



The American Convention on Human Rights

ESSENTIAL RIGHTS

Thomas M. Antkowiak
Alejandra Gonza

OXFORD

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*Para nuestros padres—Irene, Thomas, Lucía y Juan
Guillermo—y nuestros hijos, Matías y Thomasito*

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Introduction

I. Overview of Book

Our book seeks to offer a thorough and critical analysis of selected rights of the American Convention on Human Rights. The Inter-American Court of Human Rights and Inter-American Commission on Human Rights are charged with interpreting the American Convention. Consequently, over the course of this volume, we will closely examine their assessment of these rights, with emphasis on the Court's binding decisions. We have chosen those American Convention rights that have been most developed by the Court and Commission, including the rights to equality, life, humane treatment, personal liberty, property, due process, and judicial protection, as well as freedom of expression and reparations. In this way, we do not suggest that other human rights are somehow "less essential"; to the contrary, we strongly support the current view in international human rights law that civil, political, social, economic, and cultural rights are all fundamental and indivisible.¹

¹ See, e.g., Vienna Declaration and Programme of Action, Adopted by the World Conference on Human Rights in Vienna on 25 June 1993, para. 5 ("All human rights are universal, indivisible and interdependent and interrelated"); Suárez Peralta v. Ecuador, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 261, para. 131 (May 21, 2013) (recalling "the interdependence and indivisibility of civil and political rights, and economic, social and cultural rights, because they must be understood integrally as human rights without any specific ranking between them"); Airey v. Ireland, Eur. Ct. H.R., App. No. 6289/73, para. 26 (Oct. 9, 1979).

We examine the jurisprudence of the Court and Commission with a victim-centered lens. The Court has often championed a “*pro homine*” interpretation of the Convention; that is, the “most favorable” interpretation for the protection of human rights must always prevail.² Through bold rulings, both the Court and the Commission have strengthened individual and collective rights. Their interpretations have favored vulnerable petitioners over powerful States in numerous cases. The jurisprudence has also served countless other victims, and potential victims, across the Americas. However, other decisions have weakened Convention protections and distorted legal concepts. In fact, we have found a troubling divergence from the *pro homine* principle in recent case law. Principally, the Court’s assessment of potential rights violations and reparations has become less transparent and rigorous, and, at the same time, more deferential to States. Throughout the book, we discuss these critical areas that neglect a victim-centered perspective or meticulous conceptual development, and we propose alternative approaches.

This Introduction briefly presents the Inter-American Human Rights System’s impact, primary legal instruments, and its two key institutions, the Court and Commission. Next, we synthesize crucial developments in the System’s jurisprudence and briefly refer to several of our critiques and alternative conceptual proposals—all of which are elaborated in the following chapters. Finally, we outline the structure and methodology of the book’s remaining chapters.

II. The Inter-American Human Rights System’s Impact, Major Institutions, and Legal Instruments

A. IMPACT AND IMPORTANCE OF THE INTER-AMERICAN SYSTEM ---

For decades the Inter-American Commission and Court have saved lives, secured redress for victims of rights violations, bolstered the rule of law, and provided critical opposition to despotic regimes in the Americas.³ Through the 1980s, the Commission in

² *E.g.*, Juridical Condition & Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, para. 21 (Sept. 17, 2003); Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights), Advisory Opinion OC-5/85, Inter-Am. Ct. H.R. (ser. A) No. 5, para. 52 (Nov. 13, 1985).

³ *See, e.g.*, Claudio Grossman, *The Inter-American System of Human Rights: Challenges for the Future*, 83 IND. L.J. 1267, 1268 (2008) (highlighting the System’s accomplishments and explaining the region’s three phases: dictatorships, transition to democracy, and the current phase that is particularly challenged by inequality and poverty); Larry Rohter, *After Decades, Nations Focus on Rights Abuses*, N.Y. TIMES, Sept. 1, 2005, http://www.nytimes.com/2005/09/01/world/americas/after-decades-nations-focus-on-rights-abuses.html?_r=0 (explaining the critical role of the Inter-American System in fostering accountability for human rights abuses). José Miguel Vivanco, the long-standing Americas Director of Human Rights Watch, has stated: “Everything we have achieved on human-rights issues in the region in the last 30 years is in some way a result of the work of the [Inter-American System].” *Chipping at the Foundations: The Regional Justice System Comes under Attack from the Countries Whose Citizens Need It Most*, THE ECONOMIST, June 9, 2012, <http://www.economist.com/node/21556599/print>.

particular shined a spotlight on the widespread abuses of Latin American dictatorships. Subsequently, during the region's transition to democracy, the Commission and the Court confronted the dark legacy of these regimes. By striking down amnesty laws and curtailing the jurisdiction of military courts, both institutions fostered accountability for serious rights violations. Currently, the Inter-American Human Rights System has sharpened its focus on the marginalized of the Americas: indigenous communities, victims of gender violence, and many others who suffer discrimination. Without a doubt, the System's accomplishments have been significant on individual, communal, and societal levels.

Over the years, the Court and Commission have unsurprisingly encountered fierce State resistance to their decisions and legal positions. In 1998, Trinidad and Tobago denounced the American Convention owing to disputes over the death penalty.⁴ Under President Hugo Chávez, Venezuela followed suit in 2012, arguing that the Court and Commission had treated it unfairly in varied decisions.⁵

The year before, a group of States started a movement to “reform” the Inter-American Commission, an initiative that many perceived to be an attack on the institution's independence and powers.⁶ Following the Commission's calls for Brazil to halt construction on a large power plant endangering indigenous groups,⁷ that State withdrew its ambassador

⁴ See Organization of American States, *Denunciation: Trinidad and Tobago*, available at [http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm#Trinidad and Tobago](http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm#Trinidad%20and%20Tobago) (last visited Nov. 21, 2016). See also Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash against Human Rights Regimes*, 102 COLUM. L. REV. 1832 (2002). In addition, Peru under Alberto Fujimori tried to withdraw from the Court's jurisdiction without denouncing the American Convention. See JO M. PASQUALUCCI, *THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS* 145 (2d ed. 2013). The Tribunal rejected this attempt, and continued to consider Peruvian cases before it. In 2001, after a change in government, Peru announced that it considered itself fully subject to the Court's jurisdiction. See PASQUALUCCI, *supra*, at 145–46. In a similar vein, in 2014, the Dominican Republic's Constitutional Court issued a ruling to withdraw from the Inter-American Court. See, e.g., Amnesty International, *Dominican Republic: Withdrawal from Top Regional Human Rights Court Would Put Rights at Risk*, Nov. 6, 2014, <https://www.amnesty.org/en/latest/news/2014/11/dominican-republic-withdrawal-top-regional-human-rights-court-would-put-rights-risk>.

⁵ See Organization of American States, *Letter to Secretary General José Miguel Insulza from Venezuelan Minister Nicolás Maduro Moros*, Sept. 6, 2012, available at http://www.oas.org/DIL/Nota_Rep%C3%BAblica_Bolivariana_Venezuela_to_SG.English.pdf; Inter-American Commission on Human Rights, *IACHR Deeply Concerned over Result of Venezuela's Denunciation of the American Convention*, Press Release No. 64/13 (2013), http://www.oas.org/en/iachr/media_center/PReleases/2013/064.asp.

⁶ See, e.g., Claudia Martin & Diego Rodríguez Pinzón, *Strengthening or Straining the Inter-American System on Human Rights*, in *THE INTER-AMERICAN COURT OF HUMAN RIGHTS: THEORY AND PRACTICE, PRESENT AND FUTURE* (Yves Haeck, Oswaldo Ruiz-Chiriboga & Clara Burbano Herrera eds., 2015); Katya Salazar & Daniel Cerqueira, *Las atribuciones de la Comisión Interamericana de Derechos Humanos*, in *DESAFÍOS DEL SISTEMA INTERAMERICANO DE DERECHOS HUMANOS* (Dejusticia ed., 2015); *Chipping at the Foundations*, *supra* note 3.

⁷ Inter-Am. Comm'n H.R., *Precautionary Measures: Indigenous Communities of the Xingu River Basin, Pará, Brazil*, PM 382/10 (Apr. 1, 2011), available at <http://www.oas.org/en/iachr/indigenous/protection/precautionary.asp>.

to the Organization of American States (OAS), the Commission's parent institution, and stopped paying dues to the OAS.⁸ Not long afterward, the OAS Permanent Council issued numerous recommendations, several of which aimed to restrict the Commission's mandate and activities.⁹ Although the Commission and Court have weathered this tumultuous period, resulting changes to the Commission's procedures have, in some respects, weakened its authority.¹⁰ Moreover, both institutions continue to suffer from a dearth of financial support; as of this writing, the Commission's budget problems have approached crisis levels.¹¹

The Inter-American System's impact has varied throughout the hemisphere, owing to diverse national circumstances. States generally undertake to follow the Court's judgments against them, although particularly onerous or politically-sensitive orders trigger resistance and delay.¹² The Court's interpretations of the Convention and human rights norms have proven influential well beyond the confines of a specific case.¹³ Other international human rights authorities increasingly follow its case law,¹⁴ and some Latin

⁸ See, e.g., *Chipping at the Foundations*, *supra* note 3. For more on the OAS, see the next section of this Introduction.

⁹ Report of the Special Working Group to Reflect on the Workings of the Inter-American Commission on Human Rights with a View to Strengthening the Inter-American Human Rights System for Consideration by the Permanent Council (Dec. 13, 2011) GT/SIDH 13/11 rev. 2. For critiques of these recommendations, see, e.g., Rodrigo Uprimny Yepes & Nelson Camilo Sanchez, *Human Rights: New Threats in the Hemisphere*, AMERICAS Q., Fall 2012, <http://www.americasquarterly.org/human-rights-new-threats-in-the-hemisphere>.

¹⁰ A major concern involves modifications to the Commission's procedure on precautionary measures. See Inter-American Commission on Human Rights, *Reform of the Rules of Procedure, Policies and Practices*, Resolution 1/2013 (2013), available at <https://www.oas.org/en/iachr/decisions/pdf/Resolution1-2013eng.pdf>. The process to obtain these supposedly expedited measures is now more cumbersome, and has begun to resemble litigation on the merits.

¹¹ See Inter-American Commission on Human Rights, *Severe Financial Crisis of the IACHR Leads to Suspension of Hearings and Imminent Layoff of Nearly Half Its Staff*, Press Release No. 69/16 (2016), http://www.oas.org/en/iachr/media_center/PReleases/2016/069.asp.

¹² See, e.g., this volume's Chapter 9, on reparations; Thomas M. Antkowiak, *An Emerging Mandate for International Courts: Victim-Centered Remedies and Restorative Justice*, 47 STAN. J. INT'L L. 279, 292–316 (2011) (assessing State compliance with various Court remedial orders); Douglas Cassel, *The Expanding Scope and Impact of Reparations Awarded by the Inter-American Court of Human Rights*, in OUT OF THE ASHES: REPARATION FOR VICTIMS OF GROSS AND SYSTEMATIC HUMAN RIGHTS VIOLATIONS 214 (Koen De Feyter ed., 2006).

¹³ A lively debate exists about the extent to which national authorities should directly apply the American Convention and the Court's case law, a concept known as "conventionality control." See, e.g., Sergio García Ramírez, *The Relationship between Inter-American Jurisdiction and States (National Systems): Some Pertinent Questions*, 5 NOTRE DAME J. INT'L COMP. L. 115, 137–48 (2015); Ariel E. Dulitzky, *An Inter-American Constitutional Court? The Invention of the Conventionality Control by the Inter-American Court of Human Rights*, 50 TEX. INT'L L.J. 46 (2015); Eduardo Ferrer Mac-Gregor, *Reflexiones sobre el control difuso de convencionalidad a la luz del caso Cabrera García y Montiel Flores vs. México*, XLIV BMDC 917 (2011).

¹⁴ See, e.g., *Opuz v. Turkey*, Eur. Ct. H.R., App. No. 33401/02, para. 83 (June 9, 2009); Centre for Minority Rights Development (Kenya) and Minority Rights Group International (on behalf of Endorois Welfare Council) v. Kenya, Comm. No. 276/2003, Afr. Comm'n on Human & Peoples' Rights (Feb. 4, 2010), paras. 233–38, 263–68, 294–98; Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, A/HRC/15/37 (2010), para. 75. See also James L. Cavallaro & Stephanie Erin Brewer, *Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case*

American States enable the Court's jurisprudence to deeply permeate national law, institutions, and politics.¹⁵

Readers from nations that have not yet accepted the Court's jurisdiction, such as the United States, may question the relevance of its case law.¹⁶ Yet the Tribunal, through its interpretation of the Convention, has shaped crucial principles in international human rights law—commitments accepted by States Parties to widely-ratified treaties, such as the International Covenant on Civil and Political Rights. In fact, many such universal principles are applicable to all States through international customary law. Further, the Court's jurisprudence forcefully impacts the Inter-American Commission. The Commission, for its part, exercises jurisdiction over the OAS Member States—all 35 independent States of the Americas—by virtue of the OAS Charter.

B. THE ORGANIZATION OF AMERICAN STATES, THE AMERICAN CONVENTION, AND OTHER CRITICAL HUMAN RIGHTS INSTRUMENTS

In 1948, the Ninth International Conference of American States adopted the OAS Charter in Bogotá, Colombia. As noted, all 35 independent States of the region have ratified the Charter and joined the OAS, the world's oldest regional governmental organization, which serves as a forum for political, legal, and social issues. Although the OAS Charter calls for the “consolidation . . . of a system of individual liberty and social justice based on respect for the essential rights of man,” it does not specify these “fundamental rights of the individual.”¹⁷

During the 1948 Conference, the American Declaration on the Rights and Duties of Man was also approved, eight months before the United Nations' celebrated Universal Declaration of Human Rights.¹⁸ The pioneering American Declaration proclaimed numerous civil, political, economic, social, and cultural rights. The Declaration stands

of the Inter-American Court, 102 AM. J. INT'L L. 768, 827 (2008) (the Court's “model of supranational litigation . . . will be increasingly relevant in other parts of the world”).

¹⁵ See, e.g., Alexandra Huneeus, *Constitutional Lawyers and the Inter-American Court's Varied Authority*, 79 LAW & CONTEMP. PROBS. 179, 192 (2016) (with respect to Colombia, “the [Court's] judgments are frequently cited in domestic litigation over constitutional rights, and they continue to guide and constrain state actors while shaping public debates over certain policy matters”); Sergio García Ramírez, *Prólogo*, in LA CORTE INTERAMERICANA DE DERECHOS HUMANOS: UN CUARTO DE SIGLO vii (2005), available at <http://www.corteidh.or.cr/docs/libros/cuarto%20de%20siglo.pdf> (highlighting the increasing incorporation of the Court's jurisprudence into Latin American national law).

¹⁶ The United States signed the American Convention in 1977, but it still has not ratified the treaty. American Convention on Human Rights, “Signatories and Ratifications,” https://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm (last visited Nov. 21, 2016). On the other hand, the United States has participated in the Inter-American System in other ways, such as by providing financial support and presenting candidates to the Inter-American Commission.

¹⁷ Charter of the Organization of American States, 119 UNTS 3, Preamble (1948).

¹⁸ American Declaration of the Rights and Duties of Man, O.A.S. Official Rec., OEA/Ser.L./V./II.23, doc. 21 rev. 6 (1948).

as an important human rights instrument and source of legal obligations.¹⁹ The Inter-American Court has affirmed that the American Declaration “contains and defines the fundamental human rights referred to in the [OAS] Charter.”²⁰

A binding treaty focusing on human rights, which also would establish the Inter-American Court to enforce its provisions, took longer to develop. In 1967, the Inter-American Commission on Human Rights revised an earlier draft prepared by the Inter-American Council of Jurists.²¹ The Inter-American Commission’s draft American Convention on Human Rights served as the basis for the Inter-American Specialized Conference on Human Rights, held in San José, Costa Rica, in November 1969. Delegates from two-dozen nations attended the San José Conference, where they negotiated and adopted the American Convention’s final text. Of the 35 OAS Member States, 22 currently adhere to the Convention, which entered into force in 1978.²²

In its first Part, the American Convention establishes State obligations to both respect and ensure the treaty’s rights without discrimination. The Convention then enumerates those rights, including the rights to life, juridical personality, humane treatment, personal liberty, fair trial, compensation, privacy, reply, assembly, a name, nationality, property, government participation, equal protection, and judicial protection, as well as the freedoms of conscience, religion, thought, expression, association, movement, and residence. The Convention also establishes rights for children and the family, and sets out prohibitions against discrimination, slavery, and ex post facto laws.²³ Although the Convention focuses on civil and political rights, its Article 26 calls for States Parties “to achiev[e] progressively . . . the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.”²⁴

¹⁹ See Douglass Cassel, *Inter-American Human Rights Law, Soft and Hard*, in COMMITMENT AND COMPLIANCE, THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 394 (Dinah Shelton ed., 2000); Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89, Inter-Am. Ct. H.R. (ser. A) No. 10, paras. 42–43 (July 14, 1989).

²⁰ *Id.* para. 43.

²¹ See Inter-American Commission on Human Rights, “Introduction,” available at <http://www.oas.org/en/iachr/mandate/Basics/intro.asp> (describing the history of the American Convention) (last visited Nov. 21, 2016).

²² The States Parties to the American Convention are as follows: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, and Uruguay. American Convention on Human Rights, “Signatories and Ratifications,” https://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm (last visited Nov. 21, 2016).

²³ The American Convention’s Article 9 actually encompasses much more than its title, Freedom from Ex Post Facto Laws, indicates: “No one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed. A heavier penalty shall not be imposed than the one that was applicable at the time the criminal offense was committed. If subsequent to the commission of the offense the law provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom.”

²⁴ American Convention, art. 26.

In the Convention's Part II, "Means of Protection," the treaty creates the Inter-American Court of Human Rights and details the functions of the Inter-American Commission on Human Rights. These crucial supervisory institutions are further explained below. The Convention's final section, Part III, contains provisions on signature, ratification, reservations, amendments, protocols, and denunciation.

The American Convention's text drew from the American Declaration and the International Covenant on Civil and Political Rights, which had been adopted in 1966.²⁵ The European Convention for the Protection of Human Rights and Fundamental Freedoms was also influential, particularly with respect to the supervisory mechanisms established.²⁶ Nevertheless, the delegates at the San José Conference also adapted their Convention to the reality and priorities of the Americas.²⁷ These efforts are reflected in every Convention article examined in this book, and in numerous other Convention provisions. In every chapter, we indicate the distinctive terms found in each article; some of these formulations were subsequently emulated by other global rights instruments.

Two decades later, a pair of protocols to the American Convention were adopted: the first recognizes economic, social, and cultural rights; the second seeks to eliminate the death penalty. The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, also known as the "Protocol of San Salvador," sets out rights to work, trade unions, social security, health, a "healthy environment," food, education, and "the benefits of culture," among others; the Protocol also features terms to protect families, children, the elderly, and the disabled.²⁸ As of this writing, 16 States of the Americas have ratified or acceded to the Protocol of San Salvador; it entered into force in November 1999.²⁹ Thirteen States have ratified or acceded to the Protocol to the American Convention on Human Rights to Abolish the Death Penalty,

²⁵ See, e.g., Cecilia Medina, *Los 40 años de la Convención Americana sobre Derechos Humanos a la luz de cierta jurisprudencia de la Corte Interamericana*, ANUARIO DE DERECHOS HUMANOS 2009, at 16 (2009) [*Los 40 años*]; DINAH SHELTON, REGIONAL PROTECTION OF HUMAN RIGHTS 102 (2008).

²⁶ See SHELTON, *supra* note 25, at 102; HÉCTOR GROS ESPIELL, LA CONVENCION AMERICANA Y LA CONVENCION EUROPEA DE DERECHOS HUMANOS: ANÁLISIS COMPARATIVO (1991); Thomas Buergenthal, *The American and European Conventions on Human Rights: Similarities and Differences*, 30 AM. U.L. REV. 155, 156 (1981).

²⁷ See, e.g., Minutes of the 2nd Session of Committee I, Doc. 36, Nov. 11, 1969, p. 160 (Brazilian delegate emphasizing that the San José Conference must not simply follow the ICCPR text); Minutes of the 11th Session of Committee I, Doc 52, Rev. 1, Nov. 17, 1969, pp. 238–39 (several State representatives considering the agrarian reform movements in Latin America when formulating the right to property); Report of Committee I "Protection." Rapporteur Juan Isaac Lovato, Doc. 60 (Revised) Nov. 19, 1969, p. 296 (noting that Conference debates on the death penalty responded to trends found in the region).

²⁸ Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador"), OAS Treaty Series No. 69; 28 ILM 156 (1989), arts. 6–18, respectively.

²⁹ *General Information on the Treaty*, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, available at <http://www.oas.org/juridico/english/sigs/a-52.html> (last visited Nov. 21, 2016).

which enters into force for a State as soon as it deposits its instrument of ratification or accession.³⁰

Further, the OAS Member States have been engaged in a continuous process to create specialized treaties, building an extensive Inter-American framework on human rights: the Inter-American Convention to Prevent and Punish Torture (IACPPT);³¹ the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, also known as the “Convention of Belém do Pará”;³² the Inter-American Convention on Forced Disappearance of Persons (IACFDP);³³ the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities;³⁴ the Inter-American Convention Against Racism, Racial Discrimination, and Related Forms of Intolerance;³⁵ and the Inter-American Convention Against All Forms of Discrimination and Intolerance,³⁶ among others.³⁷ Of these treaties, the Convention of Belém do Pará currently boasts the highest number of ratifications, at 32 States.

C. THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

In 1959, 10 years before the American Convention’s adoption, the Fifth Meeting of Consultation of Ministers of Foreign Affairs established the Inter-American Commission on Human Rights.³⁸ The Commission, composed of seven members and based in Washington, DC, eventually became recognized by both the OAS Charter (through subsequent amendments) and the American Convention. In its early phase, the Commission

³⁰ *Signatories and Ratifications*, Protocol to the American Convention on Human Rights to Abolish the Death Penalty, available at <http://www.oas.org/juridico/english/sigs/a-53.html> (last visited Nov. 21, 2016).

³¹ Inter-American Convention to Prevent and Punish Torture, O.A.S. Treaty Series No. 67 (1985).

³² Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, 33 ILM 1534 (1994).

³³ Inter-American Convention on Forced Disappearance of Persons, OAS Treaty Series No. 68, 33 ILM 1429 (1994).

³⁴ Inter-American Convention on the Elimination of All Forms of Discrimination against Person with Disabilities, AG/RES. 1608 (XXIX-1999).

³⁵ Inter-American Convention Against Racism, Racial Discrimination, and Related Forms of Intolerance, adopted in 2013.

³⁶ Inter-American Convention Against All Forms of Discrimination and Intolerance, adopted in 2013.

³⁷ Also of importance in the Inter-American System are the following instruments: Inter-American Democratic Charter, adopted in 2001; Declaration of Principles on Freedom of Expression, adopted in 2000; Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, adopted in 2008; and the newly-adopted American Declaration on the Rights of Indigenous Peoples, approved in 2016. See Inter-American Commission on Human Rights, *Basic Documents in the Inter-American System*, available at http://www.oas.org/en/iachr/mandate/basic_documents.asp (last visited Nov. 21, 2016).

³⁸ For more detailed information on the Inter-American Commission, see SHELTON, *supra* note 25, at 497–526; Inter-American Commission on Human Rights, *What Is the IACHR?*, available at <http://www.oas.org/en/iachr/mandate/what.asp> (last visited Nov. 21, 2016).

mainly promoted human rights in the region, investigated problematic situations within OAS Member States, and issued country or thematic reports.

After the entry into force of the American Convention and the establishment of the Inter-American Court, the Commission became much more involved in responding to individual petitions.³⁹ In the petition procedure, the Commission receives complaints that individuals, groups or nongovernmental organizations⁴⁰ have lodged against States (or inter-State petitions).⁴¹ If the matters do not reach settlement, the Commission evaluates admissibility, establishes facts, and determines human rights violations and remedies, if applicable.⁴² The Commission can also issue “precautionary measures” to address “serious and urgent situations presenting a risk of irreparable harm.”⁴³ Its decisions have the force of recommendations; although not legally binding, the conclusions can be influential for both defendant States and the region as a whole.

In its reports and individual petition decisions, the Commission initially ascertains whether the State has ratified the American Convention. If not, for purposes of the Commission’s analysis, the State’s general human rights obligations derive from the American Declaration, which applies to all OAS Member States. To illustrate, the Commission has found the United States, which has not yet ratified the Convention, responsible for numerous human rights violations under the American Declaration.⁴⁴ On the other hand, the Commission employs the American Convention to assess the human rights obligations of States Parties to that treaty.

³⁹ The Commission currently has thousands of petitions before it. In 2015 alone, it received 2,164 petitions; there has been a pronounced upward trend in recent years. See Inter-American Commission on Human Rights, *Statistics*, available at <http://www.oas.org/en/iachr/multimedia/statistics/statistics.html> (last visited Nov. 21, 2016).

⁴⁰ Although the rights of legal persons or entities are not protected by the American Convention, the Court has stated, “this does not mean that . . . an individual may not resort to the Inter-American system . . . to enforce his fundamental rights, even when they are encompassed in a legal figure or fiction.” *Perozo et al. v. Venezuela*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 195, para. 399 (Jan. 28, 2009).

⁴¹ Inter-State disputes in the Inter-American System are very rare. One example is the petition lodged by Nicaragua against Costa Rica in 2006. Report N° 11/07, Inter-State Case 01/06 *Nicaragua v. Costa Rica*, Mar. 8, 2007.

⁴² The settlement procedure is an important tool in the Inter-American System to resolve a case more expeditiously; such settlements have included generous reparations packages for victims of human rights violations. See Inter-American Commission on Human Rights, *Impact of the Friendly Settlement Procedure*, OEA/Ser.L/V/II. Doc. 45/13 (2013), available at www.oas.org/en/iachr/friendly_settlements/docs/Report-Friendly-Settlement.pdf; Laparra Martínez and family: Mexico, Report on Friendly Settlement, OEA/SER. L/ V/II. 157 (2016).

⁴³ Inter-American Commission on Human Rights, Rules of Procedure, Article 25 (2013), available at <http://www.oas.org/en/iachr/mandate/Basics/rulesiachr.asp>.

⁴⁴ E.g., *Abdur’ Rahman v. United States*, Case 12.422, Inter-Am. Comm’n H.R., Report No. 13/14, OEA/Ser.L/V/II.150, doc. 17, para. 94 (2014) (“United States is responsible for the violation of the right to a fair trial (Article XVIII) and right to due process of law (Article XXVI) guaranteed in the American Declaration”); *Lackey et al. v. United States*, Cases 11.575, 12.333, 12.341, Inter-Am. Comm’n H.R., Report No. 52/13, OEA/Ser.L/V/II, doc. 50 corr. 1, para. 250 (2013) (finding multiple violations to the American Declaration).

At this point, it is important to recall that the Commission and the Inter-American Court—like all international human rights mechanisms—play a subsidiary role in the protection of human rights. This means that these institutions cannot find a State responsible for breaching its international legal obligations until it first has had a fair opportunity to address and remedy the situation. As a result, both the Commission and Court, with certain exceptions, require the exhaustion of domestic remedies before their jurisdiction can be activated. Further, as human rights mechanisms, the Commission and Court only establish State responsibility for rights abuses; they never determine the criminal responsibility of individuals. Finally, the Commission and Court are not intended to function as appellate tribunals to review the judgments of national courts. When due process violations are alleged, nevertheless, the Commission and Court will frequently examine domestic proceedings “to establish their compatibility” with the American Convention or Declaration.⁴⁵

Both the Commission and States can submit cases to the Inter-American Court under certain conditions.⁴⁶ First, the defendant State must have accepted the Court’s jurisdiction; this is an additional step necessary upon ratification of the American Convention.⁴⁷ Second, the Commission must conclude that the defendant State has not sufficiently complied with the recommendations contained in its decision. If these two conditions apply, the Commission will refer the case to the Court—unless an absolute majority of the seven Commissioners decides against the referral. In making their decision to submit the case, the Commissioners consider the following factors: “a) the position of the petitioner; b) the nature and seriousness of the violation; c) the need to develop or clarify the case-law of the system; and d) the future effect of the decision within the legal systems of the Member States.”⁴⁸

The Commission sends to the Court, on average, about 14 cases per year,⁴⁹ and is obligated to appear in all cases before the Tribunal.⁵⁰ Yet the Commission is not the respondent or petitioner to any dispute. It transforms from a quasi-judicial body that assesses matters of fact and law to a “procedural” party before the Court.⁵¹ The Commission’s

⁴⁵ *E.g.*, Mohamed v. Argentina, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 255, para. 79 (Nov. 23, 2012); Herrera Ulloa v. Costa Rica, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 107, para. 146 (July 2, 2004).

⁴⁶ State referrals, however, are almost non-existent. *But see* In the Matter of Viviana Gallardo et al., Inter-Am. Ct. H.R. (ser. A) No. 101 (July 15, 1981). In this case, Costa Rica actually requested the Court to establish whether it was responsible for human rights violations, as a result of lethal violence in the State’s prison.

⁴⁷ States may accept the Court’s jurisdiction “unconditionally,” or on an ad hoc basis: for a specified period, for specific cases, or by special agreement. American Convention, art. 62(2).

⁴⁸ Inter-American Commission on Human Rights, Rules of Procedure, Article 45 (2013), *available at* <http://www.oas.org/en/iachr/mandate/Basics/rulesiachr.asp>.

⁴⁹ *See* Inter-American Commission on Human Rights, *Statistics*, *available at* <http://www.oas.org/en/iachr/multimedia/statistics/statistics.html> (describing last 10 years) (last visited Nov. 21, 2016).

⁵⁰ American Convention art. 57.

⁵¹ Inter-American Court of Human Rights, Rules of Procedure, Article 2(23) (former Rules, amended in 2000), *available at* http://www.corteidh.or.cr/sitios/reglamento/2000_eng.pdf.

role, “an auxiliary of the judiciary,” has been described as akin to a *ministerio público* in Latin American criminal justice systems.⁵² Yet, over the years, some were unsettled by the Commission’s dual role: first adjudicator, and then victims’ advocate—or unwanted representative—before the Court. Now, after the 2009 amendments to the Court’s Rules of Procedure, the Commission may no longer present fact witnesses or victims’ statements; these roles are reserved for the victims and their attorneys.⁵³ The Commission can only offer expert witnesses when “the Inter-American public order of human rights is affected in a significant manner.”⁵⁴ Beyond involvement in cases, the Commission may request that the Court issue advisory opinions or binding “provisional measures” to avoid irreparable harm in urgent situations.⁵⁵

D. THE INTER-AMERICAN COURT OF HUMAN RIGHTS

I. Introduction

In 1979, the OAS General Assembly elected the first seven judges of the Inter-American Court. However, the Tribunal, located in San José, Costa Rica, had only limited work until a substantial number of States accepted its jurisdiction and the Commission regularly referred cases.⁵⁶ Currently, 20 States of the Americas have accepted what is known as the Tribunal’s “contentious jurisdiction”: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, and Uruguay.⁵⁷ In

⁵² Separate Opinion of Judge Rodolfo E. Piza E., para. 4, In the Matter of Viviana Gallardo et al., Inter-Am. Ct. H.R. (ser. A) No. 101 (July 15, 1981). This analogy emphasizes that the Commission strives to uphold the public interest, much like a public prosecutor’s office purports to do.

⁵³ See Statement of Motives for the Reform of the Rules of Procedure (2009), available at http://www.corteidh.or.cr/sitios/reglamento/nov_2009_motivos_ing.pdf.

⁵⁴ Inter-American Court of Human Rights, Rules of Procedure, Article 35(1)(f) (current Rules, amended in 2009), available at http://www.corteidh.or.cr/sitios/reglamento/nov_2009_ing.pdf. In addition, the Commission previously assumed the representation of petitioners before the Court without attorneys. Now, the Court will appoint an “Inter-American defender,” an attorney for petitioners without legal representation, so that “economic considerations will no longer impede access” to the Court. Statement of Motives for the Reform of the Rules of Procedure (2009), available at http://www.corteidh.or.cr/sitios/reglamento/nov_2009_motivos_ing.pdf.

⁵⁵ American Convention, art. 63(2); Inter-American Court of Human Rights, Rules of Procedure, Article 27(2) (current Rules, amended in 2009) (“With respect to matters not yet submitted to it, the Court may act at the request of the Commission.”).

⁵⁶ In the Tribunal’s first decade, advisory opinions constituted a significant portion of its work; in fact, it had issued nine of them before it handed down its first merits decision in a contentious case. Owing to “institutional rivalry,” among other factors, the Inter-American Commission was initially reluctant to refer cases to the Court. Thomas Buerghenthal, *New Upload: Remembering the Early Years of the Inter-American Court of Human Rights*, 37 N.Y.U. J. INT’L L. & POL. 259, 269 (2005).

⁵⁷ American Convention on Human Rights, “Signatories and Ratifications,” https://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm (last visited Nov. 21, 2016).

addition to ruling on contentious cases and supervising State compliance with these judgments, the Tribunal issues advisory opinions and provisional measures in emergency situations.⁵⁸

According to the Court, the American Convention “distinguishes very clearly” between the Tribunal’s contentious proceedings, regulated by Convention Articles 61 to 63, and its advisory jurisdiction of Article 64.⁵⁹ The contentious case is “a dispute arising as a result of a claim initiated by an individual or State Party,” alleging violations to the Convention.⁶⁰ In contentious proceedings, the Court interprets “the applicable norms,” assesses the evidence submitted, and determines whether a State has violated the Convention.⁶¹ If so, it will require the State to remedy the violations pursuant to the Convention’s Article 63.⁶²

Interpreting the Convention, the Tribunal has affirmed that all of its “decisions”—from judgments on the merits to orders on State compliance and provisional measures—are legally binding.⁶³ It has insisted that resulting State obligations may not be altered or mitigated “by invoking provisions or difficulties of domestic law.”⁶⁴ As for the precedential value of its decisions, although the Tribunal lacks a formal rule on *stare decisis*, it generally follows its established case law.⁶⁵

With respect to advisory opinions, Article 64 establishes that OAS Member States or authorized institutions, including the Inter-American Commission, “may consult the Court” on the American Convention or on “other treaties concerning the protection of human rights in the American states.”⁶⁶ In addition, the Tribunal may issue “opinions regarding the compatibility” of national laws with human rights treaties.⁶⁷ In advisory proceedings, then, the Court primarily engages in the analysis and interpretation of legal

⁵⁸ American Convention, art. 63(2); Inter-American Court of Human Rights, Rules of Procedure, Article 27 (current Rules, amended in 2009).

⁵⁹ Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights), Advisory Opinion OC-3/83, Inter-Am. Ct. H.R. (ser. A) No. 3, para. 31 (Sept. 8, 1983).

⁶⁰ *Id.* para. 33.

⁶¹ *Id.* para. 32.

⁶² Article 63(1) of the American Convention establishes: “If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.”

⁶³ Baena Ricardo et al. v. Panama, Competence, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 104, para. 61 (Nov. 28, 2003) (stating “the obligation to comply with the provisions of the Court’s decisions corresponds to a basic principle of the law on the international responsibility of the State”). Note also that the Spanish version of the Convention’s Article 68(1) refers to a broader term, the Court’s “decision,” rather than its “judgment.” Article 68(1) in Spanish provides: “*Los Estados Partes en la Convención se comprometen a cumplir la decisión de la Corte en todo caso en que sean partes.*”

⁶⁴ *Id.* para. 61.

⁶⁵ See PASQUALUCCI, *supra* note 4, at 48.

⁶⁶ American Convention, art. 64.

⁶⁷ *Id.*

norms.⁶⁸ As a result, the Tribunal has concluded that advisory and contentious proceedings are “parallel systems” and “alternate judicial methods.”⁶⁹ A further distinction often made is that advisory opinions lack binding force. However, some scholars have argued that they are in fact obligatory for all States Parties to the Convention.⁷⁰ At the very least, the Court’s advisory opinions constitute authoritative and far-reaching legal pronouncements.⁷¹ When citing to its jurisprudence, the Court rarely distinguishes or prioritizes between contentious case judgments and advisory opinions.⁷²

2. The Court in Relation to the Commission

As the “ultimate interpreter of the American Convention,” the Inter-American Court is not bound by the Inter-American Commission’s decisions with respect to that treaty.⁷³ The Commission is not technically a court of first instance, and so the Inter-American Court should not be considered its court of appeals; rather, the Court’s authority “to examine and review all actions and decisions of the Commission derives from [the Court’s] character as *sole judicial organ*” of the American Convention.⁷⁴ In this way, the Court has rejected the Commission’s findings and analysis, and reviewed alleged procedural irregularities before the Commission.⁷⁵ It has even re-evaluated compliance with admissibility requirements, such as whether petitioners exhausted domestic remedies—issues often decided by the Commission several years before. This approach has been

⁶⁸ Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights), Advisory Opinion OC-3/83, Inter-Am. Ct. H.R. (ser. A) No. 3, para. 32 (Sept. 8, 1983).

⁶⁹ *Id.* para. 43.

⁷⁰ See HÉCTOR FAÚNDEZ LEDESMA, *THE INTER-AMERICAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS: INSTITUTIONAL AND PROCEDURAL ASPECTS* 925 (3d ed. 2007).

⁷¹ See, e.g., Thomas Buergenthal, *The Advisory Practice of the Inter-American Human Rights Court*, 79 AM. J. INT’L L. 1, 25–27 (1985); LAURENCE BURGOGUE & AMAYA ÚBEDA DE TORRES, *THE INTER-AMERICAN COURT OF HUMAN RIGHTS* 96 (2011).

⁷² See also Request for an Advisory Opinion Presented by the Inter-American Commission on Human Rights, Order of the Court, Inter-Am. Ct. H.R., para. 13 (June 24, 2005) (explaining the importance of advisory opinions for the Convention’s interpretation), available at http://www.corteidh.or.cr/docs/opiniones/res_cor_24_06_05.pdf.

⁷³ E.g., Article 55 of the American Convention on Human Rights, Advisory Opinion OC-20/09, Inter-Am. Ct. H.R. (ser. A) No. 20, para. 18 (Sept. 29, 2009); *Almonacid Arellano et al. v. Chile*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 154, para. 124 (Sept. 26, 2006).

⁷⁴ 19 Merchants v. Colombia, Preliminary Objection, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 93, para. 27 (June 12, 2002); *Velásquez Rodríguez v. Honduras*, Preliminary Objections, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 1, para. 29 (June 26, 1987).

⁷⁵ The Court has considered alleged procedural irregularities before the Inter-American Commission, an issue that formed the basis of a State’s preliminary objection before the Inter-American Court. *Velásquez Rodríguez v. Honduras*, Preliminary Objections, paras. 31–34. More recently, the Court expressly affirmed its authority to supervise due process of law in those Commission proceedings related to matters submitted to the Court. Control of Legality in the Practice of Authorities of the Inter-American Commission of Human Rights Advisory Opinion OC-19/05, Inter-Am. Ct. H.R. (ser. A) No. 19, para. 31 (Nov. 28, 2005).

criticized as an intrusion upon the Commission's domain.⁷⁶ Yet the Court will often concur with the Commission's decisions on admissibility, or rule that States tacitly waived their objections by failing to respond in a timely fashion.⁷⁷

3. The Court's *Ratione Materiae*, *Ratione Temporis*, *Ratione Personae*, and *Ratione Loci* Jurisdiction

Like the International Court of Justice, the European Court of Human Rights, and other tribunals, the Inter-American Court has asserted "the inherent authority to determine the scope of its own competence."⁷⁸ The Tribunal has invoked this *compétence de la compétence* principle to affirm its jurisdiction in the face of vigorous State challenges.⁷⁹ The only way a State may withdraw from the Court's jurisdiction is "to denounce the Convention as a whole," pursuant to the treaty's applicable clause in Article 78.⁸⁰

The Court's subject-matter (*ratione materiae*) competence centers on the American Convention, but is not limited to that treaty. Its jurisdiction is also established in legal instruments listed earlier, such as the Protocol of San Salvador, the Convention of Belém do Pará, the IACPPT, and the IACFDP. The Protocol of San Salvador grants jurisdiction to the Inter-American Commission and the Court over petitions alleging violations of the rights to unionize and education.⁸¹ The IACFDP also authorizes the Commission and Court explicitly;⁸² as a result, the Court has declared State violations of

⁷⁶ Concurring Opinion of Judge Cançado Trindade, *Gangaram Panday v. Suriname*, Preliminary Objections, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 12, para. 6 (Dec. 4, 1991) (stating that the Commission and the Court "have defined powers, the former being entrusted with competence to decide on the admissibility of applications . . . the latter with jurisdiction (in contentious cases) to determine whether there had been a violation of the Convention").

⁷⁷ *E.g.*, *Moiwana Cmty. v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 124, paras. 37–69 (June 15, 2005); *Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua*, Preliminary Objections, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 66, para. 56 (Feb. 1, 2000).

⁷⁸ *E.g.*, *Benjamin et al. v. Trinidad & Tobago*, Preliminary Objections, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 81, para. 69 (Sept. 1, 2001); *Ivcher Bronstein v. Peru*, Competence, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 54, paras. 32–34 (Sept. 24, 1999). For the authority of the International Court of Justice and the European Court of Human Rights in this matter, see Statute of the International Court of Justice, Article 36(6); European Convention, Article 32(2). Interestingly, the Inter-American Commission's draft for the American Convention expressly stated this principle, but it was abruptly removed during the San José conference without explanation. Draft Inter-American Convention on Protection of Human Rights, art. 51, Doc. 5 (English). September 22, 1969.

⁷⁹ In 2003, Panama challenged the Court's competence to supervise judgment compliance. It argued that such monitoring is a "post-judgment stage" that "is not included in the norms that regulate the jurisdiction and procedure of the Court." *Baena Ricardo et al. v. Panama*, Competence, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 104, para. 53 (Nov. 28, 2003).

⁸⁰ *Constitutional Court v. Peru*, Competence, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 55, para. 39 (Sept. 24, 1999) (rejecting Peru's attempt to withdraw immediately from the Court's contentious jurisdiction); *Ivcher Bronstein v. Peru*, Competence, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 54, para. 40 (Sept. 24, 1999) (same).

⁸¹ Protocol of San Salvador, art. 19(6).

⁸² Inter-American Convention on Forced Disappearance of Persons, art. XIII.

that instrument.⁸³ In several judgments, the Tribunal has found breaches to the IACPPT as well,⁸⁴ as that treaty grants competence to “the international fora” recognized by the respondent State Party.⁸⁵ Further, the Court aggressively assumed jurisdiction over the Convention of Belém do Pará in *González et al. v. Mexico*, over the State’s detailed objections.⁸⁶

Finally, the Court frequently refers to other international legal instruments in order to interpret the scope and content of the American Convention’s rights. It does this in recognition of the Convention’s progressive interpretation provision, Article 29,⁸⁷ and “the evolution of the fundamental rights of the human person in contemporary international law.”⁸⁸ For example, on numerous occasions the Court has sought guidance from the Convention on the Rights of the Child to define the contours of the American Convention’s Article 19 (Rights of the Child),⁸⁹ and has referred to the ILO Convention No. 169 to assess indigenous rights to property.⁹⁰ It has even employed non-binding international instruments—such as the U.N. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials and the U.N. Guiding Principles on Internal Displacement—to interpret the Convention.⁹¹ The Court’s distinctive tendency to

⁸³ *E.g.*, *Ticona Estrada et al. v. Bolivia*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 191, para. 70 (Nov. 27, 2008); *Molina Theissen v. Guatemala*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 106, para. 43 (May 4, 2004).

⁸⁴ *E.g.*, *Bayarri v. Argentina*, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 187, para. 94 (Oct. 30, 2008); “Street Children” (*Villagrán Morales et al.*) *v. Guatemala*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 63, para. 252 (Nov. 19, 1999).

⁸⁵ Inter-American Convention to Prevent and Punish Torture, art. XIII.

⁸⁶ *González et al. (“Cotton Field”) v. Mexico*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205, paras. 35–77 (Nov. 16, 2009).

⁸⁷ The Convention’s Article 29 provides:

No provision of this Convention shall be interpreted as: a. permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein; b. restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party; c. precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy . . . ; or d. excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.

⁸⁸ *E.g.*, *Yakye Axa Indigenous Cmty. v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125, para. 127 (June 17, 2005); *Juridical Condition & Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, para. 120 (Sept. 17, 2003).

⁸⁹ *E.g.*, *Chitay Nech et al. v. Guatemala*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 212, para. 165 (May 25, 2010); “Street Children” (*Villagrán Morales et al.*) *v. Guatemala*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 63, para. 194 (Nov. 19, 1999).

⁹⁰ *E.g.*, *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, para. 92 (Nov. 28, 2007); *Yakye Axa Indigenous Cmty. v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125, para. 127.

⁹¹ *E.g.*, *Landaeta Mejías Brothers et al. v. Venezuela*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 281, para. 124 (citing the U.N. Basic Principles on the Use of

incorporate international legal instruments has been considered controversial, particularly when the instruments have not been ratified by the defendant State or lack regional consent.⁹² In addition, the Court's long-standing application of European Court standards has actually narrowed the American Convention's protections in areas such as freedom of speech and property rights.⁹³

The Tribunal has explained its *ratione temporis* (temporal) jurisdiction, citing to the non-retroactivity principle of the Vienna Convention on the Law of Treaties.⁹⁴ The Court may only find violations "with regard to actions or omissions that have taken place following the date of recognition of the Tribunal's jurisdiction and with respect to any situations which have not ceased to exist by that date."⁹⁵ This allows for jurisdiction over violations, such as forced disappearances or displacement, which were committed prior to and continue after the State's acceptance. However, the Court has held that torture is not a continuing violation, as "each act of torture is consummated or terminated within itself, the perpetration thereof not extending over time."⁹⁶

Ratione personae jurisdiction, for the Inter-American Court, includes two issues: whether a State can be properly brought before the Court as a respondent, and whether a party has standing to petition the Tribunal.⁹⁷ On the first count, as noted, a State must not only ratify the American Convention, but it must also expressly recognize the Tribunal's binding jurisdiction. With respect to standing, as mentioned, "only the States Parties and the Commission shall have the right to submit a case to the Court."⁹⁸

Individuals, groups, and nongovernmental organizations cannot initiate a case before the Inter-American Tribunal. In contrast, victims may petition the European and African human rights tribunals directly.⁹⁹ Not surprisingly, commentators have criticized petitioners' lack of agency in this key respect.¹⁰⁰ Still, the petitioner's role before

Force and Firearms); *Moiwana Cmty. v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 124, para. 111 (June 15, 2005) (citing the U.N. Guiding Principles on Internal Displacement).

⁹² See Gerald L. Neuman, *Import, Export, and Regional Consent in the Inter-American Court of Human Rights*, 19 EUR. J. INT'L L. 101 (2008) ("the Court has come to undervalue the consent of the relevant community of states as a factor in the interpretation of a human rights treaty").

⁹³ See this volume's Chapter 7, on the freedom of expression, and Chapter 8, on the right to property.

⁹⁴ Vienna Convention on the Law of Treaties art. 28, 1155 UNTS 331, 8 ILM 679 (1969).

⁹⁵ E.g., *Moiwana Cmty. v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 124, para. 70 (June 15, 2005); *Serrano Cruz Sisters v. El Salvador*, Preliminary Objections, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 118, para. 65 (Nov. 23, 2004).

⁹⁶ *Campo Dodd v. Mexico*, Preliminary Objections, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 113, para. 78 (Sept. 3, 2004). This contested holding barred the Court's *ratione temporis* jurisdiction over the violations alleged in the case. *Id.* para. 85.

⁹⁷ PASQUALUCCI, *supra* note 4, at 130.

⁹⁸ American Convention, art. 61(1).

⁹⁹ See Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222, art. 34; Statute of the African Court of Justice and Human Rights, art. 30; Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, art. 5.

¹⁰⁰ Antonio Cançado Trindade has called this a significant flaw of the System, "as it is not reasonable to conceive rights without the procedural capacity to vindicate them directly." Separate Opinion of Judge Cançado

the Inter-American Court has expanded significantly over the last two decades. First, the petitioner was allowed to independently submit evidence and claims at the reparations stage.¹⁰¹ Currently, with the procedural reforms of 2000, they can also present their own legal arguments and evidence once the Commission sends the case to the Court.¹⁰²

Finally, *ratione loci* competence requires that the alleged violation take place within the jurisdiction of the respondent State. In international law, this jurisdiction does not merely contemplate formal territorial boundaries; instead, the relevant question is whether the State exercises “authority and control” over the area.¹⁰³ In this way, the Inter-American Commission decided that the Guantánamo Bay detainees, although not held within the borders of the United States, nevertheless were under that State’s *ratione loci* jurisdiction.¹⁰⁴

4. Note on the Court’s Assessment of Evidence and Burden of Proof

Generally, in the Inter-American System the party alleging rights violations must carry the burden of proof. However, there are situations when this burden is shifted, such as when the defendant State has superior access to evidence and information.¹⁰⁵ The Inter-American Court has often applied this doctrine when evaluating alleged mistreatment in State custody or forced disappearances.¹⁰⁶ Moreover, when States fail to refute or respond to the petitioner’s allegations, the Court may presume their validity, provided that the submitted evidence is consistent with those allegations.¹⁰⁷ The Court has employed a variety of other presumptions in its judgments.¹⁰⁸

Trindade, para. 14, *Castillo Páez v. Peru*, Preliminary Objections, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 24 (Jan. 30, 1996).

¹⁰¹ See Inter-American Court of Human Rights, Rules of Procedure, Article 23 (former Rules, amended in 1996), available at http://www.corteidh.or.cr/sitios/reglamento/1996_eng.pdf.

¹⁰² This change was instituted by Article 23 of the Court’s Rules of Procedure amended in 2000. Inter-American Court of Human Rights, Rules of Procedure, Article 23 (former Rules, amended in 2000), available at http://www.corteidh.or.cr/sitios/reglamento/2000_eng.pdf.

¹⁰³ See, e.g., WILLIAM A. SCHABAS, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS: A COMMENTARY* 95 (2015); PASQUALUCCI, *supra* note 4, at 147.

¹⁰⁴ On this basis, the Inter-American Commission ordered precautionary measures for potential violations to the American Declaration and the Third Geneva Convention. Inter-American Commission on Human Rights, Precautionary Measures with respect to the United States and the Guantanamo Bay Detainees (Mar. 12, 2002), para. 80, available at http://www.cidh.oas.org/medidas/2002_eng.htm.

¹⁰⁵ E.g., *J. v. Peru*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 275, para. 306 (Nov. 27, 2013); *Velásquez Rodríguez v. Honduras*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, para. 135 (July 29, 1988).

¹⁰⁶ *Id.*

¹⁰⁷ E.g., *Vera Vera et al. v. Ecuador*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 226, para. 24 (May 19, 2011); “Street Children” (*Villagrán Morales et al.*) v. Guatemala, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 77, para. 68 (May 26, 2001).

¹⁰⁸ See PASQUALUCCI, *supra* note 4, at 169–71; Álvaro Paúl, *In Search of the Standards of Proof Applied by the Inter-American Court of Human Rights*, *REVISTA IIDH* (2012). We consider over the course of this volume various presumptions used by the Court.

There is no precise standard of proof for the Court to find States responsible for human rights violations. According to its settled case law, the Tribunal need not establish State liability “beyond all reasonable doubt,” nor should it determine individual criminal responsibility.¹⁰⁹ It has indicated that, for international tribunals, “the criteria for the assessment of evidence are less rigid” than in the domestic legal sphere; in this way, the Court “freely” accepts and evaluates many forms of evidence and testimony.¹¹⁰ In sum, the Court’s flexible, if somewhat obscure, approach calls for evidence to be “sufficient, reliable, and pertinent to prove the facts that are the subject of the analysis.”¹¹¹

III. Key Developments and Critiques of the Inter-American Jurisprudence

A. INTRODUCTION

The Inter-American jurisprudence has proven distinctive in many respects. We already noted the Court’s enthusiasm to incorporate other sources of international law into its interpretation of the American Convention, because it considers human rights treaties to be “living instruments whose interpretation must consider the changes over time and present-day conditions.”¹¹² This section summarizes what we consider to be key developments concerning the rights to equality, life, humane treatment, personal liberty, due process, free expression, property, and reparations. Emphasizing a victim-centered perspective, we also point out critical areas where the Court’s case law lacks consistency and clarity, and briefly mention some of our alternative conceptual proposals.

B. EXTENSIVE STATE OBLIGATIONS TO RESPECT AND ENSURE RIGHTS

To begin, the Court gives a robust reading to Article 1(1), the Convention’s fundamental clause to “respect and ensure” the rights contained in the treaty. Similar to the United Nations, European, and African human rights regimes, States Parties to the Convention

¹⁰⁹ *E.g.*, *J. v. Peru*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 275, para. 305 (Nov. 27, 2013); *Velásquez Rodríguez v. Honduras*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, paras. 127–28 (July 29, 1988).

¹¹⁰ *J. v. Peru*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 275, para. 305 (Nov. 27, 2013).

¹¹¹ *E.g.*, *Vélez Restrepo and Family v. Colombia*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 248, para. 174 (Sept. 3, 2012); *Velásquez Rodríguez v. Honduras*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, para. 127 (July 29, 1988).

¹¹² *E.g.*, *Yakye Axa Indigenous Cmty. v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125, para. 125 (June 17, 2005); *Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, Inter-Am. Ct. H.R. (ser. A) No. 16, para. 114 (Oct. 1, 1999).

have both negative (“respect”) and positive (“ensure”) obligations. Negative obligations are generally understood to require States not to interfere in the exercise of rights, whereas positive obligations compel States to take action—affirmative steps to protect rights.¹¹³ Positive obligations have expanded in international human rights jurisprudence, and the Inter-American System has driven many of these advances.¹¹⁴

Since its first contentious case, *Velásquez Rodríguez v. Honduras*, the Inter-American Court has held that “ensuring” human rights demands the positive State duty “to organize the governmental apparatus and, in general, all the structures through which public power is exercised” in order to safeguard the “free and full enjoyment” of the Convention’s rights.¹¹⁵ To comply with this sweeping “ensure” obligation, furthermore, “States must prevent, investigate and punish any violation of the rights recognized by the Convention and . . . attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation.”¹¹⁶ Under this framework, States can readily be found responsible for the conduct of non-State actors, if States do not protect individuals under their jurisdiction according to a “reasonableness” standard—the rule of due diligence.¹¹⁷

C. ARTICLE 63: REPARATIONS

The Court’s extensive reparations and interpretation of Convention Article 63¹¹⁸ are widely hailed as trailblazing.¹¹⁹ Its contemporary remedial approach comprises measures of restitution, rehabilitation, satisfaction, and guarantees of non-repetition, in conjunction with pecuniary and non-pecuniary damages. The Court is the only international body with binding jurisdiction that has consistently ordered this full range of reparations. Especially noteworthy is the Tribunal’s focus upon exacting non-monetary remedies, in direct response to victims’ repeated petitions.

¹¹³ See, e.g., Dinah Shelton & Ariel Gould, *Positive and Negative Obligations*, in THE OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW 562–63 (Dinah Shelton ed. 2013); MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 123–124 (2d ed. 2005).

¹¹⁴ See *id.* at 563, 579; Medina, *Los 40 años*, *supra* note 25, at 22.

¹¹⁵ Velásquez Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, para. 166 (July 29, 1988).

¹¹⁶ *Id.*

¹¹⁷ E.g., Suárez Peralta v. Ecuador, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 261, para. 129 (May 21, 2013); Velásquez Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, para. 172 (July 29, 1988). See also Shelton & Gould, *supra* note 113, at 577 (due diligence “is generally held to mean: the reasonable measures of prevention that a well-administered government could be expected to exercise under similar circumstances”).

¹¹⁸ See this volume’s Chapter 9, on reparations, for a full discussion.

¹¹⁹ See, e.g., Sergio García Ramírez, *supra* note 13, at 148–49; BURGORGUE & ÚBEDA DE TORRES, *supra* note 71, at 224; Thomas M. Antkowiak, *Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond*, 46 COLUM. J. TRANSNAT’L L. 351, 386 (2008).

Of course, the Tribunal's reparations are not without their flaws. As for non-monetary remedies, the Court at times could require more intensive victim engagement in the design and implementation of reparations. Still, the Court's non-monetary reparations generally respond to victims' preferences for restoration, and even contemplate the complex realities of certain marginalized populations. In contrast, the Tribunal's inconsistent monetary reparations invite scrutiny. Particularly in the judgments involving groups, such as indigenous communities, the Court does not always respond to substantiated claims for monetary damages by both individuals and collectivities. If it neglects well-founded requests for material or moral compensation, the Court will compromise both individual and collective rights.

D. ARTICLE 24: RIGHT TO EQUALITY

Article 24¹²⁰—despite its limited title, “Right to Equal Protection”—in fact establishes two critical, autonomous rights: the right to equality before the law and the right to equal protection of the law. The Inter-American equality jurisprudence has been dynamic over the last decade, considering varied forms of discrimination with both clarifying and confusing results. The Inter-American Court has declared equality to constitute a *jus cogens* principle, which would render it binding for all States, and expanded State obligations in this area—far surpassing the U.S. delegation's limited intentions during the Convention's negotiations. The Court broadly condemns indirect and private discrimination, and promotes affirmative action programs. However, its standards of review and even standards of proof for differential treatment remain uncertain.

The Court's interpretation of Article 24 and Article 1, both as separate concepts and in relation to each other, has been inconsistent and, more recently, problematic. The Tribunal now regards the scope of Article 24 as limited to “the application or interpretation of a specific domestic law.”¹²¹ We have objections to the Court's current approach, which overemphasizes the non-discrimination provision of Article 1(1). The approach conflicts with the Tribunal's prior jurisprudence, which in turn reflects international understandings of equality principles.

Further, an Article 24 violation clearly condemns discrimination, putting States on notice and likely providing more satisfaction to victims. In contrast, an Article 1(1) violation occurs in the Court's case law whenever a substantive right is breached (the violation necessarily results from the State's failure to respect or ensure the right in question). Merely finding yet another breach of Article 1(1) for discrimination obscures the Court's conclusion and diminishes its impact. To be clear, the Tribunal fully prohibits

¹²⁰ See this volume's Chapter 2, on the right to equality, for a full discussion.

¹²¹ *Artavia Murillo et al. (In-vitro Fertilization) v. Costa Rica*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 257, para. 285 (Nov. 28, 2012).

discrimination in law and in fact; however, for these and other reasons explained in Chapter 2, it should return to its former manner of interpreting Article 24.

E. ARTICLE 4: RIGHT TO LIFE

The American Convention is the only human rights treaty that expressly determines the point from which the right to life¹²² must be protected: “in general, from the moment of conception.”¹²³ In a surprising departure from its recent tendency to defer to States, the Court has established a firm rule for when “conception” occurs. *Artavia Murillo et al. v. Costa Rica*, a judgment from 2012, left little discretion to national authorities on this disputed matter, in contrast to the deferential approaches of the European Court of Human Rights and other tribunals.¹²⁴

The Court has found arbitrary deprivations of life in numerous cases, such as when the death penalty has been applied under prohibited circumstances. In this area, the Inter-American System has played a key role in staying executions and in overturning “mandatory” death penalty statutes.¹²⁵ Of course, a State’s use of disproportionate police or military force also imperils the right to life. In this context, the Court’s case law has evolved, finding violations of Article 4 even when victims *survived* life-threatening situations. Further, internal armed conflicts in Latin America have obligated the Tribunal to analyze multiple killings under international humanitarian law. Yet it has not appeared well positioned to assess military objectives, technical weapon characteristics, and the notion of “excessive” civilian casualties.¹²⁶

As is well known, the Court has been a pioneer in the conceptual development of the crime of forced disappearance. In 1988, the year of its first merits judgment *Velásquez Rodríguez v. Honduras*, there was scarce international law on disappearances.¹²⁷ Inter-American jurisprudence has established the crime as a violation of the rights to personal integrity, personal liberty, and the right to life; more recently, the Court has also affirmed that forced disappearance breaches the right to juridical personality, Article 3 of the Convention.

¹²² See this volume’s Chapter 3, on the right to life, for a full discussion.

¹²³ American Convention, art. 4(1).

¹²⁴ *Artavia Murillo et al. (In-vitro Fertilization) v. Costa Rica*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 257, para. 189 (Nov. 28, 2012).

¹²⁵ *E.g.*, *DaCosta Cadogan v. Barbados*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 204, para. 53 (Sept. 24, 2009); *Hilaire, Constantine, and Benjamin et al. v. Trinidad & Tobago*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 94, para. 104 (June 21, 2002).

¹²⁶ International Committee of the Red Cross, Customary International Humanitarian Law Database, Rule 14: Proportionality in Attack, *available at* https://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter4_rule14 (last visited Nov. 21, 2016).

¹²⁷ *Velásquez Rodríguez v. Honduras*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988).

Inter-American and international law demands significant positive obligations of States to safeguard life. At times, the Court's judgments blur positive and negative State duties in this area. Still, its case law clearly holds that States must adopt numerous positive measures, including legislative action, prevention of violence, and the investigation and punishment of crime—all according to the due diligence standard. Finally, international human rights bodies, foremost the Inter-American Court, have recognized the rights to health, education, culture, food, and clean water as components of the right to life. Much remains to be developed with regard to this key relationship between life and social, cultural and economic rights, as well as with respect to other complex Article 4 matters, such as abortion, genetic engineering, and euthanasia.

F. ARTICLE 5: RIGHT TO HUMANE TREATMENT

The American Convention's Article 5¹²⁸ provided an important contribution to international human rights law. Whereas other treaties only listed prohibited forms of conduct, Article 5 was innovative for general human rights treaties because, in addition to its other components, it established an autonomous *right*: "Every person has the right to have his physical, mental, and moral integrity respected."¹²⁹ Later, the African Charter on Human and Peoples' Rights and the European Union Charter followed this example and declared rights to personal integrity and human dignity.¹³⁰

The Inter-American System's approach toward torture and other cruel, inhuman, and degrading treatment has often followed that of the European Court of Human Rights. Perhaps most importantly, the two Tribunals share the view that progressing standards for the protection of personal integrity require more rigorous safeguards of States and "greater firmness" of courts in finding violations.¹³¹ What may be regarded as inhuman treatment today may constitute torture in the near future.

Human rights jurisprudence, at both the regional and United Nations levels, has converged significantly in this area. First, the prohibition of torture *and* cruel, inhuman or degrading treatment is absolute, even in the face of terrorism and threats to national security. Second, substantial positive State duties have emerged to protect personal integrity.

¹²⁸ See this volume's Chapter 4, on the right to humane treatment, for a full discussion.

¹²⁹ American Convention, art. 5. See CECILIA MEDINA, *THE AMERICAN CONVENTION ON HUMAN RIGHTS: CRUCIAL RIGHTS AND THEIR THEORY AND PRACTICE* 89 (2014).

¹³⁰ The African Charter's Article 4 establishes, in part: "Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right;" further, its Article 5 provides, in part: "Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status." African Charter on Human and Peoples' Rights, art. 4-5, June 27, 1981, 1520 U.N.T.S. 217. In its Article 3(1), the Charter of Fundamental Rights of the European Union establishes, "Everyone has the right to respect for his or her physical and mental integrity." Charter of Fundamental Rights of the European Union, art. 3(1), 2010 O.J. C 83/02.

¹³¹ *Cantoral Benavides v. Peru*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 69, para. 99 (Aug. 18, 2000) (citing to European Court judgments).

Third, poor detention conditions violate personal integrity, and prolonged solitary confinement is particularly dangerous. Although certain official sanctions are permissible, no punishments shall be “inconsistent with the spirit of the absolute prohibition of torture, inhuman and degrading treatment.”¹³²

Over the last two decades, the Inter-American Court—also drawing from the IACPPPT, the Convention of Belém do Pará, and the Inter-American Commission’s jurisprudence—has delivered a number of authoritative judgments, which have served to expand conceptions of torture and ill-treatment, broaden State obligations, condemn gender violence, and provide wide-ranging redress to victims. Nevertheless, the Court has not always been consistent in its approaches to Article 5, and more recently has shown a troubling reluctance to find torture and other violations in certain cases, as explained in Chapter 4.

G. ARTICLE 7: RIGHT TO PERSONAL LIBERTY

For most human rights treaties, a deprivation of liberty must meet two requirements in order to be permissible: its procedures and reasons must be established by law, and the detention or arrest cannot be arbitrary. Similarly, the American Convention’s Article 7¹³³ establishes the general right of all persons to not be deprived illegally or arbitrarily of their liberty; in addition, it contains specific protections for individuals who have been deprived of their freedom. These detailed guarantees primarily contemplated criminal proceedings, but the Inter-American Court has now extended them to administrative deprivations of liberty, such as immigration detention.

To activate the protections of Article 7, the Court does not require a specific duration or location for the detention. In this way, the Tribunal has found violations to Article 7 in a wide range of detention scenarios, and denounces the widespread abuse of pre-trial detention in the Americas. Notably, the Court has even surpassed the Commission’s broad interpretations by recognizing Article 7 protections in cases where deprivations of liberty were carried out by non-State actors, without the order or control of State authorities.

We consider the Tribunal’s current method of interpreting legality and arbitrariness to be flawed in certain respects. First, when the Court finds an illegal detention, it frequently deems it unnecessary to examine arbitrariness. Although such an approach may appeal to notions of judicial economy, it fails to fully condemn detentions that are both illegal and arbitrary. The Tribunal cannot neglect its duty to rigorously analyze a case’s facts in light of all the applicable Convention provisions. Second, unlike other international human rights tribunals, the Court often considers only the relevant domestic law,

¹³² Association for the Prevention of Torture and the Center for Justice and International Law, *Torture in International Law: a Guide to Jurisprudence* 75 (2008).

¹³³ See this volume’s Chapter 5, on the right to personal liberty, for a full discussion.

and not international law, in its assessment of a detention's legality. When the Court narrows its legality inquiry to the letter of national law, international human rights may be limited or distorted, and the State's discretion to restrict liberty may be increased. Finally, the Court appears increasingly reticent to criticize vague national laws regulating detention, even when the statutes plainly contravene the well-established legal certainty principle.

H. RIGHTS TO DUE PROCESS AND JUDICIAL PROTECTION

I. Article 8: Right to a Fair Trial

Article 8,¹³⁴ the Convention's primary due process provision, is called "Right to a Fair Trial." However, the Article goes far beyond trials and even judicial matters, regulating proceedings of "any public authority, whether administrative, legislative or judicial, which, through its decisions determines individual rights and obligations."¹³⁵ These broad protections have become more expansive still through numerous judgments of the Inter-American Court, consistent with its notion of the "evolutive nature of judicial process."¹³⁶

Outside criminal cases, the Court appears to require the full range of criminal due process guarantees in administrative proceedings that "involve a manifestation of the punitive powers of the State," such as the process to deport or expel a migrant.¹³⁷ In addition, the Tribunal has commendably established that any proceeding that could result in an individual's deprivation of liberty or deportation calls for free legal representation, whenever necessary, as "an imperative for the interests of justice."¹³⁸

Emerging from the region's history of forced disappearances and extrajudicial executions is a robust set of guarantees for victims and family members. The Court has established the overarching right to "justice": to have crimes effectively investigated and prosecuted, to learn the truth about what happened, and to receive reparation for harm suffered.¹³⁹ Such wide-ranging rights contrast with prosecutorial discretion and other constraints found in the criminal justice systems of the United States and other nations.

¹³⁴ See this volume's Chapter 6, on the rights to due process and judicial protection, for a full discussion.

¹³⁵ *Constitutional Court v. Peru*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 71, para. 71 (Jan. 31, 2001).

¹³⁶ *Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, Inter-Am. Ct. H.R. (ser. A) No. 16, para. 117 (Oct. 1, 1999).

¹³⁷ *Separate Opinion of Judge Sergio García Ramírez, Claude Reyes et al. v. Chile*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 151, para. 8 (Sept. 19, 2006).

¹³⁸ *Pacheco Tineo Family v. Bolivia*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 272, para. 132 (Nov. 25, 2013).

¹³⁹ *E.g.*, *Luna Lopez v. Honduras*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 269, para. 188 (Oct. 10, 2013); *Blake v. Guatemala*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 36, para. 97 (Jan. 24, 1998).

In recent years, the Court has called for the exclusion of all evidence produced under “any form of duress”—a crucial advance for the Americas, where forced confessions and other statements are still accepted as valid evidence.¹⁴⁰ Although the American Convention does not specifically allude to consular assistance, the Court has developed the “right to effective access to consular assistance,” in recognition of the vulnerability of detained foreign nationals and international legal developments.¹⁴¹ Contemporary Court decisions have also condemned several amnesty laws and elaborated exceptions to the double jeopardy rule, in response to the impunity enjoyed by many rights abusers in the region. Now, spurious acquittals can be disregarded, and renewed prosecution may be permissible. Much remains for the Court to explain about its requirements for “effective” counsel, and the rights to translators and interpreters, among other essential topics.¹⁴²

2. Article 25: Right to Judicial Protection

The Convention’s Article 25,¹⁴³ Right to Judicial Protection, primarily referred to *amparo*, a “simple and prompt” judicial recourse of Latin American origin.¹⁴⁴ *Amparo* is designed to protect “fundamental rights” recognized in either State law or in the American Convention, and includes the writ of habeas corpus.¹⁴⁵ Yet the Court has expanded the remedies of Article 25 beyond *amparo*, and the Article’s full content has become unsettled. This owes, at least in part, to the Court’s frequent method of combining Articles 8 and 25 in its judgments; the practice has hindered the latter provision’s meticulous development.

I. ARTICLE 13: FREEDOM OF EXPRESSION

The American Convention was designed to provide vibrant guarantees for the freedom of thought and expression.¹⁴⁶ Among international treaties, it contains the only prohibition

¹⁴⁰ *E.g.*, *García Cruz and Sanchez Silvestre v. Mexico*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 273, para. 58 (Nov. 26, 2013); *Cabrera García and Montiel Flores v. Mexico*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 220, paras. 165–166 (Nov. 26, 2010).

¹⁴¹ *E.g.*, *Vélez Lóor v. Panama*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 218, paras. 151, 160 (Nov. 23, 2010); *Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, Inter-Am. Ct. H.R. (ser. A) No. 16, paras. 84 and 124 (Oct. 1, 1999).

¹⁴² *See DaCosta Cadogan v. Barbados*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 204, para. 93 (Sept. 24, 2009) (beginning to set out parameters for “effective” counsel).

¹⁴³ *See* this volume’s Chapter 6, on the rights to due process and judicial protection, for a full discussion.

¹⁴⁴ *Habeas Corpus in Emergency Situations* (Arts. 27(2), 25(1), and 7(6) American Convention on Human Rights), Advisory Opinion OC-8/87, Inter-Am. Ct. H.R. (ser. A) No. 8, para. 32 (Jan. 30, 1987).

¹⁴⁵ American Convention, art. 25(1).

¹⁴⁶ *See* this volume’s Chapter 7, on the freedom of expression, for a full discussion.

against prior censorship and features an innovative provision on “indirect” restrictions to expression.¹⁴⁷ Interpreting Article 13, the Inter-American Court became the first international human rights tribunal to establish the right of all individuals to access State-held information—a right that was later recognized by other human rights authorities. The Court has issued several decisions that condemned censorship and disproportionate sanctions on expression, protecting the Article 13 rights of individuals and society at large. These judgments led to legislative reforms, the reversal of criminal convictions, and the lifting of bans on films and books, among other successes.

Until 2008, the Court conceived of the freedom of speech as a primary means to limit State power and foster democracy. Subsequently, however, the Tribunal began to allow more constraints on expression and to require more responsibilities of speakers. In doing so, it has often cited to European Court judgments, which interpret a treaty more restrictive of the freedom of speech. For example, contrary to the Inter-American Commission’s position, the Court has held that criminal sanctions on expression are a legitimate means to protect honor and reputation, and that States have the obligation to establish such laws. The Court even accepted that protecting the honor of a State’s armed forces was a legitimate objective to criminally punish speech.

In response, we argue that criminal sanctions on expression, in order to protect honor and reputation, should always violate Article 13. Among other reasons, this is because criminal punishment fails the proportionality requirement of Article 13(2). As a result, the Court must change its approach and prohibit the use of criminal law in these cases. Second, pursuant to the Convention, the Tribunal must develop clear definitions and rules concerning any sanctions on speech, with the goal to promote vigorous public debate. Otherwise, governments, domestic judges, and the Court itself will inevitably fail to honor Article 13’s generous protections. Of course, speakers and journalists also require predictable standards to avoid chilling effects on the freedom of expression. Yet the Court’s case law still permits, under uncertain circumstances, civil and even criminal sanctions for criticizing State institutions and public figures.

Also of concern, since 2006 the Court started finding violations of Article 13(1)’s general provision, without analyzing the Article’s other paragraphs. As asserted above, the Tribunal cannot neglect its obligation to rigorously analyze a case’s facts in light of the Convention’s express terms and limitations. Otherwise, its assessment becomes opaque; again, this can result in greater discretion for the Court and States in this critical area.

J. ARTICLE 21: RIGHT TO PROPERTY

Among regional treaties, the American Convention provides a strong formulation of the right to property,¹⁴⁸ requiring, among other protections, “just compensation” upon

¹⁴⁷ American Convention, art. 13(3).

¹⁴⁸ See this volume’s Chapter 8, on the right to property, for a full discussion.

property deprivation.¹⁴⁹ The Inter-American Court has elaborated a broad notion of property, including tangible and intangible property, as well as communal and private property. The Court's property case law has especially influenced international jurisprudence on indigenous rights.

In 2001, the Court decided *Mayagna (Sumo) Awas Tingni v. Nicaragua*; this ruling on an indigenous right to communal property was a first for an international human rights court.¹⁵⁰ Beginning with *Awas Tingni*, the Court has recognized "the unique and enduring ties that bind indigenous communities to their ancestral territory."¹⁵¹ In the Inter-American System, even if non-native communities have occupied their lands "in accordance with customary practices," they may be entitled to official recognition of their ownership rights.¹⁵² By requiring communities to follow a 'cultural script,' however, commentators have rightly criticized that the Court's approach limits the autonomy of indigenous peoples and their capacity for change.¹⁵³

Throughout the Americas, States and private companies have extracted natural resources and developed commercial projects on lands belonging to indigenous peoples and Afro-Latin communities. In response, the Court has required that States comply with specific "safeguards"; with respect to "major" projects, they must even secure the community's free, prior, and informed consent.¹⁵⁴ Although this approach was pioneering for international tribunals, the Court's protections are easily evaded. To better safeguard vital ancestral lands and resources, we argue that the Court should adopt a robust right-to-life approach, rather than relying upon the modest right to property in these cases.

IV. The Book's Structure and Methodology

The following chapters examine each Convention right named above: the rights to equality, life, humane treatment, personal liberty, property, due process, and judicial protection, as well as freedom of expression and reparations. Although we have focused on those aspects of the Convention that have been most analyzed to date, there are still many gaps in the Inter-American jurisprudence, nearly five decades after the Convention's adoption.

¹⁴⁹ American Convention, art. 21(2).

¹⁵⁰ *Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001).

¹⁵¹ *Id.* para. 149.

¹⁵² *E.g.*, *Xákmok Kásek Indigenous Cmty. v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 214, para. 93 (Aug. 24, 2010); *Moiwana Cmty. v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 124, para. 131 (June 15, 2005).

¹⁵³ *See, e.g.*, KAREN ENGLE, *THE ELUSIVE PROMISE OF INDIGENOUS DEVELOPMENT: RIGHTS, CULTURE, STRATEGY* 162–82 (2010); Ariel E. Dulitzky, *When Afro-Descendants Became "Tribal Peoples": The Inter-American Human Rights System and Rural Black Communities*, 15 *UCLA J. INT'L L. & FOREIGN AFF.* 29, 42 (2010).

¹⁵⁴ *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, para. 134 (Nov. 28, 2007).

By 1996, for example, the Court had fewer than 10 rulings on the merits. Further, its judgments, although lengthy, frequently lack in-depth conceptual development, a deficiency that often has constrained this book's analysis. Currently, however, with over 300 judgments on contentious cases and over 20 advisory opinions, the Tribunal's work has reached a critical mass.

Each chapter generally consists of the following: (1) an Introduction to compare the right's formulation with equivalent rights in other major international and regional treaties; (2) a Background section to consider the right's negotiation history; (3) a Scope of Protection section to analyze the right's provisions, paragraph by paragraph or topic by topic; and (4) a Limitations section, if applicable, to study any limitations to the right. The assessment centers on the judgments, advisory opinions, and other decisions of the Inter-American Court—the ultimate authority on the American Convention. The Inter-American Commission's relevant reports, published decisions, and other documents are also considered, especially with respect to issues that have not been addressed by the Court. At times, focused references are made to the decisions of other influential human rights authorities, such as the European Court of Human Rights and the United Nations Human Rights Committee, to draw significant comparisons and contrasts.

A Note on Judgment Citations

In its rulings, the Inter-American Court often repeats certain principles and observations. Due to space constraints, we cannot cite every judgment that states the repeated point. As a result, we have decided to use “e.g.” and then list two pertinent Court judgments: a recent decision and an earlier one. “E.g.” indicates to readers that even more Court judgments contain the same point.