formal resolution adopted by the Municipal Council of Buenos Aires, an organ of the Costa Rican state, in August 2012.

In July 2012, the Bribri of Salitre, led by one of their leaders, Sergio Rojas, organised a peaceful recovery of lands illegally occupied by non-indigenous persons in Cebror, a location in their titled territory. This provoked a furious reaction by non-indigenous persons and resulted in a number of threats made against indigenous leaders. For example, the press reported that in a meeting held in Buenos Aires, a nearby town, on 9 September 2012, 500 mostly illegal occupants of lands in indigenous territories met with state authorities, including a Member of Congress. They angrily made statements explaining that violence and deaths would occur if the indigenous people persisted with the recovery of lands. One person, supported by many others, shouted that "the government must make a commission to deal with this emergency before blood is shed; some of the owners of the lands can't take it anymore…."[107]

A few weeks earlier, the Buenos Aires Municipal Council, a local government body with jurisdiction over the canton (and six indigenous territories, including Salitre and Térraba), had inflamed the situation. In particular, the Municipal Council adopted an official resolution declaring Sergio Rojas *persona non grata* because of his leadership in the recovery of lands in Salitre. Among other things, the resolution declares "Sergio Rojas Ortiz, persona non grata in the Canton of Buenos Aires, for psychological aggression against the Costa Rican citizens born in our location…."[108] The resolution was widely disseminated in the local media. Leaving aside the legality and propriety of an official organ of the state formally declaring an indigenous citizen *persona non grata* for doing no more than asking that his people's rights, as guaranteed by both domestic and international law, be respected, this decision empowered persons hostile to indigenous peoples to undertake violent actions, including, as noted above, the attempted assassination of Sergio Rojas. The national authorities have done nothing to date to ameliorate this situation, nor to sanction the Municipal Council for its discriminatory resolution and the climate of hostility it engendered.

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107 *See Meeting in relation to land tenure within indigenous territories*, *InfoBaires*, 10 September 2012, <www.infobaires.net/reunion-en-relacion-de-la-tenencia-de-tierras-en-territorios-indigenas/>, visited 25 September 2012.

108 Resolution of the Municipal Council, *supra* note 41.

Notwithstanding the Municipal Council's action and the above described meeting, on 30 September 2012, the Bribri of Salitre hosted a meeting of indigenous leaders from southern Costa Rica in one of the properties that had been recovered from illegal occupants in July 2012. This meeting was quickly disrupted by a group of non-indigenous persons carrying tools and firearms. While the indigenous leaders were away viewing a number of other recovered properties, the non-indigenous persons constructed barbed-wire and cattle fencing around the property of the meeting venue. This was immediately reported to the authorities by the Bribri, including the local police in Buenos Aires. However, even with the police present, an indigenous person was attacked and sustained a serious head injury. The local police did nothing to intervene. This led to a three day-long conflict between indigenous people and illegal occupants, which required the presence of the head of the Office of the Ombudsman, the Minister of Security, the Attorney General Officer for Indigenous Issues, over 20 regular police officers and a detachment of the special anti-riot police to restore order.

A few days later, an agreement was reached between the Bribri and the state in which the former agreed to suspend land reclamation actions for one month, during which the state would propose a plan of action to address the situation. At the end of October, however, the state requested an extension until the end of January 2013 to present its plan of action. To-date, Costa Rica has not presented any plan of action or commitment to address this situation, nor has it explained why it failed to prepare the agreed plan.

Indigenous leaders from Térraba showed their solidarity with the Bribri people and were present during the period in question. They saw well-known persons who illegally hold land in Térraba attacking indigenous people in Salitre. This demonstrates that some of the illegal occupants hold lands in both territories. It also shows that the state's failure to investigate and hold accountable – ostensibly known - perpetrators of threats and violence against indigenous people have created a climate of impunity. The perpetrators believe that their actions will have no consequences and the state has done nothing to alter this view.

At present a coalescing of various elements hostile to indigenous peoples is generating profound concerns and deep fear among indigenous leaders and community members – fears the state of

Costa Rica is not doing anything meaningful to address. This includes the increasingly vocal and hostile organisation of non-indigenous persons that illegally hold land within indigenous territories; their statements warning of violence and bloodshed in public meetings attended by state officials who make no comment on such threats; and the actions of state bodies, such as the Municipal Council, that vilify and *de facto* incite and endorse violence against indigenous leaders. The resolution adopted by the Municipal Council shows how government officials themselves are personally compromised. For instance, at least one of the members of the Municipal Council who voted in favour of declaring Sergio Rojas *persona non grata* in Buenos Aires illegally holds land in Teribe territory. The police also appear to support non-indigenous illegal occupants even when they are attacking indigenous persons.

Sergio Rojas and Pablo Sibas, the Teribe leader, both filed complaints about the threats and assassination attempts with the judicial authorities. The Tribunal of Pérez Zeledón, the court in a nearby town, offered them protection but only if the two leaders would relocate from their territories to Pérez Zeledón. The proposed solution therefore was to remove the victims from their ancestral lands rather than to remove the illegal occupants and/or perpetrators of the violence. Both leaders rejected these measures as ineffective: because they would be forced to leave their territory whereas the attackers may remain; they would be forced to live in non-indigenous areas, which they consider to be inherently more dangerous; they consider that the measures would disrupt their struggles to protect their territories; and that the measures fail to account for their cultural and spiritual relationships to their lands.

In January 2013, indigenous peoples' fears about further and increased violence were realised in Salitre. At midnight on 6 January, a band of non-indigenous illegal occupants attacked a group of unarmed and peaceful Bribri persons, resulting in severe injuries to three individuals. Marcos Obando Delgado was attacked with a machete and lost the use of three fingers; Mainor Ortiz Delgado was also severely injured with a machete, suffering a number of deep lacerations, and was tortured with a hot iron on his chest, resulting in severe physical and psychological trauma; and Wilbert Ortiz Delgado was shot in a leg and suffered a number of head wounds after being

attacked with a machete.[109] This organised and planned attack was in retaliation for the victims' participation in actions held on 3 January 2013 to reclaim lands within their titled territory, specifically a property of approximately 30 hectares located in Río Azul, Salitre.[110] The Costa Rican state's Office of the Ombudsman and the United Nations country office issued a joint press release condemning the acts of violence and urging the state to take all necessary measures to ensure the life and physical integrity of all people involved in the conflict. They called for "these situations to be solved by peaceful means, within the legal framework and guaranteeing the rights of indigenous persons to their territory."[111] There has been no official reaction by the Costa Rican state to date and none of the attacks has been formally investigated by state authorities.

G. Illegal Occupation Violates the Right to Cultural Integrity and other rights in addition to Property Rights, and Threatens Indigenous Peoples' Integrity and Survival

Indigenous or tribal peoples who lose total or partial possession of their territories preserve their property rights over such territories, and have a preferential right to recover them, even when they are in hands of third parties. The IACHR has highlighted the need for States to adopt measures aimed at restoring the rights of indigenous peoples over their ancestral territories, and it has pointed out that restitution of lands is an essential right for cultural survival and to maintain community integrity.[112]

The above described situation in Costa Rica constitutes a gross and persistent pattern of violations, with impunity, of rights that are basic to indigenous peoples' survival. As noted above, the IACHR holds that "the guarantee of the right to territorial property is a means to allow members of indigenous communities to possess

109 *Finqueros Machetean y Plomean tres Indígenas*, Diario la Extra, 7 January 2013, <http://diarioextra.com/2013/enero/07/sucesos4.php>, visited 15 January 2013.

110 *Enfrentamiento por tierra deja a 3 indígenas bribris heridos*, *La Nación*, 7 January 2013, <www.nacion.com/2013-01-07/Sucesos/Enfrentamiento-por-tierra-deja-a-3-indigenas-bribris-heridos.aspx>, visited 15 January 2013.

111 Press release issued by the United Nations Country Office in Costa Rica and the Office of the *Ombudsman*, 8 January 2013, <http://www.pnud.or.cr/index.php?option=com_content&view=article&id=1510:preocupacion-por-los-hechos-de-violencia-ocurridos-en-el-territorio-indigena-de-salitre&catid=49:reduccie-la-pobreza-desigualdad-y-exclusi&Itemid=101>, visited in 10 January 2013.

112 IACHR Indigenous Lands, *supra* note 7, at para. 123 (footnotes omitted).

their lands."[113] It further explains that the Inter-American human rights protection organs[114] have affirmed that indigenous peoples "have the right to possession and control of their territory without any type of external interference, given that territorial control by indigenous and tribal peoples is a necessary condition for the maintenance of their culture."[115]

The organs of the Inter-American system thus affirm that indigenous peoples have the right to the effective possession, control and ownership of their territories and that, in order to freely determine, pursue and enjoy their own development, indigenous peoples have the right, effectuated through their own institutions, to make authoritative decisions about how best to use that territory.[116] In Costa Rica, however, these rights are wholesale disregarded and nullified due to the massive illegal occupation of indigenous territories and, in some cases, the official diminishment of their territories, and the transfer of their effective control to state-created entities (see Section III on the ADIs below). Indigenous peoples'

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113 *Id*. at para. 90 (footnotes omitted).

114 *See* Saramaka People, *supra* note 21, at para. 115 (stating that "the State's legal framework merely grants the members of the Saramaka people a privilege to use land, which does not guarantee the right to effectively control their territory without outside interference"). *See also* UN Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, Annex, U.N. Doc. A/RES/61/295 (13 Sept., 2007), Art. 26(2) (providing that "Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired").

115 IACHR Indigenous Lands, *supra* note 7, at para. 110 (footnotes omitted). *See also Saramaka People*, *supra* note 21, at para. 194 and 214(7) (where, consistent with its conjunctive reading of Article 21 and the right to self-determination, the Court ordered that legislative recognition of indigenous peoples' territorial rights must include recognition of "their right to manage, distribute, and effectively control such territory, in accordance with their customary laws and traditional collective land tenure system." Each of these terms has a specific meaning and describes rights and powers vested in indigenous peoples in relation to their territory. 'Control', for instance, can be defined as the power to 'exercise authoritative or dominating influence,' in this case over territory or specific traditionally owned resources within that territory).

116 *See* UNDRIP, *supra* note 115, Article 4 (providing that "Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions").

survival is consequently substantially threatened and this aggravates Costa Rica's international responsibility.

Not only is Costa Rica violating these basic guarantees on a daily basis, the scale of the dispossession of indigenous lands, their consequent displacement from their lands, and the state's willful disregard for this situation and its consequences, on aggregate, rises to violations of rights that are integral to the right to life and survival of peoples.[117] This is reflected in Article 8 of the UN Declaration on the Rights of Indigenous Peoples, which provides that indigenous peoples "have the right not to be subjected to forced assimilation or destruction of their culture" and, in connection with this, that "states shall provide effective mechanisms for prevention of, and redress for: … (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources…." In the same vein, the IACHR explained in 2009 that

117 In its *Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin*, OEA/Ser.L/V/II.62, Doc. 26 (1984), at p. 76 and 81, the IACHR held that "special legal protection" is recognized for indigenous languages, cultures, economies, ecosystems and natural resource base, religious practices, "ancestral and communal lands," and the establishment of an institutional order that facilitates indigenous participation through their freely chosen representatives. Two years later in its *Report on the Situation of Human Rights in the Republic of Guatemala*, OEA/Ser.1/V/II.67, Doc. 9 (1986), at p. 114, the IACHR characterized the preceding as "human rights also essential to the right to life of peoples." *See also* Río Negro Massacres, *supra* note 3, para. 162 & 177 (stating, respectively, that "the displacement of the members of the community of Río Negro … led to the destruction of their social structure, the disintegration of the families, and the loss of their cultural and traditional practices, and the Maya Achí language" and; "in keeping with its consistent case law on indigenous matters, in which it has recognized that the relationship of the indigenous peoples with the land is essential for maintaining their cultural structures and for their ethnic and material survival, the Court considers that the forced displacement of indigenous peoples outside their community or away from its members, can place them in a situation of special vulnerability, which 'owing to its destructive effects on the ethnic and cultural fabric […], generates a clear risk of the cultural or physical extinction of the indigenous peoples'") (footnotes omitted); and Chitay Nech, *supra* note 3, para. 147 (stating that "the forced displacement of the indigenous peoples out of their community or from their members can place them in a special situation of vulnerability, that for its destructive consequences regarding their ethnic and cultural fabric, generates a clear risk of extinction and cultural or physical rootlessness of the indigenous groups, for which it is indispensable that the States adopt specific measures of protection...") (footnotes omitted).

> … disregard for the rights of the members of indigenous communities over their ancestral territories can affect … other basic rights, such as the right to cultural identity, the collective right to cultural integrity, or the right to collective survival of communities and their members. The extreme living conditions borne by the members of indigenous communities that lack access to their ancestral territory cause them to suffer, and undermine the preservation of their way of life, customs and language.[118]

In other words, Costa Rica's acts and omissions in relation to the vast majority of indigenous territories approach 'ethnocidal' conduct,[119] and are prohibited by a range of international norms beyond those pertaining solely to property rights.[120] The Inter-American Court emphasized this point in its 2012 *Sarayaku* judgment, stating that, given the "intrinsic connection that indigenous and tribal peoples have with their territory, the protection of property rights and the use and enjoyment thereof is necessary to ensure their survival."[121] Likewise, the Governing Body of the ILO holds that territorial rights "not only relate to ownership and occupation, but also to the survival of indigenous peoples as such and their historical continuity."[122] In *Saramaka People*, the Court

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118 IACHR Indigenous Lands, *supra* note 7, at para. 57 (footnotes omitted).

119 The term *ethnocide* refers to the destruction of the ethnic identity of a group and its members, in whole or in part. Charny refers to 'ethnocide' in cases of "major processes that prohibit or interfere with the natural cycles of reproduction and continuity of a culture or nation." *See* I. Charny, *Toward a Generic Definition of Genocide*, *in* Genocide: Conceptual and Historical Dimensions, (G. Andreopoulos ed., 1994).

120 Sarayaku, *supra* note 21, at para. 171 (citing its judgments in *Saramaka People* and *Mayagna,* the Court observed that "Under international law, indigenous people cannot be denied the right to enjoy their own culture, which consists of a lifestyle that is strongly associated with their territory and the use of its natural resources").

121 *Id*. at para 146 & para. 147 (stating that "Moreover, lack of access to the territories and their natural resources may prevent indigenous communities from using and enjoying the natural resources necessary to ensure their survival, through their traditional activities; or having access to their traditional medicinal systems and other socio-cultural functions, thereby exposing them to poor or inhumane living conditions, to increased vulnerability to diseases and epidemics, and subjecting them to extreme situations of vulnerability that can lead to various human rights violations, as well as causing them suffering and harming the preservation of their way of life, customs and language").

122 *Report of the Committee set up to examine the representation alleging non-observance by Guatemala of the Indigenous and Tribal Peoples Convention, 1989*

defined the term 'survival' to mean indigenous peoples' "ability to 'preserve, protect and guarantee the special relationship that they have with their territory', so that 'they may continue living their traditional way of life, and that their distinct cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected'."[123] Applying this definition to the situation in Costa Rica, it is no exaggeration to say that the vast majority of indigenous peoples' ability to maintain their various relationships with their territories is denied or, at a minimum, substantially obstructed and, thus, their distinct cultural identity is neither respected or protected, and their survival is, at the very least, jeopardized due to the illegal occupation of their territories.

The Court further explains in *Sarayaku* "that the close relationship between indigenous communities and their land is generally an essential component of their cultural identity …" and "the right to cultural identity is a fundamental right - and one of a collective nature - of the indigenous communities, which should be respected in a multicultural, pluralistic and democratic society."[124] The Court in particular cites the right to self-determination of indigenous peoples in this respect, noting that it protects, *inter alia*, the right "to freely pursue economic, social and cultural development."[125] This right also protects indigenous peoples' from state or private conduct that denies them their means of subsistence, including as derived from the use of the natural resources within their traditional territories.[126]

(No. 169), made under article 24 of the ILO Constitution by the Federation of Country and City Workers (FTCC) (GB.294/17/1):(GB.299/6/1) (2007), at para. 44.

123 *Saramaka People, Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs*. Judgment, 2008, Inter-Am. Ct. H.R. (ser. C) No. 185, at para. 37 (12 August 2008).

124 Sarayaku, *supra* note 21, at para. 159 and 217.

125 *Id*. at para. 159 and associated footnote and para. 305 (where the Court discusses measures to "repair the damage caused to the Sarayaku People, particularly through the violation of their rights to self-determination, cultural identity and prior consultation…").

126 *Inter alia*, Sarayaku, *supra* note 21, para. 146 (explaining that "the protection of the territories of indigenous and tribal peoples also stems from the need to guarantee the security and continuity of their control and use of natural resources, which in turn allows them to maintain their lifestyle. This connection between territory and natural resources that indigenous and tribal peoples have traditionally maintained, one that is necessary for their physical and cultural survival and the development and continuation of their worldview…").

Not only are indigenous peoples in Costa Rica presently being denied their right to cultural identity – and their survival is threatened – due to the illegal occupation of their lands, in most cases this illegal occupation has also denied them any security over their means of subsistence and their right to freely pursue their economic, social and cultural development, which in turn affects a range of other basic rights. Costa Rica persists in allowing these basic and mutually reinforcing rights to be violated with impunity and is even disregarding its own internal laws by doing so. As discussed below, it has also imposed alien and unaccountable governance institutions in indigenous territories that further frustrate, undermine and violate their rights. This problem is inseperably intertwined with the violations of indigenous property and related rights discussed above.

III. THE IMPOSITION OF ALIEN AND UNACCOUNTABLE GOVERNANCE INSTITUTIONS THAT VIOLATE INDIGENOUS PEOPLES' RIGHTS TO AUTONOMOUS SELF-GOVERNANCE, SELF-REPRESENTATION, EFFECTIVE PARTICIPATION AND JURIDICAL PERSONALITY

The *Ley Indígena* nominally recognises and protects traditional indigenous governance institutions and procedures. However, less than one year after it was adopted, this protection was rendered null and void by Decree No. 8487 of 1978, which established ADIs in indigenous territories, the form of local government employed throughout the country.[127] The Special Rapporteur on the Rights of Indigenous Peoples observes that this Decree has "effectively deprived indigenous peoples' traditional institutions of the authority to represent them in matters of sustainable development, establishing the ADIs for this purpose."[128] ADIs are official government bodies and part of the Costa Rican state that, by law, "represent" and govern each indigenous territory and exercise legal personality on behalf of indigenous peoples.[129] The ADIs

127 Article 3 of the Decree provides that "To exercise the rights and fulfil the obligations referred to in article 2 of the Indigenous Act, the indigenous communities shall adopt the organization … of the Associations for Community Development."
128 SRIP Report on El Diquís, *supra* note 15, at para. 46.
129 *See* Article 5 of Executive Decree 8487-G (providing that "the Associations for Development, once legally inscribed, will represent said communities judicially and extra-judicially"). The status of ADIs as the sole entity with juridical personality to represent the community in which it is located has been recognized in numerous sources of Costa Rican law. In addition to Executive Decree 8487-G, ADIs' position

also hold title to indigenous territories. This is the case despite the fact that they are alien and imposed state-created structures that do not take into account indigenous peoples' traditions and customs and are perceived to be discredited, unrepresentative and unaccountable entities by most indigenous peoples.[130] Moreover, the ADIs were overwhelmingly rejected by indigenous peoples as inappropriate to the indigenous context during the consultation process on the Autonomy Bill (see below).

As discussed below, the ADIs as currently constituted deny indigenous peoples' their right to collective juridical personality; to determine their membership for the purposes of collective action; to freely choose their own representatives in order to participate in decision making; and greatly impede their rights to freely pursue their economic, social and cultural development and to effectively control their traditional territories through their own institutions – all rights upheld by the Inter-American Court in *Saramaka People* and *Sarayaku*. The Court also observed the inter-connectedness between the right of indigenous peoples to collective juridical personality, their territorial rights and the exercise of their right to self-determination in *Xákmok Kásek*.[131] This same conclusion was reached by the University of Texas Law School's Human Rights Clinic, which states that

> circumstances unique to Costa Rica's systems for both indigenous self-governance and property rights present interdependent complications for the exercise of indigenous rights within the national system. ADI structural limitations undermine indigenous peoples' right to self-determination and create problems for indigenous redress of land issues,

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was confirmed in Executive Decree 13568-C-G of 30 April 1982, Article 1 (providing that "[t]he Associations of Integral Development have the legal representation of the indigenous communities and will act as their local governments"). The validity of this arrangement has been upheld by the judiciary, including in Judgment 6433-96, (file number 96-006433-0007-CO), Constitutional Chamber of the Supreme Court of Justice (1997) and; Judgment 2007-016213 (file number 07-011520-0007-CO), Constitutional Chamber of the Supreme Court of Justice (2007).

130 *See inter alia Indigenous Peoples Sidelined in Plans for Dam*, *IPS* 27 May 2009, <http://ipsnews.net/news.asp?idnews=47000>, visited 15 October 2012.

131 Xákmok Kásek, *supra* note 3, at para. 255 (ruling that "although said facts constitute obstacles to conveying title to the land, as well as having an a negative impact on the Xákmok Kásek Community's abilities of self-determination, no one has presented evidence and reasoning sufficient to allow the Court to declare an autonomous violation of Article 3 of the Convention … with regard to the collective aspect of the right to recognition of juridical personality").

> representation in the Costa Rican polity, and the effective participation of indigenous peoples in the decision-making processes regarding projects that directly affect them. Thus the [Diquís dam] highlights many structural problems that exist in Costa Rica, frustrating indigenous peoples' realization of their human rights and illustrating the Costa Rican state's non-compliance with its obligations under international law.[132]

The preceding is further confirmed by the Special Rapporteur on the Rights of Indigenous Peoples, who observes that

> the ADIs in Costa Rica's various indigenous communities are viewed as State agencies and not as institutions which truly represent indigenous people. It has been alleged that the ADIs were imposed on the communities and that they have weakened the traditional systems of representation. In both the Teribe territory and the other territories concerned, there are various organizations which represent the interests of the territories in some way and offer alternatives to the ADIs;[133]

and,

> [a]lmost all the indigenous representatives who met with the Special Rapporteur during his visit claimed that the ADIs did not adequately represent the indigenous peoples, adding that indigenous peoples see the presence of the ADIs in their territories as a denial of their right to self-government and their right to make decisions regarding their land and communities. The ADIs are apparently regarded as State institutions that regularly make decisions without notifying or consulting the indigenous communities they supposedly represent.[134]

A crucial, although often unconsidered, element of the right to self-determination and the exercise thereof – as well as the collective right to juridical capacity – is the ability of indigenous peoples to autonomously[135] determine their membership for the

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132 Swimming Against the Current, *supra* note 50, at p. 19-20.

133 SRIP Report on El Diquís, *supra* note 15, at para. 26.

134 *Id*. at para. 47.

135 *See* Xákmok Kásek, *supra* note 3, at para. 37 (where "the Court highlights that neither the Court nor the State determines the Community's denomination or ethnic identity. … The identity of the Community, from its name to its membership, is a historical and social fact that is part of its autonomy"); and note 157 *infra* and associated text (acknowledging that the manner by which indigenous peoples exercise their collective juridical capacity is also part of their 'autonomy'). *See also* Saramaka

purposes of collective action (the *self* in self-determination), whether in relationship to internal governance decisions or participation in external decision-making that may affect them.[136] However, in Costa Rica, there is no legal requirement that indigenous peoples can determine the membership of the ADI or that all indigenous persons who are members of their people or territory can participate in the ADI. Indeed, the ADIs often operate with less than 20 percent of the population of the territory as members. To make matters worse, in some cases, including in the situation of the Teribe, non-indigenous persons have assumed positions of authority in the ADIs and have acted to the detriment of indigenous peoples, particularly by transferring lands to outsiders.

With one important exception, when the state consults with indigenous peoples it does so only through the ADIs, which is tantamount to the state consulting with itself given that the ADIs are local government bodies that were created by, report to and are responsible to the central government rather than the indigenous community over which they presume to preside.[137] It is known,

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People, *supra* note 124, at para. 18 (holding that "[b]y declaring that the consultation must take place 'in conformity with their customs and tradition', the Court recognized that it is the Saramaka people, not the State, who must decide which person or group of persons will represent the Saramaka people in each consultation process ordered by the Tribunal"), and at para. 26-7 (holding that "as to who can benefit from development projects, the Court observes that … in the event that any internal conflict arises between members of the Saramaka community regarding this issue, it 'must be resolved by the Saramaka people in accordance with their own traditional customs and norms, not by the State or this Court in this particular case'" and; "the Tribunal reiterates that all issues related to the consultation process with the Saramaka people, as well as those concerning the beneficiaries of the 'just compensation' that must be shared, must be determined and resolved by the Saramaka people in accordance with their traditional customs and norms…").

136 *See also* UNDRIP, *supra* note 115, arts. 9 & 33 (providing, respectively, that "Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right" and; "1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live. 2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures").

137 The exception is the process for the elaboration of the *Bill for Autonomous Development of Indigenous Peoples*. In this process, indigenous peoples participated in 'Assemblies' in each of the twenty four indigenous territories; and only indigenous

for instance, that the state has made certain agreements with the ADI in the Teribe territory in relation to the Diquís dam, but the nature and scope of the agreement(s) are unknown and requests to access relevant documents, if any exist, have been ignored. Likewise, when presenting requests for funding to the World Bank's Forest Carbon Partnership Facility, which may have considerable impacts on indigenous peoples, the state is only consulting with the ADIs.[138] Again, this is basically the state consulting other state agencies and denying indigenous peoples their right to freely identify their own representatives, through their own procedures, in order to participate in and determine crucial decisions pertaining to their territories.[139]

This has very serious and negative practical consequences for indigenous peoples. As the University of Texas Law School Human Rights Clinic explains with respect to the Teribe people, "[t]he legal antecedents and the practical operation of the ADI in Térraba renders it ineffectual to prevent further land loss, redress past losses, ensure the effective exercise of self-government, and enable the Teribe peoples to exercise their rights of effective participation, consultation, and consent on mega-projects such as the [Diquís

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persons could elect their representatives to elaborate and negotiate the text of the bill. The elections were monitored and verified by an indigenous organization and organized with representatives of the Office of the *Ombudsman*, the Legislative Power and the Supreme Elections Court. The members of each territory were previously informed about the election process and all members above 18 years could vote. This stands in stark contrast to the normal process of only consulting with the ADIs.

138 *Readiness Preparation Proposal, Submitted to the World Bank FCPF*, Government of Costa Rica (June 2010), p. 15 (stating that consultations have taken place with the ADIs "representing the interests of the indigenous peoples"),<www.forestcarbonpartnership.org/fcp/sites/forestcarbonpartnership.org/files/Documents/PDF/Jun2010/ENGLISH-R-PP_Template_COSTA_RICA_14_June_2010.pdf>, visited 19 October 2012.

139 UNDRIP, *supra* note 115, Article 18 (providing that "Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures as well as to maintain and develop their own indigenous decision-making institutions"). *See also* ILO 169, Arts. 6 & 7 and; *Report of the Committee set up to examine the representation alleging non-observance by Argentina of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Education Workers Union of Río Negro (UNTER), local section affiliated to the Confederation of Education Workers of Argentina (CTERA) (GB.297/20/1):(GB.303/19/7)*, (2008), at para. 81 (stating that "all the representative organizations of peoples or communities should be able to participate and be consulted about legislative or administrative measures that may affect them directly").

dam]."[140] It further explains that the ADI "does not provide an adequate and appropriate mechanism for indigenous representation in the territory. To the contrary: the Térraba ADI weakens indigenous representation by stifling dissent, allowing high levels of non-indigenous participation, and driving indigenous peoples into ad hoc, marginalized alternatives."[141]

Indigenous peoples have legally challenged the imposition and operation of ADIs in their territories as a denial of their right to govern themselves through their own institutions and to control their lands and communities, and for failing to take "into account [their] particularities, their economic and social characteristics, as well as their especially vulnerable situation, their customary law, values, customs and mores."[142] This has included complaints by indigenous community members that they have been selectively denied membership in the ADI as well as legal challenges to the validity of the ADI system in relation to indigenous peoples' rights in general.[143] The situation has been so bad that, with respect to the former, the Supreme Court has even had to order ADIs to admit indigenous persons as members. In the case of the latter however, complaints have been rejected by the Constitutional Chamber of the Supreme Court, which has held that, while the ADIs are far from ideal in the indigenous context, they are the only option available under existing law.[144]

A case filed by members of the Teribe people that challenges the ADI for being incompatible with indigenous peoples' rights was recently rejected by fourth chamber of the Supreme Court (responsible for *amparo* actions).[145] Among other things, the Court ruled that the ADIs were required because the electoral process employed to choose its officers guaranteed indigenous community members ample and organised participation.[146] It further rejected complaints that the ADI system violated the right to juridical personality of indigenous

140 Swimming Against the Current, *supra* note 50, at p. 18.
141 *Id*. at p. 4.
142 Yakye Axa, *supra* note 26, at para. 63.
143 *See* Swimming Against the Current, *supra* note 50, p. 62.
144 *Id*. p. 63-4.
145 *Unconstitutionality action filed by Pablo Sibas Sibas*, 22 May 2009 (against articles 3, 4, 5, 6, 7 and 15 of the regulation of the Indigenous Law and the Executive Decree 13568-C-G). File: 09-7688-0007-CO.
146 *Id.*

peoples. However, these rulings do not stand up to scrutiny in relation to norms of human rights law pertaining to indigenous peoples.

In this respect, the judgments of the Inter-American Court in *Yatama, Chitay Nech*, *Plan de Sanchez Massacre* and *Saramaka People* are particularly relevant. In *Yatama*, the Court highlighted that universal rights of equality and political participation give rise to an obligation on states to adopt affirmative and differentiated measures to guarantee the participation of indigenous groups.[147] It further stressed that states parties to the American Convention must guarantee that indigenous peoples "can participate, in conditions of equality, in decision-making on matters that affect or could affect their rights and the development of their communities … and that they are able to do so through their own institutions and in accordance with their values, uses, customs and forms of organization…."[148] As the quotes above confirm, the ADIs are clearly not regarded by indigenous peoples in Costa Rica as their own institutions and they do not operate in accordance with their customs or forms of organization.

In *Chitay Nech*, a 2010 case revolving around the forced disappearance of a Maya indigenous leader, the Court explained that the community to which he belonged was deprived of "the full exercise of the direct participation of an indigenous leader in the structures of the State, where the representation of groups in situations of inequality becomes a necessary prerequisite for the self-determination and the development of the indigenous communities within a plural and democratic State."[149] Observing that its jurisprudence confirms that indigenous peoples have a right to direct participation in decisions that may affect their rights and development, "in accordance with their values, traditions, customs and forms of organization," the Court noted that indigenous leaders

147 Yatama v. Nicaragua, Merits and Reparations, Judgment 2005, Inter-Am. Ct. H.R. (ser. C) No. 127, para. 229 (23 June 2005).

148 *Id*. at para. 225. *See also* Sarayaku, *supra* note 21, para. 202-03 (explaining that consultation "procedures must include, according to systematic and pre-established criteria, the various forms of indigenous organization, provided these respond to the internal processes of these peoples" and finding that Ecuador violated indigenous peoples' rights be it was "proven that the oil company tried to negotiate directly with some members of the Sarayaku People, without respecting their forms of political organization. … Accordingly, the Court considers that the actions carried out by the company in order to obtain the consent of the Sarayaku People cannot be construed as an appropriate and accessible consultation") (footnote omitted).

149 Chitay Nech et al., *supra* note 3, at para. 113.

"exercise their charge by mandate or designation and in representation of a community. This duality is both the right of the individual to exercise the mandate or designation (direct participation) as well as the right of the community to be represented. In this sense, the violation of the first reverberates in the damage of the other right."[150]

Finding that the state had obstructed the indigenous leader in question from representing his community, who "according to their vision and tradition was elected to serve and contribute to the construction of their free development,"[151] the Court ruled that he was denied "the exercise of the right to political participation in representation of his community, recognized in Article 23(1), subparagraph a) of the American Convention."[152] The Court thus recognizes that political participation and representation rights vest in both mandated indigenous leaders and collectively in the community or people to which they belong, which also has the collective right to be represented by persons or institutions of its choice. Violations of the former impair the collective right of the community and/or people. Moreover, the direct representation of indigenous peoples, through their mandated representatives and/or institutions, is "a necessary prerequisite" for the exercise of their right to self-determination and, by extension, their right to freely pursue their economic, social and cultural development "within a plural and democratic State."

It may be inferred from this jurisprudence, first, that states that fail to guarantee and respect these rights may not be acting in accordance with democratic principles.[153] Second, that the Inter-

150 *Id*. at para. 115.
151 *Id*. at para. 116.
152 *Id*. at para. 117.
153 *See in this respect*, *Inter-American Democratic Charter* (11 Sept. 2001), arts. 6 & 9 (stating, respectively and in pertinent part, that, "[i]t is the right and responsibility of all citizens to participate in decisions relating to their own development. This is also a necessary condition for the full and effective exercise of democracy. Promoting and fostering diverse forms of participation strengthens democracy" and; "[t]he elimination of all forms of discrimination … as well as … the promotion and protection of human rights of indigenous peoples … and respect for ethnic, cultural and religious diversity in the Americas contribute to strengthening democracy and citizen participation"). *See also* Río Negro Massacres, *supra* note 3, para. 160 (citing the right to self-determination and explaining that indigenous peoples' cultural identity or integrity "is a fundamental and collective right of the indigenous communities that must be respected in a multicultural, pluralist, and democratic society…") and; UNCERD, *General Recommendation XXI on the right to self-determination*, para. 5 (23 August 1996) (recommending that states should

American Court and other international human rights bodies could – and logically, should – interpret the collective aspect of indigenous peoples' political participation rights conjunctively with the right to self-determination, in the same way that they have interpreted indigenous property rights[154] and linguistic, religious and cultural rights together with the right to self-determination.[155] In practice

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be "sensitive towards the rights of persons belonging to ethnic groups, particularly their right to lead lives of dignity, to preserve their culture, to share equitably in the fruits of national growth and to play their part in the Government of the country of which they are citizens;" and that states vest "persons belonging to ethnic or linguistic groups comprised of their citizens … with the right to engage in activities which are particularly relevant to the preservation of the identity of such persons or groups").

154 *See inter alia* Sarayaku *supra* note 21, para. 171 and footnote 223 & 288; and Saramaka People *supra* note 21, para. 93 (explaining that "by virtue of the right of indigenous peoples to self-determination recognized under said Article 1 [of the international Covenants], they may 'freely pursue their economic, social and cultural development', and may 'freely dispose of their natural wealth and resources' so as not to be 'deprived of [their] own means of subsistence.' Pursuant to Article 29(b) of the American Convention, this Court may not interpret the provisions of Article 21 of the American Convention in a manner that restricts its enjoyment and exercise to a lesser degree than what is recognized in said covenants") (footnote omitted); and Río Negro Massacres, *supra* note 3, para. 160 (citing the right to self-determination and other international standards and stating that the "Court has already indicated that the special relationship of the indigenous peoples with their ancestral lands is not merely because they constitute their main means of subsistence, but also because they are an integral part of their cosmovision, religious beliefs and, consequently, their cultural identity or integrity, which is a fundamental and collective right of the indigenous communities that must be respected in a multicultural, pluralist, and democratic society…") (footnotes omitted).

155 *See Apirana Mahuika et al. vs. New Zealand*, (Communication No. 547/1993, 15/11/2000), UN Doc. CCPR/C/70/D/547/1993 (2000), at para. 9.2 (where the "Committee observes that the Optional Protocol provides a procedure under which individuals can claim that their individual rights have been violated. These rights are set out in part III of the Covenant, articles 6 to 27, inclusive. As shown by the Committee's jurisprudence, there is no objection to a group of individuals, who claim to be commonly affected, to submit a communication about alleged breaches of these rights. Furthermore, the provisions of article 1 may be relevant in the interpretation of other rights protected by the Covenant, in particular article 27"). *See also J G A Diergaardt (late Captain of the Rehoboth Baster Community) et al. v. Namibia*, Communication No. 760/1997. UN Doc. CCPR/C/69/D/760/1997 (2000), at para. 10.3 ("the provisions of Article 1 may be relevant to the interpretation of other rights protected by the Covenant, in particular Article 25, 26 and 27"); *UN Human Rights Committee, General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25)*, CCPR/C/21/Rev.1/Add.7, para. 1-2 (7 December 1996) (explaining that "Article 25

this means recognizing indigenous peoples' autonomous forms of self-government and their collective right to direct participation in the affairs of the state on matters that may affect indigenous peoples' rights. This interpretation is supported by the jurisprudence of the Inter-American Court and other international human rights bodies and by reference to international instruments that explicitly recognize and guarantee the rights of indigenous peoples.

In this regard, the Court highlighted the importance of respect for and the preservation of indigenous peoples' communal structures and modes of self-governance in its judgment in *Plan de Sanchez*,[156] rights also affirmed in the UN Declaration on the Rights of Indigenous Peoples[157] and ILO 169.[158] The latter both uphold that these rights

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lies at the core of democratic government based on the consent of the people and in conformity with the principles of the Covenant" and "[t]he rights under article 25 are related to, but distinct from, the right of peoples to self-determination. By virtue of the rights covered by article 1(1), peoples have the right to freely determine their political status and to enjoy the right to choose the form of their constitution or government"); and; Report of the African Commission's Working Group of Experts on Indigenous Populations, *supra* note 7, at p. 78 (concluding that, because Article 1 of the International Covenants is part of international law, ratified by many African states, "there is an obligation on African states to honour rights granted to indigenous peoples under common Article 1 of the ICCPR and the ICESR as well as Article 27 of the ICCPR"). For an extensive discussion on this issue by a former member of the Human Rights Committee, *see* M. Scheinin, *The Right to Self-Determination under the Covenant on Civil and Political Rights*, *in*, Operationalizing the Right of Indigenous Peoples to Self-Determination (P. Aikio and M. Scheinin eds., 2000).

156 Plan de Sánchez Massacre, Reparations, Judgment, 2004 Inter-Am. Ct. H.R. (ser. C) No. 105, para. 85 (19 November 2004).

157 UNDRIP, *supra* note 115, *inter alia*, Article 4 (providing that "Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions"); Article 33 (providing that "1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live. 2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures"); and Article 34 (providing that "Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards").

158 ILO 169, Article 7(1) provides that "The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social

shall be exercised through indigenous peoples' freely identified representatives or institutions. For instance, the Governing Body of the ILO has repeatedly held that "indigenous peoples have the right to elect their own representative institutions;" and that, while ILO 169 "does not impose a model of what a representative institution should involve, the important thing is that they should be the result of a process carried out by the indigenous peoples themselves;" and that "it is essential to ensure that the consultations are held with the institutions that are truly representative of the peoples concerned."[159]

In *Saramaka People*, the Court directly related the right to self-determination to indigenous peoples' property rights and ordered that recognition of the Saramaka people's territorial rights must include recognition of "their right to manage, distribute, and effectively control such territory, in accordance with their customary laws and traditional collective land tenure system."[160] The right to effective control of traditional territory is a wide-ranging and substantial power, and presupposes that indigenous peoples are able to exercise it through their own freely identified institutions, and that these institutions are established consistent with the customs and traditions of the indigenous peoples themselves, not those of the national government. These and the rights enunciated above recognize that indigenous peoples have rights to autonomous self-government and effective participation in external decision making through institutions of their choice and in accordance with their own customs and traditions, and that this right is integral to respect for their right to self-determination and the principles that delineate legitimate democratic governance. Costa Rica, however, persists

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and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly."

159 *Report of the Committee set up to examine the representation alleging non-observance by Argentina of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), supra note 140, a*t para. 75.

160 Saramaka People, *supra* note 21, at para. 194. *See also Concluding observations of the Committee on the Elimination of Racial Discrimination: Guyana,* CERD/C/GUY/CO/14, at para. 15 (4 April 2006) (rejecting a legislative scheme providing that "decisions taken by the Village Councils of indigenous communities concerning, *inter alia*, scientific research and large scale mining on their lands, as well as taxation, are subject to approval and/or gazetting by the competent Minister…" and; recommending that Guyana recognize and support indigenous councils that are "vested with the powers necessary for the self-administration and the control of the use, management and conservation of traditional lands and resources").

with its imposition of the ADIs in indigenous territories in violation of these rights and principles and in direct opposition to the stated wishes of the vast majority of indigenous peoples.

The same considerations also apply with regard to the right to juridical personality guaranteed in, *inter alia*, Article 3 of the American Convention.[161] This right is highly significant given that the enjoyment and enforcement of domestic legal protections (including those that are required to give effect to international obligations) depend on legal personality.[162] In *Sawhoyamaxa*, the Court explained that states have to use all means at their disposal, including legal and administrative measures, to ensure that the right to juridical personality is respected, and that states have special obligations to ensure respect for this right in connection with persons in situations of vulnerability, marginalization and discrimination, and with due regard for the principle of equality before the law.[163]

In *Saramaka People*, the Court extended this right to the Saramaka people, as a people (i.e., not just to an individual indigenous member and not to an entity created in addition to, and outside of the people itself, like the ADI). It ruled that the right to collective juridical personality is "one of the special measures owed to indigenous and tribal groups in order to ensure that they are able to use and enjoy their territory in accordance with their own traditions."[164] It further explicated and ordered that the state must recognize the Saramaka people's collective legal personality

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161 *See e.g., Concluding observations of the Committee on the Elimination of Racial Discrimination: Suriname*, CERD/C/64/CO/9, at para. 14 (12 March 2004) (observing that "indigenous and tribal peoples cannot as such seek recognition of their traditional rights before the courts because they are not recognized legally as juridical persons").

162 Yakye Axa, *supra* note 26, para. 78-83 (where the Court observed, at para. 82-3, that "juridical personality, for its part, is the legal mechanism that confers on [indigenous peoples] the necessary status to enjoy certain fundamental rights, as for example the rights to communal property and to demand protection each time they are vulnerable"). The Court clarified that recognition of juridical personality only makes operative the pre-existing rights that indigenous peoples have exercised historically; indigenous peoples' political, social, economic, cultural and religious rights and forms of organisation, as well as the right to reclaim their traditional lands, belong to the people themselves irrespective of whether the state formally recognizes their personality before the law.

163 Sawhoyamaxa, *supra* note 67, at para. 189.

164 Saramaka People, *supra* note 21, at para. 172. *See also* Saramaka People, Interpretation of the Judgment, *supra* note 124, para. 54.

in law and through judicial and administrative measures, all of which guarantee them "the use and enjoyment of their territory in accordance with their communal property system, as well as the rights to access to justice and equality before the law."[165] With respect to how the collective juridical personality of indigenous peoples is to be exercised, the Court explained that this "is a question that must be resolved by the [people concerned] in accordance with their own traditional customs and norms, not by the State or this Court in this particular case."[166] In *Sarayaku*, the Court stressed that international law recognizes indigenous peoples and their rights "as collective subjects," and that they "exercise certain rights recognized by the [American] Convention on a collective basis," including the right to legal personality.[167] The IACHR has also emphasized this point.[168]

the ADIs in Costa Rica's various indigenous communities are viewed aRead conjunctively, the preceding jurisprudence affirmatively obligates Costa Rica to recognize, through differentiated measures, the collective juridical personality of indigenous peoples, as peoples, and to ensure that they can make authoritative decisions, through their own autonomous institutions and in accordance with their own customs and traditions, about their territories, populations and development. Disregarding this authoritative jurisprudence, and continuing to support and utilize the ADIs, Costa Rica has failed to effectively recognize indigenous peoples' collective juridical personality and the associated right to freely choose the means and modalities by which it is exercised, and by extension their right to freely pursue their economic, social and cultural development. Under extant Costa Rican law, only the ADI, a state agency that in no way accounts for indigenous particularities, may exercise legal personality and governance powers on behalf of indigenous peoples even for the purpose of holding title to their territories. The imposed rules and practices of the ADI system do not allow them any meaningful say in how their juridical personality is exercised and their traditions in this

165 Saramaka People, *id*. at para. 174.
166 *Id*. at para. 164.
167 Sarayaku, *supra* note 21, at para. 231.
168 IACHR Indigenous Lands, *supra* note 7, at para. 66 (stating that the "collective nature of indigenous and tribal peoples' right to territorial property bears a direct incidence upon the content of other rights …, giving them a collective dimension. Such is the case of the right to juridical personality or of the right to effective judicial protection") (footnotes omitted).

respect have been wholesale disregarded as has their right to freely determine their own membership for the purposes of collective action.

IV. THE AUTONOMY BILL: A LONG AWAITED SOLUTION?

> For more than a decade, indigenous leaders have been promoting a bill to guarantee the rights of the country's indigenous peoples. … The Special Rapporteur understands that the debate on the bill is at a standstill. More recently, in August 2010, 30 indigenous persons were expelled from the legislative chamber, where they had been protesting to urge legislators to discuss the bill.[169]

Given the absence of effective judicial and other remedies to address the imposition of the ADIs and the invasion and expropriation of their lands, indigenous peoples have sought to correct this situation through the legislature. This led to the drafting, over a seven year-long period, of the *Proyecto de Ley de Desarrollo Autónomo de los Pueblos Indígenas* (the Bill for Autonomous Development of Indigenous Peoples ("Autonomy Bill")), which was first submitted for debate in the Congress in 1995. It was subsequently modified and reconsidered by the Congress in 2002 after an extensive round of consultations during which indigenous peoples' freely chosen representatives overwhelmingly supported the Bill.[170] As the UNCERD observed, the Autonomy Bill is "aimed at granting full autonomy to indigenous peoples and recognizing their right to enjoy their own cultures, as well as the right to administer their territories."[171] If adopted and effectively implemented, this law could go far towards correcting the long-standing problems affecting indigenous peoples in Costa Rica, including those highlighted herein. Costa Rica itself has described the Bill as setting out

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169 SRIP Report on El Diquís, *supra* note 15, at para. 45.

170 *See Ley de desarrollo autónomo de los pueblos indígenas*, File number 14.352, *Asamblea Legislativa de la República de Costa Rica*, at p. 3-4 (describing the consultation process and affirming, at p. 4, that the "members of the Standing Committee on Social Affairs concluded and certified that participation was within the parameters expected for electoral processes. They recall, moreover, that the proposals and concerns of the indigenous communities expressed during the consultation of the eight indigenous peoples were incorporated into the substantive text of the Bill"), <www.cicaregional.org/archivos/download/14gd38200.pdf>, visited on 21 November 2012.

171 UNCERD, Costa Rica, *supra* note 24, at para. 9.

> a series of regulations and actions to be implemented in the areas of public administration, a special education system, health, environmental protection, infrastructure and housing programmes, management of land tenure, establishment of credit systems and recognition of a system of political organization based on territorial councils elected directly by the indigenous communities for the purpose of managing the indigenous territories. The bill also recognizes their autonomy and their right to their own culture.[172]

However, the UNCERD additionally observed in 2007 that "despite the recommendation contained in its final comments of 2002, the *Autonomous Development of Indigenous Peoples Bill* has not been adopted owing to legislative obstacles."[173] It added that it was "disturbed to learn that the bill may once again be shelved" and recommended that Costa Rica "remove without delay the legislative obstacles preventing [its] adoption…."[174] The ILO has made similar comments on more than one occasion,[175] as has the Special Rapporteur on the Rights of Indigenous Peoples, who, quoting the UNCERD's recommendation that Costa Rica remove legislative obstacles preventing the adoption of the Autonomy Bill, states that there "is a need to address concerns about the representativeness of the ADIs; doing so could boost progress towards the adoption of the Autonomous Development of Indigenous Peoples Bill."[176] Nonetheless, this Bill continues to languish in the legislature in early 2013, and the state has recently explained that it will not present the Bill for adoption as its requirement that indigenous peoples' consent be obtained may threaten the Diquís dam or other projects,[177] a statement that was further criticized by the UNCERD in September 2011.[178]

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172 *Reports submitted by States Parties*, *supra* note 23, at para. 35.

173 UNCERD, Costa Rica, *supra* note 24, at para. 9.

174 *Id*.

175 *See Reports submitted by States Parties, supra* note 23, at para. 36 (noting that the ILO had, in connection with Costa Rica's 2004 report on ILO 169," regretted the shelving of the Autonomous Development of Indigenous Peoples Bill and recalled the importance of dealing with the problem of the presence of non-indigenous persons in indigenous communities and the implications of this situation for land tenure").

176 SRIP Report on El Diquís, *supra* note 15, at para. 48.

177 *See Government stopped indigenous law for conflicting with hydroelectric plan*, El Nacion, 15 August 2010, <www.nacion.com/2010-08-16/ElPais/NotasSecundarias/ElPais2481419.aspx>, visited 15 October 2012.

178 *See Communication of the UNCERD*, *supra* note 24, (where the UNCERD expressed "its concern on information received about statements made by the State

It is important to recall that indigenous peoples overwhelming rejected the continuance of the ADIs in their territories during the consultation process on the Autonomy Bill and that, for this reason, the Bill includes provision for indigenous peoples to freely determine their own forms of governance institutions in their territories.[179] Indeed, one of the main aims of the Bill is to modify existing institutions for the representation of indigenous peoples in the Costa Rican polity with the aim of retaining and revitalizing traditional structures of representation and promoting the self-governance of indigenous peoples.[180] To give effect to this aim, the replacement of ADIs with 'indigenous territorial councils' is specifically provided for in the Autonomy Bill.[181]

The Bill also establishes new procedures and a fund for the expropriation of illegally occupied lands in indigenous territories,[182] as well as a fund for indigenous self-development.[183] According to the ILO's Committee of Experts on the Application of Conventions and Recommendations, this procedure entails the following:

> sections 5, 6, 11, 12, 13 and 14 of Bill No. 14352 … govern a summary procedure for the reclaiming of lands. It notes that these sections provide that: (i) within this rapid procedure, if the lands being reclaimed were occupied by a party purchasing indigenous lands in good faith, the State will finance the recovery of such lands (section 12); (ii) as regards the possession of lands by indigenous peoples since time immemorial, the prevailing criterion will be that the burden

party on the situation of El Diquís hydroelectric dam as a reason for not adopting the Autonomy Bill of Indigenous Peoples, which has been waiting the approval in Congress for 16 years").

179 Swimming Against the Current, *supra* note 50, at p. 4 (stating that "A proposed legal reform provides in its abolition of CONAI and ADIs as indigenous governance structures a potential remedy for Costa Rica's violation of indigenous peoples' rights to representation, but the bill's progress towards passage has been lengthy and remains stalled").

180 *See* E. Ramírez Flores, *Insisten en que se apruebe proyecto de ley: indígenas consideran vital el desarrollo autónomo*, *Semanario Universidad*, 28 April – 4 May 2010, <www.semanario.ucr.ac.cr/index.php/mainmenu-pais/1295-insisten-en-que-se-apruebe-proyecto-de-leyindigenas-consideran-vital-el-desarrollo-autonomo-.html>, visited on 19 October 2012.

181 *See Ley de desarrollo autónomo de los pueblos indígenas*, File Number 14.352, *Asamblea Legislativa de la República de Costa Rica*, *supra* note 171, Article 4(d).

182 *Id*. Articles 6 and 11-14.

183 *Id*. Chapter VI.

> of proof regarding legitimate possession will fall exclusively on non-indigenous parties claiming possession, who will be entitled to the payments to be made by the State (section 13(d)); and (iii) the corresponding Indigenous Territorial Council may participate and become involved at any time in the procedure, and the requirements regarding identification and written documentation are simplified, these being acceptable even in handwritten form.[184]

The Autonomy Bill, therefore, represents a positive and long overdue step toward addressing the pervasive violations of indigenous peoples' rights in Costa Rica. It has not been adopted by the Congress due to opposition from powerful vested interests, some of whom illegally occupy lands in indigenous territories, as well as from the current government, which perceives the Bill to be a threat to its national development initiatives.[185] This has essentially paralyzed the legislative process for the past 17 years and today the Bill is in danger of being completely withdrawn from consideration. In the meantime, indigenous peoples' rights continue to be violated with impunity and their cultural and territorial integrity and survival continues to be undermined and threatened by the invasion and illegal alienation of their lands; by the imposition of unwanted and unaccountable state institutions like the ADIs; by national parks that fail to adequately respect their rights; and by resource extraction and infrastructure projects that take place without regard for their rights and without their free, prior and informed consent.

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184 ILO CEACR, *Costa Rica: Observation, supra* note 37.

185 Various statements by government officials have been made about the *Autonomy Bill*. The current President of Costa Rica, Laura Chinchilla, stated that "that the law for the minorities is important but they must analyze which elements would affect the development of an entire country, therefore they will not submit the Bill until they clarify their doubts"; <www.prensalibre.cr/pl/nacional/30125-chinchilla-no-convocara-ley-de-autonomia-indigena.htm>, visited on 28 November 2012; the former head of the governing party in the Congress stated that "[t]he National Liberation Party (PLN) removed their support from the autonomy bill of indigenous peoples because it jeopardized the Diquís Hydroelectric project in the Southern Region"; <www.nacion.com/2010-08-16/ElPais/NotasSecundarias/ElPais2481419.aspx>, visited on 29 November 2012; and the Minister of Environment (currently the Executive President of ICE) stated that "if the autonomy plan is approved for the 22 indigenous territories, the previous consultations become more rigid ... which could eventually mean the loss of this valuable resource for the country", <www.nacion.com/2010-08-16/ElPais/NotasSecundarias/ElPais2481419.aspx>, visited on 29 November 2012.

V. CONCLUSION

Costa Rica rightly prides itself on its long tradition of peaceful democratic change, respect for human rights and the rule of law, and its leadership on environmental and biodiversity issues. It has ratified all of the major human rights instruments, which have been held by the judiciary to have constitutional or supra-constitutional status, as well as both of the ILO conventions pertaining to indigenous peoples.[186] Coupled with the abolition of the military in 1948, these factors have greatly assisted in avoiding the violent conflicts and instability that have characterised many of its neighbours as well as contributing to its status as an 'upper middle income' country that has been ranked as the "happiest" country in the world in both 2011 and 2012.[187] This ranking however does not measure most human rights issues or the infringement of rights when determining happiness, well-being or sustainability.

While a variety of human rights issues are of concern in Costa Rica, the treatment of the indigenous peoples who now find themselves within its borders stands out as one of the major problems, if not *the* major human rights problem. This is the case notwithstanding the fact that Costa Rica adopted laws that are intended to secure indigenous peoples' rights as early as the 1930s, well in advance of most of the other countries in Latin America and elsewhere (albeit the rights recognised therein have yet to be elevated to the constitutional level as they have been in many of the countries in the Americas). This includes recognising indigenous ownership of 24 titled reserves that cover seven percent of Costa Rica's land mass

186 *See supra* note 20 (citing judgments on the supra-constitutional status of ratified human rights instruments) and; Constitutional Chamber of the Supreme Court of Justice of Costa Rica, *Judgment No. 2011-1768, 11 February 2011, Amparo Proceedings*, at Considering III (holding that "because of the normative status granted by Article 7 of the Constitution, the ILO Convention No. 169 supersedes the laws and therefore, its protection falls within the scope of constitutional jurisdiction").

187 *See* The New Economics Foundation, Happy Planet Index Report 2012: A Global Index of Sustainable Well-Being, p. 13 (ranking Costa Rica first on the 'happy planet index', a measure of "data on experienced well-being, life expectancy, and Ecological Footprint to generate an index revealing which countries are most efficient at producing long, happy lives for their inhabitants, whilst maintaining the conditions for future generations to do the same"), <www.happyplanetindex.org/assets/happy-planet-index-report.pdf>, visited 05 January 2013.

and are mandated as inalienable and exclusive to indigenous peoples under domestic law.

However, indigenous peoples in Costa Rica fall at the bottom of all social and economic indices, have access to state services that are quantitatively and qualitatively worse than those enjoyed by all other Costa Ricans, and their rights – and the rule of law more generally[188] – continue to be violated with impunity, a long-standing condition that the Costa Rican state is well aware of and which has been raised numerous times by international human rights bodies. As discussed herein, these violations are especially pronounced in relation to the complex of rights that converge on and are interdependent with indigenous peoples' territorial rights. Violations of territorial rights in the narrowest sense may be broken down into two categories: first, the inadequate delimitation and demarcation of traditionally-owned lands and territories with respect to the existing system of reserves; and second, the massive and persistent pattern of illegal occupation of these reserves and the abject failure of the state to correct this situation.

Regarding the first point, most of the reserves as presently constituted in Costa Rica were delimited on the basis of studies undertaken without indigenous participation and without reference to the traditional tenure systems and customary norms that underlie and give rise to indigenous property rights in international law.[189] It is highly unlikely therefore that their current boundaries would withstand challenges based on contemporary human rights law and they would have to be revised accordingly should a challenge be brought and succeed. The boundaries of the Teribe people's reserve, for instance, excluded at least one Teribe community when they were established – despite the fact that this community's lands were

188 *See e.g.,* Sarayaku, *supra* note 21, para. 262 (explaining that "the Court has reiterated that the right of all persons to simple and prompt recourse or any other effective remedy before a competent judge or tribunal for protection against acts that violate their fundamental rights 'constitutes one of the basic pillars, not only of the American Convention, but also of the Rule of Law itself in a democratic society, within the meaning of the Convention'").

189 *See* Sawhoyamaxa, *supra* note 67, para. 248 (summarising the Court's jurisprudence); and Maya Indigenous Communities, *supra* note 4, at para. 117 (where the IACHR observed that "the jurisprudence of the system has acknowledged that the property rights of indigenous peoples are not defined exclusively by entitlements within a State's formal legal regime, but also include that indigenous communal property that arises from and is grounded in indigenous custom and tradition").

and are contiguous to the boundary of the reserve – and it presently remains without any legal protection for its lands. Its exclusion from the reserve continues to lack any factual or legal justification today. Although no definitive study has been undertaken about traditional tenure outside of the existing reserve system, this situation is not unique to the Teribe and it is expected that significant modifications would need to be made to these reserves to account for traditional tenure and present-day occupation and use by indigenous peoples.

Massive illegal occupation, the second point, has reached alarming proportions that both invite and compel international oversight and action: all the more so as domestic remedies have, for a variety of reasons discussed above, proved to be ineffective. This includes wholesale disregard for the extant domestic legal regime that applies to these reserves; failure to comply with decisions of the Supreme Court; judicial decisions that misinterpret international legal protections to indigenous peoples' detriment; and the prolonged and politically motivated inaction with respect to the enactment of the Autonomy Bill, a proposed law that was overwhelming supported by indigenous peoples and which is intended to correct illegal occupation and other long-standing concerns. Indigenous peoples are now forced to seek protection in international fora – the Teribe, for instance, filed a petition with the IACHR in 2012 about the Diquís dam and land tenure and other rights. The Inter-American Court of Human Rights, which sits in Costa Rica's capitol city, may eventually have to reach a decision on this or other cases.

Illegal occupation of indigenous lands not only deprives the indigenous owners of the possession, use, benefit and enjoyment thereof, it also fatally strikes at the heart of a range of rights that are integral to indigenous peoples' self-determined development, security over their means of subsistence, and their identity and survival as distinct territorial, cultural and political entities.[190] For example, lacking possession of or control over their lands and resources, in

190 *See inter alia* IACHR, *Second Report on the Situation of Human Rights in Peru*, OEA/Ser.L/V/II.106, Doc 59 rev., (2000), at Ch. X, para. 16 (where the IACHR explains explained that "Land, for the indigenous peoples, is a condition of individual security and liaison with the group. The recovery, recognition, demarcation and registration of the lands represent essential rights for cultural survival and for maintaining the community's integrity") and; *in accord*, IACHR, *Third Report on the Human Rights Situation of Human Rights in Paraguay.* OEA/Ser.L/V/II.110 Doc.52 (2001), Ch. IX, para. 47

most cases, indigenous peoples are no longer able to benefit from their traditional economy, which is also fundamentally interconnected with their culture and identity. Costa Rica's tolerance and tacit approval of this situation therefore transcends simple violations of property rights and, instead, threatens indigenous peoples' survival in violation of a series of interrelated and basic rights. In short, its acts and omissions in this respect negate and quash not only the exercise and enjoyment of those rights, but also their very rationale. This persistent and pervasive pattern of discrimination against indigenous peoples has also led to a climate of racial tension and hostility that is becoming increasingly violent. This includes assassination attempts against indigenous leaders and racially discriminatory – and likely otherwise illegal – resolutions adopted by state bodies that vilify indigenous leaders for doing no more than seeking respect for their rights. As with illegal occupation, this (unprecedented in Costa Rica) violence and hostility is taking place with impunity.

Likewise, the imposition of the ADI system in indigenous territories amounts to a *de jure* annexation of indigenous governance institutions and powers that denies indigenous peoples' collective legal personality, their right to effectively determine and control their internal affairs and development through their own institutions and in accordance with their customs and traditions, as well as their right to effective participation through their own representatives in external decision making that may affect them.[191] They are unable to collectively control, manage and benefit from their territories

191 *See e.g.*, EMRIP, *Final report of the study on indigenous peoples and the right to participate in decision-making, Report of the Expert Mechanism on the Rights of Indigenous Peoples*, UN Doc. A/HRC//18/42 (17 August 2011), Annex: 'Expert Mechanism advice No. 2 (2011): Indigenous peoples and the right to participate in decision-making', at para. 17-18 (advising that "With regard to the right to self-determination, the Declaration on the Rights of Indigenous Peoples affirms that indigenous peoples, in exercising their right to self-determination, have the right to develop and maintain their own decision-making institutions and authority parallel to their right to participate in external decision-making processes that affect them. This is crucial to their ability to maintain and develop their identities, languages, cultures and religions within the framework of the State in which they live"; and "Article 3 of the Declaration on the Rights of Indigenous Peoples mirrors common article 1, paragraph 1, of the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. Consequently, indigenous peoples have the right to determine their own economic, social and cultural development and to manage, for their own benefit, their own natural resources. The duties to consult with indigenous peoples and to obtain

and resources in accordance with their customs and traditions and are unable to freely pursue their economic, social and cultural development. It is no coincidence that extreme poverty among indigenous peoples is more than six times higher than it is among the national population and no coincidence that indigenous peoples suffer from loss of culture and language and disproportionate and serious social and other problems. This is all attributable in large part to Costa Rica's disregard for their rights; as the former UN rapporteur on indigenous lands observes: "[i]ndigenous societies in a number of countries are in a state of rapid deterioration and change due in large part to the denial of the rights of the indigenous peoples to lands, territories and resources…."[192]

While indigenous peoples have suffered, and continue to suffer, serious and long-term harm that requires urgent remediation and redress, the situation in Costa Rica is not irredeemable. Many of the illegal occupants in indigenous territories are far from being poor migrants and individually hold large areas of land.[193] Consequently, in most territories, the recovery and restoration to indigenous peoples of these large land holdings would involve the expropriation of a limited number of properties. Compensation will be required in some cases, but in many cases the illegal occupants are not entitled to compensation and may be evicted and relocated elsewhere at little or no cost to the state. In the Ngöbe Coto Brus territory, for instance, three non-indigenous persons possess 1,500 hectares (20 percent of the territory) and in the Cabécar Bajo Chirripó territory nine illegal occupants hold 4,696 hectares (about 25 percent of the territory). In the Ngöbe Osa and the Cabécar Nairi-Awari territories there are a total eight illegal occupants in possession of 10 and 11 percent, respectively, of the indigenous lands. To resolve illegal occupation in these four territories would thus require compensating or removing a mere 20 persons and would immediately treble the number of territories 100 percent possessed by their indigenous owners. In

their free, prior and informed consent are crucial elements of the right to self-determination").

192 Indigenous people and their relationship to land, *supra* note 2, at para. 123.

193 Perfil de los Pueblos Indígenas de Costa Rica, *supra* note 22 (finding that in 14 indigenous territories, almost 60 per cent of the 24 territories, the number of illegal occupants range from 3 and 399 persons. In five other territories the numbers are more daunting, ranging from 412 to 1,568 illegal occupants. In two, one of which is 97 to 98 per cent illegally occupied, there is no data on the number of illegal occupants).

other words, dealing with illegal occupation by 20 persons would remedy this problem in one-quarter of the indigenous territories.

A national survey of unresolved – and presently unresolvable due to the absence of domestic legal provisions – indigenous land rights outside of the boundaries of the reserves is also an option that would not involve considerable amounts of funds, funds at any rate that would likely be readily available from a variety of donors if so desired. Correction of the boundaries and any associated compensation in relation to expropriations will be more costly, but is nevertheless required to complete the process of bringing Costa Rica into compliance with its international obligations. However, a significant number of these modifications would be to the boundaries of Costa Rica's large array of national parks and would require little more than legislative amendments. Last, but not least, enactment of the Autonomy Bill *and* its implementation would for the most part adequately address and establish the means to fund many of these issues.

Policing violent confrontations between indigenous peoples and illegal occupants, the costs associated with escalating judicial proceedings (national and international), delays in projects due to indigenous opposition, and the damage to Costa Rica's international reputation are likely equally costly. Irrespective, Costa Rica cannot plead poverty in this situation; it has the resources to deal with the problem and simply needs to make space in its annual budget to fund the necessary remedial measures. To put this into perspective, the most expansive estimate of the costs of addressing all compensation claims in relation to illegal occupation (USD70 million) is dwarfed many times over by even the most conservative and out-dated estimate of the USD2.05 billion needed to construct the Diquís dam alone.

Additionally, rather than frustrate indigenous development, as it has done for decades, Costa Rica may instead give concerted support for indigenous peoples to pursue their own development initiatives, which, in turn, will greatly enhance the pursuit and attainment of its national development objectives. Indigenous peoples are after all the owners of a considerable amount of some of the most pristine lands in Costa Rica and the Autonomy Bill provides for a fund for indigenous development that can be supplemented with funds from the international donor community. Put another way, rather than see indigenous peoples as a hindrance to national development – as

it currently does – Costa Rica can view indigenous development, as determined by indigenous peoples' themselves, as part of its overall national development.[194] Experience from other countries shows that this is best achieved where indigenous peoples are able to exercise their right to self-determination through accountable and culturally appropriate governance institutions vested with authoritative and practical decision-making powers as well as the ways and means to give effect to their decisions.[195]

As noted above, the Autonomy Bill provides for the reconfiguration of governance institutions in indigenous territories and the vesting of substantial powers in institutions to be freely chosen by indigenous peoples themselves, rather than perpetuating the discredited ADI system. However, this, by itself, is not enough. First, elevating indigenous rights to the constitutional level would provide indigenous peoples with greater leverage and security in domestic judicial and other venues as well as demonstrate a greater commitment to those rights by the state. This should be accompanied by dedicated training programmes for the judiciary, civil service and indigenous peoples themselves about indigenous rights and the measures required to respect, protect and fulfil those rights in the Costa Rican context. The Inter-American Institute for Human Rights and the Inter-American Court are both based in Costa Rica and can be of invaluable assistance in this respect. Costa Rica may also request intensified technical support from the UN Special Rapporteur on the Rights of Indigenous Peoples, as proposed in his 2011 report on the Teribe and the Diquís dam.

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194 *See in this regard*, UNDRIP, *supra* note 115, Art. 20(1) (providing that "Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities"); and Art. 32(1) (providing that "Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources"). *See also* IACHR, *Report on the Human Rights Situation in Mexico*. OEA/Ser.L/V/II.100 Doc. 7 rev. 1 (1998), at para. 577 (stating that "[i]t is the obligation of the State of Mexico, based on its constitutional principles and on internationally recognized principles, to respect indigenous cultures and their organizations and to ensure their maximum development in accordance with their traditions, interests, and priorities").

195 *See* S. Cornell and J. Kalt, *Two Approaches to Economic Development on American Indian Reservations: One Works, the Other Doesn't in* Resources for Nation Building: Strategies for Governance and Development (M. Jorgensen ed., 2007).

Second, indigenous peoples are a tiny minority of Costa Rica's population and largely invisible in the electoral and political systems.[196] This invisibility, together with opposition from powerful competing interests, has in large part contributed to the current situation. In order to further address and safeguard indigenous peoples' rights additional forms of indigenous representation are therefore required to ensure that indigenous peoples are adequately represented in both the legislative and executive branches of government. A number of countries – Colombia, New Zealand and Burundi, for example – employ specific indigenous electoral roles that may be used as models and which serve to ensure that indigenous peoples have designated seats in the legislature, separate from political party affiliations and loyalties, to raise concerns about indigenous rights when necessary.[197] While not capable of fixing all problems, indigenous concerns could at least be aired and debated prior to the adoption of measures that may affect them and measures for their benefit could be independently proposed within the legislative process.

With regard to participation in the executive branch of government, Costa Rica already has an institution, the National Commission on Indigenous Affairs ("CONAI" in its Spanish acronym) that is supposed to represent indigenous interests. For example, one of its fundamental objectives is ensuring "the respect of the rights of indigenous minorities, stimulating the action of the State in order to guarantee the Indian the individual and collective property of the land...."[198] As currently constituted, however – in particular, being

196 For instance, in October 2008, the Costa Rican Congress passed a new biodiversity law without any prior consultation with indigenous peoples, despite the fact that this law directly affects their rights and interests. It also did so with disregard for a decision of the Constitutional Chamber of the Supreme Court requiring that a consultation process be designed and executed with indigenous peoples. *See COSTA RICA: Indigenous People Still Largely Invisible*, IPS, 29 October 2008 (observing that "In Costa Rica, the most advanced country in Central America in terms of human development, indigenous people tend to be neglected and forgotten. The country's native peoples have the highest poverty rates and lowest levels of human development, and their views and interests receive little attention from the government"), < http://www.ipsnews.net/2008/10/costa-rica-indigenous-people-still-largely-invisible/>, visited on 29 November 2012.

197 *See* EMRIP, *Final report of the study on indigenous peoples and the right to participate in decision-making, supra* note 192, para. 40-47 (containing examples of direct and differentiated indigenous representation in legislative bodies).

198 *Law on Creation of CONAI, N° 5251* of 11 July 1973, Article 4(e).

composed of the chairpersons of the ADIs in indigenous territories – it has failed to fulfil its mandate, a fact abundantly attested to, *inter alia*, by the present level of illegal occupation of indigenous territories. The government itself explained to the UNCERD in 2007 that CONAI has "failed to represent the interests of the indigenous peoples and … as the State party recognizes, it has in the past strayed from its functions and responsibilities."[199] For these reasons, the Autonomy Bill abolishes CONAI and replaces it with a body to be composed of the representatives of the 'indigenous territorial councils' that will be chosen and established by indigenous peoples in their territories to exercise their autonomous self-governance powers and to replace the ADIs. This new institution, assuming that its representatives are sufficiently accountable to indigenous peoples and its enabling laws provide it adequate independence, funding and authority, would hopefully assume the role that CONAI was intended to play when it was first established, namely to represent indigenous issues within the executive.

Finally, any sustainable resolution of the current urgent situation facing indigenous peoples and their rights in Costa Rica is ultimately a matter of political will. Costa Rica has the legislative tools at hand and sufficient resources, financial, human and technical, to fully address this substantial blemish on its otherwise largely positive human rights record. However, it has yet to show the will to correct this major problem despite substantial and sustained international criticism. Indigenous peoples have made numerous good faith efforts to work with the state without result and have been forced to seek redress outside of the country. The case filed by the Teribe with the IACHR may provide a catalyst for generating political will in the power centers of the state, either through some form of negotiated friendly settlement process that could go beyond the specifics of the complaints raised by the Teribe or through implementation of an eventual decision of the IACHR or judgment of the Inter-American Court. Either way, it is high time that indigenous Costa Ricans can join their fellow citizens in actually enjoying being part of the 'happiest country in the world'.

Note Special thanks to Vanessa Jimenez and Marcus Colchester for their comments; any errors are the authors' alone.

199 UNCERD, Costa Rica, *supra* note 24, at para. 10.

EQUALITY AND NON-DISCRIMINATION UNDER INTERNATIONAL HUMAN RIGHTS LAW

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Together with equality before the law and equal protection of the law without any discrimination, non-discrimination provides the foundation for the enjoyment of human rights. As Shestack has observed, equality and non-discrimination "are central to the human rights movement."[1] This paper offers an overview of the sources of nondiscrimination and the historical development of the concept, and examines in detail the scope of the principle of non-discrimination. The paper emphasis the domestic l implementation of the principle with a discussion of its application in China.

Sources of Non-Discrimination and Equality

UN Charter

Before 1945, the prohibition of discrimination was only dealt with in the so-called minority treaties, which were severely limited in their scope.[2] With the adoption of the UN charter, a non-discrimination clause applying to everyone became a recognized part of international law. The idea that the United Nations should become the international protector of the rights of the individual grew out of the tragic experience of the Second World War and the horrendous violations of human rights committed in the Holocaust. Many wartime leaders believed that the rise of Hitler could have been averted had there existed a strong international organization with the authority to address human rights issues in the 1930's.

1 Jerome Shestack, "The Jurisprudence of Human Rights", in Theodor Meron (ed), *Human Rights in International Law: Legal and Policy Issues*, 1984, p. 101.

2 Such treaties were signed between the victorious Allies and Poland, Czechoslovakia, Yugoslavia, Romania, Greece, Austria, Bulgaria, Hungary, and Turkey, and were guaranteed only in so far as they affected members of such minorities.

These leaders felt it was critical that the experience with the interwar League of Nations, which was weak and lacked the power to deal with human rights issues, not be repeated. It was therefore expected that the UN Charter would contain provisions establishing an effective system for the protection of human rights. Unlike the League Covenant, which specifically excludes mention of racial and religious equality, the United Nations Charter drawn up at San Francisco has the promotion of human rights - in particular equality and non-discrimination – as one of its basic provisions. One delegate to the Third Committee went so far as to say that the "United Nations Organization had been founded principally to combat discrimination in the world."[3] The three main provisions discussing human rights in the UN Charter are Articles 1(3), 55(c) and 56. In addition, other Articles of the Charter make it clear that human rights protection is a fundamental part of the UN's mission: the Charter states that the UN aims to "develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples"[4] and "promote and encourage respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."[5]

However, these provisions did not establish immediate obligations to guarantee or observe human rights, nor did they define what was meant by "human rights and fundamental freedoms." Instead, they imposed the vague obligation to "promote…universal respect for, and the observance of, human rights" and to take "joint and separate action in co-operation with the Organization" to achieve this purpose. The only unambiguous provision in the Charter is the prohibition of discrimination.[6]

Universal Declaration of Human Rights

At the inaugural conference of the United Nations held in April 1946, the representatives of Cuba, Mexico and Panama had proposed that the conference should adopt a declaration on the essential rights of man. However, there was insufficient time available to discuss

3 UN document. A/C 3/ S.R 100, 7, cited in Warwick Mckean, *Equality and Discrimination under International Law*, 1983, p. 59.

4 UN Charter Article 1(2).

5 id Article 13 (1).

6 Thomas Buergenthal, "The Normative and Institutional Evolution of International Human Rights", 19 *Human Right Quarterly*, 1997, p. 707.

the proposal, and at the first session of the UN General Assembly, Panama submitted a draft declaration on fundamental human rights and freedoms. The General Assembly decided to refer the draft to the Economic and Social Council for detailed consideration by its Commission on Human Rights. The Commission spent two years working on a draft, with the instruction that the bill should be acceptable to all, short, simple and easy to understand. The draft bill was presented to the third session of the General Assembly, and in December 1948 Resolution 217A was adopted, known thereafter as the Universal Declaration of Human Rights.

The Universal Declaration of Human Rights (UDHR) elaborates the UN Charter's equal rights prescriptions; the principle of equality pervades the declaration. Of the thirty articles, some are in one way or another explicitly concerned with equality, and the rest implicitly refer to it by emphasizing the all-inclusive scope of the UDHR, as in the following Articles (emphasis added):

> Article 1. *All* human beings are born free and equal in dignity and rights.
>
> Article 2. *Everyone* is entitled to all the rights and freedoms set forth in the Universal Declaration without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
>
> Article 4. *No one* shall be held in slavery or servitude.
>
> Article 7. *All* are equal before the law and are entitled without any discrimination to equal protection of the law.

INTERNATIONAL COVENANTS

Just beneath the Charter and the Universal Declaration in importance are two international covenants which offer detailed provisions and provide means of implementation: the Covenant on Civil and Political Rights (ICCPR, 1966), and the Covenant on Economic, Social, and Cultural Rights (ICESCR, 1966). The principal clause on non-discrimination is found in Article 26 of the ICCPR:

> All persons are equal before the law and are entitled without any discrimination to equal protection of the law. In this respect,

> the law shall prohibit discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The ICESCR also contains general and specific non-discrimination clauses, which are similar to the ICCPR[7].

Treaties in Specific Fields

The Convention on the Elimination of All Forms of Racial Discrimination (CERD, 1965) is one of the first major conventions to elaborate on the contents of one of the nondiscrimination grounds of the UDHR. Although it largely repeats the discrimination provisions of the covenants, its existence as a separate instrument underscores the significance which the international community places on non-discrimination. Another addition to the body of United Nations equal rights jurisprudence is the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), promulgated in 1979.

Regional Human Rights Conventions

The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR,1950) and the American Convention on Human Rights (ACHR,1969) also contain similar non-discrimination clauses. (ECHR Article 14, ACHR Article 24)

The Scope of the Right to Equality and Non-Discrimination

What is Meant by Discrimination?

Before proceeding with the discussion of the right to equality and non-discrimination, it is important to review the concept of discrimination and its relationship with the concept of equality. It is widely accepted that equality and non-discrimination are positive and negative statements of the same principle.[8] In other words, equality

7 See ICESCR Article 2 (3), 3.

8 Ann F. Bayefsky, "The principle of Equality or Non-discrimination in International Law", *11 Human Rights Quarterly*, 1990, p. 5.

means the absence of discrimination, and upholding the principle of non-discrimination between groups will produce equality.

The Sub-commission on the Prevention of Discrimination and Protection of Human Rights was created by the United Nations specifically to deal with questions of discrimination. Early in its first session, the Sub-commission did not attempt to agree upon a legal definition but merely indicated the considerations which should be taken into account in framing the proposed Universal Declaration of Human Rights. "Prevention of discrimination" was described as the prevention of any action which denies to individuals or groups of people the equality of treatment which they may wish. The Sub-commission held that differential treatment of such groups or of individuals was justified when it was exercised in the interests of their contentment and the welfare of the community as a whole. One illuminating conceptual breakthrough contained in the definitions was the clear distinction made between differentiation which may be justified in the interest of true equality, and discrimination which is based upon 'unwanted,' 'unreasonable,' or 'invidious' distinctions and which is never justified.[9] In the Commission on Human Rights, some delegates considered that the description of 'prevention of discrimination' was "loose and unscientific" because the mention of equality of treatment without qualification was unacceptable given that absolute equality of treatment was obviously impossible to achieve. The insertion of the word 'justified' before 'equality' was suggested, but was opposed on the grounds that the word 'equality' used here in its legal sense did not mean 'absolute' equality but fair or justified equality, and that there was therefore no need for a qualifying adjective.[10]

The ICCPR and ICESCR neither define the term "discrimination" nor indicate what constitutes discrimination. However, CERD Article 1 defines racial discrimination as any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on the equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. CEDAW Article 1

9 Warwick Mckean, Equality and Non-Discrimination Under International Law, 1983, p. 82.

10 See UN doc.E/CN. 4/S.R.32-41, cited in Warwick, supra note 12, p. 83.

also defines "discrimination against women" as any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Although these conventions deal only with cases of discrimination on specific grounds, the term discrimination should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on equal footing, of all rights and freedoms.[11]

From the definitions of discrimination provided in the above-mentioned conventions, we can see that a universal 'composite concept of discrimination' can contain the following elements:

Stipulates a difference in treatment;

And has a certain effect;

Which is based on a certain prohibited ground.

A. Differential Treatment

The common terms 'distinction,' 'exclusion,' 'restriction,' and 'preference' are all used to describe differential treatment. Any one of these terms would suffice to establish an action for the purpose of discrimination. 'Preferences' suggests that the action does not necessarily have to be directed against the group alleging discrimination, but may be effected through unreasonable promotion of one group at the expense of others. The Committee on Economic Social and Cultural Rights noted in the case of Vietnam that there was evidence of discrimination "on the basis of preferences in favour of persons from certain groups."[12] As one commentator has noted, "the discriminatory or equal treatment of one person must be measured by the relative treatment of somebody else."[13] Although differential

11 See The Human Rights Committee General Comment No. 18.

12 Concluding observations on report of Vietnam, E/C. 12/1993/8, at p. 2.

13 Y. Dinstein, "Discrimination and International Human Rights," (1985), Israel Yearbook of Human Rights, cited in Matthew C.R. Craven, *The International*

treatment is a prerequisite, it is not in itself sufficient to establish a case of discrimination. For example, in some cases, preference may legitimately be given to members of specific racial groups for the purpose of authenticity, e.g. a film producer might require an actor of a particular racial background. In the *Mauritian women's* case,[14] the Human Rights Committee in finding a violation of articles 2(1) and 3 of the ICCPR considered that a distinction based on gender was not in itself conclusive. The determining factor was that no 'sufficient justification' had been given for such a distinction. It is clear that not all differentiation of treatment constitutes discrimination under the Covenants. The Human Rights Committee has stated in General Comment No.18 that differentiation of treatment is permissible if: (1) the goal is to achieve a legitimate purpose; (2) the criteria for such differentiation are reasonable and objective, as illustrated in *Van Oord v The Netherlands*.[15] Mr. and Mrs. Van Oord are former Dutch nationals who immigrated to the United States, where they remained and later became US nationals. Their Dutch pensions were taxed, whereas former Dutch nationals who had emigrated to Australia, Canada and New Zealand, and who had become nationals of those countries, received Dutch pensions which were not taxed. The different treatment was due to the details in separate bilateral treaties that the Netherlands signed with those countries. Mr. and Mrs. Oord claimed, *inter alia*, that the difference in pension treatment violated their rights to non-discrimination under 26 of the ICCPR. The Human Rights Committee held that there had been no violation of Art. 26, observing that a differentiation in treatment is legitimate if it is based on reasonable and objective criteria.

The difference in treatment in this case was based on different treaty arrangements. In the *Belgian linguistic* case,[16] the court held that the non-discrimination principle was only violated if the distinction had no "reasonable and objective justification." The existence of such a justification must be assessed in relation to the aim and effects of the measures under consideration. That means there must be a legitimate aim and a reasonable relationship of proportionality between the legitimate aim and the discriminatory measure under

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Covenant on Economic, Social, and Cultural Rights, 1995, p. 164.
14 HRC Resen. 9/35, UN Doc. A/36/40, at 134.
15 http://www.unhchr.ch
16 Townshend-Smith, Richard, Discrimination law: Text, Cases and Materials, 1998, p. 137.

review. The objective of differentiation must be legitimate, and the means chosen must be appropriate and proportionate to that objective. It is normally not difficult for the state to show that the policy under challenge has a rational aim. As to the means chosen, the court is relatively deferential to what is termed the "margin of appreciation", that is, the state's discretion as to the appropriate manner in which to achieve its policy objective.

B. Purpose or Effect

There are four human rights treaties which contain explicit definitions of discrimination. In addition to the CERD and CEDAW which were mentioned above, the International Labor Organization (ILO) Convention No.111 Concerning Discrimination in Respect of Employment and Occupation (1958) states:

> For the purpose of the this Convention the term 'discrimination' includes: (a) any distinction, exclusion or preference made on the bases of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.

According to the UNESCO Convention Against Discrimination in Education (1966),

> For the purpose of this Convention the term 'discrimination' includes distinction, exclusion, limitation or preference which being based on race colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education.

All of the four conventions refer to the 'effect' of that differential treatment. Three of them, except the ILO Convention, find discrimination by looking at 'purpose or effect.' 'Purpose' can be inferred as containing a meaning of 'intention'. The ILO Convention No.111 refers only to 'effect', omitting the concept of 'purpose,' while the other three conventions use the words 'purpose or effect.' The use of the word 'or' rather than 'and' indicates that 'purpose' can be deprioritised in comparison with 'effect'. Since the concept of purpose contains a meaning of intention, it is difficult to define and prove the subjective intention necessary in order to establish a

discriminatory act. Consequently, a discriminatory intention is not a necessary element of discrimination. The emphasis on the 'effect' of policy rather than the intention means that neutral measures will be considered 'discriminatory' if in fact they negatively affect a group in society that has been singled out for protection. In the *South West Africa* cases (second phase) 1966,[17] Judge Tanaka in his dissenting opinion dealt with the substantive issues raised by the applications. South Africa argued that the policy of apartheid was required for the purpose of the promotion of the well-being and social progress of the inhabitants of the Territory, and produced many witnesses and experts to support their claim. Judge Tanaka, in explaining what was in his view a customary interpretation of the international law on non-discrimination based on race, found that different treatment is permitted when it is just or reasonable, and justice or reasonableness excludes arbitrariness. He said, "The arbitrariness which is prohibited, means the purely objective fact and not the subjective condition of those concerned. Accordingly, the arbitrariness can be asserted without regard to motive or purpose." He concluded, "The practice of apartheid is fundamentally unreasonable and unjust. The unreasonableness and injustice do not depend on the intention or motive of the Mandatory, namely its *mala fides*." It is instructive here to consider the ways in which domestic courts in their jurisdictions have dealt with these questions.

A central trend in the development of discrimination law in many domestic jurisdictions has been the movement from a requirement of intention to ground a complaint to the recognition of adverse effect of discrimination. Initially, liability for discrimination was circumscribed very narrowly, requiring a form of intention that was tantamount to malice. Now discrimination law has tended to swing from one extreme to the other, from an exclusive focus on the moral blameworthiness of the defendant to a focus solely on the effects of discrimination on its victims. Some commentators analyze this change from the perspective of tort law.[18]

The word 'discrimination' taken alone is now commonly used in the pejorative sense, as being an unfair, unreasonable, unjustifiable or arbitrary distinction, both in English and in other languages.

17 *South West Africa Case*, Second phase, I.C.J Report, 18 July, 1966.
18 Denise G. Reaume, "Harm and Fault in Discrimination Law: the Transition from Intentional to Adverse Effect Discrimination", *http: /www.paper.ssm.com*.

The most obvious meaning of discrimination emphasizes hostility or prejudice, but it is important that a wider definition be adopted: first because the evidence suggests that disadvantageous differential treatment frequently occurs in the absence of prejudice or hostility, and second because of the difficulty inherent in defining or proving prejudice or hostility. In the United Kingdom, for example, one of the most common reactions to domestic claims of discrimination is, 'How can this be proven?', and the assumption is that a discriminatory intention must be an essential element of the wrong.

Proof of discrimination has three elements: first, we must know how discrimination is defined in the legal context in which it is purported to appear. Secondly, we must identify what must be proved in order to establish that discrimination has occurred. Here the question of intention arises. Thirdly, there is the question of obtaining the necessary evidence. In *Peake v Automotive Products,*[19] there was a prior question before the court to be considered, namely, whether there had been any intention on the part of the respondent to discriminate. Mr. Peake claimed sex discrimination because his employer allowed women to leave work five minutes earlier than men. It was accepted that they did this for the benevolent motive of avoiding the congestion which would occur if all employees finished work at the same time. It was obvious that men and women were differently treated, and that men were treated less favourably by having to wait or work for an extra five minutes, but was the treatment 'on the grounds of sex'? Judge Phillips in the Employment Appeal Tribunal held that motive was immaterial. He stated, "[Sex Discrimination Act] requires one to look to see what in fact is done amounting to less favourable treatment, and whether it is done to the man or woman because he is a man or woman. If so, it is of no relevance that it is done with no discriminatory motive."[20]

Sitting in the same Employment Appeal Tribunal, Lord Denning took a different view, arguing that the employer's worthy motive justified his action. Another way to put the argument advanced by Lord Denning would be to say that it is permissible to treat a person of one sex or race less favourably than another sex or race, provided one does so with an overriding benevolent purpose. This would be

19 I.R.L.R 1977, p. 105, cited in Bob Hepple, Erika M. Szyszczak (eds), *Discrimination: The Limits of Law*, 1992, p. 54.
20 Bob Hepple, Erika M. Szyszczak (eds) supra note 23.

to permit acts disadvantagingminorities in the interest of what an individual judge might decide to be a counterbalancing advantage to society as a whole or to another section of it.[21]

Moreover, there is a way for the employer to achieve her original aim without raising the spectre of discrimination: allowing some of the employees (including both women and men) to leave five minutes earlier and requesting the other employees (including both women and men) to remain longer, while allowing them to take turns between groups.

(interview with Ronald Craig)

In the United Kingdom at least, the tide of case law has moved against such a subjective approach. *In R. Birmingham City Council ex prate Equal Opportunity Commission*,[22] the House of Lords upheld the decision of the Court of Appeal, namely that the test of Judge Phillips in *Peake* was the correct one: motive was immaterial, and what was relevant was whether the differential treatment was based on the target's sex or race.

C. Grounds upon which Discrimination is Prohibited

Concerning the grounds upon which discrimination is prohibited, there are three types of ways to address this issue in legislation. One is to frame a broad open-textured equality guarantee, stating simply that all persons are equal before the law, without specifying any particular grounds. This approach leaves it to judges to decide when a classification is prohibited. For example, the US constitution simply states, in the Fourteen Amendment, that no state may "deny to any person within its jurisdiction the equal protection of the law". A second approach is to formulate legislation containing an exhaustive list of grounds. This contrasts with the first approach in that the choice of ground leaves no discretion to the judges. Grounds can be added or removed only legislatively, and not judicially. This fixed-category approach is found in both United Kingdom antidiscrimination legislation and in the law of the European Union.

The last approach specifies a list of grounds of discrimination, but indicates that the list is not exhaustive. This is the approach adopted not only in the primarily international human rights instruments

21 Bob Hepple, Erika M. Szyszczak (eds) supra note 23.
22 I.R.L.R. 1989, p. 173.

like the ICCPR, the UDHR and the ECHR but also in some domestic legislation, e.g. the Canadian charter of rights and the South African constitution. This approach is distinguished by two factors. The first is that these nondiscrimination articles contain an enumeration of grounds of discrimination, concluded by referring to "other status." Secondly, they do not impose any standard whatsoever as to how to assess what constitutes unequal treatment. The definition of what exactly constitutes discrimination in the context of these articles is left to the courts. It gives judges some discretion to adopt variable standards, lends weight to the notion of reasonable justification and extends the list according to a set of judicially generated principles.[23]

During the drafting of the United Nations Charter, it was argued that it would be unwise to limit possible bases for discrimination to race, sex, language, or religion, since discrimination, whether open or disguised, could also occur based on opinion, country of origin, nationality, social status, etc. However, the phrase used in Article 55 of the Charter did not attempt to limit definitively the types of distinction upon which it was forbidden to discriminate, but merely enumerated the most common variants. Article 62 empowers the Economic and Social Council to make recommendations for the purpose of promoting respect for and observance of human rights and fundamental freedom *for all*. The affirmative 'equality' formulation '*for all*' is very important. Later formulations such as that in Article 14 of the European Convention of Human Rights not only give a longer list of types of distinction but also add the phrase 'such as' or 'other status,' to indicate that these are not exhaustive. It is clear that the use of words 'such as' means that other unstated grounds for discrimination could also contravene these articles. This open-ended provision has one particular significance: in determining whether a given distinction violates the non-discrimination principle, it whether the ground is covered by the nondiscrimination provision or not is not germane to the argument. For example, the European Convention on Human Rights Article 14 has been interpreted by European human rights courts in the context of the following distinctions, none of which is expressly set out in Article 14: stateless individuals, migrant workers, refugees, unmarried couples and parents, people with AIDS, homosexuals, individuals with disabilities, the poor and the elderly. Clearly, this does not mean that

23 Sandra Fredman, *Discrimination Law*, 2001, p. 68.

all differences in treatment based on such grounds are discriminatory. For example, it is accepted in a number of countries that elderly may be deprived of their right to work through compulsory retirement. But it does mean that differences justified on such grounds will be subject to a stricter level of scrutiny than others.[24] However, according to Bayefsky,[25] some individual communications suggest that the Human Rights Committee does not intend to interpret the ICCPR in the same way as the European Court interprets the similar language of the European Convention. In *B. v Netherlands* a distinction was made by a public administrative agency between physiotherapists who had been directly notified of the lack certain insurance obligations and those physiotherapists who had not been directly notified. The Committee found the case to be inadmissible and in so holding stated:

> The Committee also recalls that Article 26, second sentence provides "…other status."
>
> The Committee notes that the authors have not claimed that their different treatment was attributable to their belonging to any identifiably distinct category which could have exposed them to discrimination on account of any of the grounds enumerated or "other status" referred to in Article 26.

In other words, the Committee is suggesting that despite the language of Article 26, which states that discrimination is prohibited on any ground, they will nevertheless limit the scope of the Article to cases involving grounds which are explicitly enumerated or which can be said to come within the words of "other status." But European Court of Human Rights did not even find it necessary to state the particular ground of distinction involved. In *Rasmussen v Denmark*,[26] the court states:

> For the purpose of Article 14, the Court accordingly finds that there was a difference of treatment as between Mr. Rasmussen and his former wife as regards the possibility of instituting proceeding to contest the former's paternity. There is no call to determine on what ground this difference was based, the list of grounds appearing in Article 14 not being exhaustive.

24 Craven, supra note 16, p. 171.
25 Anne F. Bayefsky, supra note 11, p. 6.
26 HRLR17, 1985.

Then comes the question: is there a hierarchy of forms of discrimination? Professor Hilary, in analyzing the inadequacies of the international legal account of equality and non-discrimination, pointed out that international law has developed a hierarchy of forms of discrimination.[27] In his opinion, discrimination based on race is typically regarded as considerably more serious than other forms of discrimination. This hierarchy can be seen most clearly in judicial and academic discussion of norms that have attained the status of *jus cogens* or obligations *erga omnes* (binding all states). In the *Barcelona Traction case* the International Court of Justice referred to the category of *erga omnes* obligations as including specifically "the basic human rights of the human person, including protection from slavery and racial discrimination."[28] Other forms of discrimination are seen as more easily justified, particular in the case of discrimination against women.

Although discrimination on the grounds of sex is prescribed by treaty, and the Women's Convention has over 160 parties, its lesser status in the hierarchy is indicated by the reservations made by states. More than fifty states have entered reservations to the Convention, many of which undermine the basic obligations set out in the treaty.[29] The most sweeping reservations have been made in the name of religious and cultural rights. For example, New Zealand made a reservation to provisions of the Convention with respect to the Cook Islands, "to the extent that customs governing the inheritance of certain Cook Islands chief titles may be inconsistent with Article 2(f) and 5(a)".[30]

Clearly, treaty prohibition of discrimination has been fully developed mainly in the limited contexts of race and sex. Although Article 26 of the ICCPR uses the extremely wide language of "other status", the practice of Human Rights Committee has indicated, as Professor Hilary notes, that "there is little development outside the specified grounds. International law has not seemed able yet to respond to issues of inequality on the basis of disability or sexuality."[31]

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27 Hilary Charlesworth, "Concept of Equality in International Law," Grant Huscroft & Paul Rishworth (ed) *Litigating Right*s, 2002, p. 143.
28 I.C.J Report, 1970, pp. 3, 32.
29 see http://www.untreaty.un.org
30 Hilary Charlesworth, supra note 31.
31 Hilary Charlesworth, supra note 31.

What is Meant by 'Equal Protection of the Law'?

UDHR Article 7 reads: "All are equal before the law and are entitled without any discrimination to equal protection of the law." Almost identical language is found in the first sentence of Article 26 of the ICCPR. From the beginning, the words "equal protection of the law" caused confusion.[32] During debates on the draft of Declaration, one representative described the principle of equality of rights as "a very ambiguous one," while others claimed that it was a very clear principle which had been defined for centuries. . Mr. Cassin agreed, quoting the famous phrase from Article 1 of the 1789 French Declaration of Rights: "Men are born equal and remain free and equal before the law." This was a broad definition but it was not, in his view, necessary to specify the principle in too much detail. But Belgium opposed the immediate acceptance of the principle of equality, arguing that it was necessary to define the concrete rights attached to the concept.[33]

Article 7 embodies two concepts:

(1) equality of all before the law;

(2) equal protection of the law without discrimination ;

It is unclear what the relationship is between the ideas expressed in (1) and (2). Does formulation (2) mean that there should be laws which should be applied equally, or that all are equally entitled to the protection of whatever laws existed?[34] According to the Australian representative, it meant that all individuals are entitled to equal treatment under whatever laws existed. 'Equality before the law' means that everyone is entitled to the impartial application of the law, whatever that law may be. A statement that certain rights are to be equally enjoyed by everyone irrespective of race, sex, religion, or other status merely means that only those rights are to be enjoyed equally by all. The 'equal protection' formulation, on the other hand, has a much broader application. It means that the substantive provisions of the law should apply to everyone equally. This does not mean that everyone should be treated in exactly the same way but that they should not be discriminated against, i.e. treated differently on irrational, arbitrary grounds. Despite this explanation,

32 Richard B. Lillich, "Civil Rights" in Theodor, supra note 1, p. 132.

33 Warwick Mckean supra note 3, p. 63.

34 See e.g. United Kingdom representative in the Commission, UN doc. E/ CN.4 S.R.52, cited in Warwick Mckean, supra note 3.

the drafting of the articles was not entirely felicitous and there was no compelling reason for not amalgamating them.

This lack of clarity and felicity persists under ICCPR. Professor Robertson analyzes the alternative interpretation as follows:[35]

> Broadly speaking, two quite different meanings seem possible: that the substantive provisions of the law should be the same for everyone; or that the application of the law should be equal for all without discrimination. The former interpretation would seem unreasonable; for example, in most countries women are not required to perform military service, while it is unnecessary that the law should prescribe maternity benefits for men. It would seem therefore that the meaning rather is to secure equality, without discrimination, in the application of the law, and this interpretation is borne out by the travaux preparatoires.

This view was reaffirmed by the General Comment of Human Rights Committee No. 18, which states, "the enjoyment of rights and freedoms on an equal footing, however, does not mean identical treatment in every instance.

Professor Eide offers an overview of this historical development of the concepts of equality before the law and equal protection of the laws and non-discrimination by way of the law:

> The terms "equality before the law," "equal protection of the laws" and "nondiscrimination by way of the law" express related but distinct ideas. However, they seem to have developed in that order at different stages during the 18th, 19th and 20 centuries. …The range of human rights was considerably extended from the 18thcentury notion of "natural rights" to the international system of the 20th century. The concern with equality expanded correspondingly.
>
> The scope of state legislation was rather narrow in the 18th century. Equality before the court, which interpreted and applied customary law, was therefore a priority. The other priority was to avoid arbitrariness in the use of power by the executive; hence the concern with legality. Interference by the state with the freedom of the individual, being made in

35 A. Robertson, *Human Rights and the World,* 1972, pp. 86-90, cited in Theodor, supra note 1, p. 132.

accordance with the general law which in itself, should be equally applicable to all, hence "equality before the law".

During the period of economic liberalism in the early and middle part of the 19th century, the state was not expected to interfere much with the private sphere, roughly coinciding with the domain regulated by private law. Social or material inequality was not held to be something with which the state should interfere. The private sphere was extensive, including most economic activities, where inequality became rampant. At its extreme, some even held that slavery was within the private sphere since slavery is a form of property. This, however, was very difficult to reconcile with the notion that everyone was born and should remain free. Slavery was prohibited during the course of the 19th century. To give effect to this prohibition, however, states had to extend protection to persons who might otherwise have been treated like slaves. From this and similar concerns emerged the notion that everyone should have the right to "equal protection of the laws". Since slavery had in recent centuries been based on race, its initial focus was on equal protection regardless of race….

Industrialization made social relations more complex, and the scope of legislation extended greatly. Protection had to be provided against disability resulting in from industrial accidents, against loss of income caused by illness, by old age, or by unemployment. To some extent the burden was placed on the employer. Equal protection by law thus received a more extended meaning, in addition encompassing economic and social rights ….[36]

Autonomous or Limited Character?

(A) ICCPR Article 26

ICCPR Article 26 stipulates in part that, "all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. *In this respect*, the law shall prohibit discrimination….." (emphasis added). It is suggested that the second sentence of Article 26, if it stood alone, would constitute an

36 Asbjørn Eide & Tørkel Opsahl, "Equality and None- Discrimination", written communication presented in Proceedings of the 7th International Colloquy on the European Convention on Human Rights, p. 103.

important and far reaching commitment and a general protection against discrimination. But the words "in this respect" were added at the beginning of this sentence, so that its scope is now limited to the general statement of equality and equal protection contained in the preceding sentence.[37]37 According to one of the experts on this subject,

> The second sentence as amended…makes the article an accumulation of tautologies. It now says, inter alia, that the law shall prohibit any discrimination in respect of the entitlement not to be discriminated against. It says further that the law shall guarantee to all persons equal and effective protection against discrimination in respect of their entitlement to equal protection of law. In other words, the second sentence (of Article 26) has no normative content at all…[38]

This interpretation is consistent with the approach taken in Articles 2 and 7 of the UDHR. As Robertson argues, Article 2 does not lay down a general rule of equality but only of equality in regard to the rights and freedoms set forth in the declaration. In other words, Article 2 cannot be considered as having established the right to equal treatment as a human right, but only as a principle of Declaration. Therefore inequality in anything which does not specially represent a human right under Declaration could not be considered a violation of Article 2.[39] Therefore, both Articles 2 and 7 of the UDHR and Articles 2(1) and 26 of the CCPR mandate non-discriminatory treatment only in so far as the rights set out in the respective human rights instruments are concerned. Although they guarantee one important civil right to all persons on a non-discriminatory basis, they cannot be read to constitute a general norm of non-discrimination invocable in other contexts, but rather limited to the rights considered in the instruments.

However, there is a contrary view. While Article 2(1) of the CCPR prohibits discrimination with regard to any of the rights guaranteed in the Covenant, Article 26 provides an autonomous human right. This means that Article 26 may be violated although no other right

37 Richard B. Lillich, supra note 49.
38 Schwelb, "The International Convention on the Elimination of All Forms of Racial Discrimination", 15 *Int'l & Comp Law*, 1966 p. 996, citing Theodor supra note 1, p. 357.
39 A. Robertson, supra note, 52.

in the Convention is violated or applicable. Therefore Article 26 has what is regarded as an autonomous existence. This can be seen quite well in the *Brooks* case. Mrs. Brooks was a married woman who became disabled, and was dismissed by her employer. Subsequently she received unemployment benefit until June 1980. She did not qualify for further unemployment benefits because she was not a breadwinner under the Unemployment Benefits Act. If she had been a married man, however, she would have received further payment. The Dutch Government argued, *inter alia*, that Mrs. Brooks could not invoke Article 26 in order to claim the benefit of Article 9 of the Economic, Social and Culture Convention because that convention is completely separate from the Civil and Political Convention. The negotiators of the CESCR had not included a complaints procedure because it was not intended to allow individual complaints to be submitted in connection with what was meant to be an essentially 'programmatic' treaty. The Human Rights Committee upheld the argument that the Dutch Government had in fact violated Article 26 because the applicant had been treated in a discriminatory way. The Committee stated,

> Although Art. 26 requires that legislations should prohibit discrimination, it does not of itself contain any obligation with respect to matters that may be provided for by legislation. Thus it does not, for example, require any states to enact legislation to provide for social security. However, when such legislations are adopted in the exercise of a state's sovereign power, then such legislation must comply with Art. 26 of the Covenant.

What is at issue is not whether or not social security legislation should be progressively established in the Netherlands but whether the legislation providing for social security violates the prohibition against discrimination contained in Art.26….[57]

Since the *Brooks* case, the Committee has confirmed several times that Article 26 protects against discrimination in relation to economic and social rights as well as civil and political rights. It has considered allegations concerning employment in *Bwalya v Aambia*, education in *Waldman v Canada* and children's benefits in *Oulajin & Kaiss v the Netherlands*, all of which are rights not guaranteed in the ICCPR.

The Human Right Committee makes this explicit in its General Comment No. 18 (YEAR):

> While Article 2 limits the scope of the rights to be protected against discrimination to those provided for in the Covenant, Article 26 does not specify such limitation…. In the view of Committee, Article 26 does not merely duplicate the guarantee already provided for in Article 2 but provides in itself an autonomous right.

(B) Articles 2 and 26 of the ICCPR, compared

Unlike Article 26, Article 2 (1) of the ICCPR links the prohibition of discrimination to a general obligation to implement the Convention. It states that "Each state party … undertakes to respect and to ensure to all individuals … the rights recognized in the present Convention, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other statuses." Its general and accessory nature is thus obvious. The responding provision in the ECHR is in Article 14. It is quite clear that the Human Rights Committee from the outset confirmed the meaning of Article 2 in a way analogous to Article 14 of the ECHR:

> Whenever restrictions are placed on a right guaranteed by the Covenant, this has to be done without discrimination on the ground of sex. Whether the restriction in itself would be in breach of the right regarded in isolation, is not decisive in this respect. It is the enjoyment of the rights which must be secured without discrimination.

(C) Article 14 of the ECHR

The Convention for the Protection of Human Rights and Fundamental Freedoms, of the Council of Europe, adopted in Rome in 1950, was heavily influenced by the UDHR. Since it was concluded at a much earlier stage, however, attention to equality and nondiscrimination was less prominent. It does not express for example the idea of equality before the law. It has been suggested that its authors perhaps thought it too self-evident to be worth mentioning.[40]

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40 [57] *Textbook on International Human Rights Law* (Chinese edition), edited by project group of NCHR, CUPL and FAC, 2002, p. 389.
Paul Sieghart, *The lawful rights of mankind,* 1985, p. 134.

The main provision in this area is Article 14, which provides that "the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground…."

It is clear from the wording of this article that it is a derivative equality provision: only the rights and freedoms set forth in the Convention must be secured without discrimination. The result is that no claim can be made of unequal treatment except in conjunction with one of the specified rights. This limitation is somewhat softened by the fact that it has been held not to be necessary to show an actual breach of one of the substantive rights. For example, a right may justifiably be restricted under one of the specified headings, but would amount to a breach of Article 14 if the restriction were applied in a discriminatory way. Nevertheless, there is still no stipulated right to equality outside of the enumerated areas.

The limitations of the dependent nature of Article 14 have been acknowledged in recent years, and a more general equality guarantee, in the form of Protocol 12, was opened for signature on November 4, 2000. Article 1(1) provides that "the enjoyment of any right set forth by law shall be secured without discrimination on any of the specified grounds." Article 1(2) states that "no one shall be discriminated against by any public authority on one of the specified grounds." Thus there can be no discrimination, not just in the enjoyment of Convention rights but also in the enjoyment of any right specifically granted to individuals by law. Professor Fredman goes even further in stating that, "the equality right arises even if the right has not been specially granted, but inferred from a duty imposed upon a public authority. For example, the statutory duty to provide education for school-age children, or to house unintentional homeless, while not necessary creating rights in individuals, would attract the duty not to discriminate."[41]

The Implementation of the Principle of Non-Discrimination

Enforceability of the UN Charter and the UDHR

What is the effect of these equal rights provisions of the Charter and UDHR? Some scholars have characterized them as too vague to be enforceable, and are therefore opposed to undertaking international

41 Sandra Fredman, supra note 46, p. 86.

obligations which would supersede domestic jurisdictions with explicit, enforceable provisions.

The UDHR has been universally accepted. As Professor Humphrey writes,[42] "whatever its drafters may have intended in 1948, it is now part of customary law of nations, therefore binding on all states." This assertion is supported by the many statements of international conferences referring to it, and by state practice. It has been suggested that the UDHR has the attributes of *jus cogens*. This statement goes too far if intended to assert that all the rights enumerated in the UDHR have this character. But there is little doubt that the right to equality and non-discrimination has the character of *jus cogens*, because this right appears in both UDHR and ICCPR. The *jus cogens* status is made explicit in the ICCPR provision that even when the life of a nation is threatened by a public emergency, although the parties may take steps derogating from certain obligations under the Covenant, such measures may not involve discrimination solely on the ground of race, colour, sex, language, religious or social origin.

State Obligations

Obligations under international human rights law are addressed in the first instance to states. Their obligations are threefold: to respect, to ensure and to fulfil these rights. A state complies with the obligation to "respect" the recognized rights by not violating them. To ensure was to take the requisite steps, in accordance with its constitutional process and the provisions of Covenant, to adopt such legislative or other measures which are necessary to give effect to these rights. Most Covenant rights need to be protected by specific legislative measures. the HR Committee looked towards concrete legislative measures as evidence of a state's commitment to eliminating discrimination. One member of the ICESCR commented that:

> *The ICESCR did not automatically imply that legislation was an indispensable component of a policy designed to eliminate discrimination in employment, for example. However, it was evident that, if that were the interpretation adopted by governments, the burden of proof would lie with those governments, which would therefore be expected to show that*

42 Humphrey, "The Implementation of International Human Rights Law", 24 *NYL Rev.*, 1978, p. 32, cited in Theodor, supra note 1.

the non-legislative measures that they had taken effectively ensured the elimination of discrimination and that it was not essential to take legislative measures.[43]

It would seem apparent that states are capable of eliminating most *de jure* discrimination immediately. There is certainly little justification for introducing new legislation or administrative practices that are discriminatory. The elimination of *de jure* discrimination does not involve significant economic expenditure. In the case of Zaire, which was criticized for having a law that required women to ask permission from their husbands to work outside home, it was felt that the question of economic development was irrelevant. However, it would be wrong to suggest that the elimination of discrimination will always be capable of being achieved immediately. First, it is true that certain forms of corrective action will involve considerable financial expenditure. For example, the elimination of discrimination as regards remuneration in employment or retirement age may involve employees being paid more for a longer period of working time. Secondly, where de jure discrimination may be eliminated by the creation and enforcement of relevant legislation, the existence of de facto discrimination, as evidenced through material inequalities and individual prejudice, is a matter that necessitates longer term social and educational efforts. Thirdly, the obligation under Article 2(1) of the ICESCR is progressive in nature.

To fulfil the rights means that any person whose rights are violated would have an effective remedy. Rights without remedies have little value. The ICESCR requires states to ensure that effective and enforceable remedies are available to individuals in case of discrimination .The right to claim is to be determined by competent judicial, administrative or legislative authorities. Neither the ICCPR nor the ICESCR in general prescribes what kinds of remedies are to be provided in respect of particular rights. However, the Human Rights Committee proposed offering compensation for many rights violations, including discrimination.

The "to respect and to ensure to all individuals" clause of Article 2(1) of the ICCPR implies that the states are obliged to ensure compliance by private persons with some of the Conventions' norms, or at a minimum, to adopt measures against private interference with enjoyment of the rights protected in the Conventions. In the case of

43 E/C. 12/ 1987/ SR6, p. 3.

X and Y v The Netherlands, the European Court of Human Rights addressed the duty of states to conform to the ECHR by adopting legislative measures governing certain relations between private individuals. The applicant claimed that the rights of both his daughter and himself to respect for their private life guaranteed by Article 8 of the European Convention had been infringed, and that Article 8 required that parents must be able to have recourse to remedies in the event of their children being the victims of sexual abuse. Finding that Article 8 had in fact been breached, the court stated:[44]

> The court recalls that although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the state to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life…. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves.

The international Convention on the Elimination of All Forms of Racial Discrimination requires states to bring an end to "racial discrimination by any persons or group or organization."[45]45 Article 2(e) of the Convention on the Elimination of All Forms of Discrimination Against Women targets discriminatory behaviour by "any person, organization or enterprises". As Professor Meron states:

> *Although contemporary human rights law focuses on the duty of governments to respect the human rights of individuals, human rights violations committed by one private person against another, for example the perpetration of acts of egregious discrimination, cannot be placed outside the ambit of human rights law if that law is ever to gain significant effectiveness.*[46]

Indeed, human rights obligations stated in international human rights instruments increasingly extend to private individuals and their private actions. The most obvious example concerns the relationship of terrorist acts to the human rights of individuals. Here the norms of international law have been interpreted to apply directly to the

44 91 ECHR, Ser. A, 1985.
45 See CERD Article 2(1) D.
46 Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law*, 1989, p. 162.

perpetrators of the prohibited acts. These norms thus have a dual character. They impose upon the states the obligation to attempt to prevent terrorist acts and to punish or extradite the perpetrators, and impose upon the perpetrators and non-governmental actors to respect the norms implicated.[47]

The purpose of human rights law is to protect human dignity. Since some essential human rights are often breached by private persons, the obligation of states to observe and ensure respect for human rights and to prevent violations cannot be confined to restrictions upon governmental powers, but must also extend to at least some private interference with human rights. Whether a particular human right delineated in an international human rights instrument must be respected not only by governments or other public actors but also by private or non-governmental actors depends on the content and the interpretation of the provisions, i.e. its language, purpose and object. Because the object of human rights treaties is to ensure effective protection of human dignity, due weight must be given to the principle of effectiveness in construing human rights treaties. When the human rights treaty establishes an obligation of result,[48]48 and that result may be frustrated by private action, the arguments for an interpretation reaching private action are compelling.[49]

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47 Dinstein, International Criminal Law, 20 *Israel Law Rev.* 1985, p. 206, 217, cited in Meron, supra note 68.

48 Theodor Meron classified two types of obligation: obligation of means and obligation of result. Obligation of means, also known as obligation of conducts, comes from the International Law Commission's draft articles on state responsibility. Article 20 reads, "There is a breach by a state of an international obligation requiring it to adopt a particular course of conduct when the conduct of that state is not in conformity with that required of it by that obligation."

Obligation of result leaves the state with the discretion to choose the means necessary for achieving the desired goal. It comes from the ILC's draft article on state responsibility. Article 21 reads as follows: "1. There is a breach by a state of an international obligation requiring it to achieve, by means of its own choice, a specified result if, by the conduct adopted, the state does not achieve the result required of it by that obligation. 2. When the conduct of the state has created a situation not in conformity with the result required of it by an international obligation, but the obligation allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of that state, there is a breach of the obligation only if the state also fails by its subsequent conduct to achieve the result required of it by that obligation."

49 Theodor Meron, supra note 68, p. 169.

Non-Discrimination and its Application in China

The Chinese Constitution provides some protection against discrimination. Apart from constitution, there is some limited protection in Chinese law against particular forms of discrimination. For example, the Employment Act, Education Act and Legislation on Protection of the Interests of Women and Children all contain language prohibiting discrimination.

Of course, the mere existence of rules does not ensure observance of them. It is far easier to identify particular rights than to provide effective mechanisms to enforce them. As The UN High Commissioner for Human Rights pointed out, "eliminating *de facto* decimation is much more complex and difficult task than enacting laws which recognize equal rights to all."[50]

This aptly characterizes much of Chinese practice. In 1995, the Standing Committee of the Beijing People's Congress enacted a regulation concerning non-Beijing residents applying for jobs and doing business in the city, with the intent of preventing people other than Beijing residents from engaging in certain types of business and accepting certain types of employment in Beijing. In 1999, the Beijing Labour Bureau promulgated the Occupational and Professional Scope on the Allowance and Restrictions of Beijing Residents Without Formal Residence Permits (which went into effect starting in 2000).

The number of restricted professions increased from 34 to 103, bringing to 108 the number of jobs for which it is prohibited to employ non-Beijing staff. Such regulations carry an obvious discriminatory character, based on residential registration, and thus result in inequality. That Article 26 of the CCPR uses the words "such as" and "other status" implies that any criterion used to impose disadvantage on certain individuals without justification can be a prohibited ground.

The thorough-going violations of the right to equality and non-discrimination currently permitted under Chinese law are exemplified in the different treatment residents of various provinces receive in the university admissions process. In general, the entrance examination for acceptance to university is regarded as the most equal and fair competitive system conducted by the Ministry of Education. For the examinees and their parents, it is extremely important as their lives

50 http://www.aspeninst.org

for it can change the students fate. However, the minimum score required for examinees resident Beijing to be admitted the university is more than 100 points lower than those from other places. That is to say, an examinee from Beijing who scored456 points on the 2001 examinations was qualified to be admitted to the top university in the country, while an examinee in, for example, Shandong province who scored 539 would fail to be admitted to any university.

Article 26 of the UDHR reads, "higher education shall be equally accessible to all on the basis of merit," but "merit" is not defined. However, even a limited definition of merit would at least preclude admission policies based on wealth, social standing or similar factors, including the residential registration system peculiar to China. A similar article is found in the CESR, which China has also ratified, and which is thus applicable in China. Article 13(2) states, "higher education shall be made equally accessible to all, on the basis of capacity." "Capacity," in my opinion, should be interpreted as admission on the basis of tests and scores.

The right to equality, according to Professor Richard, also means equality of opportunity. Equality of opportunity implies that all people should be treated as individuals in the sense of having the opportunity to compete on equal terms for the goods which society has to offer.[51] Inequality of opportunity is often the result of inequalities in the economic situation of various groups in society. It has been suggested in the Human Rights Committee that states are expected to undertake programs to combat the discriminatory attitudes and prejudices of domestic society. In particular, action should be directed toward the elimination of stereotypes, whether racial, religious or otherwise.[52]

Of course, this does not exclude affirmative action policies, i.e. a program of positive measures taken by states to improve the status of a disadvantaged group. The purpose of affirmative action is to achieve substantial equality. For example, Chinese education policy admits minorities to universities on the basis of grades and examination scores below those of Han (Chinese) nationality. However, in the present case, Beijing residents without formal residence permits are neither a minority nor a disadvantaged group. On the contrary, Beijing residents have access to privileged educational resources

51 Richard B. Lillich, supra note 49, p. 73.
52 E/C. 12/ 1990 /SR. 18 p. 8.

and more financial support. This differentiation policy thus has no reasonable and objective purpose, and constitutes discrimination against all examinees resident outside of Beijing.

The situation is reminiscent of Judge Tanaka's dissenting opinion in the South West Africa case.[53] In his conclusion he states:

> The principle of equality does not mean absolute equality, but recognizes relative equality, namely different treatment proportionate to concrete individual circumstances. Different treatment must not be given arbitrarily; it requires reasonableness, or must be in conformity with justice, as in the treatment of minorities, different treatment of the sex regarding public convenience, etc. In these cases the differentiation is aimed at the protection of those concerned, and it is not detrimental and therefore against their will.

It is encouraging that three examinees from Qingdao recently filed a case with the Supreme Court against the Ministry of Education, claiming that the policy violated their equal right to education. Chinese Education Law Article 36 reads, "people in education have the equal rights provided by law with respect to admission, promotion and employment etc." The Chinese Constitution stipulates that, "all citizens of People's Republic of China are equal before the law" and "all nationalities in People's Republic of China are equal. Discrimination against …any nationality is prohibited."[54] The plaintiffs in this case may also argue that the principle of non-discrimination and equality has become customary international law and has *jus cogens* status in almost all of the international human rights covenants (including the ICESR, to which China is a state party).[55]

It should be noted that the introduction of legislation to ensure equality and nondiscrimination can only be seen as formal equality. *De facto* equality can only be achieved through enforcement of the law. The Chinese Constitution and some other domestic legislation are important components of any strategy to eliminate discrimination. However, experience elsewhere demonstrates that such legislation

53 I.C.J Report 1966, p. 4.

54 Chinese Constitution Article 44.

55 13 August, 2001, the Chinese Supreme Court promulgated a judicial interpretation (called an 'Instruction') on how to apply law in cases where fundamental rights provided in the Constitution are violated. Before that the Chinese Constitution was not justiciable. This instruction is a landmark, opening the way for the remedy of infringement of rights provided in the Constitution through judicial process.

is far from enough. In particular, discrimination by a government in its administrative decisionmaking cannot be challenged in judicial review proceedings. Moreover, at least until recently, in Chinese judicial practice, the constitution was not evoked in any claim action.

Consequently, a person claiming to be discriminated against could not in practice file an application based on the infringement of constitutional rights. This deficiency makes the notion of equality weaker and more frustrating. A diversified approach will be necessary to ensure real rather than merely formal equality, including a comprehensive antidiscrimination law, and the establishment of a Commission with the competence to deal with violations of human rights.

Effective judicial process and national institutions are generally regarded as a necessary component of anti-discrimination and human rights law. Although states remain the central addressee in human rights law, most problems of discrimination occur in the private sector, in housing, employment, education and so on. Effective implementation of international human rights standards is ultimately a national issue.[56]

Domestic anti-discrimination law serves the following functions: to provide a formal remedy for individuals who have suffered direct discrimination at the hands of the state, and if horizontal remedies are to be provided, by an individual; to promote preventive measures through legislation, in order to diminish the incidence of racial and sex discrimination; to use the law as a vehicle of social engineering in order to counteract not only direct discrimination but also the social, cultural, political and other factors which may underpin indirect discrimination and racial disadvantage. Therefore such legislation is designed to:

(1) Provide an unequivocal declaration of public policy;
(2) Provide protection and redress to minority groups;
(3) Reduce prejudice by discouraging the behaviour in which it finds expression;
(4) Reduce systematic discrimination by changing policies and practices which result in indirect discrimination;
(5) Establish standards by which public and private behaviour may be measured and improved;

56 B. Burdekin and A. Gallacher, "The United Nations and National Human Rights Institutions", *Human Rights* / Droits de l'Homme No.2, 1998, pp. 21-26.

In addition to passing human rights related legislation, many countries have established human rights institutions. National human rights institutions are important for improving the implementation of national human rights law, and also play a role in increasing the impact of international human rights covenants, in particular to increase their protection of disadvantaged and vulnerable groups. These institutions provide information and promote awareness and education about human rights, advise the government on human rights affairs and investigations of alleged violations.

Conclusion

The legal principles of equality and non-discrimination are at the core of international human rights treaties and declarations. However, the progress achieved in the development of international covenants against discrimination does not mean that this system as a whole is now fully satisfactory. The advancement of standards prohibiting discrimination of persons belonging to various vulnerable groups is uneven. In some cases the prohibition is established by conventions, in others by non-binding declarations. There are also vulnerable groups, such as indigenous people or people with HIV/AIDS, who are not protected by any specific instruments. The effectiveness of even the most advanced protective structures, based on international conventions, is diminished by the fact that they are not ratified by all states, and that upon ratification or accession many states parties have stipulated reservations that in many cases significantly limit the scope of the convention. Many more countries have ratified the conventions but have not put in place any enforcement mechanisms at the national level. In light of these limitations a call for further development of anti-discriminatory law would seem to be fully justified. It is important for states to implement their international obligation by adopting legislative and other measures to give effect to the nondiscrimination rights, especially to provide individual alleging discrimination an adequate effective and readily accessible machinery to settle these complaints. A big step forward in eliminating discrimination can only be achieved if a collective effort is made both at the international level and by governments.

Bibliography

Alfredsson, Gudmundur, and Eide, Asbjørn (eds), *The Universal Declaration of Human Rights- A Common Standard of Achievement*, 1999.

Bayefsky, Anne F., "The Principle of Equality or Non-Discrimination in International Law", *Human Rights Law Quarterly* (1999), Vol. 1: Craven, Matthew C.R., *The International Covenant on Economic, Social and Cultural Rights*, 1995.

Campbell, Tom, David Goldberg, Sheila Mclean and Tom Mullen (eds), *Human Rights-From Rhetoric to Reality*, 1986.

Cassese, Antonio, *International Law in a Divided Word*, 1986.

Eide, Asbjørn and Tørkel Opsahl, *Equality and Non-Discrimination*, Norwegian Institute of Human Rights, Publication No.1, 1990.

Felice, William F., "The UN Committee on the Elimination of All Forms of Racial Discrimination: Race, Economic and Social Rights," *24 Human Rights Quarterly* (2002).

Fredman, Sandra, Discrimination Law, 2002.

Hucker, John, "Anti-discrimination Law in Canada: Human Rights Commission and the Search for Equality", *19 Human Rights Quarterly* (1997).

LIU Hainian, LI Lin, and Morten Kjaerum (eds), Human Rights and Administration of Justice (Chinese version), 1999.

Loenen, Titia & Peter R. Rodrigues (eds), *Non-Discrimination Law: Comparative Perspectives*, 1999.

McColgan, Aileen, *Discrimination Law: Text, Cases and Materials*, 2000.

Mckean, Warwick, *Equality and Discrimination Under International Law*, 1983.

Meron, Theodor, *Human Rights and Humanitarian Norms as Customary Law*, 1989.

-----, *Human Rights in International Law: Legal and Policy Issues*, 1984.

Townshend-Smith, Richard J., *Discrimination Law: Text, Cases and Material*, 1998.

WANG Jiafu, LIU Hainian, LI Lin (eds), *Human Rights and the 21st century* (Chinese version), 2000.

http://www.unchr.ch

http://www.rightsinternational.org

http://www.aspenist.org

JUSTICE THEORIES AND REPARATION FOR VICTIMS OF INTERNATIONAL CRIMES

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I. INTRODUCTION

The idea of justice, in all its dimensions, is one of the most ancient and complex notions that surround humanity. Crimes, similarly, have accompanied mankind from the beginning of times. Criminal conduct has met with different responses, which may take one form or another, and which in turn are often said to fit within the concept of "justice". Theories of justice have emerged as rationales behind responses to mass crimes, each bearing consequences on the architecture of legal systems.

In international criminal law, the guiding notion of justice (as in "international criminal justice") has lived through a refinement process along the years of its development. At its inception, the idea of justice involved the notion of accountability and punishment of the offender. Justice also encompasses the notion of equality of victims, which is the theme of the present study. More recently, international criminal law discourse embraces the rhetoric of "justice for victims".[1]

Dealing with the aftermath of conflicts and mass victimisation imposes very hard questions regarding the kind of response one ought to give to these crimes. Should international crimes be countered with retribution, in the form of trial and punishment of the offender(s), restoration and reconciliation with the victims and affected communities, a combination of both, or a completely different system altogether? Are punishment and victim redress mutually exclusive?[2]

1 See e.g. *Statement of the ICC Deputy Prosecutor in the opening of the Prosecutor's case in Katanga and Chui*, "ICC Cases and Opportunity for Communities in Ituri to Come Together and Move Forward", ICC-OTP-20080627-PR332), 27 June 2008.

2 These questions are crucial to the development of international criminal law and are the guiding trail of our research in this study. The present chapter provides a few

The present study has as its backdrop the principle of equality of victims and non-discrimination. In examining how justice theories have shaped international criminal law and justice, the equality of victims is a guiding principle, in the sense that there should be no discrimination of victims of international crimes for purposes of the right to reparation.

This chapter examines how justice theories – retributive and restorative/reparative justice theories – have provided some bases for the architecture of international criminal law and justice.[3] The aim of this chapter is to overview justice theories relevant to the study of international criminal law, from its inception to its contemporary application, and to examine the theoretical dichotomy of punishment and reparation, starting from the premise of the equality of victims. In this prism, this chapter first overviews two main justice theories which bear some relevance to the shaping of international criminal law, from its inception to its contemporary form. Then, we turn to the examination of the alignment of international criminal law, at its inception, with punishment and retribution, to then examine the development of reparations in other fields of international law (notably in international human rights law and international humanitarian law), alongside the development of international criminal law. Finally, theories of punishment and reparation are juxtaposed in international criminal law.

II. A THEORETICAL INQUIRY INTO PUNISHMENT AND REPARATION: AN OVERVIEW OF RETRIBUTIVE AND RESTORATIVE JUSTICE THEORIES

In order to understand how modern international criminal law is shaped by different justice theories, one needs to first look into the justice theories themselves.

As widely known, the aftermath of international crimes can be dealt with in different forms of post-conflict justice, for example,

pieces of the analysis of these questions.

3 The purpose of this chapter is not to address a thorough analysis of different theories of justice, but rather to trace the genesis and evolution of international criminal justice through the prism of how principles of different theories of justice shape international criminal justice.

with criminal trials or truth and reconciliation processes.[4] Differently from other responses to mass atrocities, punishment and retributive justice theory have provided an important model for international criminal justice.

To respond to criminal conduct with criminal prosecution represents embracing a commitment to the rule of law and the recognition that alleged perpetrators should be held accountable for their crimes.[5] International criminal trials represent an opportunity to seek the truth and may provide deterrence.[6] Furthermore, punishment and international criminal trials may also be seen in the light of its expressive roles.[7]

1. Crime and punishment

There are few different rationales that underpin the idea of punishment as a response to criminal conduct. It is believed that punishment may deter future criminal conduct. Members of a given society, knowing that a certain conduct entails a given punishment might abstain from pursuing that conduct. This idea finds support in the writings of authors throughout the centuries, among whom Plato, who stated that "…he who desires to inflict rational punishment does not retaliate for a past wrong which cannot be undone; he has regard to the future, and is desirous that the man who is punished,

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4 This important question goes beyond the scope of our Chapter. See generally on this topic, Darryl Robinson, "Serving the Interests of Justice: Amnesties, Truth Commissions, and the International Criminal Court", 14 *European Journal of International* Law 3, (2003); Charles Villa-Vicencio, "Why Perpetrators Should Not Always Be Prosecuted: Where the International Criminal Court and Truth Commissions Meet", 49 *Emory Law Journal* (2000) 205; Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (1998).

5 Martha Minow, Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence (1998), p. 25.

6 But see Brianne N. McGonigle, "Two for the Price of One: Attempts by the Extraordinary Chambers in the Courts of Cambodia to Combine Retributive and Retorative Justice Principles", 22 *Leiden Journal of International Law* (2009), p. 129, who claims that there is no empirical evidence that criminal trials have a deterrent effect.

7 See generally in this regard, Anthony Duff, "Authority and Responsibility in International Criminal Law" in *The Philosophy of International Law*, Samantha Besson and John Tasioulas (eds.), (Oxford University Press, Oxford, 2010); Bill Wringe, "Why Punish War Crimes? Victor's Justice and Expressive Justifications of Punishment", 25 *Law and Philosophy* 159 (2006).

may be deterred from doing wrong again. He punishes for the sake of prevention."[8]As such, inflicting punishment in relation to a given criminal conduct can be regarded as a way to prevent future crimes.

In the same vein, a theoretical justification for punishment as a response to criminal conduct is the rehabilitation of the criminal; the proponents of this justification focus on punishment for the *criminal* as opposed to the *crime*.[9] The goal of punishment, so the theory goes, is to effect a change in the behaviour of the criminal so as to decrease the likelihood of the commission of a crime in the future.[10] In this sense, it is based on the premise that punishment can change behaviour. For Hart, "by announcing certain standards of behavior and attaching penalties for deviating … [leaves] individuals to choose. This is a method of social control which maximizes individual freedom within the framework of the law."[11]

Another theoretical rationalization of punishment is retribution.[12] Responding to international crimes with criminal trials and punishment follows the model of retributive justice theory. In classical retributive justice theory, a crime is responded to by punishing the perpetrator in a proportionate way to the crime committed. The focus in this kind of response is not on the individual victim(s); the crime is seen to have been committed against the State as a whole. A crime is first and foremost a violation of a law, a legal norm enacted by the State. The affected community and the victim are represented by the State.

Retributive theorists' view of punishment is that it produces a proper response to crime because it "cancels out" the crime, restoring the proper balance in society.[13] To Kant, punishment

> "can never be inflicted merely as a means to promote some other good for the criminal himself or for civil society. It must always be inflicted upon him only *because he has committed*

8 Plato, "Protagoras", in *Works of* Plato 193, 211-12 (I. Edman ed. 1956).
9 Farooq Hassan, "The Theoretical Basis of Punishment in International Criminal Law", 15 *Case Western Reserve Journal of International Law* 40, p. 49.
10 Cf. George W. Patton, *Textbook of Jurisprudence*, 1972, p. 360.
11 H.L.A. Hart, *Punihsment and Responsibility* 23 (Clarendon Press, Oxford, 1968).
12 Cf. Anthony Platt, "The Meaning of Punishment", 2 *Issues in Criminology* 79 (1966).
13 David Dolinko, "Punishment" in *The Oxford Handbook of Philosophy of Criminal Law*, Oxford University Press, 2011, pp. 403-440, at p. 406.

> *a crime.* For a human being can never be treated merely as a means to the purposes of another or be put among the objects of rights to things: his innate personality protects him from this, even though he can be condemned to lose his civil personality."[14]

In this light, the focus of retributive justice theory is on finding guilt and imposing blame. The offender is seen as a danger to society as a whole, and needs to be punished once the guilt is found, and is to be taken out of society. This kind of justice is based on the premise that punishment is an effective response to a crime.

Retribution theory has a long history. Retributive justice is illustrated in the *lex talioni*, where reciprocity should equate the crime committed. In ancient history, the Code of Hamurabi recognized retributive justice. Retribution has been a form of justice for centuries ever since. As a consequence of the centralization of the State, the focus was put on the punishment of the offender and retribution, which brought about a proliferation of criminal codes and penalties.[15] The focus on retribution, and the marginalised role of victims in the administration of justice lasted until the end of the eighteenth century, when victims started playing a more active role in the administration of justice.[16]

2. Victims, reparation and restorative justice theory

Restorative justice has been known to many civilizations. Since the Roman law period, there were possibilities for remedies for a wrongful conduct.[17] The shift to retribution as a way to respond to criminal conduct seems to have occurred between the 12th and 13th centuries, when a wrongful conduct was committed against the State and by way of retribution, it was protecting the interests of society as a whole and not of individual victims.

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14 Immanuel Kant, *The Metaphysics of Morals*, Cambridge University Press, 1996, p. 105 (translation Mary Gregor).

15 Ilaria Bottigliero, *Redress for Victims of Crimes under International Law*, Nijhoff, Leiden, 2004, p. 24.

16 Lucia Zedner, "England", in *Reparation in Criminal Law: International Perspectives*, Albin Eser and Susanne Walther (eds.), Iuscrim, Max-Planck Inst. Für Ausländisches und International Strafrecht (1996), Vol. 1, 109-227.

17 Cf. Arlette Lebigre, *Quelques Aspects de la Responsabilité Pénale en Droit Romain Classique*, Paris, Presses Universitaires de France, 1967.

Restorative justice, also sometimes called "reparative justice"[18], to the contrary of retributive justice, focuses on victims' needs and seeks to provide forms of redress to the latter. It is concerned with bringing victims and offenders together. The perpetrator is encouraged to make amends and repair the harm caused to the victim. Thus, restorative justice has a strong forward-looking approach.

John Braithwaite, a leading author in restorative justice theory, has defined restorative justice as:

> "a process where all stakeholders affected by an injustice have an opportunity to discuss how they have been affected by the injustice and to decide what should be done to repair the harm. With crime, restorative justice is about the idea that because crime hurts, justice should heal. It follows that conversations with those who have been hurt and with those who have afflicted the harm must be central to the process".[19]

As far as reparations are concerned, it has been noted that "[restorative justice] places particular emphasis on the principles and aims of human dignity, strong relationships and morality [which] allows a more holistic approach to reparations", to the extent that "restorative justice provides a persuasive theoretical rationale for reparations".[20]

An important concern of restorative justice is whether the criminal justice process addresses the full complexity of the criminal conduct. Under this theory, the criminal conduct is not a wrong committed against some abstract community but instead it should be dealt with as a dispute between the offender and the victim.[21]

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18 See e.g. Conor McCarthy, "Reparations under the Rome Statute of the International Criminal Court and Reparative Justice Theory", 3 *International Journal of Transitional Justice* 2009.

19 John Braithwaite, "Restorative Justice and De-Professionalization" 13 *The Good Society* 1 (2004), 28–31

20 Antonio Buti, "The Notion of Reparations as a Restorative Justice Measure", in One Country, Two Systems, Three Legal Orders – Perspectives of Evolution: Essays on Macau's Autonomy after the Resumption of Sovereignty by China, (Jorge Costa Oliveira & Paulo Cardinal, (eds.), Springer, p. 198.

21 Conor McCarthy, "Reparations under the Rome Statute of the International Criminal Court and Reparative Justice Theory", 3 *International Journal of Transitional Justice* 2009, p. 253.

III. THE GENESIS OF INTERNATIONAL CRIMINAL LAW: THE SHIFT FROM STATE RESPONSIBILITY TO INDIVIDUAL ACCOUNTABILITY

To understand the theoretical framework that guided the development of the doctrinal foundations of international criminal law from its early existence, one needs to place the development of international criminal law within the broader context of international law at the time of its inception.

International criminal law developed as a response to the atrocities committed during the Second World War. In the aftermath of the war, it became clear that the international crimes committed during the war needed to be accounted for and that the punishment of individual perpetrators was crucial for the reestablishment of the international legal order. At the wake of the end of the Second World War, the framework for allocating responsibility in the international legal order was focused on the State and the establishment of international criminal law represented a shift from a State-centred approach.[22] For many centuries, international law was concerned solely with inter-State matters, and the idea of individuals being a subject of international law, standing trial and being inflicted punishment would have been inconceivable within the traditional framework of international law.[23]

In this sense, it can be said that the mere advent of international criminal law represents a turning point in the conceptual framework of international law. This paradigm is well illustrated by the famous statement of the International Military Tribunal at Nuremberg whereby "crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[24] This statement also demonstrates that, from its

22 See generally, Hersch Lauterpacht, "The Law of Nations and the Punishment of War Crimes", 21 *British Yearbook of International Law* 58 (1944).

23 See e.g. the edition of 1912 of the L. Oppenheim treatsy on international law, stating that "…the Law of Nations is a law between States, and … individuals cannot be subjects of this law", L. Oppenheim, *International Law*, § 292 (2nd ed. 1912). The later edition was modified to take into account the growing position of individuals as subjects of international law.

24 *Trial of Major War Criminals before the International Military Tribunal*, Nuremberg, 14 November 1945-1 October 1946 (Nuremberg: International Military Tribunal, 1947), p. 223.

inception, international criminal law has focused on the trial and punishment of perpetrators, as a means to enforce international law.

It is perceived that individual accountability and punishment informed the formative stages of international criminal law. This can be explained by the need to hold individual perpetrators accountable for their crimes, thus making the shift from State responsibility to individual accountability, which marks the development of international criminal law alongside the regime of State responsibility. This shift from a State-based framework was not however complete in dealing with the aftermath of conflicts, since while individual perpetrators were held criminally accountable, civil redress for victims of the crimes perpetrated during the War was left to be resolved by inter-State agreements.[25]

Holding individual perpetrators accountable for international crimes, as opposed to the States for which they acted, has put the focus on the offender, while moving away from victims and civil redress. International criminal law at its inception was concerned with addressing the limitations that the system based on State responsibility afforded. The idea of "justice for victims" was not present at the developmental stage of international criminal law and, as we shall see in later chapters, only gained relevance in the international criminal justice discourse recently.

As such, international criminal law, in its first phase, solidified the foundation of a system based on individual accountability and punishment, as opposed to collective responsibility. This dichotomy was explained by Hans Kelsen in the following terms:

> "the difference between the punishment provided by national law and the specific sanctions of international law… consists of the fact that punishment in criminal law constitutes individual responsibility, whereas the specific sanctions of international law constitute collective responsibility."[26]

The reliance on the accountability of individual perpetrators, as opposed to a framework that included accountability and victim redress, in the shaping of the architecture of international criminal

25 Cf. Pierre d'Argent, Les Réparations de Guerre en Droit International Public (Paris : LGDJ, 2002).

26 Hans Kelsen, "Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals", 31 *California Law Review* 530 (1943).

law at its formative stages can be understood in the context of the position of the individual as a subject of international law. The battle of that time was to be able to put on trial the individuals responsible for the atrocities of the Second World War.[27]

Hersch Lauterpacht warned of the risks of continuing to hold a purely State-centred approach: "[t]here is little hope for international law if an individual, acting as an organ of the state, can in violation of international law, effectively shelter behind the abstract and artificial notion of the state."[28]

The idea that individuals should not be shielded by the State's responsibility for certain acts, which were ultimately performed by individuals, was the necessary rationale for the shift between State responsibility and individuals' accountability for international crimes. Thus, the focus on retribution and punishment of the perpetrator, in contrast with reparations, at this early stage of international criminal law can be explained by the idea that "[individual] punishment, in contrast to [interstate] reparation, satisfies … the need for guarantees against future infractions of the law."[29]

The genesis of international criminal law in the XXth century is marked by a preoccupation to overcome the limitations of State responsibility in order to form a system in which individuals could be held accountable for international crimes they personally committed.[30] In this context, it is easy to understand that international criminal law, at its formative stage, had a so-called "up-hill battle", and the interests of those harmed by the crimes for which individuals were to be prosecuted at an international tribunal were not addressed. Reparations for victims of armed conflicts were

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27 Even prior to the Second World War, John Westlake had stated that "the same tone of thought will again be evil if it allows us to forget that … the action of our State is that of ourselves", L. Oppenheim (ed.), *The Collected Papers of John Westlake on Public International Law*, Cambridge University Press, 1914, p. 411.

28 Hersch Lauterpacht, "Règles générales du droit de la paix", 62 *Recueil des Cours* (1937) 95, p. 351 (translation).

29 Hersch Lauterpacht, "Règles générales du droit de la paix", 62 *Recueil des Cours* (1937) 95, p. 352, (translation).

30 See Conor McCarthy, "Victim Redress and International Criminal Justice: Competing Paradigms, or Compatible Forms of Justice?", *Journal of International Criminal Justice* 10 (2012), p. 359, where the author concludes that "international criminal law was conceptualized as a system of law little concerned with victims but rather one which was concerned with perpetrators and the enforcement of the rules of international law itself."

thus left for national courts or, within the international legal system, to be resolved through their State by lump-sum agreements.[31]

As it can be seen, the dogma of State sovereignty remained as far as reparations for victims were concerned: if there was any claim for reparation from an individual victim, it was for the sovereign State to "represent" their interests.

In sum, the State was pushed aside in international criminal law so that individuals could be prosecuted on their personal capacity. This was a passive role for individuals in international law: they were the object of prosecutions; at this point in history (in the wake of the Second World War and the development of international criminal law in the XXth century) individuals could not yet play an active role, separate from its State of origin, to claim reparations for himself/herself in international law.

IV. PAVING THE WAY INTO REPARATION FOR MASS CRIMES: OVERVIEW OF VICTIMS' RIGHT TO REPARATION IN OTHER FIELDS OF INTERNATIONAL LAW

Alongside the development and solidification of international criminal law procedures, victim redress mechanisms have developed in other fields of international law. In order to better understand the shift from a purely retribution-oriented international criminal justice to a system which has a more active role for victims,[32] including the right to seek reparations within the international criminal proceedings, it is useful to review the wider framework[33] and the development of legal redress for victims of armed conflict specifically in two areas closely linked to international criminal law (albeit relating to the duty of reparation emanating from a State rather than an individual): international human rights law and international

31 Cf. Richard Lillich *et al.*, *International Claims: Their Settlement by Lump-Sum Agreement*, vol. I University Press of Virginia, 1975.

32 The question of the inclusion of reparation within international criminal law will be reviewed in a later chapter of this study.

33 Theoretical questions pertain to the genesis of the right to reparation under the different fields of international law and the purpose of reparation to the victims. Normative questions relate to how civil redress should develop in areas of international law that pertain to the regulation of the conduct of individuals (international humanitarian law) or the unlawful consequences thereof (international criminal law). Practical questions relate to the enforcement of the right to reparation.

humanitarian law. In this prism, we will first dwell upon the duty of reparations under international law, and then briefly overview the right of reparation in fields of international law closely linked with international criminal law, to then finally engage in a theoretical discussion of the relationship between theories of punishment and reparation.

1. General remarks: the duty of reparation in international law

The duty of reparation for an internationally wrongful act is a well-established principle of international law.[34] While much has been written on the right of States to obtain reparation,[35] the focus of our study rests on victims of international crimes, thus on reparation to individuals.

The principle underlying the duty to make reparation is simple: every breach of an international obligation carries with it a duty to repair the harm caused by the breach.[36] Such right has been confirmed in a number of international instruments and jurisprudence of international and regional courts.[37] It has been crystallized in a passage by the Permanent Court of International Justice, in the *Charzów Factory* Judgment, wherein it stated that:

> "The essential principle contained in the actual notion of an illegal act . . . is that reparation must, so far as possible, wipe-out all the consequences of the illegal act and reestablish the

34 See e.g. on the duty to reparation for wrongful conduct under international law, P. Fauchille, *Traité de Droit international public*, vol. I-Part I, Paris, Libr. A. Rousseau Éd., 1922, p. 515; L. Reitzer, *La réparation comme conséquence de l'acte illicite en Droit international*, Paris, Libr. Rec. Sirey, 1938, p. 30 ; J. Personnaz, *La réparation du préjudice en Droit international public*, Paris, Libr. Rec. Sirey, 1939, pp. 53-60; H. Accioly, "Principes généraux de la responsabilité internationale d'après la doctrine et la jurisprudence", 96 *Recueil des Cours de l'Académie de Droit International de La Haye* (1953) p. 415.

35 See e.g., C. Dominicé, *Observations sur les droits de l'Etat victime d'un fait internationalement illicite*, dans : Droit international 2, par C. Dominicé. Paris : Pedone, 1982, p. 1-70 ; F.V. García-Amador, *The changing law of international claims*, New York [etc.]: Oceana, 1984. F.V. García Amador, *Principios de derecho internacional que rigen la responsabilidad: análisis crítico de la concepción tradicional,* Madrid: Escuela de funcionarios internacionales, 1963.

36 See Dinah Shelton, "Righting Wrongs: Reparations in the Articles on State Responsibility", 96 *American Journal of International Law*, p. 835.

37 This study examines the question of reparation from the perspective of the victims' right to obtain reparation and not the State or the offender's duty to provide reparation.

> situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law"[38].

This traditional conception of reparation has been applied in the jurisprudence of many international courts and tribunals such as the International Court of Justice,[39] other international courts,[40] including regional human rights courts and other human rights bodies,[41] arbitral tribunals[42] and claims tribunals and commissions.[43]

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38 *Factory at Chorzów*, Jurisdiction, Judgment No. 8, 1927, *P.C.I.J.*, Series A, no. 17, p. 29.

39 Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949, p. 184; Gabčíkovo-Nagymaros Project (Hungary/ Slovakia), Judgment, I.C.J. Reports 1997, p. 81, para. 152; Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, I.C.J. Reports 2004 (I), p. 59, para. 119; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I), p. 198, para. 152; Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005, p. 257, para. 259; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007, pp. 232-233, para. 460; Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment of 20 April 2010, p. 77, paras. 273-274; Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Judgment of 30 November 2010, p. 48, para. 161.

40 See, for example, *M/V "Saiga" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea)*, Judgment, I.T.L.O.S. Reports 1999, para. 170.

41 See, for example, *Velásquez-Rodríguez* v. *Honduras*, Merits, Judgment of 29 July 1988, I.A.Ct.H.R., Series C, No. 4, para. 174; see also *Papamichalopoulos and Others* v. *Greece*, Application No. 14556/89, Judgment of 31 October 1995, E.Ct.H.R., Series A, No. 330-B, para. 36.

42 See, for example, *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc*. v. *Argentine Republic*, Case No. ARB/02/1, Award of 25 July 2007, I.C.S.I.D., available at <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC786_En&caseId=C208> (accessed 15 February 2012), para. 31; *ADC Affiliate Limited and ADC & ADMC Management Limited* v. *Republic of Hungary*, Case No. ARB/03/16, Award of 2 October 2006, I.C.S.I.D., para. 484.

43 See, for example, Final Award, *Eritrea's Damages Claims Between the State of Eritrea and the Federal Democratic Republic of Ethiopia*, 17 August 2009, Eritrea-Ethiopia Claims Commission, available at <http://www.pca-cpa.org/upload/files/

The principle of a State's duty of reparation has also been explicitly recognized in Article 31 of the 2001 International Law Commission Articles, which reads as follows: "[t]he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act".[44]

The State's duty of reparation for a wrongful act has also been explained in numerous works of learned jurists. As Anzilotti posed it : "La violation de l'ordre juridique international commise par un État soumis à cet ordre donne ainsi naissance à un devoir de réparation, qui consiste en général dans le rétablissement de l'ordre juridique troublé."[45]

In a similar vein, Fauchille explained that:

> "A quelles règles est soumise la responsabilité juridique internationale des Etats? Les règles auxquelles cette responsabilité est assujettie se résument dans l'idée de droit naturel que tout fait qui cause à autrui un dommage oblige celui par la faute duquel il est arrivé à le réparer. Cette idée est appliquée en droit privé dans les rapports des individus ; il n'y a pas de motifs pour ne pas l'appliquer aussi dans les relations que des collectivités ont entre elles-mêmes au avec des individus. Pour qu'il y ait lieu à la responsabilité juridique à la charge d'un Etat, il faut dès lors : 1o. qu'un dommage ait été causé par lui ; 2o. que ce dommage soit le résultat d'une action illicite de sa part ; 3o. qu'il lui soit imputable."[46]

The International Court of Justice clarified in the *Avena and Other Mexican Nationals* case that "[w]hat constitutes 'reparation in an adequate form' clearly varies depending upon the concrete

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ER%20Final%20Damages%20Award%20complete.pdf> (accessed 12 January 2012), pp. 7-8, para. 24; Final Award, Ethiopia's Damages Claims Between the State of Eritrea and the Federal Democratic Republic of Ethiopia, 17 August 2009, Eritrea-Ethiopia Claims Commission, available at <http://www.pca-cpa.org/upload/files/ET%20Final%20Damages%20Award%20complete.pdf> (accessed 12 January 2012), p. 8, para. 24; *Amoco International Finance Corporation* v. *The Islamic Republic of Iran et al.*, Partial Award No. 310-56-3 of 14 July 1987, 15 Iran-United States Claims Tribunal Reports 189, paras. 189-206.

44 Paragraph 2 of Article 31 defines "injury" as: "any damage, whether material or moral, caused by the internationally wrongful act of a State".

45 Dionisio Anzilotti, "La responsabilité internationale des États a raison des dommages soufferts par des étrangers", *Revue générale de droit international public*, p. 13.

46 Paul Fauchille, *Traité de Droit International Public*, Tome I, Rousseau & Cie. (eds.), p. 515.

circumstances surrounding each case and the precise nature and scope of the injury, since the question has to be examined from the viewpoint of what is the 'reparation in an adequate form' that corresponds to the injury."[47]

2. The purpose of reparations

It goes without saying that reparations may serve varied purposes and thus be based on different theoretical underpinnings.[48] A common purpose of reparations is that of remedial justice, in order to correct the wrong done and rectify injustice by restoring the *status quo ante*. As Professor Dinah Shelton puts it, this rationale "appears to be the basis for most international decisions on reparations, including the *Chorzów Factory* case".[49]

Reparations could also serve as a form of retribution, to punish the offender and deter the wrong conduct.[50] Under this theoretical explanation, the form and extent of reparations could bring about a deterrent factor in future wrongdoing. In this sense, reparations can include a form of punitive damages and in a way it could bridge criminal (sanctions) and civil (restoration) dimensions. Another purpose of reparation speaks to restoration of victims and affected communities. The goal in this perspective would be to reconcile and restore, as well as induce positive future behaviour.[51]

Some aspects of this overview of theories and purposes of reparations are worth emphasizing. First, it may be noted that the system of reparations could be different depending on its context,

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47 *Avena and Other Mexican Nationals (Mexico* v. *United States of America)*, Judgment, I.C.J. Reports 2004 (I), p. 59, para. 119; see also *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay)*, Judgment of 20 April 2010, p. 77, para. 273.

48 This Chapter is not aimed at examining or discussing the purpose of reparations specifically in international criminal law. This topic will be the subject of the following chapter.

49 See generally, Dinah Shelton, "Righting Wrongs: Reparations in the Articles on State Responsibility", 96 *American Journal of International Law*.

50 See Antônio A. Cançado Trindade, *International Law for Humankind: Towards a New* Jus Gentium, Nijhoff, 2010, p. 371.

51 See generally on theories of restorative justice: Daniel W. Van Ness & Karen Heetderks Strong, *Restoring Justice* (2002); *Burying The Past: Making Peace And Doing Justice After Civil Conflict* (Nigel Bigger Ed., 2001); *Restorative Justice And Civil Society* (Heather Strang & John Braithwaite Eds., 2001); Gerry Johnstone, *Restorative Justice: Ideas, Values, Debates* (2002); Daniel W. Van Ness & Karen Heetderks Strong, *Restoring Justice* (2002).

the society where it is applied or the purpose it is devised to achieve. Another interesting point for our purposes is to whom reparations are intended: the actual victim, the (international or domestic) community or the offender. These questions shed light on the interconnectedness between victims and offenders, and the community in which they may belong. When a wrongful act is committed (e.g., a crime) various relationships are broken, values shattered and the situation that existed before the wrongful conduct is no longer in place.

Thus, the theoretical framework of the right to reparations evidences, in our view, the tight relationship between crimes (a wrongful conduct) and civil redress (reparation), offenders and victims, the past and the future. It also exposes, in our view, the weaknesses of a nuclear treatment of international law, the compartmentalised study of different doctrines, in parallel, and with different aims, even though in essence they often pertain to the same conduct.

In the same line of reasoning, a broader question pertains to the consideration of international law and international justice: if different disciplines of international law do not interact and feed off of each other, in a synergetic communication, the ultimate goal of justice may not be fully achieved. As Judge Cançado Trindade puts it,

> "While an international tribunal of human rights (such as the European and Inter-American Courts, and more recently, the African Court) cannot determine the international criminal responsibility of the individual, and an international criminal tribunal (such as the ad hoc International Criminal Tribunals for the Former Yugoslavia [ICTFY] and for Rwanda [ICTR], and the ICC) cannot determine the responsibility of the State, impunity is most likely bound to persist, being only partially sanctioned by one and the other"[52].

In this section we have only partially examined the purpose of reparation in a general sense, to set the stage for the analysis of justice theories in international criminal law.

52 See Antônio A. Cançado Trindade, *International Law for Humankind: Towards a New* Jus Gentium, Nijhoff, 2010, p. 371.

3. International human rights law and the development of individual victims' redress

As we have seen above, the early stages of international criminal law in the XXth century focused on prosecution and punishment. Other areas of international law developed alongside international criminal law which had some impact on the development of reparations for victims of conflicts. The most significant development in this area, in our view, was the advent of international human rights law, which through its mechanisms empowered victims to seek and obtain reparations from their State for violations of their rights.

The advent of international human rights law has provided avenues for individuals to seek reparations for acts committed by their State of origin.[53] It has significantly expanded the possibility for individuals to seek and obtain redress. The trailblazing instrument was the Universal Declaration of Human Rights,[54] which then prompted many other similar instruments.[55] The right of victims to seek and obtain a remedy has been codified in human rights treaties and instruments. It has also been firmly reiterated and expanded upon by international jurisprudence.[56] The European Convention on

53 Cf. R. Pisillo Mazzeschi, "International Obligations to Provide for Reparation Claims", in A. Randelzhofer and C. Tomuschat (eds.), *State Responsibility and the Individual – Reparations in Instances of Grave Violations of Human Rights* (The Hague/London/ Boston: Kluwer, 1999, 149).

54 Proclaimed by General Assembly Resolution 217A(III), 10 December 1948.

55 See generally, e.g. Universal Declaration of Human Rights (Art. 8); the International Covenant on Civil and Political Rights (art. 2(3), 9(5) and 14(6)); the International Convention on the Elimination of All Forms of Racial Discrimination (art. 6); the Convention of the Rights of the Child (art. 39); the Convention against Torture and other forms of Cruel, Inhuman and Degrading Treatment (art. 14); the European Convention on Human Rights (art. 5(5), 13 and 41); the Inter-American Convention on Human Rights (art. 25, 68 and 63(1)); the African Charter of Human and Peoples' Rights (art. 21(2)).

56 *See e.g.*, *Velásquez Rodríguez* Case, Inter-American Court of Human Rights, Serial C, No 4 (1989), par. 174 . *See also Papamichalopoulos* v. *Greece*, E.C.H.R. Serial A, No 330-B (1995), p. 36. *See e.g. Rodriquez* v. *Uruguay* (322/88), CCPR/C/51/D/322/1988 (1994); 2 IHRR 12 (1995); *Blancov* v. *Nicaragua* (328/88), CCPR/C/51/D/328/1988 (1994); 2 IHRR 123 (1995); and *Bautista de Arellana* v. *Columbia* (563/93), CCPR/C/55/D/563/1993 (1995); 3 IHRR 315 (1996). The most impressive and significant jurisprudence on reparations in international human rights law has been developed by the Inter-American Court of Human Rights.

Human Rights,[57] the American Convention on Human Rights,[58] and the Optional Protocol to the African Charter establishing an African Court of Human Rights,[59] provide their Courts the possibility of awarding reparation for violations of a conventional right.

The Inter-American Court of Human Rights has interpreted the individual's right to a remedy as stated in Article 25 of the American Convention on Human Rights as requiring States to provide reparation to individuals who suffered a violation of the Convention. Importantly, the Court has held that a State which violates the Convention is under a "duty to make reparation and to have the consequences of the violation remedied."[60] The European Court of Human Rights, for its part, has taken a more timid approach to reparations. In its jurisprudence, the Court repeatedly refers to the provision of compensation "where appropriate".[61] The jurisprudence of both Courts, and specially that of the Inter-American Court of Human Rights, may provide insightful guidance as to the examination of reparations in other fields of international law.

Beyond the jurisprudence of regional human rights Courts, there were other important developments in this field, in the form of *soft law*. Already in 1985, the United Nations adopted the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,*[62] whereby the right of victims to obtain reparation was emphasised. The focus of this Declaration was on reparation to victims of domestic crimes.[63] Subsequently, another instrument was adopted by the United Nations General Assembly: the *Basic Principles and guidelines on the right to a remedy and reparation*

57 European convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, entry into force 3 September 1953, CETS No. 5, as amended by Protocol 11 CETS No. 155, 11 May 1994, entry into force 1 November 1998.

58 American Convention on Human Rights, 22 November 1969, entry into force 18 July 1978, 114 UNTS 123.

59 Protocol to the African Charter on Human and Peoples' rights on the Establishment of an African Court on Human and Peoples' Rights, 9 June 1998, entry into force 25 January 2004, OAU/LEG/MIN/AFCHPR/PROT.1 rev.2 (1997).

60 *Baldeón-García* v. *Peru*, Merits, Reparations and Costs, 6 April 2006, Series C No. 147, para. 147.

61 See *Aydin* v. *Turkey*, Merits, Grand Chamber, 25 September 1997, 25 EHRR 251, para. 103.

62 GA Res. 40/34, 29 Nov 1985.

63 Cherif Bassiouni, "International Recognition of Victims' Rights", 6 *Human Rights Law Review* 2, pp. 203-279.

for victims of gross violations of international human rights law and international humanitarian law.[64] The right of victims of gross violations of international human rights law or serious violations of international humanitarian law to obtain reparation was enunciated in its Article 15, pursuant to which:

> "In accordance with its domestic laws and international legal obligations, a State shall provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law."

Other recent documents have also affirmed victims' right to receive reparation. For example, the *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General* concluded that, on the basis of human rights law,

> "the proposition is warranted that at present, whenever a gross breach of human rights is committed which also amounts to an international crime, customary international law not only provides for the criminal liability of the individuals who have committed that breach, but also imposes an obligation on States of which the perpetrators are nationals, or for which they acted as de jure or de facto organs, to make reparation (including compensation) for the damage made."[65]

This brief overview demonstrates that reparation for victims of conflicts has been receiving growing attention in international human rights law.[66] The concept of individual redress for victims of armed conflict is not as alien as it used to be before the development of international human rights law.

Be that as it may, it remains that, in spite of the impressive number of instruments providing for the possibility of seeking a remedy, as discussed above, there remains a large gap whereby

64 GA Res. A/RES/60/147, 16 Dec 2005.

65 Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, para. 598.

66 Jurisprudence of regional human rights Courts provide examples of awards of reparation in relation to armed conflicts. In the European Court of Human Rights, e.g.: *Khatsiyeva et al.* v. *Russia*, Merits, 17 January 2008, unreported, Application No. 5108/02, para. 139; *Varnava et al*. v. *Turkey*, Merits, Grand Chamber, 18 September 2009, unreported, Application No. 16064/90.

individuals cannot obtain redress through international human rights mechanisms.

International human rights law is built upon the premise of State responsibility for violations of rights recognized under a certain instrument. This explains two limitations of international human rights law for the award of reparations to individual victims of international wrongful acts. The first limitation concerns the fact that victims cannot, under international human rights mechanisms, obtain reparation from individual perpetrators, a State having to be involved in the violation. As it is widely known, many international crimes are committed by armed opposition groups, and thus, because the State in question is not held accountable, the individual victim cannot use the mechanism of the international human rights system.

The second limitation which stems from this premise is that for a Court to award reparation to victims, there needs to be a violation of the rights recognized in the basic human right instrument of that Court (i.e. the European Convention on Human Rights or the American Convention on Human Rights) and the State against whom reparation is sought must have acceded to the convention. Finally, the question of extraterritorial application of human rights restricts the possibility of victims of international armed conflicts to seek redress under international human rights law.[67]

Thus, as it can be seen, international human rights law has provided an important avenue for victims of violations of their human rights (and victims of armed conflicts) to seek redress, albeit it does not encompass all victims of violations.

4. International humanitarian law: reparation and its enforcement

In this section, the present chapter looks at reparations for violations of international humanitarian law, within the same perspective of the broader framework of victim redress in different fields of international law, and examines the possibilities and limitations of provisions of reparation under international humanitarian law.

67 On this question, see generally, Marko Milanovic, "From Compromise to Principles: Clarifying the Concept of State Jurisdiction in Human Rights Treaties", 8 *Human Rights Law Review* 411 (2008).

Victims' individual right to reparation under international humanitarian law is a topic of much debate in the legal doctrine.[68] In our view, it is clear that there exists an obligation to make reparation stemming from texts of international humanitarian law,[69] as it will be further expanded upon below. The controversy however hinges upon whether victims of international humanitarian law violations can claim reparation directly from the offender.[70]

In relation to armed conflicts, both international human rights law and international humanitarian law may be applicable, the latter being the *lex specialis*.[71] In the present chapter we overview provisions relating to reparations for humanitarian law violations and the question concerning the beneficiaries of reparation for international humanitarian law violations.[72] The present chapter does

68 See e.g., F. Kalshoven, "State Responsibility for Warlike Acts of the Armed forces", 40 *International and Comparative Law Quarterly* 827 (1991); C. Greenwood, "International Humanitarian Law (Laws of War)", in F. Kalshoven (ed.), *The Centennial of the First International Peace Conference,* Kluwer, 2000, at 250.

69 Draft Articles on State Responsibility, Article 31; Second Protocol to the Hague Convention for the Protection of Cultural Property, Article 38; First Geneva Convention, Article 51; Second Geneva Convention, Article 52; Third Geneva Convention, Article 131; Fourth Geneva Convention, Article 148; cf., Rule 150 of the ICRC Rules on Customary International Humanitarian Law: "A State responsible for violations of international humanitarian law is required to make full reparation for the loss or injury caused.". As to examples of treaty provisions in international humanitarian law that establish an obligation to provide reparation for breaches, Article 3 of the Hague Convention No. IV of 1907 states that: "A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces." Similarly, Article 91 of Additional Protocol I of 1977 states that: "A party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces."

70 See e.g., C. McCarthy, "Victim Redress and International criminal Justice: Competing Paradigms, or Compatible Forms of Justice?", 10 *Journal of International Criminal Justice* (2012), pp. 351-372, at p. 356 (note 19).

71 Cf. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion), ICJ Reports 136 (2004), p. 178.

72 See Georges Abi-Saab, *The Specificities of Humanitarian Law*, in C. Swinarski (ed.), "Studies and Essays of International Humanitarian Law and the Red Cross Principles in Honour of Jean Pictet", ICRC, Geneva/ The Hague, 1984, p. 269, where it is argued that international humanitarian law's objective goes "beyond the inter-state levels and [reaches] for the level of the real (or ultimate) beneficiaries of humanitarian protection, i.e. individuals and groups of individuals". See also,

not aim at an extensive analysis of reparations under international humanitarian law.[73]

A) Preliminary remarks: reparations in international and internal armed conflicts

A study by the International law Association addressing the question of reparations for victims of armed conflict devoted some attention to the conceptualisation of "victims"[74] for purposes of the application of the principles proclaimed therein:

> "1. For the purposes of this Declaration, the term 'victim' means natural or legal persons who have suffered harm as a result of a violation of the rules of international law applicable in armed conflict.
>
> 2. This provision is without prejudice to the right of other persons **-** in particular those in a family or civil law relationship to the victim **-** to submit a claim on behalf of victims provided that there is a legal interest therein. This may be the case where the victim is a minor child, incapacitated or otherwise unable to claim reparation."[75]

Theodor Meron, "The Humanization of Humanitarian Law", 94 *American Journal of International Law* 2000, pp. 239-278.

73 See generally as to this question: Veronika Bílková, "Victims of War and Their Right to Reparation for Violations of International Humanitarian Law" 4 *Mickolc Journal of International law* 2, pp. 1-11 / 2007; Christian Tomuschat, "Reparation in Favour of Individual Victims of Gross Violations of Human Rights and International Humanitarian Law", in *Promoting Justice, Human Rights and Conflict Resolution through International Law*, Marcelo G. Kohen (ed.), Nijhoff; Rainer Hofmann, "Victims of Violations of International Humanitarian Law : do they have an Individual Right to Reparation against States under International Law?" in *Common Values in International Law : Essays in Honour of Christian Tomuschat*, 2006; Emanuela-Chiarra Gillard, "Reparation for violations of international humanitarian law", 85 *International review of the Red Cross* (2003), pp. 529-553.

74 The word "victim" does not appear in all instruments of IHL. For example, the Geneva Conventions and other treaties do not mention the word "victim" in contrast with the Additional Protocol to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, of 8 June 1977 and the Additional Protocol to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts.

75 International Law Association, *Remedies for Victims of Armed Conflict*, 74 International Law Association Report Conference 291, 2010, Article 4, p. 302.

According to this conception of "victims", there must be (1) a violation of international law applicable in armed conflicts; (2) a harm must have been suffered; (3) there must be a link between the harm suffered and the violation of the international law applicable in armed conflict.[76] It has been argued that international humanitarian law ensures the protection and assistance to individuals that are victims of an armed conflict but when that same individual becomes a victim of a violation of international humanitarian law, the protection given by this field of the international law does not seem sufficient.[77]

Delving into the provisions that pertain to reparations for violations of international humanitarian law, as far as international armed conflicts are concerned, Article 3 of The Hague Convention IV provides that:

> "A belligerent party which violates the provisions of the [annexed] Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces."[78]

This same obligation appears in Article 91 of Additional Protocol I to the Geneva Conventions (concerning violations of the Additional Protocol or of the Geneva Conventions of 1949).[79] The duty to make reparation for violations of international humanitarian law is also stated in Article 38 of the Second Protocol to the Hague Convention for the Protection of Cultural Property, and it is implied in the four Geneva Conventions of 1949, whereby States cannot absolve themselves for liability incurred in respect of grave breaches: First Geneva Convention, Article 51; Second Geneva Convention, Article 52; Third Geneva Convention, Article 131; Fourth Geneva Convention, Article 148.[80]

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76 See commentary to: International Law Association, *Remedies for Victims of Armed Conflict*, 74 International Law Association Report Conference 291, 2010, Article 4, p. 302.

77 Liesbeth Zegveld, *Remedies for Victims of Violations of International Humanitarian Law*, 85 International Review of the Red Cross, 2003, pp. 497-526.

78 Hague Convention (IV) Respecting the Laws and Customs of War on Land, 18 October 1907, entry into force 26 January 1910, 9 UKTS (1910)

79 Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, entry into force 7 December 1978, 1125 UNTS (1979).

80 ICRC, Customary International Humanitarian Law, Rule 150: Reparation. 1949 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and

As to non-international armed conflicts, Common Article 3 to the four Geneva Conventions of 1949, Provisions of Additional Protocol II relating to Non-International Armed Conflicts,[81] Article 38 of the Second Protocol to the Hague Convention for the Protection of Cultural Property,[82] (which expressly refers to the duty of States to provide reparation, and which applies in any armed conflict), as well as other rules of customary international law form the legal framework for reparation in such types of conflict.[83]

B) The beneficiary of reparation under IHL

Having set out the positive duty to provide reparation for violations of international humanitarian law, both in international and non-international armed conflicts, an important question to be examined is the beneficiary of such reparation, and whether individual victims have the right to claim reparations from States.

The text of the provisions referred to above do not expressly state that individuals can enforce claims of reparations against States that violated the laws of war. For non-international armed conflicts, individuals may generally seek reparation against the State before their national Courts, in accordance with their domestic laws.[84] As the ICRC commentary states, "[i]t lies in the nature of non-international armed conflicts, however, that the procedures which have been made

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Sick in Armed Forces in the Field, 12 August 1949, entry into force 21 October 1950; 1949 Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, entry into force, 21 October 1950; 1949 Geneva Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949, entry into force 21 October 1950; 1949 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, entry into force 21 October 1950.

81 Protocol II Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, entry into force 7 December 1978, 1125 UNTS 609.

82 Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 26 March 1999, entry into force 9 March 2004, 38 ILM (1999).

83 ICRC, *Customary International Humanitarian Law*, Rule 150: Reparation. The ICRC concludes in its study on customary international law that a State that violated the laws of war in relation to a non-international armed conflict has a duty to make reparation.

84 ICRC, Customary International Humanitarian Law, Rule 150: Reparation.

available to provide reparation in international armed conflict are not necessarily relevant in non-international armed conflict."[85]

Moving on, more generally, to reparation for violations of international humanitarian law in international armed conflicts, the question as to whether there exists an individual right to claim reparation from States for violations of international humanitarian law is more complex than in non-international armed conflicts.

A few domestic courts have had to decide on cases where individual victims sought reparation from a foreign State for violations of international humanitarian law.[86] While there have been instances – in Greece[87] and in Italy[88] – where individuals were successful in seeking reparations against a State (for crimes against humanity and violations of international humanitarian law), there is also case law that stands against the possibility for individuals to claim reparation directly from a State.[89]

Recently, this question was put to the International Court of Justice in the *Case concerning jurisdictional immunities of the State (Germany v. Italy; Greece intervening)*,[90] concerning the decisions of Greek and Italian Courts mentioned above, which awarded reparation to individual victims against a State (Germany) for violations having occurred during the Second World War. The question of whether or not individuals have a right to reparation

85 ICRC, Customary International Humanitarian Law, Rule 150: Reparation.

86 The question of whether or not States have an obligation to pay reparation to individual victims of international humanitarian law violations is intrinsically intertwined with questions of State immunity. See e.g.: Maria Gavouneli, "War reparation claims and State Immunity", 50 *Revue Hellénique de droit international* (1997); Brigitte Stern, "Vers une limitation de 'l'irresponsabilité souveraine' des Etats et chefs d'Etat en cas de crime de droit international ?", in *Promoting justice, human rights and conflict resolution through international law :* liber amicorum *Lucius Caflisch*, Marcelo Kohen (ed.), Nijhoff, Leiden (2007), pp. 511-548.

87 *Prefecture Voiotia* v. *Federal Republic of Germany*, Hellenic Supreme Court, 4 May 2000, Case no. 11/2000. Note however, that the decision was not enforcement due to a lack of authorization by the Minister of Justice of Greece. See also, at the European Court of Human Rights concerning a similar factual background, *Kalougeropoulou and Others* v. *Greece and Germany*, Admissibility, 12 December 2002, Application No. 59021/00.

88 *Ferrini* v. *Federal Republic of Germany*, Corte di Cassazione (Sezioni Unite), 11 March 2004, 87 *Rivista di diritto internazionale* 539.

89 See e.g. *Bridge of Varvarin case*, Landgericht (LG) Bonn, 1 O 361/02, NJW 2004, 525, HuV-I 2/2004, 111-113, confirmed by *Oberlandesgericht* (OLG) Köln, 7 U 8/04.

90 Judgment of 3 February 2012 ("ICJ State Immunity Judgment").

(enforceable against a State) under international humanitarian law was debated during the proceedings.[91] Nevertheless, based on its decision that Germany enjoyed immunity under international law, the Court did not deem it necessary to dwell upon this question in the Judgment.[92] It stems from the foregoing that the question of State immunity is a limitation on the possibility of individual victims to obtain reparations from the responsible State.

Be that as it may, it is important to keep in mind, in this regard, that international law is in constant and tirelessly development in this field. As it has been posited, in the beginning of this century,

> "A decade ago, it would have been generally understood that only the classical approach, which considers war-related individual claims as being subsumed by the intergovernmental arrangements for peace, was consistent with international law as reflected in practice and doctrine. However, the 1990s have witnessed a remarkable, and in some respects revolutionary, attempt to restructure the classical approach to peacemaking and the resolution of matters relating to the international consequences of war. In what may be described as an attempt to replace the traditional exclusive government-to-government process of negotiating a comprehensive peace treaty, efforts were undertaken to adjudicate claims by individuals before regular courts of law."[93]

On the question of reparation for victims of violations of international humanitarian law, it has been stated that

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91 See e.g. Counter-memorial of Italy, 22 December 2009, Chapter V, Section II; Reply of Germany, 5 October 2010, Chapter 4, sections 37-41.

92 See para. 108 of the ICJ State Immunity Judgment. This Judgment has prompted many scholarly commentaries. Recent scholarship concerning this Judgment include: Benedetto Conforti, "The Judgment Of The International Court Of Justice On The Immunity Of Foreign States: A Missed Opportunity", 21 *Italian Yearbook of International Law* (2011); Riccardo Pavoni, "An American Anomaly? On the ICJ's Selective Reading of United States Practice in Jurisdictional Immunities of the State", 21 *Italian Yearbook of International Law* (2011); Carlos Espósito, "Jus Cogens and Jurisdictional Immunities of States at the International Court of Justice: A Conflict Does Exist", 21 *Italian Yearbook of International Law* (2011); Mirko Sossai, "Are Italian Courts Directly Bound to Give Effect to the Jurisdictional Immunities Judgment?", 21 *Italian Yearbook of International Law* (2011).

93 Rudolf Dolzer, "The Settlement of War-related Claims: Does International Law Recognize a Victim's Private Right of Action? Lessons After 1945", 20 *Berkeley Journal of International Law* 296 (2002).

> "[t]here is increasing acceptance that individuals do have a right to reparation for violations of international law of which they are victims. This is particularly well established with regard to human rights law. Not only do many of the specialized human rights tribunals have the right to award 'just satisfaction' or 'fair compensation', but a number of human rights treaties also expressly require States to establish a remedy for violations before national courts. … The courts of various States have considered claims by individual victims of violations of international humanitarian law on a number of occasions and the results of such cases have been far from uniform."[94]

In a similar vein, former President of the International Criminal Tribunal for the former Yugoslavia, Judge Jorda, also stressed this development of international law for the benefit of individuals in the sense that

> "the universal recognition and acceptance of the right to an effective remedy cannot but have a bearing on the interpretation of the international provisions on State responsibility for war crimes and other international crimes. These provisions may now be construed to the effect that the obligations they enshrine are assumed by States not only towards other contracting States but also vis-à-vis the victims, i.e. the individuals who suffered from those crimes. In other words, there has now emerged in international law a right of victims of serious human rights abuses (in particular, war crimes, crimes against humanity and genocide) to reparation including compensation) for damage resulting from those abuses."[95]

Similarly, the recently adopted *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*[96], in its Article 15, states the duty of States to provide for reparation to victims: "In accordance with its domestic laws and international legal obligations, a State

94 Emanuela-Chiara Gillard, "Reparation for violations of international humanitarian law", *IRRC*, September 2003 Vol. 85 No 851, pp. 536-537.
95 *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*, para. 597, citing a letter dated 12 October 2000 of Judge C. Jorda (the then President of the International Criminal Tribunal for the former Yugoslavia) to the United Nations Secretary General.
96 Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005.

shall provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law."

History demonstrates, however, that reparation of war claims involving States has been generally settled by other means than an individual action against a responsible State, as for example, through claims processes and lump-sum agreements between States, especially relating to the Second World War, but also more recently.[97] Furthermore, claims commissions and arbitral tribunals have been set up to deal with reparation claims;[98] examples of such institutions established to settle claims of redress arising out of international armed conflicts, include, in recent years, the Eritrea-Ethiopia Claims Commission,[99] the Housing and Property Claims Commission (concerning the 1998-1999 conflict in Kosovo),[100] the Commission for Real Property Claims of Displaced Persons and Refugees in Bosnia and Herzegovina.[101]

It stems from the foregoing that in many instances individual victims are left without reparation for violations of international humanitarian law which they suffered. This is because, *inter alia*, the absence of arrangements for reparations or because the reparation received does not reach the individual victims. The analysis above demonstrates that it is not ideology that is driving the development of reparation for violations of international law but rather the remnants of the historical conception of international humanitarian law.

V. PERPETRATORS AND VICTIMS, PUNISHMENT AND REPARATION

97 See generally, Pierre d'Argent, *Les Réparations de Guerre en Droit International Public* (Paris : LGDJ, 2002) ; Henckaerts and Doswald-Beck, Customary International Humanitarian Law : Volume 1 : Rules, pp. 539 et seq.

98 See generally, Howard Holtzmann and Edda Kristjánsdóttir (eds.), *International Mass Claims Processes: Legal and Practical Perspectives* (Oxford University Press, 2007).

99 Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea, 12 December 2000, 40 ILM 260 (2001). It does not grant individuals standing to submit claims.

100 UNMIK Regulation No. 1999/23, 15 November 1999, UNMIK/REG/1999/23.

101 Article 1, Annex 7, General Framework Agreement for Peace in Bosnia and Herzegovina, 35 ILM 75 (1996), "Dayton Agreement".

IN THE DEVELOPMENT OF INTERNATIONAL CRIMINAL LAW

Having overviewed, on the one hand, some key concepts of two justice theories that may provide some theoretical foundations for the genesis of international criminal law, and on the other, the development of the law of reparation in other areas of international law, we now inquire into the dichotomy between the role of punishment and of reparation. This chapter is not aimed at addressing an exhaustive analysis of sentencing practices of international criminal tribunals and whether punishment in international criminal law has thus far attained the roles attached to punishment under criminal jurisprudence.[102] The purpose of this chapter is instead to grasp the goals of punishment and juxtapose these rationales with the role of reparation.

International criminal law was firstly conceived as a response to the atrocities committed during the Second World War by Nazi forces, as we have seen. The heinous crimes committed during the war shocked human conscience which lead the way into this new era of international law, one where individual perpetrators are held accountable for their crimes under international law. At that print of history, it was decided that something needed to be done against those who had committed acts, which under international law, were already considered criminal.[103]

After the War and the trials that followed it, international criminal law continued to develop, through the enactment of international legal texts that defined international crimes, and importantly, the development of international and *ad hoc* criminal tribunals.

Against this background, a few questions remain: is the punishment of offenders the most appropriate answer to those criminal acts? What role does trial and punishment accomplish in international law? What theory of punishment drove the development of international criminal law in the 20th century?

Retribution, from the begging of international criminal law in the XXth century, has been a leading justification for punishment

102 For a very insightful examination of this question, see Mark A. Drumbl, *Atrocity, Punishment, and International Law*, Cambridge University Press, 2007.
103 *Trial of Major War Criminals before the International Military Tribunal*, Nuremberg, 14 November 1945-1 October 1946 (Nuremberg: International Military Tribunal, 1947), Part 22.

of offenders in international law.[104] As one author has put it "[r]etribution, …, though not historically a significant part of the evolutionary trends of international criminal law, was a definite component of at least the punishments awarded by the International Military Tribunal at Nuremberg."[105] The idea of fighting impunity, which is symbolic of international criminal justice and the establishment of international and *ad hoc* criminal tribunals, speaks to the justification of punishment as a form of retribution.

It can be argued that at a moment of recovery of the international community from the horrors of the war, an international criminal trial pours the rule of law back again in the international legal order. Setting up an international tribunal to try and punish the alleged offenders re-establishes law and order in a world devastated by war. At the end of the war, when the world became aware of the atrocities that were committed by Nazi forces, something needed to be done against those who perpetrated acts that shocked the conscience of humankind. One of the most famous statements emanating from the Nuremberg trials refers specifically to the idea that those crimes could not go unpunished due to the their nature and level of gravity: "… by punishing individuals who commit such crimes can the provisions of international law be enforced."[106]

Be that as it may, retribution was not the only reason for trying and punishing criminals. One of the claimed underlying rationales for punishment of offenders in international criminal law is deterrence.[107] If a criminal is punished, as the theory goes, others will know that act is wrongful under international law which entails consequences, thus deterring others from taking the same course of action. Deterrence and prevention of future crimes seems to have been one of the justifications for inflicting punishment on those

104 For thorough review of the goals and functions of punishment in international criminal law, see Mark A. Drumbl, *Atrocity, Punishment, and International Law*, New York: Cambridge University Press, 2007.

105 Farooq Hassan, "The theoretical basis of punishment in international criminal law", 15 *Case Western Reserve Journal of International Law* (1983), p. 55.

106 *Trial of Major War Criminals before the International Military Tribunal*, Nuremberg, 14 November 1945-1 October 1946 (Nuremberg: International Military Tribunal, 1947), p. 223.

107 See generally, Farooq Hassan, "The theoretical basis of punishment in international criminal law", 15 *Case Western Reserve Journal of International Law* (1983), pp. 48 et seq.

found responsible for the crimes committed by the Nazi Germany.[108] This is illustrated by the statement of Justice Jackson: "It is high time that we act on the juridical principles that aggressive war-making is illegal and criminal … so as to make war less attractive to those who have governments and the destinies of people in their power".[109]

Punishment is said to aide in the maintenance of the international legal order.[110] One author has posited in regard to this justification for punishment that "[j]ust as the general welfare of citizens and the supreme need for maintaining the social order in the domestic scene are considered paramount, the need for ensuring the sanctity of the most fundamental values of the international community also demands that potential violators be forewarned from committing breaches of the international legal order."[111]

In the international legal order, where there are no central enforcing institutions or agencies, punishment could be seen as a manner in which international rules are enforced. Certain atrocities are too cruel that escape human imagination – how is it possible to kill 800.000 people in 90 days? – and the punishment of those responsible is for the benefit of all, so that the acts are not repeated and are accounted for.

This said, it is difficult to grasp precisely whether international criminal law and the punishment with which individual perpetrators are being sentenced actually fulfil the role of retribution or deterrence. There is a growing debate as to whether punishment of individuals actually contributes to the prevention of future crimes.[112] It is also premature, at this print of international criminal justice to

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108 Farooq Hassan, "The theoretical basis of punishment in international criminal law", 15 *Case Western Reserve Journal of International Law* (1983), p. 50.

109 *Report to the President by Mr. Justice Jackson*, 6 June 1945, "International Conference on Military Trials", 42, 52-53 (1945). See also, Robert Jackson, *The Case against the Nazi War Criminals* 3 (1946).

110 See generally, Cesare Beccaria cited in Monachesi, "Pioneers in Criminology IX: Cesare Beccaria", 46 *Journal of Criminal Law, Criminology & Political Science*, (1955) 439, at p. 445.

111 Farooq Hassan, "The theoretical basis of punishment in international criminal law", 15 *Case Western Reserve Journal of International Law* (1983), p. 56.

112 See generally, David Wippman, "Atrocities, Deterrence, and the Limits of International Justice", 23 *Fordham International Law Journal* 473, 488 (1999); Payam Akhavan, "Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?", 95 *American Journal of International Law* (2001).

understand whether, and if so how, punishment can influence and modify individuals' conduct.

Prevention and deterrence, while they were present as a justification for punishment, they did not seem to be the leading rationales when the International Military trials took place after the War. As international criminal law developed, however, retribution began to lose its importance as a justification for inflicting punishment on offenders.[113] Whether or not punishment can truly promote deterrence in relation to international crimes cannot yet be fully assessed. Many claim that international criminal law (and punishment) is not producing the magnificent effect it has set for it.[114]

Perhaps a justification for punishment in international criminal law is the fact that atrocious crimes need to be responded to in such a way that the world will see its unlawful nature, and such a response is a criminal process which by definition results in sentencing and punishment for guilty offenders.

Be that as it may, given the less important role of retribution as a justification for punishment, in this context it is understandable how victim redress could make its way into international criminal law. In a framework where reparation does not take the form of punitive damages, but rather comes from the concern with victims' redress, it is difficult to reconcile how reparation to victims may contribute to retributive justice theory.[115] Retribution provides no justification for including reparation within the realm of international criminal law remedies. Reparations in international criminal law are not equated to punishment; they are not punitive in nature. This is confirmed, at least within the ICC framework, by the negotiating history of the

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113 See generally, Farooq Hassan, "The theoretical basis of punishment in international criminal law", 15 *Case Western Reserve Journal of International Law* (1983), p. 56.

114 Cf. David Wippman, "Atrocities, Deterrence, and the Limits of International Justice", 23 *Fordham International Law Journal* 473, 488 (1999).

115 On the question of the dichotomy between reparation and retribution, see Abel and Marsh, *Punishment and Restitution: A Restitutionary Approach to Crime and the Criminal* (Westport, Connecticut: Greenwood Press, 1984); Fattah, "From a Guilt Orientation to a Consequence Orientation" in Kueper and Welp (eds), *Beitraege zur Rechtswissenschaft* (Heidelberg: C.F. Mueller Juristischer Verlag, 1993) 771- 792. See also, Watson, Boucherat and Davis, 'Reparation for Retributivists' in Wright and Galaway (eds), *Mediation and Criminal Justice: Victims, Offenders and Community* (London: Sage, 1989), cited in Lucia Zedner, "Reparation and Retribution: Are they Reconcilable?", 57 *Modern Law review* 225 (1994), p. 228.

Rome Statute and the location of reparation provisions within the Statute.[116]

Thus, while retribution cannot provide any basis for a justification of including reparation within the realm of international criminal justice, a role for reparations may have been made easier by the slow divorcing of retribution as one of the justifications for punishment and goals of international criminal justice. It would seem irreconcilable with the international criminal justice if its conception was focused on retribution, unless reparation would have the role of punitive damages. Including reparations within the realm of international criminal law seems to have been made possible by the evolution of the position of individuals, and victims of conflicts, within the bigger picture of international law, and thus, it came from the perspective of empowering the victims, and not a focus on the offender.

Beyond the issue of the driving rationale for including reparation within international criminal justice, an interesting question is whether reparation could contribute to the main goals with which trial and punishment are concerned, that is, prevention and deterrence (besides the question of whether or not punishment is attaining this role), thus reinforcing its role in international criminal law.

In this chapter, we do not intend to dwell on the questions whether reparation for victims within international criminal proceedings, and at the ICC as its main example, is compatible with the traditional goals of international criminal justice, whether it is appropriate and how it should develop. The inquiry at this juncture fits within the broader discussion of theories of justification for punishment in international criminal justice.

The relationship between reparation and deterrence is closely linked with the forms of reparation that can be awarded within the realm of international criminal justice and the involvement of the offender in the reparation process. If reparation is limited to compensation through a sum of money from the accused, this may provide a degree of deterrence in the same sense as punishment may have - the possibility of having to face a criminal trial as well as having to pay compensation for the victims may deter individuals from committing a crime.

116 See on this point, Conor McCarthy, "Victim Redress and International Criminal Justice: Competing Paradigms, or Compatible Forms of Justice?", *Journal of International Criminal Justice* 10 (2012), pp. 361-362.

Perhaps, however, the most significant way in which reparation or victim redress may impact the prevention of future atrocities can be evaluated in a more holistic way. The integration of victims' concerns in the international criminal justice process may affect the way in which criminal conduct is dealt with. Including victims in the process, and having reparation types of award where the offender will have to face the victim and respond to its actions, as opposed to treating crime as a public matter, might contribute to the preventive effect that punishment is intended to have on future atrocities.

Be that as it may, as discussed above, deterrence is difficult to assess, at least at the current print of international criminal law. It is yet too soon to make conclusive observations as to whether punishment of those who commit an international crime, or reparation to victims, may contribute to the prevention of future atrocities. However, if the question of deterrence is looked at from the wider lens of international criminal justice as a whole, there may be a role for reparation as one of the tools contributing to the prevention of future atrocities.

VI. CONCLUDING REMARKS

Some conclusions can be drawn from the discussion above. On a legal theory level, we have seen that international criminal law has been traditionally aligned with theories of punishment, retribution and deterrence. International criminal justice as conceived today applies a mix of theories, with elements of retributive and restorative justice theories. As we have argued, reparations could serve similar purposes as punishment.

An interesting observation, upon having overviewed possibilities of reparation for victims in other domains of international law, is that, one way or another, there is some possibility of victim redress for violations of international law. The enforcement of reparations is a different matter however. The brief overview above of the wider legal framework of victim redress under international law demonstrates that while individual reparation for violations of international law (generally speaking) is possible under certain mechanisms, it remains that in each field of international law there are gaps pertaining to the possibility of obtaining redress. From the perspective of reparative/restorative justice theories, there should be no discrimination of victims of international crimes as it pertains to reparations.

THE NON-DISCRIMINATION AND EQUALITY IN THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

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The Committee on Economic, Social and Cultural Rights (CESCR) thinks that the non-discrimination is an immediate and cross-cutting obligation in the Covenant. Article 2(2) of the International Covenant on Economic, Social and Cultural Rights (Covenant) requires States parties to guarantee non-discrimination in the exercise of each of the economic, social and cultural rights enshrined in the Covenant and to apply it in conjunction with these rights. It is to be noted that discrimination constitutes any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of Covenant rights. Discrimination also includes incitement to discriminate and harassment.[1]

I. HUMAN RIGHTS IN THE LARGE CONFERENCES PRECEDING THE CREATION OF THE UNITED NATIONS

Some of the political personalities of the time attended the preparation conferences for the production of the UNO and contributed to the historical development of human rights of that supranational institution. Thus the speech of USA president, F. Roosevelt, on January 26, 1941, before the American Congress represented one of the promptest constructive and nominative precedents of human rights international law, which would serve

1 UNO. ECOSOC. E/C.12/GC/20, par. 7.

to set the pace for, and inspire other UN treaties and international documents – including those that consolidate the International Bill of Human Rights. This speech exhorts the construction of a world based upon four fundamental freedoms: freedom of speech and expression; freedom of cult and religious belief; freedom of want, of being free from poverty and need; and the right to be free from fear, meaning a world-wide reduction of armaments.[2]

In the field of Human Rights, reflections of the speech were so striking that during the Sixth Session of the United Nations Human Rights Commission, on May 9, 1950, the representative of Yugoslavia pointed out that for Roosevelt there could not be a free society without economic rights. Likewise, the Rapporteur of the General Assembly's Third Commission highlighted before the plenary session of the organization held on December 9, 1948, at the moment of the UDHR's approval, that Roosevelt's words "sincerely and clearly translated the aspirations of the twentieth-century man".[3]

Another document, which the preceding history of human rights in the UNO specially harbors, is the Atlantic Charter[4], signed by Roosevelt and Churchill on August 14, 1941, and whose principles would come to be interpreted as being the first official formulation of the war's goals and the fundaments of peace to the Allies[5]. It is important to point out the place reserved to individual freedoms and to human rights, and – definitely – the four fundamental freedoms mentioned by Roosevelt that were contemplated therein. The Charter's Article six states:

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2 QUINTANA, Fernando. *La ONU y la exégesis de los derechos humanos – una discusión teórica de la noción* (Porto Alegre: UNIGRANRIO, 1999), 35-36.

3 *Documents Officiels de la Troisième Session de l´Assemblée Générale*. In: *Séances Plenières de l´Assemblée Générale, Comptes Rendus Analytiques des séances.* Première Partie: 180 séances plenières. Paris, Palais de Chaillot, 21Septembre – 12 Décembre, 1948. p. 853.

4 According to Quintana the Atlantic Charter establishes, moreover, the need for a more complete collaboration among all nations – great and small alike – aiming to guarantee to all of them better conditions for the working class and social security. Thus, the Declaration by United Nations, which was signed in Washington on January 1, 1942, by twenty six countries at war with the Axis countries and adheres to the principles described in the Atlantic Charter, elevates the stipulations of the latter document to the level of international law.

5 This was a, outstanding historical moment, for at the time Roosevelt proposes a new international order, and for the first time the post-war world, still undergoing conflict, is discussed.

> After the final destruction of the Nazi tyranny, they hope to see established a peace which will afford to all nations the means of dwelling in safety within their own boundaries, and which will afford assurance that all the men in all lands may live out their lives in freedom from fear and want.[6]

It is important to emphasize that this article was also defended by the representative of Australia: at the moment of his country's adhering to the document, he sustained that the right to living "free from need" should be recognized. The intervention of the representative of Cuba treaded the same path, as he proposed the inclusion of another norm regarding the right to food to the text.[7]

The Declaration of Philadelphia[8] is also a document of crucial importance to the shaping of the international human rights forum in the UN, and although proclaimed in the preceding history of said supranational organization, it intensely reflected on the success of the International Bill of Human Rights. The Declaration proclaimed, among other topics, the imperative of social justice; established a new listing of the workers' rights, including the conditions that allowed his employment; and foresaw the duty of carrying out a wider and more complete use of the world's productional resources.[9]

The main goal of the Conferences sponsored by the world's powers in the period imminently prior to the conception of the UN surely was the maintaining of peace and international security, nevertheless the thread of human rights never ceased to feature as part of the essence of such documents. The previous statement can be proven once the Dumbarton Oaks Conference,[10] held in October 1944, is analyzed for throughout its duration the creation of an organization that would come to fairly ensure the keeping of the peace and of international security was proposed. Independently

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6 *The Atlantic Charter*, Article 6.

7 *Ibid*, 37.

8 Adopted unanimously on May 10, 1944 by the members of the International Labour Organization.

9 This affirmation can be extracted from the *considerations* of the Declaration of Philadelphia.

10 It resulted from the agreement reached by the four Powers present at the Moscow Conference (1943). The conversations of Dumbarton Oaks took place in two different phases: the first one, from August 28 to September 28, with representatives from the USA, the United Kingdom and the USSR; and the second, from September 29 to October 7, with representatives from China, the USA and the United Kingdom.

of the ideological conflict sponsored by the powers of that time and present at the Conference, the North-American delegation obtained the necessary support of the participants to include in the Charter of the United Nations an explicit mention of the promotion of human rights as a means for "the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations."[11] As a consequence, chapter nine of the Dumbarton Oaks Proposals provides:

> With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations, the Organization should facilitate solutions of international economic, social and other humanitarian problems and promote respect for human rights and fundamental freedoms. Responsibility for the discharge of this function should be vested in the General Assembly and, under the authority of the General Assembly, in an Economic and Social Council.[12]

The importance of Dumbarton Oaks is fundamental for the current state of human rights in the UN: the ideas that would give origin to the Human Rights Commission – as conceived today and under the supervision of the Economic and Social Council (ECOSOC) – emerged then. The Council had a deciding role in the drafting and codification of the articles that comprise the documents of the international charter. The proposal stated that:[13]

> The Economic and Social Council should set up an economic commission, a social commission, and such other commissions as may be required.

The United Nations Commission on Human Rights is not explicitly mentioned in the text; however a norm leaves room for the possibility of it coming into being in the future. Hence, the document approved in Dumbarton Oaks, explicitly and for the first time, established an international commitment towards the promotion of human rights.

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11 *Charter of the United Nations*. Chapter 1, Article 1, Paragraphs 1, 2 and 3.
12 *Déclaration de Dumbarton Oaks*. *Documents Nations Unies.* In**:** *Journal du Droit International 1940-1945***.** Tome 67-72, n. 1, París, 1945. Apud: Quintana. *Ibid,* 41-42.
13 Chapter IX, section D of the *Proposals of Dumbarton Oaks*.

The Yalta Conference, held from 4 to 11 February, 1945, at Crimea (USSR), also had capital relevance on the historical bringing about and solidification of human rights in the UN. At the Conference, the United States, the United Kingdom and the USSR[14] published a declaration in which they complimented the resulted achieved in Dumbarton Oaks and called for a United Nations conference, to take place in San Francisco, from April 25, 1945, with the main goal of maintaining peace and international security.

Particularly regarding human rights, the Yalta Conference determined – through an adopted document denominated "Declaration of Free Europe" – the establishment of democratic institutions and the commitment that, whenever possible, free countries would implement – by way of democratic elections – governments which would be the expression of their peoples' will, thus building an international order inspired by the laws of peace, security, freedom, and the well-being of humanity as a whole.

The future of human rights had the Inter-American Conference of Chapultepec[15] as of one of its most outstanding precedents. The goals of the assembly were to deal with issues regarding war and peace. The Conference staged a deeply crucial historical fact for the theme under discussion: the adoption of a final act including a series of pilot resolutions on the matter of human rights. After mentioning that the Declaration by United Nations, signed in 1942, had sanctioned the necessity of establishing an international protection of human rights, the Act stated that it was necessary to not only to list and/or define these rights, but to also list its corresponding rights in a declaration to be adopted by the nation States under a Covenant or a Treaty. Its Resolution 41 is highlighted, for it stipulated that world peace could not be consolidated while man was prevented from exercising his fundamental rights, without racial or religious prejudice; moreover, it proclaimed the principle of equality of rights for all human beings, regardless of race or religion.[16]

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14 A historical and political fact of the *Yalta Conference* was the decision about the USSR's participation in the UN: besides veto power as a permanent member, it would have three more seats in that supranational Organization – those of Russia, Ukraine and Belarus.

15 Held in Mexico from February 21 to March 8, at which twenty-one American nations were present, except for Argentina.

16 *Resolution XLI* of the *Inter-American Conference of Chapultepec*.

The inter-American contribution to the affirmation of human rights in the UN was also mounted on the repercussion of the right to an effective means before the national courts. From a material normative perspective, this was extracted from Article 18 of the American Declaration of the Rights and Duties of Man (dated April 1948) to Article 8 of the Universal Declaration of Human Rights (dated December 1948), the former precursory to the latter.[17]

As there was no longer war on European ground, from July 17 to August 2, 1945, the Potsdam Conference took place in Berlin. The new leaders of the great Powers attended it: Harry Truman succeeding Roosevelt (deceased on April 12, 1945), Clement Attlee representing the United Kingdom (Churchill would come to lose the British elections) and Stalin representing the USSR. There it was established that the Allies would give another opportunity to the German people to prepare for the reconstruction of their lives on a foundation of democracy and peaceful cooperation to the international living.

II. THE AFFIRMATION OF HUMAN RIGHTS IN THE UNITED NATIONS ORGANIZATION

The United Nations Organization was brought in to being during the San Francisco Conference, held from April 25 to June 26, 1945, in the USA. The treaty that comprises the statement referred to as the Charter of the United Nations (or UN Charter of San Francisco) was signed on June 26, 1945, and came into force of October 24 of that same year, at the moment that it was ratified by the USSR, the USA, China, the United Kingdom and France – the Five Big Powers – and by the majority of the founder-States of the international organization, which attended the Conference.[18]

The formation of four sharply defined clusters that maintained a strong influence in the discussions, development and shaping of the

17 About this subject, please read: CANÇADO TRINDADE, Antônio Augusto. *O legado da Declaração Universal e o futuro da Proteção Internacional dos Direitos Humanos*. In: AMARAL JÚNIOR, Alberto e PERRONE-MOISÉS, Cláudia (orgs.). *O Cinqüentenário da Declaração Universal dos Direitos do Homem* (São Paulo: Edusp, 1999), 17.

18 Those nation States that signed and ratified the *Charter of the United Nations* soon after attending the *San Francisco Conference*, or at least signed the *Declaration by United Nations*, of 1942, are considered originating members of the UNO.

human rights doctrine at the core of the UNO[19] was noted since its foundation. A group of Western countries – that swiftly took over the political lead of the Institution and had the United States, France and England as its political and ideological mentors – followed by various other countries of the political West, among which was Australia. A second group constituted by the Latin American countries that, from the beginning, seized the human rights cause, frequently making significantly more advanced decisions in this field than the more developed countries of that hemisphere themselves. The bloc of Socialist countries – in conformity with their principles and ideas – endowed with extreme political caution and generalized mistrust accepted to cooperate in the advancement of human rights. And the Asian countries, except for those Moslem nations ruled by Saudi Arabia and Pakistan, had little to do with the initial conversations on the subject.[20]

In spite of the four above-mentioned clusters, the majority of the political and ideological confrontation took place between the West and Socialist Europe. Such fact can be verified through the conversations held throughout the years under study (1945-1966) and confirmed by the composition in charge of reconciling and elaborating the different proposals and thesis that emerged from the discussions. The Drafting Committee was consisted mainly of members of the Western chain and by the USSR, as follows: Australia, Chile, the USA, France, Great Britain, Lebanon and the USSR.

The conversations then held at the United Nations embodied the political and diplomatic context of the Cold War.[21] The Charter of the United Nations, in regards to human rights, contemplated norms far removed from the expectations and hopes stirred by President Roosevelt's declaration, in 1941. In fact, each one of the Big Powers victorious from the Second World War was bringing problems to the moment of the Charter's drafting in the human rights field: racial discrimination in the USA, and lack of freedom and political expression in the USSR.

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19 At that moments there were 58 members of the UN: 14 Western, 20 Latin American, six Socialists, four Africans and 14 Asians.

20 About this subject read Cassese. *Ibid*, 40-46.

21 Political-ideological atmosphere instituted by the two greatest Powers of the time – the USA and the USSR – in the world scene immediately after the end of the Second World War.

The articles of the UN Charter of San Francisco do not allow for a clear and accurate definition of human rights. The document is limited to mentioning the promotion and developments of those rights, which were considered one of UN's goals, alongside with its other main goal: the maintenance of international peace and security.[22]

The paramount and historical relevance of the Charter of San Francisco – from the perspective of Public International Law – stands out in the positivation of the general principles that direct friendly relations among States. These are enlightened throughout its Articles 1 and 2: sovereign equality of the States; autonomy, non-intervention in matters within domestic jurisdiction of any State; refrainment from the threat or use of force; peaceful settlement of international disputes; international cooperation; respect for human rights; and good faith in fulfilling international obligations.[23] The United Nations Charter is the first great universal international document that registers those principles in such explicit fashion. Those are the seven general principles of contemporary Public International Law.

III. THE INTERNATIONAL BILL OF HUMAN RIGHTS

The International Bill of Human Rights is formed by a set of documents consisting of the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and its two Optional Protocols. In 1945, the world was distinctly split in two political-ideological threads that directed the international system towards spinning around a bipolar nature led by the USA, on the one hand, and the USSR on the other.

The USA were leading the Western Capitalist countries that defended liberal democracy as the only political regime capable of promoting respect towards the fundamental freedoms and rights, and the full development of individuals, under both economic and political viewpoints. The USSR commanded the Socialist bloc that

22 See Article 1 of the *Charter of the United Nations*.

23 For these subjects please consult: Antônio Augusto Cançado Trindade. *O Direito Internacional em um Mundo em Transformação* (Rio de Janeiro: Renovar, 2002), 91–140.

held – in social or real democracy[24] – the key to the elimination of social inequalities and the means for the establishment of universal peace, as Socialist countries did not engage in war against one another.[25]

The briefing of the United Nations Preparatory Commission of 1945 originally recommended the creation of a human rights commission to draft an international declaration of rights. The completion of this document, the fourth and last step in the masterpiece of creating the UN, obtained, as it did in the three previous stages:[26]

1. Approval of the Proposals of Dumbarton Oaks (adopted in 1944) completed by decisions made at the Yalta Conference (February 1945).
2. Signing of the Charter of the United Nations in San Francisco that created the UN and institutes the Preparatory Commission (on June 26, 1945).
3. London Conversations (from August 16, 1945) sponsored by the Executive Committee of that Commission, in charge of elaborating the briefing.

The document made by the Preparatory Commission regarding the Economic and Social Council (ECOSOC) established in its chapter III, section 4, paragraphs 14 and 16, the creation of the *United Nations Commission on Human Rights* (UNCHR), whose activities would be oriented by and international declaration on human rights.

The Nuclear Commission on Human Rights was founded at the First Session of the Economic and Social Council, by way of the Resolution 5 (I), dated February 16, 1946, and it consisted of nine members appointed based on their individual capacity. The Commission on Human Rights met for the first time from January 27 to February 10, 1947, at Lake Success. At this session, the elaboration of a preliminary project of the International Declaration of Human Rights was assigned to the chairman, the vice-chairman and the rapporteur, to be submitted for discussion and approval by

24 Regarding the discussion on "democracy and socialism" read the heading "Democracy", in: BOBBIO et alii. *Dicionário de Política* (Brasília: Edunb, 1992), 324-325.

25 For the themes discussed in this paragraph read WIGHT, Martin. *Power Politics* (London: Continuum, 1978), 175-192.

26 QUINTANA. *Ibid*, 69.

all the members of the Commission at the following Session, in December 1947. Due to the lack of adopting a proper geographic division for the election of the Drafting Group's members, this decision was targeted by criticism from ECOSOC, and the procedure for elaborating the project was modified according to ECOSOC Resolution 46 (IV), dated March 28, 1947.[27]

A new Commission, based on a more equitable geographic division, was appointed and met in Lake Success from June 11 to July 5, 1947, initiating the drafting works. As per solicitation of its chairman, the Commission adopted a project proposal of the declaration on human rights prepared by the Human Rights Division in the UN Secretariat, as its first preliminary draft, which comprised a preamble and 48 articles.[28]

According to members of the Human Rights Division, the document's main quality was the attempt to "provide the questioner with an affirmative answer as to whether reaching an agreement about a universal precept on matters of human rights was possible."[29]

A lengthy and controversial discussion surrounded the atmosphere of the UNCHR and the Drafting Committee. International jurists and social scientists broadened the scope of discussions basing on distinct ideological thinking that were laying foundation on the world scene – and were arousing enquiries and questionings about the individual's freedom before the forces of collectiveness, about moral judgments in the industrial society, about the natural law principle of consecrated rights, about the inclusion of economic and social rights in the upcoming declaration of rights, and even about the relations among individual and social rights, and their differences in implementing each category of rights.[30]

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27 Its original members were Paal Berg (Norway), René Casin (France), Fernand Dehousse (Belgium), Victor Raúl Haya de la Torre (Peru), K.C.Neogi (India), Mrs. Roosevelt (the USA), Jhon C.H. Wu (China), and also individuals that the ECOSOC members representing the USSR and Yugoslavia would indicate to the UNO Secretary-General. Later, C. L. Hsia substituted C. H. Wu as China representative; and D. Brkish and A. Borisov represented Yugoslavia and the USSR, respectively.

28 The document contained almost all the rights mentioned in various national Constitutions and other articles present in the text of the international declaration in possession of the Secretariat.

29 QUINTANA. *Ibid*, 76.

30 This discussion and historical analysis is show more deepened in: TRINDADE, Antônio A. Cançado. *Tratado de Direito Internacional de Direitos Humanos*. Vol. I (Porto Alegre: Fabris, 1997), 35-37.

The drafting work of the future declaration was uninterrupted: starting from a first preliminary draft consisting of a preamble and 43 articles prepared by R. Casin and other Commission members, the Drafting Committee submitted two project proposals to the Second Session of the UN Commission on Human Rights for considerations and alterations into a final version. During the Second Session of the Commission on Human Rights[31] it was decided[32] to name the first document *Declaration*, the second, *Covenant*, and the combination of those, *Bill*; henceforth the title "International Bill of Human Rights" would designate the set of three documents being prepared. Three working groups to examine separately the documents were formed, and from their reports the Commission on Human Rights prepared two texts – one for the declaration, and the other for the covenant – which were sent to the governments for due consideration and suggestions.

The two documents – the Declaration and the Covenant – with the governments' proper proposals were, then, edited at the Second Session of the Drafting Committee.[33] The methodology used was the initial appreciation of the Covenant, followed by analysis of the two other documents that would comprise the International Bill. Such process lacked support from the USSR and Lebanon representatives, as they favored to firstly analyze the Declaration, that is, to start with the fundamental principles, and then proceed to study the Covenant and the measures for its execution.[34]

During the Second Session of the UN Commission on Human Rights, held at Lake Success, from May 24 to June 18, 1948, only the Declaration proposal was reviewed and the amendments suggested by the various representatives were taken into consideration. Therefore, there was not reasonable time to review the Covenant and the execution measures. The CHR informed ECOSOC in its report[35] that the Commission had not fully completed its obligation, that is, it lacked appreciation of the Covenant and of the execution and/or application measures, and it suggested this task be completed at the Fourth Session of the Commission, in 1949.

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31 Held in Geneva, 12 to 17 December, 1947.
32 Decided from a Syrian-Lebanese proposal.
33 Held at Lake Success, from 3-21 May, 1948.
34 The result of the internal election held in the Drafting Committee to decide on the methodology mentioned in the text was 5 votes in favor, 1 against and 2 abstentions.
35 The rapporteur was Mr. Malik, representative of Lebanon.

ECOSOC sent the declaration project to the General Assembly, the Third Committee – in charge of social, cultural and humanitarian issues (SOCHUM) – of which was assigned to analyze it and formulate suggestions. The Third Committee concluded it best to edit only the Declaration, as it understood itself not to be in condition to carry out a deeper study of both documents. Moreover, the Committee approved the initiative of the Haiti representative, which established the universal character of the document, as well as the amendment from France, changing the word "international" for the term "universal".

Thus the UN General Assembly while gathered in Paris (at the Palais de Chaillot), on December 10, 1948, for its Third Ordinary Session adopted the Universal Declaration of Human Rights through its Resolution 217 A (III), by 48 in favor, 8 abstentions and none against.[36] The Universal Declaration legitimized the international community's concern about the promotion and protection of human rights by condemning concrete and persistent violations, including those in armed conflicts, and selecting out the elimination of extreme poverty and social exclusion as international priorities. Thus, having contracted these obligations in front of the international community, the States could not then, as currently they also cannot, affirm that the subject is exclusive to domestic jurisdiction.[37]

IV. THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

The International Covenant on Economic, Social and Cultural Rights (ICESCR) was adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 3 January 1976, in accordance with its article 27.

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36 Voted in favor: Afghanistan, Argentina, Australia, Belgium, Burma, Bolivia, Brazil, Chile, China, Colombia, Costa Rica, Cuba, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, France, Greece, Guatemala, Haiti, Iceland, India, Iraq, Iran, Lebanon, Liberia, Luxembourg, Mexico, The Netherlands, New Zealand, Norway, Nicaragua, Pakistan, Panama, Paraguay, Peru, Philippines, Siam, Sweden, Syria, Turkey, the United Kingdom, the United States of America, Uruguay, and Venezuela.
Abstentions: Belarus, Czechoslovakia, Poland, Saudi Arabia, Ukraine, South Africa, the Union of Soviet Socialist Republics, and Yugoslavia.
37 RODRIGUES. *Ibid*, 70.

The ICESCR´s norms dispose about: the right to work; the right of everyone to the enjoyment of just and favourable conditions of work; the right of everyone to form trade unions and join the trade union of his choice, the right of everyone to social security, including social insurance; the right to the widest possible protection and assistance should be accorded to the family; the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions; the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; the right of everyone to education; the right to take part in cultural life and to enjoy the benefits of scientific progress and its applications. All these rights accord to the principles of self-determination, equality and non discrimination.

IV.a - The Committee on Economic, Social and Cultural Rights (CESCR)

The CESCR was established under ECOSOC Resolution 1985/17 of 28 May 1985 to carry out the monitoring functions assigned to the United Nations Economic and Social Council (ECOSOC) in Part IV of the International Covenant on Economic, Social and Cultural Rights. It is the body of independent experts that monitors implementation of the ICESCR by its States parties.

All States parties are obliged to submit regular reports to the Committee on how the rights are being implemented. States must report initially within two years of accepting the Covenant and thereafter every five years. The Committee examines each report and addresses its concerns and recommendations to the State party in the form of "concluding observations".

In addition to the reporting procedure, the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights , which entered into force on 5th May 2013, provides the Committee competence to receive and consider communications from individuals claiming that their rights under the Covenant have been violated. The Committee may also, under certain circumstances, undertake inquiries on grave or systematic violations of any of the economic, social and cultural rights set forth in the Covenant, and consider inter-state complaints.

The Committee meets in Geneva and normally holds two sessions per year, consisting of a three-week plenary and a one-week pre-sessional working group. It also publishes its interpretation of the provisions of the Covenant, known as general comments. There are 21 general comments until now: No. 1: Reporting by States parties ; No. 2: International technical assistance measures (Art. 22); No. 3: The nature of States parties obligations (Art. 2, par.1); No. 4: The right to adequate housing (Art.11 (1)); No. 5 (1994): Persons with disabilities (Annex IV); No. 6: The economic, social and cultural rights of older persons; No. 7: The right to adequate housing (art. 11.1 of the Covenant): forced evictions (sixteenth session, 1997); No. 8: The relationship between economic sanctions and respect for economic, social and cultural rights; No. 9: The domestic application of the Covenant; No. 10: The role of national human rights institutions in the protection of economic, social and cultural rights; No. 11 (1999): Plans of action for primary education (art.14); No. 12 (Twentieth session, 1999): The right to adequate food (Art.11); No. 13 (Twenty-first session, 1999): The right to education (Art.13); No. 14 (2000): The right to the highest attainable standard of health; No. 15 (2002): The right to water; No. 16 (2005): The equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3 of the International Covenant on Economic, Social and Cultural Rights); No. 17 (2005): The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author; No. 18: Article 6 of the International Covenant on Economic, Social and Cultural Rights; No. 19, The right to social security (art. 9); No. 20: Non-discrimination in economic, social and cultural rights; No. 21: Right of everyone to take part in cultural life.

V. THE OPTIONAL PROTOCOL ON THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

The Optional Protocol, which entered into force on 5th May 2013, provides the Committee competence to receive and consider communications from individuals claiming that their rights under the Covenant have been violated. The Committee may also, under certain circumstances, undertake inquiries on grave or systematic violations of any of the economic, social and cultural rights set forth in the Covenant, and consider inter-state complaints.

Communications may be submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party, claiming to be victims of a violation of any of the economic, social and cultural rights set forth in the Covenant by that State Party. Where a communication is submitted on behalf of individuals or groups of individuals, this shall be with their consent unless the author can justify acting on their behalf without such consent.[38]

The CESCR shall not consider a communication unless it has ascertained that all available domestic remedies have been exhausted. This shall not be the rule where the application of such remedies is unreasonably prolonged. Important to say that the Committee shall declare a communication inadmissible when:

> (a)It is not submitted within one year after the exhaustion of domestic remedies, except in cases where the author can demonstrate that it had not been possible to submit the communication within that time limit; (b) The facts that are the subject of the communication occurred prior to the entry into force of the present Protocol for the State Party concerned unless those facts continued after that date; (c) The same matter has already been examined by the Committee or has been or is being examined under another procedure of international investigation or settlement; (d) It is incompatible with the provisions of the Covenant; (e) It is manifestly ill-founded, not sufficiently substantiated or exclusively based on reports disseminated by mass media; (f) It is an abuse of the right to submit a communication; or when (g) It is anonymous or not in writing.[39]

The CESCR may, if necessary, decline to consider a communication where it does not reveal that the author has suffered a clear disadvantage, unless the Committee considers that the communication raises a serious issue of general importance.[40]

At any time after the receipt of a communication and before a determination on the merits has been reached, the CESCR may transmit to the State Party concerned for its urgent consideration a request that the State Party take such interim measures as may be

38 Art. 2 of Optional Protocol.
39 Art. 3 of Optional Protocol.
40 Art. 4 of Optional Protocol.

necessary in exceptional circumstances to avoid possible irreparable damage to the victim or victims of the alleged violations.[41]

The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights has provisional rules of procedure adopted by the CESCR at its forty-ninth session (12-30 November 2012). By these rules, in any matter related to communications under the Optional Protocol, the Committee may establish a Working Group and/or may designate a Rapporteur to make recommendations thereon to the Committee and/or to assist it in any manner in which the Committee may decide.[42]

Very important point is that the CESCR may, in exceptional circumstances, after the receipt of a communication and before a determination on the merits has been reached transmit to the State party concerned, for its urgent consideration, a request that it take such interim measures as the Committee considers necessary to avoid possible irreparable damage to the victim/s of the alleged violations. When the Committee requests interim measures under this rule, the request shall state that it does not imply a determination on the admissibility or the merits of the communication. The State party may present arguments at any stage of the proceedings on why the request for interim measures should be lifted or is no longer justified. The Committee may withdraw a request for interim measures on the basis of submissions received from the State party and the author/s of the communication.[43]

In fact, these communications shall be dealt with in the order in which they are received by the Secretary-General, unless the Committee decides otherwise. The Committee may decide to consider two or more communications jointly. The Committee may divide a communication and consider its parts separately, if it addresses more than one issue or it refers to persons or alleged violations not interconnected in time and place.[44]

The CESCR shall, by a simple majority, decide whether the communication is admissible or inadmissible under the Optional Protocol. The decision to consider a communication admissible or inadmissible may also be taken by the Working Group established

41 Art. 5 of Optional Protocol.
42 See rule 6.
43 See rule 7.
44 See rule 8.

under the present rules provided that all its members so decide. The decision is subject to confirmation by the Committee plenary which may do so without formal discussion, unless a Committee member requests for such a discussion.[45]

Regarding the procedures about the communications received, as soon as possible after the receipt of a communication, and provided that the individual or group of individuals consent to the disclosure of their identity to the State party concerned, the Committee, or the Committee through a Working Group or a Rapporteur, shall bring the communication confidentially to the attention of the State party and request that the State party submit a written reply. In this way, any request made shall include a statement indicating that such a request does not imply that any decision has been reached on the question of admissibility or the merits of the communication. So, within six months after receipt of the Committee's request under the present rule, the State party shall submit to the Committee written explanations or statements that relate to the admissibility and the merits of the communication, as well as to any remedy that may have been provided in the matter.

The CESCR may request written explanations or statements that relate only to the admissibility of a communication but, in such cases, the State party may nonetheless submit written explanations or statements that relate to both the admissibility and the merits of a communication within six months of the Committee's request. If the State party concerned disputes the contention of the author/s, that all available domestic remedies have been exhausted, the State party shall give details of the remedies available to the alleged victim or victims and said to be effective in the particular circumstances of the case. Also, the Committee may request the State party or the author of the communication to submit, within fixed time limits, additional written explanations or statements relevant to the issues of the admissibility or merits of a communication. The Committee shall transmit to each party the submissions made by the other party pursuant to the present rule and shall afford each party an opportunity to comment on those submissions within fixed time limits.

As could be noticed from its rules, the Optional Protocol establishes three international protection procedures: individual communications; inter-State communications; and an inquiry

45 See rule 9.

procedure for investigating grave or systematic violations of economic, social and cultural rights. Beyond individual communications, the Protocol also empowers the Committee to undertake inquires into grave and systematic violations of the Covenant as well as to receive inter-state complaints.

VI. THE GENERAL COMMENT Nº 20: NON-DISCRIMINATION IN ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Both, non-discrimination and equality are fundamental components of international human rights law and essential to the exercise and enjoyment of economic, social and cultural rights. Article 2(2) of the ICESCR obliges each State Party "to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".[46]

The Covenant also explicitly mentions the principles of non-discrimination and equality with respect to some individual rights. Article 3 requires States to undertake to ensure the equal right of men and women to enjoy the Covenant rights and Article 7 includes the "right to equal remuneration for work of equal value" and "equal opportunity for everyone to be promoted" in employment. Article 10 stipulates that mothers should be accorded special protection during a reasonable period before and after childbirth and that special measures of protection and assistance should be taken for children and young persons without discrimination. Article 13 recognizes that "primary education shall be compulsory and available free for all" and provides that "higher education shall be made equally accessible to all".

Even the UN Charter and the Universal Declaration of Human Rights prohibit discrimination in the enjoyment of economic, social and cultural rights. International treaties on racial discrimination, discrimination against women and the rights of refugees, stateless persons, children, migrant workers and members of their families and persons with disabilities include the exercise of economic, social and cultural rights, while other treaties require the elimination of discrimination in specific fields, such as employment and education.

46 UNO. ECOSOC. Doc. E/C.12/GC/20, par. 2.

In addition to the common provision on equality and non-discrimination in both Covenants, ICESCR and the International Covenant on Civil and Political Rights, Article 26 of ICCPR contains an independent guarantee of equal and effective protection before and of the law.[47]

For the CESCR, the non-discrimination is an immediate and cross-cutting obligation in the ICESCR. Article 2(2) requires States parties to guarantee non-discrimination in the exercise of each of the economic, social and cultural rights enshrined in the Covenant and can only be applied in conjunction with these rights. It is to be noted that discrimination constitutes any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of Covenant rights. Discrimination also includes incitement to discriminate and harassment. In order for States parties to "guarantee" that the Covenant rights will be exercised without discrimination of any kind, discrimination must be eliminated both formally and substantively:[48]

> Formal discrimination: Eliminating formal discrimination requires ensuring that a State's constitution, laws and policy documents do not discriminate on prohibited grounds; for example, laws should not deny equal social security benefits to women on the basis of their marital status.
>
> Substantive discrimination: Merely addressing formal discrimination will not ensure substantive equality as envisaged and defined by Article 2(2). The effective enjoyment of Covenant rights is often influenced by whether a person is a member of a group characterized by the prohibited grounds of discrimination. Eliminating discrimination in practice requires paying sufficient attention to groups of individuals which suffer

47 See the preamble, articles 1(3) and 55 of the UN Charter and article 2(1) of the Universal Declaration of Human Rights. Also, International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); Convention on Elimination of All Forms of Discrimination Against Women (CEDAW); Convention relating to the Status of Refugees; Convention relating to the Status of Stateless Persons; Convention on the Rights of the Child; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; Convention on the Rights of Persons with Disabilities. Them, see General Comment No. 18 of the Human Rights Committee.

48 See General Comment No. 20, par. 8.

> historical or persistent prejudice instead of merely comparing the formal treatment of individuals in similar situations. States parties must therefore immediately adopt the necessary measures to prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate substantive or *de facto* discrimination. For example, ensuring that all individuals have equal access to adequate housing, water and sanitation will help to overcome discrimination against women and girl children and persons living in informal settlements and rural areas.

For the CESCR, in order to eliminate substantive discrimination, States parties may be, and in some cases are, under an obligation to adopt special measures to attenuate or suppress conditions that perpetuate discrimination. Such measures are legitimate to the extent that they represent reasonable, objective and proportional means to redress *de facto* discrimination and are discontinued when substantive equality has been sustainably achieved. Such positive measures may exceptionally, however, need to be of a permanent nature, such as interpretation services for linguistic minorities and reasonable accommodation of persons with sensory impairments in accessing health care facilities. Both direct and indirect forms of differential treatment can amount to discrimination under Article 2(2) of the Covenant:[49]

> Direct discrimination occurs when an individual is treated less favourably than another person in a similar situation for a reason related to a prohibited ground; e.g. where employment in educational or cultural institutions or membership of a trade union is based on the political opinions of applicants or employees. Direct discrimination also includes detrimental acts or omissions on the basis of prohibited grounds where there is no comparable similar situation (e.g. the case of a woman who is pregnant).
>
> Indirect discrimination refers to laws, policies or practices which appear neutral at face value, but have a disproportionate impact on the exercise of Covenant rights as distinguished by prohibited grounds of discrimination. For instance, requiring a birth registration certificate for school enrolment may discriminate against ethnic minorities or non-nationals who do not possess, or have been denied, such certificates.

49 See General Comment No. 20, par. 9.

The CESCR also treats the dimension of the discrimination in the private sphere, the concept of systemic discrimination and the permissible scope of differential treatment. About these important issues, the CESCR´s points of views are:[50]

> Private sphere. Discrimination is frequently encountered in families, workplaces, and other sectors of society. For example, actors in the private housing sector (e.g. private landlords, credit providers and public housing providers) may directly or indirectly deny access to housing or mortgages on the basis of ethnicity, marital status, disability or sexual orientation while some families may refuse to send girl children to school. States parties must therefore adopt measures, which should include legislation, to ensure that individuals and entities in the private sphere do not discriminate on prohibited grounds.
>
> Systemic discrimination. The Committee has regularly found that discrimination against some groups is pervasive and persistent and deeply entrenched in social behaviour and organisation, often involving unchallenged or indirect discrimination. Such systemic discrimination can be understood as legal rules, policies, practices or predominant cultural attitudes in either the public or private sector which create relative disadvantages for some groups, and privileges for other groups.
>
> Permissible scope of differential treatment. Differential treatment based on prohibited grounds will be viewed as discriminatory unless the justification for differentiation is reasonable and objective. This will include an assessment as to whether the aim and effects of the measures or omissions are legitimate, compatible with the nature of the Covenant rights and solely for the purpose of promoting the general welfare in a democratic society. In addition, there must be a clear and reasonable relationship of proportionality between the aim sought to be realised and the measures or omissions and their effects. A failure to remove differential treatment on the basis of a lack of available resources is not an objective and reasonable justification unless every effort has been made to use all resources that are at the State party's disposition in an effort to address and eliminate the discrimination, as a matter of priority.

50 See General Comment No. 20, pars. 11, 12, 13.

About the prohibited grounds of discrimination, the CESCR also has an appreciation built upon article 2(2) of the ICESCR that lists the prohibited grounds of discrimination as "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". In the spirit of this article, the inclusion of "other status" indicates that this list is not exhaustive and other grounds may be incorporated in this category. The express grounds and a number of implied grounds under "other status" are discussed as below:[51]

> Membership in a group. In determining whether a person is distinguished by one or more of the prohibited grounds, identification shall, if no justification exists to the contrary, be based upon *self-identification* by the individual concerned. Membership also includes *association* with a group characterised by one of the prohibited grounds (e.g. the parent of a child with a disability) or *perception* by others that an individual is part of such a group (e.g., a person has a similar skin colour or is a supporter of the rights of a particular group or a past member of a group).
>
> Multiple discrimination. Some individuals or groups of individuals face discrimination on more than one of the prohibited grounds, for example women belonging to an ethnic or religious minority. Such *cumulative discrimination* has a unique and specific impact on individuals and merits particular consideration and remedying.

A. Express grounds

> The Committee has consistently raised concern over *formal* and *substantive* discrimination across a wide range of Covenant rights against indigenous peoples and ethnic minorities amongst others.
>
> 'Race and colour'. Discrimination on the basis of 'race and colour', which includes an individual's ethnic origin, is prohibited by the Covenant as well as by other treaties including the International Convention on the Elimination of Racial Discrimination. The use of the term 'race' in the Covenant or the present General Comment does not imply

51 See General Comment No. 20, pars., 15 to 27.

the acceptance of theories which attempt to determine the existence of separate human races.[52]

Sex. The Covenant guarantees the equal right of men and women to the enjoyment of economic, social and cultural rights. Since the adoption of the Covenant, the notion of the prohibited ground 'sex' has evolved considerably to cover not only *physiological* characteristics but also the social construction of *gender* stereotypes, prejudices and expected roles, which have created obstacles to the equal fulfilment of economic, social and cultural rights. Thus, the refusal to hire a woman, on the ground that she might become pregnant, or the allocation of low-level or part-time jobs to women based on the stereotypical assumption that, for example, they are unwilling to commit as much time to their work as men, constitutes discrimination. Refusal to grant paternity leave may also amount to discrimination against men.

Language. Discrimination on the basis of language or regional accent is often closely linked to unequal treatment on the basis of national or ethnic origin. Language barriers can hinder the enjoyment of many Covenant rights, including the right to participate in cultural life as guaranteed by Article 15 of the Covenant. Therefore, information about public services and goods, for example, should be available, as far as possible, also in languages spoken by minorities and States parties should ensure that any language requirements relating to employment and education are based on reasonable and objective criteria.

Religion. This prohibited ground of discrimination covers the profession of religion or belief of one's choice (including the non-profession of any religion or belief), that may be publicly or privately manifested in worship, observance, practice and teaching.[53] For instance, discrimination arises when persons belonging to a religious minority are denied equal access to universities, employment, or health services on the basis of their religion.

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52 Outcome Document Durban Review Conference, paragraph 6: "*Reaffirms* that all peoples and individuals constitute one human family, rich in diversity, and that all human beings are born free and equal in dignity and rights; and strongly rejects any doctrine of racial superiority along with theories which attempt to determine the existence of so-called distinct human races."

53 See also General Assembly's Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, proclaimed by General Assembly resolution 36/55 of 25 November 1981.

Political or other opinion. Political and other opinions are often grounds for discriminatory treatment and include both holding and not-holding, as well as expression of views or membership within opinion-based associations, trade unions or political parties. Access to food assistance schemes, for example, must not be made conditional on an expression of allegiance to a particular political party.

National or social origin. 'National origin' refers to a person's State, nation, or place of origin. Due to such personal circumstances, individuals and groups of individuals may face systemic discrimination in both the public and private sphere in the exercise of their Covenant rights.'Social origin' refers to a person's inherited social status, which is discussed more fully below in the context of 'property' status, *descent-based discrimination* under 'birth' and 'economic and social status'.[54]

Property. Property status, as a prohibited ground of discrimination, is a broad concept and includes real property (e.g., land ownership or tenure) and personal property (e.g., intellectual property, goods and chattels, and income), or the lack of it. The Committee has previously commented that Covenant rights, such as access to water services and protection from forced eviction, should not be made conditional on a person's land tenure status, such as living in an informal settlement.[55]

Birth. Discrimination based on birth is prohibited and Article 10(3) specifically states, for example, that special measures should be taken on behalf of children and young persons "without any discrimination for reasons of parentage". Distinctions must therefore not be made against those who are born out of wedlock, born of stateless parents or are adopted or constitute the families of such persons. The prohibited ground of birth also includes *descent*, especially on the basis of caste and analogous systems of inherited status. States parties should take steps, for instance, to prevent, prohibit and eliminate discriminatory practices directed against members of descent-based communities and act against dissemination of ideas of superiority and inferiority on the basis of descent.

54 See paras. 25, 26 and 35 respectively.
55 See General Comments Nos. 15 and 4 respectively.

The CESCR is also clear that the nature of discrimination varies according to context and evolves over time. A flexible approach to the ground of "other status" is thus needed to capture other forms of differential treatment that cannot be reasonably and objectively justified and are of a comparable nature to the expressly recognised grounds in Article 2(2). These additional grounds are commonly recognised when they reflect the experience of social groups that are vulnerable and have suffered and continue to suffer marginalisation. In this way, the Committee puts special attention on these situations:[56]

> Disability. In General Comment No. 5, the Committee defined discrimination against persons with disabilities[57] as "any distinction, exclusion, restriction or preference, or denial of reasonable accommodation based on disability which has the effect of nullifying or impairing the recognition, enjoyment or exercise of economic, social or cultural rights." The denial of reasonable accommodation should be included in national legislation as a prohibited form of discrimination on the basis of disability. States parties should address discrimination, such as prohibitions on the right to education, and denial of reasonable accommodation in public places such as public health facilities and the workplace, as well as in private places, e.g., as long as spaces are designed and built in ways that make them inaccessible to wheelchairs, such users will be effectively denied their right to work.
>
> Age. Age is a prohibited ground of discrimination in several contexts. The Committee has highlighted the need to address discrimination against unemployed older persons in finding work, or accessing professional training or re-training and against older persons living in poverty with unequal access to universal old age pensions due to their place of residence. In relation to young persons, unequal access by adolescents to sexual and reproductive health information and services amounts to discrimination.
>
> Nationality. The ground of nationality should not bar access to Covenant rights, e.g., all children within a State, including

56 See General Comment No. 20, pars. 28 to 35.

57 For a definition see Article 1, CRPD: "Persons with disabilities include, but are not limited to individuals with "long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others".

those with an undocumented status, have a right to receive education and access to adequate food and affordable health care. The Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation.

Marital and family status. Marital and family status may differ between individuals because, *inter alia*, they are married or unmarried, married under a particular legal regime, in a *de facto* relationship or one not recognized by law, divorced or widowed, live in an extended family or kinship group or have differing kinds of responsibility for children and dependents or a particular number of children. Differential treatment in access to social security benefits on the basis of whether an individual is married must be justified on reasonable and objective criteria. In certain cases, discrimination can also occur when an individual is unable to exercise a right protected by the Covenant because of his or her family status or can only do so with spousal consent or a relative's concurrence or guarantee.

Sexual orientation and gender identity "Other status" as recognized in article 2(2) includes sexual orientation. States parties should ensure that a person's sexual orientation is not a barrier to realising Covenant rights, for example, in accessing survivor's pension rights. In addition, gender identity is recognized as among the prohibited grounds of discrimination; for example, persons who are transgender, transsexual or intersex often face serious human rights violations, such as harassment in schools or in the work place.

Health status. Health status refers to a person's physical or mental health. States parties should ensure that a person's actual or perceived health status is not a barrier to realizing the rights under the Covenant. The protection of public health is often cited by States as a basis for restricting human rights in the context of a person's health status. However, many such restrictions are discriminatory, for example, when HIV status is used as the basis for differential treatment with regard to access to education, employment, health care, travel, social security, housing and asylum. States parties should also adopt measures to address widespread stigmatisation of persons on the basis of their health status, such as mental illness, diseases

such as leprosy and women who have suffered obstetric fistula, which often undermines the ability of individuals to enjoy fully their Covenant rights. Denial of access to health insurance on the basis of health status will amount to discrimination if no reasonable or objective criteria can justify such differentiation.

Place of residence. The exercise of Covenant rights should not be conditional on, or determined by, a person's current or former place of residence; e.g., whether an individual lives or is registered in an urban or a rural area, in a formal or an informal settlement, is internally displaced or leads a nomadic lifestyle. Disparities between localities and regions should be eliminated in practice by ensuring, for example, that there is even distribution in the availability and quality of primary, secondary and palliative health care facilities.

Economic and social situation. Individuals and groups of individuals must not be arbitrarily treated on account of belonging to a certain economic or social group or strata within society. A person's social and economic situation when living in poverty or being homeless may result in pervasive discrimination, stigmatisation and negative stereotyping which can lead to the refusal of or unequal access to the same quality of education and health care as others, as well as the denial of or unequal access to public places.

National implementation is a very important step of the human rights affirmation and consolidation. In this way, the CESCR said that "in addition to refraining from discriminatory actions, States parties should take concrete, deliberate and targeted measures to ensure that discrimination in the exercise of Covenant rights is eliminated. Individuals and groups of individuals, who may be distinguished by one or more of the prohibited grounds, should be ensured the right to participate in decision-making processes over the selection of such measures. States parties should regularly assess whether the measures chosen are effective in practice:"[58]

Legislation. Adoption of legislation to address discrimination is indispensable in complying with Article 2(2). States parties are therefore encouraged to adopt specific legislation that prohibits discrimination in the field of economic, social and cultural rights. Such laws should aim at eliminating *formal* and *substantive* discrimination, attribute obligations to

58 See General Comment No. 20, pars. 36-41.

public and private actors and cover the prohibited grounds discussed above. Other laws should be regularly reviewed and, where necessary, amended in order to ensure that they do not discriminate or lead to discrimination, whether formally or substantively, in relation to the exercise and enjoyment of Covenant rights.

Policies, plans and strategies. States parties should ensure that strategies, policies, and plans of action are in place and implemented in order to address both formal and substantive discrimination by public and private actors in the area of the Covenant rights. Such policies, plans and strategies should address all groups distinguished by the prohibited grounds and States parties are encouraged, amongst other possible steps, to adopt temporary special measures in order to accelerate the achievement of equality. Economic policies, such as budgetary allocations and measures to stimulate economic growth, should pay attention to the need to guarantee the effective enjoyment of the Covenant rights without discrimination. Public and private institutions should be required to develop plans of action to address non-discrimination and the State should conduct human rights education and training programmes for public officials and make such training available to judges and candidates for judicial appointments. Teaching on the principles of equality and non-discrimination should be integrated in formal and non-formal inclusive and multicultural education, with a view to dismantling notions of superiority or inferiority based on prohibited grounds and to promote dialogue and tolerance between different groups in society. States parties should also adopt appropriate preventive measures to avoid the emergence of new marginalised groups.

Elimination of systemic discrimination. States parties must adopt an active approach to eliminating systemic discrimination and segregation in practice. Tackling such discrimination will usually require a comprehensive approach with a range of laws, policies and programmes, including temporary special measures. States parties should consider using incentives to encourage public and private actors to change their attitudes and behaviour in relation to individuals and groups of individuals facing systemic discrimination, or penalize them in case of non-compliance. Public leadership and programmes to raise awareness about systemic discrimination and the adoption of strict measures against incitement to discrimination are often

necessary. Eliminating systemic discrimination will frequently require devoting greater resources to traditionally neglected groups. Given the persistent hostility towards some groups, particular attention will need to be given to ensuring that laws and policies are implemented by officials and others in practice.

Remedies and accountability. National legislation, strategies, policies and plans should provide for mechanisms and institutions that effectively address the individual and structural nature of the harm caused by discrimination in the field of economic, social and cultural rights. Institutions dealing with allegations of discrimination customarily include courts and tribunals, administrative authorities, national human rights institutions and/or ombudspersons, which should be accessible to everyone without discrimination. These institutions should adjudicate or investigate complaints promptly, impartially, and independently and address alleged violations relating to article 2(2), including actions or omissions by private actors. Where the facts and events at issue lie wholly, or in part, within the exclusive knowledge of the authorities or other respondent, the burden of proof should be regarded as resting on the authorities, or the other respondent, respectively. These institutions should also be empowered to provide effective remedies, such as compensation, reparation, restitution, rehabilitation, guarantees of non-repetition, public apologies, and State parties should ensure that these measures are effectively implemented. Domestic legal guarantees of equality and non-discrimination should be interpreted by these institutions in ways which facilitate and promote the full protection of economic, social and cultural rights.

Monitoring, indicators and benchmarks. States parties are obliged to monitor effectively the implementation of measures to comply with Article 2(2) of the Covenant. Monitoring should assess both the steps taken and the results achieved in the elimination of discrimination. National strategies, policies and plans should use appropriate indicators and benchmarks, disaggregated on the basis of the prohibited grounds of discrimination.

The Committee on Economic, Social and Cultural Rights (CESCR) promotes the principles of non-discrimination and equality present in the International Covenant on Economic, Social and

Cultural Rights (ICESCR) by an important conceptual and normative interpretation framework built on the practice of its Concluding Observations and General Comments.

BECOMING HUMAN: INTERNATIONAL CRIMINAL COURTS AND THE CONSTRUCTION OF THE MEMORIES OF THE VICTIMS

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INTRODUCTION

In one's first years of legal studies, a law student learns that there are some principles, which are paramount to mankind, and some shared interests that may constitute values protected by the legal order (BULL, 1977). According to Hedley Bull (1977), sharing common interests, such as the restriction of violence or the respect for agreements, is what enables the maintenance of order in any society.

International Law dedicates special attention to a set of shared values, considering them *"jus cogens"*, which cannot be overruled by any convention. Their application is imperative, they are peremptory norms. Such concept is described at the 1969 Vienna Convention on the law of treaties as follows:

> Article 53: Treaties conflicting with a peremptory norm of general international law (jus cogens).
>
> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

The Vienna Convention does not specify what these peremptory norms must contain in order to be considered as such. Although the International Law Commission (ILC) presented to the Vienna Conference some examples of what may be considered *jus cogens* in its final report, they were not included in the draft sent to the Convention (NIETO-NAVIA, 2001). As quoted by Nieto-Navia, the examples were the following:

> (1) Principles of the Charter of the United Nations prohibiting the unlawful use of force; (2) International laws that prohibit the performance of any other act criminal under international law; and (3) International laws that oblige States to co-operate in the suppression of certain acts such as trade in slaves, piracy or genocide (NIETO-NAVIA, 2001, p.12-13)

As demonstrated above, basic *jus cogens* norms refer to abusive use of force and perpetration of violent criminal acts, such as genocide or other crimes against humanity. Accordingly, one can easily conclude that human life is protected by international public law, and violence can only be addressed in limited forms and when justified.

Humanity is a value that deserves consideration and protection by the members of international society (BULL, 1977). The perpetration of genocide breaches this value, violates it and, consequently, demands a response by the same community whose fundamental norms were disrespected.

Since the early 20th century, the response given by international society, when confronted with these human rights violations, has been an international criminal trial of individuals involved in the perpetration of such actions. Genocide has been considered a crime, with a legally determined form and characteristics.

International trials have several specificities that distinguish them from national courts and procedures. One of these peculiarities is the nature of the crimes imputed to the defendant, specifically, the nature of genocide. As genocide is a crime that violates human condition (ARENDT, 2001), it deprives victims of their human status, *i.e.* their humanity. This trait is more important than death itself. Victims can no longer access the necessary elements, which enable them to develop as a person, such as their history, culture, dignity or family bindings.

Once a victim loses his or her humanity, it becomes difficult to reconnect him or her to a political society. Garapon (2002) approaches

this phenomenon as a loss of faith in the world or, according to a few scholars, as a trauma.

This paper addresses the importance of international trials as a means to cope with this trauma and, thus, a chance for the victims to retake their humanity and work through the violent experience they have suffered. The judicial process, we will argue, is a stage that can symbolically return victims to their legal statuses, giving them voice and a chance to construct a linear narrative, trying to make sense of a traumatic experience.

2. GENOCIDE: THE TRAUMA OF LOSING HUMANITY

Genocide was a term used by Raphael Lemkin to explain the Nazi goals concerning the Hebrews. The word was defined as "the destruction of a nation or of an ethnic group." (LEMKIN *apud* FEIN, p.1, 1993).

The massive violence against a selected group has its beginning with an attractive rhetoric that takes advantage of social distress in order to blame a certain part of the population pictured as the enemy (SEMÉLIN, 2009). The enemy is described as sinful, dangerous or even diabolical. Most importantly, the enemy is a specific and determined group that will gather all social anguish.

Once this "other", *i.e.* this "enemy", is determined, the same rhetoric can successfully change fear and anguish into hate and the desire to destroy what is causing this fear. The advantage of this kind of political maneuver is the strengthening of the group identified as "us" (understood as good) as a reaction to the "other" (seen as evil). This process becomes easier when groups are already culturally determined, such as the case of Tutsis x Hutus or Muslims in Bosnia (SEMÉLIN, 2009).

In critical times, when people can lose track of their personal references, they tend to be drawn to a common identity, in order to merge into a group. The idea is that a strong and united community can better deal with crises. Strengthening the group signals a rejection of the "other", the different. It is a classic social phenomenon that one's identity is built over the denial of such difference (identity/alterity).

This rejection of the "other" represents the desire of a perfect "unity", leading to the exclusion inside the group of those that offer resistance or try to bond with the "enemy". It is most commonly

a quest for "purity" inside the group, categorizing the "other" as impure. This idea of purity in itself carries serious implications, since those that do not belong with "us" are labeled as unclean, dirt, trash, vile. It also envisages an appeal to what is sacred, the necessity of purification, cleansing those that are unholy (SÉMELIN, 2009).

Besides labeling a group as dirty, there is the animalization of those that do not pertain to the group. It is common in war that soldiers use animal names to convince themselves that they are not killing people. Naming the "enemy" as an animal helps dehumanizing the victims. The killing begins when a group starts disqualifying the humanity of the others. The animals used to refer to this "enemy" are always pestilent, such as rats or cockroaches.

The idea of the "other" as a plague, something harmful, matches perfectly with the need of purification. Once this is accomplished, the "enemy" is no longer considered human, but instead an animal that pollutes the world, and it is a duty to the "us" group to purify and annihilate those considered "insects".

For this reason, before the assassinations take place, genocide victims are no longer perceived as humans, they are deprived of their humanity. Their lives are no longer protected and they can be eliminated without being considered wrong or criminal.

Giorgio Agamben compares this dehumanization to the ancient Roman figure of the *homo sacer*, a punishment in which the life of an individual is left without legal protection. Agamben (2010) names this a bare life, merely biological, without political or legal implications. *Homo sacer* is a man that is not under the sovereign's protection, since he was offered to the gods (sacred life); nonetheless, he still lives, hence not in the gods' realm. This means the *homo sacer* cannot be sacrificed, but he can be killed by any member of the community and it would not be considered murder.

Hannah Arendt (2001) also stated that in a context where genocide takes place, human condition is violated and men are excluded from the political community and cannot bond with other fellow citizens. According to Garapon, "victims live an experience of not belonging to this world, one of the most desperate and radical experiences to men. Victims are alone in the world, even when they share this experience with thousands more." (GARAPON, 2002, p.109, translated by author)[1]

1 "A vítima vive a experiência da não-pertença absoluta ao mundo, uma das experiências mais radicais e desesperadas do homem. A vítima está só no mundo,

As part of the destruction of a group it is necessary to go further than merely destroying its members, it is imperative to eliminate their culture, history and shared memories. That is to say that genocide goes beyond the biological death, reaching a symbolical one. The idea is to eliminate all traces that this particular group ever left on the face of the Earth. Survivors have difficulty in finding family members (often spread all over the territory), symbolical locations (such as churches, temples, museums) or any references to who they were before the violence began.

The unheard violence of such crime shows that there is an evil worse than death and cruelty (GARAPON, 2002). Men become empty, as Primo Levi describes:

> The anonymous crowd, continually renewed and always the same, the non-men that march and labor in silence; the divine sparkle has been extinguished in them, they are empty, they cannot really suffer. One may hesitate to call them alive; one may hesitate to call "death" their death, which they do not even fear, since they are too tired to understand it. They fill my memory with their faceless presence and, if I could concentrate in one image all evil in our time, I would choose this image (…) (LEVI, 2000, p.91, translated by author)[2]

Dehumanization suppresses the memories of the victims and causes this symbolic death for which there is no mourning. History and memory are lost; "any element capable of identifying a person or connecting her with a political community has been eliminated, in such a way that there would not remain any signs of her passing through this world (…)" (GARAPON, 2002, p.114, translated by author).[3]

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mesmo quando, na verdade, partilha essa experiência com milhares de outras." (GARAPON, 2002, p.109).

2 A multidão anônima, continuamente renovada e sempre igual, dos não-homens que marcham e se esforçam em silêncio; já se apagou neles a centelha divina, já estão tão vazios, que nem podem realmente sofrer. Hesita-se em chama-los vivos; hesita-se em chamar "morte" à sua morte, que eles já nem temem, porque estão esgotados demais para poder compreendê-la. Eles povoam a minha memória com sua presença sem rosto, e se eu pudesse concentrar numa imagem todo o mal do nosso tempo, escolheria essa imagem (...) (LEVI, 2000, p.91)

3 qualquer elemento susceptível (*sic*) de identificar uma pessoa, de liga-la a uma comunidade política (...), era eliminado, de modo a que não subsistisse qualquer vestígio nem da sua passagem pela terra (...)" (GARAPON, 2002, p.114)

This experience faced by a genocide victim constitutes a trauma. In Freudian terms, a traumatic experience is such that cannot be fully assimilated while it occurs (SELIGMANN-SILVA, 2006). Individuals that face violent situations, such as wars or massacres, tend to re-live the event (LOCKHURST, 2008). An experience could be considered traumatic when it affects the individual's psychological defenses and, as a result, disrupts the process in which memories are registered[4].

Victims cannot understand the traumatic event as such in the exact moment of the experience. An event of such nature can only be understood afterwards, by flashbacks and a delayed attempt of understanding the symptoms presented by the individual. "For Caruth, trauma is hence a crisis in representation, of history and truth, and of narrative time" (CARUTH *apud* LUCKHURST, 2008, p. 5)

Traumatic memory, according to Freud, is absent from the patient's memory while he or she is in a normal psychological state, but it exists in potency, waiting to emerge. It is imperative for the study of genocide as a trauma, the comprehension that there are two different moments taking place in the individual's mind: the first is the impact, when the violence occurs; the second moment is when the issue reappears as a flashback. An event is not understood as traumatic until it returns to the individual's conscious mind. Consequently, a linear narrative of a traumatic event, such as genocide, cannot take place, and this presents a challenge to international criminal courts which are expected to build a linear coherent narrative of it.

Victims of such trauma relive the violent moment, seeking to understand something that is inadmissible to their mind (LUCKHURST, 2008). This "acting out", in which a victim repeats the behavior and experience of the event over and over, does not help healing and overcoming the trauma. The individual seeks a lost memory that was wrongfully written in his mind (LACAPRA, 1994).

Understanding and identifying these repetitions in behavior in order to deal with the trauma is the first step to working through it. Although it is not possible to fully reintegrate or heal a genocide victim, international trials can be seen as an instance to help those individuals to overcome trauma and win back their humanity.

4 Edkins (2003) adds that trauma has a component of loss of trust. Extreme violence is not enough, it is important that this violence erupts from a figure that should represent protection, like the State.

A criminal court could mean liberation to the victim (LACAPRA, 1994). It is a context in which the victims' voices can be heard. As stated by LaCapra (1994) "(…) working through means confronting the individual voice in a field dominated by political decisions and administrative decrees which neutralize the concreteness of despair and death" (LACAPRA, 1994, p. 213).

LaCapra (1994) argues that the testimonies of holocaust victims signaled a complex relation between memory and reconstruction of events. These statements demonstrated that victims, sometimes, could not believe what they had witnessed. This poses the issue of representation, since those extreme experiences cannot be put into words or interpreted or even analyzed under the individual's personal knowledge.

The question of the trauma overcame disciplinary boundaries and became crucial for the discussion of the survivor's experiences in genocides or crimes against humanity. When the unedited-nine-hour-long movie "Shoah", by Claude Lanzman, was released, there was a lot of discussion on the limits of representing the holocaust and the possibilities of testifying it (FRIEDLANDR, 1996). How can one tell a story of an event so terrible that its limits become unreal and unimagined? How can one build such a narrative? How can one testify about the unspeakable? These are some of the issues faced in an international criminal trial.

3. TRIAL: REGAINING HUMANITY

Hannah Arendt has a famous quote, which states that crimes against humanity cannot be punished; nonetheless, they cannot be forgiven. This is quite interesting to those who study international criminal courts. After all, if a crime cannot be punished enough, what is the point in prosecuting it?

This research presents an alternative view of trials, focusing on the victim's need for justice and how such an arena seems to be important in helping to cope with the trauma and reclaim humanity.

Garapon (2002) understands that a criminal court has the capacity to reconstruct a political relation between victims and perpetrators, recognizing both as equals in the same shared humanity. On one hand, for the victim it is possible to retrieve his political importance, as a voice that deserves to be heard; for the perpetrator, on the other

hand, it is an opportunity to be separated from his crime, have his actions put in perspective and understand the gravity of his acts.

International criminal courts offer a stage where the victims' experiences can be communicated and shared with others. These testimonies are crucial in helping victims to cope with their trauma and recover their human status. Unfortunately, as briefly mentioned hitherto, this necessity in telling their story collides with the impossibility of communicating the experience (EDKINS, 2003).

According to Seligman-Silva (2006), "testimonies are the narrative, not so much of these violent facts, but of the resistance in understanding them. Language tries to siege and limit what was not subject to a form in the moment of the reception." (SELIGMAN-SILVA, 2006, p.48, translated by author)[5]. This is the drama faced by the survivor: the incapacity of representing his or her reality.

A judicial process seeks to establish facts, one truth. However, these facts depend on the narratives of the witnesses, thus impossible to be represented. The testimony is a moment when the court tries to bind together a broken memory and contextualize it (SELIGMANN-SILVA, 2005, p.85). Moreover, it is the moment to group people, sharing that experience that once was lonely and individual, moving towards a collective memory. Judging is the attempt to give meaning to that experience and sharing it among all victims.

That is why it becomes so important to label, name, define and transform the unspeakable into an intelligible legal category, namely a criminal offense that has been previously defined, such as genocide or crime against humanity (GARAPON, 2002).

> Judicial process also allows to impose a coherence based on sparse evidences and fragmentary testimonies, when a certain degree of intentionality and organization is attributed, aiming at elaborating a coherent and explicative narrative – therefore reassuring – of the facts. The judicial truth is, in some way, limited by the procedure. The judge is always constrained by constitutive elements and rules of competence. (GARAPON, 2002, p. 165-166, translated by author)[6]

5 "o testemunho seria a narração não tanto desses fatos violentos, mas da resistência à compreensão dos mesmos. A linguagem tenta cercar e dar limites àquilo que não foi submetido a uma forma no ato da sua recepção" (SELIGMANN-SILVA, 2006, P. 48).

6 O processo também permite impor uma coerência baseada em provas esparsas e testemunhos fragmentários, ao atribuir um grau de intencionalidade e de

The concern surrounding international criminal trials would be, in consequence of that, more connected to making sense of all those narratives, logically revamping them and fitting those actions into a legal category. It is a stage where victims can have their voice heard. This characteristic limits the procedure and the defense that would be seen in a "regular" domestic trial (GARAPON, 2002). Justice is an instance for recognition where the past is not seen with neutrality, but with a certain connotation.

International criminal courts surpass their primary function, which is to determine the personal responsibility of individuals implicated in severe human rights violations, and form the history of the event. This is a dangerous course to follow, since a court is not expected to do so. According to Wilson (2011):

> (…) how law as a system of knowledge filters evidence and establishes an official version of the past. Understanding why courts succeed or fail at the task of writing history requires in part an understanding of how international courts receive, embrace, or reject various types of nonlegal evidence brought before them. (WILSON, 2011, p.16)

There are many concerns regarding this ability of a court to put history together, mainly because their records would be a poor historical record. The scope of a court should not be straightforward, but only to solve and conclude the matter. However, international courts provide evidence that historians can successfully use, hence their impact in history lingers long after the conclusion of the trials.

This paper proposes, as done by Wilson (2011), that the relation between justice and writing history should be more closely analyzed. The ability to write history is fundamental for the psychological recovery of victims and perpetrators. It is an opportunity for both prosecution and defense to present historical experts and, in the victim's point of view, a chance to have their story told in a political international arena and, therefore, recoup their political status.

In the words of the Senior Trial Attorney of the ICTY Hildegaard Retzlaff-Uertz quoted by Wilson:

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organização com o objetivo de elaborar uma narrativa coerente e explicativa – logo, tranquilizadora – dos factos. A verdade judiciaria é, de alguma forma, formatada pelo procedimento. O juiz está sempre constrangido por elementos constitutivos e regras de competência. (GARAPON, 2002, pp.165-166)

> People criticize us for doing too much history but our task is different from a domestic jurisdiction… [W]e have to prove a widespread and systematic attack upon a civilian population, so we have to explain the whole context of a crime, what was happening around it and how the crime was part of a plan. This cannot be avoided. As long as a crime against humanity is the crime we are prosecuting at the Tribunal, you have to know the background of the crime. That's why history discussions occur in cases. (RETZLAFF-UERTZ *apud* WILSON, 2011, p. 19)

Discussing history and, in a sense, re-writing it is inevitable in an international criminal court. It is impossible to judge genocide without considering the global effect of the action. A person alone cannot commit such crime; actions must be put into context in order to have legal meaning.

In this sense, an international criminal court has a duty to history and cannot be separated from it. Moreover, this relation with history is paramount to a trial as far as the victims are concerned. It is a chance for them to have their story told and to see their suffering fitted into a legal and intelligible category. It is a chance to make sense of what happened and share this experience with others, a first step towards working through the trauma and also recapturing their humanity.

4. CONCLUSION

Genocide is a crime that attacks human nature. It has the ability to deprive its victims of their humanity by denying them access to elements that can constitute a human being, such as political action, family, culture and dignity.

Humanity is not a natural data, but a political attribute. The violence that struck the world in the 20th century shows that human life can be considered disposable and it could become legally unprotected. In other words, a person could become much like ancient Rome's *homo sacer,* a man whose life has no legal protection and whose murder would not be considered a crime.

As far as this research is concerned, the most important characteristic of genocide is not the resulting death, but the ability to dehumanize the victims, abandoning them in a state of bare life (AGAMBEN, 2010), a merely biological existence, without legal or political implication.

This experience constitutes a trauma to the individual. Studies based on Freud's definition of trauma understand that violent experiences, such as genocide, cannot be fully understood by the person who has lived it. The individual cannot make sense of it while it is happening. Comprehension would only be possible afterwards, in a delayed attempt to understand an experience which was not properly engraved in the person's mind.

Victims tend to relive the traumatic event in a constant attempt to understand something that does not make sense in their frame of personal past experiences. Such incapacity to make sense out of it is translated into the impossibility of communicating with others and sharing their personal experiences.

In this regard, international criminal courts have an important role in providing an environment where victims can have their voice heard and their stories told in a political legal arena.

The judicial legal process helps victims understand the reality of their experiences, by fitting a senseless action into a predetermined legal category, such as genocide or a crime against humanity.

A trial has the ability to pick up sparse narratives and evidences and to bind them together, forming a coherent and linear narrative, thus helping to make sense of traumatic events.

This paper argues that this capacity of a court in constructing linear narratives and creating history is a way of helping victims to cope with their traumas. Moreover, international trials present a possibility for them to have their voice heard in a political international arena. As a result, international courts have an important role in helping victims to reclaim their political and legal importance, thus their humanity.

BIBLIOGRAPHY

AGAMBEN, Giorgio. *Homo Sacer: o poder soberano e a vida nua*. 2 ed. Belo Horizonte: Editora UFMG, 2010.

AGAMBEN, Giorgio. *O que resta de Auschwitz*. São Paulo: Boitempo, 2011.

AGUIAR, Odilio. *A categoria da condição humana em Hannah Arendt*. In: CORREIA, Adriano (Org.) Hannah Arendt e a condição humana. Salvador: Quarteto, 2006.

AMBOS, Kai. *A parte geral do direito penal internacional: Bases para uma elaboração dogmática.* São Paulo: Editora Revista dos Tribunais, 2008.

ARAÚJO, Ana Cristina Alves. *Contos sobre Ruanda: Uma análise Crítica das narrativas sobre o genocídio ruandês de 1994***.** 2005. 159f. Tese (mestrado) – Pontifícia Universidade Católica do Rio de Janeiro, Instituto de Relações Internacionais da PUC-RJ, Rio de Janeiro.

ARENDT, Hannah. *A condição humana*. 10. ed. Rio de Janeiro: Forense Universitária, 2001.

ARENDT, Hannah. *Responsabilidade e julgamento.* São Paulo: Companhia das Letras, 2004.

ARENDT, Hannah. *As origens do Totalitarismo*. São Paulo: Companhia das Letras, 1998

ARENDT, Hannah. *Eichmann em Jerusalém: Um relato sobre a banalidade do mal***.** São Paulo: Companhia das Letras, 2010

ARENDT, Hannah**.** *Compreender: formação, exílio e totalitarismo* (ensaios) 1930-1954. Belo Horizonte: Ed. UFMG, São Paulo: Companhia das Letras, 2008.

AROCENA, Mª Dolores Bollo. *Derecho Internacional Penal: Estudio de los crímenes internacionales y de las técnicas para su represión***.** Bilbao: Servicio Editorial Universodad del País Vasco, 2004.

BASSIOUNI, M. Cherif. *Derecho penal internacional: proyecto de código penal internacional.* Madrid : Tecnos, 1984.

BAZELAIRE, Jean-Paul; CRETIN, Thierry**.** *A justiça penal internacional: sua evolução, seu futuro***:** de Nuremberg a Haia. Barueri: Manole, 2004.

BROWNING, Cristopher R. *German Memory, Judicial Interrogation, and Historical Reconstruction: Writing Perpetrator History from Postwar Testimony*. *In* FRIDLANDER, Saul. Probing the Limits of Representation: Nazism and the "Final Solution". Massachusetts: Harvard University Press, 1996.

BULL, Hedley. *A sociedade anárquica: um estudo da ordem na política mundial*. São Paulo: Universidade de Brasília, 2002.

CAMARGO, Margarida Maria Lacombe. *Hermenêutica e argumentação: uma contribuição ao estudo do direito***.** Rio de Janeiro: Renovar, 2001.

CASELLA, Paulo Borba. *Direito Internacional dos Espaços*. São Paulo: Editora Atlas, 2009.

DES FORGES, Alison Liebhafsky. *Leave none to tell the story: genocide in Rwanda*. New York: Human Rights Watch, 1999

EDKINS, Jenny. *Trauma and the memory of politics*. Cambridge: Cambridge University Press. 2003

FASOLT, Constantini. *The Limits of History*. Chicago: The University of Chicago Press, 2004.

FEIN, Helen. *Genocide: a sociological perspective*. London: SAGE Publications Ltd, 1993

FRIDLANDER, Saul. *Probing the Limits of Representation: Nazism and the "Final Solution"*. Massachusetts: Harvard University Press, 1996.

GADAMER, Hans Georg. *Verdade e método: traços fundamentais de uma hermenêutica filosófica.* 4. ed. Petrópolis: Vozes, 2002.

GARAPON, Antoine. *Crimes que não se podem punir nem perdoar: Para uma justiça internacional.* Lisboa: Instituto Piaget, 2002.

GOUREVITCH, Philip. *We Wish to Inform You That Tomorrow We Will Be Killed with Our Families: Stories from Rwanda*. New York: Farrar, Straus and Giroux, 1998.

HABERMAS, Jürgen. *Direito e democracia: entre facticidade e validade*. Rio de Janeiro: Tempo Brasileiro, 1997.

HANSEN, L. *Security as Practice: Discourse analysis and the Bosnian war*. New York: Routledge, 2006.

HATZFELD, Jean. *Uma temporada de facões: relatos do genocídio em Ruanda*. São Paulo: Companhia das Letras, 2005.

LACAPRA, Dominick. *History in Transit: Experience, Identity, Critical Theory*. Ithaca: Cornell University Press, 2004.

LACAPRA, Dominick. *Representing the Holocaust: History, Theory and Trauma*. Ithaca: Cornell University Press, 1994.

LAFER, Celso. *A reconstrução dos direitos humanos: um diálogo com o pensamento de Hannah Arendt.* São Paulo: Companhia das Letras, 1988.

LAFER, Celso. *Hannah Arendt: pensamento, persuasão e poder*. 2 ed. São Paulo: Paz e Terra, 2003.

LE GOFF, Jacques. *História e Memória*. Campinas: Editora da Unicamp, 2008

LEVI, Primo. *Os afogados e os sobreviventes*. Rio de Janeiro: Paz e Terra, 2004

LEVI, Primo. *É isto um homem*. Rio de Janeiro: Rocco, 1988

LISOWSKI, Carolina Salbego. *Análise do discurso e direito: considerações acerca dos depoimentos testemunhais do/no processo penal. In* IV Seminário de estudos em análise do discurso: 1969-2009: Memória e história na/da Análise do Discurso. Porto Alegre, 2009. Disponível em <http://www.ufrgs.br/analisedodiscurso/anaisdosead/4SEAD/POSTERES/CarolinaLisowski.pdf> Access in September 16th, 2013.

LUCKHURST, Roger. *The trauma question*. London: Routledge, 2008.

OST, François. *Júpiter, Hércules, Hermes: Tres Modelos de Juez*. DOXA - Cuadernos de Filosofia, número 14, 1993, p. 169-194. Disponível en <http://rua.ua.es/dspace/bitstream/10045/10681/1/doxa14_10.pdf> September 16th, 2013.

PÉREZ, María Torres; FRANCH, Valentín Bou. *La Contribución del Tribunal Internacional Penal para Ruanda a la Configuración Jurídica de los Crímenes Internacionales*. Valencia: Trant lo Blanch, 2004.

SELIGMANN-SILVA, Márcio. *História, Memória, Literatura: O testemunho na Era das Catástrofes.* Campinas: Editora da Unicamp, 2006

SELIGMANN-SILVA, Márcio. *O local da diferença: Ensaios sobre memória, arte, literatura e tradução.* São Paulo: Editora 34, 2005.

SÉMELIN, Jacques. *Purificar e Destruir: Usos políticos dos massacres e dos genocídios.* Rio de Janeiro: DIFEL, 2009.

SILVA, Carlos Augusto Canêdo Gonçalves da. *O genocídio como crime internacional*. Belo Horizonte: Liv. Del Rey Editora, 1999.

WILSON, Richard Ashby. *Writing History in International Criminal Trials*. Cambridge: Cambridge University Press, 2011.

ZEHFUSS, Maja. *Wounds of Memory: The Politics of War in Germany*. Cambridge: Cambridge University Press, 2007.

ANNEX

SEPARATE OPINION OF JUDGE A.A. CANÇADO TRINDADE IN THE ADVISORY OPINION ON *JUDGMENT N. 2867 OF THE I. L. O. ADMINISTRATIVE TRIBUNAL UPON A COMPLAINT FILED AGAINST IFAD* (OF 01.02.2012)

I. INTRODUCTION

1. I have concurred with my vote to the adoption today, 01st February 2012, by the International Court of Justice (ICJ), of the present Advisory Opinion on *Judgment n. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development*. The course of the advisory proceedings has, however, raised points to which I attach much importance, and in relation to which I feel bound to leave on the records the foundations of my position thereon. I propose thus to dwell upon such points in the present Separate Opinion, in a logical sequence, and with a constructive spirit, so as to shed some light on certain matters which lay on the foundations of contemporary international law as well as the internal law of the United Nations, which seem to me to require the utmost attention.

2. In this understanding, I purport to examine, in the present Separate Opinion, a series of interrelated points, having, as common denominator, the fundamental question of procedural equality in the access of individuals to justice at international level. To start with, I shall address the points which are predominantly factual in the context of the present Advisory Opinion, namely: a) the factual background of the present matter lodged with the Court; b) the determination of compliance with Judgment n. 2867 of 2010 of the ILOAT favourable to the individual complainant; c) the difficulties in the compliance with Judgment n. 2867 of 2010 of the ILOAT favourable to the individual complainant; d) the individual complainant´s appeal for equality of arms and realization of justice; and e) the contrasting positions of the individual complainant and the IFAD as to the present request for an advisory opinion of the ICJ.

3. Next, I shall focus on the points of juridical epistemology, which in my view are deserving of attention and care, and from which we can extract lessons in the light of the present Advisory Opinion. Those points are the following ones: a) the lack of equality of arms:

a recurring problem in procedures of the kind before the ICJ; b) the force of inertia: the regrettable persistence of procedural inequality; c) the emergence of individuals as subjects of international law, endowed with international juridical capacity; d) subjects of rights: the outdated dogmatism of the PCIJ and ICJ Statutes; e) the erosion of the inter-State outlook of adjudication by the ICJ; f) the imperative of securing the equality of the parties in the international legal process, as a component of the right of access to justice *lato sensu;* and g) the need to secure the *locus standi in judicio* and the *jus standi* to individuals before international tribunals, including the ICJ. The way will then be paved for the presentation of my concluding observations.

II. THE FACTUAL BACKGROUND OF THE PRESENT MATTER LODGED WITH THE COURT

4. May I at first recall, as to the factual background of the present matter lodged with this Court, that, on 26.04.2010, the International Court of Justice (ICJ) received a request for an Advisory Opinion from the International Fund for Agricultural Development (the IFAD)[1], concerning the validity of a Judgment rendered by the Administrative Tribunal of the International Labour Organization (the ILOAT). Ms. Ana Teresa Saez-García, a national of Venezuela, had a contract of employment with the IFAD, whereby she worked for the Global Mechanism of the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (Global Mechanism).

5. The Global Mechanism was established by Article 21 of this U.N. Convention, and began its operations in October 1998. Before that, the IFAD had been selected to house the Global Mechanism in 1997, and to provide the needed administrative services to it. The Global Mechanism was - and remains - housed in the IFAD's premises in Rome, by virtue of a housing agreement (Memorandum of Understanding), entered into by the IFAD and the Conference of the Parties to the Desertification Convention in 1999.

1 The IFAD is one of the specialized agencies of the United Nations, which have been authorized by the General Assembly, on the basis of Article 96(2) of the U.N. Charter, to request advisory opinions of the ICJ on legal questions arising within the scope of their activities.

6. Ms. Saez-García held a fixed-term contract of employment (with the IFAD, to render services to the Global Mechanism)[2], which was due to expire on 15.03.2006, and was not renewed subsequently[3]; she then filed an appeal with the Joint Appeals Board, which recommended in December 2007 that she be reinstated within the Global Mechanism for a period of two years, and that she be paid an amount equivalent to all the salaries, allowances and entitlements she had lost since March 2006. The President of the IFAD rejected this decision in April 2008.

7. The next step taken by her was to file a complaint against the IFAD with the ILOAT, on 08 July 2008, asking that Tribunal to order the IFAD to reinstate her, for a minimum of two years, in her previous post, or an equivalent post with retroactive effect from 15.03.2006, and to grant her monetary compensation for the damages suffered. The two parties in the case before the ILOAT were, thus, an individual (Ms. Saez-García, the complainant) and an international organization (the IFAD, the respondent).

8. The ILOAT, in its Judgment n. 2867, of 03.02.2010, on the complaint filed by Ms. Saez Garcia against the decision of the President of the IFAD to dismiss her internal appeal against the decision not to renew her contract because her post was being abolished, found in favour of the complainant. The ILOAT decided, in the aforementioned Judgment n. 2867 of 2010, *inter alia*, to set aside the decision of the President of IFAD, because the abolition of the complainant´s post was tainted with illegality; it then ordered IFAD to pay material and moral damages and costs to Ms. Saez Garcia.

9. The Executive Board of the IFAD decided to challenge the validity of Judgment n. 2867 of the ILOAT, by way of application to the International Court of Justice (ICJ) for an Advisory Opinion, pursuant to Article XII of the Annex to the ILOAT Statute, which reads as follows:

> "1. In any case in which the Executive Board of an international organization which has made the declaration specified in Article II, paragraph 5, of the Statute of the Tribunal challenges a decision of the Tribunal confirming its jurisdiction, or

2 Her appointment was made in accordance with the general provisions of the IFAD Personal Policies Manual; it was signed by the Director of the Personnel Division of the IFAD.

3 The decision not to renew her contract was sealed by the President of the IFAD.

> considers that a decision of the Tribunal is vitiated by a fundamental fault in the procedure followed, the question of the validity of the decision given by the Tribunal shall be submitted by the Executive Board concerned, for an advisory opinion, to the International Court of Justice.
>
> 2. The opinion given by the Court shall be binding."

10. Upon the filing of its request for an advisory opinion to the ICJ, the IFAD thereafter requested the ILOAT the stay of execution of its Judgment n. 2867, pending the delivery of the ICJ's Advisory Opinion in the *cas d´espèce*. For its part, the ILOAT, in its subsequent Judgment n. 3003, of 06.07.2011, dismissed the IFAD's application for stay of execution of prior Judgment n. 2867, pending the delivery of the present Advisory Opinion of the ICJ. In the course of the somewhat troublesome advisory proceedings before this Court, both the IFAD and Ms. Saez Garcia referred to the issue of the equality of parties before (international) courts and tribunals since 1946, when the provision was made, in Article XII of the Annex to the Statute of the ILOAT, for the ICJ to review, on specified grounds, judgments of the Tribunal (cf. *supra*).

11. In the course of the present advisory proceedings, the only State which forwarded its views to the ICJ was the Plurinational State of Bolivia. In its written statement of 26.10.2010, it expressed its concern, in particular, with the relationship between the Global Mechanism (under the U.N. Convention to Combat Desertification) and the IFAD, and the need to clarify their respective competences, bearing in mind the right of individuals to identify with legal certainty "the international organization that hires them" (p. 6). Bolivia added that

> "labour and social rights of individuals should clearly be protected, providing them assurances and proper legal security (…), having identified clearly the employer" (p. 5).

12. It ensues, from the aforesaid, that the subject-matter of the present Advisory Opinion of the Court contains elements, which are proper to the law of the international organizations, one of them being the relationship between the IFAD and the Global Mechanism. Yet, the core of the matter is a distinct one: it concerns the position of the individual as subject of rights in international law, in its various interrelated aspects, which form altogether the object of attention of the present Separate Opinion. As I attach the

utmost importance to the condition of the individual as subject of contemporary international law (the *droit des gens*), I feel bound to examine those aspects, one by one, in the sections that follow.

III. THE DETERMINATION OF COMPLIANCE WITH JUDGMENT N. 2867 OF 2010 OF THE ILOAT IN FAVOUR OF THE INDIVIDUAL COMPLAINANT

13. Before I embark on an examination of the various aspects of the procedural equality of parties before international courts and tribunals, with a bearing on the *cas d´espèce*, may I summarize the Judgment n. 3003 of 2011, whereby the ILOAT dismisses the IFAD's application for stay of execution of its previous Judgment n. 2867 of 2010. The ILOAT determined, *inter alia*, that Judgment n. 2867 was "immediately operative", there being no need for Ms. Saez Garcia to have further recourse to the ILOAT to ensure its execution (para. 16). The ILOAT further clarified that there was no provision in the Statute or the Rules of the ILOAT which stipulated that a request to the ICJ for an Advisory Opinion would automatically have suspensive effect on the contested judgment, even though this fact would not in itself preclude the possibility of requesting the ILOAT for the suspensive effect of the judgment (para. 25).

14. As to the central question of the equality of arms (*égalité des armes*) between the parties, the ILOAT next considered whether international organizations - such as the IFAD, in the *cas d´espèce*, - should be permitted to request suspension of a judgment of the ILOAT which they intend to challenge before the ICJ pursuant to Article XII of the Annex to the ILOAT Statute. In this regard, the ILOAT was of the opinion that the procedure set forth in Article XII of the Annex of its Statute is "fundamentally imbalanced to the detriment of staff members", because the option of submitting a request for an Advisory Opinion of the ICJ is limited only to the organization concerned, and cannot be pursued by staff members (para. 40). The ILOAT added that, as only the organization can request the ICJ for an advisory opinion, this means that

> "the possibility of obtaining a stay of execution would, by definition, only benefit the organizations themselves (…), doubly worsen[ing] the imbalance between the parties created by the Article XII procedure, to the detriment of staff members" (para. 43).

The ILOAT then insisted on its view that it is

> "difficult to justify that organisations should be able to seek a stay of execution where the staff members concerned are without any parallel recourse in law" (para. 44).

15. The ILOAT next stated that granting a stay of a judgment which was rendered in favour of a staff member would further aggravate the imbalance between the parties, since it would deprive the staff member of the benefit of the judgment in her favour (such as its Judgment n. 2867 of 2010, in the present case), for the duration of the advisory proceedings before this Court. The ILOAT added that

> "[t]he difference in treatment between organizations and their staff which derives from the actual provisions of Article XII (…) would thus be compounded by a further inequality, and one which would doubtless be even more keenly felt in practice, stemming from the fact that an application to the Court [for an advisory opinion] in this context could result in a stay of execution of the contested judgment" (para. 45).

16. The ILOAT then went on to state that, as Article XII of the Annex of the ILOAT Statute creates "an objective inequality between the parties", it has the duty to take care that it does not amplify the consequences of this inequality by considering admissible organizations' requests for a stay of execution of a judgment, to the detriment of a staff member (para. 46). The ILOAT then concluded that it is not possible to recognize the admissibility of an organization's request to stay the execution of a judgment in respect of which the procedure set forth in Article XII has been initiated before the ICJ (para. 47).

IV. THE DIFFICULTIES IN THE COMPLIANCE WITH JUDGMENT N. 2867 OF 2010 OF THE ILOAT IN FAVOUR OF THE INDIVIDUAL COMPLAINANT

17. The concern rightly expressed by the ILOAT has, in my view, its *raison d´être*. It is well-founded. Yet, despite its new Judgment n. 3003 of 2011, whereby the ILOAT dismissed the IFAD's request for a stay of execution of Judgment n. 2867 of 2010 (which ordered the IFAD to pay moral and material damages, and costs, to the complainant, Ms Saez Garcia), it appears from the records of the case that Ms. Saez Garcia has not yet received any payment from the

IFAD. Ms. Saez Garcia contended, in a written statement submitted to the Court on 30.08.2011, that

> "[t]he mere request for an advisory opinion has provided an excuse for [the IFAD] not to execute Judgment [n.] 2867. Even though [the IFAD]'s application for suspension of execution was denied, [it] has still avoided execution on the grounds that it might become entitled to repayment of the amounts due if the Court declares Judgment [n.] 2867 invalid" (para. 14).

18. Thus, to sum up, Ms Saez Garcia obtained a judgment in her favour, ordering the IFAD to pay to her moral and material damages, and costs (the ILOAT's Judgment n. 2867 of 2010). The Executive Board of IFAD, pursuant to Article XII of the Annex to the ILOAT Statute, decided to challenge the validity of Judgment n. 2867 of 2010, by way of a request to the ICJ for an Advisory Opinion. The IFAD then requested the ILOAT for a stay of execution of Judgment n. 2867 of 2010, pending the delivery of the Advisory Opinion by the ICJ. In its subsequent Judgment n. 3003 of 2011, the ILOAT dismissed the IFAD's application for stay of execution of Judgment n. 2867 of 2010, reaffirming that this judgment is operative. In considering the IFAD's request for suspensive effect of Judgment n. 2867 of 2010, the ILOAT examined the question of the inequality of parties that stems from the procedure set forth under Article XII of the Annex to the ILOAT Statute and decided that ordering a stay of the contested judgment would only amplify this inequality.

19. In its Judgment n. 3003 of 2011, the ILOAT limited its examination of the matter to the inequality of parties ensuing from Article XII of the Annex to the ILOAT Statute, given that only the international organization concerned may challenge a decision of the ILOAT unfavourable to itself. Understandably, the ILOAT did not dwell upon the question of the *locus standi in judicio* of individuals in advisory proceedings before this Court. Yet, the position of the individuals before this Court (whether they can appear before it) and the persisting restriction that all communications coming from the complainant have to be transmitted to the Court through the IFAD (the fact that all) are, in my understanding, of the utmost importance, for the good administration of justice (*la bonne administration de la justice*). Accordingly, I deem it fit to examine the question of the *locus standi in judicio*, as well as of *jus standi*, of individuals before this Court, in the present Separate Opinion (section XIV, *infra*).

V. THE INDIVIDUAL COMPLAINANT´S APPEAL FOR EQUALITY OF ARMS AND REALIZATION OF JUSTICE

20. It is indeed worrisome to see that, despite the two Judgments of the ILOAT in her favour (n. 2867 of 2010, and n. 3003 of 2011), the complainant, Ms. Ana Teresa Saez Garcia, has not yet seen justice done, and the two Judgments of the ILOAT have not been complied with yet, pending the advisory proceedings before this Court. It is worth referring here to a passage of her statement submitted to this Court on 30.08.2011, wherein she contends that "[t]he imbalance in the present proceedings began with the fact that only the defendant was able to request review" (para. 14). As regards, more specifically, her position before the Court in the present proceedings, she stated that:

> "Only [the IFAD] is able to communicate directly with the Court. The Court has attempted to equalize the position of the complainant by requiring [the IFAD] to transmit the pleadings of the complainant. But the positions have not been equalized. Before the first pleadings were due, the complainant's counsel requested a document to attach to the complainant's statement. The defendant replied that, 'in conformity with the rules governing advisory proceedings before the International Court of Justice, you do not have the prerogative to introduce such an item in the proceedings' (…). Since the complainant depended upon [the IFAD] to transmit her statement and documents, this created a significant obstacle to pleading her case. It required the intervention of the Registry to overcome. In transmitting the comments of [the] IFAD on 9 March 2011, [the IFAD] requested that the Court seek the views of the Conference of Parties of the United Nations Convention to Combat Desertification. [The IFAD] also requested oral hearings. The complainant's counsel received this letter on 17 March. When he attempted to respond to these new requests, the defendant refused to transmit the communication to the Court on the grounds that it was after the deadline of 11 March for filing comments. Again, the intervention of the Registry was required to compel the defendant to transmit the letter from the complainant's counsel. Even at present time, the complainant is under the disadvantage of having to submit this statement through IFAD, which requires submitting it well before the deadline specified in the Registrar's letter of 21 July 2011. IFAD will be able to work on its reply until the

morning of 29 August 2011; the complainant will have to submit hers the morning of 26 August" (paras. 15-17).

21. At this stage of the present Separate Opinion, I shall limit myself to pointing out that there clearly appears to exist two distinct inequality claims in the present advisory proceedings. The *first claim* concerns the fact that, pursuant to Article XII of the Annex to the ILOAT Statute, only the international organization at issue, the IFAD, can challenge an unfavourable decision of the ILOAT before the ICJ. This question was examined by the ILOAT in its Judgment n. 3003 of 2011 concerning the IFAD's request for stay of execution of Judgment n. 2867 of the ILOAT, which found in favour of the complainant, Ms. Saez Garcia.

22. The *second claim* of procedural inequality pertains to the position of the individual complainant in the present proceedings before this Court, and more particularly to an aspect not addressed in the ILOAT's Judgment n. 3003 of 2011. Yet, Ms. Saez García touched upon it, in complaining of the inequality of the parties reflected in the fact that only the IFAD - her opposing party in the present case - can address the Court directly, and that all her communications and submissions to the ICC ought to be done through the IFAD; such inequality, - she added, - has, not surprisingly, caused her some constraints.

VI. THE CONTRASTING POSITIONS OF THE INDIVIDUAL COMPLAINANT AND THE IFAD AS TO THE PRESENT REQUEST FOR AN ADVISORY OPINION OF THE ICJ

23. In the present advisory proceedings, the IFAD and Ms. Saez García have made clear their contrasting positions as to the present request for an Advisory Opinion of this Court. Thus, in its written statement of 29.10.2010, submitted to this Court, IFAD argued that the issuing of an Advisory Opinion by the ICJ would not violate the rights of equality of parties, since the subject matter of the requested Advisory Opinion is not the rights of the individual, but the jurisdiction of the ILOAT, based on the agreement between the IFAD and the ILO that recognized the jurisdiction of the ILOAT (paras. 78-83). Thus the IFAD attempted to decharacterize its difference with an individual staff member, as - in its argument – a "matter pertaining to the external relations of the organization concerned" (para. 79), here concerning the IFAD and the ILO (as to the jurisdiction of the ILOAT).

24. The IFAD insisted on its own description of the case: in a subsequent statement, its Reply of 26.08.2011, it argued that the operation of Article XII of the Annex to the ILOAT Statute is to resolve disputes within the ILO regarding the competences of each of its bodies (paras. 39-44) or to resolve "disputes" between the ILO and U.N. specialized agencies pertaining to the jurisdiction of the ILOAT, which is based on an agreement between such specialised agencies and the ILO (paras. 45-68). The IFAD went further: it made a parallel with investor-State arbitration, where only the investor has the right to initiate proceedings and the State has exclusively the right to seek authoritative interpretation of a treaty, without - in its view - violating the right of the equality of parties (paras. 69-76). The IFAD made even a parallel with the pending contentious case before the ICJ concerning the *Jurisdictional Immunities of the State* (Germany *versus* Italy, Greece intervening), arguing that "interested individuals" do not have access to the ICJ, but issues that are clearly of their interest are going to be adjudicated by the ICJ (para. 77).

25. Contrariwise, in her written statement of 26.08.2011, the original complainant, Ms. Saez-García, stated that the right of equality of parties before courts and tribunals is enshrined in all major human rights instruments, at global and regional levels, namely: the Universal Declaration of Human Rights (Article 10), the U.N. Covenant on Civil and Political Rights (Article 14(1)), the European Convention of Human Rights (Article 6(1)), and the American Convention on Human Rights (Article 8(1)) (paras. 5-9). She also referred to some of the jurisprudence of the supervisory organs or Courts operating thereunder (paras. 5 and 9-11); she quoted, *inter alia*, the *Andrejeva versus Latvia* case (2009), before the European Court of Human Rights, as illustration of the view that, when appeal procedures exist, they ought to abide by the provisions of Article 6 (right to a fair trial) of the European Convention of Human Rights (para. 11).

26. She then recalled the *rationale* of the abolition, by the U.N. General Assembly in 1995, of the review procedure of the United Nations Administrative Tribunal (UNAT) rulings by the ICJ, which also had in mind the issue of the equality of parties (para. 12). Next, Ms. Saez-García turned to the recognition, by the ILOAT itself, that its review procedure was not in accordance with the principle of the equality of the parties, and was "fundamentally imbalanced to the detriment of staff members" (para. 13). She also claimed that the

IFAD, despite not winning a suspension of execution of the 2010 Judgment of the ILOAT, unilaterally denied execution of the ILOAT ruling while the advisory proceedings before the ICJ were pending, whereas in a situation of real equality it is up to the courts to decide "whether and upon what conditions judgments are executed during the appellate phases" (para. 14).

27. She further also argued that, despite the practical measures taken by the ICJ to secure equality to the position of the parties, their positions have not been equal, since "[o]nly the defendant is able to communicate directly with the Court" (para. 15), and she - the complainant - remains dependent upon the IFAD for the simple transmission of documents to the Court, and the IFAD has in fact been posing obstacles (paras. 15-17); twice, in the course of the proceedings, the intervention of the Court´s Registry was thereby required (paras. 15-16). The difficulties she encountered affected even the deadlines for the submission of written statements (para. 17). Mrs. Saez-García then concluded that

> "The substantial inequality of arms between the complainant and the defendant is one factor that the Court may wish to take into account in exercising its discretion under Article 65 of its Statute. (...)
>
> In [the Advisory Opinion of 1956 on *Judgments of the ILOAT upon Complaints Made against UNESCO*] the Court achieved a balance between equality and usefulness. Since [that Advisory Opinion on *Judgments of the ILOAT upon Complaints Made against UNESCO*] the doctrine of equality of arms has increased the requirement for equality in the administration of justice. (...)" (paras. 18-19).

VII. THE LACK OF EQUALITY OF ARMS: A RECURRING PROBLEM IN REVIEW PROCEDURES OF THE KIND BEFORE THE ICJ

1. The Dilemma before the Court

28. Despite the fact that we are here before general principles of law such as the equality of arms (*égalité des armes*) before courts and tribunals, and the principle of *la bonne administration de la justice*, the fact remains that a problem such as the one raised before the ICJ, by the original complainant before the ILOAT, has been recurrent in this Court, in procedures of the kind. As already

indicated, the review procedure of the UNAT decisions by the ICJ has been abolished in 1995 (*supra*), but the review procedure of the *cas d´espèce*, of the ILOAT decisions by the ICJ, subsists, with the same problem identified in 1956 by this Court in its Advisory Opinion on *Judgments of the ILOAT upon Complaints Made against UNESCO*. Despite that identification of the problem, it persists to date: for more than half a century (56 years) the force of inertia and mental lethargy seem to have prevailed, much to the detriment of individuals, subjects of rights under international administrative law, or the law of the United Nations.

29. In the proceedings which led to the Court´s Advisory Opinion of 1973 on the *Application for Review of Judgment n. 158 of the U.N. Administrative Tribunal*, the question came to the fore of the *nature* of the procedure, prompted by the fact that it was *not* the rights of States which were in issue herein: it was the rights of individuals. Doubts were voiced as to "the legality of the use of the advisory jurisdiction for the review of judgments of the [U.N.] Administrative Tribunal", i.e., for dealing with what originally appeared as a contentious case with the law of the United Nations. The use of the Court´s advisory jurisdiction was questioned for "the judicial review of contentious proceedings which have taken place before other tribunals and to which individuals were parties"[4].

30. Dogmas of the past began, not surprisingly, to weigh heavily in the minds of the Judges of this Court, in particular the outdated dogma that individuals were not subjects of international law (the *droit des gens*). In any case, the ICJ, in its aforementioned Advisory Opinion of 1973, without ridding itself of the consequences of this dogma, at least asserted that

> "The mere fact that it is not the rights of States which are in issue in the proceedings cannot suffice to deprive the Court of a competence expressly conferred on it by its Statute" (para. 14)[5].

31. Before I proceed to a consideration of this matter, to which I attribute much importance, I find it appropriate to proceed, first, to an overview of the five Advisory Opinions of the kind (issued in 1954, 1956, 1973, 1982 and 1987), which preceded the present Advisory

4 Paragraph 14, of the Advisory Opinion of 12.07.1973, on the *Application for Review of Judgement n. 158 of the U.N. Administrative Tribunal*, *ICJ Reports* (1973) p. 171.

5 *Ibid.*, p. 172.

Opinion on *Judgment n. 2867 of the Administrative Tribunal of the ILO upon a Complaint Filed against the International Fund for Agricultural Development (IFAD)*, which the Court is delivering today, [05] February 2012. This will enable us to appreciate the difficulties experienced by the Court when faced with a conception of international law, which had the vain pretension to defy the passing of time (as legal positivists do).

2. The Advisory Opinion of 1954

32. In its Advisory Opinion of 1954 on the *Effect of Awards of Compensation Made by the U.N. Administrative Tribunal*, the main focus of attention of the ICJ was on the relations between the General Assembly and the U.N. Administrative Tribunal, in the newly-emerging internal law of the United Nations. Yet, despite this focus of attention on the relations between U.N. organs, the ICJ kept in mind that what was ultimately at stake were the rights of individuals, of U.N. staff members. The Court then concluded that the General Assembly cannot "on any grounds" refuse to give effect to an award of compensation made by the U.N. Administrative Tribunal in favour of a U.N. staff member, "whose contract of service has been terminated without his assent"[6].

3. The Advisory Opinion of 1956

33. Two years later, in its Advisory Opinion on *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against UNESCO* (1956), the ICJ observed that the "absence of equality" in the review procedure before it flew from the relevant provisions of its own Statute, affecting rights of U.N. officials. It added that the Court was required, by its own judicial character, to ensure that "both sides directly affected by these proceedings" be in "a position to submit their views and their arguments to the Court". In its view, the difficulty confronting it

> "was met, on the one hand, by the procedure under which the observations of the [U.N.] officials were made available to the Court through the intermediary of UNESCO and, on the other hand, by dispensing with oral proceedings. […] The principle

6 ICJ, Advisory Opinion of 13.07.1954, on the *Effect of Awards of Compensation Made by the U.N. Administrative Tribunal*, *ICJ Reports* (1954) p. 62.

> of equality of the parties follows from the requirements of good administration of justice. These requirements have not been impaired in the present case by the circumstance that the written statement on behalf of the [U.N.] officials was submitted through UNESCO. Finally, although no oral proceedings were held, the Court is satisfied that adequate information has been made available to it. In view of this there would appear to be no compelling reason why the Court should not lend its assistance in the solution of a problem confronting a specialized agency of the United Nations authorized to ask for an Advisory Opinion of the Court"[7].

34. This time the Court focused its attention on the controversy opposing an individuals (staff members) to an international organization (UNESCO). After expressly saying so, the Court deemed it fit to warn:

> "The arguments, deduced from the sovereignty of States, which might have been invoked in favour of a restrictive interpretation of provisions governing the jurisdiction of a tribunal adjudicating between States are not relevant to a situation in which a tribunal is called upon to adjudicate upon a complaint of an official against an international organization.
>
> The Court recognizes that the Administrative Tribunal is a Tribunal of limited jurisdiction"[8].

35. The developments of international law had already overcome the *mens legis* of pertinent provisions of the Statute of the Court, concerning review procedures, opposing individuals to international organizations. In its 1956 Advisory Opinion, the Court, referring to the applicable Staff Regulations, stated that it had kept in mind their texts as well as "their spirit, namely, the purpose for which they were adopted". The Court reminded that

> "That purpose was to ensure to the Organization the services of personnel possessing the necessary qualifications of competence and integrity and effectively protected by

7 ICJ, Advisory Opinion of 23.10.1956, on *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against UNESCO*, *ICJ Reports* (1956) p. 86.

8 *Ibid*., p. 97.

> appropriate guarantees in the matter of observance of the terms of employment and of the provisions of the Staff Regulations"[9].

36. By then, the Court - created to solve disputes only between States - was already attentive, in the review proceedings of the kind, to the individuals employed by international organizations and working for them. Already in 1956 the Court pondered that a request for an Advisory Opinion under Article XII of the Statute of the ILOAT was limited to challenges of decisions of this latter confirming its jurisdiction, or else to cases of "fundamental fault of procedure"; apart from that, there was no remedy against decisions of the ILOAT[10]. In other words, the rule of law applied not only in inter-State disputes, but also in controversies between international organizations and their staff members. In its Advisory Opinion of 1956, the Court confirmed the validity of the Judgments of the ILOAT[11].

37. The procedure followed by the Court, however, did not escape criticisms. In his Separate Opinion, Judge M. Zafrulla Khan observed that

> "By dispensing with oral proceedings the Court deprived itself of a means of obtaining valuable assistance in the discharge of one of its judicial functions. Oral proceedings were dispensed with not because the Court considered that it could not receive any assistance through that means, but because the inequality of the parties in respect of oral hearings could not be remedied in any manner"[12].

38. Judge R. Córdova went even further: in a thoughtful Dissenting Opinion, he began by pondering that review procedures of the kind envisaged herein attributed new functions to the ICJ, well beyond the provision of Article 34(1) of its Statute, whereby *only* States may be parties in cases before it[13]. Article XII of the Statute of the ILOAT and Article 11 of the Statute of the UNAT introduced "a confusion" into the two main functions (contentious and advisory) of the ICJ. Articles 34-37 of the Court´s Statute exclude the possibility of individuals "becoming parties in contentious cases before the

9 *Ibid*., p. 98.
10 *Ibid*., p. 98.
11 Cf. *ibid*., p. 101.
12 *Ibid*., p. 114.
13 *Ibid*., p. 157.

Court"[14]. The contentious function of the Court, - Judge Córdova recalled, - was limited to cover

> "disputes between States, *only and exclusively*.
>
> In debarring individuals from coming before the Court as parties to `a case´, that is, to a contentious litigation, the Statute adopted the theory that individuals are not subjects of international law"[15].

39. At the 1945 San Francisco Conference, - he went on, - this matter was the object of attention (and even a Venezuelan amendment did not succeed), but at the end of the debates the Chairman of the Committee IV of the Conference (the Delegate of Peru) summed up the discussions, stating that Article 34 of the Court´s Statute was indeed intended to lay down that only States, and not individuals and international organizations, might be parties to contentious cases before the Court[16]. Yet, the case brought before the Court in the present review procedure was of a "contentious" nature, seeking, "in the guise of an advisory opinion", a "true judgment", a "real decision binding those parties"[17].

40. There was, - Judge Córdova insisted, - a "confusion", in Article XII of the ILOAT and in Article 11 of the UNAT, between advisory and contentious proceedings; but what UNESCO wanted (in that case of 1956) from the ICJ was, in his view, "a binding decision, a judgment"[18], - binding on "both the Organization and the private individuals, its officials"[19]. To him, that was indeed "a contentious case"; and he lucidly added:

> "It is impossible to get away from the fact that the [U.N.] officials were necessarily parties in the first instance and they should be so considered in the second instance as well. One cannot think of this case as being of two different natures, a contentious case before the Administrative Tribunal and not a contentious case when it comes before the Court. When and why should it lose its initial nature? When it comes to the second instance before the Court and just because it is improperly introduced

14 *Ibid.*, p. 159.
15 *Ibid.*, p. 160.
16 *Ibid.*, p. 161.
17 *Ibid.*, p. 161.
18 *Ibid.*, p. 161.
19 *Ibid.*, p. 163.

> as an Advisory Opinion? The decision of this Court is not only connected with, but absolutely restricted to, the contentious dispute decided by the Administrative Tribunal between the two parties, the Organization and the individuals"[20].

41. Equality of the parties existed in the procedure before the ILOAT, but not subsequently, in the review procedure before the ICJ. As to this latter, Judge Córdova warned,

> "The inequality of the parties in the present case is evident, owing to the impossibility under the Statute for individuals to come before the Court and therefore the impossibility for the Court to respect one of the most fundamental and time-honoured principles which requires equality of the parties before the law and in the exercise of their rights before tribunals"[21].

42. The decision to dispense with oral hearings, thus departing from "the normal procedure", - he added, - led to an "unusual" and "abnormal" procedure, making "more flagrant the existence of such inequality between the parties", making the original complainants "depend upon the goodwill of their opponents", rendering it, in his view, "impossible for the Court to administer justice in strict compliance with the basic principles of justice"[22]. He then concluded that

> "For individuals and international organizations to be parties in a contentious procedure it would be absolutely necessary to change the Statute, the only means of securing equality for them before the Court. This fact necessarily means that the Court, according to the present terms of the Statute, cannot legally act in compliance with the equality principle (…)"[23].

4. The Advisory Opinion of 1973

43. Almost two decades later, in its Advisory Opinion of 1973 on the *Application for Review of Judgment n. 158 of the U.N. Administrative Tribunal*, the ICJ admitted that the difficulty it faced in such review proceedings ensued Article 66 of its Statute, which made provision

20 *Ibid*., p. 163.
21 *Ibid*., p. 166.
22 *Ibid*., pp. 166-167.
23 *Ibid*., p. 168.

for "the submission of written or oral statements only by States and international organizations" (para. 34). The Court then bypassed that difficulty by deciding not to hold public hearings; in this way, it added, "the requirements of equality had been sufficiently met to enable it to comply with the request for an Opinion" (para. 34)[24]. The Court referred to General Assembly resolution 957 (X), which recommended in 1955 to avoid oral statements in such review proceedings, so as to avoid inequality of arms; the Court itself found that it could prescind from oral statements, as it did in its advisory proceedings which led to the Advisory Opinion of 1956 (*supra*). In its view, written statements were sufficient in review proceedings (para. 36)[25].

44. The Court upheld its *jurisprudence constante* to the effect that "a reply to a request for an advisory opinion should not, in principle, be refused", and "only compelling reasons would justify such a refusal" (para. 40)[26]. In his Dissenting Opinion, Judge F. de Castro referred to a "hybrid procedure", or a "pseudo-advisory opinion", which Judge P. Morozov commented in his Dissenting Opinion that "the right to initiate the procedure for review of the judgments of the ILO Tribunal does not belong to private persons or to any State, but to the Governing Body iself alone"[27]. And in his insightful Dissenting Opinion, Judge André Gros warned that "[l]egality and expediency must be clearly separated", and added that

> "the elimination of the oral proceedings in this case prejudiced the right of Members of the Court to obtain information. Unwillingness to open the door of oral argument for the staff member concerned has led to its being closed not only to the administration - which obviously did not mind - but also to the judge"[28].

5. The Advisory Opinion of 1982

45. One decade later, in its Advisory Opinion of 1982 on the *Application for Review of Judgement n. 273 of the U.N. Administrative Tribunal*, the ICJ expressly acknowledged that the questions lodged

24 ICJ, Advisory Opinion of 12.07.1973, on the *Application for Review of Judgement n. 158 of the U.N. Administrative Tribunal*, *ICJ Reports* (1973) p. 179.
25 *Ibid*., pp. 180-181.
26 *Ibid*., p. 183.
27 *Ibid*., pp. 275 and 300, respectively.
28 *Ibid*., pp. 257 and 262.

with it, in the *cas d´espèce* and in previous cases of the kind, concerned the rights of individuals (para. 20). The Court also warned that the fact that it decided to comply with the request for an advisory opinion did not in any way imply "condonation" of irregularities, and stressed the need "to secure equality between the applicant State and the staff member" and to assist the General Assembly in this connection[29]. In his Separate Opinion, Judge H. Mosler referred to the *bypassing* of "the question of inequality between the parties", by not holding hearings (as the Court had done in 1973); and he judiciously added that

> "The main preoccupation of the Court related to the inequality between the parties to the original dispute, the Secretary-General and the staff member, because individual persons have, according to the Statute, no *jus standi in judicio* before the Court. (...) I cannot but regret that there should exist a particular type of case coming under the competence of the Court in which oral statements before the Court are practically excluded once and for all"[30].

6. The Advisory Opinion of 1987

46. Half a decade later, the Advisory Opinion of the ICJ of 1987, on the *Application for Review of Judgement n. 333 of the U.N. Administrative Tribunal*, was unfavourable to the original complainant, not having accepted his pleas. The ICJ found therein that the UNAT did not fail to exercise jurisdiction vested in it, and did not err on any question of law relating to the provisions of the U.N. Charter[31]. In his Separate Opinion, Judge Roberto Ago was critical of the review procedure, for not fully meeting the need for a satisfactory "system of administrative justice". In his view, "the only true remedy" for the existing drawbacks

> "would be the introduction of a second-tier administrative court, in other words, a court with competence to review the

29 Cf. paragraph 79, of the Advisory Opinion of 20.07.1982, on the *Application for Review of Judgement n. 273 of the U.N. Administrative Tribunal*, *ICJ Reports* (1982) pp. 365-366.
30 *ICJ Reports* (1982) p. 380.
31 Cf. paragraph 97, of the Advisory Opinion of 27.05.1987, on the *Application for Review of Judgement n. 333 of the U.N. Administrative Tribunal*, *ICJ Reports* (1987) pp. 72.

decisions of the first-tier court in all respects, both legal and factual, and to correct and compensate any defects they may contain" (para. 6).

7. General Assessment

47. In so far as the problem of the inequality of the parties in review procedures before the ICJ is concerned, the incisive dissenting warning of Judge Córdova in the Court´s Advisory Opinion on *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against UNESCO* (*supra*), dates from 23.10.1956. The problem still faced by the ICJ today, 01.02.2012, over half a century later, when the Court delivers its present Advisory Opinion on *Judgment n. 2867 of the Administrative Tribunal of the ILO upon a Complaint Filed against the International Fund for Agricultural Development (IFAD)*, is essentially the same.

48. For 56 years the force of inertia and mental letargy have prevailed in this regard. The abnormal procedure keeps on being followed by the Court (in respect of review of the ILOAT judgments), in 2011 as in 1956, rested olympically upon the dogma of times past that individuals cannot appear before the ICJ because they are not subjects of international law. The result is the prehistoric and fossilized procedure that defies logic, common sense and the basic principle of the good administration of justice (*la bonne administration de la justice*).

49. In the course of the present proceedings, not only was the original complaint in the hands of her opponent to submit their views to the Court, but, moreover, twice the Registry of the Court had to intervene to make sure that that was done in a duly and proper way (cf. *supra*). In the already mentioned statement by Ms Saez Garcia of 30.08.2011 (para. 20, *supra*), she complained of the inequality permeating the whole review procedure; not only was the IFAD the sole party able to request review, but inequality continued to exist all the time, as

> "The mere request for an advisory opinion has provided an excuse for the defendant not to execute Judgment 2867. Even though the defendant´s application for suspension of execution was denied, the defendant has still avoided execution on the grounds that it might become entitled to repayment of the

amounts due if the Court declares Judgment 2867 invalid" (para. 14).

In an epoch in which the topic of "*The Rule of Law at National and International Levels*" is gaining increasing currency in the recent debates of the U.N. General Assembly[32], it may not be excessive to add that the rule of law is not only for States but also for international organizations, encompassing review procedures of the kind envisaged in the present Advisory Opinion of the Court, in so far as the internal law of the United Nations is concerned.

50. Last but not least, on the problem at issue, it should not pass unnoticed that, throughout the last 56 years, dissenting views and well-founded expressions of discontent with the present situation emanated from Judges (also jurists) from different legal systems and traditions (like M. Zafrulla Khan, R. Córdova, F. de Castro, P. Morozov, A. Gros, H. Mosler, R. Ago). This is not surprising, as we are here before basic principles of law, such as those of the good administration of justice (*la bonne administration de la justice*) and of the equality of arms (*égalité des armes*) in (international) legal procedure.

51. As for many years I have consistently attached the utmost importance to such matter (also in another international jurisdiction), I feel obliged to take this criticism further, given the unnecessary persistence of the problem, and the fact that it touches on other aspects which are very dear to me, namely: a) the emergence and consolidation of individuals as subjects of international law; b) the imperative of securing the equality of the parties in the international legal process, as a component of the right of access to justice *lato sensu*; and c) the need to secure the *locus standi in judicio* and the *jus standi* to individuals before international tribunals, including the ICJ. May I thus add some remarks on the regrettable persistence of procedural inequality, and then move, accordingly, to the consideration, within the confines of the present Separate Opinion, of these three remaining points.

32 Cf., on the item "The Rule of Law at the National and International Levels", the following resolutions of the U.N. General Assembly: resolutions A/RES/61/39, of 04.12.2006; A/RES/62/70, of 06.12.2007; A/RES/63/128, of 11.12.2008; A/RES/64/116, of 16.12.2009; A/RES/65/32, of 06.12.2010.

VIII. THE FORCE OF INERTIA: THE REGRETTABLE PERSISTENCE OF PROCEDURAL INEQUALITY

52. As we have seen, the problem of the procedural inequality has marked presence in the five previous Advisory Opinions of the Court, namely, those of 1954, 1956, 1973, 1982 and 1987 (cf. s*upra*). Despite this inequality, or parallel to it, the inclination of the ICJ has been in the sense of confirming the validity of the decisions at issue of both the UNAT and the ILOAT, where favourable to the original complainants or not. Thus, in its Advisory Opinions of 1954, 1973, 1982 and 1987, it upheld the prior decisions of the UNAT, while in its Advisory Opinion of 1956 and in the present one of 2012, it did the same in respect of prior decisions of the ILOAT (cf. *supra*). Yet, the handling of the issue of procedural inequality, - e.g., by deciding not to have oral hearings in the course of the proceedings, - has been and is, in my understanding, most unsatisfactory: rather than a solution, it is the capitulation in face of a persisting problem.

53. It is not surprising that, in the mid-nineties, the initiative was again taken by the U.N. General Assembly to undertake an over-all revision of the review procedure concerning the UNAT. This occurred half a century after its 1955 reconsideration of the procedures for review of judgments of administrative tribunals. In fact, the U.N. General Assembly retook the subject, in 1994. This time the General Assembly focused specifically on the review of the procedure under Article 11 of the Statute of the UNAT. A clear majority of the Delegations found that that procedure was not feasible, and should be replaced by a more adequate one, "to assist practically in the resolution of staff of staff employment problems" (para. 9, and cf. para. 12).

54. Much of the criticism was directed to the appeal system (in the review procedure at issue) available within the Secretariat (para. 37). Several representatives raised "serious doubts" about the appropriateness of involving the ICJ in staff disputes; the Nordic countries noted further, in particular, that

> "the advisory procedure envisaged by the Statute of the Court did not provide an appropriate adversary procedure necessary for an appeals tribunal, which is the Court´s present role in this process" (para. 18)[33].

33 And cf. para. 35, for the reference to the 1984 *Report* of the U.N. Secretary General, on the feasibility of establishing a single administrative tribunal for the

55. The "overwhelming majority of representatives" found that the UNAT´s review procedure "should be abolished" (para. 36). This is what in fact happened. By 1995 the decision had been taken to suppress the existing review procedure in respect of the UNAT; that mechanism was formally extinguished by General Assembly resolution 50/54, of 29.01.1996. However, the other mechanism, the review procedure in respect of the ILOAT, persists to date, and, with it, by force of inertia, the procedural inequality which has existed from the beginning.

56. The shortcomings of, and problems raised by, the operation of international administrative jurisdictions in general, and by the review procedure in particular, have kept on being object of attention in expert writing[34]. Yet, such problems persist to date. This being so, it seems all too proper to rescue, for consideration in the present context, the advances experienced by the *jus gentium* of our times with the emergence and consolidation of individuals as subjects of International Law, with their access to justice *lato sensu* (encompassing procedural equality), with their *locus standi in judicio* and their *jus standi*, in the hope that due consideration will be given to them in the operation of international administrative jurisdictions in general (encompassing the review procedure in particular) in future developments.

IX. THE EMERGENCE OF INDIVIDUALS AS SUBJECTS OF INTERNATIONAL LAW, ENDOWED WITH INTERNATIONAL JURIDICAL CAPACITY

57. Preliminarily, it should be kept in mind that this matter can, in its origins, be traced back to the *emerging* law of nations, which envisaged the individuals as *subjects* of rights. In effect, the acknowledgment of the necessity of the *legitimatio ad causam* of individuals in international law[35], finds support, in historical perspective, in the

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settlement of disputes of the kind.

34 Cf, *inter alia*, e.g., X. Pons Rafols, *Las Garantías Jurisdiccionales de los Funcionarios de las Naciones Unidas*, Barcelona, Universitat de Barcelona, 1999, ch. IV, pp. 145-193; D. Ruzié, "Réflexions sur la pratique du droit de recours des fonctionnaires internationaux", *in Internationale Gemeinschaft und Menschenrechte - Festschrift für G. Ress* (eds. J. Bröhmer *et alii*), Köln/Berlin/München, C. Heymanns Verlag, 2005, pp. 223-233.

35 A.A. Cançado Trindade, *The Access of Individuals to International Justice*, Oxford, Oxford University Press, 2011, pp. 1-212; A.A. Cançado Trindade, *Évolution du droit*

thinking of the so-called "founding fathers" of the discipline, which should not be forgotten in our times. May I briefly recall the main thrust of their thinking to this effect, within the confines of the present Separate Opinion. I have done so in my Separate Opinion (paras. 26-28) in the Court´s Order of 04.07.2011 (concerning the intervention of Greece) in the case concerning the *Jurisdictional Immunities of the State* (Germany *versus* Italy); as the point has again been brought to the fore in the course of the present advisory proceedings, I deem it fit to dwell upon it once more herein, in greater detail, in the present Separate Opinion.

58. Along the XVIth century, the conception of Francisco de Vitoria (author of the renowned *Relecciones Teológicas*, 1538-1539) flourished, whereby the law of nations regulates an international community (*totus orbis*) constituted of human beings organized socially in States and coextensive with humanity itself; the reparation of breaches of (human) rights reflects an international necessity fulfilled by the law of nations, with the same principles of justice aplying both to States and to individuals and peoples who form them[36]. Earlier on, in his *De Lege*, F. Vitoria sustained the necessity of every law to pursue, above all, the common good; and he added that natural law is found not in the "will", but rather in right reason (*recta ratio*)[37].

59. More than four and a half centuries later, his message retains a remarkable topicality. On his turn, Alberico Gentili (author de *De Jure Belli*, 1598) sustained, by the end of the XVIth century, that Law governs the relationships between the members of the universal *societas gentium*. In his *De Jure Belli Libri Tres* (1612), A. Gentili held that the law of nations was "established among all human beings", being "observed by all mankind"[38]. In the XVIIth century, in the

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international au droit des gens - L´accès des individus à la justice internationale: Le regard d´un juge, Paris, Pédone, 2008, pp. 7-184; A.A. Cançado Trindade, *El Acceso Directo del Individuo a los Tribunales Internacionales de Derechos Humanos*, Bilbao, University of Deusto, 2001, pp. 17-96.

36 Cf. Francisco de Vitoria, *Relecciones - del Estado, de los Indios, y del Derecho de la Guerra*, México, Porrúa, 1985, pp. 1-101; Francisco de Vitoria, *De Indis - Relectio Prior* (1538-1539), *in*: *Obras de Francisco de Vitoria - Relecciones Teológicas* (ed. T. Urdanoz), Madrid, BAC, 1960, p. 675 ; F. de Vitoria, *La Ley* (*De Lege - Commentarium in Primam Secundae*), Madrid, Tecnos, 1995, pp. 5, 23 and 77.

37 F. de Vitoria, *La Ley* (*De Lege - Commentarium in Primam Secundae*), Madrid, Tecnos, 1995, pp. 5, 23 and 77.

38 A. Gentili, *De Jure Belli Libri Tres* (1612), vol. II, Oxford/London, Clarendon Press/H. Milford - Carnegie Endowment for International Peace, 1933, p. 8.

outlook advanced by Francisco Suárez (author of the treaty *De Legibus ac Deo Legislatore*, 1612), the law of nations discloses the unity and universality of humankind, and regulates the States in their relations as members of the universal society[39].

60. Shortly afterwards, the conception elaborated by Hugo Grotius (*De Jure Belli ac Pacis*, 1625), sustained that *societas gentium* comprises the whole of humankind, and the international community cannot pretend to base itself on the *voluntas* of each State individually; human beings - occupying a central position in international relations - have rights *vis-à-vis* the sovereign State, which cannot demand obedience of their citizens in an absolute way (the imperative of the common good), as the so-called "*raison d'État*" has its limits, and cannot prescind from Law[40]. In this line of reasoning, in the XVIIIth century, Samuel Pufendorf (*De Jure Naturae et Gentium*, 1672) sustained as well the subjection of the legislator to reason; to him, international law was founded on natural law, being a great system of universal law "embracing even private law"[41].

61. On his turn, Christian Wolff (author of *Jus Gentium Methodo Scientifica Pertractatum*, 1749), pondered that, just as individuals ought to, in their association in the State, promote the common good, the State for its part has the correlative duty to seek its perfection[42]. Stressing that the law of nations was necessary rather than voluntary, Wolff defined it as "the science of that law which nations or peoples use in their relations with each other and of the obligations corresponding thereto"; it "binds nations in conscience",

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39 Cf. Association Internationale Vitoria-Suarez, *Vitoria et Suarez - Contribution des Théologiens au Droit International Moderne*, Paris, Pédone, 1939, pp. 169-170.

40 Cf., on his conception of *jus gentium*, H. Grotius, *De Jure Belli ac Pacis* (1625), The Hague, Nijhoff, 1948, pp. 6, 10 and 84-85. Cf. also Hersch Lauterpacht, "The Grotian Tradition in International Law", 23 *British Year Book of International Law* (1946) pp. 1-53.

41 H. Wehberg, "Introduction", *in* S. Pufendorf, *Elementorum Jurisprudentiae Universalis Libri Duo* (1672), vol. II, Oxford/London, Clarendon Press/H. Milford - Carnegie Endowment for International Peace, 1931, pp. XIV, XVI and XXII. To him, the standards of justice applied *vis-à-vis* the States as well as the individuals; Hersch Lauterpacht, "The Law of Nations, the Law of Nature and the Rights of Man", 29 *Transactions of the Grotius Society* (1943) pp. 7 and 21-31, esp. p. 26.

42 C. Wolff beheld nation-States as members of a *civitas maxima*, a concept which Emmerich de Vattel (author of *Le Droit des Gens*, 1758), subsequently, invoking the necessity of "realism", pretended to replace by a "society of nations" (a less advanced concept); cf. F.S. Ruddy, *International Law in the Enlightenment - The Background of Emmerich de Vattel's Le Droit des Gens*, Dobbs Ferry/N.Y., Oceana, 1975, p. 95.

in order to preserve society composed of individuals, and to promote the common good. C. Wolff stressed that, just as all individuals were free and equal, all nations likewise were "by nature equal the one to the other", with the corresponding rights and obligations being also the same[43]. Already in the presentation of his treatise, Wolff wrote with clarity that natural law

> "controls the acts of individual men as well as those of nations also, by prescribing duties both toward themselves and toward each other. And just as it has united individual men to each other (...) and has established among them a certain society, so that man is necessary to man (...); so (...) has it united nations, (...) so that nation is necessary to nation (...). Therefore the entire human race is likened to a living body (...), and it retains unimpaired health so long as the individual members perform their functions properly"[44].

62. However, the illuminating thoughts and vision of the so-called founding fathers of International Law, which conceived it as a truly *universal* system, regrettably came to be gradually surpassed by new doctrinal constructions, and mainly by the emergence of legal positivism. Yet, even with the early emergence of this latter, doctrinal constructions such as that of Cornelius van Bynkershoek (*De Foro Legatorum*, 1721; *Questiones Juris Publici - Libri Duo*, 1737) continued to uphold a multiplicity of subjects of *jus gentium*. To Bynkershoek, e.g., those subjects were mainly the nations (*gentes*), but also peoples and other "persons of free will" (*inter volentes*); legal subjectivity, to him, embraced all those who acted in the field of *jus gentium* of his times, and, to approach this latter, resort was to some extent still made to *ratio*[45].

63. The subsequent personification of the all-powerful State, inspired mainly in the philosophy of law of Hegel, had a harmful influence in the evolution of international law by the end of the XIXth century and the beginning of the XXth century. This doctrinal trend resisted as much as it could to the ideal of emancipation of the human being as subject of the law of nations, endowed with international juridical

43 C. Wolff, *Jus Gentium Methodo Scientifica Pertractatum* (edition of 1764), vol. II, Oxford/London, Clarendon Press/H. Milford - Carnegie Endowment for International Peace, 1934, pp. 3, 9-11, 13 and 15-16.

44 *Ibid*., p. 3.

45 K. Akashi, *Cornelius van Bynkershoek: His Role in the History of International Law*, The Hague, Kluwer, 1998, pp. 56-59, 174-175 and 178-179, and cf. pp. 68-69.

capacity. Legal positivism personified the State and shifted emphasis to its "will", seeking to reduce the rights of the human person to those "conceded" by the State. It was necessary to wait for the first decades of the XXth century, to witness individuals vindicating their own rights as subjects of the law of nations, endowed with international juridical personality.

64. The advent of a permanent international jurisdiction, early in the XXth century, in fact transcended a purely inter-State outlook of the international *contentieux*. The projected International [Maritime] Prize Court (1907) foresaw the access to international justice not only by States, but also by individuals. That Court, however, was not established, given the lack of the required number of ratifications for the corresponding Convention to enter into force. Yet, the idea of overcoming the inter-State paradigm was already present at the II Hague Peace Conference of 1907. In that same year, in effect the idea found concrete expression, not at universal level, but rather at the regional Latin-American level, by means of the creation of the first (permanent) international tribunal of our era, the Central-American Court of Justice.

65. Created in 1907 and endowed with a wide jurisdictional basis, the Central-American Court of Justice, the pioneer of modern international tribunals, granted *jus standi* (direct access not only to States but also to individuals (who could present claims against their own States). In fact, the Central-American Court of Justice was seized by both States and individuals[46], having operated continuously for one decade (1908-1918), while the Washington Convention which established it remained in force. Once again, Latin America, faithful to its rich international legal heritage, was in the forefront of the evolution of modern international law in this domain.

66. The Central American Court of Justice heralded the advent and the first concrete advances of the *rule of law (préeminence du droit)* at international level, even before the creation of the Permanent Court of International Justicia (PCIJ). During its decade of existence, it was regarded as giving expression to the "Central American conscience"[47]. The important point to retain here is that, in historical perspective,

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46 A.A. Cançado Trindade, "International Law for Humankind: Towards a New *Jus Gentium* - General Course on Public International Law - Part I", 316 *Recueil des Cours de l'Académie de Droit International de la Haye* (2005) p. 289.

47 C.J. Gutiérrez, *La Corte de Justicia Centromericana,* San José of Costa Rica, Ed. Juricentro, 1978, pp. 31, 42, 106, 150-154 and 157-158.

that pioneering experiment granted *jus standi* – not only *locus standi in judicio* – to individuals as the complaining party before it.

67. In the era of the League of Nations, other pioneering experiments flourished, going likewise beyond the traditional inter-State dimension, and giving procedural capacity to individuals (*jus standi* and *locus standi*) at international level. Such was the case of the systems of minorities and of territories under mandate (*infra*), and the systems of petitions of Upper-Silesia, the Aaland Islands and the Saar and of Danzig[48]. They paved the way for the consolidation, in the era of the United Nations, of the mechanisms of international individual petition, not only in the trusteeship system, but also, and above all, under the internationals human rights treaties and instruments[49], which were to be extended also to the regional level (European and Inter-American Courts of Human Rights, lately followed by the African Court of Human and Peoples´ Rights). The individual was erected into subject of international law, endowed with international procedural capacity.

68. The individual came to be acknowledged as subject of both domestic and international law[50]. In fact, he has always remained in contact, directly or indirectly, with the international legal order. In the

48 J.-C. Witenberg, "La recevabilité des réclamations devant les juridictions internationales", 41 *RCADI* (1932) pp. 5-135; J. Stone, "The Legal Nature of Minorities Petition", 12 *BYBIL* (1931) pp. 76-94 ; M. Sibert, "Sur la procédure en matière de pétition dans les pays sous mandat et quelques-unes de ses insuffissances", 40 *RGDIP* (1933) pp. 257-272; M. St. Korowicz, *Une expérience en Droit international - La protection des minorités de Haute-Silésie,* Paris, Pédone, 1946, pp. 81-174.

49 J. Beauté, *Le droit de pétition dans les territoires sous tutelle,* Paris, LGDJ, 1962, pp. 1-256; M.E. Tardu, *Human Rights - The International Petition System,* binders 1-3, Dobbs Ferry N.Y., Oceana, 1979-1985; T. Zwart, *The Admissibility of Human Rights Petitions,* Dordrecht, Nijhoff, 1994, pp. 1-237.

50 On the historical evolution of the legal personality in the law of nations, cf. H. Mosler, "Réflexions sur la personnalité juridique en Droit international public", *in Mélanges offerts à H. Rolin - Problèmes de droit des gens*, Paris, Pédone, 1964, pp. 228-251; G. Arangio-Ruiz, *Diritto Internazionale e Personalità Giuridica*, Bologna, Coop. Libr. Univ., 1972, pp. 9-268; G. Scelle, "Some Reflections on Juridical Personality in International Law", *in Law and Politics in the World Community* (ed. G.A. Lipsky), Berkeley/L.A., University of California Press, 1953, pp. 49-58 and 336; J.A. Barberis, "Nouvelles questions concernant la personnalité juridique internationale", 179 *Recueil des Cours de l'Académie de Droit International de La Haye [RCADI]* (1983) pp. 157-238.

inter-war period, the experiments of the *minorities*[51] and *mandates*[52] *systems* under the League of Nations, for example, bear witness thereof[53]. They were followed, in that regard, by the *trusteeship system*[54] under the United Nations era, parallel to the development under this latter, along the years, of the multiple mechanisms - conventional and extra-conventional - of international protection of human rights.

69. Those earlier experiments in the XXth century were of relevance for subsequent developments in the international safeguard of the rights of the human person[55]. It is beyond the purposes of the present Separate Opinion to undertake a survey of all these developments. May I limit myself here, once again, to refer to my previous Separate Opinion in the Court´s recent Order of 04.07.2011 (pertaining to Greece´s intervention) in the case concerning the *Jurisdictional Immunities of the State* (Germany *versus* Italy): I have had therein the occasion to dwell upon the distinct aspects of the individuals as *titulaires* of rights (parallel to States) in the new *jus gentium* of our times, namely: a) the legacy of the individuals´ subjectivity in the law of nations (paras. 25-29); b) their presence and participation in the international legal order (paras. 30-35); c) their rescue as subjects of international law (paras. 36-49) ; and d) the historical significance of their international subjectivity (paras. 50-54).

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51 Cf., e.g., P. de Azcárate, *League of Nations and National Minorities: An Experiment*, Washington, Carnegie Endowment for International Peace, 1945, pp. 123-130; J. Stone, *International Guarantees of Minorities Rights*, Oxford, University Press, 1932, p. 56; A.N. Mandelstam, "La protection des minorités", 1 *RCADI* (1923) pp. 363-519.

52 Cf., e.g., G. Diena, "Les mandats internationaux", 5 *RCADI* (1924) pp. 246-261; N. Bentwich, *The Mandates System*, London, Longmans, 1930, p. 114; Quincy Wright, *Mandates under the League of Nations*, Chicago, University Press, 1930, pp. 169-172.

53 C.A. Norgaard, *The Position of the Individual in International Law*, Copenhagen, Munksgaard, 1962, pp. 109-131; A.A. Cançado Trindade, "Exhaustion of Local Remedies in International Law Experiments Granting Procedural Status to Individuals in the First Half of the Twentieth Century", 24 *Netherlands International Law Review/Nederlands Tijdschrift voor international Recht* (1977) pp. 373-392.

54 Cf., e.g., C.E. Toussaint, *The Trusteeship System of the United Nations*, London, Stevens, 1956, pp. 39, 47 and 249-250; J. Beauté, *Le droit de pétition dans les territoires sous tutelle*, Paris, LGDJ, 1962, pp. 48-136; G. Vedovato, "Les accords de tutelle", 76 *RCADI* (1950) pp. 613-694.

55 Cf., e.g., C.Th. Eustathiades, "Une nouvelle expérience en Droit international - Les recours individuels à la Commission des droits de l'homme", *in Grundprobleme des internationalen Rechts - Festschrift für J. Spiropoulos*, Bonn, Schimmlebusch, 1957, pp. 111-137, esp. pp. 77 and 121 n. 32.

X. SUBJECTS OF RIGHTS: THE OUTDATED DOGMATISM OF THE PCIJ AND ICJ STATUTES

70. The question of the procedural capacity of the individuals before the ICJ, and its predecessor the Permanent Court of International Justice (PCIJ), was effectively considered on the occasion of the original drafting, by the Advisory Committee of Jurists appointed by the old League of Nations, of the Statute of the PCIJ, in 1920[56]. Of the ten members of the aforementioned Committee of Jurists, only two - Loder and De La Pradelle - pronounced themselves in favour of enabling the individuals to appear as parties before The Hague Court (*jus standi*) in contentious cases against (foreign) States. The majority of the Committee, however, was firmly opposed to this proposition: four members[57] objected that the individuals were not subjects of International Law (and could not, thus, in their view, be parties before the Court) and that only the States were juridical persons in the international order, - in what they were followed by the other members[58].

71. The position which prevailed in 1920 - which has been surprisingly and regrettably maintained in Article 34(1) of the Statute of the ICJ (formerly the PCIJ) to date - was promptly and strongly criticized in the more lucid doctrine of the epoch (already in the twenties). Thus, in his thoughtful monograph *Les nouvelles tendances du Droit international* (1927), Nicolas Politis pondered that the States are no more than fictions, composed as they are of individuals, and that all Law ultimately aims at the human being, and nothing more than the human being[59]: this is something "so evident", - he added, that

> "il serait inutile d'y insister si les brumes de la souveraineté n'avaient pas obscurci les vérités les plus élémentaires"[60].

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56 A.A. Cançado Trindade, *El Acceso Directo del Individuo…, op. cit. supra* n. (35), p. 31, and cf. pp. 32-35.

57 Ricci-Busatti, Baron Descamps, Raul Fernandes and Lord Phillimore.

58 Cf. account *in* J. Spiropoulos, *L´individu en Droit international*, Paris, LGDJ, 1928, pp. 50-51; N. Politis, *op. cit. infra* n. (59), pp. 84-87; M.St. Korowicz, "The Problem of the International Personality of Individuals", 50 *American Journal of International Law* (1956) p. 543.

59 N. Politis, *Les nouvelles tendances du Droit international*, Paris, Libr. Hachette, 1927, pp. 76-77 and 69.

60 *Ibid.*, pp. 77-78.

And N. Politis proceeded in the defence of the granting to individuals of the direct appeal to international instances to vindicate their "legitimate interests", as that would to "a true necessity of international life"[61].

72. Another criticism to the solution adopted in the matter by the Statute of the PCIJ (Article 34(1)) was formulated by J. Spiropoulos, also in the twenties. Already in 1928, he had anticipated that the emancipation of the individual from the State was a "question of time" and that the individual should be able to defend *himself* and his rights at the international level[62]. There was - he added - no impediment for conventional International Law to secure to individuals a direct action at international level (there having even been precedents in this sense in the inter-war period); if this did not occur and one would limit oneself to judicial actions at domestic law level, not seldom the State would become "judge and party" at the same time, what would be an incongruity.

73. To J. Spiropoulos, the international legal order can address itself directly to individuals (as exemplified by the peace treaties of the inter-war period), thereby erecting them into the condition of subjects of International Law, to the extent that a direct relationship is established between the individual and the international legal order, which renders him "directly *titulaire* of rights or of obligations"; thus, one cannot fail to admit the international legal personality of the individual[63]. Without the granting to individuals of direct means of action at international level, his rights will continue "without sufficient protection"; only with such direct action before an international instance, - he added, - an *effective* protection of human rights will be achieved, in conformity with "the spirit of the new international order".

74. The option made by the draftsmen of the Statute of the old PCIJ, stratified with the passing of time in the Statute of the ICJ up to the present time, is even more open to criticism if we consider that, already in the first half of the XXth century, there were experiments of International Law which in effect granted international procedural status to individuals. This is exemplified by the system of the navigation of the river Rhine, by the Project of an International Prize Court (1907), by the Central American Court of Justice (1907-1917), as well as, in the era of the League of Nations, by the systems

61 *Ibid*., pp. 82-83 and 89-90, and cf. pp. 92 and 61.
62 J. Spiropoulos, *op. cit. supra* n. (58), p. 44, and cf. pp. 49 and 64-65.
63 *Ibid*., pp. 50-51, 25, 31-33 and 40-41.

of minorities (including Upper Silesia) and of the territories under mandate, by the systems of petitions of the Islands Aaland and of the Saar and of Danzig, besides the practice of mixed arbitral tribunals and of mixed claims commissions, of the same epoch[64].

75. This evolution intensified and generalized in the era of the United Nations, with the adoption of the system of individual petitions under some universal human rights treaties of our times, in addition to human rights conventions at regional level, which established international human rights tribunals (the European and Inter-American Courts of Human Rights[65], followed, more recently, by the African Court of Human and Peoples´ Rights). Thereunder the international procedural capacity of individuals came to be exercised, with their direct access to international justice[66]. The significance of the right of individual petition can only be properly assessed in historical perspective.

XI. THE EROSION OF THE INTER-STATE OUTLOOK OF ADJUDICATION BY THE ICJ

76. The fact that the Advisory Committee of Jurists did not find, in 1920, that the time was ripe to grant access to the PCIJ to subjects

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64 For a study, cf., e.g., A.A. Cançado Trindade, "Exhaustion of Local Remedies in International Law Experiments Granting Procedural Status to Individuals in the First Half of the Twentieth Century", *op. cit. supra* n. (53), pp. 373-392; C.A. Norgaard, *The Position of the Individual in International Law, op. cit. supra* n. (53), pp. 109-128; M.St. Korowicz, *Une expérience de Droit International - La protection de minorités de Haute-Silésie, op. cit. supra* n. (48), pp. 81-174; among others.

65 A.A. Cançado Trindade, *El Acceso Directo del Individuo…, op. cit. supra* n. (35), pp. 34-35.

66 At the beginning of the exercise of the right to individual petition, such right, even if motivated by the search for individual reparation, also contributed to secure the respect for the objective obligations that were binding upon States Parties. Cf., under the original text of Article 25 of the European Convention of Human Rights, e.g., H. Rolin, "Le rôle du requérant dans la procédure prévue par la Commission européenne des droits de l'homme", 9 *Revue hellénique de droit international* (1956) p. 9; C.Th. Eustathiades, "Les recours individuels à la Commission européenne des droits de l'homme", *in Grundprobleme des internationalen Rechts - Festsschrift für J. Spiropoulos,* Bonn, Schimmelbusch & Co., 1957, p. 121; F. Durante, *Ricorsi Individuali ad Organi Internazionali,* Milano, Giuffrè, 1958, pp. 129-130; K. Vasak, *La Convention européenne des droits de l'homme,* Paris, LGDJ, 1964, pp. 96-98; F. Matscher, "La Posizione Processuale dell'Individuo come Ricorrente dinanzi agli Organi della Convenzione Europea dei Diritti dell'Uomo", *in Studi in Onore di G. Sperduti,* Milano, Giuffrè, 1984, pp. 601-620.

of rights other than the States, such as the individuals, did not mean a definitive answer to the question at issue. The fact that the same position was maintained at the time of adoption in 1945 of the Statute of the ICJ did not mean a definitive answer to the question at issue. The question of access of individuals to international justice, with procedural equality, continued to occupy the attention of legal doctrine ever since, throughout the decades. Individuals and groups of individuals began to have access to other international judicial instances (cf. *supra*), reserving the PCIJ and later the ICJ only for disputes between States.

77. The dogmatic position taken originally in 1920, on the occasion of the preparation and adoption of its Statute, did not hinder the PCIJ to occupy itself promptly of cases pertaining to the treatment of minorities and inhabitants of cities or territories with a juridical statute of their own. In considerations developed in the examination of such matters, the PCIJ went well beyond the inter-State dimension, taking into account the position of individuals themselves (as in, e.g., *inter alia*, the Advisory Opinion on *the Jurisdiction of the Courts of Danzig*, 1928 - cf. *infra*, para. 88). Ever since, the artificiality of such dimension became noticeable and acknowledged, already at an early stage of the case-law of the PCIJ.

78. The exclusively inter-State character of the *contentieux* before the ICJ has not appeared satisfactory at all. At least in some cases, pertaining to the condition of individuals, the presence of these latter (or of their legal representatives), in order to submit, themselves, their positions, would have enriched the proceedings and facilitated the work of the Court. One may recall, for example, the classical *Nottebohm* case concerning double nationality (Liechtenstein *versus* Guatemala, 1955), the case concerning the *Application of the Convention of 1902 Governing the Guardianship of Infants*, (The Netherlands *versus* Sweden, 1958), the cases of the *Trial of Pakistani Prisoners of War* (Pakistan *versus* India, 1973), of the *Hostages (U.S. Diplomatic and Consular Staff) in Teheran* case (United States *versus* Iran, 1980), of the *East-Timor* (Portugal *versus* Australia, 1995), the case of the *Application of the Convention against Genocide* (Bosnia-Herzegovina *versus* Yugoslavia, 1996), and the three successice cases concerning consular assistance - namely, the case *Breard* (Paraguay *versus* United States, 1998), the case *LaGrand* (Germany *versus*

United States, 2001), the case *Avena and Others* (Mexico *versus* United States, 2004).

79. In those cases, one cannot fail to reckon that one of their predominant elements was precisely the concrete situation of the individuals directly affected, and not merely abstract issues of exclusive interest of the litigating States in their relations *inter se*. Moreover, one may further recall that, in the case of *Armed Activities in the Territory of Congo* (D.R. Congo *versus* Uganda, 2000) the ICJ was concerned with grave violations of human rights and of International Humanitarian Law; in the Land *and Maritime Boundary between Cameroon and Nigeria* (1996), it was likewise concerned with the victims of armed clashes. More recent examples wherein the Court´s concerns have gone beyond the inter-State outlook include, e.g., the case on *Questions Relating to the Obligation to Prosecute or Extradite* (Belgium *versus* Senegal, 2009) pertaining to the principle of universal jurisdiction under the U.N. Convention against Torture, the Advisory Opinion on the *Declaration of Independence of Kosovo* (2010), the case of *A.S. Diallo* (Guinea *versus* D.R. Congo, 2010) on detention and expulsion of a foreigner, the case of the *Jurisdictional Immunities of the State* (Germany *versus* Italy, counter-claim, 2010), the case of the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia *versus* Russian Federation, 2011), the case of the *Temple of Preah Vihear* (Cambodia *versus* Thailand, 2011).

80. The artificiality of the exclusively inter-State outlook of the procedures before the ICJ is thus clearly disclosed the very nature of some of the cases submitted to it. Such artificiality has been criticised, time and time again, in expert writing, including by a former President of the Court itself. It was recalled that "nowadays a very considerable part of international law" (e.g., lawmaking treaties) "directly affects individuals", and the effect of Article 34(1) of the ICJ Statute has been "to insulate" the Court "from this great body of modern international law". The ICJ remains

> "trapped by Article 34(1) in the notions about international law structure of the 1920s. (...) [I]t is a matter for concern and for further thought, whether it is healthy for the World Court still to be, like the international law of the 1920s, on

> an entirely different plane from that of municipal courts and other tribunals"[67].

81. To the same effect, S. Rosenne expressed the view, already in 1967, that there was "nothing inherent in the character of the International Court itself to justify the complete exclusion of the individual from appearing before the Court in judicial proceedings relating of direct concern to him"[68]. The current practice of exclusion of the *locus standi in judicio* of the individuals concerned from the proceedings before the ICJ, - he added, - in addition to being artificial, could also produce "incongruous results". It was thus highly desirable that that scheme be reconsidered, in order to grant *locus standi* to individuals in proceedings before the ICJ, as

> "it is in the interests of the proper administration of international justice that in appropriate cases the International Court of Justice should take advantage of all the powers which it already possesses, and permit an individual directly concerned to present himself before the Court, (...) and give his own version of the facts and his own construction of the law"[69].

XII. THE EARLY ACKNOWLEDGMENT OF THE INEQUALITY OF THE PARTIES IN THE PROCEDURE OF REVIEW OF JUDGMENTS OF ADMINISTRATIVE TRIBUNALS

82. The fact that a procedure such as the one followed in the *cas d´espèce* (review procedure) subsists unchanged to date, despite all the insufficiencies it revealed in the course of past decades, and all the criticisms raised by some of my predecessors as Members of this Court as well as by expert writers, shows indeed the force of inertia and of mental lethargy in its maintenance to date. The present review procedure has persisted so far, making abstraction of - or even indifferent to - the remarkable advances achieved, in the international adjudication by other tribunals, throughout the last decades, in respect of the *equality of the parties* in the international legal process.

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67 R.Y. Jennings, "The International Court of Justice after Fifty Years", 89 *American Journal of International Law* (1995) p. 504.
68 S. Rosenne, "Reflections on the Position of the Individual in Inter-State Litigation in the International Court of Justice", *in International Arbitration - Liber Amicorum for M. Domke* (ed. P. Sanders), The Hague, Nijhoff, 1967, p. 249, and cf. p. 242.
69 *Ibid.*, p. 250, and cf. p. 243.

83. Yet, the question was object of attention, early in the life of the ICJ, shortly after it delivered its Advisory Opinion of 1954 (cf. *supra*), particularly when the U.N. General Assembly considered, in 1955, the *Report* of its Special Committee on Review of Administrative Tribunal Judgments[70]. In the debates that followed, during the Xth session of the General Assembly, the participating Delegations dwelt upon a series of issues, amongst which was the problem of the lack of *locus standi in judicio* of individuals in the review procedure before the ICJ. The view was expressed that the review procedure should not be used "in a manner that would take undue advantage of a staff member or other interested party"[71].

84. In the course of the debates, the "serious practical difficulties" in the review procedure before the ICJ were acknowledged; the only possibility of by-passing them, then contemplated, was that of the presentation of documents and written briefs by U.N. staff members, to be brought to the attention of the ICJ, but not (under Article 66(2) of the Court´s Statute) their representation at oral hearings before the Court[72]. There was thus, admittedly, a lack of equality between the parties[73], as U.N. staff members had "no *locus standi* before the Court"; the view was then expressed that "it would be inequitable to deny a party the right to appear before the reviewing body"[74].

85. On the occasion of that exercise of review at the Xth session of the U.N. General Assembly (1955), the then U.N. Secretary-General, Dag Hammarskjold, pursuant to a suggestion of the Special Committee, presented to the General Assembly an insightful *Memorandum* titled "*Participation of Individuals in Proceedings before the International Court of Justice*"[75]. He regarded of interest

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70 Cf. U.N./General Assembly, *Report of the Special Committee on Review of Administrative Tribunal Judgments*, U.N. document A/2909, of 10.06.1955, pp. 1-46.

71 *Ibid*., p. 11, para. 74.

72 *Ibid*., pp. 5-6, paras. 27 and 31.

73 *Ibid*., p. 6, para. 31.

74 *Ibid*., p. 5, para. 27.

75 U.N., document A/AC.78/L.10, of 13.04.1955 (submitted to the X General Assembly, of 20.09-20.12.1955), *Official Records of the X General Assembly - Plenary Meetings*, pp. 26-28.

> "to examine in some detail the question of the possible participation of individuals in proceedings before the International Court of Justice" (para. 7)[76].

To that end, Dag Hammarskjold reviewed the work on this matter since the days of the 1920 Advisory Committee of Jurists, focused on

> "the question of the presentation by individuals of written and oral statements of an argumentative character in contentious cases and in advisory proceedings before the International Court of Justice and its predecessor the Permanent Court of International Justice" (para. 8)[77].

86. Despite the fact that the Advisory Committee at the end decided that "individuals should not be able to become parties" (para. 9), and that this position remained unchanged at the San Francisco Conference in 1945 (para. 25), the U.N. Secretary-General drew attention, in his *Memorandum*, to the actual participation by individuals (who submitted written statements) in advisory proceedings before the old PCIJ[78] (in the "advisory case" of the *Danzig Legislative Decrees*, 1935, and in the "advisory case" of the *Governing Commission of the Saar Territory, 1939*[79]) (paras. 15-24)[80].

87. It is thus clear that, already in the mid-XXth century, the aforementioned *Memorandum* of 1955 of the U.N. Secretary-General acknowledged that the challenge in the present context, - in respect of the procedure of review of judgments of administrative tribunals, - was to devise an *equitable procedure* in this emerging domain. The practice of the international administrative tribunals - of (formerly) the U.N. (the UNAT) and the ILO (the ILOAT) - led one into the domain of the internal or domestic law of international organizations[81], wherein the individual also marked its presence as a *subject* of rights.

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76 Cf. *ibid*., p. 26.
77 *Ibid*., p. 26.
78 *Ibid*., pp. 27-28.
79 The proceedings of this latter were never carried through, and the PCIJ had no opportunity to pass on it, because of the disruption caused by the II world war; *ibid*., p. 28, paras. 22-23.
80 *Ibid*., pp. 27-28.
81 Cf. C.W. Jenks, *The Proper Law of International Organizations*, London/N.Y., Stevens/Oceana, 1962, pp. 43 and 48; M.B. Akehurst, *The Law Governing Employment in International Organizations*, Cambridge, Cambridge University

88. May I just, in addition, single out the historical relevance, in my view, of the Advisory Opinion of the PCIJ on the *Jurisdiction of the Courts of Danzig* (of 03.03.1928, followed by its Advisory Opinion on *Danzig Legislative Decrees*, of 04.12.1935). In the view of Poland, the Danzig-Polish Agreement of 22.10.1921 (*Beamtenabkommen*), as an international agreement, created "rights and obligations for the contracting Parties only" (p. 17). The PCIJ, however, did not find that such Agreement could not create "direct rights and obligations" for individuals. In its understanding, the "very object" of the *Beamtenabkommen*, according to the ascertained intention of the contracting Parties, had been "the adoption by the Parties of some definite rules creating rights and obligations and enforceable by the national courts" (paras. 17-18).

89. In sum, the PCIJ held that a treaty (the 1921 Danzig-Polish Agreement) conferred rights directly upon the individuals concerned (railway employees). They could thus lodge personal pecuniary claims (e.g., salaries, and pensions), even though they had passed from the service of the Free City of Danzig into the jurisdiction of Poland. Thus, as early as in 1928, - two decades before the proclamation by the U.N. General Assembly of the Universal Declaration of Human Rights, - the PCIJ had the courage and vision to determine, in its Advisory Opinion on the *Jurisdiction of the Courts of Danzig*, that, in the circumstances of the matter brought into its cognizance, individuals can be subjects of rights and bearers of obligations emanating directly from international law, from an international treaty.

90. That finding by the PCIJ, recognizing standing to individuals, as early as in 1928, was to have repercussions in the following United Nations era. Thus, the new Court, the ICJ, in its Advisory Opinion of 1950 on the *International Status of South West Africa*, held that the inhabitants of the mandated territories had (even irrespective of a bilateral treaty) a right to petition the [former] U.N. Trusteeship

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Press, 1967, pp. 3-10; S. Bastid, "Have the U.N. Administrative Tribunals Contributed to the Development of International Law?", *in Transnational Law in a Changing Society – Essays in Honour of Ph.C. Jessup* (ed. W. Friedmann, L. Henkin and O. Lissitzyn), N.Y., Columbia University Press, 1972, pp. 301-302, 307 and 309; A.A. Cançado Trindade, "Exhaustion of Local Remedies and the Law of International Organisations", 57 *Revue de droit international de sciences diplomatiques et politiques* (Sottile) - Geneva (1979) pp. 86-87, 92, 96 and 108-109.

Council, under Article 80 of the U.N. Charter[82]. From all the aforesaid, it is clear that, by the mid-XXth century, the individuals´ international legal standing, and the need to secure a *procès équitable* (also in the emerging law of international organizations) were already recognized.

XIII. THE IMPERATIVE OF SECURING THE EQUALITY OF THE PARTIES IN THE INTERNATIONAL LEGAL PROCESS, AS A COMPONENT OF THE RIGHT OF ACCESS TO JUSTICE *LATO SENSU*

91. The awareness of the need to secure a *procès équitable*, and the contribution of Secretary-General Dag Hammarskjold to that end, should not be forgotten in our days. The fact that, ever since, the problem at issue has persisted unchanged to date, is, in my view, cause of concern. Worse still, in our days, the unsettled problem makes abstraction of the considerable contribution - in addition to the U.N. Human Rights Committee, quoted by this Court in the present Advisory Opinion, - of international human rights tribunals operating for many years - the European (ECtHR) and the Inter-American (IACtHR) Courts of Human Rights to the basic principle of equality of arms (*égalité des armes*) in international legal procedure.

92. Thus, the ECtHR has constructed a vast case-law on the right to a fair trial (Article 6 of the European Convention on Human Rights), wherein it has pointed out, in its *jurisprudence constante*, that that right encompasses the respect for the principle of equality of arms (*égalité des armes*), that is, the principle of the procedural equality between the contending parties (e.g., case *Delcourt versus Belgium*, 1970, para. 28; case *Monnel and Morris versus United Kingdom*, 1987, para. 62). In the case *Dombo Beheer versus The Netherlands* (1993), the ECtHR observed that the principle of equality of arms implies the reasonable opportunity to be afforded to the contending parties to present, each one, his case and evidence, without being in disadvantage *vis-à-vis* his opposing party (para. 33). This includes cross-examination of witnesses, as pointed out

82 Cf. W.P. Gormley, *The Procedural Status of the Individual before International and Supranational Tribunals*, The Hague, Nijhoff, 1966, p. 40 n. 25; and, generally, J. Beauté, *Le droit de pétition dans les territoires sous tutelle*, *op. cit. supra* n. (54), pp. 48-136.

by the ECtHR in the *Rowe and Davis versus United Kingdom* case (2000, paras. 62 and 65).

93. The ECtHR has further stressed, in its *jurisprudence constante*, "the caractère contradictoire de la procédure", allowing each party "de prendre connaissance et de discuter toute pièce ou observation présentée au juge en vue d´influencer sa décision" (cases *Mantovanelli versus France*, 1997, para. 31; *Lobo Machado versus Portugal*, 1996, para. 31; *Vermeulen versus Belgium*, 1996, para. 33; *Nideröst-Huber versus Switzerland*, 1997, para. 24)[83]. In the cases of *Borges versus Belgium* (1991, para. 24) and of *Ekbatani versus Sweden* (1988, paras. 28-30 and 33), the ECtHR characterized the principle of "equality of arms" (*égalité des armes*) as one of the elements of the wider notion of "fair trial" (*procès équitable*).

94. In the case of *Ruiz-Mateos versus Spain* (1993), the ECtHR observed that Article 6(1) of the European Convention of Human Rights encompasses the principle of "equality of arms" (*égalité des armes*) as well as the "fundamental right" to the "caractère contradictoire de la procédure", which implies, for its part, "la faculté de prendre connaissance des observations ou pièces produites par l´autre ainsi que de les discuter" (para. 63). And, in the case *Hentrich versus France* (1994), the ECtHR deemed it fit to ponder that

> "une des exigences d´un `procès équitable´ est `l´égalité des armes´, laquelle implique l´obligation d´offrir à chaque partie une possibilité raisonnable de présenter sa cause dans des conditions qui ne la placent pas dans une situation de net désavantage par rapport à son adversaire" (para. 56).

95. In fact, looking back in time, already in the late sixties it was rightly pointed out, in respect of the interrelatedness of the right to a fair trial and the principle of equality of arms, that

> "Art. 6 Abs. 1 der Europäischen Menschenrechtskonvention garantiert ein *fair trial*, das dem Grundsatz der Waffengleichheit Rechnung trägt. (...) *Fair trial* und Waffengleichheit gebieten, dass die Parteien eines Rechtsstreites unter gleichen Voraussetzungen die Entscheidung eines Gerichtes erlangen können. / (Article 6 paragraph 1 of the European Convention of Human Rights guarantees a fair trial, which provides for the principle of equality of arms. (...) Fair trial and equality of

83 Cf. also, on the principle of equality of arms, ECtHR, case *Yvon versus France*, 2003, paras. 29-37.

> arms demand the parties to a legal dispute to be able to obtain the decision of a court under the same conditions)"[84].

This understanding has been sustained, not surprisingly, in both the European and the inter-American systems of human rights protection.

96. In Latin America, for its part, the IACtHR has held, in the case of *Hilaire, Constantine and Benjamin et allii versus Trinidad and Tobago* (2002), that, in order to secure the right to a fair trial, proceedings ought to ensure "the entitlement to a right or the exercise thereof", and the adequate protection of those, whose rights are pending of judicial consideration (para. 147). In the case *Loayza Tamayo versus Peru* (1997), the IACtHR warned that a judicial process wherein a party is not able to contradict the evidence produced against her does not meet the standards of a fair trial (*juicio justo*) (para. 62). In the case of *Juan Humberto Sánchez versus Honduras* (2003), the IACtHR again held that the right to a fair trial (Article 8 of the American Convention on Human Rights) implies the observance to all requirements to secure the "adequate defense" of all those, whose rights and obligations are under "judicial consideration" (para. 124).

97. The IACtHR has stressed that the due process of law is "intimately linked to the right of access to justice" (cases *Cantoral Benavides versus Peru*, 2000, para. 112, and *Castillo Petruzzi and Others versus Peru*, 1999, para. 128). The IACtHR has further warned that a party (the respondent State) cannot rest on, or take advantage of, the difficulties or impossibility of the other party (the individual complainant) to produce evidence which not seldom cannot be obtained without its procedural cooperation (case *Maritza Urrutia versus Guatemala*, 2003, para. 128).

98. And, in its Advisory Opinion n. 16, on *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of* Law (1999), the IACtHR pondered that

> "(...) para que exista `debido proceso legal´ es preciso que un justiciable pueda hacer valer sus derechos y defender sus intereses en forma efectiva y en condiciones de igualdad procesal con otros justiciables. Al efecto, es útil recordar que el proceso es un medio para asegurar, en la mayor medida posible, la solución

84 W.P. Pahr, "Die Staatenimmunität und Artikel 6 Absatz 1 der Europäischen Menschenrechtkonvention", *in Mélanges offerts à P. Modinos - Problèmes des droits de l´homme et de l´unification européenne*, Paris, Pédone, 1968, p. 231.

> justa de una controversia. / (…) for the `due process of law´ to exist, it is necessary that a *justiciable* be able to exercise his rights and defend his interests effectively and in full procedural equality with other *justiciables*. In effect, it is proper to recall that the judicial process is a means to secure, insofar as possible, an equitable solution of a difference" (para. 117).

99. It is firmly established, in contemporary international procedural law, that contending parties are to be afforded the same opportunity to present their case and to take cognizance of, and to comment upon, the arguments advanced and the evidence adduced by each other, in the course of the proceedings. This has been carefully observed and applied by international human rights tribunals, such as the European[85] and the Inter-American[86] Courts of Human Rights, in their well-sedimented case-law on the matter at issue. Likewise, the *principe du contradictoire* has marked its presence in the most distinct contemporary international jurisdictions[87].

100. Notwithstanding the advances achieved in international procedural law, it is clear that the review procedure, considered by this Court in the present Advisory Opinion, does not abide by the principle of equality of arms (*égalité des armes*), nor does it meet the aforementioned standards. That review procedure has not accompanied the considerable advances experienced in international legal procedures throughout the last decades. It fails to do justice to the original complainants[88], who have - so anachronistically - to rely upon the opposing party to submit his or her arguments to the consideration of this Court. It regrettably has not at all accompanied the advances of international justice in our times. It is high time

85 For doctrinal considerations, cf., e.g., P. van Dijk, F. van Hoof, A. van Rijn and L. Zwaak (eds.), *Theory and Practice of the European Convention on Human Rights*, 4th. ed., Antwerpen/Oxford, Intersentia, 2006, pp. 580-589.

86 For doctrinal considerations, cf., e.g., A.A. Cançado Trindade, *El Ejercicio de la Función Judicial Internacional – Memorias de la Corte Interamericana de Derechos Humanos*, Belo Horizonte/Brazil, Edit. Del Rey, 2011, pp. 101-105 and 133-138.

87 For a survey, cf., e.g., [Various Authors,] *Le principe du contradictoire devant les jurisdictions internationales* (Journée d´études de Paris de 2003, eds. H. Ruiz Fabri and J.-M. Sorel), Paris, Pédone, 2004, pp. 1-195.

88 It is thus not surprising to find the suggestion that, the creation of a new appelate instance, or a regular appelate court, would appear more appropriate and satisfactory than to maintain the existing review procedure; cf., e.g., R. Ostrihansky, "Advisory Opinions of the International Court of Justice as Reviews of Judgments of International Administrative Tribunals", 17 *Polish Yearbook of International Law* (1988) pp. 117 and 120.

that it does, perhaps - and hopefully - as from the present Advisory Opinion of this Court on *Judgment n. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development*.

XIV. THE NEED TO SECURE THE *LOCUS STANDI IN JUDICIO* AND THE *JUS STANDI* TO INDIVIDUALS BEFORE INTERNATIONAL TRIBUNALS, INCLUDING THE ICJ

101. In order to secure the equality of the parties in the international legal process, as a component - as already indicated - of the right of access to justice *lato sensu* (*supra*), there is need to provide for the *jus standi* and the *locus standi in judicio* before this Court, among other international tribunals. Unfortunately, neither of them is granted to individuals before the ICJ, not even in review procedures such as the present one. There are thus, in fact, two regrettable and longstanding *sources of procedural inequality* before this Court in review procedures such as the one in the *cas d´espèce*. First, the lack of *jus standi*, ensuing from Article XII(1) of the Annex to the ILOAT Statute, whereby only the Executive Board of the international organization concerned (the employer) can lodge a request for an Advisory Opinion with the ICJ. The original individual complainant, the staff member of the organization (the employee), cannot do so, he or she is deprived of any *jus standi* to do so.

102. Secondly, and in addition, the lack of *locus standi in judicio*, ensuing from the ICJ Statute itself, renders unfeasible the participation of individuals in the procedures before the Court, even in a hybrid procedure such as the review one (advisory procedures disguising a contentious case of international administrative law), wherein the most interested "party", who claims the violation of a right (the employee), has to rely on the opposing party (the employer), the present his or her submissions to the consideration of the Court. The procedural inequality to the detriment of the employee thus covers the lack of *jus standi* as well as *locus standi in judicio*.

103. The perfectly avoidable position results from an outdated dogma, imposed upon this Court since its historical origins, whereby individuals cannot appear before itself because they are not subjects of international law. Only the international organization concerned (the employer) has *jus standi* and *locus standi in judicio* before the ICJ, the individual (the employee) depends on the decision (as

to resorting to this Court) of the employer, and, if the matter is submitted to the Court, he or she cannot appear before it. This is certainly a double procedural inequality before the World Court.

104. For decades the ICJ has been considering an alternative of resorting to a procedural *acrobatie* in order to by-pass or circumvent this situation, so detrimental to the individual as subject of international law. The alternative it has considered is not to give the requested Advisory Opinion: this is not a solution, as the Court is bound to clarify - as it does in the present Advisory Opinion – the subject brought before it, in the exercise of its functions. The procedural *acrobacie* is not to hold oral hearings: this is not a solution either, as the Court thereby ends up depriving itself to instruct better the *dossier* of the case, by imposing such limit to the freedom of expression of the "parties", concerned.

105. In so far as the review procedure is concerned, the solution adopted by the Statute of the PCIJ, which has been affirmed by the ICJ Statute, appears even more problematic, since, - as already indicated (cf. *supra*), - as early as in the first half of the XXth century there were already experiments of international law which had granted a procedural capacity to individuals. Such evolution was triggered in the era of the United Nations, with the adoption of a system of individual petition under the auspices of some human rights treaties of universal character[89]. This procedural capacity of the individual has a direct incidence on the individual's access to justice at international level[90].

106. It is thus necessary, still in our days, to have a thorough understanding of the nature and scope of the individual right to petition under the auspices of human rights treaties[91]. The experiments during the first half of the XXth century paved the

89 A.A. Cançado Trindade, "Co-existence and Co-ordination of Mechanisms of International Protection of Human Rights (At Global and Regional Levels)", 202 *Recueil des Cours de l'Académie de Droit International de La Haye* (1987) pp. 21-412.

90 A.A. Cançado Trindade, *The Access of Individuals to International Justice*, *op. cit. supra* n. (35), pp. 50-124 and 179-212.

91 At the historical beginning of the exercise of the right to individual petition, such right, even if motivated by the search for individual reparation, also contributed to secure the respect for the objective obligations that were binding upon States Parties. Only subsequently the right *of* petition (and no longer the right *to* petition) came into being within international organizations. The distinction between *pétition plainte* (based on the violation of a private individual right and the search for reparation before the relevant authorities) and *pétition voeu* (concerning the

way to the development, within the United Nations and under the auspices of human rights treaties at the global and regional levels (in addition to extra-conventional mechanisms), of contemporary mechanisms of petitions or communications relating to violations of human rights. Thus, in this context, the individual recovered its presence for the vindication of his rights at international level.

107. The appreciation of the individual right of petition as a means of international implementation of human rights has to take into account the basic point of the *legitimatio ad causam* of the individual petitioners and the conditions of the use and admissibility of their petitions. The solutions given by human rights treaties and instruments to the question of the *jus standi* of the individual applicant seem to be related to the nature of the proceedings at issue. But differences in the nature of the respective proceedings have not hindered, nor stood in the way of, the development of a converging jurisprudence of distinct international human rights tribunals and supervisory organs striving to secure a more efficient protection of the alleged victims.

XV. CONCLUDING OBSERVATIONS

108. Such reassuring development should be kept in mind, to reassess and overcome, once and for all, the pitfalls of the present review procedure. Its intrinsic and unjustified imbalance in the proceedings, - as disclosed in the *cas d´espèce*, - is a remnant of the past, revealing a lack of equality of arms. Expressions of discontent have, throughout many years, been uttered by some members of succeeding generations of Judges of this Court. Given the unnecessary persistence of the problem, I feel obliged to take my own criticism even further, as for many years I have consistently attached the utmost importance to such matter (also in another international jurisdiction, wherein positive results have been achieved, that is, results *pro persona humana*)[92].

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general interests of a group and the search of public measures by the authorities) was developed.

92 A.A. Cançado Trindade, "Vers la consolidation de la capacité juridique internationale des pétitionnaires dans le système interaméricain des droits de la personne", 14 *Revue québécoise de droit international* (2001) pp. 207-239; A.A. Cançado Trindade, "El Nuevo Reglamento de la Corte Interamericana de Derechos Humanos (2000): La Emancipación del Ser Humano como Sujeto del Derecho Internacional", 28 *Curso de*

109. This unnecessary problem, ensuing from outdated dogmatisms (identified in the present Separate Opinion), touches on other aspects which are very dear to me, namely: a) the emergence and consolidation of individuals as subjects of international law; b) the imperative of securing the procedural equality of the parties in the course of the proceedings (as a component of the right of access to justice *lato sensu*); and c) the need to secure the *locus standi in judicio* and the *jus standi* to individuals before international tribunals, including the ICJ. Keeping this in mind, - and dogmatisms apart, - it can hardly be denied that there should have been a hearing, with the presence not only of the legal representative of the IFAD but also of Ms. Ana Teresa Saez-García.

110. This would have better instructed the *dossier*, and would have avoided the problems that occurred, which prompted two interventions of the Court´s Registry, to secure the proper administration of justice (cf. para. 49, *supra*). This would, moreover, have been in conformity with the principle of equality of arms, and ultimately of the general principle of *la bonne administration de la justice*. This would, furthermore, have at last overcome a dogma entirely outdated, which no longer finds any justification to be followed in our days. In an epoch, such as ours, of the *rule of law at national and international levels*, it is high time to abide firmly by such general principles of law in any procedures and circumstances.

111. In the present Advisory Opinion the Court has fortunately, at the end, reached the right decision. But this is not the first time in this Court that I stress the need of holding a public hearing. In my long Dissenting Opinion in the Court´s Order of 06.07.2010 in the case concerning the *Jurisdictional Immunities of the State* (Germany *versus* Italy), whereby the Court dismissed the counter-claim (which purported to link State immunities to the factual background of war reparations claims), I allowed myself to warn that

> "In summarily discarding the Italian counter-claim as `inadmissible as such´, the Court should have at least instructed properly the *dossier* of the cas *d´espèce*, by holding, prior to the decision it has just taken, public hearings to obtain further clarifications from the contending parties. The same treatment is to be rigorously dispensed to the original

Derecho Internacional Organizado por el Comité Jurídico Interamericano de la OEA (2001) pp. 33-92.

claim and the counter-claim as a requirement of the sound administration of justice (*la bonne administration de la justice*). They are, both, autonomous, and should be treated on the same footing, with a strict observance of the *principe du contradictoire*. Only in this way the *procedural equality* of the parties (applicant and respondent, rendered respondent and applicant by the counter-claim) is secured. (…)

The Order that the Court has just adopted has made abstraction of the configuration of the notion of "continuing situation" in international legal thinking, - in both international litigation and case-law, and in international legal conceptualization at normative level. Furthermore, it has not addressed the position of the true bearers (*titulaires*) of the originally violated rights, oblivious of the pitfalls of State voluntarism. Its emphasis fell solely on waiver of claims, again oblivious of the incidence of *jus cogens*, rendering certain waivers of claims devoid of any juridical effects (…).

The Court has discarded the Italian counter-claim on the basis of succinct considerations in the two brief paragraphs 28 and 29, of the present Order. Paragraph 29 is a *petitio principii*, simply begging the question. The *ratio decidendi* lies in paragraph 28 of the Order (…).

This is, in fact, another *petitio principii* (…). The matter summarily disposed of, in the present Order, is not so clear and self-evident as the Court´s majority seems to believe. On the basis of the considerations and reflections developed in the present Dissenting Opinion, I am led to conclude that the Court´s majority position does not stand, and finds no basis, neither as to the facts nor as to the law, to rely upon. It is nothing but a *petitio principii*" (paras. 154 and 156-158).

112. There are lessons that can be extracted from the experience with the present Advisory Opinion of this Court, which, at least, has had a happy end[93], unlike the Order of 06.07.2010 in the aforementioned case. The subject of a wider participation in advisory proceedings before this Court has, along the history of the Hague Court - both the PCIJ and the ICJ, - attracted attention from time

93 After all, one should not lose sight of the fact that international organizations operate day-to-day, due to a large extent to the invisible work of their staff members, human beings of body and soul, and not simply "human resources", as their post-modern administrations tend to label them.

to time. Much has been written on it, and we live now a historical moment in which I deem it fit to single it out for further reflection, as I have always attached considerable importance to the issue of access to international justice, of *all* subjects of International Law.

113. The advisory jurisdiction of the ICJ seems to me to offer an adequate framework for the consideration of possible advances in this domain. The high significance of this topic is that it appears to go beyond a strictly inter-State outlook, in the line of recent developments in several domains of contemporary international law. This, in my view, cannot pass unnoticed, or unexplored, in a World Court such as ours. There have indeed been glimpses of enlightenment when our Court itself has taken cognizance of the issue.

114. The old PCIJ, for example, - as I pointed out in this Separate Opinion, - was attentive to it, in its advisory proceedings concerning the *Free City of Dantzig*, in the late twenties and early thirties of last century. Fourty years later, in the advisory proceedings on *Namibia*, - which led to the adoption of its célèbre Advisory Opinion of 21.06.1971, - the ICJ considered the possibility of receiving *amicus curiae* briefs (including from individuals), but preferred not to innovate. Yet, well before this, the PCIJ had taken innovative steps and indeed shaped its advisory proceedings largely through practice itself.

115. It appears to me that we ought to be attentive to the densely changing world wherein we live, and the adjustments it appears to require from our *interna corporis* and our practice[94]. To count on the public participation of all subjects of international law - including individuals - is to be faithful to the thinking of the "founding fathers" of our discipline, as indicated in the present Separate Opinion. As I also deemed it fit to recall herein, many of the matters - including contentious cases - brought into the cognizance of this Court have pertained ultimately to the concrete situations in which the individuals concerned found themselves (paras. 78-79).

116. In the light of such cases at least, one can surely argue that the participation of the individuals concerned in legal proceedings

94 Thus, in the advisory proceedings on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Palestine was among those which appeared in public sittings before the Court; *ICJ Reports* (2004) pp. 141 and 143, paras. 4 and 12. And subsequently, in the advisory proceedings on the *Declaration of Independence of Kosovo*, before the Court pronounced on the matter (in its Advisory Opinion of 22.07.2010) Kosovo participated in the public sittings (of 01-11.12.2009) before the Court.

contributes to a better instruction of the process, by giving the Court the opportunity to have a better knowledge of the parties´ perception of the facts and their arguments as to the law. Furthermore, it preserves the *principe du contradictoire*, essential in the search for truth and the realization of justice, guaranteeing the equality of arms (*égalité des armes*) in the whole procedure before the Court, essential to *la bonne administration de la justice*.

117. This is logical, since, to the international legal personality of the parties ought to correspond their full juridical capacity to vindicate their rights before the Court. In addition, their public participation in the proceedings before the Court recognizes the right of free expression of the contending parties themselves, in affording them the opportunity to act as true subjects of law. This provides those who feel victimized and are in search of justice a form of reparation, in directly contributing - with their participation - to the patient reconstitution and determination of the facts by the Court itself.

118. All these considerations render the subject-matter at issue, - which in my perception has assumed a central position in the proceedings which led to the present Advisory Opinion, - in my view a suitable one for further careful consideration from now onwards. Legal instruments, whichever their hierarchy, are a product of their time, and I am sure that we all agree as to the need to work for the realization of justice at the level of the challenges of our time, so as to respond properly to them. And as this Court is to perform its functions at the height of the challenges of our times, as the International Court *of Justice*, it is bound at last to acknowledge that individuals are subjects of international law, of the *jus gentium* of our times.

Antônio Augusto Cançado Trindade
Judge