THE EFFICACY OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS

A SOCIO-LEGAL STUDY BASED ON THE JURISPRUDENCE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS CONCERNING AMNESTY LAWS, INDIGENOUS RIGHTS, AND RIGHTS OF DETAINEES

A thesis submitted to the University of Manchester for the degree of Doctor of Laws in the Faculty of Humanities

2018

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Word count: 84,822 (excluding initial pages 1 to 14 and bibliography)

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Abbreviations

ACHR – American Convention on Human Rights, the Convention

AFCHR – African Commission on Human and People‘s Rights, the African Commission

ACtHR – African Court on Human and People’s Rights, the African Court

AI – Amnesty International

ECtHR – European Court of Human Rights, the European Court

ECJ - European Court of Justice

IACHR – Inter-American Commission on Human Rights, the Commission

IACtHR – Inter-American Court of Human Rights, the Court

IAHRS – Inter-American Human Rights System

IC(s) – International Court(s)

ICC – International Criminal Court

ICTY – International Criminal Tribunal for the former Yugoslavia

ICJ – International Court of Justice

ILO – International Labour Organization

OAS – Organization of American States

UN – United Nations

UNESCO – United Nations Educational, Scientific and Cultural Organization

Abstract

This study intends to perform a reappraisal of the efficacy of the Inter-American Court of Human Rights. To this end, the thesis is structured around three fundamental questions that express the main objectives of this inquiry: (i) How should we account for the efficacy of the Inter-American Court of Human Rights and its decisions as they impact the human rights regime and normative, institutional and social structures of global society? (ii) To what degree has the Inter-American Court of Human Rights and its aggregate jurisprudence contributed to the process of concretisation of human rights norms? (iii) Has the Inter-American Court and its decisions contributed to the redress of victims of human rights violations in the fields of amnesty laws, indigenous rights and rights of detainees? In order to provide a solid response to these questions, this study carries out a comprehensive empirical analysis of the efficacy of the Inter-American Court of Human Rights jurisprudence on amnesty laws, indigenous rights, and the rights of detainees. Assuming a victim-centred point of observation, this analysis will consider multiple dimensions of global society. The principle contributions of this thesis are two-fold: (i) the advancement of a model of "efficacy chain" to support comprehensive sociological and legal analysis of international court's efficacy and (ii) a revision, empirical supported, of the effects of decisions of the Inter-American Court of Human Rights.

Key words: Inter-American Court of Human Rights; Efficacy; Amnesty; Indigenous Rights; Rights of Detainees.

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Dedication

To all victims of human rights violations,

especially those who have not yet found proper legal redress

or the Justice inherent to the Law

Acknowledgments

Above all, I would like to express my immense gratitude to Professor Chris Thornhill who has continuously inspired me with his wisdom, generosity, and sharp analyses of sociological and legal questions. Chris' support was fundamental, and made the straining process of producing a thesis softer. His eagerness to analyse legal questions outside the courtroom and the books, leading us along 6-hour bus rides over mud roads in the Latin America countryside to greet the first indigenous autonomy after ILO 169, has pushed me beyond the thresholds of traditional academic production.

In addition, the project "A Sociology of the International Transnational", led by Chris Thornhill and funded by the European Research Council, provided me a thought-provoking environment. I am particularly grateful to my colleagues Elizabeth O'Loughlin and Maria Smirnova for their support and stimulating discussions about my project. This thesis would have a less original configuration if it was not for the generous support of the European Research Council, which funded my PhD as part of an innovative project.

This thesis has also benefited from the exceptional academic environment at the University of Manchester. I am particularly grateful to Professor Jean D'Aspremont and Professor Iain Scobbie for the provocative debates and activities hosted by the Manchester International Law Centre (MILC), and to all my colleagues from this centre. I am also in debt to my female colleagues from our co-founded Olive Schill Society, who made me think about gender issues both in the theory and in the practice of international law. Moreover, I am thankful to the staff of the PGR office, which has always been extremely helpful and has made the last years easier in many ways.

My period as a Visiting Researcher at the Inter-American Court of Human Rights has given an additional dimension to this study. I am, therefore, in debt to the staff of the Court and its library, as well as to the colleagues who helped me understand the Latin American reality better. I am especially grateful to Oscar Parra who has kindly shared his vast knowledge about the Court with me even when time was short. Colleagues from the University of Brasilia have also been essential during this process.

Most importantly, I am grateful to my family and friends, who always pushed me beyond my limits. I thank the lineages of Rodrigues, de Araújo, and Calabria for past achievements, which undoubtedly supported my present development. I thank all the women of these families for their strength, compassion, and wisdom. Particularly, my new Rance-Ellard family supported me during an essential period of writing in Canada over the winter of 2016, and added new perspectives to this work.

Of all my loved ones, I thank David Rance, who forbearingly debated the ideas here presented and relentlessly proofread my manuscripts. He stands as the one who lent me necessary perspective and kept me in peace during the whole process of elaborating this thesis.

SECTION 1

EFFICACY

Chapter 1

Introduction

1.1 Setting the scene

Historically, law has been used as a common language to face deviant patterns, achieve social changes, and organise and discipline life in society. Recent decades have witnessed a process of expansion in the use and judicialisation of law caused by changes in the structure of global society and in the form in which individuals, social groups, social movements, and organisations systematise their claims. Increasingly and with more intensity from the end of the 18th century onward, legal actors have articulated interests using a common language of rights and institutionalised claims using formal legal mechanisms. At the international level, one result of the increasing legalisation of international affairs, particularly in the human rights field, is the proliferation of courts, tribunals, mechanisms of supervision, and other juridical or semi-juridical organs. These legal institutional structures are growing in quantity and power. In order to provide a solid sociological and legal response to questions about the effects of international courts in the regime of human rights, this study carries out an empirical investigation into the efficacy of a group of decisions issued by the Inter-American Court of Human Rights (IACtHR) on amnesty laws, indigenous rights, and rights of detainees. Each of the elements that underpin this investigation will be explained in following sections to clarify both the study's scope and limits. The principle contribution of this thesis is its comprehensive empirical analysis of decisions of the Inter-American Court of Human Rights, which permit an evaluation of the efficacy of the court in broader terms.

The expansion of law, judicial review and the power of adjudicatory mechanisms raise a fundamental question: is this process of adjudicatory densification—relatively recent in the field of human rights—also increasing the

efficacy of this regime[1]? In response, one body of scholars argues that human rights courts improve compliance with human rights norms, and therefore meet the expectations that led to their creation and progressive empowerment. A second body of scholars contests the value of such courts and denies their efficacy, arguing that levels of human rights violation remain higher than expected. A third group takes the middle ground and holds that in the face of uncertainty about their efficacy, it is better to maintain them[2].

This study integrates a fourth rising group of sociology of law's-legal scholarship, and speaks to ongoing discussions in the fields of the sociology of international courts and human rights. Instead of looking instrumentally at results, this fourth group assumes that courts produce effects in their interaction with society. Such effects may lead to an immediate reinforcement of human rights or sometimes have a neutral or even deleterious effect on their immediate efficacy. Importantly, this line of scholarship observes how the enhancement of other societal structures may affect human rights based on less theoretical and more empirical evidence. In a way, depending on the empirical basis, members of this fourth body of scholarship may end up adopting the conclusions of any of the previous three. In a sense, the intention, then, is not to defend, legitimize, or disparage international courts, but to look at empirical data and evaluate which effects were produced by their rulings. Accordingly, this thesis measures the efficacy of international courts using a perspective mainly interested in observing the effects that decisions have had, and may have, on social structures in the long term, instead of looking exclusively at immediate effects.

1.2 Thesis outline

This study intends to perform a reappraisal of the efficacy of the Inter-American Court of Human Rights in relation to amnesty laws, indigenous rights, and the rights of detainees. To this end, the thesis is structured around three fundamental questions that express the main objectives of this inquiry:

[1] Helfer, 2014: 2.
[2] Chapters 2 and 3 will discuss these perspectives in detail.

(i) How should we account for the efficacy of the Inter-American Court of Human Rights and its decisions as they impact the human rights regime and normative, institutional and social structures of global society?

(ii) To what degree has the Inter-American Court of Human Rights and its aggregate jurisprudence contributed to the process of concretisation of human rights norms?

(iii) Has the Inter-American Court and its decisions contributed to the redress of victims of human rights violations in the fields of amnesty laws, indigenous rights and rights of detainees?

The next section "Efficacy" will introduce the first question of this list of objectives, while the subsequent section, "The Inter-American Court of Human Rights and the process of concretisation of human rights norms", will discuss the remaining two.

1.2.1 Efficacy

The first question expresses a methodological concern. Constantly, studies have questioned what could be a suitable methodology to assess the efficacy of the Inter-American Court of Human Rights. Due to the lack of an adequate theory or methodology to sustain far-reaching endeavours, numerous studies in this field have failed to provide a comprehensive account of efficacy. In addition, the difficulty of obtaining empirical data and disentangling the multiple social variables that often appear during investigations may put a brake on more ambitious attempts. As a result, studies frequently present partial reports of efficacy[3].

Typically, analyses of efficacy tend to focus on compliance with decisions; or on the adequacy of normative, institutional, and social structures in terms of prescribed norms. While the former perspective, focused on compliance, offers an instrumentalist view of courts and decisions, the latter, focused on adequacy,

[3] Chapter 2 will discuss these obstacles at length.

set expectations too high. Indeed, to put faith in international courts to solve structural problems and promote legal shifts that domestic legal orders were not able to is, at best, unrealistic. Yet, some accounts put the efficacy of international courts on trial as soon as human rights violations appear, or when levels of compliance with decisions diminish. Arguably, both perspectives are fixed on identifying only the conspicuous outcomes of decisions, without accounting for subtle social processes that may be unleashed and prone to affecting social structures in the long term.

Taking the viewpoint that sceptical views of the efficacy of international human rights courts are often the result of narrow or partial analysis, this study proposes a reappraisal of efficacy. Adopting a sociological approach and using empirical data as a foundation for developing further conclusions, this study addresses the lack of suitable models to give support to comprehensive sociological and legal accounts of efficacy by introducing a distinctive methodology: the "efficacy chain". Using this model, this investigation intends to bring to the surface social processes that were affected or spurred by the Court's decisions, but which normally remain overlooked.

The question "How should we account for the efficacy of the Inter-American Court of Human Rights and its decisions?" will be primarily addressed in Chapters 2 and 3.

Chapter 2 reviews previous literature on efficacy with the aim of developing a suitable model for examining the effects of decisions of the Inter-American Court of Human Rights with regard to amnesty laws, indigenous rights, and the rights of detainees. The chapter will introduce the "efficacy chain" model and describe its five constitutive layers: observance, application, strengthening (instead of enforcement), implementation (instead of compliance), and adequacy. The efficacy chain will serve as methodological foundation for the comprehensive study of the IACtHR's efficacy that will be developed in Chapters 4, 5, and 6.

Chapter 3 illuminates the functioning of the Court, emphasising modifications executed in former years that may contribute to higher or lower degrees of efficacy of decisions.

1.2.2 The Inter-American Court of Human Rights and the process of concretisation of human rights norms

The global human rights regime is composed of three international judicial bodies: the European Court of Human Rights (ECtHR), the Inter-American Court of Human Rights (IACtHR, or the Court), and the African Court on Human and People's Rights (ACtHR). In addition, there exist plans for an International Human Rights Court, which would, together with the above, compliment the 20 existing and 3 extinct human rights and humanitarian law bodies. According to some observers, the number of institutions and normative structures contained by the global human rights regime may be even higher depending on the metrics used. In addition, international human rights courts (as other internacional courts) have steadily received more cases, issued more decisions, covered more legal themes, awarded broader reparations, and produced rulings with extensive binding effects towards more states.

Complementarily, human rights norms have taken significant breadth outside human rights institutions. Indeed, human rights norms have shaped the reasoning of domestic and international courts; for example, the International Court of Justice (ICJ) and the European Court of Justice (ECJ) have increasingly adopted human rights as guiding principles. Notably, the IACtHR has challenged the principle of *res iudicata* on some occasions in order to force states to include a human rights perspective based on the norms of the American Convention on Human Rights (ACHR) in their domestic decisions. As a consequence, domestic courts have increasingly used human rights norms both spontaneously and by induction of international human rights bodies.

In the American continent, the relevance of the Inter-American Human Rights System (IAHRS) to the region is remarkable. In terms of geographical coverage, the Inter-American Court is the court with higher number of state-members on the American continent. 20 out of 35 American states have accepted its contentious jurisdiction. In terms of effects, the singular case law of the IACtHR, based on the reality of Latin America states, has been widely used by domestic and international legal mechanisms and has contributed to the entrenchment of rule of law, especially in the region. Contrastingly, in terms of compliance, out of

approximately 226 decisions issued since the creation of the tribunal, by the end of 2017 the Court had 168 contentious cases at the stage of "monitoring compliance with judgment"[4]. In addition, levels of human rights breaches are still high on the American continent.

Interestingly, while the level of full compliance with decisions of the IACtHR is restricted and violations of human rights are commonly reported in states under its jurisdiction, the jurisprudence of the Court in certain fields has deeply affected the legal reality of the region.

The second and third questions of the objectives listed above express sociological and legal concerns emerging from contrasts between compliance, adequacy and effects of decisions of the Court. Both questions aim to explore functions, capacities, and limits of the IACtHR in its interaction with societal structures as it seeks to enhance the process of concretisation of human rights norms and provide redress for victims of human rights violations.

Particularly, the second question implies that the efficacy of the Court is directly related to its capacity to drive the process of concretisation of human rights norms, by which prescribed norms become reality. Indeed, this question is related to the capacity of the Court to improve, in coordinated action with other institutions, the level of adequacy between human rights and social reality. This improvement may become manifest in a reduction of violations, but also in stronger responses of state organs to violations and in the establishment of domestic normative structures in conformity with norms of the American Convention on Human Rights. In this sense, the efficacy of the Court is reflected in all actions influenced directly or indirectly by its jurisprudence that may activate social processes that bring ACHR norms closer to reality and closer to ensuring rights to individuals. Importantly, the second question requires a nuanced response. It assumes that efficacy is manifested in nuanced degrees rather than in binary forms, and that it varies across normative, institutional and social structures.

The third and last question deals with the individual dimension of adjudicating proceedings, placing victims at the centre of the investigation. It refers both to nominal victims cited by the Court in its rulings, and to future

[4] IACtHR, *Annual Report 2016*, 2017: 94.

victims of similar violations in the fields of amnesty laws, indigenous rights and rights of detainees. Taking this expanded notion of the victim into account, the efficacy of the Court is reconnected not only to its ability to provide redress for victims that take part in contentious cases within the Inter-American Human Rights System, but also to its capacity to curtail similar violations and foster accountability within domestic legal orders.

Chapters 4, 5, and 6 will conduct a study of cases related to amnesty laws, indigenous rights, and rights of detainees, respectively. They will also provide an overview of the development of norms related to these rights in international law, and broach upon some ongoing discussions surrounding each. In sequence, each Chapter presents the jurisprudence and constitutive elements of the Court's doctrine on the subject at hand. Finally, the efficacy of cases is scrutinized, using "unities of reparation" ordered by the Court in each ruling and categories of reparation as starting points of the analysis. A unity of reparation corresponds to each single order on a list of obligations assigned by the Court to defendant states in the reparation section of a final ruling.

Chapter 7 systematises the empirical data laid out by these three Chapters and subject them to scrutiny using each of the 5 layers of the "efficacy chain" model. Chapters 4, 5, and 6 have a pronouncedly informative and legalist tone, describing facts of the selected case law, essential elements of the Court's jurisprudence regarding each issues and the process of implementation of orders of reparation. In a sense, the Court follows traditional legal approaches on the implementation of decisions. Importantly, these chapters extrapolate discussions restrict to compliance because they associate the implementation of certain acts to aspects of efficacy as described in each layer of the efficacy chain. Notably, these chapters provide foundation for extended sociological discussions executed in Chapter 7, dedicated to an integral application of the model of efficacy chain. As a consequence, although the chapters dedicated to execute study of cases guard some similarity with existing scholarship dedicated to analyse aspects of implementation of decisions, the association of acts of implementation with aspects of efficacy in these chapters, as well as the sociological articulation developed in Chapter 7 distinguish the model from existing scholarship.

Chapter 8 disposes final remarks, including prospects for future investigations.

1.3 Methodology

1.3.1 Empirical basis

In order to respond to the three underlying questions posed in this study, a comprehensive assessment of the effects of IACtHR's decisions concerning amnesty laws, indigenous rights, and the rights of detainees will be conducted. There are to date no other comparative studies that address these three issues together. Mostly, issue-based analyses concentrate on a singular issue instead of performing an integrated investigation of multiple issues. As it is not feasible to examine the efficacy of all Court's decisions given restrictions of time and length imposed by this manuscript, thematic criteria have been adopted to select cases for inquiry. The use of thematic criteria made it possible to reduce the volume of cases used as primary source material without compromising the assessment of efficacy of the Court.

Among all the issues developed legally by the IACtHR, amnesty laws, indigenous rights, and rights of detainees are three issues particularly salient to any inquiry into the efficacy of the Court. In common, they affect a representative number of states of the region and support doctrinal advances by the Court intended to ensure rights for individuals that are normally not fully included in their domestic legal orders. They help to account for the Court's efficacy in four ways. First, previous studies have attributed contrasting levels of efficacy to prominent decisions involving each of these issues. This wide spectrum of performance provides an optimal framework for exploring varying degrees of efficacy of the Court and for identifying fields in which both the effects and the non-effects of Court's decisions are more visible. Second, the aggregate of decisions including these issues encompass all categories of reparation contained in the extended reparatory regime of the Court. The diversity of forms of reparation applied in these cases will permit the investigation of how each of

these forms may contribute to a greater or lesser efficacy of the Court. Third, there are significant rates of violation involving these issues in a representative number of states. As a result, they permit the observation of how the jurisprudence of the Court may affect–or not–the performance of human rights on the ground. Fourth, domestic courts and mechanisms have systematically failed to address these issues. Based on the principle of complementarity, their consideration will allow investigation of how the Court can reinforce domestic mechanisms and reach results that were not possible to achieve at the domestic level.

The three issues also correspond to questions of relevance in the region. Amnesty laws constitute once common instruments that were frequently used by states in the region to facilitate the transition from authoritarian periods and civil wars to more democratic and stable regimes. Since the early 2000s, the Court started to impose restrictions upon this long-standing practice based on the defence of the rights to truth, reparation, and access to justice for victims. By doing that, the Court places victims instead of perpetrators or even the "national welfare" in the centre of processes of transition. Likewise, indigenous people represent a significant proportion of the population of most states that accepted the jurisdiction of the IACtHR. Not by coincidence, this is the region in the world in which rights of indigenous peoples are most fully developed and most commonly violated. Indigenous rights occupy a significant part of the jurisprudence of the Court, which has been identified as a leading authority in the subject. Finally, more than 10.2 million people are held in penal institutions throughout the world, and the number has increased at a rate of 25-30% over the last 15 years[5]. The rate of increase is even higher in Latin America[6]. In addition to the high population of detainees, violations concerning detention centres and prisoners are common in Latin America, and have been a frequent object of defence by precautionary and provisional measures issued within the IAHRS.

Combined, these three issues constitute a representative fraction of the jurisprudence of the Court, encompassing approximately 25% of the total cases

[5] Walmsley, 2016.
[6] *Ibidem*.

of the IACtHR. In total, 63 cases directly related to one of these issues were identified in the jurisprudence of the Court. In arriving at this number, all 226 decisions issued and 23 cases admitted at the Merits Stage (Pending the delivery of judgment) by the Court were considered. Precautionary measures submitted by the Commission were not included in the empirical basis of analysis; neither were provisional measures issued by the Court because they mainly consist of one-off measures. Exceptionally, some cases not included in this primary basis of analysis were used as auxiliary data to elucidate elements of the Court's doctrine. However, auxiliary data was not taken into consideration at all in the evaluation of the Court's efficacy. In addition, priority was given to cases that already have at least one order supervising compliance of the Court because they include a document in which the opinion of all parts, which means state, Commission, victims and representatives, and Court is officially presented. By considering opinion of all parts, this study intends to take distance of state centric analysis. Further details about the criteria of selection of decisions will be advanced in Chapters 4, 5, and 6, dedicated to case studies of the jurisprudence.

The 63 decisions used as primary sources of this investigation were issued between 1991 and 2017, covering almost the entire time length of the Court's functioning. As a result, the decisions analysed cover different stages of development of the Court's jurisprudence. Amnesty laws relate to a first stage of development of the Court jurisprudence more connected to themes of transitional justice and to civil and political rights. Rights of detainees' cases have a hybrid nature, incorporating both discussions related to civil and political rights, and more contemporaneous discussions of economic, social, and cultural rights. In addition, they embody the collapse of an increased faith in criminal justice systems[7]. Notably, the doctrine of the Court surrounding the rights of detainees reflects a turn to social rehabilitation and search for alternative mechanisms that clashes with the doctrine of the Court on amnesty in its early years[8]. The doctrine of the Court on indigenous rights by its turn represents a

[7] Huneeus, 2014; Engle, 2015: 1077 (referring to "the quasi-criminal jurisdiction of the human rights courts," or "international criminal law by other means).

[8] In this sense: "The field of Transitional Justice is particularly tellingly of a noticeable turn to criminal law within human rights. For the most part, scholars and advocates alike consider the ensuing increase in criminal trials for human rights violations—what Kathryn Sikkink refers to as "the justice cascade"—as a positive turn within the human rights movement" (Engle, 2016).

moment of expansion of the Court's docket, with the inclusion of new legal subjects and new themes, being closely related to the recognition of justiciability of economic, social, and cultural rights. These three issues permit the researcher to explore the evolution of the jurisprudence and functioning of the Court from its early years, which is beneficial because the element of time is fundamental to the analysis of efficacy[9]. Moreover, this broad temporal coverage will make it possible to observe how time may play a decisive role on maturing the effects of decisions and how efficacy can change over time.

In terms of geopolitical coverage, the cases stemming from these issues involve 19 states; only three of all states that have accepted the jurisdiction of the Court did not have any contentious case related to these issues: Bolivia, Costa Rica, and Dominican Republic.

This study differs from a most established tradition of state-based studies. State-based and country-specific reports occupy a majoritarian position among systematic studies of efficacy of international courts[10]. This approach is common because it contains the explanatory potential to correlate domestic conditions with the performance of courts, and it has the particular capacity to distil variables and factors that may have influence on efficacy. Moreover, such studies provide a report on state histories of compliance with decisions that may be issued to establish pressure over non-compliant state organs. They also serve to evince patterns of interaction between decisions and state organs. However, there are significant shortcomings to extrapolating sociological and legal effects of decisions using states as the basis of analysis.

This study differs from state-based studies on three aspects. First, it reckons that patterns of compliance and deviance with decisions of the Inter-American Court of Human Rights can be as influenced by state characteristics as by legal characteristics inherent to the systemic development of each issue. Normally, state organs present different patterns of interaction with decisions, depending on the legal questions brought by every issue. Therefore, it seems more reasonable to evaluate which issues have greater or lesser efficacy than which states may have decisions with greater or lesser efficacy. Second, legal elements

[9] Shany, 2012: 234.
[10] Some examples are: Keller, Stone Sweet, 2008; Hillebrecht, 2014.

presented in a decision affect not only organs of the defendant state but reverberate through organizations in the whole region. There is, then, a great potential for creating systemic effects that affect the development of a certain issue on a broad scale. In the same line, non-compliant state organs may also have influence on structures and organizations of third states. Third, state organs present different patterns of interaction with a same decision.

In general, state-based reports tend to overlook systemic effects that occur in different polities at different levels; they also fail to grasp transnational effects that irritate not only isolated polities, but contribute to the construction of a broader regime. In order to mitigate this deficiency, the chapters of this study are structured around issues instead of states. Chapters 4, 5, and 6 analyse the efficacy of individual issues (amnesty laws, indigenous rights, and rights of detainees, respectively); chapter 7 compares the efficacy of each of these issues. Although sections of chapters rely on a state structure to identify compliance and effects of decisions, major analysis have been always made considering an issue-based perspective. In addition, analyses repeatedly appoint to different patterns of engagement – and, therefore, of efficacy – of state organs with Court's decisions. By considering states as non-monolithic structures, the study relieves states as an optimal unity of analysis and observes dynamics of other social structures, such as organizations and individual state organs.

1.3.2 Sources

This thesis considered a variety of sources, including official documents and reports of the Court and Commission; scholarship on efficacy, international courts, the IACtHR, amnesty laws, indigenous rights and rights of detainees; interviews; reports of states and of non-governmental organizations; media reviews; and in-person and on-site observation.

Most empirical data collection occurred during the first semestre of 2015, over the course of a professional visit to the IACtHR headquarters in San José, Costa Rica. During this period, I worked directly with one of the legal teams of the Court and had direct access to the library of the Court and to some procedural documents. In addition, I undertook a systematic analysis of all Court

decisions and orders monitoring compliance with judgments, discussed my investigation with strategic actors, and attended public audiences where I could follow hearings of victims, representatives, experts and state representatives in the courtroom. This experience enabled me to develop a close interaction with the jurisprudence, functioning and techniques for crafting rulings of the Court. It was also during this period that I could test some of the presuppositions of the model used to observe efficacy in concrete cases and informal conversations with the staff of the Court and colleagues.

Additionally, this research integrates part of the project "The Sociology of the Transnational Constitution", funded by the European Research Council. As a researcher of the project I could take advantage of the methodology applied and data revealed by comparative research developed in polities as diverse as Argentina, Bolivia, Brazil, Canada, Chile, China, Colombia, Egypt, Ghana, Kenya, Italy, Russia, and the United States. The project enabled me to carry out fieldwork research and interview strategic actors in Brazil, Bolivia and Colombia. On-site observation provided me with information that would be impossible to find in textbooks and traditional scholarship, and also permitted a distinct view of the process of penetration of American Convention on Human Rights' norms in various legal orders.

Importantly, I carried out fieldwork research with the principal investigator of the project "The Sociology of the Transnational Constitution" in the months of April (2016), August (2016), October (2016), Abril (2017), and April (2018) in the cities of Charagua, El Alto, La Paz, Santa Cruz (Bolívia); Brasília, Fortaleza, Recife (Brasil); and Bogotá, Chocó, Manizales, Pereira, Quibdó (Colombia). During these visits we have interviewed justices of diverse instances, including justices of superior tribunals; ministers of state; members of the Public Prosecutor Office; scholars; legal advisors; representatives of victims before the Inter-American Court of Human Rights; indigenous leaders; activists; and members of NGOs. In total, around 60 individuals were interviewed, sometimes in more than one opportunity. We prepared structured questions for each of these interviews and interviews would normally take one hour. The transcriptions of all interviews constitute part of my personal research data and were taken into consideration to guide the development of research hypothesis.

Unfortunately, I could not always obtain final approval of interviewers prior to the submission of this thesis. For this reason, I decided to use the original information they provided me, as well as their personal opinions, as an indication to advance some hypothesis and to collect more information about specific points. Although not explicit, those interviews were critical to shape the arguments and structure of this study. They provided the necessary embedment at the empirical level of assertions advanced here. I revised the transcriptions of at least 82 meetings to give foundation to points advanced in this study and to edit its last version.

1.4 Caveats

There are some constraints on the assessment of efficacy of the Court that, by extension, represent hindrances for the present study. The first barrier for this study was the limited amount of reliable and systematic data available for a qualitative assessment of rates of violation of the American Convention on Human Rights (ACHR) norms, rates of litigation based on ACHR norms, or rates of implementation of orders of the Court. In addition, the Court and the Inter-American Commission on Human Rights (IACHR) produce limited official statistics; accordingly, there are an insufficient number of research institutes within member states that could provide authoritative data, and only a small number of studies have generated or reviewed significant amounts of empirical material. The absence of reliable and systematic data imposes limits on the extent to which it is possible to measure the effects of the Court on society over time[11].

The second barrier is common to other investigations and derives from the impossibility of isolating or ignoring the influence of multiple variables intervening in society. It involves a necessary discussion of the problem of causality in determining the influence of courts like the IACtHR. Just as the efficacy of the Court cannot be disentangled from broader social processes, the

[11] Greer, 2013: 156

causality link between judicial decisions and societal transformations is not normally obvious. Indeed, the effects of interactions between decisions and society are "not always visible and are hardly isolated from other interactions[12]". Therefore, establishing a line of causality between the decisions of the Court and actions carried out by state organs or individuals may sometimes incur in spurious correlations. There are exceptions. In occasions in which an order of reparation is very specific and its effects are somehow controlled, the correlation is obvious, and it is possible to trace a reasonably direct line of causality[13]. The payment of compensation to a victim, the publication of a ruling, or the realisation of a public act followed 'to the letter' of an order of reparation are effects that can be directly attributed to a judicial decision. But other actions, especially ones that cause structural changes, are not so easy to attach to a single decision. In that sense, it is most often the case that "relationships between court decisions and outcomes are probabilistic rather than deterministic"[14]. It is assumed that most of decisions have competing causes contributing both to a greater or lesser impact. In general, to cope with this barrier, the Chapters dedicated to case studies considered unities of reparation as starting points of analysis because they permit the tracing of clearer causality. For that, the study adopted categories of reparation as defined by the Court.

In addition, the significant role that other institutions may have on the state of affairs is not neglected. It is rather assumed as a basic presupposition that, as such, does not have to be constantly reaffirmed. It is important to highlight that the focus on the influence of the Court's decisions on social structures does not deny the impact of other institutions and events. If the Court's influence is more often evinced is because this is one of the objectives of this study – not because such influence is always preponderant.

The third barrier is related to the fact that the Court is still relatively young. The Court handed down its first decision on the merits less than three decades ago. Not only are the rulings of the Court recent in time, they also often deal with lingering structural problems that require complex orders of reparation to be

[12] Jones, 1968.
[13] Dworkin, 2013 [1977]: 228; Jenkins, 1980: 302; Jones, 1968:62; Huneeus, 2011: 505; Feeley, [1969]1973: 222.".
[14] Wheeler, 2011.

dealt with. Combined, these aspects impede immediate and accurate attribution of efficacy to decisions. Due to their particular characteristics, some Court rulings are necessarily going to take time to produce deeper effects. Indeed, it has been proved elsewhere that time tends to increase compliance with older decisions[15]. Oftentimes, observed instances of inefficacy of the Court are actually processes that are still maturing. As far as possible, this study attempts to overcome these obstacles by combining analysis of decisions with different degrees of complexity and issued in different periods. However, the study is aware of the limits caused by a reflexion too close in time over structural decisions of an international court.

[15] Calabria, 2017.

Chapter 2

Efficacy

2.1 Introduction

Defining efficacy, and thus what constitutes an effective court, is a common conceptual hurdle for any study dedicated to the subject. This chapter will analyse existing literature on efficacy with the aim of developing a suitable model for examining the effects of decisions by the Inter-American Court of Human Rights in the fields of amnesty law, indigenous rights, and rights of detainees. The chapter is structured in three parts. In parts (1) and (2), it revises literature from the field of sociology of law concerning efficacy of courts, including rising scholarship in the field of efficacy of international courts. Without claiming to be exhaustive, these sections will give special attention to previous studies that adopted broad approaches to efficacy in order to produce sociological and legal analysis about international courts. Building on this scholarship and attempting to address some acknowledged lacunae within the incipient sociology of international courts, it will propose a model that I term the "efficacy chain" to examine the efficacy of the IACtHR and its rulings in part (3). This chain contains five layers – (i) observance; (ii) application; (iii) strengthening (instead of enforcement); (iv) implementation (instead of compliance); and (v) adequacy. This "efficacy chain" will serve as the methodological foundation for this first comprehensive sociological and legal study of the IACtHR's efficacy, which will be further unpacked in subsequent chapters. Assuming a victim-centred point of observation, this analysis will consider multiple dimensions of global society and efficacy.

2.2 Efficacy and domestic courts

The appraisal of judicial efficacy constitutes a primary thematic concern in the sociology of law. As discussed below, it depends *theoretically* on the conceptual

and methodological definition of efficacy, and *empirically* on the assessment of domestic courts and other legal organs' performance.

At the theoretical level, there is no definition on which all scholars agree, despite the existence of early studies trying to define efficacy[16]. Attempts tend to converge into an existing lacuna between "nomos", "law-in-theory", "legal norms" on the one pole; and "ethos", "law-in-action", "practice", "custom", "social reality", "behaviour of the population", and "factual variables" on the other. Efficacy is normally described as a "function of convergence", "bridge", or "connecting tool" that brings together these two poles, reducing existing lacunae between legal norms and social practice[17]. By extension, a court's efficacy is also measured by its capacity to bring legal norms closer to social reality. The movement by which prescribed norms become reality due to an integrated action of various institutional and social structures, including courts, is described here as a "process of norm concretization"[18].

At the empirical level, studies of the efficacy of domestic courts constitute a common interest of the sociology of law, dating back to the mid-20th century and revolving around the effects of rulings, especially those issued by superior courts, upon society and the legal system. This line of studies has regularly attracted more followers in the wake of new waves of activist jurisprudence, as examples bellow will illustrate. This section will briefly revise scholar discussions incited by waves of activist jurisprudence that deal with the ability of domestic courts to induce social processes of norm concretization.

North American early scholarship constitutes an important foundation for further studies dealing with efficacy of international courts, particularly on account of its interest in analysing the extent to which courts could contribute to facilitate social changes. Notably, from the 1950's onwards, following the issuing

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[16] According to Levine, the abundance of such studies has "muddled our understanding of judicial effectiveness as much as it has clarified it" Levine, Becker, [1969], 1970: 583. Indeed, despite some isolated attempts of defining terms, there is not a widely accepted and clear conceptual differentiation between effectiveness, effectivity, and efficacy in social-legal studies. This thesis adopted the term "efficacy". Toufayan, retrieving a term of W.B. Gallie, raises the notion of "essentially contested concept". The latter "used this idea in relation to abstract, qualitative notions such as art, religion, science, democracy, and social justice to describe "concepts the proper use of which inevitably involves endless disputes about their proper uses on the part of their users," and these disputes cannot be settled by appeal to empirical evidence, linguistic usage, or the canons of logic alone. Toufayan, 2010.

[17] Aristotle, Politics II.8, 1269a20; Postema, 2008: 53-56; D'Aspremont, 2014: 165-166.

[18] Neves, 2007: 47.

of landmark Warren Court decisions, North American scholarship produced a significant literature on the impact of the United States' Supreme Court decisions[19], which is relevant to the present discussion for a variety of important reasons. Firstly, the continental dimensions of the United States and the existence of a degree of legal autonomy within each of the Federal States contribute to simulating a scenario similar to the one in which international law operates, which is characterized by volatile engagements between domestic and international courts. Secondly, this literature contains a strong empirical component, offering useful methodological blueprints for future scholars committed to empirical research[20]. Thirdly, it provides useful information on procedures normally taken to implement orders; the responsiveness of legal actors, including judges of lower courts, government officials, and legal elites; and general effects of the Court's decisions. This information has considerable relevance to the establishment of comparative lines between the implementation of international decisions and domestic decisions, as well as the elucidation of domestic patterns of compliance. Fourthly, these studies were written more than half a century ago, which is significant because socio-legal studies repeatedly stress the limits of dated sources and analysis carried out too close in time. Such limitations are a common caveat of many recent studies involving international courts. Viewing the effects of Supreme Court decisions in hindsight enables the identification of problems derived from short-sighted analysis and the avoidance of similar shortcomings in a contemporary study. It permits, for example, an appreciation of how so-called "failed decisions" may have significant effects in due time and, by extension, reason to believe that international courts with low rates of compliance may be supporting greater structural changes through for-now-declared "failed decisions".

An example of how pessimist appraisals may gain perspective with time emerges from a note about one of the most emblematic decisions issued by the Warren Court. In 1968, a commentator would compare the "feeble effects" of the Supreme Court's decision in *Brown v. Board of Education* handed down in 1954

[19] Wheeler, 2011: 21; Levine; Becker, [1969], 1970: 585-586; Wasby, 1970; Feeley, [1969], 1973.
[20] Wasby comprehensive account, developed through the 1960s-1970s is surprisingly coherent with current methodological challenges presented to the empirical study of efficacy of international courts. See Wasby, [1969] 1973: 214-217.

with the results of the Civil Rights movement that broke out in the United States in 1961.

> The Supreme Court's decision in Brown v. Board of Education had been on the books for nine years, yet painfully little progress had been made towards educational and political equality, particularly in the states of the South [...] So a younger civil rights leadership turned from the courts to the streets, from constitutional adjudication to massive nonviolent protest and resistance as the grand strategy for redress of the historic injustice. There was nothing cloudy about the results. More was done for racial justice in the seven years after 1961 than in the ninety-six years that followed the Civil War. Not even the filibuster could contain the force exerted. The triumph of social activism is recorded in subsequent acts[21].

Notwithstanding the importance of the Civil Rights Movement and of street level politics at that time, half a century later, nobody would deny the importance of the Supreme Court's decision to the social activism of 1961, as well as to the subsequent promotion of civil rights worldwide. If the Supreme Court did not spur the conquest of equalitarian rights in the United States, its decision at least provided a solid foundation to the process of conquering civil rights. Indeed, litigation is normally only one component of a multifaceted civil society campaign for conquering and protecting rights.

While the Civil Rights Movement was crucial for facilitating changes in the United States, the decision remains a landmark precedent that has been continuously used globally to foster civil rights. It is unlikely that history can replicate the social and political conditions that underpinned the Civil Rights Movements in the United States, but the precedent conceived in court can be used to instil a normative framework appropriate for supporting similar contestations. It is reasonable to assert, therefore, that the localised movement that arose in that instance may not have had the same force and widespread effects without a legal decision. This example together with the scholarly commentary offered above suggest how some decisions will require time to

[21] Jones, 1966: 195-198.

allow a clearer assessment of their importance and effects. In addition, it reveals how social structures combined with formal legal actions may have a distinctive symbiotic relationship in intensifying the efficacy of legal precedents. Together, Civil Rights Movement, street level politics, and litigation turn to be complementary rather than competing causes for the stronger promotion of civil rights worldwide.

Another example of activist jurisprudence developed in Indian Courts. Long-standing literature has stated that courts in that country act as "the last resort for the oppressed and the bewildered", exploring the role of public interest litigation in leveraging social transformation and advancing socio-economic rights[22]. Likewise, South African and more recently Kenyan courts have also been the object of studies investigating the role of courts and their decisions in promoting social changes[23]. In Europe, countries previously in the Soviet sphere of influence such as Hungary and Poland have had courts with extended functions and activist jurisprudence for some time[24]. In Latin America, Colombia has been the leading exponent of both activist practice and studies on effects of the decisions issued by the constitutional court. Remarkably, the declaration of "a state of unconstitutional affaires" by the Colombian Constitutional Court in cases regarding the integrity of human defenders[25] and the rights of prison inmates[26] has moved the state to undertake substantive actions[27]. Particularly, the "super/macro-decision" T-25/2004, concerning the violation of rights of the second-greatest population of displaced peoples in the world, "has compelled an expansion of the traditional limits surrounding discussion of rights, social and institutional structures, and efficacy of courts"[28]. On the one hand, other competing causes have contributed to expand the impact of decisions produced

[22] Baxi, 1985.
[23] O'Loughlin, 2016.
[24] For a thorough study of the expansion of functions of constitutional courts, increased interaction of domestic and international courts globally, and the formation of "transnational constitutional laws" through this process, see: Thornhill, 2016: 217, 238, 350 (offering accounts on different polities in America, Europe, Africa, and Asia); Maldonaldo, 2013 (focusing on the cases of India, South Africa and Colombia).
[25] Constitutional Court of Colombia, *T-590/98*, 1998.
[26] Constitutional Court of Colombia, *T-153/98*, 1998; Constitutional Court of Colombia, *T-606/98*, 1998; Constitutional Court of Colombia, *T-607/98,* 1998; Constitutional Court of Colombia, *T-847/00*, 2000.
[27] Constitutional Court of Colombia, *SU-559/97*, 1997.
[28] Garavito, 2010: 21; Garavito, 2011; Constitutional Court of Colombia, *T-25/04*, 2004.

by activist courts, compromising attempts to measure the sphere of judicial influence over social reality. On the other hand, direct responses to objective requirements of courts prove their relevance on bringing reality close to established rights.

Rising judicialisation, growing functions of courts, and greater effects of legal decisions upon structural problems have stimulated scholars worldwide to engage with assessing the efficacy of domestic courts and their ability to conduct in-depth reforms. A similar phenomenon has occurred beyond the limits of national states. At the international level, the global trend of judicialisation of law is reflected in the growing number of international adjudicatory mechanisms. Depending on the criteria used, it is possible to count between 24 to over 100 active international courts and tribunals in contrast with the handful that existed in the mid 1980s[29]. Currently, the field of human rights alone boasts three regional courts and a number of quasi-juridical mechanisms. Moreover, around 90% of international court decisions have been issued within the last two decades, evincing new dynamic foundations to international law[30].

The exponential increase in the number of international courts, rates of international litigation, and decisions delivered by international mechanisms has led to the development of an emerging scholarship investigating international courts and their effects. The next section will review current scholarship on the efficacy of international courts, emphasising those studies that attempted to carry out a comprehensive empirical study.

2.3 Efficacy and international courts

Continuing the efforts initiated in the previous section, which illustrated the domestic foundation of empirical studies about efficacy of courts, this section is going to describe several similar studies within international courts scholarship. Without intending conduct an exhaustive review, I will present a sustained

[29] Different sources offer different results and some accounts extrapolate the limit of one hundred International legal mechanisms. See also: "Yearbook of International Organizations" edited by the Union of International Associations. Available at: https://uia.org/yearbook. Access on: December, 2017.
[30] Alter, 2014; Madsen, 2015:4; Palmer Olsen, Toddington, 2014.

explanation of contemporary literature on international courts, emphasising prominent empirical studies addressing efficacy of international courts. To begin with, this section will examine a set of pioneering studies in the field of international courts that attempted to map, classify and understand the legal structures that have formed an evolving international judicial system. Then it will describe how inquiries about the functions of international courts, which emerged from these initial instrumental studies, can contribute to efficacy studies, introducing the most prominent model advancing this correlation. Following this, it will consider studies positioned in arguably the most productive cluster of inquiry into efficacy of international courts, the one that tries to identify factors and variables that affect court's performance and identify organ's responses to decisions. Finally, it will engage in a brief discussion about efficacy and judicial legitimacy.

Initial studies about international courts attempted to clarify the conditions and historical factors that gave rise to a multitude of international courts by tracing the process of formation, institutionalisation and expansion of an evolving international judiciary[31]. Important initiatives, as the PICT (Project on International Courts) Research Matrix project, "offered comprehensive and systematic attempts of mapping the international judicial system"[32]. Until 2004, this project identified and grouped 18 international judicial bodies in six clusters according to criteria of geographical scope and subject-matter jurisdiction. The number has been updated in recent years[33]. Since then, substantive literature has been dedicated to endogenous studies analysing the nature, structure, function, composition, procedures, characteristics, and scope of international adjudicatory mechanisms[34].

From this literature, investigations dedicated to delineating the functions of international courts are particularly important to the study of court efficacy. The elucidation of the functions attributed to a court tracks a strict relationship with

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[31] O'Connell, VanderZee, 2014.

[32] For more information about the project, visit: http://www.pict-pcti.org/publications/synoptic_chart/synop_c4.pdf. Access on: December, 2017

[33] A synoptic chart with all Courts mapped by the initiative is available at: http://www.pict-pcti.org/publications/synoptic_chart/synop_c4.pdf. Recent updates were carried out by Alter, 2014. Access on: December, 2017

[34] Madsen, 2014: 404.

the assessment of its efficacy to the extent that functions give an objective criteria to evaluate performance. By elucidating scope and descriptive aspects these investigations attempt to theoretically set limits to the court's mandate and responsibility over social structures.

The main study relating the question of efficacy to courts' goals is Yuval Shany's *Assessing the Effectiveness of International Courts*[35]. In this seminal book, Shany proposes the model of goal-based effectiveness, which suggests that the efficacy of courts can be measured by their ability to fulfil their objective aim, normally established by their treaty mandates[36]. In order to provide support to his model, Shany applied his goal-based approach to five courts from different regions and scope.

The goal-based model proposed by Yuval Shany appears to be a suboptimal model to evaluate the efficacy of the Court. On the one hand, the correlation between functions and efficacy is important because it clarifies the limits of the Court's mandate and the shared responsibility of international courts, state organs and domestic constituencies in protecting human rights norms. On the other hand, at the empirical level the model fails to address the multiplicity and changeable functions that courts also serve in terms of their potentially broad effects over society—especially courts that extrapolate their mandates and set out to provoke significant social change, such as those activist judiciaries mentioned in the first section[37]. In addition, the model suggests an endogenous observation of courts, restricted to their functions and purposes. As a result, it

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[35] Shany, 2014.

[36] Shany, 2014. See also Milano, 2005: 24 (Affirming that "Analysis on the effectiveness of tribunals has concentrated mostly on the implementation of social objectives sought within the spirit of the conventional instrument. That is why effectiveness in this context resembles the concept of efficacy of treaty instruments").

[36] The courts analysed are ICJ, WTO DSS, ICC, EDHR, and CJEU.

[36] Shany itself appoints some of the limits of his model (Shany, 2012, p. 230). Some of the functions commonly attributed to international courts are: settlement of disputes, which in the case of human rights courts may involve awarding reparations; safeguarding the overarching objectives of a treaty regime and exercising conventional review; enforcing laws and improving state compliance with conventional norms; stabilizing normative expectations; engaging in judicial lawmaking to clarify or expand conventional obligations and to elucidate legal practices; enhancing the legitimacy of international norms, institutions, and public authorities; and diffusion of appropriate international law.

[37] Shany itself appoints some of the limits of his model (Shany, 2012: 230). For discussions about functions commonly attributed to international courts see also Bogdandy, Venzke, 2014. International courts' functions will serve as guides of some of the layers of the "efficacy chain" presented in the section 2 of this chapter.

often overlooks social processes, disconnecting courts from surrounding social and institutional structures[38].

For example, associating efficacy to the goals of the IACtHR has proved problematic. There is no consensus on the court's "specific objective aim", it being very likely that the court holds multiple and changeable functions. Using the goals determined by foundational documents of the Inter-American System, as proposed by Shany, does not simplify the task of determining a functional parameter by which to assess efficacy. If the purpose of the Court was the source by which to measure its efficacy, there would be little doubt that the Court has been mostly successful in applying and interpreting the American Convention on Human Rights[39]. Notwithstanding this success, the goal of the Court goes clearly beyond the one set by its statute. The Convention, in its turn, does not establish an exclusive mandate for the Court. By establishing a subsidiary regime, the Convention actually prescribes a shared mandate for Court and State-Parts[40]. In consequence, failures in fulfilling the Convention's mandate represent only a partial stain on the Court's efficacy. Moreover, while some regional human rights treaties and protocols have been modified to textually reflect the dynamic aspect of law, the Convention has never been substantially modified since it was, adopted in 1969, —a contrast with the Rule and with the Statute of the Court that have been frequently amended. The static character of the written text of the Convention diverges from the new dynamic foundations of international law. Were the Court bound to the written text of the Convention and to a written mandate, it would not be able to update the Convention to adequately fall in line with the context that surrounds it[41]. As a matter of fact, recent decades have witnessed a shift and expansion of the Court's mandate and "ambitions". As a result, there is no consensus on the question of what would be the objective aim of the Court. Only in the last years, the Court has self-attributed to its own mandate new functions, extensive jurisdiction over other human rights

[38] Madsen, 2014: 395.
[39] IACtHR, Statute of the Inter-American Court of Human Rights, article 1:"1.3 The Inter-American Court of Human Rights is an autonomous judicial institution whose purpose is the application and interpretation of the American Convention on Human Rights".
[40] This subsidiarity makes it that the efficacy of the Court cannot be totally dissociated of the efficacy of other elements in a chain of normative concretization. See: Brunnée, Tope, 2001.
[41] Dulitzky, 2017: 297.

instruments, comprehensive reparatory faculties, and a comprehensive supervision system of sentences.

The numerous functions of international courts reveal that efficacy rests on multiple pillars. As a result, it can become manifest in different dimensions and must be measured on a gradual scale instead of absolute terms. Although some authors have focused on one-dimensional aspects of court's efficacy such as compliance or adequacy, new studies have proven that efficacy is essentially multidimensional. Helfer, for example, proposes a model that focuses on four dimensions of international court effectiveness (case compliance, *erga omnes* effects of decisions, degree of embeddedness of decisions in domestic legal actors, and norm-development)[42]. Likewise, Garavito has identified six social effects stemming from the decision T-025/2004, despite its pending-compliance status[43]. Multidimensional approaches to efficacy normally assume that implementing decisions is contingent upon an integrated process involving various institutional and social structures. Such approaches are, thus, less endogenous and more attentive to social processes[44].

Focusing on such social processes, a far-reaching group of studies is dedicated to distilling conditions and variables that may affect the efficacy of international

[42] Helfer, 2014: 1 (According to the author, "case-specific effectiveness, evaluates whether the litigants to a specific dispute change their behaviour following an IC ruling, an issue closely linked to compliance with IC judgments; erga omnes effectiveness, assesses whether IC decisions have systemic precedential effects that influence the behaviour of all states subject to a tribunal's jurisdiction; embedded effectiveness, evaluates the extent to which ICs anchor their judgments in domestic legal orders, enabling national actors to remedy potential treaty violations at home and avoid the need for international litigation; and effectiveness in developing international law or norm-development effectiveness, considers how IC decisions contribute to building a coherent body of international jurisprudence).

[43] Franco, Garavito, 2010.

[44] Feeley, [1969], 1973: 227 (advocating the replacement of a theory of impact of the Supreme Court by/with/for a theory taking into consideration a more integrated perspective on separate institutions that contribute with implementation of decisions: "The very emphasis on a single institution, rather than on a general process, considerably limits the scope of inquiry and the level of abstraction and generality (…) In a sense, such an inductive approach – if extended – would require the development of a theory of each separate institution, and in many ways contribute to fragmentation rather than integration of knowledge […] I'm not proposing, however, that either theoretical or empirical analysis of the Supreme Court's impact be abandoned. Rather what I'm suggesting is that the search for a theory of impact of the high court be abandoned and replaced by a more generalized perspective and (perhaps) a less ambiguous central concept"); Madsen, 2013; Brunnée, Toope, 2001; Schnapper, 2010: 399 (being the first sociologist at the French 'Conseil Constitutionnel', Schnapper concluded that "The only way to adequately represent any particular instance, then, is to represent it as a complex and potentially contradictory intertwining of institutions, individuals, sensibilities, histories, and meanings").

courts[45]. This group dedicated to using efficacy as a tool to elucidate factors that contribute to international courts' performance constitutes the most numerous cluster of inquiry in the field of efficacy of international courts. Three studies are seminal in this area.

The first important contribution to the field of efficacy of international courts within this cluster is the robust *A Europe of Rights: The Impact of the ECtHR on National Legal Systems*, edited by Hellen Keller and Alec Stone Sweet. As does this thesis, the authors give empirical attention to the capacity of international courts to influence law and politics at the domestic level.

Sweet and Keller's work systematically describes variances in the impact and influence of the European Court of Human Rights on 18 national legal systems. The book represents a coordinated comparative effort, using the process of reception, defined as the "process through which *official mechanisms* confront, make use of, and resist or give agency to the Convention rights" to deduce effectiveness. It proceeds to evaluate historical, political, and legal structures that may affect the process of reception and, therefore, influence the degree of impact of the ECtHR. Each of the nine national reports presented in the book examines two selected polities and responds to the same stipulated structural questions about legal structure and the developed interaction between domestic polities and conventional and international law. Each report includes a section in which it presents a comprehensive overview of the ECtHR Case Law pertaining to the analysed state. The main intention of the book is to evaluate how the ECtHR is incorporated to national legal systems and how the process of reception can affect a regime's effectiveness "cross-nationally and across time".

Sweet and Keller's research is undoubtedly rigorous and it provides substantive empirical data on the status and effectiveness of the ECtHR in the polities under consideration. However, the legalist tone of the reports inhibits combined sociological and legal attempts to discuss efficacy. For example, the preference on official acts attached to the process of reception results in disregarding societal movements occurring outside state bureaucracy. It also neglects such movements taking place beyond the shadow of decisions. While affirming that "it is through the decision-making of national officials (all agents

[45] Helfer, Slaughter, 1997; Posner, Yoo, 2005; Keller, Stone-Sweet, 2008; Hunneus, 2016.

of public authority—including judges, legislators, and administrators—who are authorised to make decisions that might affect the status of the ECtHR within the national legal order) that the Convention is given domestic agency", the authors overlook the importance of "compliance constituencies" formed on the borders of state organs[46].

In addition, the choice of a state-based analysis limits the observation of "transnational streams of rights" induced by ECtHR decisions[47]. Such streams may provoke simultaneous advances regarding the same issue in several polities. They represent, therefore, an important variable that is located outside national legal systems but that have generalised effects on the impact of the ECtHR. In that matter, Helfer and Voeten developed an important account of how courts may boost impact via "transnational streams of rights" in the context of LGBTI rights. Although remarking that judges require the "right domestic political and institutional conditions", Helfer and Voeten describe how ECtHR judgments increase political salience of certain rights, enabling judges to undertake substantial reforms even when public support for such rights is low. Examining the diffusion of LGBTI rights across Europe, the authors affirm that "ECtHR judgments increase the likelihood that all European nations will adopt pro-LGBT reforms, in observance of the regional jurisprudence", estimating that "a judgment encourages an average of eight states to alter their policies over a decade". In these cases, the existence of a transnational stream of LGBTI rights initiated by international decisions seems to have as great importance as domestic variables to explain the impact of the ECtHR.

The state-based framework adopted by Sweet and Keller restrains the space of observation given to the systemic influences and *erga omnes* effects of ECtHR's decisions over multiple domestic legal orders. This is a relevant flaw of the model because it neglects the "porosity" of the human rights field that allows rights to migrate through domestic legal orders. As a result, Sweet and Keller's account of variables that explain why impact is sometimes broad and pervasive and at other times limited offers a helpful overview of legal factors endogenous to states, but fails to identify systemic and evolving regional processes.

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[46] Alter, 2014: 348-49; Helfer, 2014: 474.
[47] Helfer; Voeten, 2013.

The second important study within this cluster that offers a complementary vision and fills some of the lacunae of Sweet and Keller's account is the approach set out by Karen Alter in *The new terrain of International Law*. Alter's book represents a successful attempt at updating the academy with new developments in international law brought about by recently established international legal mechanisms, representing the most comprehensive effort in this line since the PICT Research Matrix project. Surveying two dozens international courts around the world, and equipped with didactic graphics and comparative tables, her book provides a good overview of the international judicial system, facilitating comparative analysis.

Alter offers an evolving view of the international judiciary and of its constitutive landscape of rights and international politics, depicting international courts as emerging political actors. Of greatest importance to the present study, Alters attempts to explain how international courts have been affecting domestic and international politics, how invoking international law has contributed to altering state organs behaviour "in the direction of greater respect for the law", and why the influence of international courts varies across polities.

Alter's book does not have the same empirical breadth of Sweet and Keller's; she uses only 18 hard cases to "inductively build theory". Despite her successful attempt at providing cases with geopolitical diversity and not so successful attempt at explaining her guiding criteria ("cases that are litigated and where the defendant government lost, because it is easier to see the influence of international courts in such cases"), the empirical basis of her book does not offer latitude to support all her claims. For example, most of the contentious cases in the field of human rights could fit her selection criteria. Defendant states are often plead guilty and held responsible for the breaches they were accused of. This is even more common in litigation before human rights courts. Therefore, virtually all human rights cases in which the "defendant government lost" could meet her criteria. The selection of the case *Mayagna (Sumo) Awas Tingni Community v Nicaragua* among all the jurisprudence of the IACtHR, then, seems to be motivated by its capacity to give a better illustration of her arguments than an arbitrary selection would as she "inductively builds theory". Therefore, Alter is not clear about the reason that has led her to select 18 hard cases out of the

thousands that could fit into the criteria she established, which raises doubts about her inductive method. Furthermore, Alter appears to favour a state-based approach to verifying effects of the Court, and so limitations similar to the ones attached to Sweet and Keller's study apply.

Alter's greatest contribution lies in the special emphasis given by her analysis to the interactions between litigant pressures, domestic and international forces, and how these interactions can "propel change in the direction the law indicates". By exploring how international courts' decisions can provide legal and political resources to be used by "compliance constituencies" to influence state organs behaviours, Alter persuasively addresses the missing point of the Sweet-Keller analysis. With these dynamics in mind, Alter advances the idea of "compliance constituencies", referring to domestic structures that can push state organs to align their actions to international law.

Using a similar argument, Hillebrecht's account is one of the most prominent comparative studies about compliance with decisions of the ECtHR and IACtHR[48]. In her book *Domestic Politics and International Human Rights Tribunals: The Problem of Compliance*, Hillebrecht introduces the "Compliance with Human Rights Tribunals (CHRT) Dataset" and tries to find the "microfoundations" of compliance. The author proposes three hypotheses regarding the factors that motivate states to comply with international decisions: "(1) signaling a commitment to human rights, (2) advancing and legitimising domestic human rights reform, and (3) providing political cover for contentious or politically divisive policies". She then goes on to test these using in-depth case studies involving Argentina, Brazil, Colombia, Italy, Portugal, Russia, and the United Kingdom. Of most importance for the present study is her exploration of how compliance processes unfold, and what the effects are of compliance upon the protection of human rights. Like Alter, Hillebrecht assumes a bottom-up perspective of compliance and considers that "international human rights tribunals can be a galvanizing force domestically, providing a lightning rod around which domestic coalitions can promote policy change and advance domestic human rights reform".

[48] Other comprehensive quantitative studies about compliance with IACtHR decisions are offered by: Basch *et al*, 2010; González-Salzberg, 2010; Baluarte, 2012; González-Salzberg, 2011:115 (commenting on the diverging results of the previous studies).

Hillebrecht's work stands out as a robust contribution to compliance theory, moving beyond previous efforts and adding some sociological content to an area prominently instrumental. However, the focus on compliance overshadows the discussion of other important aspects related to the efficacy of international courts. At the core of Hillebrecht's argument is that "rulings handed down by courts are at the centre of their mission to protect human rights, and state's compliance with these rulings is critical for the tribunals to meet their objectives". The author adds that "the most concrete effect of the tribunal's ruling is in states' compliance with them". Hillebrecht is correct at reassuring the critical role of compliance for international courts. Nevertheless, the focus on compliance excludes, for example, a computation of efficacy contingent upon spontaneous observance of jurisprudence of the Court by states that are not involved in a contentious procedure. Even when the Court does not issue a final ruling, state organs and constituencies can borrow the Court's jurisprudence to enhance human rights domestically elsewhere. Compliance also fails at measuring the efficacy of the Court on strengthening domestic coalitions, a point emphasised by Hillebrecht. It also neglects, as affirmed by the author elsewhere, to address qualitatively the impact of different modalities of reparation[49].

In addition, by using states as centres of analysis, Hillebrecht, like other scholars, overlooks forces operating transnationally and ground forces supporting compliance processes that operate at the borders of the state. For her, it is not only compliance that has effects on the protection of human rights, but rather the whole process triggered by either complying or diverting from decisions. For example, when Hillebrecht affirms, "compliance with international human rights tribunals' rulings is an inherently domestic affair", she ignores the participation of non-domestic forces in the process of compliance. She also ignores the pervasive effects that continuous non-compliance or withdrawal of some polities may have over the regional regime as a whole. It may be true that the process of implementing decisions has necessarily to be undertaken by "state actors" and "domestic political forces", but these do not act in isolation. Hence, compliance may be executed by state organs but it is inherently a regional (global) affair.

[49] Hillebrecht, 2009: 368.

The studies of Yuval Shany, Alec Stone Sweet and Helen Keller, Karen Alter, Courtney Hillebrecht and Laurence Helfer can reasonably be classified as the most far-reaching accounts of efficacy of international courts grounded in empirical research. They provide important data and fundamental theoretical inputs for the development of the "efficacy chain" that will be presented in the following section. However, there are some diverging points between the present study and this literature that will be presented below.

The study of the efficacy of international courts is mainly dominated by legalist and science policy approaches, with modest sociological contributions. Markedly, this thesis adopts a combined sociological and legal perspective that it considers paramount to elucidating interactions of international courts with deeply entrenched normative, institutional, and social structures. Some of these studies are attached to a linear chain of effects that starts with an international decision and affects defendant states, disregarding diffuse effects that a single decision may cause on other polities. With exception of Helfer's study about LGBTI rights diffusion in Europe, the accounts of the authors examined above adopt a state-based perspective that imposes limits to the observation of transnational processes of rights development, as well as to the diffuse effects emanating from singular decisions. The state-based perspective here criticized refers to the consideration of states instead of issues as a main point of analysis. In that respect, this study guards difference from state-centred studies because it considers, as in Helfer's account, the existence of transnational streams of amnesty rights, indigenous rights, and detainees rights. By considering these transnational streams, it observes possible effects initiated by international decisions issued by the IACtHR.

In addition, some of these studies are too concentrated on a single aspect of efficacy – mainly compliance or adequacy – losing perspective of the chained process that 'normative concretisation' evokes. Finally, and most importantly, even when examining international human rights courts, some of these studies leave individuals and victims out of the picture, excluding their perspective from the assessment of impact or efficacy. In that respect, this study guards difference from others because it adopts a broad concept of efficacy and it considers a victim perspective when assessing efficacy.

After reviewing the main literature engaging empirical research and efficacy, it is necessary to conduct a brief discussion about the legitimacy of international courts. On this topic, a group of interdisciplinary studies about international courts have addressed questions related to themes such as legitimacy, autonomy, and efficacy focusing on "systemic issues and challenges arising from the absence of co-ordination, hierarchy, and established constituencies"[50].

Studies of the legitimacy of international courts are organised in terms of two dominant perspectives: normativity and effectiveness[51]. To be true, demonstrating efficacy is a common approach to explain legitimacy and justify the existence of international courts; however, it is important to restrict the association of effectiveness with legitimacy. As efficacy constitutes an autonomous field of study, an extension of this association would not be accurate. Although it is important to recognise the use of efficacy-based arguments to defend the legitimacy of international courts, it is even more important to recognise efficacy studies as an independent line of inquiry. For example, studies aiming exclusively on the efficacy of international courts are often focused on observing evolving societal and normative dynamics, examining how courts are "fulfilling their specific objective aim", or dissecting how courts function or hypothesising how they can function better. These are just a few examples of goals other than legitimacy that may guide efficacy inquiries. Furthermore, the subsumption of efficacy studies into legitimacy scholarship adds a political element that may divert and even corrupt socio-legal analysis.

Challenges to the legitimacy of international courts have sometimes revolved around the discussion of sovereignty, democracy and systemic issues. Not surprisingly, such discussions have often echoed domestic debates about expansion of the judiciary and legitimacy of courts' reach over national legislators[52]. A vocal critic of the deleterious impacts of the "new constitutionalism" over democratic practices, social justice and material

[50] This is the description of an investigation line of PluriCourts. See also: Romano, 2009; Vinuales, Dupuy, 2012; Palmer Olsen, Toddington, 2014.
[51] Madsen, 2014: 405 ("Echoing domestic disputes at legitimacy of Courts over legislature, and legitimacy of Courts to go beyond their mandates, the question of legitimacy has become a focal point for understanding the practices—and even existence—of ICs. The dominant debates have either played out in more normative terms as part of discussions of the alleged democratic deficits of ICs or in more pragmatic terms with respect to the effectiveness of ICs").
[52] Madsen, 2015:19.

redistribution is Ran Hirschl. Basing his analysis in a poorly representative number of constitutional democracies (Israel, Canada, South Africa, New Zealand), Ran Hirschl criticises the "shift away from majoritarian decision-making arenas toward insulated, professional policy-making institutions"[53]. His pessimist account of constitutionalism is hardly applicable to most Latin American countries; for example, the presupposition that domestic judiciaries are ascribed with limitless power is incorrect, as demonstrated by the existence of the Inter-American Court of Human Rights and other international legal organisms. The description of international tribunals as legal organs with "constrained independence" seems to be closer to facts than a depiction of a legal 'Leviathan'[54]. Subsequent analysis will reveal limits to the Court's decisions and autonomy. The idea that courts have deleterious effects over democratic practices, social justice, and material redistribution will also be contested in following chapters dedicated to empirically analysing the effects of decisions of the Court.

2.4 Efficacy Chain

2.4.1 Introduction

Building on previous empirical efforts aimed at examining the efficacy of international courts, this model is a response to existing literature that overlooks important socio-legal aspects of efficacy. Previous models either overly emphasize a single aspect of efficacy, neglect social processes unleashed or reinforced by international decisions, or did not seriously consider individuals in their analysis. Rejecting the constraints inherent to these approaches, this study adopts a multi-layered working concept of efficacy. Instead of chasing stand-alone definitions of efficacy, which are almost always devoid of suitable analytical function, it presents a model which I term "the efficacy chain".

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[53] Hirschl, 2004.

[54] Helfer, Slaughter, 2005 (contesting the hypothesis that dependent tribunals are more effective than independent tribunals and presenting the idea of "constrained independence" to dispute the idea of an unbridled/absolut liberty of international courts).

The term and the intuition of an efficacy chain derives from both the "chain of normative concretization" proposed by Marcelo Neves, and a perception of the nuanced, multidimensional, and relational character of efficacy of international courts[55]. Other theoretical contributions will be gradually mentioned at each layer of this model. Alter, in a similar construction to my own, develops a process-based approach in which she breaks the litigation process down into three stages and studies the specific influence of International Courts in each stage[56]. Alter emphasises the litigation process, and how each of these steps and the interactive effects they contain can lead to variation in the observed influence of international courts. In contrast, my model focuses mainly on the aftermath of the litigation process. Our purpose is, however, similar. According to Alter, "by identifying how different factors matter at each stage of the litigation process, and how litigation efforts can succeed or fail at each step of the process, the altered politics framework provides a natural starting point for developing scope conditions and testable hypotheses"[57]. Indeed, by considering fields of observation of normative concretisation and how efficacy can vary at each layer of the "efficacy chain", this model provides support for comparative analysis of how the efficacy of the Court may be interacting and varying in each layer. Similarly, Helfer, in his account of effectiveness, proposes a quadruplicate model and conducts his analyses through four different dimensions of efficacy, but not necessarily in a concatenate manner[58].

The efficacy chain reflects a need to contextualise efficacy beyond the "actual situated practices" of international courts, which means to situate their efficacy within "simultaneous transformation of the societal structures in which they evolve" and long-term social processes[59]. At the foundation of the efficacy chain is the belief that the effects of court decisions can be transformed through social interaction in a "continuous, mutually generative process"[60].

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[55] Neves, 2007: 42-47.
[56] Alter, 2014 (indicating that "each time frame is a threshold where different actors play a decisive role"). ".
[57] Alter, 2014.
[58] Helfer, 2014.
[59]Madsen, 2011: 269-271; Madsen, 2014:402.
[60] Brunée, Toope, 2001: 187 (suggesting an interactional approach to International law, underpinned by constructivist theory: "Institutions, norms and rules frame interactions and

The "efficacy chain" here proposed is composed of five layers: observance; application; strengthening (instead of enforcement); implementation (instead of compliance); and adequacy (of normative, institutional and, mainly, social structures). Each layer outlines core aspects related to the IACtHR's efficacy, distilled from previous studies in the field of sociology of law and from jurisprudential analysis. Layers represent dimensions of potential normative and social impact for rulings of the Court. To achieve this, they also offer fields of observation of legal practice in combination with multiple levels of social life[61]. In addition, layers do not follow a sequential or hierarchical order, and they may often overlap and have effects over each other.

The "efficacy chain" proposes a landscape upon which it is possible to observe interactions of law and society stemming from decisions of the Court, and in so doing provides a theoretical foundation for this very first comprehensive socio-legal study of the IACtHR's efficacy. The model is not definitive in its structure and may be adapted to the practice of other international courts according to their field of speciality, structure, and functions. The use of layers gives visibility to aspects of efficacy often neglected by other investigations, and helps to identify social structures in which the court is having greater effects or insufficient penetration. For this reason, rather than a binary view, this model will provide a gradual, nuanced and relational assessment of efficacy[62].

Of central importance, this efficacy chain intends to address not only a "missing sociological insight"[63] in existing studies of efficacy of international human rights court, but also a perspectival flaw. Namely, Human Rights courts

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discourse, and influence the identities of actors. In turn, institutions are themselves re-shaped through interaction and discourse, and the attendant identity changes produced in actors).

[61] These fields guard some resemblance but do not correspond strictly to the concept developed by Bordieau. Here, they describe sites of contestation over defining, concretizing and autonomizing law as established by the Court's decision. In some sense they are sites of struggle and competition for preveilance. See Madsen, 2014: 400.

[62] D'Aspremont describes effectivity and effectiveness as opposite and sometimes overlapping processes. While outward-natured effectiveness refers to the process in which "rules, institutions, and narratives of international law impact international law and law-appliers", inward-natured effectivity describes the "internalization of certain factual variables in the law itself". As here described, efficacy encompass both the process in which court's rulings affect law and legal actors and the process in which law, legal actors and social practice are internalized by the Court's jurisprudence. See D'Aspremont, 2014:165. See also Postema, 2008: 61 (admitting that law at the same time depend on and can have a profound effect on social practices, "the relationship between law and informal social practices is not merely a matter of intersection, but rather a matter of interaction of powerful reciprocal forces").

[63] Madsen, 2014: 389.

have been characterised as trustee courts because they act on behalf of "third party beneficiaries", "holders of treaty-protected rights", and "people living within the court's jurisdiction" [64]. When international human rights obligations are violated, the victims are individuals, not state organs or organisations. Trustee courts, like the Inter-American Court of Human Rights, exist "to permit individual persons to vindicate their rights against states that have compromised them" [65]. Thus, they serve "not the immediate preferences of member-state principals but rather the overarching norms and purposes of the underlying regime"[66]. Despite a common understanding of who the main signatories of a given regional human rights regime are, most studies involving international human rights courts do not contemplate the victim's perspective in their assessment of efficacy. In other words, existing scholarship devoted to assessing the efficacy of international human rights courts has not been sufficiently victim-oriented[67]. As a result, it is possible to find accounts attributing lack of efficacy to certain measures that deeply affected the life of single victims, local communities, or groups of individuals dealing with similar violations. The micro-perspective, manifested in individual as well as local histories, gains normally little space in more macro-oriented analyses of efficacy. It is reasonable to affirm that individual cases cannot prove the general efficacy of a court, but it is a mistake not to consider their efficacy at the micro-level. This study tries to conciliate macro-level analysis with the perception of how IACtHR's jurisprudence has affected individuals. In consequence, the configuration of layers of the "efficacy

[64] Stone Sweet, Brunell, 2013: 62; Alter, 2008: 39-41.
[65] Stone Sweet, Brunell, 2013: 62; Alter, 2008: 39-41.
[66] Stone Sweet, Brunell, 2013: 62; Alter, 2008: 39-41.
[67] Van Boven, 2013: 18-19. This deficiency is not exclusive to studies of efficacy of international courts, but part of a systemic problem that affects international law in general. The non-consideration of individuals is somehow enrooted in early discussions about an international bill of rights and individual access to international judiciary. See Lauterpacht, 2013 [1945]: 225 (It is, from this point of view, of minor importance whether and to what extent the Bill will effect a procedural change in the position of the individual in international law. There is no provision in the Bill for direct access of individuals to an international judicial authority by way of appeal from a final decision of national courts— though there is a clear and emphatic provision safeguarding the procedural right of petition). This vision has evolved and gained aspirational tones a decade. See Eleanor Roosevelt, during a speech in the United Nations in 1958 : "Where after all do universal human rights begin? In small places, close to home – so close that they cannot be seen on any map of the world. Yet they are the world of the individual person. [...] Unless these rights have meaning there, they have little meaning anywhere". (Excerpt from a speech by Eleanor Roosevelt at the presentation of "IN YOUR HANDS: A Guide for Community Action for the Tenth Anniversary of the Universal Declaration of Human Rights", delivered on Thursday, March 27, 1958).

chain" described in subsequent sections will provide support to the execution of victim-centred analyses in subsequent chapters.

In each of the following sections, I will present a working definition of each one of the five layers that compose the "efficacy chain", clarifying the aspects of efficacy they will examine. In sequence, I will set out a critical appraisal of previous studies that have addressed aspects of efficacy similar to the ones presented in each layer, highlighting points of convergence and disagreement with the model I advance. Finally, I will provide some direction on how to apply the efficacy chain and examine the aspects of efficacy contained in each layer, giving some practical examples. In the last section of this chapter, I will use the "efficacy chain" to illustratively demonstrate how it is going to support the analysis of efficacy of the jurisprudence of the Court in matters of amnesty law, indigenous rights and rights of detainees.

2.4.2 Observance

Observance is the first layer of the "efficacy chain" and refers to acts of spontaneous adherence to the Court's jurisprudence, without the issue of a final ruling or the existence of a contentious dispute involving the State within which an action of obedience was carried out. Observance, then, corresponds to (i) an anticipated action, that is (ii) in consonance with the Court's jurisprudence, and is (iii) carried out by any official agent of a state, of an international organization or of a domestic institution with legal personality, (iv) without the existence of a ruling on a contentious dispute ordering the action[68]. The observance layer will identify if state organs, international legal bodies, and other institutions not directly abiding by a specific legal decision have spontaneously observed the jurisprudence of the Court.

Commentators may disagree with the above definition of observance, and perhaps also dispute the spontaneity attributed to certain acts performed by

[68] Other authors also refer to phenomena similar to what is described here as observance. See: Neves, 2007: 73; Feeley, [1969], 1973: 225 (describing that the law of anticipated reactions occurs "when an actor anticipate the court's interests, feels constrained by them and acts accordingly even though there is no outward appearance of relationship or command"); Helfer, 2014: 1.

state agents. Indeed, it is certain that factors other than international rulings contribute to motivate official observance of court's jurisprudence[69]. However, in a context in which even final rulings are sometimes contested and often not fully obeyed, adherence to the Court's jurisprudence without a direct binding decision must be observed under a different perspective when analysing efficacy. In these instances, spontaneity mostly refers to the absence of a formal direct obligation before a decision.

Running with the association of spontaneity to a special and enhanced form of efficacy, some authors claim that voluntary engagement with a court's jurisprudence is tantamount to the bottom-line efficacy of a court and its decisions. According to them, effects are greater when they are the result of an "interactive process between parties" instead of a result achieved through coercive mechanisms [70]. Friendly agreements established during legal procedures before the Commission or the Court, which enjoy an 80% compliance rate, are a good example of observance and its enhanced efficacy. The high rate of full compliance with these agreements attests that "interactive processes between parties" normally result in high levels of implementation.[71]. This study will consider acts other than friendly agreements to attest that some states follow the jurisprudence of the Court even in cases that are not being processed at any level of the IAHRS.

When dealing with the analysis of the jurisprudence of the Court regarding amnesty laws, indigenous rights and the rights of detainees in subsequent chapters, the observance layer will explore actions carried out by international organizations, government officials, state organs, courts, and other domestic actors in the absence of contentious procedures within the Inter-American System in order to evaluate the degree of observance efficacy of the decisions. Complementarily, the analysis will also include prominent acts of observance conducted by organs of states outside the jurisdiction of the IACtHR, international organisations, and international courts. While observance practised within the jurisdiction of the Court may indicate an outcome of the doctrine of control of conventionality, increasing extra-regional observation of

[69] Jones, 1968: 76-77; Thomas Franck, 1990.
[70] Chayes, Chayes, 1995; Koh, 2005.
[71] Engstrom, 2017: 1259-1276.

the Court's jurisprudence might reveal a higher degree of efficacy of the Court in this layer.

2.4.3 Application

Application is the second layer of the "efficacy chain" and indicates the application of ACHR norms by state organs and its agents, by international organizations, and by other domestic entities endowed with legal personality. Application, then, corresponds to the (i) application of norms in conformity with the jurisprudence developed by the Court, (ii) by public authorities or legal subjects, (iii) who have the capacity to take decisions or enact official acts that are capable of formally affecting the status of ACHR norms in the domestic legal system, (iv) in legal documents, administrative guidelines, public policies or any other official document.

Importantly, although the term "application" refers primarily to legal application carried out by magistrates, in this layer it refers to any official agent in charge of applying or executing law[72]. This extended use serves as a reminder that law is also developed, executed and resisted outside courts and legal organs. Tellingly, as it now stands, the doctrine of control of conventionality is prescribed as a function and task of any public authority and not only of officials belonging to the judiciary branch[73].

This layer relates to the function of "judicial law-making" and the "norm-development effectiveness" of international courts[74]. Judicial decision-making and the correct, coherent, and persuasive production of law are primordial

[72] The abundant literature reinforcing the role of domestic courts to the maintenance of ACHR norms contrasts with the dearth of studies dedicated to examine contributions of other organs. About the key role performed by domestic courts: Nolkaemper, 2012; Alter, 2001; Hunneus, 2010:113; Helfer, Laughter, 2005: 290-300. Highlighting the role played by other domestic actors: Helfer, Alter, 2009: 4; Alter, 2014; Keller, Stone-Sweet, 2008: 687 ("By "national legal order", we include the domains of the legislature, the executive, and the judiciary. It is through the decision-making of national officials that the Convention is given domestic agency. By national officials, we mean all agents of public authority – including judges, legislators, and administrators – who are authorised to take decisions that are capable of affecting the status of the ECtHR within the national legal order").

[73] Dulitzky, 2015; Torelly, 2017; Mac-Gregor, 2017.

[74] Helfer, 2013: 12; Alter, 2014: 4 ("But even when law is not 100 per cent followed, law still serves a regulative role of creating guidelines and setting expectations, and the judicial system helps to clarify the meaning of the law and create some remedy for law violations, as imperfect as they may be.").

attributions of courts, but, in practice, other state organs also effectuate those functions. The quality of judicial lawmaking is directly related to the capacity of the court to promote normative stabilisation as well as elucidate legal practices[75].

When dealing with the analysis of the selected jurisprudence of the Court in subsequent chapters, the application layer will examine two aspects to evaluate the degree of application efficacy of the decisions: breadth of law-making, and strength of interpretative criteria developed by the Court.

To analyse efficacy in terms of law-making, this study will consider the legal developments and essential elements created by the Court's jurisprudence and whether they can clarify ambiguities, fill of legal lacunae, and redress and include individuals. For example, when decisions attribute specific rights to groups sub-integrated in domestic polities and legal orders (such as indigenous and tribal peoples, and inmates), the Court is actually carving out legal subjectivities. These legal subjectivities may guide domestic organs in recognising and attributing certain rights to those individuals that fit into the novel legal profiles they help establish. Interestingly, such legal subjectivities are frequently defined by a common set of shared rights rather than by steady sociological or anthropological profiles[76]. By carving legal subjectivities, the Court contributes to including sub-integrated groups within the domestic legal order and to clarifying which rights must be ascribed to them. Similarly, by associating certain forms of violation to certain forms of reparation, the Court creates precedents on how to avoid or to redress violations based on legal identities founded by shared (violated) rights.

To analyse efficacy in terms of the force of the Court's "precedent-based rationales"[77], this study will consider the degree of adherence of courts, governmental agencies and other domestic and international organisations to the precedents set out by the Court. Higher application efficacy may be indicated by how often ACHR norms are being applied and by how widespread the use of ACHR norms has become within the state bureaucracy.

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[75] Von Bogdandy, Venzke, 2014.
[76] Thornhill, Calabria *et al* (forthcoming).
[77] Stone-Sweet, Keller, 2008:14.

2.4.4 Strengthening (instead of Enforcement)

Strengthening is the third layer of the "efficacy chain" and it indicates the capacity of the Court's jurisprudence to contribute to the strengthening of normative, institutional and social structures within states under the jurisdiction of the Court and beyond. Strengthening, then, corresponds to the execution of (i) acts supported by a decision of the Court (ii) by any agent (iii) that result in the strengthening of normative, institutional and social structures that may hold state organs accountable for their conventional obligations.

Two lines of theoretical discussions give foundation to the layer of strengthening. The first line is, obviously enough, the discussion of enforcement. It is widely argued that the existence of coercive sanctions and effective enforcement mechanisms compose a strong causative force of compliance with decisions of courts[78]. This traditional association is challenged by the practice of the Court. It is generally accepted that domestic judiciaries have greater means of enforcement of decisions than international courts which establish "a legal regime with no teeth", that have "too many expectations and too little power". However, when a case reaches the Court it attests to the failure of an entire domestic legal system in providing redress for a victim or victims of human rights violations[79]. This failure indicates that the existence of stronger law enforcement mechanisms do not necessarily enhance human rights protection nor compliance with decisions of official organs[80]. Moreover, the fact that it possesses softer and less institutionalised means of coercion has not impeded the Court in developing a greater capacity for providing redress and producing jurisprudence with broader effects. Even though the Court does not have strong

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[78] This classical understanding is developed by: Jones, 1968: 77; Torpman, 2005: 148; Helfer, Slaughter, 2014: 283.

[79] Browlie, 1998: 14 (Developing an interesting argument about the comparison between domestic and international law efficacy :"On empirical grounds, given the number of civil wars, wars of secession and coups d'etat since 1945, a good case can be made for saying that public International law is *more* efficacious than *public* law within States. At any rate, whether or not such a judgment is sustainable, those who would judge International law would do well, on grounds of logical consistency, to start out by taking a hard look at the performance of *national* legal systems").

[80] Davis, Warner, 2007: 239-240 (defending the need of involvement of an International Court in states like Guatemala "because domestic enforcement mechanisms are irreconcilably deficient in this task, accountability must emanate from beyond the state").

enforcement mechanisms, organs of states still comply with its decisions. Lastly, if having mechanisms of enforcement was really essential to obtain efficacy, one would suppose that all decisions of the Court would have similar performance outcomes. However, the track record of the Court proves that different decisions have produced widely contrasting outcomes. In sum, these considerations suggest that traditional enforcement mechanisms, although important, do not determine the degree of efficacy of a case[81].

The second line of theoretical discussion relies on the foundations of strengthening. While the first line is restricted to enforcement, the second line contemplates all mechanisms that can lead to enforcement of decisions and ACHR norms. The elements that compose the normative, institutional and social structures addressed by this layer are closely connected with elements identified by other studies as factors that increase or reduce the influence of international courts decisions[82]. Differently from previous studies, the intention here is not to discern factors that influence the Court's performance, but to observe the elements that were most irritated by decisions and how they interacted with the efficacy of a line of jurisprudence. Most importantly, this layer evinces the long-term legacy of the IACtHR and how its decisions are formative of various structures of society[83]. The list of elements here presented is not exhaustive. Each chapter will highlight different elements, as each issue analysed tends to deal with different structures.

Illustratively, among some of the institutional structures that may be strengthened by court's decisions and that may enhance the court's efficacy are: institutionalisation of "mechanisms of reception" and standard procedures dedicated to compliance with human rights mechanisms[84]; institutional development of human rights-driven governmental organs dedicated to international litigation, execution of international decisions, realisation of

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[81] Cf. Downs, Rocke, Barsoom, 1996 (refuting but acknowledging a "managerial thesis" emerging from empirical research that attributes compliance rather to management than enforcement problems).

[82] Helfer, 2013: 2; Helfer and Slaughter, 1997: 273-290; Parra Vera, 2014; Hillebrecht, 2012: 959 -964; Garavito, 2010; Cavallaro & Brewer, 2008: 770; Alter & Helfer, 2010: 565; Medellín-Urquiaga, 2013: 419; Lauterpacht, 2013 [1945]: 175.

83 Thornhill, 2016.

[84] Stone Sweet, Brunell, 2008; CEJIL, 2009: 71-72; Celeste and Garavito, 2015: 298-307; Uprimny, 2007:139.

conventionality control, and internalisation of the Court's jurisprudence [85]; autonomy of the legal system, especially in relation to political and economical systems[86]; existence of legal mechanisms that permit broad access to justice[87]; and regular allocation of resources to the execution international decisions and reparations.

Among some of the normative structures that may be strengthened by court's decisions and may enhance the court's efficacy are: degree of internalisation and hierarchy of human rights norms, including jurisprudence of the Court; and the constitutional reality of states[88].

Social structures that may be strengthened by court's decisions and may enhance the court's efficacy include: the allocation of economic, scientific, technical, and human resources to comply with decisions and guarantee protection of human rights; the existence of groups of individuals and organisations working with the protection and defense of human rights[89]; rates and patterns of domestic litigation[90]; rates and patterns of litigation within the universal and regional human rights systems; leverage of public debate surrounding issues litigated before the Court; human rights awareness of key participants in dispute resolution like judges, prosecutors and human rights advocates; the penetration of human rights language through various categories of agency[91]; socio-political conditions of the state; citizen engagement in rule-making; the existence of academic production in the field of human rights; and the formation of as well as support to 'compliance constituencies'.

2.4.5 Implementation (instead of Compliance)

Implementation is the fourth layer of the "efficacy chain" and it indicates the units of action carried out by state agents that may lead to compliance with

[85] Celeste and Garavito, 2015: 298-299; Buyse, 2012.
[86] Hunneus, 2010: 131.
[87] Alter, 2014: 156.
[88] Huneeus, 2016.
[89] Helfer, Voeten, 2013.
[90] Shany, 2012: 227; González-Ocantos, 2016; Alter, 2014: 22.
[91] Levine; Becker, [1969], 1970: 235 (stating that "If the [Supreme Court of the United States] is to be a catalyst of major social change, it must reach beyond the legal community (which remains largely untouched anyway) and into the general community"); Keck; Sikkink, 1998 (mentioned effects of Courts over the formation of advocacy networks and vice versa).

decisions. Implementation, then, corresponds to the execution of (i) any official act, (ii) by any state organ or official agent, (iii) with the intention to comply with orders of reparation emanating from decisions.

Theoretical discussions that underpin this layer revolve around compliance. Frequently, compliance, defined as "whether a state conforms with the letter of the decision" is affirmed as a paramount indicator of court's efficacy. For this reason, rates of compliance with decisions are one of the aspects of efficacy on which scholars have most frequently relied to assess efficacy[92]. The IACtHR itself affirms that compliance with decisions is essential for ensuring that human rights have full force in the Organization of American States (OAS) member states, and for helping to strengthen the Inter-American system for the protection of human rights.

A substantive amount of studies has challenged the conflation between compliance and efficacy, emphasizing four critical points[93]. First, there are conceptual divergences surrounding the very meaning of compliance. For this reason, it is highly unlikely that all analyses are using the concept to describe the same material actions[94]. Tellingly, some of the cases declared fully complied with or archived by the Court's secretary were filed for reasons extraneous to strict compliance with all reparatory orders. As a result, not even the Court itself applies a uniform concept of compliance. Second, compliance is just one of several possible effects of a court's decision. The low number of cases declared fully complied with by the Court has not prevented its jurisprudence from

[92] Basch *et al*, 2010; Hillebrecht, 2014; Hathaway, 2002: 1938; Guzman, 2002.

[93] Antkowiak, 2008: 354; Hawkins; Jacoby, 2010; Hennebel, 2011: 70; Baluarte, 2012: 289; Puente, 2009: 83; Abramovich, 2009: 28; Parra-Vera, 2014; Shany, 2012: 237; Dulitzky, 2017: 299; Shelton, 2003: 5; Alter, 2008: 52; Feeley, Feeley, [1969], 1973; Helfer, Voeten, 2013; Raustiala, 2009: 368.

[94] Kingsbury, 1998 (affirming that compliance is a central concept in research projects in the fields of social sciences and international law but different theories attribute different notions to this central concept). In an article of 2011, González-Salzberg analyzes the divergences of two articles published in 2010 with the same intent of evaluate the efficacy of the IASHR. The first took into considerations all decisions of the Court until 2006. The later, decisions of the Court and the Commission during five years. The author concluded that "the two publications are far from identical; for one thing, they each analyzed different sets of data [...] Similarly, another important difference is in the conflicting conclusions drawn about the effectiveness of the IAHRS; this can be attributed to differences in indicators, rather than substantial differences in data measurement". Both publications agree that is necessary to boost compliance by strengthening - and somehow domesticating - national mechanisms, but they diverge on how to do it. See González-Salzberg, 2011.

producing broader effects[95]. Third, an excessive focus on norm compliance may ignore longer-term and systemic contributions of international courts. Compliance rates often fail to capture the court's more general "compliance-inducting effect" that may have influence over observance and strengthening efficacy. Fourth, compliance varies diachronically within states. Importantly, states rarely abstain from executing acts toward compliance[96]. As states are not monolithic structures, some cases may entail simultaneous compliance and non-compliance by different state organs and may alter with time[97]. Declaring, then, non-compliance may neglect acts carried out by compliant organs in conformity with the court's jurisprudence. Fifth, low levels of compliance can be attributed to factors extraneous to lack of efficacy of the Court's decisions. For example, reparatory orders with a greater degree of complexity may take longer to comply with, but produce more significant effects. In consequence, a low-aiming court, prescribing minimalist reparations, may generate a high level of compliance but have a reduced degree of efficacy in terms of strengthening. It is well known that the complexity of some IACtHR orders have contributed to most rulings generating only partial compliance. Such critical accounts try to instil a broader appraisal of social and legal effects emerging from legal decisions, disentangling compliance and effectiveness.

When dealing with the analysis of selected jurisprudence of the Court in

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[95] Up to December of 2017, 24 cases were declared fully complied or archived by the Court's secretary: Argentina (Kimel, Mohamed); Bolivia (Pacheco Tineo); Brazil (Escher); Chile (Olmedo Bustos, Claude Reyes); Costa Rica (Herrera Ulloa); Ecuador (Acosta Calderón, Albán Cornejo, Salvador Chiriboga, Mejía Idrovo, Suárez Peralta, Tribunal Constitucional); Honduras (Velásquez Rodríguez, Godínez Cruz); México (Castañeda Gutman); Nicaragua (Genie Lacayo, Mayagna); Panamá (Tristán Donoso); Paraguay (Ricardo Canese); Peru (Castillo Petruzzi, Lori Berenson Mejía, Abril Alosilla); Suriname (Aloeboetoe, Gangaram Panday).

[96] Indeed, the ambition of filing a case instead of addressing a problem in a definitive way, circumstances that may cause similar violations in the future has led some states to incur in actions of "ostensible compliance". An example of such a focus on results can be seen in the Mexican government's response to international pressure mounted on it to investigate and prosecute those responsible for the murders of indigenous women in Ciudad Juarez. The state falsely arrested, detained, and tortured a number of individuals, many of whom lacked the resources to challenge the accusations against them. A 2005 study of femicides in Mexico by the Latin American Working Group Education Fund (LAWGEF) reported strong evidence for false imprisonment in approximately one-sixth, and the use of physical or psychological torture to coerce confessions in nearly one-half, of the murder cases in which the state had detained a suspect. Given Mexico's widespread use of pretrial detention and its practice of considering a femicide case "resolved" for official reporting purposes once a suspect is in custody,wrongful arrest and detention offer a particularly expedient means for officials to alleviate concerns surrounding impunity for human rights violations. See Alter, 2015:1125.

[97] Huneeus, 2010:114 .

subsequent chapters, the implementation layer will map actions officially executed by state organs in reaction to a decision of the Court with the aim of avoiding similar violations, restoring violated orders, providing redress to victims, and complying with court orders in order to evaluate the degree of implementation efficacy of decisions. In sum, this layer will break compliance down into separated 'unities of implementation', that correspond to any action executed by state agents that may ultimately lead to full compliance.

2.4.6 Adequacy

Adequacy is the fifth and last layer of the "efficacy chain" and it indicates conformity between the practices of normative, institutional and social structures within states and the ACHR norms that emanate from a regional human rights regime. Adequacy, then, corresponds to the (i) decrease or non repetition of human rights violations similar to the ones identified in a decision or to the (ii) systematic redressal by domestic mechanisms of violations similar to the ones identified in a decision[98].

Adequacy differs from other layers in three aspects. Firstly, adequacy does not refer to immediate or isolated actions. It relates to long-lasting and consistent social processes of non-repetition and accountability that continuously unfold in conformity with the norms established by the Court in its decisions.

Secondly, adequacy necessarily involves the agency of society as a whole. While other layers like observance and application mainly refer to official actions stemming from one or more state organs, this layer requires the integrated actions of state organs, organisations, and individuals. For the achievement of a substantive and lasting shift from a pattern of violation and impunity to a legal standard of adequacy and accountability, society as a whole has to be engaged.

Thirdly, this layer focuses on an aspect of efficacy that goes beyond the mandate of a single decision and even beyond the mandate of the Court itself. Adequacy is the final result expected from the shared mandate of State-Parties and of the Inter-American System, namely a progressive interlacing of every aspect of social reality with human rights norms. Because this third aspect refers

[98] Guzman, 2008; Jones, 1968: 3-4; Sikkink, Kim, 2013; Engstrom, 2016: 1255.

to a shared mandate of Court and State-Parts, the efficacy of the Court should not be seen to rely considerably on this aspect. However, there is a pervasive tendency that directly associates adequacy with efficacy.

While there are a large number of studies addressing the efficacy of international courts that narrow their focus on the assessment of compliance, there are also numerous studies on efficacy of human rights that narrow their focus on the analysis of adequacy. Often, commentators look at violation rates and directly attribute low efficacy to a deficiency inherent to human rights mechanisms without considering the effects of the social processes generated by these norms, or without taking into consideration degrees of efficacy arising from different fields of observation. The "efficacy chain" represents a strong challenge to these simplified assessments of efficacy.

When integrated into analysis of selected jurisprudence of the Court in subsequent chapters, the adequacy layer will explore two aspects to evaluate the adequacy of decisions in terms of their efficacy: non repetition and accountability.

To analyse adequacy in terms of non-repetition, this study will consider the influence of decisions on decreasing or avoiding violations similar to the ones that generated a court's decision. In turn, to analyse adequacy in terms of accountability, this study will consider a victim-centred perspective and examine whether or not decisions have propelled states to create domestic mechanisms for guaranteeing proper redress for future victims of violations similar to the ones that generated a court's decision and to curb impunity. In this sense, adequacy does not refer solely to deterrence of violations; importantly, it also refers to domestic responses to when violations occur[99]. It relates, then, to non-repetition, which can be highly influenced, but it is not completely dependent on state organs—but also to accountability, which is highly dependent on state organs.

Not surprisingly, in the beginning of a process tied to adequacy, it is possible to see an increase of rates of violation. When acts that were previously socially accepted are suddenly outlawed, rates of violation may rise.

[99] Warner, Jeffery, 2007: 245.

Increase in rates of violation, therefore, may reflect periods of adjustment, greater visibility given to unlawful practices, strengthening of social and legal controls, or, finally, increase in the actual number of offenses committed. The process for ensuring the adequacy of norms established by the court's jurisprudence is normally gradual, lengthy, and interactive[100]. Importantly, adequacy resulting from this enduring social process derives not only from the court's decisions but also from all these other domestic and transnational mechanisms that contributed to change patterns of violation. Ultimately, these combined efforts may reach a level of efficacy that contributes to the decrease of infringing actions, or, at least, to avoiding the impunity of violators. This long process that leads to a decrease in violations or adequate redress to victims is 'adequacy'.

The following section will apply the efficacy chain to contextualize the efficacy of the "Maria da Penha Law", elucidating each of the aforementioned layers and creating a methodological blueprint for the following chapters.

2.5 Using the efficacy chain

In 1998, Maria da Penha denounced the Brazilian government before the Inter-American Human Rights System (case 12.051/OEA) for not providing appropriate legal responses for repeated physical abuses and an attempt of murder perpetrated by her husband in 1983. The ex-husband of Maria da Penha was found guilty and sent to prison only in 2002—mainly because of the intervention of the regional human rights system—, just as his crime was about to reach the statute of limitations. He remained in prison until 2007 when he received a conditional release. In 2008, the government of the Brazilian State of Ceara recognised its omission and paid compensation to Maria da Penha. In 2006, Brazil's Federal Law 11.340/2006, commonly referred as "Maria da Penha Law" was enacted by the Brazilian State as a response to the recommendation issued by the Inter-American Commission for the case 12.051/OEA. The law regulates

[100] Dulitzy, 2017: 297.

the crime of violence against women, amending article 129 of Brazilian Penal Code.

Notably, the law was enacted in response to the recommendation of an international quasi-judicial body; that is, an organ with less binding authority than an international court. Neither the lack of strong enforcement mechanisms nor the less authoritative status of the recommendation of the Commission restrained Brazil from fully adjusting its legal framework and strengthening its domestic normative structures in compliance with the order. Other states in the region, in observance of the recommendation of the Commission, enacted similar regulations. Organs of the United Nations (UN) have repeatedly recognized the Maria da Penha Law as one of the most important contributions to the defence of women's rights on the continent. At a normative level, the Brazilian legislation had widespread effects, indicating a substantive regional impact and an "application cascade" in other polities. In subsequent years, the Court developed jurisprudence on feminicide and adopted a gender approach to reparations in cases of violence and discrimination against women[101]. In response, in 2016, Brazil enacted a law codifying the crime of feminicide and increasing penalties for aggressors of female individuals.

In Brazil, the number of instances of litigation referring to the law has skyrocketed and homicide rates of women in their residences have dropped by 10%[102]. Both litigants and courts have widely applied the norm, as high levels of both public awareness and prosecution indicate. According to a study, 98% of the population is aware of the existence of the law[103]. Public discussion and organisations dedicated to the defence of gender rights have increased. Some reports have indicated that criminal recidivism of offenders, after detention

[101] Rubio-Marín, Sandoval, 2011.

[102] See http://www.brasil.gov.br/cidadania-e-justica/2015/12/lei-maria-da-penha-reduziu-em-10-o-numero-de-homicidio-de-mulheres. The increase in the litigation has also increased qualitative application of the law. Some important legal precedents have been developed by the STJ. See also http://institutodc.com.br/jurisprudencia-do-stj-nos-11-anos-da-lei-maria-da-penha/. Access on: December, 2017.

[103] Data from the research "Violência e Assassinatos de Mulheres" (Data Popular/Instituto Patrícia Galvão, 2013) indicates that 98% of the population know the Maria da Penha Law and 86% of the surveyed people believe that Women started to denounce more this form of violence.

period, is lower than overall average[104]. In addition, actions were implemented that created a new institutional framework to deal with cases of violence against women, as well as violence against transsexual women. After the Maria da Penha law was passed, specific public policies aimed at reducing gender violence were enacted in different states and police stations dedicated exclusively to receiving cases of abuses against women were built. Since 2007, the Brazilian National Justice Council (CNJ) has organized the "Jornadas Maria da Penha", an annual event to promote legal training and discussions about the law. The organ has also enacted resolutions creating more than 100 specialized lower courts and establishing coordinating bodies in each state. A hotline to receive accusations and a psychosocial support network for victims were also instituted. Both institutional and social structures dealing with violence against women were strengthened after the recommendation[105].

Domestically, there are controversies about the efficacy of the legislation. A recent study published in 2013 by *Instituto de Pesquisa Econômica Aplicada* (IPEA), a Brazilian institute of research, found that the number of occurrences of domestic violence perpetrated against women has not significantly decreased[106]. Likewise, the number of new indictments and cases being processed before specialised tribunals has been significantly increasing. The numbers of legal processes initiated in 2015 alone exceeded 100.000. Other analyses indicate persistent high rates of episodes of violence against women and increased litigation before tribunals of cases dealing with gender violence. These findings would indicate a low efficacy of the recommendation of the Commission, of the Maria da Penha Law, and of the gender jurisprudence developed by the Court. The approach taken by this present study disputes such conclusions.

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[104] Interview with Nilcéa Freire, former Minister of the Special Secretary of Policies for Women in Brazil, available at: http://www.info.planalto.gov.br/exec/inf_detalhehora.cfm?cod=37540. Access on: December, 2017.

[105] See http://www.cladem.org/en/our-programs/litigation/litigation-international/11-inter-american-commission-on-human-rights-oas/21-maria-da-penha-case-brazil-domestic-violence-against-women. Access on: December, 2017.

[106] Interestingly, there are some contrasts between the preliminary study of 2013 and the final report of 2015. Reports are available at: http://www.ipea.gov.br/portal/images/stories/PDFs/130925_sum_estudo_feminicidio_leilagarcia.pdf, http://repositorio.ipea.gov.br/bitstream/11058/3538/1/td_2048.pdf, and http://www.ipea.gov.br/portal/images/stories/PDFs/nota_tecnica/150302_nt_diest_13.pdf. Access on: December, 2017.

The use of the efficacy chain model indicates the existence of degrees of efficacy in all its layers, but to markedly varied levels. First, the enactment of similar regulations by other states of the region together with the actions carried out by the Brazilian state—especially the enactment of the Maria da Penha's law, the codification of the crime of feminicide, and the payment of compensation to Maria da Penha—indicate a high level of observance efficacy because these occurrences reproduce human rights values enshrined in the jurisprudence of the Court that were not imposed by a binding decision. Second, the application of the Maria da Penha law by courts—which reflects new regional understandings in the field of violence against women—has soared, as indicated by a substantial increase of litigation rates. Other sectors of public administration have also made use of the Convention's precepts in the field of violence against women, as the adoption of new public policies and special police stations attests to. Combined, these elements demonstrate a considerable application efficacy. Third, the recommendation of the Commission contributed to strengthening of Brazilian normative structures in the field of violence against women via the enactment of the Maria da Penha Law. There was also strengthening of institutional structures with the creation of special police stations, local secretaries, and specialised tribunals; and of social structures. Remarkably, 98% of the Brazilian population is aware of the existence of the law, which has gained the attention of media, scholars, research institutions and non-governmental organisations. This diffusion of human rights awareness corresponds to social strengthening. It is worth restating that the lack of traditional mechanisms of enforcement within the Inter-American Human Rights System did not put the breaks on any of these actions of strengthening. Hence, enforcement mechanisms were not a determinant aspect of efficacy in this case. Fourth, implementation efficacy was demonstrated by a string of actions implemented by state agents to reduce violence against women. Finally, a slight reduction in feminicide rates and a judgment against the perpetrator of Maria da Penha's aggression demonstrate a modest but existing adequacy efficacy.

The attribution of low efficacy to the Maria da Penha's Law and, by extension, to the recommendation of the Commission is the result of an overly narrow account of efficacy that considers solely rates of violence against women

overshadowing normative, institutional and social structures that have been created and reinforced along the entire efficacy chain. The use of the efficacy chain enabled the detection of aspects of efficacy in each layer and a comparison between layers with high performance in this case (such as observance, application and strengthening) and layers with modest efficacy (adequacy). Naturally, these effects were triggered by the recommendation of the Commission but were certainly affected by other competing factors.

2.6 Final remarks

Efficacy of human rights is often depicted around a "human rights paradox". Some argue that the recognition and reinforcement of human rights is directly proportionate to the frequency with which such rights are violated[107]. This paradox poses a challenge to the study of efficacy of human rights courts. In presenting an "efficacy chain" built upon a rising socio-legal literature in the field of efficacy of international courts, this thesis disputes such a paradox. For example, while violations of human rights indicate low efficacy of the *adequacy* layer, their reaffirmation following flagrant violations may indicate high efficacy of other layers such as *application* and *strengthening*.

The paradox derives from a one-dimensional perspective of human rights norms and their efficacy disproportionally concentrated on the analysis of adequacy. The fact that there exists a norm framing an action as a breach of law, an institutional structure that may legally address such a breach, and that a violation of human rights is strongly condemned by different sectors of society, points to a great efficacy of other layers of the efficacy chain. As a result, rather than a paradox, the field of human rights points to, in practice, an imbalance between different efficacy layers and, in scholarship, to a need to expand the fields of empirical verification of efficacy beyond adequacy. By using the five fields of observation proposed by the "efficacy chain", legal norms gain existence and unfold within different spheres and structures of social practice that are often neglected both by studies of efficacy and studies of the human rights field.

[107] Neves, 2005: 15.

Many studies tend to overlook the lengthy and integrated process of human rights concretisation.

Remarkably, this model intends to support the assessment of the efficacy of the Inter-American Court over normative, institutional and social structures within polities. By presenting a chain instead of a narrow or disintegrated perspective of efficacy, this thesis aims to present a comprehensive view of the long-term process of human rights concretisation, focusing on development of societal and institutional structures. As it works towards achieving that, it offers both a combined sociological and legal analysis of social processes related to effects of decisions of international courts and an assessment of the relative autonomization of the legal regime built by the IACtHR. Throughout all, it maintains a victim-centred perspective, as it uses the efficacy chain to assess efficacy from different fields of observation. The following chapters will evaluate the efficacy of the Court in the fields of indigenous rights, amnesty laws and rights of detainees in terms of each of the proposed layers.

Chapter 3

Inter-American Court of Human Rights

3.1 Introduction

The idea that a regional human rights tribunal should be established in Latin America dates back to the foundational conference of the recently established Organization of American States (OAS) in 1949[108]. The late establishment of such a court, which was envisioned at an early stage, owed to factors such as political instability, economic constraints, a protracted process of regional integration, and the late adherence of American states to the global regime of human rights [109]. The absence of a central juridical organ did not impede, however, the progressive development of a normative framework and of regional mechanisms of human rights protection after the 1950s on the American continent. At a normative level, the Charter of the OAS and the American Declaration of the Rights and Duties of Man, both adopted in 1948 with the setting up of the OAS, did not create any binding obligations, but established human rights constraints and responsibilities for all 35 OAS State-Members[110]. At the institutional level, the Inter-American Commission on Human Rights was the most emblematic organ of this incipient human rights regime. In 1978, with the entry into force of the American Convention on Human Rights (formally adopted in 1969), the early-envisioned court was finally established. The Court became operational in 1979[111], received its first case in 1981[112] and, after a long period of mainly giving advisory opinions[113], decided its first case on the merits, *Velásquez Rodríguez v.*

[108] Goldman, 2009.
[109] Hennebel, 2009.
[110] Hennebel, 2009: 12; Cassel, 2000.
[111] The Court became operational in 1979 with the election of its first 5 judges by the OAS General Assembly. See also Buergenthal, 1982: 231.
[112] IACtHR, *Government of Costa Rica (in the matter of Viviana Gallardo et al)*, 1981. See also Buergenthal, 2005; Pasqualucci, 2014.
[113] Buergenthal, 2005: 269 (describing the frustration of members of the Court following the failure of the Commission to send the Schmidt Case to the Court and subsequent referral of three

Honduras, in 1988. With the exception of the enactment of two protocols—the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights ("Protocol of San Salvador"), adopted in 1988; and the Protocol to the American Convention on Human Rights to Abolish the Death Penalty, adopted in 1990—the American Convention on Human Rights has remained unaltered since it came into effect. In contrast, continuous amendments were carried out to the Statute[114] and in the Rules of Procedure[115] of the Court. These amendments have altered the functioning, structure and mandate of the Court; in combination, they are a symbol of the dynamic nature of the regional regime of human rights protection. The reforms to legal mechanisms and proceedings have had a direct impact on the Court's efficacy. Without claiming to be exhaustive, and giving priority to aspects that will give foundation to further discussion related to efficacy, this chapter aims to provide an overview of the functioning of the Court and of the ways in which it has been modified over the years. Two main goals lie behind this discussion: to clarify the functioning and progressive development of the jurisprudence, procedures, and mechanisms operating within the Court, and to shed light on aspects within the structure of the Court that have given support to or have curtailed the efficacy of its decisions.

3.2 Normative and Institutional development of the Inter-American Human Rights System

The entry into force of the American Convention on Human Rights in 1978 (formally adopted in 1969) was responsible for profound normative and institutional changes in the Inter-American Human Rights System. Contrasting with the Charter of the OAS and the American Declaration of the Rights and Duties of Man adopted in 1948, the Convention inaugurated a mandatory human

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contentious cases, the Honduran Disappearance Cases, to the Court).

[114] The Statute was amended in 1991. Early drafts of the Statute were seem as "rare opportunities to enlarge the Court's powers". Buergenthal, 2005: 261.

[115] The Rules of Procedure is certainly the most modified instrument and, therefore, the one that best reflects the dynamism and institutional changes undertaken by the Court over the years. The Rules of Procedure were modified at six opportunities in 1980, 1991, 1996, 2000, 2003, and 2009.

rights regime, establishing binding obligations for all its State-Parties at the normative level. At the Institutional level, the Convention gave rise to the Court and instituted new functions for the Commission.

The Inter-American Commission on Human Rights, established in 1959 during a Chancellor's Meeting in Santiago, was the first international organ of human rights protection to operate in the region. At first, the Commission had a very restricted mandate, but its functions have expanded throughout the years. As the Convention came into effect, the Commission began to perform a dual mandate, acting both as the main OAS human rights organ (supervising the OAS Charter and the American Declaration on the Rights and Duties of Man for the 35 Member States of the Organization) and the quasi-juridical organ of the Inter-American Human Rights System for the State Parties to the Convention[116]. As an organ of the Inter-American Human Rights System, the Commission is charged the following responsibilities: receiving and investigating petitions claiming breaches of human rights filed by states and individuals; issuing recommendations or precautionary measures when it finds a violation; and referring cases to the Court if it considers that a State has not complied with the recommendations, or that a case "has particular legal or political salience"[117].

In turn, the Court performs contentious and advisory functions. The contentious jurisdiction of the Court is not obligatory; so States have to voluntarily accept it. In its contentious capacity, the Court is empowered to receive petitions exclusively from States or from the Commission, so individuals

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[116] Both the American Declaration on the Rights and Duties of Man and the Charter of the Organization of American States (Pact of Bogota) were adopted and entered into force in 1948. The American Declaration is the first international human rights instrument of general nature, anticipating the Universal Declaration of Human Rights, adopted in December of 1948, in some months. The dual mandate of the Commission, that acts as an organ of the Charter and an organ of the Convention, was formalized in 1979, when the OAS General Assembly approved the Commission's new statute.

[117] Hunneus, 2010: 117. The criteria for forwarding cases to the Court are established in article 45 of the Rules of Procedure of the Inter-American Commission on Human Rights and are sometimes criticized because of its subjectivity: "Art. 45 Referral of the Case to the Court. 1. If the State in question has accepted the jurisdiction of the Inter-American Court in accordance with Article 62 of the American Convention, and the *Commission considers* that the State has not complied with the recommendations of the report approved in accordance with Article 50 of the American Convention, it shall refer the case to the Court, unless there is a reasoned decision by an absolute majority of the members of the Commission to the contrary. 2. The Commission shall give fundamental consideration to obtaining justice in the particular case, based, among others, on 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*" (italics added).

do not have standing to bring a case directly to the Court. One requirement for admission of a contentious plea before the Court is the need to exhaust domestic remedies. This requirement is the foundation of the subsidiarity of the Inter-American Human Rights System (IAHRS). According to the Convention and Rules of Procedure, the Court is entitled to issue binding final decisions, submit advisory opinions, order provisional measures "in cases of extreme seriousness and urgency, when it becomes necessary to avoid irreparable damage to persons", and supervise compliance with judgments[118]. Originally, its mandate comprised interpreting and applying the American Convention on Human Rights, which was then further expanded to include any other human rights provisions settled in any international treaty applicable to American states[119].

Two important dynamics unfold out of the existence of two the main organs of human rights defence in the region, each of which is relevant to understanding the limits to the Court's efficacy: the gatekeeper position assumed by the Commission, and the existence of multiple overlapping regimes of human rights protection in the region.

One of the most important contributions of the Commission to the Inter-American Human Rights System arises from the intermediate role it plays between individuals and the Court, since only State Parties and the Commission have direct legal standing before the Court. In order to reach the Court, individuals have to present petitions before the Commission. The Commission serves as the only means for individuals to access a legal response and, as a result, it exerts significant power over the agenda of the Court.

After internal procedures that may involve publication of reports, submission of recommendations and attempts to reach a friendly settlement, the Commission decides if a case should be referred to the Court. In the initial stages, the Commission has great discretion over determining which cases should be forwarded to the Court. Since the adoption of the Commission's Rules of Procedure of 2001, four criteria were settled to guide this decision: "(i) the position of the petitioner, (ii) the nature and seriousness of the violation, (iii) the need to develop or clarify the case-law of the system, and (iv) the future effect of

[118] American Convention on Human Rights, article 63. See also Pasqualucci, 1993.
[119] IACtHR, Advisory opinion OC-1/82, "Other Treaties" Subject to the Advisory Jurisdiction of the Court (art. 64 American Convention on Human Rights), 1982.

the decision within the legal systems of the Member States". To some extent, these criteria make clear the intention of establishing the IAHRS as a platform for strategic litigation, with their focus on cases that give support to law-making and that represent relevant subject-matter to multiple states. Importantly, the criteria adopted by the Commission consider the effects that a single decision may have within domestic orders, anticipating *erga omnes* effects later ascribed by the Court to its decisions. On the downside, the criteria lack objectivity. In the final reckoning, it is the Commission, based on its own interests, that decides if a case "has particular legal or political salience" and, therefore, whether it should be referred to the Court[120]. The lack of transparency and the supposed political bias of the Commission are common points of criticism and discussion. After several reforms, the Commission still centralises the procedure for submitting petitions in the IAHRS, acting as a "gatekeeper"[121]. Indeed, despite the formal prevision on the standing of States, in the only occasion in which a State directly filled a complaint before the Court, the case was sent back to the Commission.

The existence of two organs of control—the Commission and the Court—and three foundational human rights instruments gave rise to the development of four overlapping regimes of human rights protection in the region, each of which possesses different authority and enforcement powers over their member states[122]. The first regime, the "OAS Human Rights Regime", is based on the OAS Charter and Declaration and is applicable to all 35 OAS State Members. The second regime, the "Human Rights Regime of the Convention", is based on the American Convention on Human Rights and it is applicable to all States that ratified the Convention but did not recognise the contentious jurisdiction of the Court. The third regime, the "Contentious Human Rights Regime of the Convention" is based on the Convention and is applicable to all States that ratified the Convention *and* recognised the contentious jurisdiction of the Court. Finally, the fourth regime is a hybrid regime, partially based on the OAS Charter and Declaration and partially based on the Convention. This fourth regime, the

[120] Hunneus, 2016.
[121] Dulitzky, 2011; Burgorgue-Larsen, Torres, 2013 [2011]: 36-37; Alter, 2014.
[122] Most authors consider the existence of a "three-tier human rights system", but I include a fourth regime associated with the two State-Parts that withdrawn from the Convention. See also Hennebel, 2009: 4.

"Hybrid Human Rights Regime" is applicable to those States that ratified the Convention and recognised the contentious jurisdiction of the Court, but withdrew from the Convention after a certain period of time. This fourth regime is currently applicable to the states of Trinidad and Tobago and Venezuela.

The majority of the states on the continent voluntarily opted to subscribe to and remain obligated to the "Contentious Regime of Human Rights of the Convention". As of December of 2017, out of 35 OAS Member States, 23 states ratified the Convention, 19 have uninterruptedly accepted the Courts' jurisdiction, 2 have accepted the Courts' jurisdiction but opted out, and 1 of the States that had withdrawn later returned to the Court's jurisdiction after a short period of time[123]. Although the departures of Trinidad and Tobago and Venezuela, as well as the threat of withdrawal by other states in recent years, have affected the system, the major states in the region remain squarely under the Court's jurisdiction. This broad adherence to the most comprehensive and strictest of these four human rights regimes—the single one with contentious competence—implies *per se* a certain degree of efficacy of the Court. Moreover, the acceptance of the contentious jurisdiction of the Court by most states in Latin America contributes to the maintenance of a regular caseload that is also central to the Court's efficacy.

3.3 Jurisprudential development of the Inter-American Court of Human Rights: expansion, diversification and inclusion

During the 1980s, the Commission dominated a significant part of the legal affairs of the IAHRS, so the activities of the Court were relegated to advisory functions. Oddly enough, the first case submitted to the Court was presented directly by a defendant state[124]. The Court refused to consider the case, explaining that the requirement of exhaustion of domestic remedies was met, but that procedures instituted by the Convention must not be circumvented. As a

[123] See table 2 at the end of this Chapter for an account of the number of rulings delivered by the Court per state, according to data from the site of the Court, updated in 2016.
[124] See supra note 5.

result, the Court referred the case to the Commission, reinforcing the position of the latter as a gatekeeper even for cases presented by states[125].

In 1987, for the first time, the Commission referred cases to the Court. The three cases forwarded by the Commission dealt with forced disappearances and were all against the same state, for which reason they were labelled the "Honduran Disappearance Cases"[126]. The first case decided on the merits was *Velásquez Rodríguez v. Honduras*, almost a decade after the Court became operational. As a result of the centralisation of activities by the Commission, by 1990 the Court had delivered only 3 decisions on the merits and 11 advisory opinions. Understandably, at around this time there emerged a serious concern about the efficacy and survival of the Court. Such concerns were quelled with the subsequent increase in petitions referred to the Court by the Commission and consequent crescent dynamism of the organ in the following years[127].

The decade of the 1990s was characterised by a rising number of petitions filled before the Commission, reflecting growing willingness to litigate and trust in the IAHRS. Notably, many State Parties have been active members of the IAHRS since the presentation of the first cases before the Court, defendant states having actively responded to applications, appeared at public hearings, and complied with reparations ordered by rulings. This proceeded as a response to the quality of the jurisprudence and growth in the reputation of the Court[128]. The increasing use of the system and propensity of individuals to litigate reflects a growing confidence in the Inter-American System as an effective legal instrument to bring justice to claims[129]. The increase in the number of petitions before the IAHRS has never been met by a proportional increase in cases sent to

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[125] Pasqualucci, 2014.

[126] Preliminary Objections to the case *Velásquez Rodríguez v. Honduras* were issued in 1987 and followed by the Judgment on Merits in 1988 and the Judgment on Reparations and Costs on 1989. The other two cases, *Francisco Fairén Garbi and Yolanda Solís Corrales v Honduras* and *Saúl Godínez Cruz v Honduras* were decided in subsequent years.

[127] The lowest number of petitons in the last 10 years was 1323 in 2008, never dropping bellow 1500 after 2010, with peaks superior of 2000 in 2013 (2061) and 2015 (2164). The number of petititions pending initial review (backlog) has progressively increased, reaching the amount of 9673 in 2015.

[128] Pasqualucci, 2014.

[129] Pasqualucci, 2014; Torpman, 2005: 151-153.

the Court as can be noted in Table 1 at the end of this chapter, a state of affairs that masks important numbers that bear strongly upon the courts efficacy[130].

Despite the disproportion between the number of petitions that are filed before the IAHRS and the number of cases that actually reach the Court, in comparison with previous years the number of cases received and decided by the Court has significantly increased[131]. From 1987 to 2003, the Court issued 55 decisions while it issued 40 decisions between 2004 and 2007 – almost the same number of decisions in drastically reduced time frame[132]. Usage of the Court oscillates and the number of cases forwarded by the Commission has varied considerably in the last years, reaching peaks of 23 in 2011 and 19 in 2014, and a minimum of 9 in 2008 and 11 in 2009 and 2013. At first sight, these numbers seem to be insignificant, especially if compared with the activity of other Courts and with the number of cases filed every year before the Commission. In response to this common view, Alter proposes the comparison on more equal terms:

> "A more apt comparison is to consider the ECtHR's first thirty years, from 1960 to 1990, a period when the ECtHR also had a commission that served as a gatekeeper to the system and a time during which its membership grew to twenty members. Making this more appropriate comparison, the Inter-American Court is more active than the ECtHR was in the 1960s and 1970s, perhaps because political tolerance for legal oversight in Latin America in the 1990s was higher than it was in Europe in the 1960s"[133].

Following Alter's estimates, one can conclude that the numbers are not as insignificant as they may appear. As a matter of fact, excluding the ECJ and the ECtHR, the IACtHR figures as the fourth most active international court in operation, outnumbering, for example, the amount of decisions delivered by the WTO legal system[134]. For at least one commentator, the IACtHR figures as one of

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[130] Some hypotheses for the high level of concentration of the Commission are investigated by Frost, 1992: 179.
[131] Dulitzky, 2011.
[132] Hennebel, 2011: 9.
[133] Alter, 2014: 180.
[134] Alter, 2014.

the five international courts "that have a sufficient number of judgments to significantly impact their jurisdiction"[135]. Qualitatively, it would not be excessive to assert that the Court's decisions have caused more impact in certain fields than the number one ranking tribunal in one of these commentators list, the Andean Tribunal of Justice[136].

In addition to maintaining reasonable usage rates of the Court in its role as gatekeeper, the Commission has also deliberately diversified the categories of cases sent to the Court, using the organ more strategically in recent years[137]. Initially, the jurisprudence of the Court was concentrated on transitional justice themes. Decisions would mainly address civil and political rights, including cases of forced disappearance, arbitrary detention, extrajudicial execution, freedom of expression and due process. These cases reflected the legacy of authoritative regimes and civil conflicts as they transitioned to constitutional and democratic forms of government.

Later in the 2000s, in response to emerging demands, the agenda of the Court became more inclusive and expanded its range of issues[138]. The Court started to dedicate increased attention to economic, social and cultural rights, albeit indirectly. At first, these rights would appear camouflaged and the Court would frame violations diffusely, maintaining classic civil and political rights as the main foundation for defining state responsibility[139]. In the ground-breaking *Gonzáles Lluy (TGGL) and Family v Ecuador* the Court waived its hesitancy and recognised, for the first time, a breach of social rights, identifying the violation of the right to Education contained in article 13 of the Protocol of San Salvador. It was the first time in which the Court declared a violation of this Protocol. Surprisingly, the Court did not declare a violation to the right to health, even though the case deals with a 3 years girl who was infected by HIV after a blood transfusion operated by the Red Cross and did not receive due medical attention from the State. Notwithstanding, the case created an important precedent reflected by the increase in cases directly litigating the right to health in the

[135] Madsen, 2013.
[136] Alter, Halfer, 2016.
[137] This strategic use is reflected in the criteria used by the Commission to determine if a case should be sent to the Court. Burgorgue-Larsen, Torres, 2013 [2011].
[138] Abramovich, 2009.
[139] Hennebel, Tigroudja, 2009:1008; Melish, 2010:29.

IAHRS. The Court had declared the justiciability of social rights in former cases (*Five Pensionists*, and especially in *Acevedo Buendía*, both involving Peru), ensuring social rights via reparatory measures. The innovation in the *TGGL* case was the declaration of violation of these rights for the first time. The Court has moved from a defence in theory to a defence in practice of the justiciability of these rights. However, in its analysis of the merits, the Court considered solely the violation of the right to education, promoting a timid defence of the right to health. In addition, the Court identified the violation of article 13 of the Protocol of San Salvador, but did not declare the violation of article 26 of the Convention concerning social rights, admitting then an indirect justiciability of these rights. Currently, two cases at the Merits Stage deal with right to health (*Poblete Vilches et al v. Chile* and *Cuscul Pivaral v. Guatemala*, also about HIV), which may contribute to a less modest expansion of the justiciability of these rights. Furthermore, the Court has expanded its jurisprudence to areas initially not covered by the Convention, such as environmental rights, humanitarian law, investors' rights, and labour law. As a result "the umbrella of protection of the Convention and the reach of the Court is far greater than originally envisaged"[140].

The legal categories addressed by the Court have also been expanded. Progressively, indigenous and traditional peoples, prison detainees, migrants, persons with disabilities, human rights defenders, and women have started to emerge in the jurisprudence of the Court. The Court has promoted their legal inclusion by defining broad legal subjectivities, mainly based on rights instead of social identities. By doing so, similar sets of rights can be ascribed to other individuals or groups of individuals enduring similar violations[141].

Transitional justice themes still appear constantly in a large number of cases brought before the Court and are far from fading from view. This is on account of the fact that most democracies and constitutional states in the region have not completely moved beyond the post-transitional stage. However, these are not the only themes in the Court's docket anymore. Moreover, the Court has conducted a reappraisal of its approach to traditional themes in order to keep it up-to-date with new and emerging rights perspectives. The most evident example is the

[140] Lixinski, 2010.
[141] Thornhill, Calabria *et al* (forthcoming).

adoption of a gender perspective to decide cases dealing with traditional themes such as arbitrary detention and torture, and the expansion of its jurisprudence to include cases dealing with LGBTI rights and violence perpetrated against women[142].

The increase in the number of cases referred to the Court and the widening of legal themes in its jurisprudence have contributed to the reinforcement of new legal subjectivities, the expansion of traditional rights into new forms, and the ascription of justiciability to formerly hidden—or not directly recognized—rights. The increase of cases involving indigenous rights, for example, permitted the Court to delineate and reinforce 'indigenous peoples' as a broad legal subjectivity that harbours protection for groups such as afro-descendants and other traditional communities of long-standing. Cases involving prison law have similarly contributed to the definition and reinforcement of detainee's rights in reference to legal subjectivities revolving around individuals under the State's guardianship. Other rights such as the right to life and the right to humane treatment have been unfolded in new forms such as the right to traditional lands and the restriction of the death penalty. Furthermore, economic, social, and cultural rights became progressively justiciable. In the early days of the Court these rights were disguised in forms of reparation, or hidden in the shadow of civil and political rights. In contrast, recent jurisprudence has dealt directly with right to education and right to health. In combination, these processes have contributed to promoting greater legal inclusion and an expansion of the effects of the Court's decisions.

3.4 Institutional development of the Inter-American Court of Human Rights: structure, proceedings, special mechanisms and doctrinaire constructions as means to enhance efficacy

[142] *López Soto et al v Venezuela*, *Selvas Gómez v Mexico*; *V.R.P AND V.P.C v Nicaragua*, *Duque v Colombia*, *Flor Freire v Ecuador*.

Over the years, the Court has refined its internal procedures in order to add to its efficacy. This section will analyse how modifications set in motion during recent decades have influenced the Court's achievement of this goal. In so doing, it will pay attention to five key aspects of reform: (i) access and participation of individuals in legal proceedings, (ii) reparatory regimes, (iii) binding effects of decisions, and (iv) enforcement of decisions. In contrast, the second part of this section will point out some institutional shortcomings that have been notoriously curtailing the performance of the Court.

3.4.1 Key aspects of reforms and efficacy

(i) Access and participation of individuals in legal proceedings

One of the most robust criticisms towards the IAHRS derives from the inadequacy of the admissibility criteria adopted by the Court[143]. To date, individuals do not have direct access to the Court, and must petition the Commission in order to file a complaint. On the one hand, the absence of direct standing for individuals seems to be a step backwards. On the other hand, the IAHRS has provided victims that would otherwise not have access to justice an effective legal resource, the "Inter-American Amparo"[144]. The term was created in reference to the domestic instrument, analogous to habeas corpus, that often represents a last legal resort for individuals in Latin America who have had their rights violated. At the end of day, there is not much that the Court could do regarding lack of individual access to the Court. In order to grant *locus standi* to individuals, it would be necessary to amend the Convention—an action that depends in great part on the will of States.

Despite this structural deficiency in the Court's standing criteria, a comparison between today's Rules of Procedure and previous iterations demonstrates that the role of victims in Court proceedings has gained strength.

[143] Pasqualucci, 2014: 18.

[144] Dulitzky, 2011. By definition, "amparo" means refuge and shelter in the Portuguese and Spanish languages. The "Inter-American Amparo" is then defined as the "Right to appear before the Commission to complain about human rights violations carried out by the act, omission, or tolerance of State agents or entities".

First informally, and later in a regulated manner, the Court has progressively modified its procedural mechanisms "in order to place the victim at the centre of the process, as far as is possible"[145].

At first, the Commission represented victims during all stages of proceedings. In 1996, victims obtained the right to have direct representation in the reparations stage. This distinction reinforces the singularity of the reparation phase of the contentious case, described by some commentators as "almost a new trial"[146]. In 2001, the term "victim" and a new article dedicated to regulating the "participation of the alleged victims" in procedures were included in the reformed Rules of Procedure. This moment demarcates the "separation of roles" between victims and the Commission, securing for the former an official seat during all stages of the litigation process, and giving them more autonomy to bring their individuals claims to the consideration of the Court[147]. Indeed, in 2009, two new articles about victims were included in the Rules of Procedure, denoting an expansion of victim participation in proceedings before the Court[148]. The increased autonomy of victims in legal proceedings is crucial to reinforcing their direct dialogue with the Court and guaranteeing greater efficacy in their individual redressal.

In parallel to the enhanced role of individuals in the litigation process, the profile of litigants has diversified over the years. This diversification is very likely a consequence of the rise of democracy and constitutionalism in the region and of the emergence of new non-governmental organisations and advocacy networks. It also owes to increased awareness and technical knowledge about the IAHRS and its rules of access, reforms that improve the transparency and accountability of the IAHRS, and the creation of enabling mechanisms.

During the initial years, the system was virtually controlled by a small number of organisations that possessed both economic means and technical expertise to litigate before the Court. The most representative of these organisations is certainly the Center for Justice and International Law (CEJIL), an NGO created in

[145] Hennebel, 2011:82.
[146] Hennebel, 2009:35.
[147] Pasqualucci, 2014.
[148] The new articles regulate the process of convocation of alleged victims (article 50) and protection of alleged victims (article 54).

1991, headquartered in Washington, and operating in more than 20 countries in the region. Teaming up with local legal actors and international experts, CEJIL represented victims in at least half of the cases decided by the IACtHR in the 1990's, handling over "300 cases and proceedings for protective measures before the Inter-American Commission and the Court"[149]. CEJIL remains a central litigant of the system but its participation has diminished, making the way for a diversification of litigants and claims.

The greatest two contributions of the IAHRS to this process of diversification was the establishment of less ambiguous rules of referral of cases to the Court that make the Commission more accountable, and the 2010 establishment of two enabling mechanisms: the Victims' Legal Assistance Fund and the Inter-American Defender. These mechanisms provide economic and technical support to litigants in situations of economic vulnerability. The Victims' Legal Assistance Fund, administered by the Court's Secretariat, allows victims to request financing for international legal proceedings after a case is submitted to the Court. The Inter-American Defender mechanism provides free-of-charge legal assistance to individuals who do not have legal representatives. Another contribution of the IAHRS is the Inter-American Association of Public Defenders which, when requested, appoints an associate who will assume the legal representation and defence of victims during the entire process. As of December 2017, the Victim's Legal Assistance Fund had assisted victims of 34 cases involving 12 states with a total amount of over 130 million dollars. Inter-American Defenders have provided legal assistance in 12 cases, involving 7 states, and the Court has delivered judgment in seven of them[150].

Among other factors, the reforms carried out in the Rules of Procedure of the Court and Commission, together with the establishment of new legal mechanisms of access, have triggered the diversification of the profiles of litigants in the IAHRS, leading to greater participation of victims in the litigation process. These outcomes reflect a modification of structures undertaken to turn the Court more inclusive and victim-centred, despite the lack of direct access of individuals to the Court's jurisdiction.

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[149] CEJIL, *Activities Reports – 20 years*, 2011.
[150] IACtHR, *Annual Report 2016*, 2017.

(ii) Reparatory Regime

Obligation to repair is a key foundation of International human rights law and state responsibility. Not by coincidence, one of the most remarkable contributions of the Court to International law lies in developing a new semantic of reparation, characterised by some as a form of "reparatory activism"[151]. The comprehensive and progressive character of the reparations regularly ordered by the Court differentiates the Court's practice from the practice of other tribunals, which rely mainly on compensatory measures to redress breaches of international law.

The first case in which the Court ordered a measure other than compensation was in 1993, in the formulation of Reparation and Costs for the case *Aloeboetoe v Suriname*, which dealt with indigenous rights. In 1996, the newly reformed Rules of Procedure formalised the developing practice of ordering reparations by including an article dedicated to "judgment on reparations". From the 1990s to the present, the measures for providing redress have significantly expanded. The Court now groups its wide range of reparatory measures into six different categories: compensation, satisfaction, rehabilitation, restitution, guarantees of non repetition, and the obligation to investigate, prosecute and punish, as appropriate[152]. Because of their varied nature and scope, these categories have

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[151] Expressions such as "innovative", "pioneer" and "progressive" are commonly used to describe the regime of reparation established by the Court. For more details on this comprehensive reparatory regime see: Baluarte, 2012: 288; Cassel, 2005: 191; Antkowiak, 2008: 351; Schonsteiner, 2011: 164; Cavallaro, Brewer, 2008; Tigroudja, 2010: 4, Laplante, 2004: 347; Galván Puente, 2009: 72; Pasqualucci, 2014.

[152] The Court defines measures of restitution, rehabilitation, satisfaction, as well as guarantees of non-repetition and obligation to investigate, prosecute and punish, as appropriate, as follows: [Restitution]"These measures entail the re-establishment, insofar as possible, of the situation that existed before the violation occurred. As a form of reparation, restitution includes measures such as: (a) re-establishment of the liberty of persons illegally detained; (b) return of property illegally seized; (c) return to the place of residence from which the victim was displaced; (d) reinstatement in employment; (e) annulment of judicial, administrative, criminal or police record and cancellation of the corresponding records, and (f) the return, demarcation and granting of title to the traditional territory of the indigenous communities to protect their communal property"; [Rehabilitation] "These are the measures aimed at the provision of the required medical and psychological care to attend to the physical and mental health of the victims, which must be supplied free of charge and immediately, including the provision of medicines and, as appropriate, the supply of goods and services"; [Satisfaction] "These measures are aimed at repairing the non-pecuniary damage (suffering and anguish caused by the violation, harm to values that are very significant to the individual, and any change of a non-pecuniary nature in the

had contrasting performances in terms of compliance and efficacy. Since some of these orders of reparation impose broad lists of measures "particularly suited to human rights cases", the implementation process of such orders is often delayed or compromised. On the other hand, because some of these orders address structural problems that affect not only individual victims but "society as a whole", they have the potential to give rise to wide-ranging effects[153]. The establishment of a comprehensive reparatory regime dedicated to properly redressing victims and to ensuring the non-repetition of violations has proved to be a fundamental aspect of promoting justice and expanding the effects of individual decisions, which has contributed largely to greater efficacy of the Court's jurisprudence.

(iii) Binding effects of decisions

By definition, decisions of International Courts have *inter pares* effects, restricted to the parties of a dispute. With the development of the doctrine of Control of Conventionality, the Court has challenged this traditional precept and

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living conditions of the victims). They also include, inter alia, acts or objects of public scope or impact, such as acts to acknowledge responsibility, public apologies to the victims, and acts to commemorate the victims, with the aim of recovering the memory of the victims, recognizing their dignity and consoling their next of kin. In this regard, the following are some example of measures of satisfaction: (a) a public act to acknowledge international responsibility and amend the memory of the victims; (b) publication or dissemination of the Court's judgment; (c) measures to commemorate the victims or the facts; (d) scholarships or commemorative grants, and (e) implementation of social programs"; [Guarantees of non-repetition] "These are measures intended to ensure the non-recurrence of human rights violations such as those that occurred in the case examined by the Court. These guarantees are of public scope or impact and, in many cases, resolve structural problems, so that not only the victim in the case benefits but also other groups or members of society. The guarantees of non-repetition can be divided into three groups, according to their nature and purpose, namely: (a) measures to adapt [and implement, complement] domestic law to the parameters of the Convention; (b) human rights training for public officials, and (c) adoption of other measures to guarantee the non-repetition of violations"; [Obligation to investigate, prosecute and punish, as appropriate] "This refers to an obligation that States have to guarantee the effective investigation of the acts that violated human rights and, as appropriate, to determine the masterminds and perpetrators of those acts, as well as to apply the corresponding punishments. This obligation also entails conducting administrative investigations in order to sanction those who may have obstructed the domestic proceedings. This obligation also means that, if applicable, the States must determine the whereabouts of the victims when these are unknown. In addition, the State must remove all the obstacles, de facto and de jure, that prevent the due investigation of the facts, and use all available means to expedite the said investigation and the respective proceedings, in order to avoid the repetition of those acts". See IACtHR, *Annual Report 2012*, 2013: 18-19.

[153] Pasqualucci, 1996: 9; Tigroudja, 2010: 847.

largely expanded the effects of its decisions[154].

Officially, the term "control of conventionality" appears for the first time in the jurisprudence of the IACtHR in the reasoned vote of judge Sérgio García Ramírez in the case *Myrna Mack Chang v Guatemala*. Notwithstanding, the essential elements of the *doctrine* are formally instituted in the case *Almonacid v Chile*, in which the Court asserted that the Judicial Branch of government must exert a control of conventionality between the domestic legal norms applied to concrete cases and the Convention[155].

Subsequent jurisprudence has confirmed and expanded the doctrine in relation to three aspects: who is obliged by the doctrine?, on what occasion?, and in reference to which norms? [156]. In response to the first question, the Judicial Power was the first branch of government appointed to exert "control of conventionality" [157]. Later jurisprudence has progressively widened the responsibility of pursuing conventionality control from "all levels of justice administration" to "any public authority"[158], and then to "all powers and state organs"[159]. In response to the second question, control of conventionality shifted from being a responsibility in response to a provocation to being an *ex officio* obligation[160]. Finally, responding to the third question, the normative framework of reference to execute Control of Conventionality expanded from ACHR norms to the contentious[161] and advisory jurisprudence of the Court[162] and, then, to all human rights treaties adopted and ratified by a given State[163]. In its present form, the doctrine of Control of Conventionality establishes for all public authorities an obligation *ex officio* to interpret and apply any domestic norm or legal practice in conformity with the "*corpus juris Interamericano*". In case of conflict of norms, the pro-homine principle must be applied, and those norms that best protect human rights must prevail[164]. Remarkably, this obligation is not conditional on

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[154] Torelly, 2017.
[155] IACtHR, *Almonacid v Chile*, 2006:124.
[156] Ferrer Mac-Gregor, 2016.
[157] IACtHR, *Boyce et al v Barbados*, 2007: 78.
[158] IACtHR, *Gelman v Uruguay*, 2011: 239.
[159] IACtHR, *Rochac Hernández et al* v El Salvador, 2014: 213.
[160] IACtHR, *Dismissed Congressional Employees (Aguado - Alfaro et al) v. Peru*, 2007:128.
[161] IACtHR, *Gelman,* 2011: 68, 102.
[162] IACtHR, OC-21/14: 31.
[163] IACtHR, *Gudiel Álvarez et al ("Diario Militar") v. Guatemala*, 2012: 330.
[164] Ferrer Mac-Gregor, 2016.

obtaining a prior judgment by the Inter-American Court. As a result, the doctrine of control of conventionality subverts the *inter partes* rule and attributes *erga omnes* effect to all decisions of the Court. The concept of *erga omnes* obligations represents an expansion of the traditional bilateral model of international law. Furthermore it represents an attempt at the collectivization of legal solutions and interpretations to shared problems.

The Control of Conventionality doctrine sets a model of diffuse control, validating the invocation of ACHR norms in litigation before domestic courts and giving more autonomy to those who apply the law in conformity with ACHR norms, regardless of their hierarchical position in the domestic legal system. Notably, the central position occupied by the Court in this arrangement has provoked some comparisons of its role with that of constitutional courts. The doctrine of Control of Conventionality amplifies the effects of single decisions and makes the jurisprudence of the Court more accessible, "establishing a juridical 'path' that facilitates the normative impact of its own jurisprudence on national procedures"[165].

The self-arrogation of interpretative power by the Court has been reasonably well-accepted by some states. Not surprisingly, many states refuse the doctrine. At a first brush, it is worth noting that the states under the jurisdiction of the Court have become increasingly more open to human rights norms, human rights treaties and declarations. This openness is revealed in myriad ways: by the privileged position that human rights norms occupy in domestic legal systems, by crescent ratification of human rights treaties, by the recognition of the special position and authoritative character of the rulings of the Court, by open acceptance to precedents established by the Court, and, finally, by progressive adherence to the doctrine of the control of conventionality[166].

(iv) Enforcement of decisions

[165] Medellín-Urquiaga, 2013: 410.

[166] Most of the constitutions in the region adopt the doctrine of block of constitutionality, giving constitutional or supra-constitutional status to human rights treaties. *See*: Tribunal Constitucional Chile, *Rol 346*, 2002; Constitutional Court of Guatemala, *Expediente 1822-2011*, 2012, Supreme Court of Justice Dominican Republic, *Resolución No. 1920-03*, 2003. For a discussion of the positive impact of a global oppeness to International law, see: Thornhill, 2016.

The absence of traditional mechanisms of enforcement is pointed out by some authors as a central challenge to the efficacy of international courts[167]. The Convention and the Statute do not establish formal procedures to enforce the rulings of the Court. However, the Court possesses two softer enforcement mechanisms to verify and induce compliance with decisions. These mechanisms have a dissuasive nature and rely on the creation of diplomatic and political pressure via the use of reputational sanctions and name-and-shame strategies to alter the conduct of non-compliant states. Other forms of creating pressure used by the Court include the convening of hearings to monitor compliance and the issuance of orders supervising the implementation of decisions.

The first mechanism at the disposal of the Court is the publication of lists of non-respondent states in its annual report to the General Assembly, under the application of article 65 of the Convention[168]. To date, this mechanism has been applied to denounce 15 cases of non-compliance, most of them involving the two states that withdrew from the Convention[169]. Markedly, the reports to the General Assembly have had little effect on altering significantly the conduct of these states in relation to these cases and inducing full compliance with decisions.

The second mechanism is the process of monitoring compliance with decisions, which has been developing as the Court practices this with more frequency.

The first decision in which the Court exercised its authority to monitor compliance was *Loayza Tamayo v Peru.* Since then, the Court started to publish 'monitoring compliance resolutions' in which it classifies whether measures were fully complied with, partially complied with, or pending compliance, and according to which requires the submission of compliance reports by States,

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[167] Hathaway, 2003. Cf. Hillebrecht, 2012: 962; Simmons, 2009; Hafner-Burton, 2008; Schonsteiner, 2011: 130; Pasqualluci, 1994: 354.

[168] ACHR, Art. 65: "To each regular session of the General Assembly of the Organization of American States the Court shall submit, for the Assembly's consideration, a report on its work during the previous year. It shall specify, in particular, the cases in which a state has not complied with its judgments, making any pertinent recommendations".

[169] The 15 cases reported to the General Assembly because of aggravated non-compliance are: Ecuador (Benavides Cavallos) Haiti (Yvon Neptune); Nicaragua (Yatama); Trinidad and Tobago (Hilaire, Constantine and Benjamin et al; Caesar); Venezuela (El Amparo, Blanco Romero, Montero Aranguren, Apitz Barbera, Ríos et al, Perozo et al, Reverón Trujillo, Barreto Leiva, Usón Ramírez, López Mendoza).

Commission, victims and their representatives[170]. In 2001, the Court altered its annual report to include a section dedicated to the status of compliance with its decisions. In the exercise of its jurisdictional powers, the Inter-American Court has consistently upheld its mandate to monitor compliance with its judgments. In 2003, in response to the state of Panama in the case *Baena Ricardo v Panama*, the Court reaffirmed its mandate to supervise compliance with decisions. Later, the Court issued a specific resolution about monitoring compliance, again reaffirming its mandate on the subject and inserted an article in the Rules of Procedure establishing the "Procedure for monitoring compliance with the Judgments and other decisions of the Court"[171]. In 2007, the Court began to hold hearings on monitoring compliance to try to enhance compliance with its decisions[172]. Since then, the Court has held hearings on multiple cases involving the same country and similar reparation orders[173], and initiated the practice of holding hearings in the territory of the states, using the opportunity to carry out on-site visits. Combined, these mechanisms have proved to be a reasonably effective tool for guaranteeing the execution of orders with a low degree of complexity issued by the Court[174]. For orders with a higher degree of complexity, specifically those requiring obligations to investigate, prosecute and punish, as appropriate, the Court maintain a low level of effective execution.

Other international legal organs and domestic courts engage in revision of compliance with decisions, but not in as systematic and compelling a way as the Court[175]. As each year the caseload of cases at the compliance stage increases

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[170] IACtHR, *Barrios Alto v Peru*, 2001; IACtHR, *Durand e Ugarte v Peru*, 2001.

[171] IACtHR, *Rules of Procedure*, Article 69; IACtHR, *Resolution "Supervision of Compliance with Sentences (Applicability of Article 65 of the American Convention on Human Rights)*, Monitoring Compliance with Judgment, 2005.

[172] The practice of holding private hearings between parts, recognized in Resolution AG/RES.2408 (XXXVIII-O/08) was also formalized in the article. See also Baluarte, 2012.

[173] Some orders are delivered in relation to multiple cases.

[174] This has been noted by the OAS General Assembly which recognized "that the private hearings held on the monitoring of compliance with the Court's judgments have been important and constructive and have yielded positive results". See also Ventura Robles, 2006.

[175] The practice of monitoring compliance with decisions is also executed by other Courts. In Europe, the Council of Europe administers this function via the Committee of Ministers, which has responsibility for supervising the implementation of the ECTHR's decisions. At the domestic level, courts have developed similar mechanisms but they are reserved for specific decisions, normally dealing with landmark decisions. Previous experiences of monitoring sentence can be associated to the instrument of "continuing mandamus", used by The Supreme Indian Court to monitor the implementation of structural cases. Argentinian courts have used similar mechanisms to track the implementation of sentences dealing with prison law and

and old cases take longer to be considered fully complied with, monitoring compliance with the Court's judgments has become one of the most strenuous functions of the Court. As of December of 2017, there were 182 cases and 901 measures of reparation at the Supervision Stage, contrasting with the number of 23 cases awaiting the sentence of the Court[176]. In terms of efficacy, the integrated process of enforcement deriving from the process of monitoring compliance has created coordination among parties and enhanced responsiveness among defendant states, overall proving essential to the proper implementation of decisions[177].

3.5 Limits to efficacy

Some limitations have prevented the Court from putting into effect its goal of protecting and promoting human rights. The first limitation derives from inadequate funding. During 2016, in the imminence of a serious crisis affecting the integrity of the organ and its functioning, the Commission carried out an extensive campaign for funding. The organ noted that voluntary donations of countries of the region to the International Criminal Court (ICC) outnumbered donations to the IAHRS, even though the ICC just has one American case in preliminary analysis. The Commission argued that "low budget can not be explained solely by economic shortcomings of the region". After extensive mobilisation and more donations, by the end of 2016 the crisis was overcome, reinforcing the trust of states in the system. However, increases in the number of cases received by the IAHRS and the expansion of the functions of the Court have not been accompanied by an increase in budget or expansion of infra-structure. The Court faces long-standing funding problems, and its total budget for 2016/17 amounted to a modest US$4,567,773.15. The total budget of the Court is lower than the budget of any other international court, making the Court the cheapest International Court in the world. In addition, around 40% of the Court's

environmental law. Domestically, the greatest experience of monitoring compliance with a decision has stemmed from the Colombian ground-breaking T-0025/04. After the decision, the Constitutional Court of Colombia has enacted "autos de seguimento" similar to the resolutions of the Court and convening public audiences similar to the hearings seated by the Court.

[176] IACtHR, *Annual Report 2016*, 2017.

[177] Abramovich, 2009: 27.

budget "corresponds to special income, based on voluntary contributions from States, international cooperation projects, and contributions from other institutions under technical assistance agreements. This means that the Court's budget is unpredictable"[178].

Other remaining shortcomings derive from malfunctions in the infra-structure of the Court. Three decades after the start of the Court's activities, judges still work in a non-integral regime. At first, the General Assembly of the OAS denied the establishment of a permanent tribunal because the costs would be unjustifiable in the absence of a substantial caseload. Despite the increase of jurisprudence and functions, the Court still operates with judges working part-time[179].

Finally, the reduced degree of autonomy of the Court to implement orders of reparation imposes considerable limits to the efficacy of decisions. The most pervasive effect of this limit is the shortage of fully complied with decisions, a state of affairs that further strains the overburdened mechanism of monitoring compliance.

3.6 Final remarks

The efficacy of international courts is not exclusively built upon interaction with factors external to their structures; there are also internal forces within the Court that can improve its own efficacy. This chapter intended to present an evolutionary view of the progressive transformations occurring in the jurisprudence, procedures and mechanisms of the Court. This, in turn, is intended to provide support to analysing efficacy in subsequent chapters. In addition, this chapter presented a brief discussion of the institutional efficacy to the Court. Four aspects imply that the Court has been progressively increasing its institutional efficacy. First, increasing use of the IAHRS and of the Court, together with the broad adherence of states in the region to the "Contentious Human Rights Regime of the Convention" under the jurisdiction of the Court,

[178] IACtHR, *Annual Report 2016*, 2017: 162.
[179] Buergenthal, 1982: 232. The draft of articles 21, 22 and 23 had also envisioned a permanent court, with judges working full time.

reveals a growing confidence in these mechanisms "as effective legal instrument[s] to bring justice to claims"[180]. Second, the diversification of litigants, the expansion of legal themes and legal subjectivities contained in the Court's jurisprudence, and the development of the process of monitoring compliance with decisions have given foundation to widening rights and legal inclusion in the system. Third, the increased autonomy of victims in legal proceedings has contributed to providing suitable mechanisms of individual redress and to locating victims at the centre of the Court's functions. Fourth, the establishment of a comprehensive reparatory regime, the establishment of the doctrine of Control of Conventionality, and the attribution of *erga omnes* effects to the entire jurisprudence of the Court have expanded the effects of every single decision, maximising the reach of the Court's jurisprudence. The downsides arise from financial and infra-structural limitations, the subsidiary nature of the System, and indirect access for individuals to the Court. These reduce considerably the Court's institutional efficacy. Subsequent chapters will provide a contextualised view of these factors.

[180] Hunneus, 2011.

TABLE 1

Comparison between number of petitions received by the Inter-American Commission, number of cases referred to the Inter-American Court, and number of cases decided by the Inter-American Court per year

YEAR	PETITIONS	REFERRALS	DECISIONS
1997	435	2	2
1998	571	3	4
1999	520	7	3
2000	658	3	0
2001	885	5	11
2002	979	7	6
2003	1050	15	5
2004	1319	12	12
2005	1330	10	17
2006	1325	14	16
2007	1456	14	10
2008	1323	9	9
2009	1431	11	15
2010	1598	16	9
2011	1658	23	13
2012	1936	12	20
2013	2061	11	13
2014	1758	19	13
2015	2164	14	15
2016	2567	16	17

TABLE 2

Number of cases decided by the Inter-American Court of Human Rights per State

STATE	NUMBER OF DECISIONS
Argentina	17
Barbados	2
Bolivia	6
Brazil	6
Chile	8
Colombia	17
Costa Rica	3
Dominican Republic	4
Ecuador	20
El Salvador	6
Guatemala	23
Haiti	2
Honduras	12
Mexico	8
Nicaragua	3
Panama	5
Paraguay	7
Peru	39
Suriname	6
Trinidad and Tobago	4
Uruguay	2
Venezuela	19

TABLE 3

Average duration of litigation proceedings

PERIOD	NUMBER OF MONTHS
1980	39
1991	38
1996	40,5
2003-2006	20
2006-2010	17,4
2011	16,4
2012	19,2
2013	21,6
2014	24,1
2015	22,2
2016	20,1

SECTION 2

THE INTER-AMERICAN COURT OF HUMAN RIGHTS: CASE STUDIES

Prologue to case studies

Based on the efficacy chain developed in Chapter 2, and on the functional and institutional characteristics of the Court described in Chapter 3, the next three Chapters will set out an analysis of the effects of decisions concerning amnesty laws, indigenous rights and rights of detainees.

These three Chapters represent the core of this research, and are dedicated to executing a comprehensive case-law study of three bodies of jurisprudence. They are focused on the scrutiny of empirical data collected from official documents available on the website of the Inter-American Court of Human Rights, on websites of domestic courts, on websites of non-governmental organizations, and in official publications of state organs. Empirical data was also collected from in-person and on-site observation carried out through periods of fieldwork in Brazil, Bolivia, Colombia during the years of 2016-2018, and at the Court during the first semester of 2015. In each Chapter, empirical data is combined with existing scholarship and comparative analysis to render a comprehensive account of aspects of efficacy concerning each group of decisions.

Each Chapter is structured in three sections. The section "Setting the Scene" will present an overview of issue development in international law and of ongoing discussions. The second section "Jurisprudence of the Inter-American Court of Human Rights" will introduce a brief description of the cases ("Facts of the Cases"), followed by a distillation of the constitutive elements of the Court's doctrine on the subject ("Essential Elements of the Jurisprudence"). The third and last section will assess the efficacy of cases in the regional and global contexts, using the unities of reparation ordered by the Court in each ruling as starting points of the analysis. Importantly, this study will not neglect the existence of cases with little or almost no implementation; however, nor will it attribute low efficacy to the Court on account of these cases alone. The analysis of efficacy will simply focus on decisions which produce effects, and even cases of extreme non-compliance may do so. Additionally, it is accepted that the analysis of non-effects of cases may be as important as the analysis of direct or indirect effects to assess efficacy.

The analysis of efficacy, although it is intended to be comprehensive, does not presume to be exhaustive. More specifically, the intention of the three following Chapters is to highlight the most significant aspects of each of the decisions to a wider discussion of efficacy. As a result, Chapters will accommodate slight variations according to the characteristics and effects stemming from different issues. In Chapter 4 about amnesty laws, for example, the factor at the centre of the analysis is how the validity of amnesty laws is affected (or not) by decisions of the Court, and how shifts in their validity affect individuals and society as a whole. Therefore, instead of carrying out a detailed analysis of every single aspect of reparations in the decisions, the Chapter will concentrate its attention on broader effects of the decisions in the dialogue between courts and other state organs. The analysis will be extended from the direct victims dealt with in the rulings to all victims of amnesty laws. Paradoxically, to focus solely on the direct victims in the rulings would effectively be less victim-centred than focusing on the broad effects of amnesty laws over society at large. In contrast, in Chapters 5 and 6 about indigenous rights and rights of detainees respectively, direct victims gain greater salience in the analysis.

Subsequently, Chapter 7 will systematise the empirical data set out in these three chapters, connecting it with each of the layers of the efficacy chain. It will also respond in the way of a conclusion to the questions posed in the introduction of this study: (i) How should we account for the efficacy of the Inter-American Court of Human Rights and its decisions as they impact the human rights regime and over normative, institutional and social structures of global society?; (ii) To what degree has the Inter-American Court of Human Rights and its aggregate jurisprudence contributed to the process of concretization of human rights norms?; (iii) Has the Inter-American Court and its decisions contributed to redress victims of human rights violations in the fields of amnesty laws, indigenous rights and rights of detainees?

Chapter 4

Amnesty laws

4.1 Setting the scene

There is no consolidated definition or consensus on the legal validity of *amnesty* in international law[181]. As much as do definitions of the term, legal norms governing amnesty laws differ considerably. Treaty law is ambiguous about the their legal status, and the only conventional norm regarding amnesties is Article 6 of the Geneva Convention governing international armed conflict, which has been used, under the weight of political and legal disputes, to validate some contemporary forms of amnesty[182]. The Inter-American Convention, as with most international treaties, does not expressly forbid amnesties, but specific articles directly clash with the impunity that they may occasion [183].

In terms of custom, amnesties have been used for a long time in international and domestic law. Originally, amnesties were used to establish peace between states in armistice agreements. Indeed, up until the end of the Second World War, amnesties were considered a reasonable mechanism to "end international conflicts, enforce reciprocal pardon for offenses committed by belligerent states, restore harmonious international relations, and establish the foundation for long-lasting peace"[184]. In consequence, until recently, amnesty clauses were authorised components of treaties and agreements. Between 1945 and 2010,

[181] Mallinder, 2007: 209; Pensky, 2008; Schabas, 2012; Freeman, Pensky, 2012: 112.
[182] Geneva Convention of 1977 (Additional Protocol II), Art. 6: "This Article applies to the prosecution and punishment of criminal offences related to the armed conflict. [...] 5. At the end of hostilities, the authorities in power shall endeavour to grant the *broadest possible amnesty* to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained"(emphasis added). Many states such as El Salvador, Peru, and Uruguay enacted amnesty laws after the ratification of the Additional Protocol II.
[183] Mallinder, 2010: 4.
[184] Pensky, 2008.

over 500 amnesty laws in 138 countries were registered[185]. At the domestic level, amnesties were also taken up as legitimate political tools to end conflicts and facilitate the transition to democracy. This position was endorsed by international law. For instance, the first comparative study about amnesties, carried out by Louis Jounet, Special Rapporteur of the UN in 1985, emphasized the role of amnesty laws in the safeguard and promotion of human rights:

> For the purposes of this study, an amnesty is considered to be the juridical expression of a political act whose expected effects directly concern the promotion or protection of human rights and, in some instances, the return to, or consolidation of, democracy: because the amnesty encourages national consensus in the wake of a political change brought about in a democratic framework; because it is the first act in the initiation of a democratic process or marks a return to democracy; or because it intended to block an internal crisis or to mark the end of an international armed conflict[186].

Especially in the context of justice of transition, amnesties have become a common practice[187]. Indeed, in Latin America amnesties constituted a rare common ground among the varied strategies of transitional justice in the region. Most states in the region (with the exception of Belize, Costa Rica, French Guyana, Guyana, and Paraguay), have adopted amnesty-like legislation, decrees, or agreements[188]. As a consequence, states without amnesty laws are the exception

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[185] Data from the "Amnesty Law Database", created by Louise Mallinder as part of her doctoral research. Available at: http://www.incore.ulst.ac.uk/Amnesty/about.html. Access on: December, 2017.

[186] United Nations Human Rights Commission. *The administration of justice and the human rights of detainees. Question of the Human Rights of Persons Subjected to Any Form of Detention or Imprisonment. Study on amnesty laws and their role in the safeguarding promotion of human rights.* Preliminary report by Mr. Louis Joinet, Special Rapporteur, 1985.

[187] Paige, 2009.

[188] Some of this legislation would exclude international crimes *de jure* from crimes covered by amnesty, but the interpretation of domestic courts could *de facto* include such crimes. A list of all the amnesty laws in the region confirms a 'regional custom' in this matter: Argentina (1973, 1975, 1983, 1986, 1987); Bolivia (1984, 2003); Brazil (1979); Chile (1978); Colombia (8 amnesty laws introduced in 1953, 1981, 1982, 1989, 1993, 1997, 2002, 2005); Ecuador (4 amnesty laws, introduced in 1957, 1967, 1976, and 2000); El Salvador (10 amnesty laws introduced in 1962, 1968, 1979 (2), 1980, 1981, 1983, 1987, 1992, 1993); Guatemala (8 amnesty laws introduced in 1982, August 1983, March 1983, 1985, 1986, 1987, 1988, 1996); Honduras (10 amnesty laws introduced in 1963, 1965, 1969, 1977, 1981, 1985, 1986, 1987, 1990, 1991); Mexico (1978,

in the region.

The perception of amnesty as a condemnable practice is, then, a present-day construction[189]. In recent years, the conditions of validity and legitimacy of amnesty laws have progressively attracted attention from international law, especially when they have been used to put closure on conflicts that left a trail of human rights violations. The fight against impunity led by the UN in the 1990s, combined with the rise of an "era of accountability"[190], an increased faith in criminal justice systems[191], and the emergence of a generation of legal actors who suffered the pervasive effects of self-amnesties, have contributed to an increased questioning of amnesty laws.

This shift in the legal status of amnesties is visible in the official documents of the Inter-American Commission on Human Rights. In the early 1980s, prior to issuing formal recommendations, annual reports would include general discussions about amnesties. These reports revealed some ambiguities in the treatment of amnesties in the region[192]. Suriname Amnesty Law, law 5544/1992, for example, resulted from peace negotiations mediated by the OAS. Furthermore, in the same Report that the Commission welcomed the adoption of amnesties in El Salvador[193], Honduras[194], and Paraguay[195], it viewed with suspicion the enactment of amnesties in Chile[196] and Guatemala[197]. Especially in

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1994); Nicaragua (10 amnesty laws, introduced in 1960, 1967, 1978, 1983, 1985, 1987, 1988, 1990, 1991, 1993); Panama (5 amnesty laws introduced in 1952, 1960, 1987, 1988, 1994); Peru (7 amnesty laws introduced in 1956, 1970, 1980, 1992, 1993, 1995, 2001); Suriname (1989, 1992); Uruguay (1966, 1985, 1986); and Venezuela (2000, 2007).

[189] Engle, 2015: 1072.

[190] Sikkink, 2011; Lessa, Payne, 2012.

[191] Hunneus, 2013.

[192] Crema, 2013.

[193] IACHR, *Annual report 1992*, 1993.

[194] IACHR, *Annual report 1986-1987*, 1987: Chapter IV, "The Commission feels it is most important to describe also the recent events in Central America, which are designed to overcome some of the most immediate causes of the restrictions on the exercise of human rights in the region. The simultaneous adoption of the measures called for in the Esquipulas II Presidential Agreement within 90 days of its signature—dialogue with the unarmed opposition, *amnesty for armed rebels*, cease fire, cessation of outside assistance to armed groups, lifting of the states of emergency and the consequent restoration of civil and political liberties—*constitutes an event to which the Commission accords the greatest significance and importance"* (emphasis added).

[195] *Idem*, "As to the right to residence and movement, the Commission duly recorded its *satisfaction over the amnesty granted in 1983*, which permitted political exiles to return to Paraguay" (emphasis added).

[196] *Idem*. The Commission referred to "*[the] impossibility of investigating the disappearance of ten persons after their arrest*" because of the adoption of an amnesty decree.

[197] *Idem*, "The new amnesty decree, geared to create a climate of social peace and to avoid difficulties to the new administration's actions also introduces a new juridical principle which, in

the case of Guatemala, in the space of a few years, amnesties were transformed from a welcome into an unwelcome practice. This ambiguity on the part of the Commission reflected the disputes about the legality of amnesty laws in the international space, and a willingness by an inexperienced Commission to carefully examine the particulars of each case of as it tried to "consolidate good international relations with States and provoke a greater cooperation". Indeed, amnesties had different outcomes in the region:

> The picture of amnesties in Latin America seen through the lens of the Inter-American Commission is thoroughly articulated. The Annual Reports of the eighties took an ambivalent approach: amnesties allowed political activists protected abroad to safely re-enter their countries (as in Paraguay); they allowed countries to reconcile after war and enjoy an environment in which human rights had greater respect (cf. *Presidential Agreement Esquipulas II*); but at the same time they prevented States from effectively protecting human rights (as in Guatemala and Chile)[198].

The greatest contribution of these ambiguous years was a "wide (and not always coherent) range of terms and concepts used to determine the illegality of amnesties, and their incompatibility with the Convention"[199].

The change in the perception of amnesty as a pervasive practice did not start within states but from the *opinio juris* and practice of international organisations and international courts. On the less extreme end, the United Nations would accept amnesties under certain restrictions[200]. At first, the UN shifted away from its past position to state that it would not take part in accords granting amnesties anymore. For instance, The 1999 Lome Agreement in Sierra Leone was mediated by the UN, and the same UN repudiated it later. In actuality, the UN is not totally opposed to amnesties, but its organs set restrictive limits on their scope. They

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the opinion of the Commission, could hinder and render inefficient the actions taken by the judicial entity in charge of investigating and, if such is the case, sanctioning, the authors of subversive and anti-subversive terrorist acts which took place in Guatemala during recent years, and the most serious legacy of which is the large number of persons abducted, illegally detained, tortured, assassinated and disappeared".

[198] Crema, 2013.

[199] *Idem*.

[200] Freeman, 2009.

recognise that amnesties can assume an important role in ending armed conflicts, reconciling sectors of society and restoring human rights. In this sense, they share the view "that justice and peace are not contradictory. Rather, properly pursued, they promote and sustain one another. Experience has shown that a culture of impunity and a legacy of past crimes that go unaddressed are likely to undermine a lasting peace"[201]. However, the United Nations doctrine imposes some restrictions on this practice. The UN asserts that amnesties should not shield individuals who were responsible for gross violations of human rights or impede the execution of legal obligations. The International Criminal Tribunal for the former Yugoslavia (ICTY) stated that amnesties covering violations of *jus cogens* norms "would not be accorded international legal recognition"[202]. In the same line, the ECtHR has emphasized the duty to investigate violations of *jus cogens* norms[203] as has the African Commission on Human and People's Rights (AFCHR)[204].

On the most restrictive side of the scale, in a series of six decisions starting in 2001, the IACtHR ruled that amnesty laws are *null ab initio* because they create impunity for violations of human rights protected by the ACHR and by other human rights treaties. In doing so, the IACtHR has placed itself at the "forefront of international law jurisprudence on amnesties". No other international tribunal has addressed amnesties as often or as categorically as has the Inter-American Court[205].

4.2 Jurisprudence of the Inter-American Court of Human Rights

The IACtHR jurisprudence dealing primarily with amnesty is limited to a few cases. However, the Court has incorporated elements of this jurisprudence into several decisions to reinforce the opposition of ACHR norms to any norm

[201] OHCHR, *Rule-of-law tools for Post-conflict States: Amnesties*, 2009: 45.
[202] ICTY, *Furundzija case*, 1998.
[203] ECtHR, *Abdülsamet v. Turkey,* 2004; ECtHR, *Yeter v. Turkey*, 2004.
[204] ACHR, *Malawi African Association and Others v. Mauritania*, 2000:83; ACHR, *Zimbabwe Human Rights NGO Forum v. Zimbawe*, *21 May,* 2006: 215; ACHR, *Mouvement Ivoirien des Droits Humains (MIDH) v. Ivory Coast*, 2008:90.
[205] Sandholtz, Padilla, 2009.

perpetuating impunity, especially in relation to gross violations of human rights[206].

The first time that the Court tentatively addressed amnesty issues was in the case *Castillo Páez v Peru*. Since then, the Court has inserted amnesty discussions in a variety of cases, even when not dealing directly with the validity of amnesty laws. In some cases, the Court has copied excerpts of a former ruling on amnesty and pasted-in earlier cases involving the same State to reinforce its jurisprudence and promote compliance[207]. On other occasions, the Court has deviated from facts of the case and digressively included a discussion on amnesty to impede the misuse of legal instruments that could lead to impunity and act like amnesty laws. In other words, the Court has used principles cemented in its amnesty jurisprudence in cases not related to amnesty laws as a form of reinforcing these principles.

However, it would not be appropriate to place all 49 decisions in which the court mentions the term "amnesty" under analysis because they do not necessarily address the same legal questions. For example, it is not clear if Suriname's amnesty law was actually a factor in the case that involved an outrageous massacre committed by state agents against civilians in the village of Moiwana in 1986[208]. Indeed, in *Moiwana v Suriname*, the Court does not expressly prohibit the Surinamese amnesty law. Approved in 1992, the Amnesty law contained a clause that excluded its application by judges in cases involving crimes against humanity. Similarly, in a sequence of cases involving Guatemala[209] the Court decided only partially about the Amnesty Law ("Law of National Reconciliation") implemented under the pacification process led by the United Nations after the country's civil war. Interestingly, in cases such as *Las dos Erres v Guatemala*, amnesty laws had not yet been applied, but domestic investigation and prosecution had been delayed due to processes involving the amnesty law. In this case, the Court reiterated the incompatibility of amnesty laws with the American Convention, but did not declare them void. Instead, the Court ordered

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[206] Crema, 2013.
[207] IACtHR, *Gómez Paquiyauri Brothers* v Peru, 2004; IACtHR, *Gómez Palomino v Peru*, 2005.
[208] Antkowiak, 2007: 280-282.
[209] IACtHR, *Myrna Mack Chang v Guatemala*, 2003; IACtHR, *Plan de Sánchez Massacre v Guatemala*, 2004; IACtHR, *Carpio Nicolle et al v. Guatemala*, 2004; IACtHR, *"Las dos Erres" Massacre v Guatemala*, 2009.

the State to guarantee that the amnesty law would not hinder the investigation of the massacre in question and the prosecution of those responsible.

For this study, only decisions in which the court directly addressed the validity of an amnesty law have been adopted as part of an empirical basis of analysis. Cases that do not fit this criterion but refer to amnesty issues serve as auxiliary sources to clarify the Court's doctrine on the subject. These outliers were not included in the primary group of analysis because the absence of a direct order of reparation voiding amnesty-like instruments would hinder the assessment of efficacy in the following way. If the Court did not specifically order an amnesty law or legal instrument to be void, the efficacy of the case is not directly connected to the process of contesting amnesty; as a result, the efficacy of these cases stem from factors external to those analysed in this chapter.

In total, six decisions, involving five states and ranging from 2001-2012 declared amnesty forbidden and ordered states to banish their amnesty arrangements (see Table 4, at the end of this chapter). None of the cases has been considered fully complied with.

This section is structured in two parts. The first part will describe in detail these six cases. The second part will outline the essential elements of the jurisprudence concerning amnesty laws in order to accentuate the main doctrinal contributions of the Court to the field.

4.2.1 Facts of the cases

This section will provide a brief discussion of the factual aspects and doctrinal advancements of the Court's seminal rulings on amnesty. As each case has distinguishing features, each will be outlined individually.

(i) The Peruvian momentous duo: Barrios Alto (2001) and La Cantuta (2006)

During the 1990s, the Court received two cases in which amnesty laws were invoked by the state of Peru to justify failure in the duty to investigate. Despite

objections from victim's representatives, endorsed by the Commission, at first the Court avoided ruling against amnesty laws[210]. It was not until 2001, with the decision in *Barrios Altos*, that the IACtHR categorically declared amnesty laws void. *Barrios Alto* is the seminal precedent of the Court for this issue and settled the foundation of the Court's doctrine on amnesty.

The case deals with the massacre of 15 persons by the paramilitary death squad "La Colina" in a poor neighbourhood of Lima called Barrios Altos. The massacre took place in 1991, during the government's campaign against insurgent groups. Domestic courts classified the event as a common crime, which was therefore covered by amnesty laws No. 26,479 and No. 26,492, both passed in 1995. These laws were presented and enacted on the same day by the Peruvian congress and exempted from responsibility military personnel, police staff, and civilians that took part in human rights violations between 1980 and 1995.

The IACtHR declared Peru internationally responsible both for the massacre of Barrios Altos, described as a crime against humanity, and for maintaining two amnesty laws in force. In the final ruling, the IACtHR identified both laws as self-amnesties, maintaining that amnesty laws "are manifestly incompatible with the aims and spirit of the Convention" and lack legal effect, ordering Peru to render the amnesty laws void. The IACtHR articulated its opposition to self-amnesty laws using three elements: impunity, vulnerability of victims, and gravity of rights violated. According to the ruling: "amnesty laws, even if they are called something else, are incompatible with the Convention if they have the legal effect of preventing the investigation and punishment of violations of *jus cogens* norms".

Subsequent challenges to amnesty laws in Peru have given to the IACtHR the opportunity to consistently reiterate the doctrine settled in *Barrios Alto*, and even to expand that decision's reach. The most important of these decisions is *La Cantuta*, the next amnesty case decided by the IACtHR heard in 2006. Like *Barrios Altos*, *La Cantuta* concerned massacres committed by the paramilitary death squad "La Colina" under the command of President Fujimori. Those responsible for the massacres were shielded from prosecution by the amnesty

[210] Engle, 2015.

laws of 1995. As in many other cases after 2001, the Court repeated to a large degree what it had already cemented in *Barrios Altos*. What distinguishes *La Cantuta* is the dispute between IACHR and IACtHR about the connection between the validity of amnesty laws and breach of ACHR norms. The Commission considered that the formal existence of amnesty laws in the domestic legal order constituted *per se* a breach of the Convention. At the same time, state and victims' representatives insisted that "in practice, given the fact that the highest judicial authorities—including the Constitutional Court—had taken the *Barrios Alto* judgment into account, said laws had no legal effects whatsoever". The IACtHR concluded that the correct application of ACHR norms by Peruvian domestic courts was sufficient to fulfil the obligation established in *Barrios Alto* to amend legislation concerning amnesty. Therefore, the Court did not require this obligation in the *La Cantuta* case.

(ii) Almonacid Arellano et al v Chile (2006): continuous effects, customary foundation of crimes against humanity, and ground of inadmissibility of amnesties

The case deals with the arbitrary arrest and extrajudicial killing of Almonacid Arellano, a professor and supporter of the Communist Party, in 1973. State police forces of the Pinochet regime fired at him in front of his family as he was leaving his house. Almonacid Arellano died the following day. The Inter-American Court of Human Rights classified the murder as a crime against humanity and concluded that it could not remain unpunished. In connection with the case, the Court evaluated the legal status of Decree Law 2.191/1978, by which amnesty was granted to all individuals who performed illegal acts during the state of siege in force from 1973 to 1978—including the perpetrators of the Almonacid Arellano murder. Chile's amnesty law was formally a blanket amnesty because it had general application. In practice, however, it functioned as a self-amnesty "since it was issued by the military regime to avoid judicial prosecution of its own crimes" [211]. During the litigation proceedings, Chile admitted its

[211] IACtHR, *Almonacid v Chile*, 2006:120.

international responsibility and recognized the prohibition of amnesty laws under Convention law[212], but contested the admissibility of the case. According to Chile, domestic courts had not applied Decree Law No. 2.191 since 1998[213]. In 2006, with the decision of *Almonacid-Arellano v. Chile*, the IACHR invalidated Chile's amnesty law.

The case advanced three new elements in the doctrine of the Court regarding amnesties. First, the crime had occurred before Chile accepted the jurisdiction of the Inter-American Court in 1990, but the Court found it admissible because once the violation remained unpunished it created "continuous effects". Second, when the offence was committed, the category of "crime against humanity" was not included in Chilean law. The Court decided that by the time of events, this category was already part of rules of customary international law, based on the Nuremberg principles. In consequence, it could bind states even before the internalisation or typification of the norm. Third, blanked amnesties are as incompatible with the norms of the Convention as are self-amnesties. In this respect, the Court stated that what makes an amnesty law fundamentally incompatible with the Convention is its *ratio legis*, which enables the impunity of perpetrators of human rights violations recognised by international law as being of the utmost priority. The basic result is that neither procedure nor form of amnesty laws can excuse them if they support impunity.

(iii) Gomes Lund et al ("Guerrilla do Araguaia") v Brazil (2010): a persistent objector

The case *Gomes Lund v. Brazil* is related to the forced disappearance of 62 people during the military campaign against Brazilian Communist Party militants in the area of the Araguaia river banks in the north of Brazil. In this ruling, the Court directly challenged Brazilian Amnesty Law, ordering the state to "remove all practical and judicial obstacles" to the investigation and prosecution

[212] During Almonacid, Chile recognized its international responsibility for the facts of the case affirming that the "Decree Law of Amnesty has any ethical or juridical value", "amnesty or self-amnesty laws are contrary to international human rights law" and, most important "it is desirable that no amnesty laws exist, but in case they do, they must not be an obstacle for the respect of human rights".
[213] Freeman, 2009: 273.

of those responsible for crimes committed during the "Guerrilla do Araguaia".

Brazilian Amnesty Law 6,683/1979 conferred a broad amnesty, which was the result of negotiation between opposite groups of the military regime—an essential part of the process of social pacification after years of political instability. Its range of application was vast, and included not only state agents but also anyone who committed crimes during the dictatorship. As in the Uruguayan case, the amnesty law in Brazil was a political agreement "supported by civil society because it was originally intended to pardon crimes of resistance committed by the politically persecuted who had been banished, exiled, and imprisoned"[214] and "ultimately acquired a sense of pragmatic conciliation, capable of contributing to the transition to democratic rule"[215]. Brazilian superior courts have consistently supported the amnesty law. Months before the final ruling of *Gomes Lund*, the Supreme Federal Tribunal of Brazil affirmed that the amnesty law was valid in a highly contested decision in the case ADPF 153/DF[216]. By a large margin of difference, justices ruled in favour of the amnesty law, affirming that "the judicial branch declared itself impeded to review the political agreement that had produced the amnesty"[217].

Subsequent to the transition of power, reparation measures for victims of the military regime were established by different mechanisms. The Brazilian Constitution of 1988 contained provisions providing reparation measures for victims of the military regime in article 8 of the "Transitional Constitutional Act". A Truth Commission concluded in 1995 granted additional reparation, including compensation to family members of the 59 alleged victims in *Gomes Lund*[218]. An Amnesty Commission created in 2002 offered symbolic reparations and a state apology to those affected by the Amnesty Law[219]; however, these were all actions carried out by the executive and legislative branches that served mostly as palliatives[220]. The Court used this case to reaffirm elements cemented in previous jurisprudence. It declared the Brazilian amnesty law void, and

[214] Abrão, Torelly, 2012.
[215] Mezarobba, 2010.
[216] Brazilian Supreme Court, *ADPF 153/DF*, 2010.
[217] *Idem*.
[218] IACtHR, *Gomes Lund et al ("Guerrilha do Araguaia") v. Brazil*, 2010.
[219] Abrão, Torelly, 2012.
[220] Mezarobba, 2010:17.

reinforced the compulsory requirement of prosecution of crimes and of legal responses provided by the judicial system.

(iv) Gelman v Uruguay (2011): the prohibition of 'democratic' amnesty laws

Gelman v. Uruguay was the first occasion in which the IACtHR ruled expansively in a case that did not involve a *de facto* self-amnesty. The case deals with the arbitrary detention and forced disappearance of María Claudia García Iruretagoyena de Gelman in 1976. At the time of her detention, María Gelman was pregnant. Her daughter was born in a detention centre in Montevideo and was then given up for adoption to a Uruguayan family under the watch of "Operation Condor". The decision deals with the denial of justice to the next of kin of María Gelman as a consequence of the application of an amnesty law, and of the failure to investigate facts and punish those responsible for her forced disappearance. Uruguayan amnesty law 15.848/1986 (the "Expiry Law") was promulgated during a democratic government to avoid penal actions with respect to crimes committed up until March 1, 1985, by military and police officials. The law attracted diverse reactions from different branches of government, ranging from support to rejection.

The Supreme Court declared the law constitutional in 1988[221]. The Uruguayan people approved the law by a short majority of votes in a referendum in 1989, and confirmed the vote in a second referendum taking place in 2009.

Contrastingly, in the mid-2000s, Uruguayan courts began to confront the Expiry Law[222]. Former dictator Jose María Bordaberry was sentenced to thirty years in prison for ordering murders and forced disappearances in "a verdict unprecedented in Latin America"[223]. In the case *Sabalsagaray Curuchet Blanca Stela,* the Supreme Court of Justice declared central parts of the amnesty law unconstitutional and considered it inapplicable to the case. In 2011, the Supreme

[221] Uruguayan Supreme Court, *No. 148*, 1988.
[222] Sandholtz, Padilla, 2009.
[223] Lessa, 2012.

Court "declared the amnesty law void for 25 additional cases"[224]. In the same year, the Congress annulled the law.

Actions of courts reflected a shift of power within the executive branch. In 2005, President Tabaré Vásquez, of the political party Frente Amplio, assumed power and reverted the government position about past human rights abuses and the amnesty law. Using a presidential decree, he informed the judicial branch that the Expiry Law was not applicable to cases related to forced disappearance. The result was that the Gelman case was reopened in the domestic legal system, and when the IACtHR examined this case in 2011 it was still being processed in Uruguay's Second Criminal Court.

Uruguayan amnesty law differs from the others analysed by the Court because of its alleged democratic legitimacy. The law was enacted during the first democratic government after the end of the Uruguayan dictatorship and endorsed on two occasions by referendums. Despite the fact that it was applicable only to the state's agents, the judiciary and the people of Uruguay had explicitly endorsed the amnesty law. In consequence, the self-amnesty was modified into an amnesty with limited scope. Despite this "democratic legitimacy", the Court maintained the consistency of its jurisprudence and declared the Uruguayan amnesty law incompatible with the American Convention. The Court argued that "The fact that the Expiry Law of the State has been approved in a democratic regime and yet ratified or supported by the public, on two occasions, namely, through the exercise of direct democracy, does not automatically or by itself grant legitimacy under International Law"[225] and that "democratic origins or approval of an amnesty law were less important than its effect in creating impunity"[226]. Importantly, the Court clarified that the incompatibility of amnesty laws with the Convention was "not limited to those which are denominated, 'self-amnesties'"[227] while still standing ready "to leave unpunished serious violations committed in international law"[228].

This case sheds light on the criteria used by Court to declare the illegality of

[224] Buriano, 2011: 24.
[225] IACtHR, *Gelman*, 2011: 238.
[226] *Idem*: 81.
[227] *Idem*:175.
[228] *Idem:* 229.

amnesty laws. Such illegality is not related to the form of enactment, class of individuals protected, or popular endorsement, but rather with the seriousness of crimes committed. According to the Court, democratic processes cannot transform an amnesty law that would otherwise be void into a lawful norm.

(v) Massacres of El Mozote and nearby places v El Salvador (2012): humanitarian law and amnesties

The case deals with successive massacres committed in the 1980s as a result of military operations carried out in the region of Morazán. Such massacres killed approximately 1,000 people, including children and other vulnerable groups. Domestic courts resorted to the "General Amnesty for Peace Consolidation", Legislative Decree 486/1993, to halt investigations and dismiss the case.

In 1992, as a consequence of peace negotiations sponsored by the United Nations to end more than a decade of violence caused by the civil war that plagued El Salvador from 1980 to 1992, a truth commission established the National Reconciliation Law. In 1993, the executive branch extended this law and enacted the 'General Amnesty for Peace Consolidation Law'. This legislative decree had a broader scope and did not exclude human rights violations from the sphere of its amnesty.

The IACtHR ruled directly on the legality of the General Amnesty for Peace Consolidation Law', reiterating previous jurisprudence but highlighting the special circumstances that surrounded the case. The difference lay in the fact that El Salvador's amnesty law differed from those of other countries because it affected "acts committed in the context of a non-international armed conflict"[229].

In its decision, the IACtHR ordered that:

> the State must ensure that the Law of General Amnesty for the Consolidation of the Peace never again represents an obstacle to the investigation of the facts that are the subject matter of this case or to the

[229] IACtHR, *Massacres of El Mozote and Nearby Places* v El Salvador, 2012: 284, 285.

identification, prosecution and eventual punishment of those responsible for this and for other similar grave human rights violations that took place during the armed conflict in El Salvador[230].

In *El Mozote*, the Court produced a far-reaching obligation, condemning the amnesty law and forbidding its application to future such cases[231].

4.2.2 Essential Elements of the Jurisprudence

The IACHR has clearly taken the lead on developing a jurisprudence concerning amnesties, one that is used as a reference by domestic and international courts[232]. This section will present the elements that comprise the "interamerican amnesty criterium", highlighting the development of key aspects of the IACtHR's doctrine on amnesties.

(i) Impunity

The great part of the doctrine of the court on amnesty is based in a resistance to impunity. Considering the whole jurisprudence of the Court, this is the only aspect that emerges as decisive in evaluating the validity of amnesty laws. Along these lines, the Court has repeated in various contexts that the *ratio legis* is the real determinant of illegitimacy of amnesties. As a result, any form of law that prevents prosecution and legal punishment of those responsible for serious human rights violations, resulting in impunity, is forbidden. Importantly, the Court highlights that impunity has pervasive effects both over society and victims simultaneously permitting the repetition of human rights violations and accentuating the total defencelessness of victims, violating their right to truth, memory and justice.

Using this criterion, the Court has declared void various forms of amnesty, including self-amnesties and blank amnesties. In *Almonacid-Arellano*, the Court

[230] *Idem*: 403.
[231] Yepes, Duque, Leon, 2014: 66-68.
[232] Engle, 2015: 1103.

defined self-amnesties as laws "issued by the military regime to avoid judicial prosecution of its own crime"[233]. In *Gomes Lund*, the Court stated that "the non-compatibility with the Convention includes amnesties of serious human rights violations and is not limited to those which are denominated, self-amnesties"[234]. In *Gelman*, the Court maintained its view that source, support and democratic approval are irrelevant in deciding the validity of amnesty laws, stating that the "protection of human rights constitutes an impassable limit to the rule of the majority, that is, to the forum of the 'possible to be decided' by the majorities in the democratic instance"[235].

Furthermore, the Court does not impose restrictions only on amnesty laws, but also on any other practice that may allow impunity or compromising access to justice, the right to truth, and fair reparation. In its decisions, the Court repeatedly reasserts the illegality of legal acts, legal instruments, and legal principles when causing similar hindering effects, especially when related to the violation of *jus cogens* norms. In *Barrios Alto*, the Court stated that amnesty laws, "*even if they are called something else,* are incompatible with the Convention if they have the legal effect of preventing the investigation and punishment of crimes against humanity"[236]. In other cases, the Court challenged the principle of *res judicata* where it impeded states to fulfil their "obligation to investigate, capture, and, where appropriate, prosecute and punish those responsible for serious human rights violations," and ordered cases to be re-opened. In a recent case, the Court established that "prescription could not be used against the crime of slavery", a principle which it deemed to have the status of *jus cogens*[237]. In order to curtail impunity, the Court declared that human rights principles should take precedence over rules of procedure.

(ii) Three pillars of prohibition

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[233] IACtHR, *Almonacid*, 2006.
[234] IACtHR, *Gomes Lund*, 2010.
[235] IACtHR, *Gelman*, 2011.
[236] IACtHR, *Barrios Alto*, 2001.
[237] IACtHR, *Hacienda Brasil Verde Workers v Brazil*, 2016: "The State must adopt the necessary measures to guarantee that the statute of limitations will not be applied to the international crimes of slavery and its analogue forms".

The Court builds its doctrine on amnesty on three pillars. The first pillar concerns victims of amnesty laws and the categories of rights of which they were deprived. The Court condemns the denial of the rights to judicial protection, integral reparation and truth to victims. The right to due reparation is the foundation of the law of state responsibility and a central function of human rights courts. In addition, the court makes clear that it considers amnesty provisions to be in violation of the right to truth. Accordingly, the Court states in *Gomes Lund* and *Gelman* that "amnesties and other analogous measures contribute to impunity and constitute an obstacle to the right to the truth in that they block an investigation of the facts on the merits" [238]. Importantly, the Court recognises the complementarity of truth commissions and alternative mechanisms to fulfil this right, but categorically affirms that it cannot replace the obligation of states to establish truth through criminal procedures in judicial settings[239].

The second pillar relates to the seriousness of the crimes committed. The impossibility of granting amnesty to the authors of violations of non-derogable rights has been discussed at great length in *Almonacid Arellano*, particularly in the reasoning about 'crime against humanity'. According to the Court, there is a core of human rights protected by international law that does not admit amnesty in case of violations. The IACtHR has contributed to characterising which crimes constitute *jus cogens* violations, and therefore to clarify the definition of such crimes. By doing this, the Court has advanced even further its doctrine on *jus cogens*, the catalogue of which includes crimes such as torture, slavery, some forms of extrajudicial execution, forced disappearance, and war crimes[240].

The third pillar is related to the *rationae temporis* of the cases. The Court cannot prosecute offenses committed before the recognition of its jurisdiction, but it can judge cases that have "continuous effects". The Court has repeatedly declared that impunity gives continuity in time to a crime. The concept of "continuous effects" permits the Court to extend its jurisdiction to virtually any

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[238] IACtHR, *Gomes Lund*, 2010.
[239] Pasqualucci, 1994.
[240] For a comprehensive list of norms and jurisprudence upholding prohibition of use of amnesty laws to shield serious crimes, see: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule159_sectionb. Access on: December, 2017.

case that causes impunity, and this has been used especially used in cases involving forced disappearances. In addition, the Court has also challenged the statute of limitations whenever it prevented the prosecution of imprescriptible crimes.

(iii) Inadmissibility of mitigating circumstances

According to the Court, as long as a law, principle or mechanism is used as an excuse to perpetuate impunity it remains inadmissible, regardless of mitigating circumstances related to its procedures of enactment, range of application or purpose. In consequence, the Court considers irrelevant if amnesty laws were adopted through democratic processes or by a particular group; if they are applicable to specific groups or the whole society.

In terms of purpose, a frequent argument used to defend amnesties is based on their facilitating role in the transition to more stable and democratic regimes. Some supporters argue that conditional amnesties can provide a fundamental leeway to peace. The Court, however, sustains that criminal justice is preferable to peace when both are not achievable concurrently. At the same time, the Court adopts the position of the United Nations and disputes the incompatibility of justice and peace. In *Gomes Lund* and *Gelman*, the Court discusses "the false dilemma between peace and reconciliation, on the one hand, and justice on the other" [241]. Likewise, the 2010 Kampala Declaration, adopted at the Review Conference of the International Criminal Court, declares that "there can be no lasting peace without justice and that peace and justice are thus complementary requirements" and that "justice and the fight against impunity are, and must remain, indivisible". In the case *Massacres of El Mozote and Nearby Places v. El Salvador*, the Court challenged an amnesty decree that ended a non-international armed conflict, entering into the domain of humanitarian law. The IACtHR unanimously decided that prosecutions of war crimes could not be constrained by any kind of amnesty, even one that bears some similarity to a peace agreement.

[241] IACtHR, *Gomes Lund*, 2010.

(iv) Principle of non-obviation of justice

In order to avoid impunity, the IACtHR, based on the principle of non-obviation of justice, sustains the need for a *legal* response. Normally, this principle is expressed in decisions as the right to be "heard by a judge". The Court recognises the relevance of mechanisms that work alongside the formal judicial process, including truth commissions, symbolic reparations, acts of forgiveness, and the construction of historical memory to promote social reconciliation. However, the Court emphasizes that nothing can obviate the victim's right to a *judicial* response. For the Court, formal criminal procedures are an indispensable component of the duty of investigate, prosecute and sanction, and cannot be substituted by other alternative mechanisms. What is implied in the Court's position is the expansion of law and judicialisation as the most legitimate mechanisms to address social injustices and breaches of human rights.

(v) Null ab initio

The Court has declared that amnesty laws are *null ab initio*. By affirming that national laws are void or lack legal effects, the Inter-American Court executes a direct control of conventionality and attributes immediate effect to its decisions, acting like a "true constitutional court"[242]. The distinction of this action is highlighted by some commentators: "It's the first time that an international court determines that national laws are devoid of legal effects within the state system where they have been adopted and consequently obliges the state to act as if these laws had never been enacted"[243].

4.3 Efficacy

[242] Binder, 2012: 1212.
[243] *Idem*.

The jurisprudence of the Court on amnesty has had a knock-on effect on the dismantling of impunity structures in Latin America. This section considers the effects of decisions, emphasising the dialogue between state organs, international legal bodies, and the IACtHR.

4.3.1 Compensation

Uruguay and Chile were the only states to fully comply with their obligation to compensate victims. Peru and Brazil have partially complied with this obligation. The Brazilian State paid compensation to 39 relatives of disappeared victims, which corresponds to 19 out of the 23 cases indicated by the Court[244]. Two of the remaining cases are in the process of payment, and in one of these the State does not have information about the victim's location. In the other two, families refused to accept compensation.

4.3.2 Satisfaction

The Court has ordered three categories of measures of satisfaction: the publication of parts of a decision, the construction of a memorial in honour of the victims, and the realisation of public acts recognising the international responsibility of States. All states have fully complied with the obligation to publish parts of the decision in a newspaper of national circulation and on an official government website[245]. El Salvador has fully complied with the publications required, and the Court did not monitor compliance of other reparatory measures. Even so, a recent decision of the Supreme Court circumvents the ill effects of El Salvador's amnesty law in relation to the duty to prosecute, resulting in the reopening of the case. Peru fully complied with the construction of a memorial monument ordered in *Barrios Alto*. In *Gomes Lund*, the relatives of victims requested permission to postpone the realisation of a public act recognizing international responsibility ordered by the Court because

[244] IACtHR, *Gomes Lund* (Monitoring Compliance with Judgment).
[245] IACtHR, *Massacres of El Mozote and the surrounding areas* v. El Salvador (Monitoring Compliance with Judgment).

"they fear that the realization of a public act without starting criminal prosecutions or clarifying the facts of the case may undermine the commitment of the State with the promotion of truth and achievement of justice"[246]. The request of the victims reflects the absorption of two essential elements of the doctrine of the Court on amnesty: the non-obviation of justice and an increased faith in criminal procedures to provide justice for human rights violations. Uruguay fully complied with the obligation to carry out a public act of acknowledgment of international responsibility as a result of the *Gelman* ruling. In 2012, during an event with participation of the three branches of government, and with the presence of the President of Republic and the victim's next of kin, the State placed a plaque in memory of victims of violations of human rights by state practices. The plaque refers to the case of Gelman and it was placed in the former building of the "Servicio de Información de Defensa", where victims were tortured. According to the Court, the event was one of the most remarkable acts among all carried out as a reparatory measure of the same nature.

4.3.3 Guarantees of non-repetition

The main guarantees of non-repetition issued by the Court are educative measures and orders of modification of legislation. In *Gomes Lund*, the State structured a permanent and obligatory programme on human rights education for military staff of all levels. In just one year, more than 100.000 officers attended the programme, which contributed to the diffusion of human rights awareness within the Brazilian Armed Forces and to the strengthening of institutional and social structures in defence of ACHR norms. In *Gelman*, Uruguay partially complied with the obligation to install a permanent human rights programme directed at the agents of the Public Prosecutor's Office and the judges of the Judicial Branch of Uruguay. A discussion about the obligation of modify domestic legislation will be combined with the forthcoming discussion about the obligation to investigate, prosecute and punish when appropriate in section 3.3.6.

[246] IACtHR, *Gomes Lund* (Monitoring Compliance with Judgment).

4.3.4 Restitution

The main measure of restitution ordered by the Court in cases related to amnesty laws is the obligation to locate, identify and deliver remains of victims to their next of kin. In order to comply with this obligation, Brazil established an inter-ministerial "Araguaia Working-Group" to coordinate and execute the necessary actions to comply with the obligation. The efforts did not result in locating any victim remains. In addition, the methodology of searches, which included a strong presence of military forces in the expeditions, received criticism from representatives of victims, families of victims, the Commission, and the Brazilian Prosecutor's Office. In *Gelman*, the Court determined that the state had partially complied with the obligation to locate victims' remains because it assembled a team of experts to conduct searches and created an Interministerial Commission to supervise investigations[247]. To comply with the obligation to identify places where bodies were buried and find the remains of victims, in 2014 the state of El Salvador assembled an international group of Forensic experts. Their main tasks included "searching for graves, exhuming bodies, identifying remains, and scientifically documenting crimes—often with the participation of grieving families"[248]. In 2017 the State expressed its willingness to create, in a joint effort with the public, a commission to search for individuals who disappeared during the country's civil war.

4.3.5 Rehabilitation

In relation to the obligation to give medical and psychological treatment to victims and next of kin, in *Gomes Lund*, the State referred victims to the Public Health System. In response, the Commission argued that the State must give preferential attention to victims of human rights violations and should differentiate reparation of victims with the provision of social services at a higher level than that offered to society as a whole. The efficacy, in this case, lies

[247] IACtHR, *Gelman v. Uruguay*, 2013 (Monitoring Compliance with Judgment).
[248] See http://blogs.berkeley.edu/2014/02/07/supporting-el-salvadors-investigation-of-el-mozote/. Access on: December, 2017.

in the capacity of the State to accommodate differentiated needs of victims within its existing infrastructure. Peru has partially complied with the obligation to locate the next of kin of victims as part of reparations, as well as with obligations to provide education and health services to victims and next of kin.

4.3.6 Judicial dialogue between domestic organs and regional jurisprudence on amnesty: the obligations to effect legislative changes and to investigate, prosecute and punish when appropriate

The decisions of the Court have appealed primarily to domestic courts that have been the most active of state organs in curtailing amnesty laws. Almost all high courts of states that were declared internationally responsible in cases involving amnesty laws have issued decisions in conformity with the Court's decision. The exceptions are the Brazilian Supreme Court and the Uruguayan Constitutional Court. However, contestation to amnesty laws has taken other forms, inside and outside the courtroom. The main vectors of the efficacy of the Court have been the proliferation of trials and an increase in prosecutions geared toward ensuring the right to truth of victims[249], an improvement of real sanctions, and significant change in the status of amnesty laws in the region. However, the efficacy of the Court is not always measured in increases in prosecution; indeed, the Court's jurisprudence has created a substantive body of doctrine widely replicated and strongly impactful upon of essential state structures[250]. This section will illuminate how decisions of the Court about amnesty law have affected institutional dialogues between various state organs, particularly strengthening those institutions that execute control of conventionality.

(i) Peru

[249] Medellin-Urquiaga, 2013.
[250] Payne, 2014: 113.

The Peruvian case is the most prominent example of application-efficacy. It is the only state that fully complied with legislative changes because of the declaration of ineffectiveness of Laws No. 26479 and 26492 by the national Constitutional Court. In addition, according to the Court Peru has made progress in including "the most suitable legal classification" to define the crime of extrajudicial execution. Peru also fully complied with ratification of the International Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes against Humanity.

In response to *Barrios Alto* and *La Cantuta*, domestic courts—in tandem with an active civil society—declared in several judgments the inadmissibility of any legal instrument with the purpose of obstructing the investigation, prosecution or punishment of gross human rights violations[251]. The strong network of human rights mobilisation in Peru was crucial to repealing amnesty laws[252]. Both the President of the Supreme Court of Peru in 2001 and the Attorney General's Office in 2005 demanded that amnesty laws should no longer be applied by courts.

In terms of implementation, in the aftermath of *Barrios Altos*, state organs implemented a series of measures to eliminate the effects of Peruvian amnesty laws. Notably, the Constitutional Court ordered all judicial and prosecutorial institutions to give effect to the *Barrios Altos* decision. The apex of this process was the extradition and criminal prosecution of former President Alberto Fujimori for having perpetrated crimes against humanity during his presidential mandate[253]. It is hardly a coincidence that these outcomes took place in Peru, the state against which the Court issued its first decision on amnesty laws. The rulings of the IACtHR in *Barrios Alto* and *La Cantuta* contributed largely to repealing amnesty laws and enabling the prosecution of hundreds of officials involved in serious human rights violations[254]. On the one hand, the Inter-American Court's amnesty jurisprudence gave support to Peruvian human rights and victims' associations in their fight for truth and reconciliation and against impunity. On the other hand, an articulated civil society in combination with

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[251] Peruvian Constitutional Court, *Expediente 679-2005-PA/TC*, 2007.
[252] Lessa *et al*, 2014.
[253] Burt, Paz, 2010: " The trial was a milestone in the fight against impunity in Peru and around the world, as it was the first time that a national court had declared that an elected Latin American Head of State could be tried for committing crimes against humanity".
[254] Roht-Arriaza, 2012.

other favourable institutional and social structures promoted a large-scale diffusion of these decisions and the principles they represent. In Peru, the removal of the amnesty law did not cause a cascade of prosecutions as it did in Chile, but it still produced a significant number of legal proceedings[255]. Between 2005 and 2012, the judiciary delivered 46 decisions in human rights trials, of which nine were guilty verdicts, 26 not-guilty verdicts, and 11 hybrid sentences (in which at least one defendant was absolved and another condemned)[256].

(ii) El Salvador

El Salvador has failed to comply with its duty to prosecute, but has taken actions that "evidence the willingness of the State to fulfil its obligations". As in the cases of Peru and Chile, El Salvador acknowledged responsibility for the Massacre of El Mozote and accepted its obligation to clarify the facts, prosecute those responsible for the alleged crimes, and adapt its domestic laws. The first time the Constitutional Court considered the constitutionality of the country's amnesty law, it dismissed the case. The Supreme Court of Justice upheld the amnesty law in both 1993 and 2000[257]. In 2003 it declared that it was up to judges of lower courts to decide if amnesty could be applied in a particular case. In response, the Salvadoran attorney general, referring specifically to the El Mozote massacre, for the first time recognised that crimes against humanity must be investigated and that those responsible might be persecuted. The Supreme Court has also ordered the exhumations of massacre victims to comply with the IACtHR's *El Mozote* decision[258].

In a landmark decision on July 13, 2016, the Constitutional Court declared unconstitutional the 'General Amnesty for Peace Consolidation Law' of 1993 and repealed it from the domestic legal order, impeding its use by any administrative authority, and restoring the right of access to justice and the right of reparation for victims of crimes against humanity and war crimes[259]. The reasoning was

[255] Payne, 2014: 22.
[256] Mallinder, 2013.
[257] Roht-Arriaza, 2012: 15.
[258] Payne, 2014:90.
[259] Constitutional Court of El Salvador, *N 44-2013AC*, 2016.

based on previous arguments used by the IACtHR in its jurisprudence. The IACtHR recognised the possibility of adoption of amnesties, but denied the capacity of the legislative organ to issue broad and unconditional ones. It is worth noting that, as prescribed by the doctrine of control of conventionality, the Salvadoran Constitutional Court effectively extends the obligation from the judiciary branch to administrative authorities and public servants in general. Although the Truth Commission made atrocities of the civil war public, it was not until this decision of July 2016 that the amnesty law ceased shielding a thorough investigation of events that occurred during the conflict.

(iii) Chile

In Chile, application of IACtHR orders in conformity with the decision in *Almonacid Arellano* started in the legislature and the executive. Official declarations and interpretative legislation have little by little compelled domestic courts to interpret amnesty laws according to the Court's determination. The case of Chile combines observance and application efficacy because since 1991 a faltering jurisprudence from the Supreme Court has spurred more progressive lower courts to start defying amnesty laws[260]. Early cases express a common pattern of resistance and dispute among lower courts, while the Supreme Court remained more resistant to changes.

There are three moments of a visible shift in the Supreme Court's faltering jurisprudence. The first moment occurred in 1998, with the start of the criminal prosecution of Augusto Pinochet and subsequent waiver of his immunities. After 1998 began a more active period of prosecutions against human rights abuses that occurred during the dictatorship, with the Supreme Court becoming increasingly assertive. In this occasion, endogenous political factors were the driven force behind the action of domestic courts.

The second moment occurred with the decision of the IACtHR in *Barrios Alto*. Citing the IACtHR decision in rulings issued after 2001, the Supreme Court

[260] Huneeus, 2011: "this was the direction that the Chilean courts have been heading since 1998 [t]hus it is impossible to attribute this switch to the Inter-American Court's single decision, or even to a line of decisions [...] the Inter-American Court provided one more tool in the kit of those arguing against the Amnesty Decree".

maintained the application of amnesty exclusively to individual cases and after finalisation of criminal prosecution[261]. In addition, the Supreme Court admitted that forced disappearance is a "permanent crime", following the concept of "continuous effects" developed in the jurisprudence of the Court. In this occasion, a causative line can be traced between the jurisprudence of the IACtHR and new jurisprudential lines adopted by Chilean superior courts. At the same time, the influence of previous legal decisions should not be neglected as a competing cause for the flourishing of human rights adjudication in Chile. As a result, prosecutions proliferated in the early 2000s; however, there were some backward steps in this process. The jurisprudence of Chilean courts has not always taken a linear trace.

The decisions of higher courts were not always consistent with the IACtHR doctrine until the IACtHR decision in *Almonacid*, which marks a third moment of definitive change in the domestic treatment of amnesty. Since the Inter-American Court's ruling, Chile's Amnesty Decree has not been applied. In recent cases the Supreme Court upheld the prohibition of applying amnesty laws to impede prosecutions for crimes against humanity. According to a study: "By February 2012, 1,342 human rights cases had been opened in the country and perpetrators found guilty of those violations are now in prison"[262]. A previous report of the IACHR commended Chile for retrieving sufficient evidence to present formal charges against former members of the military forces and for beginning a new stage of truth and justice for victims of human rights violations during the military dictatorship of General Augusto Pinochet[263]. While the effects of the amnesty law have been successfully curtailed, the norm retains legal validity. In other words, the law has been maintained but the courts have found ways around it[264]. Furthermore, a bill promoted by the Chilean government to amend the Chilean criminal code so that serious human rights violations were not subject to amnesties or statutes of limitation (such as those contemplated by

[261] Chilean Supreme Court, *Rol 4053-2001*, 2003.
[262] Lessa *et al*, 2014.
[263] IACHR, Annual Report 2015, 2016: 22.
[264] For a discussion of the decisions of the Inter-American Commission of Human Rights see Centro de Derechos Humanos, Universidad Diego Portales, 'Informe Anual sobre Derechos Humanos en Chile', 2003, http://www. derechoshumanos.udp.cl/informe-anual-sobre-derechos-humanos-en-chile-2003. Access on: December, 2017.

the 1978 amnesty decree law) have remained deadlocked in Congress since June, 2010.

Chile provides the most striking example of growing litigation after amnesty laws were invalidated. During the period 2002 and 2013, 1350 cases of human rights breaches were being investigated against more than 800 former agents of the dictatorship, and by 2012, Chile had 141 final decisions and 447 sanctions, out of which 24,1% were imprisonment. Between 2010 and 2016, the Criminal Chamber of the Supreme Court issued 23 sentences concerning breaches of human rights during the dictatorship[265]. The Court declared that: "Insofar as it was intended to grant amnesty to those responsible for crimes against humanity, Decree Law No. 2.191 is incompatible with the American Convention and, therefore, it has no legal effects" [266].

Importantly, increase on human rights litigation in Chile seems to derive from endogenous political and social processes that go back to 1998. The jurisprudence of the Inter-American Court, together with other social structures, has supported and strengthened these processes.

(iv) Brazil

Brazil is the least compliant state in the region. In the same year of the IACtHR *Gomes Lund* decision, the highest Brazilian court, the Supreme Federal Tribunal (STF), upheld the Brazilian amnesty law 6.683/1979 in a decision issued just a few months before the decision of the Court[267]. Both before and after the IACtHR ruling, the STF vocalized the non-binding effects of decisions of the IACtHR[268]. In terms of legislative changes, the Court declared that "Brazil has so far failed to carry out any meaningful action as instructed by the Inter-American Court" [269]. This affirmation does not necessarily imply that the decision of the Court did not produce effects in the state. It implies, though, that the existence of other

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[265] *Idem*.
[266] IACtHR, *Almonacid Arellano et al v. Chile* (Monitoring Compliance with Judgment).
[267] See online article "Challenging Impunity in Brazil" by Dr. Par Engstrom, 2016. Available at: http://www.justiceinfo.net/en/justice-reconciliation/26278-challenging-impunity-in-brazil-the-inter-american-court-of-human-rights-and-gomes-lund.html. Access on: December, 2017.
[268] Torelly, 2012.
[269] IACtHR, *Gomes Lund* (Monitoring Compliance with Judgment).

competing causes have overshadowed a greater efficacy of the Court's decision. Notwithstanding these shortcomings and a low efficacy concerning observation, application, and adequacy, the Court's decision in *Gomes Lund* has contributed to strengthening of official state organs[270].

In contrast with other states in the region, Brazilian self-amnesty was not challenged by courts or fought against by significant sectors of society until 2010. With the exception of one-off reparatory programmes progressively developed by the executive after democratisation, the victims of the amnesty law remained without due legal redress. In 2002, it was instituted an Amnesty Commission, subsidiary of the Ministry of Justice. This commission is in charge of analysing documents, receiving petitions, and it has autonomy to decide the cases of victims of the dictatorship. Currently, Brazilian Amnesty Commission has received more than 75.000 petitions. Although the Amnesty Commission did provide redress to victims of acts committed between 1946 and 1988, these reparations did not constitute a legal redress.

After the decision of the IACtHR there were some modifications to the domestic legal order. The development of an assertive institutional and social structure offering opposition to the amnesty law and the impunity it facilitated was in great part formed after the IACtHR *Gomes Lund* decision that directly "favoured a more progressive group of pro-compliance prosecutors"[271]. However, the influence of the Court's decision is still restrict to a few sectors.

In terms of institutional strengthening, in 2012 an official National Truth Commission was created, which challenged the amnesty law in its final report, published in 2014[272]. This action pointed to a tentative shift in executive posture towards accountability. Law 12.528/2011 created the National Truth Commission, which became operational in 2012 with the mandate to examine and clarify the serious human rights violations committed up until 1988 in order to promote the rights to memory and c truth, and to promote national reconciliation. The final report of the Truth Commission revealed that the number of forced disappearances and deaths was higher than expected, and,

[270] Bernardi, 2017.
[271] Bernardi, 2017.
[272] Brazil, Relatório Final da Comissão da Verdade (Final Report of the Truth Commission), 2014. Available at: http://www.cnv.gov.br. Access on: December, 2017.

surprisingly, it listed the names of some of the perpetrators of human rights violations. In addition, the final report endorsed the IACtHR's jurisprudence on amnesty and urged the prosecution of those responsible for breach of human rights during the dictatorship[273]. According to the former president of the Truth Commission, the body

> gave new meaning to the concept of amnesty from forgiveness for those who resisted to a word of apology from the state to those affected by actions of a de facto regime. Remarkably, the Truth Commission attempted to extend the reparatory police beyond the economic dimension by granting moral and symbolic dimensions [274].

The influence of the IACtHR in this statement is noticeable, especially regarding the attempt at providing comprehensive reparations, which was a contrast to the policy of former governments which offered mainly compensation as a form of redress to victims[275]. Notwithstanding, the work of the Truth Commission was not advanced by Brazilian judiciary branch and litigation on this field of human rights, with some exceptions, is still inexpressive.

In order to comply with the obligation of clarifying the facts surrounding the 'Guerrilla do Araguaia' as well as violations of human rights that occurred during the military regime, the State carried out several "soft" actions led by other branches of the government. First, it created a website called "Comisión Especial de Muertos y Desaparecidos politicos" ("Special Commission of Political Deaths and Disappearances") with the purpose of providing and systematising public access to information related to the Guerrilla do Araguaia. Second, it extended the mandate of the Amnesty Commission of the Ministry of Justice to provide economic reparations and reinforce the rights to truth and memory. In terms of legislative changes, Brazil did not define the crime of forced disappearance in its legal order, but it took the first steps toward the ratification of the Inter-American Convention on Forced Disappearance of Persons, and initiated two legislative proposals to comply with the obligation to do so. Legislative debates

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[273] *Idem*.
[274] Available at: http://www.vermelho.org.br/noticia/284914-1. Access on: December, 2017.
[275] Abrão, Torelly, 2011; Abrão, Torelly, 2013.

were fostered by the IACtHR's ruling, and in 2012 there was enacted a new Access to Information Law that may contribute to clarify the events occurred during the "Guerrilla do Araguaia".

In terms of application, as the STF ruled contrary to the decision of the Court, it is the Public Prosecutor's Office that occupies a central role in dismantling the amnesty law and mitigating its effects. Since the judiciary has blocked a repeal of the amnesty law even when pressured by lawyers and courts, the only institution competent to perform control of conventionality consistently in this matter is the Public Prosecutor's Office. In this sense, litigation before lower courts, and especially the action of public prosecutors, have been crucial to circumventing—rather than confronting—the decision of the STF. These actions have had the direct support of the IACtHR, but are still contingent. High-profile military officers such as colonels Ustra and Sebastião Curio Rodrigues de Moura were declared convicted, but decisions in superior courts reverted this position. To date, there are no military officers responding to a sentence, after a final decision, on the subject.

In 2014, a Brazilian political party filled a petition before the Supreme Tribunal Federal requiring clarifications about the position of the tribunal concerning amnesty laws and the decision of the IACtHR in *Gomes Lund*. The petition, ADPF 320, is currently in discussion within the STF. In this action, the litigants required the Supreme Court to directly address the applicability of the amnesty law to cases of serious violation of human rights as well as to continuous violations. The litigants made explicit reference to the decision of the Inter-American Court in the request and questioned the fundamental precept used by the Court to void amnesties as well as the use of state of limitation to impede criminal prosecution. The Supreme Court now has a different group of justices and thus the outcome to this case may be different than the one delivered in ADPF 153. In addition, one of the most emblematic cases of Brazilian dictatorship, the murder of journalist Wladimir Herzog while he was imprisoned, has been recently decided by the IACtHR. With the existence of these two cases, the amnesty has once again been submitted to constitutionality control before the STF and control of conventionality before the IACtHR.

The most recalcitrant state in the region, Brazil, provides a suitable example to analyse how Court's decisions contribute to strengthening institutional, normative and social structures. After the IACtHR *Gomes Lund* decision, there was a slight expansion of litigation rates, strengthening of civil society, and institutions that attempt to reduce the ill effects of amnesties. Because of *Gomes Lund*, eight criminal actions were initiated by the Public Prosecutor's Office and executed in the Brazilian states of São Paulo, Rio de Janeiro and Goias between 2012 and 2014. However, officers from lower and superior ranks of the judicial branch are still using the amnesty law and statute of limitations to hinder investigations of human rights violations that occurred during the dictatorship. Notably, there is a clear split between courts—which tend to overlook the decision of the IACtHR and look upon the decision of the STF in ADPF 153—and the Public Prosecutor's Office, which tries to execute the international court's decision and control of conventionality. Other institutions such as the Brazilian Bar Association, and less representative political parties, such as PSOL, have joined the Public Prosecutor's Office, but with only modest results.

In response to the position of Brazilian Courts, the IACtHR has stated that

> [T]he judicial organ must ensure the supremacy of the American Convention and of the decisions of the IACtHR over the domestic legal order [...] it is inacceptable that once the IACtHR has issued a decision, domestic norms or authorities leave it without effect [...] Therefore, Brazil cannot use domestic decisions as justification for non-compliance with the ruling issued by this International human rights tribunal—not even when such decisions were rendered by the highest Court of the domestic legal order".

The division among Brazilian judicial institutions results in variations in application, implementation and in adequacy efficacy. In this sense, Brazil provides a suitable example of the limits of the influence of Court's decisions in altering social structures closed to international and human rights law. Other historical and institutional factors, such as the degree of influence of the military

power over the executive and judiciary branches have played a more decisive role, curtailing the impact of the *Gomes Lund* case.

(v) Uruguay

Uruguay presents the scenario of "ebb and flow" which characterised Argentina a decade ago[276]. Two referendums tried to deter the contestation of the 'democratic amnesty' that was blooming in state organs, including courts. In the years previous to the decision of the IACtHR in *Gelman*, Uruguay declared high-profile officials convicted for crimes committed during the dictatorship.

In 2009, the Supreme Court neutralised the 1986 amnesty law ("Ley de Caducidad de la Pretensión Punitiva del Estado" or "Expiry Law"). Deliberating upon with the killing of a literature professor in 1974, Nibia Sabalsagaray, the Supreme Court nullified central articles of the amnesty law. In doing so, the Supreme Court cited the role of international law in Uruguay's legal system and used precedents from Argentina, as well as from the Inter-American Human Rights System's Commission and Court to reach its final decision. The action had limited effect on the case but created an important precedent to be used in later actions against impunity. In 2010, despite the 2009 referendum result in which Uruguayans refused to repeal the amnesty law, the Uruguayan Supreme Court reaffirmed its decision and displaced the law, creating binding effects on all cases. With this decision, Uruguay was recognised as the second state to formally annul the Amnesty Law, after Argentina, as recognised by the IACtHR. In the same year, former president Juan María Bordaberry was declared guilty of 14 deaths and forced disappearances committed during the dictatorship and sentenced to 30 years in prison. In addition, the former Foreign Minister was declared convicted for the imprisonment, torture, murder and forced disappearance of the teacher Elena Quinteros, and sentenced to 20 years in prison for "very aggravated crime".

Some obstacles remained, however, after the IACtHR *Gelman* decision in 2011. To address these obstacles, Uruguay adopted a new piece of legislation, law 18.831/2011, which effectively repealed the amnesty law. In addition, the

[276] Engstrom, Pereira, 2012.

executive branch revoked administrative acts that applied the Expiry Law via Decree 323/2011. According to the Inter-American Court both decrees "demonstrate a strong willingness to comply with the ruling, leaving without effects those previous acts that, in connection with the law, represented an obstacle to investigate the facts of cases involving human rights violations" [277].

In 2013, a decision of the Supreme Court would shift and compromise the control of conventionality executed by other domestic organs in Uruguay. Despite widespread protest, the Supreme Court of Uruguay reversed by a large margin the declaration of unconstitutionality of the amnesty law given by law 18.831/2011. The decision struck down law 18.831/2011 and declared it as unconstitutional. The Supreme Court based its decision on the failure of the law to respect the statute of limitations. In addition, the Supreme Court classified crimes that occurred during the dictatorship as common crimes, and not as crimes against humanity. The court also disputed the *ex post facto* effect of law 18.831. The Supreme Court's decision and related developments "were unsurprisingly met by a wave of international condemnations, including by Amnesty International (AI), the UN High Commissioner for Human Rights, the Center for Justice and International Law and the Inter-American Commission on Human Rights"[278]. The IACtHR criticised the Supreme Court decision and stated that:

> [T]he State of Uruguay had given clear and concrete steps towards the compliance of the ruling dictated in the case Gelman, particularly through the enactment of Decree 323/2011 and Law 18.831/2011. However, the decision of the Supreme Court of Justice issued in 22 February 2011 is not in conformity with the evolution of Inter-American and Universal Human Rights nor with the international responsibility of the State regarding these rights and the IACThR decision[279]

This decision provoked a cessation of criminal investigations and prosecutions. Notwithstanding, lower-court judges, supported by the IACtHR's

[277] IACtHR, *Gelman* (Compliance with Judgment).
[278] Engle, 2015.
[279] IACtHR, *Gelman* (Compliance with judgment):103.

jurisprudence, have refused to follow the Supreme Court's stance and have continued to investigate cases, creating internal disputes[280]. The application and strengthening efficacy of the IACtHR is tested with the new position of the Uruguayan Supreme Court. Despite the lower efficacy of the Court in changing this scenario of contestation in a sustainable and definitive manner, the ruling on Gelman has served as backbone to those who refuse to follow the Supreme Court's precedent and align to the IACtHR jurisprudence[281].

(vi) Argentina

Argentina's amnesty laws were repealed by the combined action of courts and legislature[282]. The amnesty laws 23.492 (De punto final, "Full Stop Law"), and 23.521 (De obediencia debida, "Law of Due Obedience"), were approved in 1986 and 1987 at the end of the 'Guerra Sucia' ("The Dirty War") to grant amnesty to military agents involved in the conflict.

During the 1990s, Argentina had amnesty law in force and was starting to carry out both truth trials and foreign trials against perpetrators of breaches of human rights [283]. This process had strong transnational nuances, being supported both by endogenous processes of social change and by international litigation. Two factors have triggered the process in which amnesty laws have been disputed domestically attesting, once more, the frequent existence of competing factors underpinning expressive social changes. First, the recommendation submitted by the Inter-American Commission in 1992 held that Argentinean amnesty laws were incompatible with the Convention[284]. Second, a decision by a French court in 1991 condemned an Argentinean national to life in prison for the murder of a French national in aggravated circumstances during the dictatorship[285]. This ruling triggered prosecutions in other countries against

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[280] Lessa, 2013.
[281] See "Recent Sentence by Uruguayan Supreme Court Obstructs Search for Truth and Justice" by Jo-Marie Burt and Francesca Lessa available at:, http://www.wola.org/commentary/recent_sentence_by_uruguayan_supreme_court_obstructs_search_for_truth_ and justice. Access on: December, 2017.
[282] Freeman, 2009.
[283] For a detailed discussion of the Argentine process, see: Engstrom, Pereira, 2012; Nino, 1991.
[284] IACHR, *Consuelo et al v Argentina,* 1992.
[285] Court D'Assises de Paris*, 1893/89*, 1990.

Argentinian dictators, and later it activated prosecutions in Argentinian territory[286].

Supported largely by international organisms such as the IACtHR and the UN Human Rights Committee—and after "the 'ebb and flow' of amnesties and trials in Argentina from the early 1980s to the end of the 1990s—human rights groups gained enough momentum to pressure for accountability and for repeal of the "impunity laws". Notably, human rights groups have been active and have exerted pressure against human rights violations perpetrated during the dictatorship since the decade of 1980. Recommendations of the Commission and decisions of the Court were not therefore the sole or the most decisive element in the Argentinean process of declaring amnesty laws void. However, decisions of international organisms combined with an effervescent national movement of contestation were fundamental to strengthening those domestic structures that would lead such process.

In 2001, an appeal court, referring to the international treaty obligations of Argentina, upheld a sentence of a lower court declaring the two amnesty laws unconstitutional.

One of the seminal sentences of this period, the case *Simon, Héctor Julio et al* concerned the abduction of minors of less than ten years of age[287], and was issued a couple of months after the decision of the Court in *Barrios Alto*. The decision was almost fully supported by both the IACthR's decision and by international law in its invalidation of amnesty laws. In an unprecedented move, the Supreme Court of Argentina resorted to a judgment issued against a third country in order to determine the scope of Argentina's international obligations in a definitive way. It is hardly coincidence that the decision that happens to be the most emblematic domestic decision about amnesty in Argentina, and which would later trigger a more robust process, was issued less than 2 months after *Barrios Alto* and structured in a similar way to *Barrios Altos*. Being deeply influenced by *Barrios Alto*, the case *Simon* is largely cited by other domestic courts, and has had a great impact at both the national and international levels. The decision reflects the contribution of the case law emanating from the IACtHR

[286] Sánchez Montero, 2010.
[287] Supreme Court of Argentina, *Simón, Héctor Julio y otros,* 2005 (Causa No. 17.768).

to reinforcing domestic changes, but also emphasizes that decisions do not act in isolation.

After this seminal case, sentences against amnesty laws proliferated within the Argentinian jurisdiction. Following a series of critical decisions, largely in line with the *Simon* judgment, national prosecutions for mass atrocities have skyrocketed in Argentina. In 2003, Law No. 25,779 was adopted which declared amnesty laws definitively invalid. This law was upheld by a lower court in 2004, and by the Supreme Court in 2005. The legislative decree, sustained by the Supreme Court, effectively repealed Argentina's amnesty laws. In subsequent decisions, the Supreme Court has reiterated the non-applicability of statutory limitations and of amnesties to crimes against humanity and human rights violations. In 2007, applying the "control of conventionality" in the decision of the emblematic case *Mazzeo, Julio Lilo and others*, the Supreme Court of Argentina referred to *Barrios Alto* and *Almonacid Arellano* to declare unconstitutional the 1989 decree by which the president had pardoned former military officers of the *Videla* regime and that conceded clemency to a defendant who had committed crimes against humanity[288]. The sentence contributed to "accelerate investigations into the largest clandestine detention centre that operated in Argentina"[289] and to impose sentences of life imprisonment against former generals. As far as 2010, almost 1,500 individuals were "facing criminal procedures for crimes against humanity perpetrated during the dictatorship" [290] including high-level military officers. In 2017, for the first time, a decision of the Federal Court of Mendoza sentenced 25 former federal judges to prison for their collaboration in crimes against humanity during the civil-military dictatorship[291]. The decision made historic progress in holding civilians and other branches of government responsible for crimes committed under the dictatorship.

The case of Argentina is emblematic because although there was no direct decision against the state, the jurisprudence of the Court served to legitimise civil society's demands for justice[292]. While Argentina is emblematic of the

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[288] Supreme Court of Argentina, *Mazzeo, Julio, Lilo*, 2007.
[289] Sánchez, 2010.
[290] Medellín-Urquiaga, 2013.
[291] See http://www.apdh-argentina.org.ar/Lesa-Humanidad/Mendoza/juicio-a-los-jueces. Access on April, 2018.
[292] Payne, 2014: 27.

capacity to challenge amnesty laws, legal and political obstacles to accountability persist. A weak infrastructure struggles to cope with both scale and scope of trials.

(vii) Colombia

To date, the Court has not issued any specific decision involving amnesty laws in Colombia. However, in recent years, decisions of the Colombian Constitutional Court have progressively incorporated the IACtHR doctrine on amnesties. To be true, both the Colombian Constitutional Court and the Supreme Administrative Court (Consejo de Estado) have repeatedly recognised the binding character of the jurisprudence of the Inter-American Court and have used elements of Inter-American jurisprudence in a variety of cases.

Notably, there is a significant change between the first Colombian Constitutional Court decisions on amnesty, pronounced after the new constitution of 1991 and decisions enacted after 2002, the year in which the Rome Statute was incorporated within domestic legislation and one year after the IACtHR *Barrios Alto* decision. Increasingly, the Constitutional Court have relied on the Inter-American jurisprudence to stake important claims pertaining to amnesty law, such as to state that such laws must follow the criteria of legality settled by international law, to defend that only specific amnesties under certain conditions are admissible, to state that amnesties cannot be used to shield perpetrators of serious human rights violation from prosecution, and to clarify the list of crimes that cannot be pardoned[293].

(viii) International courts

The IACtHR jurisprudence on amnesty has migrated to other human rights treaty bodies, including the European Court of Human Rights, the African

[293] Constitutional Court of Colombia, *C-577/14*, 2014; Constitutional Court of Colombia, *C-579/13*, 2013; Constitutional Court of Colombia, *C-695/02*, 2002; Constitutional Court of Colombia, C-578/02, 2002.

Commission on Human and People's Rights, as well as the United Nations[294]. All these institutions have used the IACtHR decisions to declare amnesty laws incompatible with human rights norms[295]. As of 2016, European Convention organs have rendered six decisions referring to amnesty, most of them against Turkey. European judgments are less assertive than those of the IACtHR, and are reminiscent of the ambiguity of the Commission during the 1980s. For example, in *Dujardin*, the adoption of French amnesty law in New Caledonia is considered necessary. Likewise, in *Tarbuk v. Croatia* the ECtHR upheld Croatia's right to impose a General Amnesty Act. The AFCHR has also held amnesty laws to be incompatible with human rights obligations related to the right of victims to be redressed[296]. Likewise, the case *Zimbabwe Human Rights NGO Forum v Zimbabwe* condemned a Clemency Order because it impeded the prosecution of individuals accused of violations of human rights.

Even with some states and with international courts recognising the legality of amnesty laws in certain cases, the influence of the IACtHR is significant. Most of the states in the region voided their amnesty laws and domestic litigants started to challenge human rights violations occurred during authoritarian periods in courts. In addition, the validity or illegality of amnesty laws have been largely decided according to the criteria settled in its jurisprudence both in domestic and international forums. In addition, decisions of the Court have been crucial to support those domestic actors attempting to repeal amnesty laws. On the other side, sectors of society and of judiciary, especially in Brazil and Uruguay, are still recalcitrant and maintain a position opposite to the Court's jurisprudence. Additionally, litigation and reparation to victims, even in states that declared their amnesty laws void, is still meagre.

[294] Engle, 2015: 1079.
[295] Engle, 2015. Engle calls attention that even a domestic court has used the jurisprudence of the IACtHR to find part of its amnesty law unconstitutional. See: Supreme Court of Nepal, *Basnet and Pokharel v. Government of Nepal*, 2014 (069-WS-0057).
[296] See section 4.1 of this chapter.

TABLE 4

Selected jurisprudence

Amnesty Laws

STATE	CASE	YEAR
PERU	BARRIOS-ALTO	2001
PERU	LA CANTUTA	2006
CHILE	ALMONACID-ARELLANO	2006
BRAZIL	GOMES-LUND ET AL (GUERRILHA DO ARAGUAIA)	2010
URUGUAY	GELMAN	2011
EL SALVADOR	THE MASSACRES OF EL MOZOTE AND NEARBY PLACES	2012

Chapter 5

Indigenous Rights[297]

5.1 Setting the scene

Whereas violations of indigenous and tribal peoples' rights are widespread and date as far back as to the colonial times, resolute responses given by international law are recent and as yet insufficient. In recent times, the IACtHR has become one of the protagonists in the development of a progressive and innovative jurisprudence addressing rights specific to indigenous people. Although the contributions of the Human Rights Committee of the United Nations, as well as other international and domestic bodies should not be disregarded, the Court has played a central role, being the first international tribunal to have decided a contentious case involving indigenous peoples[298].

The continued development of a steady jurisprudence on indigenous rights by the Court, albeit remarkable, should not be perceived as an isolated phenomenon. The last decades of the twentieth century have witnessed a progressive consolidation of a multilevel normative and institutional framework of protecting traditional native peoples' rights, including indigenous and tribal peoples included. Thornberry carries out a detailed description of this process[299]. He starts with a historical analysis of the modern era by reporting that during the early twentieth century, the very existence of indigenous and tribal people as subjects of international law was denied, as well as their

[297] Part of the jurisprudence presented in this chapter was shared with me by colleagues of the Project "A Sociology of the Transnational Constitution". I am particularly grateful for Rodrigo Céspedes, Elizabeth O'Louchlin and Professor Chris Thornhill who provided not only cases but also relevant reflections that drew me to some of the conclusions here presented. In addition, some of the information reflects observations carried out in Colombia and Bolivia as part of the Project. Some of the reflections here presented were published in other two articles, both forthcoming.

[298] The very first case in which the Court somehow affirmed indigenous rights was actually *Aloeboetoe et al v Suriname* (1991/1993). However, the first case in which the Court applied those rights to defend an indigenous community was *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (2001). For more comments on these cases see Burgorgue-Larsen, Torres, 2013 [2011]: 501.

[299] Thornberry, 2002.

independent treaty making capacity. In 1923, when Canadian Indians and New Zealand Maoris tried to reach the League of Nations with the *Deskakeh case*, the British Empire promptly took the subject out of the League's agenda, relegating the matter to a domestic discussion[300]. At least three other cases would appear in the early twentieth century to reinforce the invisibility of indigenous and tribal groups to international law. In this first period, indigenous peoples were deemed incapable before law, an argument that often justified abuses[301].

In terms of a normative framework, change only began to occur during the mid-century. Historically, the International Labour Organization (ILO) was a pioneer in promoting international standards to address indigenous and tribal peoples' claims. Following failed earlier attempts, in 1957 the ILO adopted Convention 107, which concerned the protection and integration of indigenous and other tribal or semi-tribal populations in independent countries. The Convention reached 27 ratifications and stands as the first successful endeavour to codify indigenous rights at the level of international law. Despite the severe criticisms condemning its paternalist and integrationist tone, ILO 107 for years remained the sole hard law international document that specifically regulated the rights of indigenous and tribal peoples, contributing "to signalling the need for international attention and cooperation with regard to indigenous peoples"[302].

In terms of jurisprudence, the Advisory Opinion of the International Court of Justice in the *Western Sahara* case, delivered in 1975, is perceived as a milestone for the recognition of the international personality of indigenous and tribal people, for it declares the concept of *res nullius* inapplicable in cases of "territories inhabited by tribes or peoples having a social and political organization"[303].

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[300] *Idem*: 82.
[301] *Ibidem* (observing that "The motif of natural slavery is also profoundly disabling, without the softening features of guardianship. To suggest that the indigenous inhabitants of the New World were somewhat less than human is to institute a language of dehumanisation, a perfect instrument of genocide (...) The indigenous were also deemed to lack the virtues of labour – hence the colonisers' justification of appropriation of empty lands, or the acquisition of lands superfluous to the needs of the Indians").
[302] Anaya, 2008*:* 31.
[303] International Court of Justice, *Advisory Opinion on the Western Sahara*, 1975: 75-83.

Discussions stemming out of this more inclusive background escalated throughout the 1970s, giving rise to a new normative instrument. Adopted in 1989, the Convention concerning indigenous and tribal peoples in independent countries (ILO 169) reflected a change in the attitude of international law, finally reversed from one of assimilationism to one of solidarity[304]. ILO 169 came into force in 1991 and represented "a momentous step in the consolidation of the contemporary international regime on indigenous peoples"[305]. The Convention provided formal international recognition of indigenous people's collective rights in essential areas, including cultural integrity; consultation and participation; self-government and autonomy; land, territory and resource rights; and non-discrimination in the social and economic spheres. Despite the fact that only 22 states, most of them in Latin America, have actually ratified ILO 169, "the norms embodied in the convention have been subsequently developed through the interpretive practice of the ILO and UN supervisory bodies, international courts and domestic courts"[306], which suggests that ILO 169 has in fact achieved a wide-ranging impact. From these 22 states, 15 are Latin American; four are European (Denmark, Netherlands, Norway and Spain); and Africa (Central African Republic), Asia (Nepal), and Oceania (Fiji) have one ratifying State each. Additionally, 18 States remain part of ILO 107.

Another outcome of the revisionist discussions that started back in the 1970s was the UN Declaration on the Rights of Indigenous Peoples, formally adopted by an overwhelming majority of 143 Member States in 2007[307]. The Declaration is a relevant piece of soft law that embodies a common body of opinion on the rights of indigenous peoples and reflects "the evolving normative understanding concerning the rights of indigenous peoples"[308]. Other contemporaneous international standard-setting instruments also provide for the protection of indigenous peoples, albeit in a contingent way, such as the Convention on the

[304] Lenzerini, 2008: 19.
[305] Anaya, 2008: 32.
[306] *Ibidem*.
[307] The General Assembly Resolution 61/295 was adopted after a year of the submission of its draft by the UN Human Rights Council. The Resolution also received 4 votes against (Australia, Canada, New Zealand and the United States), and 11 abstentions (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine).
[308] Anaya, 2008: 32.

Rights of the Child, the Convention on Biological Diversity, and some United Nations Educational, Scientific and Cultural Organization (UNESCO) instruments.

At the Inter-American level, since 1989, a Special Working Group operating in cooperation with the Rapporteur on the Rights of Indigenous Peoples within the IACHR has been preparing a legal instrument on the rights of indigenous populations. On February 26, 1997, the Inter-American Commission approved a draft of a Proposed American Declaration on the Rights of Indigenous Peoples, and on June 15, 2016, the final document was finally adopted by the General Assembly of the OAS. This Declaration is the first instrument in the history of the American Organization to promote and protect specifically the rights of indigenous peoples of the region[309]. The Declaration is expected to produce effects in other regions[310].

At the domestic level, the influence of these movements can be ascertained via "processes of constitutional, legal and institutional reform at the domestic level – including in States that are not formally part of the Convention–as well as in the development of other international instruments, programmes and policies"[311]. These reforms, in general initiated in the 1980's, have recognised particularities of indigenous peoples and granted them specific rights, sometimes allowing the coexistence of diversified sets of norms within a society[312].

In conjunction with this normative development, protective bodies were created at the international, regional, and domestic levels with mandates to enforce and protect these newly created rights. Despite the existence of some limitations on the ground, legal advances in the consolidation of indigenous rights on these different levels, especially in Latin America, are undeniable.

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[309] See more details of the adoption of the American Declaration on the Rights of Indigenous Peoples in: http://www.oas.org/en/media_center/press_release.asp?sCodigo=E-075/16. Access on: December, 2017.

[310] According to the former UN Rapporteur, "The normative effect of the Declaration is not limited to the United Nations human rights system, but also influences as it should the action of regional human rights bodies". Anaya, 2008.

[311] Anaya, 2008: 33.

[312] Burgorgue-Larsen, Torres, 2013 [2011]: 501. Such movements of constitutionalization have been facing limits, however. According to the first Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people to the United Nations: "Despite some countries have undertaken constitutional reforms and adopted laws recognizing distinct indigenous identities and the multicultural character of the State, in most cases, those reforms have not been able to eliminate the legacy of historical discrimination against indigenous peoples. In other extreme cases the very existence of indigenous peoples is not recognized in constitutions and laws and they are even denied citizenship". See Stavenhagen, 2006.

Within a century, the international status of indigenous peoples switched from being "formally not considered members of the community of nations"[313] to being legitimate subjects of international and domestic law, entitled to specific rights backed by a forward-looking normative and institutional framework. The jurisprudence of the Court has been taking advantage of this thriving environment and advancing it even further, as it will be explored in the next section.

5.2 Jurisprudence of the Inter-American Court of Human Rights

The previous section described how indigenous and tribal peoples have been recognised as legitimate subjects of international law in the last century, as well as the subsequent creation of a normative and institutional framework to ensure the rights of these emergent actors. This section aims to give an overview of the substantial body of case law built up by the IACtHR for the protection of indigenous rights over recent decades.

Although the Commission has dealt with indigenous rights since the 1970s, the first case involving indigenous rights reached the Court only in the 1990s. It would take still another decade for a second case to be decided. The case of *Aloeboetoe v Suriname*[314] was the Court's first decision concerning indigenous rights. In 1991, during the hearings, the State of Suriname accepted responsibility for the acts of moral harassment and abuse of force perpetrated by State agents against a group of approximately 20 unarmed Maroons during a military intervention that culminated in the disappearance and death of at least seven individuals. *Aloeboetoe v Suriname* is considered a leading case for different reasons. First, it introduced a discussion on the content of specific rights of indigenous and tribal people within the jurisprudence of the Court. In this decision, the Court considered that the matrilineal and polygamist structure of the tribe to which the victims belonged should prevail over the Surinamese

[313] Thornberry, 2002.
[314] IACtHR, *Aloeboetoe et al* v Suriname, 1991.

norms. Proceeding from this assumption, the Court recognised that insofar as the Maroons were concerned, Surinamese family law was not effective in this case. Additionally, although in Suriname marriages must be registered in order to be recognised by the State and to guarantee the enforcement of Surinamese law, this requirement is generally not met by indigenous groups due to their social structure, but also due to the dearth of registry offices in the interior of the country. Thus, compensation measures took into consideration the traditional customs and social structure of the tribe instead of Surinamese civil law[315]. Second, it suggested, from the outset of the Court's deliberations on this matter, that indigenous rights should also be used to protect distinctive rural communities or communities of African origin, such as the Maroons. In proposing the application of specific indigenous rights regardless of the existence of an indigenous ethnical component, the Court has widened the coverage of these rights, setting an important precedent. Indeed, this set of rights has been used by the Court to protect not only indigenous peoples but also other historically marginalised groups with similar characteristics, such as Afro-descendant communities and tribes[316]. Finally, it was the first case in which a form of reparation other than compensation was deemed necessary[317].

To date, between 1991 and 2017, the Court has delivered 24 decisions against 11 different States, attesting the regional importance of this legal subject (see Table 5, at the end of this chapter). These 24 decisions are used as primary cases and integrate the empirical basis of this study. Interestingly, around 25% of these decisions attribute indigenous rights to non-indigenous people as afro-descendants, tribal people, and river dwellers. The only decisions involving indigenous questions issued by the Court that were not included in the analysis of efficacy were *Myrna Mack Chang v Guatemala* and *Acosta et al v Nicaragua* because they allude only incidentally to indigenous rights. These two cases deal with the murderer of human rights defendants who worked with indigenous questions among other themes.

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[315] *Idem*: 17, 55, 58, and 62. According to the Court: "(...) here local law is not Surinamese law, for the latter is not effective in the region insofar as family law is concerned. It is necessary, then, to take Saramaka custom into account".
[316] Dulitzky, 2010.
[317] Citroni, Osuna, 2008: p. 321.

Guatemala and Suriname are the states with most cases, 6 and 4 respectively; while Chile and Panama are the states with fewest cases, with just one decision each.

From these 24 cases, 2 were considered as having met with full compliance, 17 are in the stage of supervision of compliance and had at least one order monitoring compliance with judgment, and 5 do not have an order monitoring compliance with judgment attesting supervision of compliance. The primary group of analysis is composed by the 19 cases that were considered fully complied or that are tied to at least one order monitoring compliance.

Whereas only one of these cases was delivered in the 1990s and 10 were decided during the 2000s, in the present decade, the Court has already delivered 13 decisions. The distribution of decisions during the decades indicates the growing importance of the issue, especially after 2005. The time frame of 25 years between the first and last decisions demonstrates the persistence of violations of indigenous rights in the region and the interaction of the issue with different stages of institutional development of the Court. All together, these cases involving indigenous and tribal groups represent roughly 10% of the total case law of the Court.

This section is structured in two parts. The first part will systematise the 24 identified decisions in three categories, according to similarities between facts, violations and rights ascribed by the Court in each case. The second part will outline the essential elements of the indigenous rights jurisprudence in order to accentuate the main doctrinal contributions of the Court to the field.

5.2.1 Facts of the Cases

In a recent article, Thomas Antkowiak has attempted to classify the IACtHR jurisprudence about indigenous rights in two groups. The first would bring together rulings involving "collective" victims gathering cases of massacres, lands and natural resources, and political rights involving communities. The second would assemble cases related to "single" victims concerning cultural

discrimination and disappearances, extrajudicial executions, tortures and rape[318]. In this section, I opted to group the decisions according to the rights violated in each case. I did not use the model proposed by Antkowiak because the "single" and "collective" aspects of these cases sometimes merge. The violation of the rights of "single" victims may sometimes result in collective reparations and vice-versa. The 24 decisions identified in the jurisprudence of the Court can be bracketed together in three categories, according to similarities between facts, violations and rights ascribed by the Court in each case: (i) right to humane treatment, (ii) right to property, and (iii) right to equal protection.

(i) Right to Humane Treatment

The first category comprises 10 decisions involving the violation of indigenous rights resulting from the *disproportionate use of force by law enforcement officers*, normally police officers and military agents. The disproportionate use of force results in extra-judicial executions, forced disappearance of indigenous leaders, gender-based violence, and even massacres in the most extreme cases.

In some of these decisions, abuses committed by official agents have escalated into massacres. The cases of *Plan de Sánchez Massacre v Guatemala*, *Río Negro Massacres v Guatemala*, and *Members of the village of Chichupac v Guatemala* portray the persecution and elimination of members of indigenous communities during the 1980s "within the framework of a genocidal policy of the Guatemalan State carried out with the intention of totally or partially destroying the Mayan indigenous people"[319] as a response to their resistance against the military regime. In *Plan de Sánchez Massacre v Guatemala*, the Court denounced the massacre of 268 persons perpetrated by the Guatemalan Army and civil collaborators and subsequent acts of intimidation and discrimination against survivors and the next of kin of victims. In *Río Negro Massacres v Guatemala*, the Court condemned the "destruction of the Mayan community of Río Negro by means of a series of massacres perpetrated by the Guatemalan Army and

[318] Antkowiak, 2014.
[319] IACtHR, *Plan de Sánchez*, 2004: 2.

members of the Civil Self-defence Patrols in 1980 and 1982; the persecution and elimination of its members and the subsequent violations directed against the survivors"[320]. Likewise, in *Aloeboetoe v. Suriname* and *Moiwana Community v Suriname*, Bushnegroes (Maroons) were again the victims of attacks, forced displacement, and intimidation after a massacre perpetrated by state agents against over than 40 men, women and children in a Moiwana village.

In other cases, acts of brutality have resulted in the forced disappearance of members and leaders of indigenous communities. In *Tiu Tojín v Guatemala*, María Tiu Tojín and her daughter Josefa, both members of a Mayan indigenous community, disappeared while under custody of Guatemalan army and the Civil Self-Defence Patrols; in *Escué Zapata v Colombia*, "a Cabildo Governor of the Indigenous Protection of Jambaló [...] who devoted himself to farming as well as the other members of his [c]ommunity and to the defence of the indigenous [...] territory"[321] was also declared disappeared; in *Chitay Nech et al v Guatemala*, the Court declared the State internationally responsible for the forced disappearance of the Mayan indigenous political leader Florencio Chitay Nech.

Two cases deal with gender-based violence and draw special attention to systematic violations committed against indigenous women. Both took place in Guerrero, a state located in south western Mexico characterised by a strong military presence due to activities of organised crime in the region. In the first case, *Rosendo-Cantú et al v Mexico*, Rosendo Cantú, who at the time of the events was 17 years old, was sexually assaulted near her home by members of the Armed Forces. In the second case, *Fernández Ortega et al v Mexico*, three soldiers, in uniform and carrying weapons, entered in the home of Fernández Ortega, a 25-year-old indigenous women, and assaulted her while she was with her four children. One of the officials raped the victim while her children escaped in the moments immediately prior to the crime. These cases expose not only the repeated abuses committed by military forces in Guerrero, but also the inadequacy of the health staff of clinics and hospitals, as well as the failure of judicial and police officers to deal with cases of violence against women. It has been reported that "between 1997 and 2004, six indigenous women filed

[320] IACtHR, *Río Negro Massacres v Guatemala*, 2012.
[321] IACtHR, *Escué Zapata v Colombia*, 2007:3.

complaints of rape attributed to members of the Army in the state of Guerrero"[322] and that the patriarchal structure in the State "is blind to gender equity"[323]. These complaints were heard in the military jurisdiction, without any indication of punishment of those responsible for any of the alleged crimes. According to the victims and the Commission, the rapes "had gender-specific causes and consequences [given that they were used] as a form of submission and humiliation and a method of destroying the women's autonomy"[324]. Both petitions stressed "the difficulties encountered by indigenous people, particularly indigenous women, to obtain access to justice"[325]. The State made a partial acknowledgment of its international responsibility during the public hearing, admitting that "there have been delays and a lack of due diligence in the investigation and punishment of the perpetrators"[326]. In these cases the Court took into consideration the "project of life"[327] of the victims and their next of kin, ordering extensive measures of individual redressal and giving emphasis to measures of non-repetition[328].

(ii) Right to Property

The second category comprises 11 decisions and addresses one of the most pressing issues faced by indigenous and tribal peoples worldwide, the *right of indigenous and traditional peoples to their traditional lands*. Due to the profiteering activities of some state and private actors, large numbers of indigenous and tribal peoples have been removed from their traditional lands, an

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[322] IACtHR, *Rosendo Cantú*, 2010: 71.
[323] IACtHR, *Rosendo Cantú*, 2010:71; IACtHR, *Fernández Ortega*, 2010: 78.
[324] IACtHR, *Rosendo Cantú*, 2010:81.
[325] Idem: 2.
[326] Idem: 16.
[327] For a detailed account of the concept "project of life", see subsection 6.2.2 (iii) in Chapter 6.
[328] In this case, the Court ordered: "16. The State will continue with the process to standardize a protocol, applicable at the federal level and in the state of Guerrero, regarding the handling and investigation of rape cases, 17. The State must continue to implement permanent training programs and courses on diligent investigation in cases of sexual violence against women, which include an ethnic and gender-based perspective. [...] 21. The State must continue to offer services for women victims of sexual violence through the health centre, 22. The State must ensure that assistance services for women victims of sexual violence are offered by the institutions indicated by the State, 23. The Court must continue to implement the campaign to raise awareness and to sensitize the population regarding the prohibition and effects of violence and discrimination against indigenous women". See IACtHR, *Rosendo Cantú*, 2010.

action which exposes them to situations of vulnerability characterised by lack of housing, food, and medical services. Occasionally, their separation from ancestral lands threatens their very survival.

The first case in which an international court dealt with land rights of an indigenous community was *Mayagna (Sumo) Awas Tingni Community v Nicaragua*. In this case, not only did the State of Nicaragua fail to demarcate an ancestral territory, but it also granted a private company a concession to initiate logging on communal lands without the assent of the community. Three cases against the State of Paraguay – *Yakye Axa Indigenous Community v Paraguay*, *Sawhoyamaxa Indigenous Community v Paraguay*, and *Xákmok Kásek Indigenous Community. v Paraguay* – attest to an on-going delay in the demarcation procedures occurring domestically. Two cases against Suriname, *Saramaka People v Suriname* and the recent *Kaliña and Lokono Peoples v Suriname*, reveal that even after a span of 8 years between the first and the second decision the State of Suriname remained incapable of recognizing the collective juridical capacity of indigenous communities. The sole case against Ecuador, *Kichwa Indigenous People of Sarayaku v Ecuador*, condemns the State for having granted a permit to a private company to carry out oil exploration and exploitation activities in the territory of the Kichwa Indigenous People of Sarayaku in the 1990s without previously consulting them and without obtaining their consent. In more recent cases such as *Afro-descendant communities displaced from the Cacarica River Basin v Colombia*, *Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and their Members v Panama*, *Garífuna Punta Piedra Community and its Members v Honduras*, *Garífuna Community of Triunfo and its Members v Honduras*, the right to traditional lands is extended to other groups such as afro-descendant tribes and garífunas. These decisions supported the establishment of an innovative set of reparations by the Court, as well as the development of arguments to justify the special rights of indigenous communities over their traditional lands.

(iii) Right to Equal Protection

The third group of rulings comprises three sui generis cases related to the principles of equality and non-discrimination. The first decision *López Álvarez v Honduras* deals with a prohibition imposed upon the garífuna Alfredo Lopez Alvarez which prevented him from using his mother tongue while imprisoned. The second ruling in this category, *Yatama v Nicaragua* (2005), is related to a decision issued by the Supreme Electoral Council of Nicaragua that impeded members of an indigenous regional political party from participating in municipal elections held in 2000. The Court condemned the State for not having provided "norms in the electoral law that would facilitate the political participation of the indigenous organisations in the electoral processes of the Atlantic Coast Autonomous Region of Nicaragua, in accordance with the customary law, values, practices and customs of the indigenous people who reside there"[329]. The third decision, *Norín Catrimán et al (Leaders, members and activist of the Mapuche Indigenous People) v Chile*, brings up the question of racial discrimination, which in that case came disguised as an application of the Chilean Antiterrorist Law to ancestral leaders and authorities of Mapuche communities.

5.2.2 Essential Elements of the Jurisprudence

Over the last few decades, the Court has recognised a distinctive set of indigenous rights, identifying positive and negative obligations of states and proposing innovative forms of redressal[330]. Its singular case law has thus advanced both procedural and substantive aspects of international law related to indigenous rights[331].

The main doctrinal contributions of the Court to indigenous rights encompass various aspects: latitude in ascribing indigenous rights, the balance between self-determination and the defence of the principle of non-discrimination, the recognition of collective rights of indigenous people, the identification of a distinct right to traditional lands, the development of the concept of "vida digna" ("dignified life"), access to justice, and the establishment of a distinctive set of

[329] IACtHR, *Yatama v Nicaragua*, 2005: 2.
[330] Burgorgue-Larsen, Torres, 2013 [2011]: 512.
[331] Anaya, 2008.

reparations for indigenous and tribal peoples. These aspects will be considered in more detail below.

It is notable that some of these doctrinal precepts are established in dialogue with other courts, as the Inter-American Court sometimes advances concepts created in domestic law/international law and vice versa.

(i) Indigenous Subjectivity

The Court adopts latitude in describing indigenous subjectivity and ascribing indigenous rights. In total, 6 cases dealing with indigenous rights do not ascribe these rights to indigenous people, but to traditional communities such as bushnegroes[332] (*Aloeboetoe v Suriname*, *Moiwana v Suriname*), garífunas[333] (*Bámaca Velasquez v Guatemala, Lopez-Alvarez v Honduras, Garífuna Community of Punta Piedra v Honduras v Honduras*), and people of African descent (*Operation Genesis v Colombia*). In previous decisions, the Court established that communal rights to property normally accorded to indigenous groups may also be granted to community members that are not indigenous to a region if the community possesses a "profound and all-encompassing relationship to their ancestral lands"[334]. The IACtHR extends indigenous rights to other marginal sectors in society exposed to similar violations or sharing a constitutive characteristic that entails a specific form of rights attribution. This extended construction of indigenous subjectivity is replicated by states and international organisations.

(ii) Self-determination

One of the main doctrinaire contributions of the Court is built upon diverse actions to *foster the right to self-determination*, according to which indigenous

[332] According to the IACtHR definition, bushnegroes such as the Maroons are a tribal group composed of Afro-descendants who were taken to the region of Suriname in the 17th century to work as slaves on plantations.
[333] According to the IACtHR definition, garífunas are a tribal group composed by Afro-descendants mixed with indigenous people who lives in the North Coast of the Honduran Atlantic and whose origin goes back to the 18th century.
[334] IACtHR, *Moiwana Community v Suriname*, 2005.

and tribal peoples should receive a differentiated treatment in respect to their own customs and beliefs[335] and to *guarantee the cultural and social integrity of indigenous and tribal peoples*. The jurisprudence of the Court addresses aspects related both to political self-determination and to cultural self-determination. However, cases related to the latter are more common.

In terms of cultural self-determination, in *Aloeboetoe et al v Suriname*, the customs of Saramaka people were taken into account in order to identify their heirs and successors[336]. Furthermore, in *Bámaca Velásquez v Guatemala*, before ordering reparations, the Court considered the profound repercussions caused by the forced disappearance, torture and extrajudicial execution of Efrain Bámaca Velásquez vis-à-vis the sacred relationship that unites the living and the dead in Mayan culture. In order to organise a proper burial according to the customs of the Mayan culture, the Court ordered the State to "locate the mortal remains of Efraín Bámaca Velásquez, disinter them in the presence of his widow and next of kin, and deliver them"[337].

In terms of political self-determination, the landmark case is *Yatama v Nicaragua*, which will be discussed in the following section, referring to non-discrimination. The right to self-determination is also reasserted in cases involving forced disappearance of indigenous leaders. The Court has pointed out that the deprivation of representation may directly affect the social structure of communities and jeopardize aspect as inclusion and participation. As consequence of the right to self-determination established by the IACtHR, Mexican Courts have recently reaffirmed in its jurisprudence the authority given to indigenous authorities to issue valid documents[338].

In particular, the Court gives special attention to the right of self-determination of indigenous children, expressed in the right to live according to their culture, religion and language. In cases involving disproportionate use of force by law enforcement officers and forced displacement, the Court stresses

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[335] Burgorgue-Larsen, Torres, 2013 [2011]: 513.
[336] *Idem*: 522.
[337] IACtHR, *Bámaca Velásquez v Guatemala*, 2002.
[338] Supreme Court of Justice of Mexico, *Comunidad Indígena. Los documentos expedidos por sus representantes, cuando aún no cuenta con resolución presidencial de reconocimiento y titulación de bienes comunales, tienen valor probatorio*, 2013 (Amparo directo 431/2013, Tesis Jurisprudenciales).

the special meaning of family coexistence within the indigenous culture and how the separation of families from their communities provokes ruptures in cultural identity. The Court adds that "family disintegration affects the condition of those under age at the moment of the violations" [339] in a special manner.

(iii) Non-discrimination

In a "paradoxical combination" the right of self-determination of indigenous peoples is reinforced in parallel with the defence of the principle of non-discrimination, which states that indigenous and tribal peoples shall be treated as other members of society. The Court has recognised the principle of non-discrimination as a norm of *jus cogens*, issuing decisions accordingly. In addition, the Court identifies a situation of structural marginalisation and discrimination of indigenous groups that causes particular vulnerability to members of indigenous community due to lack of adequate resources to protect indigenous rights and the weak presence of the state and services in the areas normally populated by these groups. In particular, the threefold discrimination that indigenous women continue to suffer–for being women, indigenous and poor–has been addressed with extensive reparatory measures by the Court, including the granting of scholarships for victims and their next of kin[340], the creation of an action protocol to investigate and deal with victims of rape cases, and the re-structuring of health and legal services designed for women victims of abuses[341]. In *López Álvarez v Honduras*, garífunas imprisoned in a detention centre were prohibited of speaking their native language. The Court established that "the prohibition acquires a special seriousness, since the mother tongue represents an element of identity of Mr. Alfredo López Álvarez as a Garífuna. In this way, the prohibition affected his personal dignity as a member of that community [...] Language is one of the most important elements of identity of any people, precisely because it guarantees the expression, diffusion, and transmission of their culture" [342]. In *Yatama v Nicaragua*, insidious discrimination impeded

[339] IACtHR, *Bámaca Velásquez v Guatemala*, 2002.
[340] IACtHR, *Escué*, 2007; IACtHR, *Rosendo Cantú*, 2010; IACtHR, *Fernández Ortega*, 2010.
[341] IACtHR, *Rosendo Cantú*, 2010; IACtHR, *Fernández Ortega*, 2010.
[342] IACtHR, *López Álvarez,* 2006.

indigenous candidates to run for regional elections[343]. In response, the Court ordered the State to reform the domestic electoral system so indigenous political parties could participate in subsequent elections. Although this case has not yet been met with formal compliance, there are attempts to increase indigenous participation in legislative, judicial and executive bodies in Nicaragua.

In relation to the right to non-discrimination, the Court establishes the concept of "effective" judicial protection to ensure the right to access to justice to indigenous people. This right is especially emphasised in the cases of *Fernández Ortega* and *Rosendo Cantú* in which the Court detected a permanent inadequacy of the judiciary branch to address cases of violence against women in the Mexican state of *Guerrero.* Notably, following the decisions of the Court for these cases, the Mexican state enacted "thesis of jurisprudence", which are summaries of jurisprudence legally binding to the whole domestic system, to protect the access to justice to indigenous people ("tutela jurisdicional efectiva")[344].

(iv) Collective rights

These rights are supported by the recognition of collective rights of indigenous people. Decisions have consistently held that on the conceptual level, the "indigenous community has ceased to be a factual reality to become an entity with full rights, not restricted to the rights of the members as individuals, but rather encompassing those of the community itself, with its own singularity"[345]. This acknowledgment of a collective personality is partially reflected in the establishment of a distinctive set of reparations for indigenous and tribal peoples that support the particularities of indigenous and tribal peoples. The Court has ordered various measures of reparation specific to indigenous people, such as the publication and broadcasting of rulings in native languages, the realisation of public acts organised in close consultation with the representatives of the victims and their families in which the State apologises to victims and recognises

[343] Burgorgue-Larsen, Torres, 2013 [2011]: 513.
[344] Supreme Court of Justice of Mexico, *Acceso a la tutela jurisdicional efectiva. Forma de garantizar el Derecho humano relative tratándose de personas indígenas*, 2015 (Varios 1396/2011, Tesis Jurisprudenciales).
[345] Burgorgue-Larsen, Torres, 2013 [2011]: 504-512; IACtHR, *Plan de Sánchez*, 2004 (Separate Opinion of Judge Sergio García Ramírez).

international responsibility, and the construction of monuments to honour the memory of victims. These measures dignify "the role of the victim, who is thus turned into a social actor who reacts and thinks about how to construct a space for justice"[346]. In former decisions, the Court ordered the State of Suriname to "grant the members of the Saramaka people legal recognition of the collective juridical capacity, pertaining to the community to which they belong, with the purpose of ensuring the full exercise and enjoyment of their right to communal property, as well as collective access to justice, in accordance with their communal system, customary laws, and traditions"[347]. On other occasions, the Court has ordered the implementation of a special registration program to guarantee the provision of identification documents and implied benefits to indigenous groups in affected areas of Paraguay. Following the doctrine of the Court, Mexican jurisprudence has established that any individual member of indigenous communities can fill legal instruments to protect fundamental rights in the name of the entire community[348].

(v) Right to property

Another prominent contribution of the IACtHR derives from a reappraisal of the right to property. The Court was the first international juridical body that interpreted the right to property bearing in mind the right of indigenous and tribal peoples to traditional lands. As a result, the Court introduced new perspectives on the right of indigenous and tribal peoples to land. With the decision issued in *Mayagna (Sumo) Awas Tingni Community v Nicaragua*[349], the Court became the first international tribunal to recognise the right of an indigenous community to its communal property, regardless of a holding of legal title. The Court has placed the distinctive relationship of indigenous and tribal peoples with ancestral lands at the centre of land disputes, treating land as a multidimensional and foundational element of indigenous life rather than a mere

[346] Gómez, 2008: 153.
[347] IACtHR, *Saramaka People v Suriname*, 2007.
[348] Mexican Supreme Court of Justice, *Comunidades y Pueblos Indígenas. Cualqueira de sus integrantes puede promover juicio de Amparo en Defensa de los Derechos fundamentales colectivos*, 2013 (Amparo en revisión 631/2012, Tesis Jurisprudenciales).
[349] IACtHR, *Mayagna (Sumo) Awas Tingni Community v Nicaragua*, 2001.

economic good. Taking into consideration that ancestral lands constitute a fundamental basis for essential aspects of the cultural and spiritual existence of some groups, the Court has settled the point that "ancestral property shall have priority over private property and considerations of more rational and productive use of land. All states shall introduce in their domestic systems appropriate and effective remedies for indigenous peoples to claim restitution of their ancestral lands"[350].

In its 11 rulings related to land rights, the Court has obliged States to carry out the identification, demarcation and titling of traditional territories. Moreover, it has instituted that the entire process should occur in accordance with the values, usage, and customs of affected communities, through previous, effective, and fully informed consultations. Besides that, the Court has settled that, until the final delimitation and titling is effectuated, the State should cease any act which could affect the well being of communities or interfere with the existence, value, use or enjoyment of the property located in the geographic area where the members reside. Notwithstanding the robust defence of indigenous rights to traditional lands, the Court points out that this is not an absolute right.

Other rights derive from the right to property. During periods in which communities remain landless, the State must provide adequate infrastructure, basic services, and necessary supplies for the well being of members[351]. The State has also the duty to always consult with indigenous and tribal peoples about the use of their traditional lands. The principle of free, prior and informed consent entails the right to be consulted with reasonable notice about questions affecting directly or indirectly the life and the territory of a community. This

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[350] Citroni, Osuna, 2008: 341.

[351] In *Xákmok Kásek Indigenous Community. v Paraguay*, for example, the Court ordered: "the State must take the following measures immediately, periodically, or permanently: (a) provision of sufficient potable water for the consumption and personal hygiene of the members of the Community; (b) medical and psycho-social attention to all the members of the Community, especially the children and the elderly, together with periodic vaccination and deparasitization campaigns that respect their ways and customs; (c) specialized medical care for pregnant women, both pre- and post-natal and during the first months of the baby's life; (d) delivery of food of sufficient quality and quantity to ensure an adequate diet; (e) installation of latrines or any other adequate type of sanitation system in the Community's settlement, and (f) provision of the necessary materials and human resources for the school to guarantee the Community's children access to basic education, paying special attention to ensuring that the education provided respects their cultural traditions and guarantees the protection of their own language (check the spacing in the preceding quote, I have made some changes where spaces were missing). See IACtHR, *Xákmok Kásek Indigenous Community v Paraguay*, 2010.

right includes information on the likely social and environmental impact of projects; avoidance of any possible coercion, intimidation or manipulation during the process; and provisions to reasonably share the benefits of such projects with the members of indigenous communities [352].

(vi) Right to vida digna

The Court has established the distinctive relationship of indigenous peoples with their ancestral lands as the main argument justifying their priority over the ownership of traditional territories. However, some commentators suggest the concept of the "distinctive relationship" might constitute a fragile legal basis to defend indigenous and tribal land rights[353]. They argue that by establishing a static idea of how indigenous groups relate to territory, the Court overlooks natural dynamics such as migration, cultural shifts and nomadism. Accordingly, the use of ethnic grounds as the foundation for the right to access territory could be devastating in regions marked by a complex social composition or disputes between distinct indigenous groups. Some scholars advocate, then, the use of a more substantive foundation for the defence of indigenous rights to land, embedded in the notion of "*vida digna*"[354]. The concept of "*vida digna*", which means literally life with dignity, represents a comprehensive understanding of the right to life, enshrined in article 2 of the American Convention on Human Rights, and governs not only access to land, but a wide array of fundamental rights. It can be defined as follows: "In essence, the fundamental right to life

[352] As a result, in the case of Saramaka the Court has stated "Paragraph 8: The State shall adopt legislative, administrative and other measures necessary to recognize and ensure the right of the Saramaka people to be effectively consulted, in accordance with their traditions and customs, or when necessary, the right to give or withhold their free, informed and prior consent, with regards to development or investment projects that may affect their territory, and to reasonably share the benefits of such projects with the members of the Saramaka people, should these be ultimately carried out [...]The State shall ensure that environmental and social impact assessments are conducted by independent and technically competent entities, prior to awarding a concession for any development or investment project within traditional Saramaka territory, and implement adequate safeguards and mechanisms in order to minimize the damaging effects such projects may have upon the social, economic and cultural survival of the Saramaka people [...]The State must consult the Sarayaku People in a prior, adequate and effective manner, and in full compliance with the relevant international standards applicable, in the event that it seeks to carry out any activity or project for the extraction of natural resources on its territory. See IACtHR, *Saramaka*, 2007.
[353] Pasqualucci, 2009; Antkowiak, 2014.
[354] Pasqualucci, 2008.

includes not only the right of every human being not to be deprived of his life arbitrarily, but also the right that he will not be prevented from having access to the conditions that guarantee a dignified existence"[355]. As a result, the right to "vida digna" and, as consequence, the right to life encompass a set of positive rights[356]. The concept of vida digna also spams other rights such as the rights to housing and water, etc. The concept first appeared in decisions such as *Street Children (Villagrán-Morales et al) v Guatemala* and *Instituto de Reeducación del Menor v Paraguay* and is normally used in cases involving indigenous people, children and rights of persons deprived of liberty. In proposing the replacement of the concept of "distinctive relationship" by the concept of "*vida digna*" as the foundation for the defence of the indigenous right to land, it is advocated that a more solid and comprehensive legal basis for the protection of indigenous groups would be created.

5.3 Efficacy

Latin American countries have undertaken constitutional reforms and adopted laws recognising distinct indigenous identities, the multicultural character of the State, and reinforcing rights granted by the Court. As noted in the previous section, the IACtHR jurisprudence on indigenous rights has met with widespread *observance*. Essential elements of decisions have been judicially recognised and applied without the existence of a previous binding decision by international litigants, domestic courts and bodies of international organisations. The Court has stimulated constitutional and legislative reforms. In addition, domestic courts have operationalised rights of indigenous peoples as affirmed in norms of IACtHR case law[357].

Despite considerable efficacy of the application and normative strengthening layers provoked by Court's decisions, "implementation gaps" have not been completely resolved by the action of courts (international or national) alone. Here resides the Achilles heel of the Court's jurisprudence on indigenous rights:

[355] IACtHR, *Street Children (Villagrán-Morales et al) v Guatemala*, 1999:144.
[356] Pasqualucci, 2006; Pasqualucci, 2008.
[357] Stavenhagen, 2006.

although normatively accepted, rights cemented by decisions have not been completely concretized. According to the first UN Special Rapporteur on Indigenous Rights,

> […] recent processes of constitutional and legal reform in various countries have not necessarily led to actual changes in the daily lives of indigenous peoples, and an "implementation gap" continues to exist between [L]egislation and the day-to-day reality. While these rights are generally recognised in many countries, their realisation implies a whole package of legal and administrative transformations, particularly regarding property and natural resources law and administration. Nevertheless, experience also shows that the new legal standard has become an essential tool for promoting the rights of these people, especially through the judicial system[358].

The former UN Rapporteur recognises the importance of strengthening institutional and normative structures and asserts that "courts are instrumental in resolving conflicts between laws, non-enforcement of those laws, and measures taken by the authorities that are at variance with the reforms and jeopardize the rights of indigenous peoples and communities" [359]. As expressed by the former UN Rapporteur, courts are relevant and contribute in part to avoiding indigenous rights violations, but are not decisive. The adequacy of reality to indigenous rights established on the Convention depends, then, on other factors. This complimentary nature is, by extension, a flaw that permeates domestic and international courts alike and that exposes some of the limits to the efficacy of the IACtHR.

This section, structured according to the categories of redress adopted by the Court, will address other effects resulting from the orders of reparation established by the Court in the cases analysed and how they have contributed or not to lowering the "implementation gap". Significant effects coming from the

[358] Stavenhagen, 2007.
[359] Stavenhagen, 2007.

obligation to investigate, prosecute, and punish when appropriate were not identified.

5.3.1 Compensation

The most frequently requested orders of reparation, and also those meeting with greatest compliance, were measures of compensation and satisfaction. In general, these measures add to implementation efficacy and to *individual redress* of victims and communities. Although they have high compliance, their effects are often restricted to limited groups of people. Compensations were ordered in all decisions, fully complied in 9 cases[360] and partially complied in the remaining cases. Non-compliant States claimed difficulties in identifying and locating victims, especially in the cases of massacres, but brought forward evidences of their efforts to implement the order.

Another common strategy of the Court in order to compensate victims is the creation of collective funds or the requirement that compensation be used for an agreed purpose which will benefit the community as a whole[361]. The compliance of these measures had direct effects on ensuring rights of victims. In *Plan de Sánchez Massacre v Guatemala*, the compensation was used to improve the infrastructure of the chapel in which members of the community pay homage to those executed in the massacre. In *Escué Zapata v Colombia*, it was established a fund named after the disappeared indigenous leader "Germán Escué Zapata" to be invested, according to the Court's decision, in "works or services of collective interest for the benefit of the community which he belonged"[362]. The fund was used in 2008 to acquire a *chiva*, a special bus commonly used for rural transport in Colombia. In *Mayagna (Sumo) Awas Tingni*, state and representatives of victims agreed on the construction of a student hostel for the community, in response to the obligation of investing in works or services of collective interest. The hostel was inaugurated in 2003. In *Operation Genesis*, the Court imposed a

[360] IACtHR, *Aloeboetoe,* 1991; IACtHR, *Mayagna,* 2001; IACtHR, *Moiwana*, 2005; IACtHR, *López Álvarez, 2006*; IACtHR, *Escué*, 2007; IACtHR, *Tiu Tojín v Guatemala*, 2008; IACtHR, *Chitay Nech et al v Guatemala*, 2010; IACtHR, Fernández Ortega, 2010; IACtHR, *Rosendo Cantú*, 2010.
[361] IACtHR, *Saramaka*, 2007; IACtHR, *Mayagna,* 2001; IACtHR, *Xákmok*, 2010; IACtHR, *Kichwa Indigenous People of Sarayaku v Ecuador*, 2012.
[362] IACtHR, *Escué*, 2007.

deadline and an order of priority for compensation payments to victims, but referred the compensation implementation to the domestic mechanisms of reparation of Colombia. In the judgment, the Court noted the domestic administrative mechanisms of reparation recently adopted in Colombia which benefit "those persons who individually or collectively have suffered harm owing to events that took place after January 1, 1985, as a result of violations of international humanitarian law or gross and manifest violations of international human rights law that occurred as a result of the internal armed conflict"[363]. Moreover, taking into consideration the Colombian Constitutional Court's opinion in the matter, it recognized the "progress made by the State as regards making reparation to victims of the armed conflict, implemented with increased momentum since the promulgation of the Victims Law" [364]. Both the actions of referring the implementation of reparations to domestic mechanisms of reparation and of taking into consideration the stance of high courts in the matter have relevant effects. First, it reinforces the complementarity between IACtHR and domestic courts. Second, and of central importance to this section, it contributes to invigorate the recently created mechanism of reparation and to strengthening domestic institutions.

The collective funds designed by the Court as reparatory measures are normally used to subsidise projects related to education, housing, agriculture and health. In its first decisions, the Court tended to call for the institution of an implementation committee, composed of a "representative appointed by the victims, a representative appointed by the State, and another representative jointly appointed by the victims and the State" [365] that would "be responsible, in consultation with the community for designating how the projects will be implemented"[366]. This kind of ruling was severely criticised because, according to some specialists[367], it reflected a paternalist approach towards indigenous and tribal peoples. As perhaps a response to this criticism, in more recent cases such

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[363] IACtHR, *Afro-descendant communities displaced from the Cacarica River Basin (Operation Genesis) v Colombia*, 2013: 469.
[364] IACtHR, *Afro-descendant communities displaced from the Cacarica River Basin (Operation Genesis) v Colombia*, 2013.
[365] IACtHR, *Moiwana*, 2005; IACtHR, *Sawhoyamaxa Indigenous Community v Paraguay*, 2006.
[366] *Idem*.
[367] Pasqualucci, 2009.

as *Xákmok Kásek Indigenous Community v Paraguay* and *Kichwa Indigenous People of Sarayaku v Ecuador*, the Court decided that the communities in question would "use the money as they decide", and "in accordance with its own decision making mechanisms and institutions, among other aspects, for the implementation of educational, cultural, food security, health care and eco-tourism development projects or other community infrastructure projects or projects of collective interest that the People considers a priority"[368]. The devolution of autonomy to the communities reflects a new mindset and the progression of law-application by the Court, which takes the right to self-determination even more seriously.

5.3.2 Satisfaction

Measures to ensure satisfaction met with a high level of compliance. The most popular measure to ensure satisfaction ordered by the Court in almost all cases, with exception of *Aloeboetoe* and *Mayagna* (the oldest of all cases) was to publish parts of the decision in different media (including official gazettes, newspapers of national circulation, radio stations, TV, and state´s official webpages). This order was fully complied in 6 cases[369] and partially complied in other 3[370], mainly for lack of proof of claimed publications.

The general obligation of publishing parts of the decision has gained distinct features in these cases. The Court often required adaptation of language, media, geographical coverage and part of the sentences to be broadcasted. As a result, decisions were published in languages as varied as Maya Achí (*Plan de Sanchez* and *Río Negro*), Miskito, Sumo, Rama (*Yatama*), Nasa Yuwe (*Escué Zapata*), Dutch, Saramaka (*Saramaka*), K´iche´ (*Tiu Tojín*), Mayan kaqchike (*Chitay Nech*), Me'paa (*Fernández Ortega* and *Rosendo Cantú*), Sanapaná, Enxet, (*Xákmok Kásek*), Kichwa (*Kichwa Indigenous People of Sarayaku*). In two cases the Court let at

[368] IACtHR, *Kichwa*, 2012.
[369] IACtHR, *Plan de Sánchez* (Monitoring Compliance with judgment); IACtHR, *López Álvarez* (Monitoring Compliance with Judgment); IACtHR, *Saramaka* (Monitoring Compliance with judgment); IACtHR, *Escué* (Monitoring Compliance with judgment); IACtHR, *Tiu Tojín v Guatemala* (Monitoring Compliance with Judgment), IACtHR, *Chitay Nech* (Monitoring Compliance with judgment).
[370] IACtHR, *Yatama,* 2005; IACtHR, *Yakye Axa Indigenous Community*, 2005; IACtHR, *Sawhoyamaxa*, 2006.

appraisal of the victims to decide which parts of the judgment and media would be used to preserve their integrity[371]. In addition, in *Plán de Sánchez*, the state translated not only the ruling but also the entire Convention to the native language. The accommodation of cultural particularisms in decisions reinforces the right to self-determination ascribed to indigenous and tribal peoples and obliges states to revitalise native languages leading to a greater awareness about human rights and, thus, to strengthening social structures.

Another common measure to ensure satisfaction in cases of massacres was the organisation of public acts in accordance with customs, practices, and language of communities in which states would acknowledge their international responsibility and apologise to victims and their next of kin. Public acts were carried out in 6 out of 11 cases in which they were required[372]. For instance, in *Plan de Sánchez Massacre v Guatemala*, "the State of Guatemala, represented by the vice-president went to the indigenous community of Plan de Sánchez formally to apologize in accordance with the implementation of the sentence issued by the Court. The community obliged him to attend a theatre performance by young members of the community that illustrated the events of the massacre that took place twenty-three years earlier"[373].

In *Moiwana Community v Suriname*, the State built a memorial in a suitable public location to honour the victims of the massacre. In *Chitay Nech et al v Guatemala*, the State named a school and a recognized street in San Martín Jilotepeque after Florencio Chitay Nech, and placed there a commemorative plaque with his name and a description of his activities. By honouring the victims and reconstructing the collective memory these actions provide individual redress and add to the strengthening efficacy of the Court.

5.3.3 Guarantees of non-repetition and restitution

[371] IACtHR, *Rosendo Cantú*, 2010; IACtHR, *Fernández Ortega*, 2010.
[372] IACtHR, *Plan de Sánchez* (Monitoring Compliance with judgment); IACtHR, *Yakye Axa,* 2005; IACtHR, *Moiwana*, 2005; IACtHR, *Escué*, 2007; IACtHR, *Rosendo Cantú*, 2010; IACtHR, *Fernández Ortega*, 2010.
[373] IACtHR, *Plan de Sánchez* (Monitoring Compliance with judgment).

The IACtHR is probably the Court that has most fully developed guarantees of non-repetition. Cases involving indigenous rights proved to be an optimal space for further advancements. Although the tribunal identifies three categories of guarantees of non-repetition, it applied 8 different forms of measures, expanding its own repertoire in these cases.

One of the standard guarantees of non-repetition required by the Court is the realisation of educational activities aimed at training different levels of public agents in international standards concerning the human rights of indigenous peoples and communities. Although there was not supervision of compliance of this measure in the cases in which the Court required it, the State informed in regard to the *Lopez Alvarez* case that "human rights is part of the syllabus of penitentiary agents and that the Secretary of Human Rights has adopted some trainings" [374]. This measure has great influence on strengthening social structures and on securing application in conformity with ACHR norms.

Guarantees of non-repetition were also proposed in cases in which violations were caused by *disproportional use of force by law enforcement officers.* In the cases *Fernández Ortega* and *Rosendo Cantú* the Court incited the State to maintain the process of standardisation of an action protocol to investigate cases of rape in the state of Guerrero and enforce the supply of specialized services for treating indigenous women who are victims of sexual violence. The implementation of these orders has not been monitored yet, but they have potential to guarantee accountability of similar violations and to reinforce institutional structures dealing with gender violence.

In terms of restitution, the Court ordered the concession of a scholarship for study at public Mexican institutions and for university studies to the victims' children[375]. In the case of Escué Zapata, the state granted full coverage of the academic, lodging and transport expenses of the beneficiary. In the cases *Fernández Ortega* and *Rosendo Cantú*, the State created a trust fund for the next of kin of victims in 2012.

The Court has also repeatedly reaffirmed collective rights using different strategies of redress. In former decisions, the Court ordered the state of

[374] IACtHR, *Kichwa*, 2012; IACtHR, *Rosendo Cantú*, 2010; IACtHR, Fernández Ortega, 2010; IACtHR, *López Álvarez* (Monitoring Compliance with Judgment).
[375] IACtHR, *Escué*, 2007; IACtHR, *Rosendo Cantú*, 2010; IACtHR, Fernández Ortega, 2010.

Suriname to "grant the members of the Saramaka people legal recognition of the collective juridical capacity, pertaining to the community to which they belong, with the purpose of ensuring the full exercise and enjoyment of their right to communal property, as well as collective access to justice, in accordance with their communal system, customary laws, and traditions"[376]. On other occasions, the Court has ordered the implementation of a special registration program to guarantee the provision of identification documents and implied benefits to indigenous groups in affected areas of Paraguay[377]. After these orders, the number of registered adults and children in these areas reached levels of 94% and 80%, respectively. In some cases against Guatemala, the Court ordered the State to design and implement a special project to "rescue" the Maya Achí culture. In response, the State has implemented programs in several communities, including the study and dissemination of Maya-Achí culture and the provision of teaching personnel trained in intercultural and bilingual teaching[378]

Finally, the Court ordered States to adopt legislative, administrative, and other measures that required coordinated actions of multiple governmental organs to address violations connected with the right to property. Examples are the duty to create effective mechanisms for delimitation, demarcation and titling of traditional territories in accordance with the customary laws of communities and the obligation to conduct free, informed and prior consultation with indigenous people about their lands and natural resources therein. These obligations have triggered several actions in the states, but remain far form compliance.

None of the Paraguayan cases, *Yakye Axa Indigenous Community v Paraguay*, *Sawhoyamaxa Indigenous Community v Paraguay*, and *Xákmok Kásek Indigenous Community v Paraguay* have demonstrated any real progress in the implementation of guarantees of non-repetition. According to the representatives of the first case "[n]o measures have been taken to obtain approval for the appropriate legislation [...] and, to date, the State has not promoted a draft law designed to comply with this aspect of the Judgment"[379].

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[376] IACtHR, *Saramaka*, 2007.
[377] IACtHR, *Sawhoyamaxa*, 2006; IACtHR, *Xákmok*, 2010.
[378] IACtHR, *Plan de Sánchez* (Monitoring Compliance with judgment); IACtHR, *Río Negro*, 2012.
[379] IACtHR, *Yakye Axa* (Monitoring Compliance with Judgment).

Such information is confirmed by the last joint order supervising compliance of the 3 cases, published in June of 2015, which does not feature any developments on the topic.

In the cases of *Saramaka People v Suriname* and *Moiwana Community v Suriname*, both still awaiting implementation, the State has indicated some initiatives to achieve a national solution to the land rights issues. These initiatives include an amendment in the constitution, the designation of an organisation called Amazon Conservation Team of Suriname to draft a general legislation on rights of indigenous and tribal peoples, and the solicitation, in 2008, for support of the UN Special Rapporteur in the drafting of a law recognising property rights of indigenous people. Despite some advances, the Court argues that "the complexity of those initiatives is causing excessive delays in the State's compliance with specific orders of the Tribunal"[380]. The reaction of the Court is partially motivated by the urgent special needs of these indigenous groups, but its argument sounds incoherent with the basic outcome expected from a non-repetition measure, which is to have a broader impact.

In *Sarayaku v Ecuador*, a *sui generis* measure of restitution was ordered: the request to neutralise, deactivate and, if applicable, remove all pentolite (a composite high explosive used for military and civilian purpose), left on the surface and buried in the territory of the Sarayaku People. There are no advances in the removal of the explosive and currently new oil blocks overlap more than 90% of the territory of the community. The decision of the Court, therefore, did not have a significant effect on avoiding repetitions[381].

The exception is terms of fulfillment of land rights after a decision of the Court is the case *Mayagna (Sumo) Awas Tingni Community v Nicaragua*, widely recognized as a success of the Court caselaw. In *Mayagna*, the State enacted the "Act concerning the Communal Property Regime of the Indigenous Peoples and Ethnic Communities of the Autonomous Regions of the Atlantic Coast and of the Coco, Bocay, Indio and Maiz Rivers" in January, 2003 in compliance with the obligation to adapt its "domestic law to create an effective mechanism for delimitation, demarcation, and titling of the property of indigenous

[380] IACtHR, *Saramaka* (Monitoring Compliance with Judgment).
[381] For an updated account of the case: http://amazonwatch.org/news/2016/1202-sarayaku-still-awaiting-justice. Access on: December, 2017.

communities". This norm established a specific procedure and assigned institutional authorities for the demarcation and titling of the lands of the indigenous communities that had their property rights violated. Representatives acknowledged "that Act No. 445 reflects a historic achievement for the indigenous peoples of the Atlantic Coast and represents a first step in the State's compliance with [the third operative] paragraph of the Judgment". However, they also expressed apprehension by affirming that "it is impossible to determine [...] whether this act will constitute an effective mechanism for titling the Community's lands". The restitution of lands to Mayagna community was fully complied with in 2009. The case represents a key achievement of the Court in the category of property rights. Not by coincidence, this fully complied case is among the oldest decisions of the court. Indeed, from the 19 cases analysed in this study, only two have fully complied with all orders of reparation required by the Court. Not surprisingly, these are the two oldest cases of this group, suggesting that time may play an important role on the expansion of effects and general efficacy of cases[382].

In the present conditions, implementation of reparatory orders involving land rights remains low. The greatest contribution of the Court in terms of indigenous property rights lie in the layers of observance, application, and strengthening as a result of its jurisprudence being largely used by other courts and by litigants.

In concrete cases, states have resisted allowing indigenous rights to prevail over other interests. In relation to these cases, the Court has commonly ordered States to identify, delimit, demarcate, and grant collective titles over traditional territories in accordance with their customary laws. In a case involving Afro-descendant communities, the court employed a less imperative formulation and determined that the state should "restore the effective use, enjoyment and possession of the territories *recognized by domestic law*". Interestingly, attached with obligations of land restitution the Court has also ordered states to ensure that the community's right to life is not jeopardized and, thus, to provide communities with the basic services and supplies vital for their subsistence[383]. This preventive measure is a response to the lingering implementation of

[382] IACtHR, *Aloeboetoe,* 1991; IACtHR, *Mayagna,* 2001.
[383] IACtHR, *Mayagna,* 2001; IACtHR, *Yakye Axa,* 2005; IACtHR, *Sawhoyamaxa*, 2006; IACtHR, *Xákmok*, 2010.

restitution measures, and it has entailed the delivery of comprehensive economic, social and cultural rights. This attached obligation signals the connection between land rights and the right to "vida digna", together with the recognition of state obligations towards the fulfillment of economic, social, and cultural rights.

Two guarantees of non-repetition and restitution stand out because require States to perform deep modifications in their domestic legal order. In one of the most distinctive cases of the Court, *Yatama v Nicaragua*, the State of Nicaragua was prompted to reform Electoral Act No. 331/2000 to establish a "simple, prompt and effective recourse to contest the decisions of the Supreme Electoral Council that affect human rights". In response to the requirement of the Court, the State prepared a draft bill for the amendments of Electoral Act but indicated that the process of legislative reform "has not been executed swiftly [...] as it must be […] not for a lack of will or for the desire to continue manipulating the situation [...] in favour of determined political parties, but for a situation of legal conditions and for the lack of consensus by the same parties [...] in the National Assembly". In the same manner, the State referred to the fact that "for dealing with a law of constitutional range, [the fulfillment of these extremes in the Judgment] imply a partial reform to the Political Constitution," which, according to the State, is not "of the powers of the Executive Power, but of the Legislative Power". Although it has not met with compliance, the case portraits the strengthening potential of decisions towards institutions that deal with situations of institutional blockage. In the case *Norín Catrimán*, the Court ordered the State to reverse, suspend or nullify criminal rulings that incriminated indigenous individuals under the Chilean Terrorism Act. This measure of restitution directly challenges the principle of *res iudicata*. Although the compliance of the case was still not revised, the measure has direct impact on application efficacy because it both repairs an application in disagreement with ACHR norms and creates a precedent of misuse to be avoided by domestic courts.

5.3.4 Rehabilitation

Together with most measures providing for compensation and satisfaction, rehabilitation measures are mainly devoted to restoring the victim's well-being via provision of medical and psychological care. The Court's order resulted in a series of improvements for the communities which had their rights violated. In *Sawhoyamaxa v Paraguay*, radio systems were installed to create a line of communication between the community and health authorities. In *Xákmok Kásek v Paraguay*, a permanent health clinic was established and equipped with the necessary supplies and medicines to provide adequate health care. In *Plan de Sánchez v Guatemala*, the Ministry of Public Health and Social Welfare has been providing collective, family and individual psychological treatment to the residents of the village through two psychologists and a nursing assistant.

The Court has also been instituting "socioeconomic measures of collective reparation", proposing the concept of social rehabilitation[384]. The first case in which this appeared was *Aloeboetoe et al v Suriname.* Following the orders of the Court, the State reopened a school located in the affected community and staffed it with teaching and administrative personnel, as well as with a medical dispensary. In subsequent cases, the Court ordered, among other similar measures[385], provisions for the maintenance and improvement of the road system between the communities affected by violations and nearby cities; the arrangement of sewage and adequate water supply together with housing projects; the establishment of health centres; and the obligation of providing medicine, food supplies, medical and psychosocial care, and effective hygienic management of biological waste.

5.3.5 Obligation to investigate, prosecute and punish when appropriate

The Court forced states to investigate, prosecute and punish perpetrators of violations of human rights especially in cases caused by *disproportionate use of*

[384] The concept of social rehabilitation expands the traditional definition of the Court that restricts rehabilitation to the measures aimed at the provision of the required *medical and psychological care*. For an interesting development of the concept of social rehabilitation, see Sandoval, 2009.
[385] IACtHR, *Moiwana*, 2005; IACtHR, *Yakye Axa,* 2005; IACtHR, *Xákmok*, 2010.

force by law enforcement officers. From 10 cases in which this obligation was required, none of them has even partially met with compliance. However, notably, cases in which states are completely unresponsive and do not carry out any action to implement reparatory orders are rare. Examples of actions carried out by state organs will be described bellow. In *Plán de Sánchez v Guatemala*, while victims and representatives appoint to "serious inactivity in the investigation of this massacre", the State manifested that the "Attorney´s office has started several investigations". In *Moiwana v Suriname*, the Attorney General created a coordination team to localize the victims' remains. The Court intervention in this case represents a form of resistance in relation to domestic impunity in relation to the massacre because the individuals who "publicly took responsibility for the massacre continue to be active in public life" and at least one has "made threatening and widely heard public statements about the [investigation of] the massacre without any public response by State officials". In *Escué-Zapata v Colombia***,** two legal proceedings of investigation are being conducted, one at the request of the Solicitor General´s Office of the Human Rights National Unit. One of these proceedings condemned three law enforcement officers for involvement in the case. In contrast, after more than 20 years after occurrence of the acts of *Tiu Tojín v Guatemala*, violations remain unpunished at the domestic level. In a higher degree of non-compliance, a decision of the Constitutional Court impeded investigations about the murderer of *Chitay Nech et al v Guatemala* alleging that the crime occurred before its typification. On the one hand, the ruling of the Constitutional Court expresses low application efficacy in this case. On the other hand, the existence of a counter-decision issued by the IACtHR provides a legal form of redress and resistance against impunity that domestic actors can use to push the juridical branch towards compliance. In general, the low rate of implementation of the obligation to investigate, prosecute and punish perpetrators of violations of human rights reflects structural weaknesses of domestic legal systems that contribute to the development of a culture of impunity and, thus, to the repetition of crimes. The modest efforts of states to comply with this obligation demonstrate how orders of the Court can affect defective structures and protect victims even if in a limited degree.

Other studies, relying solely on compliance criteria, have normally attributed a low efficacy to this measure. Although this is true, it is also important to emphasise that state organs rarely remain completely inactive and that the existence of such obligations strengthens social and institutional structures acting in conformity with ACHR norms. Paradoxically, it is normally in the most extreme edges of non-compliance that decisions of the Court prove to be more important.

TABLE 5

Selected jurisprudence

Indigenous Rights

STATE	CASE	YEAR
SURINAME	ALOEBOETOE *ET AL*	1991
NICARAGUA	MAYAGNA (SUMO) AWAS TINGNI COMMUNITY	2001
GUATEMALA	PLAN DE SÁNCHEZ MASSACRE	2004
NICARAGUA	YATAMA	2005
PARAGUAY	YAKYE AXA INDIGENOUS COMMUNITY	2005
SURINAME	MOIWANA COMMUNITY	2005
HONDURAS	LOPEZ-ALVAREZ	2006
PARAGUAY	SAWHOYAMAXA INDIGENOUS COMMUNITY	2006
SURINAME	SARAMAKA PEOPLE	2007
COLOMBIA	ESCUE-ZAPATA	2008
GUATEMALA	TIU TOJÍN	2008
GUATEMALA	CHITAY NECH *ET AL*	2010
MEXICO	FERNÁNDEZ ORTEGA *ET AL*	2010
MEXICO	ROSENDO CANTÚ *ET AL*	2010
PARAGUAY	XÁKMOK KÁSEK INDIGENOUS COMMUNITY	2010
GUATEMALA	RÍO NEGRO MASSACRES	2012
ECUADOR	KICHWA INDIGENOUS PEOPLE OF SARAYAKU	2012
COLOMBIA	AFRO-DESCENDANT COMMUNITIES DISPLACED FROM THE CACARICA RIVER BASIN (OPERATION GENESIS)	2013
CHILE	NORIN CATRIMAN	2014
PANAMA	KUNA INDIGENOUS PEOPLE	2014
HONDURAS	GARIFUNA COMMUNITY OF PUNTA PIEDRA	2015
HONDURAS	GARIFUNA COMMUNITY OF TRIUNFO DE LA CRUZ AND ITS MEMBERS	2015
SURINAME	KALIÑA AND LOKONO	2015
GUATEMALA	VILLAGE OF CHICHUPAC AND COMMUNITIES OF MUNICIPALITY OF RABINAL	2016

-Chapter 6

Rights of detainees

6.1 Setting the scene

By the mid-19th century, penal institutions became a main form of punishment. Presently, between 10 and 11 million individuals are held in penal institutions throughout the world, either as pre-trial detainees or as sentenced and convicted prisoners. The world prison population rate, based on United Nations estimates of national population levels, is 144 per 100,000 individuals. In South American countries this rate goes up to 242, and in Caribbean countries it escalates to 347. Since about the year 2000, the prison population has risen by over 80% in Central American countries and by 145% in South American countries—an increase considerably higher than the estimated 20% growth in the total world prison population over the same period[386].

The exponential growth of the prison population has been accompanied by escalating human rights violations within prisons. Violations of rights occurring in these conditions are not recent. In 1764, Beccaria identified problems that persist until the present day, such as the non-separation of convicted and pre-trial detainees, and the use of torture during interrogation. As early as the 1800s, Beccaria asserted that "such absurd abuses should not be tolerated in the XVIII century"[387].

Although such violations against prisoners are not new, their recognition as serious breaches of human rights and international norms is recent. Since the 1950s, the UN has developed a progressive normative framework of rules on how individuals should be treated while in detention or prison[388]. These rules constitute the foundation of a set of international detainees' rights. From 1968

[386] Walmsley, 2016.
[387] Beccaria, 1764, chapter VI, XII.
[388] UN, *Standard Minimum Rules for the Treatment of Prisoners*, 1957 [1977]; UN, *Body of Principles for the Protection of All Persons under any Form of Detention or Prison,* 1988; UN, *United Nations Rules for the Protection of Juveniles Deprived of their Liberty,* 1990.

onwards, Amnesty International (AI) started to monitor the treatment of detainees, expanding its sphere of activity from political to "ordinary" prisoners and then to those sentenced with the death penalty[389]. AI recognised that vulnerable detainees were a widespread concern. Notably, "while AI might have found some states' criminal justice systems more suspect than others, it saw all countries as capable of abusing their penal power"[390]. In 1975, the European Court of Human Rights (ECtHR) issued its first decision concerning detainees' rights in the landmark case *Golder v United Kingdom*[391]. Since then, the number of international courts' decisions concerning these questions has increased and the set of rights ascribed to detainees has expanded. Recently, discussions related to convicted prisoners' right to vote has raised questions about the limits of rights disenfranchisement[392].

In the Inter-American Human Rights System (IAHRS), a country report published back in 1965 pointed out problems stemming from the overcrowding of prisons[393]. At first, issues related to detainee rights would be addressed exclusively in country reports produced by the Commission[394]. In these early years, detainee rights were analysed on a state-by-state basis. In 1994, however, the Annual Report of the Commission to the Assembly of the OAS referred for the first time to the structural and widespread character of violations occurring within penal institutions. Importantly, in 1994, a special working group with the objective of "studying the conditions of detention in the Americas" was established. The main outcome of this initiative was to elaborate on the "code of conduct" enshrined in the *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas* adopted in 2008. This document

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[389] Engle, 2015:18.
[390] *Ibidem*.
[391] ECtHR, *Golder v United Kingdom*, 1975. According to Madsen, this case marks a turn in the jurisprudence of the ECtHR: "In a series of landmark decisions, the Court fundamentally transformed European human rights from a project mainly linked to Cold War objectives to both an independent mission of setting common standards across Europe and a quest for a real protection of human rights under the ECtHR" (Madsen, 2016:152).
[392] ECtHR, *Hirst (No. 2) v the United Kingdom*, 2005; ECtHR, *Greens and M.T. v the United Kingdom*, 2010 (pilot judgment); ECtHR *Millbank and Others v. the United Kingdom,* 2016. The ECtHR underlined in these decisions that a general, automatic, and indiscriminate restriction on the right to vote of detainees was incompatible with Article 3 of Protocol No. 1.
[393] IACHR, *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, 2011.
[394] To access country reports: http://www.oas.org/es/cidh/ppl/informes/pais.asp. Access on: December, 2017.

consolidates the essential elements of the jurisprudence of the Court concerning the rights of detainees and has legal status of a "declaration of intentions", defining standards to be followed by all states in the region.

The relevance attributed to detainee rights in the region is demonstrated by the creation in 2005 of the Rapporteurship on the Rights of Persons Deprived of Liberty, under the supervision of the Commission. Its mandate includes conducting on-site visits to OAS member states, compiling information about persons deprived of liberty, receiving petitions, issuing recommendations regarding detention or incarceration conditions, monitoring compliance with recommendations, and granting provisional measures[395]. During the period of 2000-2015, the Rapporteurship, on behalf of the Commission, approved 91 admissibility reports and 51 merits reports, promoted 20 friendly settlements, and granted 74 precautionary measures related to the rights of people deprived of liberty in the region. Furthermore, more than 25% of jurisprudence of the Court addresses these rights. Contrastingly, scholarship about the effects of Court jurisprudence over these issues has been largely absent[396].

Against this background, which displays an accentuated growth of the global detainee population but also an ongoing development of normative and institutional structures protecting its rights, the next sections will present the development of the Court's jurisprudence regarding this subject. This Chapter highlights how structural aspects concerning prison systems affect detainees' rights, and how the Court's jurisprudence has affected both these rights and structural aspects related to their concretization.

6.2 Jurisprudence of the Inter-American Court of Human Rights

The very first case received by the Court dealt with events that took place in a prison centre. The case concerned the death of Viviana Gallardo Camacho—who

[395] Information extracted from the official website of the Rapporteurship on the Rights of Persons Deprived of Liberty. See: http://www.oas.org/en/iachr/pdl/default.asp. Access on: December, 2017.

[396] Some exceptions are González-Bertomeu, 2016; Leal, 2008. See also Burgorgue-Larsen, Torres, 2013 [2011]: 219.

was killed in prison—and the wounding of her cellmates[397]. Due to failures in the submission procedure, the Court could not decide this case on its merits; however, in the following years, petitions dealing with detainees' rights would be frequent.

In total, 31 cases directly related to detainees' rights are identifiable in the jurisprudence of the Court (see Table 6 at the end of this Chapter). These cases integrate a broader body of jurisprudence concerning the rights of persons deprived of their liberty. Primary cases used for this investigation bring an institutional perspective of detainees' rights, revealing how structural questions affecting penal institutions and criminal justice have compromised detainees' rights. Cases involving arbitrary arrests, preventive detention, and the practice of torture or inhumane acts occurring in other institutional spaces, such as military quarters and police stations, were not incorporated into the empirical basis of analysis.

These 31 cases were heard between 1996-2016 and involve 13 States, predominantly Peru (7 cases), Ecuador (5 cases), and Guatemala (3 cases). Only one case was considered fully complied with and another case was archived. The other 29 cases are pending compliance, of which 6 did not receive any order monitoring compliance. Remarkably, some of these cases reached the Court after the issuance of continuous precautionary measures by the Commission for periods of up to 13 years[398].

This section is structured in two parts. The first will systematise the 31 identified decisions in five groups, according to similarities in facts, violations and rights ascribed by the Court in each case. The second part will outline the essential elements of the detainees' rights jurisprudence in order to accentuate the main doctrinal contributions of the Court to the field.

6.2.1 Facts of the Cases

Cases directly related to detainees' rights can be organised into the following 5 groups according to prominent questions discussed in the decisions and the

[397] IACtHR, *Government of Costa Rica (in the matter of Viviana Gallardo et al)*, 1981.
[398] IACHR, *Inmates of the Mendoza Penitentiary (Argentina)*, 2005.

categories of rights violated: (i) Right to Humane Treatment; (ii) Disproportional use of force by Law Enforcement Officers; (iii) Right to a Fair Trial; (iv) Death Penalty and Bodily Punishment; and (v) Right to Equal Protection. Some cases are included in more than one category according to the violations they describe. Mostly, the offenses committed (or allegedly committed) by the victims are intentionally omitted in this section because they are not relevant to the determination of their rights as detainees.

(i) Right to Humane Treatment

Inadequate physical, structural and functional prison conditions have frequently compromised rights to humane treatment, to physical integrity, and to detainee health[399]. Indeed, most cases related to detainees presented violations to the right to humane treatment.

Chronic overcrowding has been pointed out as the "most serious and wide-spread problem, which affects the absolute majority of states in the region"[400]. The case *Montero Aranguren v Venezuela* indicated that the number of detainees populating the Detention Center of Catia ranged between 2,286 to 3,618 inmates, while its maximum capacity was of 900. Overcrowding has direct influence on limiting detainees' personal space. While international standards establish that prison cells must provide 7 square metres per detainee, in *Montero Aranguren v Venezuela* it was noted that the space available for each inmate was approximately 30 square centimetres. Likewise, in *Lysias Fleury v Haiti* it was indicated that cells of 1.83 x 1.22 metres were occupied by eight individuals; the ruling in *Fermín Ramírez v Guatemala* described that cells of 20 x 6 x 8 metres accommodated up to 40 cement beds; *Tibi x Ecuador* declared that cell blocks of 120 square metres were shared by 120 to 300 people. These miniscule cells often combine other hostile conditions such as high temperatures, humidity, foul odours, insufficient ventilation, and deficiencies in natural light or basic hygiene[401]. In the case *Yvon Neptune v Haiti*, the victim described that "the walls

[399] González-Bertomeu, 2016.
[400] IACHR, *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, 2011.
[401] IACtHR, *Lysias Fleury et al v Haiti*, 2011: 35; IACtHR *Caesar v Trinidad and Tobago,* 2005: 49(13),49(16); IACtHR, *Díaz Peña v Venezuela*, 2012: 93, 97, 98.

[of his cell] were stained with human excrement, and insects and animals appeared at night"[402]. Likewise, in the case *Caesar v Trinidad and Tobago* representatives of the victim relate "there were no toilet facilities and a "slop pail" was used by everyone in the cell [...] plastic bags that would be ejected each four days by the detainee who would have to carry it with their jaws [...] prisoners were forced to defecate in the cells inside a container or on paper and to throw them out into the interior yard"[403]. Appallingly, the case *Boyce et al v Barbados* describes that victims were held for more than two years in cells that resemble cages and had to stay in their cells every day for 23 hours, during a period of over four years[404]. The conditions of "punishment cells" are equally precarious. In the case *Díaz Peña v Venezuela* the victim was held in solitary confinement for 24 hours a day in "a punishment cell measuring 2.5 metres by 3 metres, with no light, windows or sanitary installations because he had sent a letter to a radio station which was read out by a journalist"[405].

Some cases suggest that communication with family and next of kin was also limited[406]. For instance, in the case *Espínoza González v Peru*, detainees received visits two or three times a year because the prison is situated in a remote area[407]. Moreover, states have often deprived detainees of the conditions necessary for their social reintegration. In most cases detainees were prevented from practicing sports, conducting recreational or educational activities, or participating in any program of rehabilitation or re-socialisation[408].

Failures in supplying water and food in necessary amounts and with adequate levels of nutrition were also indicated in several cases[409]. Furthermore, detainees in these cases had no bed, blanket or mattress, and had to sleep in the floor, on a thin mat, on pieces of carpets, or take turns or share space with other

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[402] IACtHR, *Yvon Neptune v Haiti*, 2008: 131-138, 181-182.
[403] IACtHR, *Caesar*, 2005: pr. 49(13), 49(16).
[404] IACtHR, *Boyce,* 2007: 91-97.
[405] IACtHR, *Díaz Peña*, 2012 : 50.
[406] IACtHR, *Raxcacó Reyes, 2005: v Guatemala*, 2005: 43(19), 43(23); IACtHR, *Fermín Ramírez v Guatemala*, 2005: 54(54)-54(57), 118.
[407] IACtHR, *Espínoza González v Peru*, 2014: 79, 203.
[408] IACtHR, *Juvenile Reeducation Institute v Paraguay*, 2004:134.8; IACtHR, *Yvon Neptune*, 2008:128; IACtHR, *Espínoza González,* 2014: 79, 203; IACtHR, *Vélez Loor v Panama*, 2010: 67, 197; IACtHR, *Raxcacó Reyes*, 2005: 43(19), 43(23); IACtHR, *Fermín Ramírez*, 2005: 54(54)-54(57), 118.
[409] IACtHR, *López Álvarez v Honduras*, 2006: 54(48), 108; IACtHR, *Raxcacó Reyes*, 2005: 43(19), 43(23); IACtHR, *Lysias Fleury*, 2011: 35, IACtHR, *Yvon Neptune*, 2008:128.

detainees[410]. In addition, some detainees did not have access to appropriate clothing to cope with inhospitable weather conditions[411]. For example, in the case *Lorí Berenson Mejía v Peru*, the victim was maintained in a prison under hostile conditions and developed health conditions because of the high altitude and low temperature of the building. Lorí Berenson Mejía developed circulatory problems, Reynaud's syndrome, and suffered vision impairment due to the artificial light of her cell[412].

A case that illustrates how precarious conditions affect rights of detainees concerns a fire described in the case *Pacheco Teruel v. Honduras*. A technical report revealed that the fire was caused by a short circuit due to the overload of appliances in the prison's electrical system. More than 100 detainees were killed during the incident due to asphyxiation; others were severely burned. In this case, the victims were kept apart from the rest of the prison population because they were presumed to be gang members. The accident was a direct result of structural deficiencies and low priority assigned to penal institutions[413].

Cases also related to shortage of medicines and specialised medical attention[414]. Some detainees acquired diseases while in prison due to inadequate medical attention and diet. Particularly, in the case *Pollo Rivera v Peru*, the victim "had lost 30 kilos and presented a diagnostics of diabetes, severe arterial hypertension and post-traumatic disorders of the lumbar spine"[415]. While in prison, *Fermín Ramírez* developed gastritis, but never received adequate treatment or diet, which caused him to develop an ulcer[416]. The lack of proper medical attention particularly violates the rights of detainees with special health conditions. For instance, the case *Mendoza et al v Argentina* details that Lucas

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410 IACtHR, *Yvon Neptune*, 2008:128; IACtHR, *Caesar*, 2005: 49(13), 49(16).
411 IACtHR, *Pollo Rivera v Peru*, 2016: 44-49, 164; IACtHR, *Lori Berenson Mejía v Peru*, 2004: 2, 88, 107; IACtHR, *Cantoral Benavides v Peru*, 2001: 63, 85; IACtHR, *Montero Aranguren et al (Detention Center of Catia) v. Venezuela*, 2006: 60(9)-60(12); IACtHR, *Juvenile Reeducation Institute*, 2004: 4, 5, 63, 134.5-134.11; IACtHR, *López Álvarez,* 2006: 54(48), 108; IACtHR, *Yvon Neptune*, 2008:131-138, 181-182.
412 IACtHR, *Lori Berenson Mejía*, 2004: 2, 88, 107.
413 IACtHR, *Pacheco Teruel et al v Honduras*, 2012: 2, 24-66.
414 IACtHR, *Espínoza González*, 2014: 79, 203; IACtHR, *Cantoral Benavides*, 2001: 63, 85; IACtHR, *Montero Aranguren*, 2006: 60(9)-60(12); IACtHR, *Vélez Loor*, 2010: 67, 197.
415 IACtHR, *Pollo Rivera*, 2016: 44-49, 164.
416 IACtHR, *Fermín Ramírez*, 2005: 54(54)-54(57), 118.

Matías Mendoza did not receive any special treatment for his eye problems and that as a result his vision deteriorated[417].

The recent *Chinchilla Sandoval et al v Guatemala* is a leading case in the intersection of rights of detainees and right to health. María Inés Chinchilla Sandoval suffered from diabetes and other conditions stemming from the disease, including mobility impairment. She died while in prison because she did not receive adequate medical care or the treatment required for emergencies[418]. Likewise, the case *Vera Vera v Ecuador* reported the death of Pedro Miguel Vera Vera in a public hospital, nine days after his detention, because of the delay in treating a gunshot wound that he received during his arrest. His death was attributed to omissions in the administration of medical care while he was under state custody[419].

The ineffective control of penal centres by state officers is identified as a cause of some violations. In *Montero-Aranguren v Venezuela*, the Court denounced the lack of an accurate record of detainees and reliable data about the number or judicial status of persons in custody[420]. In other cases, penitentiaries did not establish a separation between convicted prisoners, prisoners in custody pending trial, and individuals undergoing a criminal trial[421]; between children and adults[422]; or between undocumented migrants and prisoners in custody pending trial[423]. In two cases, *Montero-Aranguren v Venezuela* and *Juvenile Reeducation Institute v Paraguay*, ineffective control permitted the creation of a promiscuous environment that also allowed circulation of weapons and illegal substances sometimes sold by prison staff[424].

(ii) Disproportional use of force by Law Enforcement Officers

The factors described in the former section contribute to increased tension

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[417] IACtHR, *Mendoza et al v Argentina*, 2013: 184-193.
[418] IACtHR, *Chinchilla Sandoval et al v Guatemala*, 2016: 1, 172-179, 186, 196, 217, 225.
[419] IACtHR, *Vera Vera et al v Ecuador*, 2011: 2, 30, 34, 41, 42, 50, 51, 73.
[420] IACtHR, *Montero Aranguren*, 2006: 60 (4)-60(9).
[421] IACtHR, *López Álvarez,* 2006: 54(47); IACtHR, *Suárez Rosero v Ecuador*, 1999: 1, 26, 34, 71-74.
[422] IACtHR, *Juvenile Reeducation Institute*, 2004: 4, 5, 134.44.
[423] IACtHR, *Annual Report 2013*, 2012: 70; IACtHR, *Tibi v Ecuador*, 2004: 90.49.
[424] IACtHR, *Juvenile Reeducation Institute*, 2004: 134.13-134.17; IACtHR, *Montero Aranguren*, 2006: 60 (4)-60(9).

and violence between detainees and prison staff, which in turn leads to other violations. Many cases involved the use of torture and other cruel, inhuman or degrading treatment or punishment[425]. For instance, five cases reported use of "incommunicado" detention and solitary confinement[426]. In *Juvenile Reeducation Institute v Paraguay*, escalation of violence towards adolescents held in custody and unpreparedness of police staff to deal with emergencies and accidents culminated in the deaths of detainees. Eventually, after a series of fires and incidents that killed scores of adolescents the state was forced to close the institution[427]. In the cases *Mendoza et al v Argentina*, *Durand and Ugarte v Peru*, and *Neira Alegría v Peru*, victims faced death while serving their sentences under the custody of the State due to extreme acts of violence. The former two cases describe the excessive force used to subdue simultaneous uprisings taking place at three penal centres in Lima that resulted in the death of 111 persons.

Massacres are the most extreme example of disproportionate use of violence by law enforcement agents. The case of *Montero Aranguren v Venezuela* brings to light the death of 63 detainees, injury of 52 detainees and disappearance of 28 detainees after the intervention of prison staff, military and police troops at the Detention Center of Catia. The massacre took place after the second attempt at a *coup d'etat* in Venezuela[428]. In *Miguel Castro Castro v Peru,* a premeditated massacre took place during a transfer of detainees executed during a visiting day. The massacre caused the death of 42 detainees, injury of 175 detainees, and submitted another 322 detainees who survived the assault to cruel, inhuman, and degrading treatments. The attack included cutting electricity off and "firebombs that produced an orange light, in an environment of complete darkness and of screaming voices" [429]. According to the Court "the attack was designed as a reproduction of hell and was "intentionally planned" so that it would remain in the survivor's memories" and in the memories of their next of

[425] IACtHR, *Herrera Espinoza v Ecuador*, 2016: 91-95, 107, 109; IACtHR, *Cabrera García*, 2010: 70; IACtHR, *Bayarri v Argentina*, 2008: 2, 78, 79, 98; IACtHR, *Lysias Fleury*, 2011: 36.
[426] IACtHR, *Cabrera García*, 2010: 70, IACtHR, *Montero Aranguren*, 2006: 93-94; IACtHR, *Bayarri*, 2008: 2, 78, 79, 98; IACtHR, *Espínoza González,* 2014: 207; IACtHR, *Cantoral Benavides*, 2001: 85.
[427] IACtHR, *Juvenile Reeducation Institute*, 2004:134.13-134.17.
[428] IACtHR, *Montero Aranguren*, 2006: 3, 60(8)-(26).
[429] IACtHR, *Miguel Castro Castro Prison v Peru*, 2008: 3, 197, 260.

kin who were visiting on that day[430].

(iii) Right to a Fair Trial

Violations of the right to a fair trial have manifested both in cases involving the arbitrary use of preventive detention and in those demonstrating a lack of judicial supervision for detainees. These practices violate the principle of presumption of innocence, and are directly related to failures in the administration of justice. Gravely, people in preventive detention compose around half the global prison population.

Seven cases violated the right to fair trial due to prolonged use of preventive detention and excessive delay to bring victims before a judge. In *Daniel Tibi v Ecuador*, a French gem merchant was detained for suspicion of drug trafficking in the context of Ecuadorian law on narcotics and psychotropic substances. At the moment of his detention, Daniel Tibi was informed that the procedures were part of 'migration control'. After being deprived of his liberty for more than 27 months, he was declared innocent and released[431]. In *López Alvarez v Honduras*, the victim remained detained for 6 years and was then acquitted from the accusation of possession and trafficking of illegal narcotic drugs. Shockingly, after being acquitted, the victim continued under state custody for an extra 6 months[432]. In *Pollo Rivera v Peru*, the victim was arrested without a warrant issued by a competent authority, and was presented before a competent judicial authority only one year after his detention[433]. In *Acosta Calderon v Ecuador*, the victim's statement was received by a judge only two years after his detention, and he remained in custody pending trial for more than five years[434]. Even in cases resulting in conviction, preventive detention has been used abusively. In *Suárez-Rosero v Ecuador*, the victim was arrested under the same framework of drug control involved in other cases. Before he was convicted, Suárez-Rosero had been held in preventive detention for more than three years. Notably,

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[430] IACtHR, *Miguel Castro Castro Prison v Peru*, 2008: 3, 197, 260.
[431] IACtHR, *Tibi*, 2004: 3, 90.1.
[432] IACtHR, *López Álvarez,* 2006: 54(49), 166-169.
[433] IACtHR, *Pollo Rivera*, 2016: 102, 103, 108, 121.
[434] IACtHR, *Acosta-Calderón v Ecuador*, 2005: 3, 74, 75.

Ecuadorian law prescribes a maximum penalty of two years for the offence he committed[435].

(iv) Death penalty and Body Punishment

Five cases deal with detainees sentenced to the death penalty[436]. The Convention does not prohibit the death penalty but imposes restrictions on its application, norms reiterated by the Court in these cases[437]. Accordingly, the death penalty must be imposed only for the most serious crimes and after a final judgment rendered by an authorised court, in accordance with the law. The Court prohibits the application of capital punishment in cases of political offences or common crimes. In the case *Raxcacó Reyes v Guatemala* the Court condemned, for example, applying the death penalty to the crime of kidnapping. Importantly, the Court applies the principle of non-retroactivity of criminal law, which means that the application of capital punishment cannot be extended to crimes that were not subject to this penalty at the moment of ratification. Likewise, the death penalty cannot be re-established in states that have abolished it. The Court referred to the "death row phenomena" in these cases to highlight the "intrinsic suffering that the alleged victims already endure due to the impending imposition of their death penalty"[438] to order to impose improvements in the conditions of prison centres. Furthermore, the Court reinforced the right ascribed to detainees condemned to death to apply for amnesty, pardon or commutation of sentence by requiring states to reconsider the application of the penalty and abstain from executing the victims.

In *Caesar v Trinidad and Tobago*, the Court condemned the penalty of flogging administered with a whip called the "cat o' nine tails" administered against the victim. Under the current legislation of Trinidad and Tobago (Corporal

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[435] IACtHR, *Suárez Rosero*, 1999: 1, 26, 34, 71-74.
[436] Two cases involving the state of Guatemala, *Fermín-Ramírez v Guatemala* and *Raxcacó-Reyes v Guatemala*, two cases involving the state of Barbados, *Boyce et al v Barbados* and *Dacosta Cadogan v Barbados*, and a collective case involving the state of Trinidad and Tobago, *Hilaire, Constantine and Benjamin et al v Trinidad and Tobago*.
[437] ACHR, Article 4.
[438] IACtHR, *Hilaire, Constantine, Benjamim et al v Trinidad and Tobago*, 2002: 76(b), 77(c), 84; IACtHR, *Raxcacó Reyes*, 2005: 43(19), 43(23); IACtHR, *Fermín Ramírez*, 2005: 54(54)-54(57), 118.

Punishment Act of 1953, last amended in 2005), offenders above sixteen years of age may receive a corporal punishment sentence when convicted of certain crimes. The Court sustains that the mere existence of the norm constitutes a violation to the Convention: "Regarding the law and practice in Trinidad and Tobago of judicial corporal punishment by flogging, the Court considers that the very nature of this punishment reflects an institutionalisation of violence, which, although permitted by the law, ordered by the State's judges and carried out by its prison authorities, is a sanction incompatible with the Convention"[439]. As a consequence, the Court ordered the state to abrogate the Corporal Punishment Act.

(v) Right to Equal Protection

Seven cases deal with vulnerable groups. In two cases, the Court adopted a gender perspective and highlighted the situation of vulnerability among female detainees. According to the Court, state agents treated female detainees with particular cruelty during the massacre described in *Miguel Castro Castro v Peru*. The massacre was intentionally executed during a female visiting day to the prison during the week of Mother's Day, "so the mothers and sisters of the detainees could witness the exemplary punishment"[440]. In *Espínoza González v Peru*, the Court emphasised the "pattern of torture and sexual violence implemented in a discriminatory manner against women in the context of detentions and trials of individuals accused of terrorism and treason in Peru". The case deals with the arbitrary detention of Gladys Carol Espinoza Gonzáles and her conditions of imprisonment during the Peruvian authoritarian regime[441].

In two other cases, the Court reinforced special rights of youngsters in situations of imprisonment. In *Juvenile Reeducation Institute v Paraguay,* the Commission described the Panchito López Center, where adolescents were held, as "the antithesis of every international standard pertaining to the incarceration of juveniles, given the allegedly grossly inadequate conditions under which the

[439] IACtHR, *Caesar*, 2005: *73, 74.*
[440] IACtHR, *Castro Castro*, 2008: 260.
[441] IACtHR, *Espínoza González,* 2014: 67, 78 229, 277.

children were interned"[442]. *Mendoza et al v Argentina* describes patterns of human rights violation against adolescents in detention, including the death of Ricardo David Videla Fernández. The victim repeatedly reported that his physical safety was in danger and that prison staff was persecuting him. Ricardo David Videla Fernández died at the age of 20 and was found hanging from a bar of the window in his cell[443].

The remaining three cases deal with a human rights defender, a Garífuna, and a migrant, respectively. In the case *Lysias Fleury et al v Haiti*, the victim was threatened and intimidated by police officers when identified as a human rights defender[444]. In the case *López Alvarez v Honduras*, a Garífuna leader was impeded from using his native language while imprisoned[445]. In the case *Vélez Loor v Panama*, the victim, an undocumented migrant, was imprisoned together with people arrested for having committed crimes[446].

6.2.2 Essential Elements of the Jurisprudence

The appalling conditions of penal institutions in Latin America have been brought to light by the jurisprudence of the IACtHR detailed in the former section. Over the years, the Court has incorporated and adapted international standards regarding the rights of persons deprived of liberty. Without being exhaustive, this section will illuminate the essential elements advanced by the Court's doctrine on the rights of detainees. These standards are enshrined in the jurisprudence of the Court and in the "Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas", adopted by the Commission. The standards were also subsequently reiterated by the "Revision of the United Nations Standard Minimum Rules for the Treatment of Prisoners" submitted by the Commission in 2013 to the United Nations Office on Drugs and

[442] IACtHR, *Juvenile Reeducation Institute*, 2004: 4, 5, 63, 134.5-134.11.
[443] IACtHR, *Mendoza*, 2013: 103-108, 126.
[444] IACtHR, *Lysias Fleury*, 2011: 31-34, 79.
[445] IACtHR, *López Álvarez,* 2006: 54(49), 166-169. For more details about garífunas, see Chapter 5 on indigenous rights.
[446] *IACtHR, Vélez Loor, 2010: 67, 199-200, 232-245.*

Crime (UNODC)[447]. These documents will serve as auxiliary sources, together with the decisions of the Court, to distil the Inter-American criteria on rights of detainees.

(i) Structural failures

According to the Court, to ensure the rights of detainees it is necessary to address structural failures that affect the prison system as a whole[448]. The perception that "problems emerging in the prison system reveal only the most visible aspect of structural failures that derive from other institutional spaces" [449] is central to the Court's doctrine on rights of detainees [450]. The Court has normally referred to deficiencies at a normative, a judicial, and an administrative level[451].

At the normative level, the Court has condemned the punitive rational adopted by states to combat criminality, commonly manifested in the toughening up of criminal laws. Interestingly, some of the Court's proceedings have also been characterised by a criminal law approach[452]. This is particularly visible in the IACtHR jurisprudence on amnesty laws, especially in the outcomes of the principle of non-obviation of justice and in the strong opposition to impunity.

At the administrative level, the Court has emphasised drawbacks caused by inefficient executive policies, low budgetary allocation, corruption, and bad management of prisons. For instance, public security policies of "zero tolerance" and "war on drugs" to combat criminal organisations and crimes form part of the background of the cases analysed in this chapter and reflect the pervasive effects that inefficient executive policies may have on the protection of rights of

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[447] IACHR, Revision of the United Nations Standard Minimum Rules for the Treatment of Prisoners, 2013. Available at: https://www.unodc.org/documents/justice-and-prison-reform/EGM-Uploads/IEGM_Brazil_Jan_2014/IEGM_Vienna_25-28-March-2014/IACHR-E-VMTG.pdf. Access on: December, 2017.
[448] IACtHR, *Montero Aranguren*, 2006: 60 (7).
[449] IACHR, *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, 2011.
[450] González-Bertomeu, 2016: 81.
[451] IACHR, *Report Guatemala*, 2001: chapter VIII, paragraph 2.
[452] Hennebel, 2011: 65-68 (describing the 'criminalization' of the procedures of human rights protection in the IAHRS); Campos, 2014 (discussing the paradoxes of the IACtHR decisions, including the contrast between the criticism to criminalization and the adoption of a criminalist perspective); Huneeus, 2014.

detainees[453].

At the judicial level, the Court has criticised the excessive use of preventive detentions and custodial sentences as sanctions to any offense. Despite the rise of restorative justice and alternative mechanisms to social rehabilitation, imprisonment is still the main response given by domestic courts to many offenses[454]. In addition, detainees do not have proper judicial supervision of their detentions. Courts frequently fail in providing fast answers, leading to a long wait for judgments. The Court has attempted to address some of these structural failures using comprehensive reparations, especially guarantees of non-repetition and orders of legislative changes.

(ii) The Special Position of Guarantor of States

The concept of "special position of guarantor" was developed by the Court to emphasise states' obligations in relation to individuals in their custody. When a state officer deprives a person of freedom, the state assumes a special position of guarantor, which implies full responsibility to provide prison conditions in conformity with international standards. The state is obliged to ensure that detainees continue to enjoy fundamental rights, especially the right to life and to personal integrity. In this sense, the state must guarantee that "any deprivation of liberty does not exceed the unavoidable level of suffering inherent in detention"[455]. Importantly, the Court has established that responsibility to guarantee detainees' right to humane treatment entails the duty to investigate, prosecute, punish, and redress violations committed against persons in custody of states. This obligation reinforces the Court's opposition to impunity, an omnipresent aspect of its doctrine.

Throughout its jurisprudence, the Court has specified which obligations are ascribed to States under the "special position of guarantor" doctrine. Above all else, the Court has affirmed that states must prevent overcrowding. According to the Court, "overcrowding is, in itself, a violation of personal integrity that hinders

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[453] IACtHR, *Pacheco Teruel,* 2012: 26-28; IACtHR, *Espínoza González,* 2014: 61.
[454] González-Bertomeu, 2016: 81.
[455] IACtHR, *Boyce,* 2007: 88; IACtHR, *Yvon Neptune*, 2008: 83; IACtHR, *Neira Alegría v Peru*, 1996: 70.

the normal execution of essential functions in prisons"[456]. In addition, cells must contain a minimum personal space for each individual according to international standards and have sufficient natural or artificial light, ventilation, and adequate conditions of hygiene[457]. Accordingly, latrines must be hygienic and offer privacy[458].

Furthermore, the Court ruled that those who are being processed must be separated from those who have been convicted and that children must be held separately from adults, so that those deprived of liberty receive treatment appropriate to their situation[459]. The separation implies not only keeping different categories of detainees in different cells, but also locating those cells in different sections of penal centres. In some cases, the Court imposes the obligation to establish a classification system for prisoners in penitentiary centres to assure control of their status.

In terms of basic rights, the Court affirms that all detainees must have access to potable water for basic needs, and that the lack of drinking water constitutes serious negligence by the State[460]. Furthermore, food provided in prisons must be of good quality and sufficient nutritional value[461].

Regarding rights to health and welfare, states must provide regular medical attention to detainees, and a medical officer must examine every detainee as soon as they are admitted in a penal centre[462]. However, the Court does not recognize the right to health as an absolute right. Accordingly, state duty to provide medical assistance to detainees "does not imply the existence of a duty to satisfy all wishes and preferences of a person deprived of liberty regarding medical assistance, but only those real needs consistent with the actual circumstances and condition of the detainee" [463].

Importantly, the Court emphasizes that education, work, and recreation must be recognized as essential functions of prisons. Therefore, activities in these

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[456] IACtHR, *Tibi*, 2004: 150, IACtHR, *Lysias Fleury*, 2011: 85; IACtHR, *Montero Aranguren*, 2006: 20; IACtHR, *Vélez Loor*, 2010: 204.
[457] IACtHR, *Montero Aranguren*, 2006: 146, and Case of the Miguel
[458] IACtHR, *López Álvarez,* 2006; IACtHR, *Castro Castro*, 2008: 319.
[459] IAHRS, *Inter-American Convention on Human Rights*, Article 5(4); IACtHR, *Tibi*, 2004: 263.
[460] IACtHR, *Vélez Loor*, 2010: 216.
[461] IACtHR, *López Álvarez,* 2006: 209.
[462] IACtHR, *Chinchilla,* 2016: 301; IACtHR, *Tibi*, 2004: 156; IACtHR, *Castro Castro*, 2008.
[463] IACtHR, *Montero Aranguren*, 2006: 102.

areas must be provided to all detainees in order to guarantee their rehabilitation and social adjustment[464]. Moreover, conditions of visits must be guaranteed and detention under a restricted visiting regime must consider humane treatment[465]. Finally, the Court declared that excuse of financial difficulty cannot justify detention conditions that do not meet minimum standards, and that fail to respect the inherent dignity of human beings inacceptable[466].

(iii) Life project

In *Cantoral Benavides v Peru*, the Court reasoned that "the facts of this case dramatically altered the course that Luis Alberto Cantoral Benavides' life would otherwise have taken. The pain and suffering that those events inflicted upon him prevented the victim from fulfilling his vocation, aspirations and potential, particularly with regard to his preparation for his chosen career and his work as a professional. All this was highly detrimental to his 'life project'"[467].

The Court used the concept of "life project" for the first time in the case *Loayza Tamayo v Peru*, related to the arbitrary arrest and torture of a university professor. According to a commentator "this is without any doubt one of the most original and innovative elements of the Inter-American Court's case law and is a testimony to its legal creativity"[468]. On that occasion, the Court defined that:

> The concept of a "life plan" is akin to the concept of personal fulfilment, which in turn is based on the options that an individual may have for leading his life and achieving the goal that he sets for himself. Strictly speaking, those options are the manifestation and guarantee of freedom. An individual can hardly be described as truly free if he or she does not have options to pursue in life and to carry that life to its natural conclusion. Those options, in themselves, have an important existential value. Hence,

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[464] IACtHR, *Montero Aranguren*, 2006: 146; IACtHR, *Vélez Loor*, 2010.
[465] *Cf. Case of Loayza Tamayo, pr. 58,* IACtHR, *Castro Castro*, 2008: 315.
[466] IACtHR, *Montero Aranguren*, 2006: 85, IACtHR, *Vélez Loor*, 2010.
[467] IACtHR, *Cantoral Benavides*, 2001: 60. For a more detailed discussion on the concept of "life project" and its application to other cases see: Burgorgue-Larsen, Torres, 2013 [2011]: 229-232.
[468] Burgorgue-Larsen, Torres, 2013 [2011]: 229-232.

> their elimination or curtailment objectively abridges freedom and constitutes the loss of a valuable asset, a loss that this Court cannot disregard[469].

Accordingly, this concept is related to the fulfillment of individual ambitions and potentialities.

Damage to a "life-project" entails the request of comprehensive reparations that go beyond compensation[470]. In the case *Cantoral Benavides v Peru*, the Court ordered the state to provide the victim with a fellowship to pursue university studies and to cover his living expenses for the duration of his studies. The concept of life-project gains salience in the context of wrongful imprisonment and torture, and evinces the victim-centred perspective taken by the Court in its reparatory regime. The order of reparations proportional to the damage caused to the "life project" of individuals attest to the implementation efficacy of the Court and its large impact at the individual level. From the point of view of victims, this measure has effects far more extensive than the ones emanating from orders of compensation. For this reason, even when partially complied with, this measure adds more to the efficacy of the Court than fully complied measures of compensation or satisfaction.

(iv) Jus Cogens

Disciplinary measures that constitute cruel, inhuman or degrading treatment, including corporal punishment, incommunicado detention, prolonged solitary confinement, and any other measure that may compromise the physical or mental health of detainees are strictly prohibited[471]. Other disciplinary measures must be used in a proportional manner, and states must formulate and implement policies to prevent escalation of violence in situations of the

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[469] IACtHR, *Loayza Tamayo* v. *Peru,* 1998: 147.
[470] Pasqualucci, 2015: 245-246; Burgorgue-Larsen, Torres, 2013 [2011]: 229-232 (affirming that "the development of this new legal category has opened up new horizons for reparations"); Shelton, 2015 [2009]: 350 (affirming that "if the life project is cancelled or subject to interference, the loss cannot be ignored by the Court").
[471] IACtHR, *Caesar*, 2005: 70.

occurrence of accidents[472]. Particularly, solitary confinement is considered an exceptional instrument that must be used only in the exceptional conditions established by previous domestic laws.

To prevent the use of inappropriate disciplinary measures, the Court reiterates that the prohibition of physical and mental torture corresponds to a norm of *jus cogens.* The Court stresses that these norms must remain in force even under extreme circumstances such as "war, state of siege or emergency, civil unrest or domestic conflict, suspension of constitutional guarantees, domestic political instability, or other public emergencies or disasters"[473]. The advancement of the principle of *jus cogens* is one of the main contributions of the Court in terms of law-making[474]. By associating concrete facts to *jus cogens* norms the Court clarifies ambiguities and fills legal lacunae about the meaning and application of this controversial concept. In addition, the attribution of status of *jus cogens* to violations frequently taking place in prison centres fosters the strengthening efficacy of the Court over normative structures, because it formalizes such violations making them accountable. As a consequence, domestic courts and disciplinary bodies can legally restrict such acts of violation.

(v) Vulnerable groups

Based on the principle of equality and non-discrimination, the Court has repeatedly reaffirmed that subjects of special constitutional protection or groups particularly vulnerable must receive special attention in situations of deprivation of liberty[475]. For instance, the Court reiterates that, when dealing with children and adolescents deprived of liberty, the State must assume a special position of

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[472] IACtHR, *Juvenile Reeducation Institute*, 2004: 178.
[473] IACtHR, *Lysias Fleury*, 2011: 52.
[474] Neuman, 2008: 117-118 (referring to the expansion of the concept of *jus cogens* as an innovative interpretation of the Court; and highlighting that the Court has been active in identifying *jus cogens* norms in relation to forced disappearances, physical and psychological torture, inhumane treatment, among other aspects).
[475] IACHR, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, 2008, Principle II: "Measures designed exclusively to protect the rights of women, particularly the rights of pregnant women and nursing mothers; of children; of the elderly; of those who are sick or suffering from infections such as HIV-AIDS; of persons with a physical, mental, or sensory disability; as well as of indigenous peoples, afro-descendants, and minorities shall not be considered discriminatory".

guarantor "with the utmost care and responsibility, and must take special measures based on the principle of the best interests of the child"[476].

The Court has also made reference to the particularly vulnerable situation of migrants, emphasizing that "migrants must be held in facilities specifically destined for that purpose, according to their legal situation and not in common prisons"[477].

In one case, the Court has reinforced the right to self-determination and cultural rights of ethnic minorities. In *López Álvarez v Honduras*, the Court condemned the prohibition of detainees communicating in their native language during detention. The Court decided that: "States must take into consideration the elements that differentiate the members of the indigenous populations from that of the population in general, highlighting that language is one of the most important elements of identity of any people, because it guarantees the expression, diffusion, and transmission of their culture"[478].

A gender perspective has become more prominent in decisions of the Court in the last few years. Previously, the Court decided a number of cases involving female detention. However, only in 2014, in the decision *Espínoza González v Peru,* did the Court recognise the existence of gender-stereotyping procedures within organs of the judiciary, and violence based on gender perpetrated by prison staff. In other cases such as *Miguel Castro Castro v Peru* the Court identified practices that incited gender violence, but in a less assertive manner[479]. In *Espínoza González v Peru,* the Court "recognizes and rejects the gender stereotype according to which women suspected of having committed an offense are considered to be intrinsically untrustworthy or manipulative, especially in the context of judicial proceedings", concluding that: "The inadequate response of States and judges to gender-based violence suffered by women when they are in police custody or in prison reflects and perpetuates the perception that this type of violence against women is not a serious crime" [480]. Here, the Court recognised that:

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[476] IACtHR, *Mendoza*, 2013: 191.
[477] IACtHR, *Vélez Loor*, 2010: 98, 208.
[478] IACtHR, *López Álvarez,* 2006: 83, 171, 173.
[479] IACtHR, *Castro Castro*, 2008: 260.
[480] IACtHR, *Espínoza González,* 2014: 211-213, 267, 270, 272, 281, 282.

> Peru rendered invisible the egregious pattern of sexual violence of which women detained due to their presumed participation in crimes of terrorism and treason were victims, which represented an obstacle to the judicialization of these facts, promoting their impunity to date, and constituted gender-based discrimination in access to justice [481].

In response to this decision, the Supreme Court of Justice of Peru recognised that "some sectors of the community assume that this assessment of the evidence of sexual offenses is governed by gender stereotypes among the police, prosecutors and judges" [482] and identified the need "to make an appropriate assessment and selection of the evidence in order to neutralize the possibility of producing any error that injures human dignity and is a sources of impunity"[483].

The contrast between the decision of the Court in *Lori Berenson Mejía v Peru,* in which gender issues were not raised, and *Espínoza González v Peru* is remarkable. Both cases involve female detainees accused of crimes of terrorism and treason during Peruvian authoritarian regime, but only the latter assumes a gender perspective. In the case *Espínoza González v Peru* the Court recognized that there is a pattern of violations perpetrated by prison staff and judges that are motivated by the gender of the victim. Consequently, the Court ordered the State to reform legal and administrative mechanisms to avoid the repetition of violations motivated by gender issues. The doctrine of the Court on "rights of female detainees" is particularly timely given that the total female prison population has increased by 50% since about 2000, while the equivalent figure for the male prison population is 18%[484]. This turn has particular relevance to the enhancement of application efficacy in relation to gender issues that have also been maturing in domestic courts.

(vi) Preventive detentions

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[481] *Ibidem*.
[482] IACtHR, *Espínoza González,* 2014: 278; Supreme Court of Justice of Peru, *Plenary Decision 1-2011/CJ-116*, 2011.
[483] *Idem*.
[484] Walmsley, 2016.

Preventive detention is one of the most severe measures applicable to individuals accused of a crime. As such, the Court establishes that its use must be exceptional and limited by the principles of presumption of innocence, legality, need, and proportionality "between said measure, the evidence to issue it, and the facts under investigation"[485]. The Court has consistently held that preventive detention is a precautionary rather than punitive measure. As a result, it must be founded in adequate evidence and subjected to periodic revision. Furthermore, the Court has prohibited the practices of arrest or imprisonment by methods that, although qualified as legal, may in practice result in unreasonable or proportional practices. By extension, the application of collective, massive and premeditated arrests without substantiated evidence of a crime is also prohibited. In addition, the adoption of precautionary or coercive measures such as detentions must be always authorised by a judge or authorised legal officer who must guarantee the rights of the person detained and their adequate treatment in accordance with the presumption of innocence.

6.3 Efficacy

This is the issue with most serious problems regarding implementation of rulings and the response of states. Realistically, the impact of the Court's jurisprudence has been, with a few exceptions, modest. From the 31 cases pertaining to the group of cases discussed, 6 do not have any order monitoring compliance. *Acosta-Calderón v Ecuador* is the only case to have met with full compliance, and *Lori Berenson-Mejía v Peru* was archived even though some measures of reparation ordered by the Court were not fully complied with[486].

[485] Hennebel; Tigroudja, 2008: 1013; Gil, 2013: 155.

[486] IACtHR, *Lori Berenson Mejía*, (Monitoring Compliance with Judgment). Remarkably, the obligations to "adapt detention conditions in the Yanamayo Prison to international standards" and to "transfer any other prisoners who cannot be confined at the altitude of that prison, owing to their health" were disregarded when the victim received provisional release. In the final order monitoring compliance with this decision, the Court noticed that the victim's representatives were not presenting observations to the information provided by the State and decided to conclude the monitoring of compliance with the case. In this final order, the representatives vaguely stated that they "appreciate the Commission's continued insistence regarding the

The Court applied article 65 of the Convention in relation to four other cases, including them in the list of non-respondent states that is sent in its annual report to the General Assembly: *Yvon Neptune v Haiti*; *Hilaire, Constantine, Benjamin et al v Trinidad and Tobago*; *Caesar v Trinidad and Tobago*; *Montero Aranguren et al (Detention Center of Catia) v Venezuela.* These cases were included in the annual report of the Court to the OAS on account of an extreme degree of state inaction. In the remaining cases, effects in response to Court's decision were normally carried-out at a superficial level. Some cases present chronic non-implementation. In the case *Miguel Castro Castro v Peru*, for instance, after 11 years from the issuance of the decision and the publication of six resolutions monitoring compliance, the state had still not started implementing any of the orders of reparation.

The low degree of implementation of court's decisions and of absorption of its jurisprudence by strategic social actors is similar to the low degree of adequacy efficacy in this area, expressed by high levels of human rights violations in prison centres and declarations of a structural problem involving the regional prison system. The Colombian Court has declared a "state of unconstitutional affairs" regarding its prison system, and some other states have been discussing the application of the concept to declare the failure of their own prison systems as well[487].

Contrastingly, most states in the region adopted constitutions containing norms that converge[488] with an understanding of the social function of

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detention conditions of the Yanamayo prison [and h]opes that the Commission will continue its investigation on the living conditions at the Challapalca prison."

[487] Constitutional Court of Colombia, *T-153/98*, 1998. The Brazilian Supreme Federal Court is analysing the question in an ongoing case: Brazilian Supreme Federal Court, *ADPF 347 MC/DF* (ongoing). See also Sombra, 2015.

[488] Bolivia, Article 118: "The fulfillment of sentences of deprivation of liberty and the security measures imposed are directed toward the education, rehabilitation and reinsertion in society of the condemned persons, with respect for their rights"; Ecuador, Article 201: "The social rehabilitation system shall be ultimately aimed at ensuring the integral rehabilitation of the persons sentenced for crimes, for their reinsertion into society, as well as protecting incarcerated persons and guaranteeing their rights"; Guatemala, Article 19: "The penitentiary system must tend to the social rehabilitation and re-education of the prisoners [reclusos] and to comply[,] in their treatment, with [observance to] the following minimum norms"; Honduras, Article 87: "Prisons are establishments for the security and social defence. They shall be used to bring about the rehabilitation of prisoners, and their training for work"; Mexico, Article 18: "The prison system shall be organized on the basis of respect for human rights, as well as work, training, education, health and sports as a means to achieve inmate's social rehabilitation, pursuing that he/she will not commit a crime again and following the benefits that the law establishes for

deprivation of liberty as enshrined in the Convention, according to which "punishments consisting of deprivation of liberty shall have as an essential aim the reform and social re-adaptation of the prisoners"[489]. In addition, domestic courts have issued decisions in accordance with the jurisprudence of the Court. In 2002, the constitutional court of Peru issued a decision in a corrective *habeas corpus* petition on behalf of 34 inmates to be transferred from a prison to another institution. Accordingly, the Supreme Court of Argentina has affirmed that "getting into prison does not deprive a man from the protection of the law, and, prominently, of the constitution"[490]. Likewise, the Constitutional Court of Colombia has affirmed detainee rights in a series of decisions[491], suggesting that

> "the prison is not a place outside the law. Inmates have not been removed from society. […] In view of his previous antisocial behaviour, the inmate has some of the rights suspended, such as freedom, other rights limited, including the right to communication or intimacy, but enjoys other rights in full, as the right to life, to physical integrity and health"[492].

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him/her. Women and men shall be imprisoned in separate places"; Panama, Article 28: "The penitentiary system is based on principles of security, rehabilitation and social defence. It is unlawful to apply measures which may damage the physical, mental, or moral integrity of incarcerated individuals"; Paraguay, Article 20: "The penalties that are deprivative of liberty will have for their objective the rehabilitation of the sentenced [person] and the protection of the society"; Peru, Article 139: "Principles and rights of the jurisdictional function are the following: […] The principle that the purpose of the criminal justice system is the re-education, rehabilitation, and reintegration of the guilty into society"; Venezuela, Article 46: "Everyone is entitled to respect for his or her physical, mental and moral integrity, therefore: […] No person shall be subjected to penalties, tortures, cruelty, inhuman or degrading treatment. Every victim of torture or cruel, inhumane or degrading treatment effected or tolerated by agents of the State has the right to rehabilitation" and Article 272: "The State guarantees a penitentiary system such as to ensure the rehabilitation of inmates and respect for their human rights. To this end, penitentiary establishments shall have areas for work, study, sports and recreation, shall operate under the direction of professional penologists with academic credentials, and will be ruled by decentralized administration by state or municipal governments; they may be subject to privatization arrangements. In such establishments, an open regimen shall be preferred, as well as the model of custodial agricultural colonies. In all cases punishment formulas without restriction of freedom shall be applied with preference to measures that restrict freedom. The State shall create the essential institutions to provide post- penitentiary assistance for the reinsertion of the inmate into society and shall encourage the creation of an autonomous penitentiary institution with personnel of an exclusively technical nature".

[489] IAHRS, *American Convention on Human Rights*, Article 5, paragraph 6.

[490] Supreme Court of Argentina, *Dessy s/habeas corpus*, October 19, 1995 (D. 346: XXIV).

[491] Constitutional Court of Colombia, *T-596/92*, 1992; Constitutional Court of Colombia, *T-153/98*, 1998; Constitutional Court of Colombia, *T-896/06*, 2006.

[492] González-Bertomeu, 2016: 82.

In conformity with this trend, the Supreme Court of Honduras issued, in 2007, a corrective *habeas corpus* on behalf of seven people housed in one cell of San Pedro Sula prison[493]. In response to the special position of children and young people, Paraguay has introduced a number of legislative, administrative and infrastructural changes with regard to children in conflict with the law in Paraguay. Prominent among these are the establishment of a new Code of Criminal Procedure, Policy Decision No. 214 regulating the functions of the Juvenile Trial and Sentencing Courts; a Child and Adolescent Code; and the creation of alternative centres for children in conflict with the law[494].

This 'contrast' could suggest the existence of a "human rights paradox". However, it is more likely to express varied degrees of efficacy within the efficacy chain. Namely, the strong defence of rights of detainees by normative structures such as constitutions and by courts suggests a higher degree of efficacy in the layers of strengthening and application, respectively. In turn, the reduced rate of implementation of orders of reparation required by the Court and the profusion of human rights violations occurring in prison centres indicate a lower degree of efficacy in the layers of implementation and adequacy. This section is going to explore how the effects instilled by the orders of reparation issued by the Court may interfere in these dynamics and contribute to higher degrees of efficacy along the entire efficacy chain.

6.3.1 Compensation

Measures of compensation were fully complied with in 9 cases[495]. This same form of reparation was considered partially complied with in one case[496] , and non-complied with in the remaining cases. These measures have direct impact on the well-being of victims and next-of-kin, and indicate a degree of

[493] Supreme Court of Honduras, *SJCSJ-RH0159*, 2007.
[494] IACtHR, *Juvenile Reeducation Institute*, 2004: 134.57.
[495] IACtHR, *Durand and Ugarte*, (Monitoring Compliance with Judgment); IACtHR, *Tibi* (Monitoring Compliance with Judgment); IACtHR, *Bayarri* (Monitoring Compliance with Judgment); IACtHR, *Cantoral Benavides* (Monitoring Compliance with Judgment); García-Lucero, 2015; IACtHR, *Vera vera* (Monitoring Compliance with Judgment); IACtHR, *Cabrera García*, (Monitoring Compliance with Judgment); IACtHR, *López Álvarez* (Monitoring Compliance with Judgment); IACtHR, Suárez Rosero (Monitoring Compliance with Judgment).
[496] Caballero Delgado, 2003.

implementation efficacy.

6.3.2 Satisfaction

Measures of satisfaction ordering the publication of pertinent parts of the judgment—generally proven facts and operative paragraphs—were fully complied with in 12 cases[497]. The same obligation was considered partially complied with in one case[498]. Furthermore, in two opportunities the state of Peru gave public apologies and acknowledged its responsibility for its violations of human rights[499]. Such forms of reparation promote human rights awareness, the right to truth, and honour the memory of victims. As a result, they increase the strengthening efficacy of the Court.

6.3.3 Restitution

After measures of compensation and satisfaction, orders of restitution were those with the highest level of full compliance.

The states of Guatemala and Peru fully complied with orders of restitution of justice to the victims of 5 cases. In the cases of *Fermín Ramírez v Guatemala* and *Raxcacó Reyes v Guatemala*, the state did not execute victims condemned to the death penalty, following the order of the Court. Particularly, in the case of *Fermín Ramírez v Guatemala*, the state conducted a new trial satisfying the demands of due process of law in accordance with Convention norms[500]. The principle of *res iudicata* was particularly softened in the case *Cantoral Benavides v Peru*. Due to

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[497] IACtHR, *Cantoral Benavides* (Monitoring Compliance with Judgment); Juvenile Institute(Monitoring Compliance with Judgment); IACtHR, *Lori Berenson Mejía* (Monitoring Compliance with Judgment).; IACtHR, *Bayarri* (Monitoring Compliance with Judgment); García-Lucero(Monitoring Compliance with Judgment); IACtHR, *Vera Vera* (Monitoring Compliance with Judgment); IACtHR, *Vélez Loor* (Monitoring Compliance with Judgment); Montiel Flores(Monitoring Compliance with Judgment); IACtHR, *López Álvarez* (Monitoring Compliance with Judgment); IACtHR, *Raxcacó Reyes* (Monitoring Compliance with Judgment) IACtHR, *Acosta-Calderón*(Monitoring Compliance with Judgment); IACtHR, *Tibi* (Monitoring Compliance with Judgment).

[498] IACtHR, *Durante and Ugarte* (Monitoring Compliance with Judgment).

[499] IACtHR, *Durante and Ugarte* (Monitoring Compliance with Judgment); IACtHR, *Cantoral Benavides* (Monitoring Compliance with Judgment).

[500] IACtHR, *Fermín Ramírez*, (Monitoring Compliance with Judgment); IACtHR, Raxcacó Reyes, (Monitoring Compliance with Judgment)

the Court decision, the state nullified procedures against the victim on the part of courts, executive organs, and police staff. Furthermore, the state reversed the verdict of conviction upon the enactment of Legislative Decree 926, a conviction formerly delivered by domestic courts. The act discharged the victim from the criminal responsibility that was formerly attributed to him[501]. Likewise, in the cases *Acosta-Calderón* and *Suárez Rosero*, both against Peru, the state erased the criminal records of the victims from the public registry. *Suárez Rosero* was also exempted from a fine unlawfully imposed upon him previously[502]. The similar obligation to remove the name of a victim from all public records in which appeared a criminal history was partially complied with by the state of Argentina in the case *Bayarri v Argentina*. To fully comply with the obligation, the state had to extend the action to the records of other institutions, such as the National Naval Prefecture and the Argentine Federal Police[503].

These cases demonstrate high implementation and application efficacies. In order to rectify dissatisfactory rulings which breach Convention norms and to include a human rights perspective in the process of law application by domestic legal organs, the Court challenges one of the most protected legal principles, the principle of *res judicata*. In doing so, the Court implies that the validity of domestic court rulings directly depends upon their correct application of Convention norms and respect for human rights norms. Remarkably, states complied with this obligation in all the aforementioned cases.

6.3.4 Rehabilitation

Both the states of Mexico and Panama fully complied with the obligation to cover the expenses of health services used by victims [504]. The same obligation to provide adequate medical and psychological treatment was considered partially

[501] IACtHR, *Cantoral Benavides* (Monitoring Compliance with Judgment)
[502] IACtHR, *Suárez Rosero* (Monitoring Compliance with Judgment).
[503] IACtHR, *Bayarri* (Monitoring Compliance with Judgment).
[504] IACtHR, *Vélez Loor* (Monitoring Compliance with Judgment); IACtHR, *Montiel Flores*, (Monitoring Compliance with Judgment).

complied with in three other cases[505]. These actions demonstrate efficacy of the Court in providing redress at the individual level.

In the case *Cantoral Benavides v Peru*, the state funded the victim's studies in Law at a Brazilian university from 2004 until 2008, granting an academic scholarship and covering the other costs and living expenses generated during his studies. The obligation was considered partially complied with, because a part of the payments was not completely refunded to the victim[506]. Similarly, in the case *Mendoza v Argentina,* still without an order monitoring compliance, the Court introduced again the concept of "life project", this time in relation to the self-realization of 21 youngsters who were serving their sentences in the custody of the state. The Court ordered the state to "ensure that victims receive the formal educational or training opportunities that they want, including university studies, through the prison system or, if they have been released, through its public institutions"[507]. This case does not have orders monitoring compliance yet.

6.3.5 Guarantees of non-repetition

The most significant guarantee of non-repetition required by the Court was orders to adopt within a reasonable time the necessary measures to substantially improve detention conditions, conforming them to relevant international standards[508]. More specifically, some orders required states to perform legislative changes aimed at providing prisons with adequate infrastructure and trained staff[509]. One decision ordered the state to establish a system to allow detainees to file complaints of human rights violations with legal authorities[510].

Three guarantees of non-repetition were designated to children and adolescents. In the case *Mendoza v Argentina*, the Court ordered the state to

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[505] IACtHR, *Cantoral Benavides* (Monitoring Compliance with Judgment); IACtHR, *Raxcacó Reyes*, (Monitoring Compliance with Judgment); IACtHR, Bayarri (Monitoring Compliance with Judgment).
[506] IACtHR, *Cantoral Benavides* (Monitoring Compliance with Judgment).
[507] IACtHR, *Mendoza*, 2013: 18; 313-314.
[508] IACtHR, *Díaz Peña*, 2012: 154, operative paragraph 6; IACtHR, *Montero Aranguren*, 2006: operative paragraph 10.
[509] IACtHR, *Pacheco Teruel,* 2012; IACtHR, *Yvon Neptune*, 2008.
IACtHR, *Fermín Ramírez,* 2005; IACtHR, *Lori Berenson Mejía*, 2004.
[510] IACtHR, *Montero Aranguren*, 2006.

ensure that sentences of life imprisonment and reclusion for life are not imposed on any person for crimes committed while a minor. The obligation was not complied with, but theoretically it directly affects the application of norms by domestic courts. The order to adapt the legal framework according to international standards "and implement public policies with clear goals and timetables, as well as with the allocation of adequate budgetary resources, for the prevention of juvenile delinquency through effective programs and services that encourage the integral development of children and adolescents" [511] was issued in the same case. In *Juvenile Reeducation Institute v Paraguay*, the Court indicated that the state should take appropriate measures so that children deprived of their liberty are separated from adults while in detention.

In the case of *Espínoza González v Peru*, the Court ordered the state to "implement protocols to ensure that cases of torture, rape and other forms of sexual violence are investigated and prosecuted appropriately, pursuant to the international standards" and to "implement, within a reasonable time, a mechanism that allows all women victims of the generalized practice of rape and other forms of sexual violence to have free access to specialized medical, psychological and/or psychiatric rehabilitation to remedy this type of violation"[512].

Although these measures were not fully complied with, they reflect the institutional strengthening intended by the Court with its reparations and create an important precedent to be used by domestic legal courts.

Among guarantees of non-repetition, there has been a great focus on education and training of state agents[513]. Training programs were intended to train agents of the state that handle issues related to migrant persons; members of the organs of investigation and administration of justice, including judges and personnel of the public prosecutor's office; members of the security forces; and police and penitentiary staff, including medical, psychiatric and psychological staff. Educational measures were partially complied with in one case and fully

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[511] IACtHR, *Mendoza*, 2013.
[512] IACtHR, *Espínoza González v Peru,* 2014.
[513] IACtHR, *Mendoza*, 2013: 23; IACtHR, *López Álvarez,* 2006: operative paragraph 9; IACtHR, *Castro Castro*, 2008: 15; IACtHR, *Cabrera García*, 2010: operative paragraph 17; IACtHR, *Vélez Loor*, 2010: operative paragraph 16; IACtHR, *Bayarri*, 2008: 13; IACtHR, *Lysias Fleury*, 2011: 3; IACtHR, *Tibi*, 2004: 13; IACtHR, *Chinchilla,* 2016: 6.

complied with in another as described bellow.

In response to this obligation, the state of Ecuador created an inter-institutional committee to promote capacitation on human rights and rights of detainees to judicial, administrative and medical staff. The state also implemented an agreement between the Ministry of Justice and the International Committee of the Red Cross in 2014. In addition, it trained more than 700 prison agents, following the instructions of the Court. The Court considered that these actions partially complied with the obligation to promote education and training of state agents required in the case *Tibi v Ecuador*[514].

In relation to the case *Montiel Flores v Mexico*, Mexico complied with the obligation to implement educational programs on human rights and diligent investigation in cases of cruel, inhumane, or degrading treatment and torture. These training programs were delivered at the Public Prosecutor's Office and to penitentiary personnel, and contributed to enhancing both application efficacy (because it created an incentive for correct application of Convention norms by prosecutors) and strengthening efficacy (because it created a greater awareness of human rights, especially among those who were formally their violators)[515].

None of the cases involving the death penalty and cruel, inhuman and degrading treatment were fully complied with. However, it is worth noting that, since 1999 and 2000, the states of Trinidad and Tobago and Guatemala, respectively, have not executed inmates already condemned to death. On the one hand, this change in attitude cannot be completely attributed to the decisions of the IACtHR on this subject, which were only released in 2002 and 2005, respectively. As mentioned in other parts of this study, there are often competing causes to explain changes on social structures. Both the actions of the Privy Council (and later of the Caribbean Court of Justice) have contributed to a shift in the domestic regime of death penalty. application On the other hand, there is a high chance that the regional regime set out by this Court which governs the death penalty, explained in Sub-section 6.2.1, iv have also influenced and strengthened internal changes on social and normative structure.

[514] IACtHR, *Tibi* (Monitoring Compliance with Judgment).
[515] IACtHR, *Cabrera García*, (Monitoring Compliance with Judgment).

TABLE 6

Selected Jurisprudence

Rights of Detainees

STATE	CASE	YEAR
PERU	NEIRA-ALEGRÍA	1996
ECUADOR	SUÁREZ-ROSERO	1999
PERU	CANTORAL-BENAVIDES	2001
PERU	DURAND AND UGARTE	2001
TRINIDAD AND TOBAGO	HILAIRE, CONSTANTINE AND BENJAMIN ET AL	2002
ECUADOR	TIBI	2004
PARAGUAY	JUVENILE REEDUCATION INSTITUTE	2004
PERU	LORI BERENSON-MEJÍA	2004
GUATEMALA	FERMÍIN RAMÍREZ	2005
ECUADOR	ACOSTA-CALDERÓN	2005
GUATEMALA	RAXCACÓ-REYES	2005
TRINIDAD AND TOBAGO	CAESAR	2005
HONDURAS	LÓPEZ-ALVAREZ	2006
PERU	MIGUEL CASTRO CASTRO	2006
VENEZUELA	MONTERO-ARANGUREN ET AL (DETENTION CENTER OF CATIA)	2006
BARBADOS	BOYCE ET AL	2007
HAITI	YVON NEPTUNE	2008
ARGENTINA	BAYARRI	2008
BARBADOS	DACOSTA CADOGAN	2009
MEXICO	CABRERA GARCIA AND MONTIEL FLORES	2010
PANAMA	VÉLEZ LOOR	2010
ECUADOR	VERA VERA	2011
HAITI	LYSIAS FLEURY ET AL	2011
HONDURAS	PACHECO TERUEL ET AL	2012
VENEZUELA	DÍAZ PEÑA	2012
ARGENTINA	MENDOZA *ET AL*	2013
CHILE	GARCÍA LUCERO	2013
PERU	ESPÍNOZA GONZÁLEZ	2014
ECUADOR	HERRERA ESPINOZA	2016
GUATEMALA	CHINCHILLA SANDOVAL ET AL	2016
PERU	POLLO RIVERA	2016

SECTION 3

THE EFFICACY OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS: A REAPPRAISAL

Chapter 7

Inter-American Court of Human Rights' efficacy: a Reappraisal

7.1 Introduction

Two events were decisive for the expansion of a language of rights in the mid 20th century: the constitutional revolutions of the eighteenth century that occurred in England, the United States, and France; and the transformation of the role of international law amid the large-scale conflicts of the 19th century, which after 1945 gained traction in the field of human rights and started to mutate into forms of transnational law[516]. International courts played a decisive role in this second moment.

In Latin America, the expansion of rights language tracked the transition from authoritarian regimes and widespread civil war to constitutional states. As a result of these events, law's ongoing expansion has become more pronounced in fields such as human rights—a development that keeps pace with the development of modern states. The Inter-American Court of Human Rights has played a central role in assisting the transition and reinforcement of state structures in the region by promoting the expansion of human rights language, supporting the development of transnational law in tandem with domestic forward-looking courts, and providing a legal basis for the concretization of human rights. The influence of the Inter-American Court of Human Rights in the region varies according to the legal issue advanced by the cases and to the existence of social structures in domestic legal orders that may contribute to the repulsion or accommodation of human rights. As a consequence, the influence of the Court is curtailed or expanded due to the pattern of interaction of decisions with other competing causes of normative concretization.

[516] Thornhill, 2016.

Previous chapters reviewed the main effects generated by orders of reparations, and more specifically by the Court's jurisprudence regarding amnesty laws, indigenous rights and rights of detainees in interaction with existing competing causes. Using the efficacy chain, this chapter will systematise and analyse the data and preliminary discussions presented in the last 3 chapters adopting a more sociological perspective. Section 1 will discuss the Court's efficacy in relation to each layer of the "efficacy chain", based on its ability to contribute to a concretization of human rights norms. Section 2 will ascertain to what extent the Court's decisions have contributed to redressing victims of human rights violations and fostering legal accountability.

7.2 The Inter-American Court of Human Rights and the concretization of Human Rights Norms

This section intends to evaluate the effects emerging from the interaction between the IACtHR's decisions and societal structures in the fields of amnesty laws, indigenous rights and rights of detainees. Importantly, the following layers of efficacy analysis will demonstrate how norms have become concretized in various forms, from monuments in memory of victims of massacres to rulings abrogating amnesty laws, and from restitution of traditional lands to resistance against the application of corporeal punishment. These different forms of norm materialization reveal that a court's efficacy rests on multiple pillars. Each layer will display distinct aspects of the process of norm concretization, bringing to surface social processes that were affected or spurred by the Court's decisions and which normally remain overlooked.

7.2.1 Observance: systemic concretization of human rights

As defined earlier in Chapter 2, observance corresponds to any action carried out by official state agents in conformity with the Court's jurisprudence that was executed *without* being bound by a previous ruling. Although not always consistently, Court's doctrine regarding amnesty laws, indigenous rights and rights of detainees has been largely observed by domestic and international

organs. The following examples will demonstrate that decisions sometimes ignored by defendant states can trigger more visible and lasting effects in third-party states or organizations[517].

For example, the ECtHR has cited IACtHR jurisprudence to reinforce its decisions on a variety of subjects, rights of detainees and amnesty including. In past cases, the ECtHR has referred to IACtHR's precedents to establish norms of inspection of female visitors in prisons[518], limits to the use of solitary confinement cells[519], the non-applicability of statute of limitations to crimes of torture[520], the obligation to socialize detainees[521], and standards of family visiting rights for detainees[522].

Regarding amnesty, the most prominent example of observance by the ECtHR is the decision in the case *Marguš v. Croatia*. In this ruling, the ECtHR largely relied upon the IACtHR's amnesty doctrine, making reference to all six decisions that compose the core of this jurisprudential line, to declare the incompatibility of amnesties to serious breaches of human rights. In this case, the ECtHR declared that no international treaty prohibits the use of amnesties in relation to grave breaches of fundamental human rights. Particularly, article 6 of the Additional Protocol to the Geneva Conventions foresees the possibility of grand amnesties to persons that participated in armed conflicts. However, "the interpretation of the Inter-American Court of Human Rights of that provision excludes its application in respect of the perpetrators of war crimes and crimes against humanity. The basis for such a conclusion, according to the Inter-American Court of Human Rights, is found in the obligations of the States under international law to investigate and prosecute war crimes"[523]. The ECtHR has a generally more flexible stand on jurisprudence than the IACtHR, as mentioned in Chapter 4. However, to fill-in gaps in treaty law and custom, in *Marguš v. Croatia* the ECtHR observed to the letter the IACtHR doctrine on amnesty. The use of the

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[517] Helfer, 2014:480.
[518] ECtHR, *Zontul v. Greece*, 2012 using IACtHR, *Castro Castro*, 2006.
[519] ECtHR, *Babar Ahmad and Others v. United Kingdom*, 2012 in relation to IACtHR, *Montero Aranguren*, 2006.
[520] ECtHR, *Mocanu and Others v. Romania*, 2014 (concurring opinion Judge Pinto de Albuquerque, joined by Judge Vučinić).
[521] *Idem*.
[522] ECtHR, *Khoroshenko v. Russia*, 2015.
[523] ECtHR, *Marguš v. Croatia,* 2014: 131.

IACtHR jurisprudence on amnesty by the ECtHR evinces some degree of observance efficacy and at the same time the limits of the influence of the Court over the legal status of amnesties worldwide.

Another excellent example illustrating third-party state effects is Colombia. The Court has never issued any decision concerning amnesty in reference to Colombia; and yet, the peace process unfolding in this state poses the ultimate test to the Court's jurisprudence on amnesty. The Colombian model of negotiated transition, which balances expectations of peace with guarantees of victims' rights to truth and reparation, puts forward an amnesty in conformity with international law[524]. The final peace agreement that ended the historic conflict with the FARCs (Fuerzas Armadas Revolucionarias de Colombia/Ejército del Pueblo, "Revolutionary Armed Forces of Colombia") in December, 2016, established provisions for the creation of a Truth Commission, a Special Unit to investigate cases of forced disappearances during the armed conflict, and importantly, a Special Jurisdiction for Peace (SJP) for dealing with crimes committed during the armed conflict. The SJP constitutes a legal organ independent from the regular judicial system. Its creation was spearheaded in coordination with the IACHR, the IACtHR, and the ICC, and its collective role was to ensure that its operations do not violate the mandate of any of these international courts. Notably, it is the first time that a hybrid domestic jurisdiction situated on the limits of domestic and international law—and therefore transnational law—is situated to promote transition and accountability under the tenets of justice, truth and reparation.

Focused on the social rehabilitation of the perpetrators of human rights violations during the armed conflict, the SJP reconciles two lines of jurisprudence of the IACtHR. It merges accountability for victims with a new mindset on criminal justice. Alternative penalties for those convicted of crimes who confess their deeds and agree to repair victims include:

> five to eight years in conditions of effective restriction of liberty, a term that according to the agreement will not be understood as jail or prison. For this, there are previsions of creation of special zones of restriction of

[524] Yepes, Duque, Léon, 2014: 24.

liberty and alternative conditions of reclusion, like agricultural colonies. In the Marco para Paz, the use of criteria of selection and application of alternative mechanisms is in conformity with international standards[525].

After the landmark decision in the *Barrios Altos* case, in which the IACtHR declared amnesty laws voided for the first time, the Colombian Peace Process may represent the first successful amnesty in the region to observe all elements prescribed by the IACtHR. As such, its model of judicial amnesty may serve as a model to other regions in transition.

Importantly, Colombia's absorption of principles of restorative justice draws attention to the observance of the Court's doctrine on rights of detainees by Colombian Courts. Back in 1998, The Colombian Constitutional Court declared a "state of unconstitutional affairs" of its prison system in the decision T-153/1998. The term indicates a systemic failure in protecting specific constitutional norms, and has been employed in relation to the right to health, the right to pension, and forced displacement[526]. As a result, the Constitutional Court urged a series of reforms which would later be reinforced by subsequent decisions[527]. In response to these rulings, the state carried out a series of reforms including the expansion of the number of penal institutions and the improvement of their infrastructure. In the decision T-388/2013 the Constitutional Court commended the efforts of the public administration in creating a broader penitentiary infrastructure. However, despite these efforts and the assertive state response in the initial years, the Court asserted that the crisis continues. Almost two decades after the issuance of T-153/98, the appalling conditions that led the Court to declare a "state of unconstitutional affairs" remain.

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[525] Yepes, Duque, Léon, 2014: 30

[526] Garavito defines the "state of unconstitutional affairs" as judicial Proceedings that "(1) affect a massive human rights violation associated with systemic failures in state action, which affect a large number of people who allege a violation of their rights, (2) implicate multiple government agencies found to be responsible for pervasive public failures that contribute to such rights violations and (3) involve structural injunctive remedies, i.e. enforcement orders whereby court instruct various government agencies to take coordinated actions to protect the entire affected population and not just the specific complainants of the case". Garavito, 2011.

[527] Constitutional Court of Colombia, *T-256/20*, 2000, Constitutional Court of Colombia, *T-1030/03*, 2003; Constitutional Court of Colombia *T-388/13*, 2013; Constitutional Court of Colombia, *T-861/13*, 2013; Constitutional Court of Colombia *T-815/13*, 2013.

In 2015, with the decision T-762/15, the Colombian Constitutional Court promoted a shift in its evaluation of the causes of the prison system crisis in Colombia. In implied observance of the IACtHR doctrine, the Colombia Constitutional Court gave emphasis to the 'structural failures' that affect penal institutions, and required a comprehensive adaptation of domestic criminal structures to international standards centred on the protection of detainee's rights.

Observance of the Court's doctrine regarding indigenous rights is concededly widespread, especially concerning the IACtHR's constructions of "indigenous subjectivity", "right to property", and "right to vida digna".

The expansive approach to indigenous subjectivity adopted by the Court has been used to adapt state bureaucracies and deal with the rights of indigenous peoples, but also of other national minorities such as Roma people, women, communities of African descent, and peasants. In Colombia, a special agency located in the Ministry of the Interior, the *Dirección de Asuntos Indígenas, ROM y Minorias* (Office for Indigenous, Roma and Minorities Issues), is responsible for dealing with issues concerning indigenous peoples, Roma people and other minorities. In Bolivia, the normative effects of the Court's broad approach can be seen in article 32 of the Constitution, which states that African-Bolivian people enjoy all the economic, social, political and cultural rights that are recognized in the Constitution as accruing to rural native indigenous peoples. In the same line, article 25 of the Brazilian Constitution states that "The National Government shall protect expressions of popular, indigenous and Afro-Brazilian cultures and those of other participant groups in the process of national civilization". Similarly, decisions of the UN Human Rights Committee (UNHRC) related to non-discriminatory issues[528] and political participation[529] do not differentiate strictly between indigenous peoples, people of African descent, women, migrants, persons with disabilities, those from rural areas, and other minorities.

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[528] See Human Rights Committee, Concluding Observations on Peru, CCPR/C/PER/CO/5, 29 April 2013: 7; Human Rights Committee, Concluding Observations on Costa Rica, CCPR/C/CRI/CO/6, 22 April 2016: 9, Human Rights Committee, Concluding Observations on Ecuador, CCPR/C/ECU/CO/5, 24 November 2009: 19.

[529] See Human Rights Committee, Concluding Observations on Suriname, CCPR/C/SUR/CO/3, 3 December 2015: 47; Human Rights Committee, Concluding Observations on Brazil, CCPR/C/BRA/CO/2, 1 December 2005: 10.

The doctrine of right to property and "vida digna" developed by the Court is perhaps the element of its jurisprudence most replicated by courts and state organs and, therefore, entails the highest efficacy in terms of observance. For example, the first and only instance in which the African Court on Human and Peoples' Rights (ACtHR)—in operation since 2006—has ruled on indigenous rights was in the case *African Commission on Human and Peoples' Rights v. Republic of Kenya*[530], in which the Court recognised

> the indigeneity of the group based on their strong attachment to their traditional land, and on their cultural distinctiveness, following the jurisprudence of the IACtHR (par. 109-112) [...] Moreover, it established a distinction between the right to life and the 'right to decent existence of a group', referring again to the jurisprudence of the IACtHR (par. 147, 153; footnotes 38, 39) and indirectly to the notion of 'vida digna'[531].

Kenyan courts have also used similar criteria in domestic cases[532]. On a rare occasion, a case was transferred to the ACtHR by the African Commission in 2012 on the basis of occurrence of serious and massive human rights violations. The case involves the rights of more than 35,000 victims, and deals with the forced eviction of the Ogiek people, a Kenyan hunter-gatherer community, from their traditional lands in the Mau forest. The Court emphasized the distinct relationship of the Ogiek People to the forest and how the evictions interfered with their traditional life style, particularly with the right to practice their religion. Specifically based on the IACtHR approach to indigenous rights, the ACtHR established for the Ogiek a right to their ancestral lands. At the occasion, The African Court declared that it would issue its decision on reparations separately. Notably, this decision of the ACtHR reinforces the interpretative criteria of the jurisprudence of the IACtHR and attests to its observance efficacy.

In addition, *UN Special Rapporteurs on the rights of indigenous peoples* have also referred to the IACtHR jurisprudence to clarify certain points related to its

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[530] AFCtHR, *African Commission on Human and Peoples' Rights v. Republic of Kenya*, 2017.
[531] Thornhill, Calabria, et al (forthcoming).
[532] eKLR, *Joseph Letuya and 21 Others v Attorney General and 5 Others*, 2014.

own operations. In the annual report of 2016, the *Saramaka* case was used to elucidate restrictions on indigenous peoples' property rights[533]. In the Permanent Court of Arbitration case *South American Silver Mining v. the Plurinational State of Bolivia*, the Plurinational State of Bolivia cited the ruling of the Inter-American Court of Human Rights in *Sawhoyamaxa v. Paraguay* to defend the primacy of human rights over investor protections in a case involving the expropriation of 10 mining concessions. In defence, however, the United Kingdom claimed that the IACtHR jurisprudence is not binding on States that are not part of the Convention. The position of the United Kingdom sets clear limits to the observance efficacy of the Court jurisprudence. Nonetheless, at the domestic level, indigenous land rights have been recognised by constitutional courts of several other states, including Peru[534] and Colombia[535].

The right of indigenous communities to be consulted in matters relating to their territories and their right to enjoyment of the natural resources on communal territories, repeatedly reaffirmed by the IACtHR jurisprudence, is echoed in several domestic decisions on the continent[536]. The Brazilian Public Prosecutor's Office has defended the existence of a duty of consultation with indigenous communities in cases involving major infrastructural projects[537]. With some variations, courts in Colombia and Peru have declared that mining and/or extractive companies are obliged to consult with indigenous groups, especially when exploiting resources may affect the interests of indigenous

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[533] IACtHR, *Annual report 2016*, 2017. International human rights law recognizes that in certain contexts restrictions can be placed on indigenous peoples' property rights. However, to be legitimate, such restrictions must be: (a) established by law; (b) necessary; (c) proportional to their purpose; and (d) non-restrictive to the peoples' survival. See IACtHR, *Saramaka*, 2007.
[534] Constitutional Court of Peru, *Comunidad Nativa Tres Islas Y Otros*, 2011.
[535] Constitutional Court of Colombia, Sentencia T-257/93, 1993.
[536] These rights are set out in IACtHR, *Saramaka*, 2007.
[537] See for example TRF-1 Brazil, *Ação Civil Pública No. 3883-98.2012.4.01.3902, UHE São Luiz do Tapajós*, 2015. The Brazilian Public Prosecutor Office has a constitutional mandate to represent indigenous peoples, and it acts as a central organ to protect indigenous rights in Brazil. The Brazilian Supreme Court did not deny the existence of an indigenous right to previous consultation but it has been less emphatic on affirming and protecting it. In some occasions, the Supreme Court has reversed decisions of regional federal courts which suspended the construction of dams that did not comply with this right, evincing an ambiguous position of the Supreme Court. See *Supreme Tribunal Federal of Brazil*, SL 722 DF, 2013. There are currently three ongoing judicial processes questioning the right to consultation in reference to the construction of das on the Teles Pire, São Luis do Tapajós and Belo Monte dams without a final judicial response that may clarify the practical status of this right within the Brazilian legal order (Processes 0018341-89.2012.4.01.0000, 0003883-98.2012.4.01.3902, and200639030007118 being discussed at TRF-1).

communities[538]. Furthermore, Mexican courts have established a so-called "thesis of jurisprudence" to define standards for the realisation of consultation procedures with indigenous people in conformity with "International standards in matters of protection of indigenous communities," without being required to address this question directly in its two decisions involving indigenous rights[539]. Although formally recognized, some of these rights have not always been converted into practice. The right to be consulted has often not impeded the advance of "developmentalist" projects in states of the region, tracing a clear restriction on the influence of the Court.

This layer has briefly explored how the IACtHR jurisprudence has affected the standards used to settle processes of transition; the manner that state bureaucracy is organized; the way in which judges and prosecutors approach legal questions; the arguments used by states to defend their interests in international litigation proceedings; and the legal reasoning of international courts and organizations. The observance of the IACtHR doctrine in all these situations attests to how the IACtHR has been *systemically* enhancing the process of human rights concretization both directly through its rulings and recommendations, but also indirectly through its impact on institutions, legal claims, and peace processes.

7.2.2 Application: extending the reach of Conventionality Control

As defined earlier in Chapter 2, this layer refers to the application of norms in conformity with the jurisprudence developed by the Court by public authorities who have the capacity to take decisions or enact official acts that are capable of formally affecting the status of ACHR norms in the domestic legal system. High level application efficacy manifests in two forms: degree of adherence of courts,

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[538] Constitutional Court of Chile, *Comunidad Indígena Colla de Río Jorquera*, Rol de la causa: 3676-2013, 2013; Constitutional Court of Guatemala, *Sentencia Expedientes 1643-2005 and 1654-2005*, 2008; Constitutional Court of Peru, *Asociación Interétnica de Desarrollo de la Selva Peruana (AIDESEP) con Ministerio de Energía y Minas, Perupetro S.A., Barrett Resource Perú Corporation y Repsol YPF*, 2007; Constitutional Court of Colombia, *C-208/07*, 2007.

[539] Supreme Court of Justice of Mexico, Pueblos y Comunidades Indígenas. Derecho a ser consultados. Requisitos essenciales para su cumplimiento, 2015 (Amparo en revisión 499/2015, Tesis Jurisprudenciales); Supreme Court of Justice of Mexico, Pueblos y Comunidades Indígenas. En su Derecho a ser consultados, el estándar de impacto significativo constituye element essencial para que proceda, 2015 (Amparo en revisión 500/2015, Tesis Jurisprudenciales).

governmental agencies and other domestic and international organisations to the precedents set out by the Court; and breadth of law-making undertaken by the Court. This section will analyse the effects of the Court's jurisprudence using these two forms of manifestation to assess application efficacy.

(i) Degree of adherence of state organs

Judge Ferrer MacGregor, currently vice-president of the IACtHR, has recently affirmed that "judicial dialogue between the Inter-American Court of Human Rights and Supreme Courts in Latin American has different intensities"[540]. This statement extends to other organs as well. The intensity of adherence to the IACtHR's jurisprudence has varied according to the issue and state organ examined, as the following analysis will demonstrate. In general, as affirmed by Huneeus, "The Court has been successful at creating a coherent, oft-cited body of jurisprudence through its roughly one hundred contentious cases"[541].

The reception of amnesty laws by state organs provides a great example of widespread effects caused by IACtHR decisions in the domestic application of law. High courts have been active in circumventing amnesty laws in all states that received a ruling of the Court regarding this subject, with Brazil and Uruguay being the main exceptions. Peruvian courts offer the most prominent example of application-efficacy. Peru is the only state to have fully complied with the legislative changes ordered by the Court in amnesty cases, which it accomplished through a series of court decisions, including the Constitutional Court, which declared the inadmissibility of any legal instrument with the purpose of obstructing the investigation, prosecution or punishment of gross human rights violations. In addition, the Peruvian President of the Supreme Court and the Peruvian Attorney General's Office made a request to domestic courts no longer apply amnesty laws. Recently, the Constitutional Court of El Salvador repealed its own amnesty law, thereby impeding any administrative authority from using it. In consequence, it established a compulsory application of the IACtHR ruling in the *El Mozote* case to all levels of administration.

[540] MacGregor, 2017, p. 109.
[541] Hunneus, 2010, p. 118.

Application of the IACtHR amnesty doctrine has also taken other forms outside the courtroom. In Chile, application in conformity with the decision in *Almonacid Arellano* started directly in the legislature and the executive. Official declarations and interpretative legislation have little by little compelled domestic courts to interpret amnesty laws according to the Court's determination. Similarly, in Argentina and Uruguay, amnesty laws were repealed by the combined action of courts and legislature.

Regarding indigenous rights, a commentator suggests that adherence of state organs to IACtHR indigenous rights doctrine has facilitated the application of ILO 169 in the region:

> [C]ountries participating in the regional human rights system have learned to take into account internally the decisions and interpretative criteria applied by the court and the commission. This process is slow and complex, and far from complete. However, it has led to increased openness of many domestic courts to consider the inter-American jurisprudence— especially the jurisprudence of the Inter-American Court of Human rights. This may explain the gradual move towards invoking international human rights standards by domestic courts[542].

In some cases, application efficacy resulted in the coordinated effort of various state organs to annul acts of application in discordance with a ruling of the IACtHR. In the cases *Cantoral Benavides, Acosta-Calderón* and *Suárez Rosero*, both against Peru, and *Bayarri v Argentina*, state organs removed criminal registers with the names of victims from public records. Notably, in *Cantoral Benavides v Peru*, a legislative decree challenged the principle of *res judicata* and reversed a conviction verdict delivered by a domestic court. These examples demonstrate the concretization of the right to justice through the use of measures related to the restitution of justice.

The application of the Court's jurisprudence by state organs reveals "transnational streams of rights" emerging from different levels of application.

[542] Courtis, 2009.

These streams are a signal of systemic maturation and evince the emergence of multileveled regimes of rights protection[543].

There are, however, cases of non-application of the Court's jurisprudence. The decision of the Brazilian Supreme Court in the case Raposa Serra do Sol is a clear indicative of non-effects of the Court's jurisprudence on indigenous rights[544]. Furthermore, the continuous and generalized practice of preventive detention goes against the doctrine of the Court concerning detainee's rights. Adherence of state organs is, therefore, oscillating and attests a variable efficacy of the Court regarding this aspect.

(ii) Breadth of law making

The "essential elements of jurisprudence" described in previous chapters demonstrates application efficacy in terms of law making. This function is intrinsically connected with normative strengthening. The main effect of law-making on the concretization of human rights comes from both the reduction of ambiguities and the legal formalization of rights not previously recognized as such. As a result, the rights protected by the Court have become far clearer and farther-reaching than originally stipulated by the ACHR.

Importantly, the establishment of criteria of validity of amnesties contributes to soothing the absence of comprehensive norms in treaty laws, and contributes to a normative stabilization of the field. For example, in the case *El Mozote v El Salvador*, the Court expanded its doctrine to the field of humanitarian rights. In this opportunity, the Court shed necessary light on the scope and limit of use of article 6 of the Additional Protocol to the Geneva Conventions, the only international prevision regulating amnesty laws. While the written text of article 6 remains the same, the interpretation of this provision has been under dispute in the face of controversy over the legitimacy of amnesties. The interpretation of the IACtHR clearly states that such an article cannot be extended to amnesties applying to war crimes.

The doctrine of the Court has also elucidated the controverted concept of *jus*

[543] Nollkaemper, 2013.
[544] Brazilian Supreme Court, *PET 3.388/RR*, 2009.

cogens, enabling its use by litigants and domestic courts. Supporting the application efficacy of the Court in this matter, a former Inter-American judge affirmed that "the Inter-American Court has probably done more for *jus cogens* than any other contemporaneous International tribunal"[545].

In this vein, domestic courts have adopted elements of the doctrine of the Court to strengthen elements in their own constituencies. Back in 1945, when creating a draft of what would become the Universal Declaration on Human Rights, Lauterpacht expressed his concern over the existence of international human rights courts with regard to their potential for enforcement and the suitability of 'world law' to deal with 'municipal problems'. Accordingly, he states that:

> It is possible—though highly improbable—that at some distant date the laws of States will merge into one world law in this and in other matters. The International Bill of the Rights of Man cannot attempt to introduce such a world law. On the contrary, it must be enforced through the law of States, suitably adapted, if need be, to the fundamental requirements of the Bill of Rights. That municipal law of States cannot be administered by international courts possessing no requisite knowledge of the law, of the legal tradition, and of the social and economic problems of the individual States[546].

These concerns of Lauterpacht have been addressed by the shared law-making of the Court and domestic courts, leading to an expansion of the 'breadth of law making' of Court and states. Domestic courts have expanded elements created by the Court, adapting it to their realities. In that sense, application of Convention law by state organs necessarily involves law-making because it adapts rights to local realities and concrete cases. Not rarely, states have advanced even further these elements, respecting the threshold settled by the Court. Colombian Constitutional Law has expanded the concept of 'vida digna' and applied it to guarantee not only the rights of indigenous people, detainees,

[545] IACtHR, *Caesar*, 20005 (separate opinion of Judge Cançado Trindade).
[546] Lauterpacht, 2013 [1945].

and children and youngsters (as did the Court), but also expansive rights to housing[547], rights to health[548], and the right to have sufficient means of subsistence ("mínimo vital")[549]. Domestic norm creation supported by the jurisprudence of the Court has often supported the creation of transnational norms, situated within the borders between international and national norms. Likewise, domestic law has influenced the process of law-making of the Court, especially in cases involving indigenous rights and their reparation. As examples, the Court took into consideration the customs of the Saramaka people to identify heirs and successors of victims in *Aloeboetoe et al v Suriname*. Similarly, in *Bámaca Velásquez v Guatemala*, the Court considered the repercussions caused by the forced disappearance, torture and extrajudicial execution of Efrain Bámaca Velásquez to order reparations in concordance with Mayan culture.

Application efficacy contributes to concretization of human rights norms in three forms. First, because adherent state organs have been prompted to identify violations that they would not have otherwise identified as such. Human rights transited from an abstract realm to concrete cases, in which they were applied. Second, because clarification of ambiguities has contributed to reinforcing and clarifying rights, sometimes even adapting them to local realities. Third, because it has given a legal subsidy to state organs that "act in the direction that law indicates" to apply ACHR norms even if in discordance with organs hierarchically superior in the bureaucracy of the state or with majoritarian law application. Application efficacy, in certain cases, is still oscillating and reveals that the impact of the Court is still circumscribed to a few organs of states and issues. Although application of the Court's jurisprudence is not generalized and uniform in the region, issues such as amnesty laws have greater adherence than detainee's rights.

7.2.3 Strengthening: forming compliance constituencies, institutions and norms

[547] Constitutional Court of Colombia, *T-675/11*, 2011.
[548] Constitutional Court of Colombia, *T-444/99*, 1999.
[549] Constitutional Court of Colombia, *T-184/09*, 2009.

As defined earlier in Chapter 2, strengthening efficacy is the ability of the Court's jurisprudence to produce effects that will contribute to the strengthening of normative, institutional and social structures within, but not limited to, states under the jurisdiction of the Court. What lies behind this layer is a process of maturation of "compliance constituencies". Because of the subsidiary nature of the IAHRS, the IACtHR cannot effectuate the concretization of human rights norms without the cooperation of individuals, organizations and state organs. For this reason, decisions of the Court have been intentionally used such parties to support structures aligned with ACHR norms.

(i) Normative strengthening

The first evidence of normative strengthening in this analysis was cases of adaptation of domestic norms in conformity with ACHR norms via legislative changes and ratification of human rights treaties. In addition, states made progress in including elements of the IACtHR jurisprudence in their legal orders. One of the strongest indicators of high normative strengthening efficacy is the existence of norms in conformity with IACtHR decisions in most of state constitutions. Another prominent example of incorporation of IACtHR doctrine was the repeal of amnesty laws by decrees, courts judgments, and legislative reforms in many Latin American states. Importantly, there was a crescent transition from static legislative creation to a dynamic law creation by courts, the executive power, and other state organs. In contexts of institutional blockage, this multilevel construction of law favoured the possibility of application of norms in conformity with the IACtHR jurisprudence in contexts at least partially hostile to them.

Another important effect of IACtHR decisions over normative strengthening comes from the doctrine of control of conventionality. The adoption of this doctrine by certain states gave immediate validity to decisions at domestic levels, creating "transnational streams of rights" that allowed individuals and organizations to denounce human rights violations that were previously non-accountable by domestic norms. This was particularly visible in cases in which the conduct of state organs was in dispute. In these cases, the doctrine of Control

of Conventionality amplified effects of individual decisions and improved the accessibility of the IACtHR jurisprudence.

The strengthening of normative frameworks contributed to the normative concretization of human rights norms because it made the Court's doctrine available to domestic constituencies, changing domestic normative perception, enhancing domestic recognition of rights, and imposing legal limits on the actions of state organs[550]. Because of the Court's decisions there is, therefore, an expansion of human rights norms protected in domestic spheres.

In its decisions, the Court elucidated new sets of justiciable rights. For instance, describing the creative effects of the decision T-025/2004, Garavito and Franco assert that pressing social problems such as malnutrition; poor access to public services such as education, health, and housing; and forced displacement were redefined in terms of violations to the rights to food, education, health, and housing[551]. Likewise, the Court has redefined social problems stemming from a long list of grievances, such as: the expulsion of indigenous people from their lands, the marginalisation of indigenous peoples and detainees, the disproportionate use of force by law enforcement officers, denial of justice, and impunity. This translation of social problems to legal terms with the intentional goal of contributing to the concretization of rights had a great impact for victims of human rights violations, which subsequently started to be treated as such in some places. Illustratively, Garavito and Franco describe how the Colombian Constitutional Court T-25/2004 decision contributed to redefining forced displacement as a human rights violation and forcibly displaced peoples as human rights victims: "[because of] the symbolic turn propelled by the Court, the perception of displacement and displaced people as a secondary effect of the armed conflict shifted and both displacement started to be approached as a source of human rights violations and displaced people were characterized as human rights victims"[552]. Similarly, decisions of the Court redefined amnesty victims, indigenous and tribal peoples, and detainees as subjects entitled to rights settled by the Court. This process of social

[550] Frowein, Stain, 1997: 292.
[551] Garavito, Franco, 2010: 100.
[552] Garavito and Franco refer to this redefinition as a "creative effect" of the decision T-25/2004. Garavito, Franco, 2010: 100-103.

strengthening of legal identities entitled individuals that faced violations similar to those described by the Court in its decisions to plead rights ascribed to such legal identities in domestic legal fora.

Despite normative advancements brought by the Court, there is still great criticism towards the coherence of some of its decisions – especially those issued during activist periods.

(ii) Institutional strengthening

The Court has also contributed to the concretization of norms via creation and reinforcement of institutions that facilitate compliance with decisions of international courts, promote human rights more broadly, and contribute to the redress and accountability of human rights violations.

At first, the existence of a continuously diversified flux of cases before the IAHRS, and the active presence of victims, organizations, experts, and states in hearings, litigating proceedings, and during the stage of monitoring compliance with decisions contributed to the refinement of the Court and its jurisprudence. This process was already explained in detail in Chapter 3, but it is worth mentioning that the action of all these actors combined contributes to the institutional strengthening—or weakening—of the Court. More than competing causes, mutual institutional strengthening is a collaborative cause for normative concretization and efficacy.

The obligation to implement measures of reparation ordered by Court decisions constitutes an incentive for States to create general conditions that facilitate the reception of decisions of international courts and of international law in general. After litigating with the Court, states created mechanisms of reception and compliance with human rights decisions.

In Colombia, law 288/1996 established proceedings to implement pecuniary measures, and decree 321/2000 created an inter-sectorial commission, chaired by the Republican Vice-President to deal with international matters concerning human rights. This commission has mandate to coordinate compliance with decisions of the IACtHR. The Colombian Constitutional Court has also accepted

the execution of reparatory measures via "tutelas"[553]. For some cases, such as *Mapiripán Massacre v Colombia*, the state established special mechanisms of coordination and supervision. In Peru, law 27.775/2002 governs the execution of compensation measures. In Argentina, a Legal Council within the Ministry of Foreign Affairs in concert with a Human Rights secretary within the Ministry of Justice are in charge of receiving and executing decisions of international organisms, including the IACtHR. Similarly, in Ecuador, the Ministry of Justice, Human Rights, and Cults, in concert with other organs such as the Public Prosecutor's Office, has been the responsible for executing decisions of the IACtHR. In Paraguay, decree 1595/2009 created an inter-institutional organ headed by the Vice-President of Republic in charge of complying with Commission and Court's decisions. Under its current mandate, this organ must assemble every 30 days. Not by coincidence, Peru and Colombia, respectively the first and seventh states with the most decisions before the Court (see Table 2, at the end of Chapter 3) are the states with the most institutionalized forms of compliance with decisions[554]. The comparison between states with high numbers of decisions and reinforcement of domestic human rights structures suggests that decisions of the Court may be forming domestic bureaucracies aligned with human rights norms[555].

Importantly, mechanisms in charge of litigating before the Court and complying with decisions contributed to a progressive formation of a 'domestic human rights institutional architecture', permitting a greater penetration of human rights norms into the state bureaucracy. Traditionally, the institutions in charge of litigation before the Court are Ministries of International Affairs or Ministries of Justice. The rise of litigation before the regional human rights system has boosted the creation of more specialized organs to take part in contentious proceedings and execute decisions of the IACtHR. These organs have paved the way for an increased diffusion of human rights themes within state bureaucracy and domestic legal orders. Brazil and Guatemala provide illustrative examples of this reinforcement of a 'domestic human rights institutional

[553] Constitutional Court of Colombia, *T-568/99*, 1999; Constitutional Court of Colombia *T-558/03*, 2003.
[554] Garavito, Celeste, 2015: 297; Burgos, 2014:143.
[555] Burgos, 2014, p. 142.

architecture' caused by decisions and recommendations arising from the IAHRS. In Brazil, litigation before the Court was first delegated to Itamaraty, the Ministry of Foreign Affairs. Later, it was transferred to the docket of the Secretary of Human Rights, subordinated to the Presidency of the Republic. Presently, this function is executed by the International Department of the Attorney General's Office ("Procuradoria Geral da União", PGR). This department is also responsible for the supervision of any litigation in Brazil in which international law is applied, and for the provision of legal advice to the public administration. As such, the mandate of this department understands the procedures involved in litigating before the Court, ensuring compliance with decisions, and, importantly, increasing the consistent application of human rights jurisprudence across all organs of the Union. Officials connected to the PGR International Department are placed in all executive ministries and in the presidency, allowing a great permeability of international human rights law expertise in these spaces. The structure of Brazilian bureaucracy evinces that by strengthening institutional structures, the Court creates institutional spaces of dissemination of its decisions, increasing their reach. Although some sectors of Brazilian bureaucracy have been defiantly non-compliant with the IACtHR *Gomes Lund* decision (evincing some of the 'non-effects' of the decision), the formation of these 'institutional spaces of dissemination' permit that dissident sectors align to Convention norms and challenge non-compliant behaviours. In Guatemala, governmental agreement 244/1988 established a presidential commission to coordinate the execution of human rights policies (COPREDEH). The organ is currently responsible for compliance with the decisions of the IACtHR and for enhancing the consistent application of and human rights domestically[556]. Mexico, Peru and other states of the region have created inter-institutional commissions similar to COPRADEH[557].

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[556] This point was explained to me by Ignacio Grazioso, intern of the Inter-American Court of Human Rights during the first semester of 2015.

[557] On 14 July 2011, the Mexican Supreme Court adopted a ground-breaking decision in which it: (i) affirmed the obligatory nature of the judgments of the Inter-American Court against Mexico; (ii) concluded that no national authority (including the Supreme Court itself) can review or modify the regional judgment; (iii) stated that all authorities must interpret national legislation in accordance with constitutional and international human rights standards, and (iv) ordered all national judges and courts to exercise, if necessary, constitutional and conventional control over national legislation (an extensive version of traditional judicial review). Uprimny, 2007.

Remarkably, decisions of the Court have contributed to softening emerging deadlocks, having an effect of "institutional unlocking", and reinforcing the mandate of institutions aligned with ACHR norms[558]. Although domestic courts were important counterparts of the Court in domestic legal orders, other state organs were essential to increasing application in conformity with the Court's jurisprudence. In fact, in several contexts in which high courts would deviate from the jurisprudence established by the Court, other legal actors became crucial to guaranteeing the prevalence of conventional norms. For instance, the action of Uruguayan lower court judges has been central in a scenario of institutional blockage in relation to that country's amnesty law. The Uruguayan case indicates the existence of domestic institutions sympathetic to the dismantling of the law, but they needed a legitimate legal instrument to be used against the hegemony of the political-legal arrangement in its favour. The *Gelman* decision occupied the position of such an instrument, and in so doing reinforced the mandate of institutions coordinated with the jurisprudence of the Court.

It is worth noting that the Court's decision normally provoked mixed reactions within state organs. Typically, interactions between domestic public authorities and the jurisprudence of the Court have taken forms of alignment or contestation. The simultaneous divergence of opinions within the same state and the faltering adherence to Court's decisions, depending on the state organ taken into consideration, indicate that analyses based on monolithic approaches of states overlook important social dynamics within institutional structures. Even in the least compliant scenarios, decisions incite at least some reactions of alignment, even if inconstant, within governmental organs. The reverse is also true: even in compliant scenarios, decisions may incite reactions of contestation that may reverse compliance. This reversion occurred in Uruguay in the context of the IACtHR *Gelman* decision.

In cases of severe contestation, the jurisprudence of the Court has served as an instrument used by resistant factions to promote ACHR norms among those state organs aligned with the international regime of human rights protection. In this sense, the Court's efficacy does not reside only in uniform application, but

[558] Garavito and Franco attribute six effects to the Constitutional Court of Colombia T-25/2004 decision, among which "institutional unlocking". See Garavito, Franco, 2010: 128.

also in strengthening institutional and social structures favourable to ACHR norms. Tellingly, while the Brazilian Supreme Court issued a decision upholding the Brazilian amnesty law, prosecutors and judges of lower courts have ingeniously circumvented these decisions with the support of the IACtHR decision in *Gomes Lund*. These acts contributed to both concretizing norms of human rights in relation to victims and society as a whole, and spreading it through spaces of public administration.

Reparatory measures that required the actions of multiple agencies tended to take more time to be implemented. At the same time, they provoked widespread effects at different levels of the public administration. According to Wasby, "a decision will be more likely to bring action if it disturbs the balance between interests than if it affects an interest without affecting others"[559]. Indeed, the attempt of Suriname to amend its constitution has provoked delay in compliance with obligations imposed in the cases *Saramaka People v Suriname* and *Moiwana Community v Suriname*, but the result of this attempt promises hope for a national solution to traditional land rights issues. Notably, the decision appoints to the importance of carrying out a multiple analysis of efficacy that transcends compliance and takes into consideration other aspects of efficacy as strengthening and adequacy.

Decisions of the Court propelled the emergence of institutions with specific mandate over certain subjects. Amnesty cases created incentives for the establishment of truth commissions and amnesty Commissions, along with institutions, public policies, legislation and mechanisms to fight impunity, guarantee prosecution, and ensure right to truth and reparation of victims. In addition, almost all states in the region have reformed their bureaucracies to accommodate indigenous rights' policies[560]. Inter-institutional arrangements, normally within Ministries of Justice, have been used to cope with issues arising from prison systems[561]. Guarantees of non-repetition have prompted states to reform institutions that have been at the centre of persistent or systematic

[559] Wasby, [1969] 1973: 215.
[560] See examples in the section 7.2.1 of this chapters about "observance" how state bureaucracy has developed an institutional architecture receptive to the expansive approach to indigenous subjectivity adopted by the Court.
[561] See example of Venezuela in the section 7.2.4 of this chapter about "implementation".

violations. For example, in the cases *Fernández Ortega v Mexico*, *Rosendo Cantú v Mexico, and Espínoza González v Peru*, the Court required Mexico to maintain protocols to investigate cases of rape and to supply specialized services for treating women who are victims of sexual violence.

Importantly, decisions contributed to the greater autonomy of the courts in the region. According to Medellín-Urquiaga, "long-standing authoritarian regimes and armed conflicts have had an impact on the judiciary within the region, so courts were systematically disbanded and weakened by groups interested in fostering impunity. Courts were the object of legal attacks from the legislative and judiciary branches and individuals involved in the prosecution of mass atrocities were target of attacks and threats against their life and integrity" [562]. The Court has intentionally enhanced the autonomy of domestic judiciaries through its jurisprudence, thereby transforming the identities of domestic courts, their reception of international law, and prevailing legal cultures. Illustrative of this point is a long-stand line of jurisprudence of the Court specifically concerning independence of the judiciary[563].

A final piece of evidence of institutional strengthening of states, influenced by the Court, is the increased capacity of states to provide adequate legal redress domestically. For example, in *Operation Genesis v Colombia*, the Court recognized this capacity and referred the implementation of compensation directly to domestic reparation mechanisms of the state. The Court has adopted a similar posture in relation to the domestic reparations programmes of other states undergoing transition, such as Chile, Guatemala, and Peru[564]. Illustratively, in the case *Five Pensioners v Peru*, the Court decided that "the possible patrimonial consequences of the violation of the right to property should be established under domestic legislation, by the competent national organs"[565].

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[562] Medellín-Urquiaga, 2013: 407.
[563] See IACtHR, *Constitutional Court v Peru*, 1999; IACtHR, *Five Pensioners v Peru*, 2003; IACtHR, *Acevedo-Jaramillo et al* v Peru; IACtHR, *Apitz Barbera et al v Venezuela*, 2008; IACtHR, *Acevedo Buendia et al (Discharged and Retired Employees of the Controller) v Peru*, 2009; IACtHR, *Barreto Leiva v Venezuela*, 2009; IACtHR, *Reverón Trujillo v Venezuela, 2009*; IACtHR, *Chocrón Chocrón v Venezuela*, 2011; IACtHR, *Mejía Idrovo v Ecuador*, 2012; IACtHR, *Constitutional Tribunal (Camba Campos et al) v Ecuador*, 2013; IACtHR, *Supreme Court of Justice (Quintana Coello et al) v Ecuador*, 2013; IACtHR, *López Lone et al v Honduras*; IACtHR, *Galindo Cárdenas et al v Peru*, 2016; IACtHR, *Colindres v El Salvador* (ongoing).
[564] Sandoval, 2017; Tsereteli, 2016.
[565] IACtHR, *Five Pensioners v Peru*, 2003: 187.

(iii) Social strengthening

The Court has contributed in some level to the social strengthening of vulnerable groups. For example, in a case involving indigenous people, the order of recognition of the collective juridical capacity of the Saramaka people in the case *Saramaka v Suriname* has guaranteed the group their collective access to justice, in accordance with their communal system, customary laws, and traditions. With regard to amnesty, the prohibition of amnesty laws by the Court has triggered a steep increase in the numbers of trials and prosecutions in all states with such laws, even the ones in line with this norm to begin with. Rates of litigation in cases of amnesty have soared especially in Argentina, Chile, and Guatemala. Binder notes that the Court's decisions on amnesty laws aligned with the efforts of national courts, legislatures, and civil society to end impunity and were welcomed by public opinion and news media[566]. As described by Engstrom, the IACtHR jurisprudence created a "wave of late justice which is clearly reflected in the rising number of human rights trials addressing past human rights abuses in several countries"[567].

Publication of parts of rulings in different medias, public acts acknowledging state responsibility for human rights violations, and especially educational measures were particularly important to strengthening human rights awareness at different levels of society. In *Gomes Lund*, the state structured a permanent programme on human rights education for military staff, and trained more than 100.000 in just one year. In *Montiel Flores v Mexico*, Mexico complied with the obligation to implement educational programs within the Public Prosecutor's Office and to penitentiary personnel on the topics of human rights and diligent investigation in cases of cruel, inhumane, or degrading treatment and torture. These courses were especially targeted towards those in charge of delivering rights, such as prosecutors, prison staff, and health professionals in the case of detainees. Barriers are often created because agents in direct contact with victims are not aware of rights they are supposed to abide by. By promoting

[566] Binder, 2012: 1227.
[567] Engstrom, 2016.

wide social strengthening and spreading a language of rights among different categories of agency, the Court helps to avoid repetition of violations by the same agents.

Importantly, the jurisprudence of the Court has still not been able to influence a structural change on the social position of vulnerable groups such as indigenous people and detainees. Although the Court has been reasonably successful in advancing a set of norms specific to these groups, violations are still common and a detrimental social perception about their rights remains. The impact of the Court's jurisprudence is, therefore, constrained by other social structures.

7.2.4 Implementation: efficacy from the edge

The section "Efficacy" of Chapters 4, 5, and 6 described a series of actions taken by state organs to implement reparatory orders required by the Court, as well as some of the effects emerging from these actions. However, these actions rarely amounted to full compliance with all obligations instituted by the Court. In total, only two decisions regarding indigenous rights were considered fully complied with by the Court[568], and one case regarding detainees' rights was declared fully complied with[569] and the other archived[570]. Not even one of the cases concerning amnesty has been declared fully complied with, even despite the widespread effects of cases like *Barrios Alto*, for example. Importantly, the social effects of non-complied decisions attest the importance to examine efficacy beyond compliance. The efficacy chain has provided a suitable method to carry out this comprehensive exam, distinguishing this study from existing scholarship on compliance.

The measures of reparation implemented most frequently were payments for pecuniary damages and non-pecuniary damages, and publication of the judgment of the Court in various medias. These measures integrate the reparatory categories of compensation and satisfaction, respectively. Usually,

[568] IACtHR, *Aloeboetoe*, 1991; IACtHR, *Mayagna*, 2001.
[569] IACtHR, *Acosta Calderón*, 2005.
[570] IACtHR, *Lori Berenson Mejía,* 2004.

compensation has primarily individual effects restricted to victims. However, in some cases regarding indigenous rights, the creation of collective funds or the investment of compensation in works or services of collective interest impacted whole communities. Satisfaction measures, in their turn, contributed to creating greater human rights awareness in addition to honouring the memory of victims and concretizing the right to truth. Less complex measures of reparation, such as payment of compensation and publication of decisions tend to have higher degree of compliance, normally because they require less acts of implementation. Remarkably, other measures with higher degrees of complexity and broader effects, such as restitution of justice, restitution of lands, and the taking of human rights courses also had some degree of implementation. Although less complied with, these categories of decisions trigger more effects in other layers of the "efficacy chain", especially contributing to the strengthening of institutional and social structures[571]. In that sense, compliance delays associated with orders of reparation of "high-aiming courts" should be approached with this in mind when assessing a court's case-specific effectiveness[572].

The effects of the implementation of these measures of reparation were described in other layers of this chain, leaving little doubt as to the existence of degrees of efficacy despite the generalized partial compliance with decisions. Indeed, implementation resulting in compliance has a critical role for the efficacy of international courts. This inter-layer migration of effects shows the concatenate functioning of the chain and how implementation efficacy may have an important contribution to other layers.

In this section, I would like to carry out an ultimate test of implementation efficacy by stretching to the limits my analysis of non-compliance. I would like to examine how even cases in the extreme end of non-compliance present some degree of implementation efficacy and spread effects to other layers of the chain. Without denying the non-effects of these decisions and their limited level of efficacy, I intend to demonstrate that compliance cannot be used as the only determinant vector to assess efficacy. By doing so, I intend to demonstrate Court's efficacy from the edge.

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[571] Wasby, [1969] 1973: 215 (concluding "the broader the decision, the greater the impact and the broader the non-compliance).
[572] Shany, 2014.

It is often affirmed that states rarely abstain from executing acts toward compliance. Indeed, most of the Court's decisions display partial compliance; however, some states fall into severe non-compliance, leading the Court to apply article 65 of the Convention and report these cases to the OAS General Assembly[573]. From the 15 cases in which article 65 was applied, 5 are examined by this study: *Yvon Neptune v Haiti*, *Yatama v Nicaragua*, *Hilaire, Constantine, Benjamin et al v Trinidad and Tobago*, *Caesar v Trinidad and Tobago*, and *Montero Aranguren v Venezuela*. Out of this list, four cases are related to rights of detainees, evincing the low compliance with orders emerging in relation to this issue in comparison with the other two. Importantly, 3 out of these 5 cases involve states that have subsequently withdrawn from the Convention, demonstrating the existence of efficacy dilemmas within the "Hybrid Human Rights Regime", identified in Chapter 3[574].

Here, The case *Yvon Neptune v Haiti* characterizes the very low end of both compliance and effects arising from a decision. According to the last order monitoring compliance of this case, released in 2015, the State had failed at complying with its duty to inform about the execution of orders required by the Court for over 6 years. The former Haitian Prime Minister Yvon Neptune was arrested on charges of ordering the assassination of opponents of ousted president Jean-Bertrand Aristide in 2002, and remained in prison until 2004, 2 years before the decision of the IACtHR on his behalf. There is no indication of compliance with any of the measures of reparation ordered by the Court, which included payment of compensation and repair of the victim's legal status as well as improvement of national prison conditions up to international standards. However, although not elected, in 2010, Yvon Neptune became a candidate for the position of President. In 2017, he was invited with other former prime ministers to provide consultancy to the national parliamentary committee instituted in March of 2017 with a mandate to amend the constitution[575]. These

[573] For more details about application of article 65, see Sub-section 3.4.1, iv of this study (Enforcement of decisions).
[574] For more details about the four overlapping regimes of human rights protection in the American continent, see Section 3.2 (Normative and Institutional development of the Inter-American System).
[575] More details in: http://www.alterpresse.org/spip.php?article22493#.WksX_EtJnu4. Access on: December, 2017.

facts indicate that the legal status of the victim have been partially repaired, otherwise he would not be allowed to run for a presidential election or provide consultancy to the legislative organ. As such, even on the very low end of non-compliance, the IACtHR decision, among other factors, produced effects in clearing the reputation and inciting the concretization of the rights to truth and memory of the victim.

In the most recent order monitoring compliance of the case *Yatama v Nicaragua*, in 2015, the Court stated that the State had not presented information about compliance with the decision since 2010. The case deals with the failure of the indigenous organization Yapti Tasba Masraka Nanih Asla Takanka (YATAMA), founded in 1988, to obtain authorization to be recognized as a regional political party and run for regional elections in 2000. Although the state did not comply, some actions of implementation were carried out and recognized by the Court. In past orders monitoring compliance with the decision, the Court declared that the State had fully complied with its obligation to publish the judgment in the National Official Gazette, in a large-circulation newspaper, and on the State's official web site. In addition, the Court noticed that the State had partially fulfilled obligations pertaining to compensation and publication of the decision through a radio station with widespread coverage on the Atlantic Coast, where the victims live.

In relation to the obligation to adopt legislative measures to adapt its electoral norms, the state has indicated that "at least *one concrete action*" has been carried out "that signals that the State has had [the] will to encourage these reforms", but argued that a situation of Institutional blockage between the executive and the Legislative impedes full compliance with the order. In this vein, the state informed that it has worked on a "draft project of reform of electoral law" but that fulfillment of this obligation "has not been executed swiftly [...] as it must be [...] not for a lack of will or for the desire to continue manipulating the situation [...] in favour of determined political parties, but for a situation of legal conditions and for the lack of consensus by the same parties [...] in the National Assembly." The State added that "for dealing with a law of constitutional range,

[the fulfillment of these extremes of the Judgment] imply a partial reform to the Political Constitution"[576].

The political party YATAMA gained juridical personality in 2002. At first, the party formed a coalition with FSLN (Frente Sandinista de Liberação Nacional, "Sandinista National Liberation Front"), a democratic socialist political party in Nicaragua, in its bid to run for elections. Since then, YATAMA ran elected representatives in regional elections. In 2014, the two political parties broke up their coalition. In 2016, Brooklyn Rivera, independent candidate of YATAMA, won the general elections of Nicaragua and stands as the only indigenous deputy of the party in the national congress[577]. The line of causality between the IACtHR *Yatama* decision and the national projection of the homonymous political party is rather open to debate, but the upward trajectory of YATAMA in domestic elections indicates progressive concretization of indigenous rights of political self-determination. For this reason, although the implementation efficacy of this case is not high, effects over the social strengthening of indigenous political parties seem substantive – even if not determined exclusively by the decision of the Court. A reformed electoral system would certainly enhance the representativity of indigenous parties, but the decision of the Court gives YATAMA a mechanism to legitimate its objectives. The *Yatama* case proves that even though the implementation of decisions is contingent upon an integrated process involving various institutional structures, rulings can still produce effects that may fulfil the rights of victims.

Trinidad and Tobago did not formally comply with any of the reparations ordered in the cases *Hilaire, Constantine, Benjamin et al v Trinidad and Tobago* and *Caesar v Trinidad and Tobago*. However, in both cases the state abstained from executing victims condemned to the death penalty, as ordered by the Court. To be sure, by the end of 2012, there were 36 prisoners under sentence of death

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576 IACtHR, *Yatama v Nicaragua* (monitoring compliance with judgment).

577 This information was collected in several media. See https://www.culturalsurvival.org/news/no-callaran-nuestras-voces-indigenas-triunfan-en-las-elecciones-generales-de-nicaragua, https://www.elnuevodiario.com.ni/politica/284567-cse-15-partidos-personeria-juridica/, http://www.prensaindigena.org/web/index.php?option=com_content&view=article&id=7917:nicaragua-ponerse-de-acuerdo-sobre-la-autonomia&catid=86:noticias&Itemid=435. Access on: December, 2017.

in the state, but the year in which executions last took place was 1999[578]. The contribution of the decision of the Court to safeguard the right to life of the victims indicates a high implementation efficacy in relation to the obligation of not executing victims, and a high adequacy efficacy in relation to the Court's doctrine on rights of detainees sentenced to the death penalty.

In the *Caesar* case, the IACtHR asserted that the sentence of flogging imposed upon the victim constituted a cruel and inhuman penalty; therefore, domestic legislation should be reformed to eliminate the practice. Trinidad and Tobago did not formally implement any of the reparatory orders required by the Court. However, the decision of the Court has deeply reverberated among strategic legal actors. The decision of the Court adds to decisions of the Privy Council and of the Caribbean Court of Justice that similarly condemns the practice. In a lecture delivered in 2015 in the Judicial Education Institute of Trinidad and Tobago, Judge Linda Dobbs referred to the IACtHR *Caesar* decision and echoed the position of the Court:

> It is said that corporal punishment is rarely used as a sentence or as a punishment today. But why is the Act still on the Statute books? We know from your local press that there have been reports of violent beatings in prisons and one of your judges referring to the conditions in prison referred to them as cruel and inhuman. Taking these clearly inappropriate punishments from the statute books is one step in the direction of sending out the message that corporal punishment in any form will not be tolerated[579].

Despite the low implementation efficacy of the decision, the stand of the Trinidadian judge demonstrates high application and normative strengthening efficacy. Importantly, from the edge of inefficacy, the position illustrates that even in a state that has withdrawn from the jurisdiction of the Court, the effects of IACtHR decisions can have influence over a regional judiciary.

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[578] See post of John Knechtle "An Update on the Death Penalty in Trinidad & Tobago" on I-connect for more details. Available at: http://www.iconnectblog.com/2015/03/an-update-on-the-death-penalty-in-trinidad-tobago/. Access on: December, 2017.
[579] Dobbs, 2015.

The implementation of the obligations of the case *Montero Aranguren v Venezuela* were hindered both by the withdrawal of Venezuela from the jurisdiction of the Court and by decisions of the Superior Tribunal of Justice declaring that decisions of the Court are not executable. However, in orders monitoring compliance, the victim's representatives commended legislative initiatives concerning a wide range of improvements including: the approbation of a code concerning the penitentiary system; the improvement of penal institutions by means of the "Plan of Penitentiary Humanization", which carried out a national census and expanded the number of penal institutions; and the creation of the "Superior Penitentiary Council", an organ in charge of formulating structural policies to the Penitentiary System. In addition, the Court recognized educational measures carried out by the state via the National Institute of Penitentiary Studies and Public Prosecutor's Office in compliance with the obligation to provide training courses to state agents. Although the situation of prisons in Venezuela remain unsatisfactory, the Court's decision contributed to generating effects over the creation of public policies that may affect in the long term the concretization of detainees' rights in the state.

7.2.5 Adequacy

The implementation gap between human rights norms and social practice has led scholars to produce sceptical accounts about the efficacy of human rights regimes. In this line, a body of scholars contests the value of human rights regimes and denies the efficacy of international human rights courts, arguing that levels of human rights violation remain higher than forecasted. Posner affirms that "human rights treaty regime can do little to improve the well-being of people around the world"[580]. Earlier, Posner and Yoo argued that "independent" tribunals in which judges are not appointed by state parties for the purpose of resolving a particular dispute, such as international human rights courts, tend to be less effective at resolving disputes[581]. Hefner-Burton recommends a "cautious scepticism" towards human rights efficacy because of

[580] Posner, 2014: 8.
[581] Yoo, Posner, 2004.

the "persistent gap between rhetorical success and empirical reality"[582]. Hathaway compares the relationship between human rights treaties and countries' human rights practices of more than 160 nations over a forty-year period in five areas. The author, supported by comprehensive empirical data, concludes that:

> From the standpoint of leading perspectives on international law, the results of my research are counterintuitive. Although the ratings of human rights practices of countries that have ratified international human rights treaties are generally better than those of countries that have not, noncompliance with treaty obligations appears to be common. More paradoxically, when I take into account the influence of a range of other factors that affect countries' practices, I find that treaty ratification is not infrequently associated with worse human rights ratings than otherwise expected. I do, however, find evidence suggesting that ratification of human rights treaties by fully democratic nations is associated with better human practices[583].

Hathaway disputes the line of causality between commitment with human rights treaties and human rights practices, attributing the better performance of countries that have ratified international human rights treaties to other factors, namely, democratic indicators. Subsequent studies have challenged such sceptical accounts of the efficacy of international human rights treaties, courts, and norms[584].

Prominently, disputes concerning efficacy of human rights regime boil down to questions about adequacy. As defined in Chapter 2, adequacy corresponds to conformity between human rights treaties and human rights conditions on the ground. Therefore, questions about adequacy are empirical in character[585]. To respond to these disputes, this section will analyse how IACtHR jurisprudence has affected two essential aspects of adequacy efficacy: the decrease or non-

[582] Hefner-Burton, 2009:362, 363.
[583] Hathaway, 2002: 1940.
[584] Goodman, Jinks, 2003; Helfer, Slaughter, 2005.
[585] Goodman, Jinks, 2003.

repetition of human rights violations similar to the ones identified in a decision, and the systematic redressal by domestic mechanisms of violations similar to the ones identified in a decision.

In terms of non-repetition of violations, results in the fields of indigenous rights and detainee's rights are still fragile, and rates of human rights violations regarding these issues remain elevated. There are therefore clear limits to the influence of the Court in these fields. However, decisions of the Court have propelled some shifts. Execution of the death penalty was interrupted both in Guatemala and Trinidad and Tobago. In these instances, the social practice changed before the adaptation of the normative framework. Remarkably, although violations of indigenous rights and rights of detainees have not faded, they have been progressively rendered accountable to or redressed by domestic legal systems. In that sense, the Court's efficacy does not lie solely in a direct reduction of violations, but also in the approach of domestic legal systems to the resolution of cases.

Notably, Court jurisprudence on amnesty is the one with the highest adequacy efficacy. Only Brazil has maintained its amnesty law in force during the entire period following the decision of the IACtHR. Tellingly, most of the States in the region have circumvented or derogated amnesties norms.

Not unexpectedly, the derogation of amnesty laws is an extremely rare event. Payne has traced challenges to the validity of amnesty laws in the 34 states that adopted them. Interestingly, the author found that the number of challenges to amnesty laws was high (161), but they were concentrated in just a few states. Payne affirms that 145 of these challenges, the equivalent to 90 per cent of all challenges in the world, occurred in Latin America. Regional patterns indicate that after the ICC was established, the number of challenges to amnesty laws has increased: Latin America had 73 challenges before 1998 and 72 afterwards[586]. Importantly, many of these challenges were made after 2001, the year in which the landmark *Barrios Alto* decision was issued. These numbers attest to the effects of internal courts over domestic legal orders, even those not bound by a ruling from an international court.

[586] Payne, 2014a: 109-113.

Globally, only 12 states executed challenges to amnesty laws, and these can be grouped into three categories. First, only three transitional states with amnesties for human rights violation of state laws have been overturned: Argentina, Bangladesh, and Uruguay, which reversed its decision. Second, five states circumvented their amnesty laws, which means that although the amnesty law remained valid, the domestic reinterpretation of its scope and application significantly reduced its reach. This is the case of Chile, El Salvador, Guatemala, Honduras, and Peru. Finally, four states challenged their amnesty law but the process confirmed their scope, application and legitimacy: Brazil, South Africa, Spain and Thailand. The remaining 22 countries, equivalent to 65%, never received any challenges. In consequence, only the 8 states in the first and second categories have successfully overturned or circumvented their amnesty laws[587]. Remarkably, seven of these states are under the jurisdiction of the Court, four have an IACtHR decision concerning amnesty, and the other three have referred to the IACtHR jurisprudence when challenging their amnesty laws. The fact that Latin America stands out as the region with the greatest numbers of challenges and successful derogations is an indication of the efficacy of the IACtHR. Although other factors have certainly contributed in the process of voiding amnesty laws, the jurisprudence of the IACtHR in the field should not be neglected. The study of Payne leaves hardly any doubt about the high adequacy efficacy of the Court regarding amnesty laws, even despite the fact that none of the decisions regarding this issue was considered fully complied with. Again, compliance is here proved as a suboptimal vector for assessing efficacy. Notably, even though the Court doctrine establishes the most restrictive regime regarding amnesty laws, most of the states in the region have fallen into line with it.

7.3 The Inter-American Court of Human Rights and the victims of breaches of amnesty laws, indigenous people, and detainees

[587] *Ibidem*.

Human Rights courts like the Inter-American Court of Human Rights have been characterised as trustee courts because they act on behalf of "third party beneficiaries", "holders of treaty-protected rights", and "people living within the court's jurisdiction". As such, they "permit individual persons to vindicate their rights against states that have compromised them"[588]. One of the questions that guides this study refers exactly to the individual dimension of adjudicating proceedings, placing victims at the centre of the investigation. As mentioned in Chapter 1, the concept of victim refers both to nominal victims cited by the Court in its rulings, and to future victims of similar violations in the fields of amnesty laws, indigenous rights and rights of detainees. Taking this expanded notion of the victim into account, this section will evaluate the Court's ability to provide redress for victims that took part in contentious cases within the Inter-American Human Rights System, to curtail similar violations, and to foster accountability within domestic legal orders.

The efficacy of the IACtHR is more apparent at the individual level. Together, the 63 cases analysed by this study permitted the direct redress of hundreds of victims and next of kin listed in each case, not to mention individuals who were indirectly benefited from measures of reparation with broad effect[589]. Despite the structural deficiency in the Court's standing criteria that disqualifies individuals from petitioning the court directly, an analysis of the evolution of the Court's proceedings demonstrated that the role of victims in Court proceedings has gained strength.

The comprehensive and progressive character of the reparations regularly ordered by the Court permitted the comprehensive redress of victims of rights violations. Measures of compensation, satisfaction, restitution and rehabilitation had a special value to promoting rights to truth, memory, and redress to victims. The micro-perspective, manifested in individual as well as local histories, received space in orders—analysed in previously chapters—that successfully contributed to the restitution of lands of traditional communities; to the building of memorials and the naming of schools and streets in honour of the memory of victims; to guarantees of the maintenance of road systems; to guarantees of

[588] See discussion in Chapter 3.
[589] Laplante, 2004; Tigroudja, 2010; Schonsteiner, 2011.

access to water, food, medicine and housing; to the safeguarding of the right to life in cases involving death penalties; to the restitution of the "project of life" of victims of violations of *jus cogens* norms; to the improvement of the infrastructure of a chapel in which community members pay homage to victims executed in massacres; to the challenge of amnesty laws; to the construction of a hostel for a traditional community; among other actions. In addition, because some of these orders address structural problems that affect not only individual victims but also "society as a whole", they gave rise to wide-ranging effects. Combined, these measures contributed to the adequate redress of victims and greater accountability in relation to human rights violations both at the international and domestic level.

In addition, legal subjectivities addressed by the Court have expanded. Indigenous and traditional peoples and prison detainees are participants in a wider process of the emergence and reinforcement of new legal subjectivities via the expansion of traditional rights into new forms and the ascription of justiciability to formerly hidden rights. Especially in cases of amnesty, in which individuals rights are subdued in order to facilitate collective transition, the Court places victims in the centre of human rights litigation. Decisions demonstrate that the Court takes victims seriously, equalizing victim's rights to truth and reparation with national interests of peace and democratization. Indeed, the first pillar that supports the IACtHR's doctrine on amnesty concerns victims of amnesty laws and the categories of rights to which they were deprived. The most prominent example of construction of legal subjectivities in the IACtHR doctrine refers to the idea of indigenous rights. Recently, the international status of indigenous peoples switched from being "formally not considered members of the community of nations" to being legitimate subjects of international and domestic law. The IACtHR played an active role in this process.

The development of legal subjectivities and redefinition of social problems in the language of rights created new pathways for individuals to pursue access to justice. Importantly, the "Inter-American Amparo" unlocks the possibility of obtaining legal responses at the domestic level when all legal means were previously declared exhausted. By doing so, decisions of the Court promote legal inclusion and expand the possibility of access to the legal system for individuals

regardless of their legal and social status. This new form of legal inclusion, enabled by the IACtHR produces an important response to critiques concerning the Court's democratic deficit. Notably, the idea of democratic deficit of international courts is founded in the absence of procedural aspects of democratic validation (the lack of 'constituency' of international courts) and of traditional forms of political insertion. However, the Court may provide new forms of democratic participation embedded in the legal system. Especially in the case of vulnerable groups that are sub-represented in society, government, and in traditional forms of political inclusion, the Court provides a legitimate space for legal contestation. Importantly, the Court permits that not only legal actors, but actors normally sub-included have the opportunity to articulate interests using a common language of rights, and to institutionalise claims using formal legal mechanisms. In this sense, the human rights movement, it terms of its strategic litigation before the Court, is far less a challenge to democracy than an appeal to different forms of legal inclusion. This differentiated form of inclusion is a result of the development of new forms of democracy incited by international litigation[590].

All victims of the 63 cases analysed in this study found a dead-end within all forms of democratic insertion offered by states, so the Inter-American Amparo was the last legal resource available. In many ways at odds with the idea that constitutionalism may have a depreciative effect on democracy, the Inter-American Court has opened-up new channels of communication between victims and mechanisms of redress, has expanded the scope of rights to include pressing social problems, and has developed new legal subjectivities to expand the scope of protection of rights. In many forms, international law gives to sub-included constituents a more robust defence of their rights. In that sense, the Court has provided structural conditions and enabled individual autonomy in order to concretize rights. On the other hand, the Court was not able to structurally affect the social condition of indigenous peoples and detainees or to significantly reduce the number of human rights violation affecting these sectors of the population. As a consequence, it is possible to identify some nuances of adequacy

[590] Thornhill, 2018 (forthcoming).

efficacy, but there are still limits for a full concretization of the rights advanced by the Court's jurisprudence.

Chapter 8

Final remarks

This study intended to perform a reappraisal of the efficacy of the Inter-American Court of Human Rights in relation to amnesty laws, indigenous rights, and the rights of detainees. To this end, the thesis was structured around three fundamental questions that expressed the main objectives of this study. This final chapter will summarise how this study responds to each of them.

(i) How should we account for the efficacy of the Inter-American Court of Human Rights and its decisions as they impact the human rights regime and normative, institutional and social structures of global society?

Chapter 2 advanced the model of an "efficacy chain" composed of five layers: observance; application; strengthening (instead of enforcement); implementation (instead of compliance); and adequacy (of normative, institutional and, mainly, social structures). The layers of the efficacy chain provide fields of observation of elements commonly presented by socio-legal analysis of efficacy of international courts. The efficacy chain reflected a need to situate the efficacy of international courts within "simultaneous transformation of the societal structures in which they evolve" and long-term social processes[591]. At the foundation of the efficacy chain is the belief that the effects of court decisions can be transformed through social interaction and convey important, although sometimes lengthy, social transformations. The "efficacy chain" offered a landscape upon which this study could observe interactions of law and society stemming from decisions of the Court and the impact of the Court over the human rights regime and normative, institutional and social structures of global society. Of central importance, the "efficacy chain" addressed not only a "missing sociological insight"[592], but also the absence of studies that contemplate the victim's perspective in the assessment of international courts efficacy.

[591]Madsen, 2011: 269-271; Madsen, 2014:402.
[592] Madsen, 2014: 389.

Importantly, the model of the "efficacy chain" is not definitive. Future studies must adjust the model and test it with other international courts according to their field of speciality and the structure and function of their study. The model can also be used to analyse individual decisions, as performed in the case *Maria da Penha* in Chapter 2. Future studies may also suggest the insertion of new layers, expanding the fields of observation of the model. Importantly, socio-legal studies repeatedly emphasize the limits of analysis carried out without due time distance. In consequence, future studies analysing the effects of these same decisions may be able to undercover effects currently paled by observation too close in time.

(ii) To what degree has the Inter-American Court of Human Rights and its aggregate jurisprudence contributed to the process of concretisation of human rights norms?

(iii) Has the Inter-American Court and its decisions contributed to the redress of victims of human rights violations in the fields of amnesty laws, indigenous rights and rights of detainees?

The existence of judicial review and international courts cannot be naturalized nor taken as a given. A mere half century ago, judicial review by domestic courts and the existence of supranational courts were deemed as "unsound and impracticable". As he sat drafting a primitive version of an "International Bill of the Rights of Man" Lauterpacht questioned: if "Can it be expected that countries which have no judicial review within their borders and in which legal opinion and legal tradition have resisted it vigorously and successfully, will entrust it to an international tribunal?"[593] If he were here today, he may be surprised to learn that the protection of victims' rights through decisions of international human rights courts is one of the great achievements of recent decades. The principle contribution of this thesis was to carry out a comprehensive empirical analysis of decisions of the Inter-American Court of Human Rights, to permit a better visualization of the efficacy of IACtHR's

[593] Lauterpacht, 2013 [1945]: 174 .

decisions in broader sociological and legal terms. The study permitted a reappraisal of efficacy, moving from narrow or partial analysis that often rested on sceptical views of the usefulness of international human rights courts to a broader view of the effects of the Court over normative, institutional and social structures.

In its almost 40 years of existence, the Court has reaffirmed existing rights and progressively identified new sets of rights. Using the efficacy chain, chapter 7 carried out a comprehensive account of how the jurisprudence of the Court has deeply affected the legal reality of the region in the fields of amnesty laws, indigenous rights, and rights of detainees. Importantly, this analysis also considered the non-effects of the decisions and the point of view of victims. For victims, effects of the court have been impactful and far-reaching, even where compliance with complex reparatory measures has been lacking. Under the influence of the Court's jurisprudence, unlawful practices such as forced disappearances have faded away and become more subject to legal accountability, a shift marked by the recent classification of forced disappearance as a specific crime by several states[594]. The jurisdiction of military courts has been restricted[595]. States have conducted legislative changes, including constitutional amendments, to guarantee freedom of expression and to give a distinct standing to human rights and ACHR norms in their constitutional orders[596]. Amnesty laws were banished in almost all states in the region and

[594] IACthR, *Trujillo Oroza v. Bolívia*, 2002 (in response to this ruling the state of Bolivia classified the crime of forced disappearance with the enactment of Law 3326/2006); IACthR, *Heliodoro-Portugal v. Panam*a, 2008, (in compliance with the order of legislative changes of this ruling, the state of Panama modified the articles referring to torture and forced disappearance of its penal code and adopted the definition of article 2 of the Inter-American Convention to Prevent and Punish Torture and article 2 of Inter-American Convention on the Forced Disappearance of Persons respectively).

[595] IACtHR, *Zambrano Vélez et al v. Ecuador*, 2007 (In a key judgment, the Constitutional Court of Ecuador carried out a series of legislative reforms, including the amendment of articles 88 e 164 of the Constitution to comply with the obligation of avoid attribution of competences of ordinary jurisdiction to military jurisdiction); IACthR, *Fernández Ortega et al v. México*, 2011; IACtHR, *Rosendo Cantú et al v. México*, 2011; IACthR, *Cabrera García and Montiel-Flores v. México*, 2010 (In response to the obligation of guarantee an effective remedy to contest the use of military jurisdiction, the Supreme Court of Justice applied human rights criteria that restricted the use of military forum and it was established a New Law of Amparo).

[596] IACthR, *Olmedo-Bustos et al ("La Última Tentación de Cristo") v. Chile*, 2001 (In this landmark decisions, the State carried out a constitutional amendment via enactment of the act 19.742/2001 to guarantee the right to freedom of scientific, technical, literary and artistic creativity and eliminate cinematographic censorship); IACtHR, *Eduardo Kimel v. Argentina*, 2008

former heads of state were indicted and found guilty by domestic courts for crimes previously unpunished[597]. Indigenous people emerged as groups with strong legal subjectivities entailing a set of rights[598]. The right to education was declared justiciable[599]. A state welcomed the first in vitro fertilised baby after a ruling of the IACtHR challenged a constitutional prohibition of the practice for 16 years[600]. States declared a "state of unconstitutional affairs" in relation to domestic prison conditions[601]. One state was obliged to modify its electoral process to allow inclusion of indigenous parties. The crime of feminicide was classified as a crime in several states[602]. A gender perspective was included in the judgment of crimes related to violence against women, a significant and structural problem in the region[603].

The performance of Court's decisions has varied according to each issue and, in many aspects, did not deliver adequacy. Amnesty decisions had triggered greater effects than decisions regarding rights of detainees, with indigenous rights decisions occupying an intermediate position. Most of the states in the region have declared the failure or even a 'unconstitutional state of affaires' of their prison systems, which have pervasive effects over detainees' rights. Despite the number of decisions, provisional measures, and precautionary measures regarding this issue, the Court and the Commission have not been successful at addressing shortcomings coming from penal institutions and promoting broader social changes. At the individual level, decisions of the Court have provided legal inclusion to detainees and gave visibility to violations occurring on daily basis. In addition, decisions have served to support civil society and organizations in their claims. However, at the systemic level, the effects of the Court's jurisprudence

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(the enactment of law 26.551/2009 modified the Argentinean Penal Code and altered the requirements sanction for the crimes of libel and slander).

[597] See discussion in Chapter 4.

[598] See discussion in Chapter 5.

[599] IACtHR, *Gonzales Lluy et al v Ecuador*, 2015 (in this case, the Court declared, for the first time, the violation of a economic, social, and cultural right).

[600] IACtHR, *Gómez Murillo et al v. Costa Rica*, 2016 (friendly agreement); IACtHR, *Caso Artavia Murillo et al ("In vitro fertilization") v. Costa Rica*, 2012. In 8th of March of 2017, it was officially registered the first birth of an individual conceived by In-Vitro fertilization in Costa Rica since the prohibition of the technique in 2001.

[601] See discussion in Chapter 6.

[602] IACtHR, *González et al ("Campo Algodoneiro") v. México*, 2005 (after this landmark decision, Mexican state created the legal category of feminicide, being followed by other states in the region).

[603] See discussion in Chapter 6.

are still cursory. Importantly, the Court has not been able to develop a robust legal subjectivity concerning detainees that appeal to society and state organs. Contrastingly, although violations to indigenous rights keep occurring, they have became progressively more accountable. With variations, indigenous groups have increasingly used the language of rights developed by the Court to organize their claims and mobilize. This scenario indicates a greater efficacy of the Court in layers such as normative strengthening and a lower efficacy in layers such as adequacy.

Interestingly, the efficacy of the Court increases not only adherence to ACHR norms, but to international law and human rights in general. Accordingly, "today the national systems in Latin America are becoming more and more receptive to international law in general, and international human right law *as developed by the Inter-American Court* in particular"[604]. Indeed, the creation of a common vocabulary of rights, supported by elements of the Court's doctrine is remarkable. Elements of the jurisprudence of the Court and international law are increasingly presented in legal decisions, administrative guidelines, public policies and official documents.

Some scholars believe that the IACtHR has assumed a protagonist role in the guarantee of fundamental rights in Latin America[605]. In the same line, other authors adopt the view that international law is a decisive element in the formation and robustness of modern states[606]. Indeed, the IACtHR has acted as a catalytic structure for a model of entangled efficacy triggered by international litigation. One commentator has remarked that "today the national systems in Latin America are becoming more and more receptive to international law in general, and international human right law as developed by the Inter-American Court in particular". Indeed, the creation of a common vocabulary of rights, supported by elements of the Court's doctrine, is remarkable. Elements of the jurisprudence of the Court and international law are increasingly presented in legal decisions, administrative guidelines, public policies and official documents. However, legal institutions do not act independently to advance legal standards. In addition, existing shortcomings in the Court's infrastructure, legal reasoning,

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[605] Abramovich, 2009.
[606] Thornhill, 2016.

and proceedings may also be addressed to enhance its efficacy. Changes occurring within different levels of both institutions and society have contributed to spurring, giving efficacy to, and accommodating the normative shifts proposed by the Court. The efforts of the Court, although remarkable, still represent only an incipient step toward the strict fulfilment of rights of indigenous people, detainees and amnesty victims worldwide. Try as the Court may, issuing decisions and monitoring human rights norms alone is not sufficient to fully ensure rights. A realistic picture of the effect of the Court and its impact in the region has to identify the hidden places where there is impact but also acknowledge the limits of a court's influence. In that sense, the Court's efficacy is embedded in the interactions established with societal structures that may enhance of weaken observation, application, strengthening, implementation, and adequacy of norms with social reality. This efficacy has varied greatly according to the issues, domestic legal orders and layers of efficacy analysed. As a consequence, although it is possible to identify nuances of the Court efficacy, any strict affirmation of efficacy or non-efficacy would be erroneous or simplistic.

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