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Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law

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Abstract

The article examines the jurisprudence of the Inter-American Court of Human Rights in several areas of adjudication which initially did not fall under the instrument, such as environmental rights, international humanitarian law, and investors' rights. In all these areas, the Court has used instruments 'foreign' to the Inter-American system as a means to expand the content of rights in the American Convention. As a result, the umbrella of protection of this instrument, and the reach of the Court, is far greater than originally envisaged. After analysing the specific provision on interpretation of the American Convention on Human Rights as compared to the equivalent mechanisms in the Vienna Convention on the Law of Treaties, the article analyses several case studies of expansionism in the case law of the Court, asking throughout the analysis the question whether this helps the unity or the fragmentation of international law. The article argues that this exercise in expansionism, albeit imperfect, eventually contributes to the unity of international law. In this sense, this expansionism happens within controlled boundaries, and the use of external instruments is more of a validation of findings the Court could make based solely on the Inter-American instruments, rarely creating new rights.

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1 Introduction

The Inter-American Court of Human Rights ('the Inter-American Court' or 'the Court') has for several years now used interpretive tools as a means to expand its jurisdiction into new areas of international law which were originally thought to fall outside the domain of human rights. This article looks at how this process has taken place.

Through the analysis of several case studies of 'expansionism' and activism by the Inter-American Court, I will try to distill the tools used by the Court in interpreting and applying the American Convention, the core instrument of the Inter-American system. The background question is the extent to which human rights can be thought of, in the Inter-American system, as a self-contained regime[1] of international law in interpreting legal instruments, or if it is overall a part of the general international legal system. My contention is that the Inter-American system's use of 'external elements' makes the case for it being part of the larger system of international law.[2] In the long run, this supports the unity of international law, as opposed to its feared fragmentation.[3]

In order to attempt to prove this claim, this article will first look at the specific rules on interpretation of the American Convention, and then at the interpretation of the Convention in light of other instruments. This latter part will first explore the idea of the American Convention as part of general international law (something which has been discussed by the Court's jurisprudence), and then proceed to case studies on expansionism, which constitute the bulk of the article. These case studies will look at several areas of international law, such as international humanitarian law, investors' rights, and environmental law, which have not been originally thought as being part of the field of human rights, but which have become intermingled with the field in adjudicatory practice. It will also look at areas, such as economic, social and cultural rights (ESCR) and the protection of cultural minorities and indigenous peoples, which, even though human rights concerns, have originally fallen outside the jurisdiction of most adjudicatory bodies.

The analysis will be based almost entirely on the case law of the Inter-American Court, even though some reference to the case law of the Inter-American Commission may be necessary at times. It is therefore an empirical and descriptive exercise which will attempt to make more general normative considerations in the concluding

[1] See Simma, 'Self-Contained Regimes', 16 *Netherlands Yrbk Int'l L* (1985) 111.

[2] Making a similar claim with respect to the European Court of Human Rights see Tzevelekos, 'The Use of Article 31(3)(c) of the VCLT in the Case Law of the ECtHR: An Effective Anti-Fragmentation Tool or a Selective Loophole for the Reinforcement of Human Rights Teleology? Between Evolution and Systemic Integration', 31 *Michigan J Int'l L* (2010) 621, at 670–680.

[3] See International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', Report of the Study Group, finalized by Martti Koskenniemi. UN Doc A/CN.4/L.682, of 13 Apr. 2006. For different perspectives see Dupuy, 'L'Unité de l'Ordre Juridique International: Cours Général de Droit International Public', 297 *Recueil des Cours de l'Academie de Droit International* (2002) 1 (defending the overall unity of the international legal order); and Conforti, 'Unité et Fragmentation du Droit International: "Glissez, Mortels, N'Appuyez Pas!"', 111 *RGDIP* (2007) 5, at 6 (criticizing the ILC Report).

remarks. I will now look at the specific provision on interpretation of the American Convention and the way it has been construed by the Court.

2 The Specific Rules on Interpretation of the American Convention

The American Convention on Human Rights has a specific provision dedicated to rules of interpretation. More specifically, Article 29 determines the ways in which the American Convention should *not* be interpreted. It precludes interpretations which would allow for the restriction of rights protected in the Convention (except within the limits set by the Convention) or rights 'inherent in the human personality'. More importantly for our purposes, it precludes interpretations which generally restrict the enjoyment of rights recognized in municipal law or other international treaties.[4]

This means that the American Convention will be interpreted consistently with other relevant international treaties which recognize rights and freedoms. Any instrument can then be used as a means to expand the jurisdiction of the Inter-American system, as human rights are interdependent, even if they are not all contained within the key instrument the Court is interpreting.

A contentious case before the Inter-American Court forced the Court into considering the reach of Article 29. In the *Case of Salvador Chiriboga v. Ecuador*, the representatives of the victim (not the Commission) argued that Article 29 of the American Convention, just like Articles 1(1) and 2,[5] imposes a general obligation upon States. According to the representatives, the violation of a right protected by the American Convention often derives from a wrongful interpretation of it, and therefore there was, in that case, a violation of Article 29.[6] The Court said that there were no specific violations of Article 29, even though it did not expressly say that this provision is not justiciable (I suggest it is not).

The Inter-American Court has looked at interpretation as a central question in one of its Advisory Opinions. In responding to the question of how to interpret the American Declaration on the Rights and Duties of Man, the Court stated that the protection

[4] The relevant provision is the following: '*Article 29. Restrictions Regarding Interpretation.* No provision of this Convention shall be interpreted as: a. permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein; b. restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party; c. precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or d. excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.'

[5] Art. 1(1) ACHR is the obligation to respect and protect human rights, and the Art. which imposes an obligation on states parties. This is the reason any violation of a provision of the ACHR is a violation of that provision *in conjunction with* Art. 1(1). Art. 2 is also a general obligation, and is that of adapting municipal legislation to the ACHR standards.

[6] I/A Court HR, *Case of Salvador Chiriboga v. Ecuador,* Preliminary Objections and Merits, Judgment of 6 May 2008, Series C No. 179, at para. 131.

of human rights must be the fundamental cornerstone of the evolving 'law of the Americas'. Referring to the International Court of Justice's Namibia Advisory Opinion,[7] the Court said that international legal instruments should always be interpreted in light of the normative framework in force at the moment the interpretation is done. The Inter-American Court, by endorsing the ICJ's Opinion, thus rejected any 'historical' interpretations.[8]

Another important tenet of the application and interpretation of treaties by the Inter-American Court is the idea that the American Convention and other instruments should be given a '*pro homine*' interpretation, that is, that they should be interpreted in the way which is most protective of human rights. This declared 'bias' of the Court is another means of advancing interpretation in accordance with the purpose of the treaty; by choosing the *pro homine* way, the Inter-American Court dismisses the interpretation of its instrument according to the ordinary meaning of its words (the primary rule of interpretation) or any other traditional cannons of interpretation, instead directly serving the teleology of the instrument.[9]

Article 29 of the American Convention leads to rules very similar to those in Article 31 of the Vienna Convention on the Law of Treaties (VCLT). For instance, Article 31(1), *in fine*, establishing the teleological interpretation of international law, is the general rule of interpretation adopted by the Inter-American Court. And Article 29(b) of the American Convention has essentially the same effect as Article 31(3)(c) VCLT, in promoting interpretation taking into account the normative context of the instrument, but including in this normative context only instruments which are applicable to the state concerned.

This section asserts that the Inter-American Court has refused to consider Article 29 as an obligation on the same footing as the general obligations of Articles 1(1) and 2 of the American Convention. This means that the specific rules on interpretation of the Convention are instrumental in nature, and not substantive, as a rule on interpretation should be. Further, the Inter-American Court has rejected interpretations which aim at looking for the 'original intent' of an instrument, rather asserting

[7] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion [1971] ICJ Rep 16.

[8] I/A Court H.R., *Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights,* Advisory Opinion OC-10/89 of 14 July 1989, Series A No. 10, at para. 37. This and all other cases from the Court referred to in this article are available at: www.corteidh.or.cr.

[9] See I/A Court H.R., *Case of Ricardo Canese v. Paraguay,* Merits, Reparations, and Costs, Judgment of 31 Aug. 2004, Series C No. 111, at para. 181; I/A Court H.R., *Case of Herrera-Ulloa v. Costa Rica,* Preliminary Objections, Merits, Reparations, and Costs, Judgment of 2 July 2004, Series C No. 107, at para. 184; and I/A Court H.R., *Case of Baena-Ricardo et al. v. Panama,* Merits, Reparations, and Costs, Judgment of 2 Feb.2001, Series C No. 72. This idea finds less resonance in the European system, according to one commentator on interpretation by the European Court of Human Rights: see Toufayan, 'Human Rights Treaty Interpretation: A Postmodern Account of Its Claim to "Speciality"', NYU Center for Human Rights and Global Justice Working Paper No. 2 (2005), at 10 (arguing that there is no preferred method of interpretation in the European system). In a contrary sense see Meron, 'International Law in the Age of Human Rights – General Course on Public International Law', 301 *Collected Courses of the Hague Academy of International Law* (2003) 1, at 192–193.

that the normative context of a rule at the moment it is interpreted should be the key factor. This is consistent with the tenets of Article 29, which requires an interpretation in accordance with other relevant instruments. This goes in hand with the idea of interpretation *pro homine* which has been advanced by the Court, which is an idea of teleological interpretation. How this all falls into place is the object of the following section.

3 Interpreting the Convention in Light of Other Instruments

A *The American Convention as Part of General International Law*

In the Advisory Opinion on the American Declaration, the Inter-American Court said that the Inter-American human rights system had reached a certain degree of specialization as compared to 'classic International Law'.[10] This seems to be a claim to human rights as a self-contained regime.

It has been asserted that the tendency of international law towards literal interpretation aimed at a precise delineation of states' obligations is not applicable in the human rights context. Instead, the interpretation of human rights instruments has the primary aim of promoting the effective application (*effet utile*) of the instrument.[11] This is in line with the idea that, human rights instruments having a different aspiration from many other international instruments, they deserve to be interpreted differently.[12] As human rights instruments aim at law-making, rather than contractual arrangements between states, it is only to be expected that they will be interpreted in a different way, which will take into account the different purposes that this type of treaty is meant to serve.

This view has been reinforced in the *Mapiripán Massacre Case*, one of the most important cases of the Inter-American Court in the past five years. In this case, when analysing the issue of attribution to the state of responsibility for human rights violations perpetrated by non-state actors, the Court stepped away from general rules of international law, affirming the independence of human rights from the general international legal system, based precisely on the special character of human rights obligations due to the purposes of human rights treaties and obligations.[13] Further, the Court affirmed that human rights treaties must be interpreted in accordance with current circumstances, as opposed to an understanding based on an 'original meaning'. In saying that, the Court based this reasoning on Article 29 of the American Convention, and also, more tellingly, on the rules of the VCLT.[14]

[10] *Interpretation of the American Declaration, supra* note 8, at para. 38.

[11] See Cançado Trindade, 'International Law for Humankind: Towards a New Jus Gentium (II) – General Course on Public International Law', 317 *Collected Courses of the Hague Academy of International Law* (2006) 1, at 60.

[12] See in this sense Joseph Weiler's *Prolegomena* in this volume.

[13] I/A Court H.R., *Case of the 'Mapiripán Massacre' v. Colombia*, Merits, Reparations, and Costs, Judgment of 15 Sept. 2005, Series C No. 134, at paras 104–108.

[14] *Ibid.*, at para. 106.

By doing so, the Court reaffirms its links with general international law,[15] even though it is ready to set it aside when its call for human rights protection requires that. Human rights then becomes *lex specialis* to general international law.[16] The Court has also used the VCLT to make the case that the American Convention must be interpreted taking into account other treaties and instruments related to it, and also, more importantly, the system within which the Convention is inserted.[17]

Therefore, even though the human rights system is still part of the general system of international law, it still serves a different purpose, and for that it must look at some tools of interpretation as taking precedence over others, adopting a necessarily more dynamic approach to interpretation. This has been the case of the Inter-American Court, for instance, in responding to the request for an Advisory Opinion on the right to consular assistance, in which the Court drew upon general international law and confirmed that human rights is a part of general international law. More than that, even, the Court said through that Opinion that human rights considerations permeate other areas of international law, and that when human rights interests are concerned legal obligations should be interpreted in a dynamic manner, so as to cover new situations on the basis of pre-existing rights.[18]

The human rights regime in this sense can be seen not as separate from general international law, but as an overarching regime.[19] International law must be applied consistently with human rights law, according to this view, and not the other way round. This activist approach permeates much of the Court's activities, and it proposes some kind of hierarchy within international law in which international human rights law is at the top. This is reinforced by what the Inter-American Court said in the *Sawhoyamaxa* case (to be analysed in detail below) regarding the alleged conflict between the American Convention (ACHR) and a bilateral investment treaty (BIT). The Court said that obligations deriving from 'commercial treaties' do not justify not meeting obligations under the ACHR, and that the application of the BIT should be compatible with the rules of the American Convention; that because of the law-making character of the ACHR, which creates individual rights and does not depend on state reciprocity for its functioning.[20]

[15] *Ibid.*, at para. 107. The Court also mentions other references to rules of general international law in the American Convention *ibid.*, n. 186.

[16] *Ibid.*, at para. 107.

[17] I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay,* Merits, Reparations, and Costs, Judgment of 17 June 2005. Series C No. 125, at para. 126. See also I/A Court H.R., *Case of Tibi v. Ecuador,* Preliminary Objections, Merits, Reparations, and Costs, Judgment of 7 Sept. 2004, Series C No. 114, at para. 144; I/A Court H.R., *Case of the Gómez-Paquiyauri Brothers v. Peru,* Merits, Reparations, and Costs, Judgment of 8 July 2004, Series C No. 110, at para. 164; I/A Court H.R., *Case of the 'Street Children' (Villagrán-Morales et al.) v. Guatemala,* Merits, Judgment of 19 Nov. 1999, Series C No. 63, at paras 192–193; and I/A Court H.R., *The Right to Information on Consular Assistance. In the Framework of the Guarantees of the due Process of Law,* Advisory Opinion OC-16/99 of 1 Oct. 1999, Series A No. 16, at para. 113.

[18] See Cançado Trindade, *supra* note 11, at 62.

[19] In this sense see Meron, *supra* note 9, at 195–196.

[20] I/A Court H.R., *Case of the Sawhoyamaxa Indigenous Community v. Paraguay,* Merits, Reparations, and Costs, Judgment of 29 Mar. 2006, Series C No. 146, at para. 140.

An optimistic reading of the Advisory Opinion on consular assistance, coupled with the *Sawhoyamaxa* judgment, may suggest this hierarchical understanding of the legal order and the supremacy of human rights obligations. A more nuanced construction, though, indicates that human rights are pervasive and perennially relevant in all adjudication, but not necessarily superior. In this sense, the multiple legal sources available engage in a dialogue, rather than opposition, and all cooperate towards achieving the best possible result. Human rights are an essential consideration, but not one which automatically trumps all other applicable rules.

This means that the Court is willing to consider other instruments as interpretive aids for the American Convention. Coupled with the activism of the Inter-American Court, this has led to a great expansion of its role as an international adjudicator in the continent. I will now look at some instances in which this expansion has taken place.

B *The Expansion of the Inter-American Human Rights System*

1 International Humanitarian Law

The organs of the Inter-American system (Commission and Court) have adopted different positions over time as to the relationship between international humanitarian law (IHL) and human rights (HR) in their individual petition system. Initially, the Inter-American Commission rejected using IHL rules in interpreting the American Declaration on the Rights of Man and the Citizen[21] in *Disabled Peoples' International et al. v. United States*, concerning bombing promoted by the US in Grenada in 1987 which injured 16 inmates of a psychiatric clinic.[22] The Commission restricted its analysis to the American Declaration – or at least it did not openly mention the application of IHL rules – and declared the case admissible.

Later, in *La Tablada v. Argentina*, the Inter-American Commission, when analysing whether it could apply IHL rules directly and declare their violation, decided it could do so based on five primary reasons,[23] the most important of which was the fifth one. It stated that, because the Inter-American Court had affirmed that it could analyse other treaties in its exercise of jurisdiction in an Advisory Opinion,[24] the Commission could

[21] This instrument was used instead of the ACHR because the US is not a party to the latter, and thus the competence of the Commission for hearing individual complaints, while still existent, is limited to the rights protected by the Declaration.

[22] For commentaries on this case see Weissbrodt and Andrus, 'The Right to Life During Armed Conflict: *Disabled Peoples' International v. United States*', 29 *Harvard Int'l LJ* (1988) 59; Heintze, 'On the Relationship between Human Rights Law and International Humanitarian Law', 86 *IRRC* (2004) 789, at 802; and Doswald-Beck and Vité, 'International Humanitarian Law and Human Rights Law', 293 IRRC (1993) 94.

[23] These reasons are listed by Zegveld, 'The Inter-American Commission on Human Rights and International Humanitarian Law: A Comment on the Tablada Case', 324 *IRRC* (1998) 505; and Heintze, *supra* note 22, at 803. While the latter seems to be convinced by them, the former, who wrote the case note when the decision came out, was not persuaded by any of them, except the fifth one.

[24] I/A Court H.R., '*Other treaties' subject to the advisory jurisdiction of the Court (Art. 64 American Convention on Human Rights)*, Advisory Opinion OC-1/82 of 24 Sept. 1982, Series A No. 1.

accordingly extend its mandate to analyse alleged violations of other treaties, including the Geneva Conventions of 1949 and its Additional Protocols.[25]

The finding of the Advisory Opinion had been restricted to the advisory competence of the Court, however, and was therefore misinterpreted by the Commission. This was later corrected by the Court in its decision on preliminary objections in *Las Palmeras*.[26] In this case against Colombia, the Commission had declared a violation of Common Article 3 to the Geneva Conventions in its report on the merits, and had requested the Court, upon submitting the case to it, to make the same finding. The Court, however, declined directly to determine whether a rule of international humanitarian law had been breached in the case; instead, it determined that it could use Common Article 3 in interpreting the reach of the American Convention.[27]

One commentator has argued that the only reason why the Court admitted using Common Article 3 to illuminate the scope of the right to life as protected by the American Convention was that such Article represented customary law.[28] However, subsequent practice of the Inter-American Court in which the Court does not allude to the customary status of a rule it invokes shows that this was not the case, or, if the customary status of an IHL rule was ever a requirement, that this requirement was dropped or is simply assumed at this stage.

The *Bámaca Velásquez* case is quite remarkable in the practice of the Inter-American Court. In this case, while analysing the enforced disappearance and (presumed) execution of the victim, the Court, under a separate heading, analysed the violation of Article 1(1) of the American Convention in the light of Common Article 3 to the Geneva Conventions.[29] The Court said that Common Article 3 imposed upon states several obligations which overlapped with provisions of the American Convention,[30] and in this way it seems to have drawn a parallel between the provision of the Geneva Conventions and its general provision. In the end, though, the Inter-American Court decided to declare the violation of Article 1(1) in conjunction with other provisions of the American Convention, and not directly with Common Article 3, truthful to its mandate of interpreting only the American Convention.[31]

The fact that the Court decided that the only provision it needed in order to give meaning to Article 1(1) was an extraneous provision, coming from international humanitarian law, gives Common Article 3 a very important status. More important for the present purposes, the Inter-American Court drew on its general provision on the guarantee of rights so as to extend its competence and apply humanitarian law.

[25] IACHR Report No. 55/97, *Case No. 11.137, Argentina*, OEA/Ser/L/V/II.97, Doc. 38, 30 Oct. 1997, at para. 157.

[26] I/A Court H.R., *Case of Las Palmeras v. Colombia,* Preliminary Objections, Judgment of 4 Feb. 2000, Series C No. 67.

[27] *Ibid.*, at paras 32–33.

[28] See Martin, 'Application du Droit International Humanitaire par la Cour Interaméricaine des Droits de l'Homme', 83 IRRC (2001) 1037, at 1039.

[29] I/A Court H.R., *Case of Bámaca-Velásquez v. Guatemala,* Merits, Judgment of 25 Nov. 2000, Series C No. 70, at paras 203–214.

[30] *Ibid.*, at para. 209.

[31] *Ibid.*, at para. 214.

In the *Mapiripán Massacre* case, the Court referred to Common Article 3 of the Geneva Conventions and to Additional Protocol II as a set of provisions which should be taken into consideration when considering the entirety of the case.[32] According to the Court, Article 29(b) of the American Convention requires that provisions of international humanitarian law be taken into account.[33]

Subsequent practice of the Inter-American Court on the relationship between IHL and HR uses provisions of the Geneva Conventions and Additional Protocol II (relative to non-international conflicts) in interpreting the rights to freedom of movement,[34] property, and private and family life,[35] among others.

All of these subsequent cases, like the entire practice of the Inter-American Court, refer to the specific provisions in connection with the general provision on the guarantee of rights. Thus, none of them contradicts the finding in *Bámaca Velásquez*, and it looks as if it is by illuminating the general obligation on the guarantee of rights, a general clause within the American Convention, that the Inter-American Court makes room for extending its competence to assessing IHL concerns.

In *Vargas Areco v. Paraguay*, the Court dealt with the matter of recruitment of child soldiers.[36] For this, the Court referred to IHL provisions and also to the UN Convention on the Rights of the Child and the Protocol thereto. It also referred to several reports, recommendations, and other soft law instruments, and to the Statute of the International Criminal Court. This was all to prove that there was an 'international tendency' to avoid the recruitment of child soldiers.[37] It is noteworthy that the whole discussion on the recruitment of child soldiers was irrelevant to the case before the Court, as the temporal limitations on the exercise of the Court's jurisdiction did not allow it to consider the recruitment of child soldiers *per se* as a human rights violation (even though this was the object of the consideration of the case before the Commission). In this sense, the Court went out of its way in the consideration of the case solely to state that IHL was a relevant set of rules for human rights protection, regardless of whether it was at the core of the case or not.

Another interesting case, decided on the same day, concerns the determination of the concept of 'crimes against humanity' in the context of determining whether an amnesty law which granted blanket amnesties even for crimes against humanity amounted to a violation of the human right to a remedy and to judicial protection.[38] The Court drew on a wide range of instruments of international criminal law, including the Statutes of

[32] *Case of the 'Mapiripán Massacre', supra* note 13, at para. 114.

[33] *Ibid.*, at para. 115.

[34] *Ibid.*, at paras 167–189; I/A Court H.R., *Case of the Ituango Massacres v. Colombia,* Preliminary Objection, Merits, Reparations, and Costs, Judgment of 1 July 2006, Series C No. 148, at paras 201–235.

[35] The rights to property and private and family life were analysed under the same heading in *ibid.*, at paras 169–200.

[36] I/A Court H.R., *Case of Vargas-Areco v. Paraguay,* Merits, Reparations, and Costs, Judgment of 26 Sept. 2006. Series C No. 155, at paras 111–134.

[37] *Ibid.*, at para. 122.

[38] I/A Court H.R., *Case of Almonacid-Arellano et al. v. Chile,* Preliminary Objections, Merits, Reparations, and Costs, Judgment of 26 Sept. 2006, Series C No. 154, at paras 86–133.

the ICC, ICTY, ICTR, and of the Special Court for Sierra Leone, as well as the Nuremberg and Tokyo Charters. Among the IHL instruments cited are the Hague Convention of 1907 on land warfare (Convention IV), Common Article 3 and Additional Protocol II. All these instruments are used to define the category of crimes against humanity, and through that to determine that the impunity of such a crime violates several rights of the American Convention (many of which are not susceptible to derogations).[39] This leads to the conclusion that the amnesty law was enacted in contravention of the American Convention. IHL is then used, alongside international criminal law, as a tool to give context to a case, becoming simply part of the 'factual matrix' of the case. These two branches of law in this case are not interpretive tools; they are evidentiary accessories to a legal point.[40]

The Inter-American Court, hence, will bring into its judgments an entirely different regime (IHL or international criminal law) as a means of giving meaning to the provisions of the American Convention, or of offering legal support to a claim which relates to the violation of a certain right. The Court has used this tool in order to give meaning to several isolated Articles of the Convention, and also to Article 1(1), the central provision of the instrument. The Court has not always relied on external regimes for this task of 'expansion' of the meaning of the American Convention, or at least not as decisively. The cases on environmental rights exemplify this.

2 Environmental Law

The Inter-American system has a very peculiar approach to environmental issues: instead of thinking of environmentalism as an autonomous area of concern, the organs of the Inter-American system, particularly the Commission, tend to connect the protection of the environment with the protection of indigeneity. Most cases brought before either the Commission or the Court involving environmental harms concern indigenous communities, and one of these cases gets to the point of categorizing the effects of pollution into material values (including health) and the *spiritual values associated with the environment*.[41]

This case, involving the Community of San Mateo de Huanchor in Peru, concerns the pollution caused by toxic waste sludge next to the community,[42] and a claim for the violation of the right to life, among others,[43] has been declared admissible by the Inter-American Commission.[44] It is important to mention that, while the petitioners also claimed a violation of the right to the protection of dignity and the right to protection of the family, these claims have been deemed unfounded by the Commission, and

[39] *Ibid.*, at para. 111.

[40] *Ibid.*, at para. 125.

[41] IACHR, Report n. 69/04, Petition 504/03, Admissibility, *Community of San Mateo de Huanchor and its Members v. Peru*, 15 Oct. 2004, at para. 16.

[42] *Ibid.*, at para. 1.

[43] *Ibid.*, at para. 66. These other rights include the right to personal security, the rights of the child, and judicial protection.

[44] *Ibid.*, at para. 67.

will not be analysed on their merits.[45] This means that, while the Commission accepts the connection between the right to life and the environment, it seems to reject the connection with private and family life, characteristic of the European system.[46]

Another case, involving the effects of the construction of a dam in Chile, did not frame the connection between indigenous peoples and the environment based on the right to life, but rather on the right to physical integrity and the right to freedom of religion,[47] thus reinforcing the connection between the spiritual element of indigeneity and the environment characteristic of the Inter-American System. The case ended in a friendly settlement, however, and the Commission did not have the opportunity to analyse the merits of such connection.

The *Case of the Saramaka Community v. Suriname* is also an interesting example of an environmental claim which has not been fully recognized within the case. In this case, the claims for human rights violations deriving from the environmental harm caused by a mining project on indigenous lands were rejected by the Court in the Preliminary Objections phase. The Commission did not present the environmental claim in its original petition and, even though the Representatives are able to present new legal claims before the Court in any given case, they must do so within the set of facts as presented by the Commission. The Commission failed in its initial petition to mention the environmental harm caused by the mining project, and thus the claim was rejected by the Court.[48] This would have been a great opportunity for the Court directly to address the human rights dimension of pollution, but it failed on procedural grounds.

Other cases before the Inter-American Court generally go in a different direction. In *Claude Reyes et al. v. Chile*,[49] the Court dealt with the matter of the right to freedom of information (a corollary of the right to freedom of expression, which was in fact the provision analysed) of a group of citizens who brought an action for having been denied information by the country's foreign investment committee about the environmental effects of a certain project on the ground that the activities of the foreign investment committee were bound by confidentiality. The Court mentioned the International Covenant on Civil and Political Rights (ICCPR) and the Universal Declaration of Human Rights (UDHR) as examples of instruments in which the right to freedom of expression has been construed also to embody the right to receive information.[50] It also mentioned the UN Convention against Corruption and the Aarhus Convention

[45] *Ibid.*, at para. 66.

[46] App. No. 16798/90, *López Ostra v. Spain* (ECtHR), judgment of 9 Dec. 1994.

[47] IACHR, Report n. 30/04, Petition 4617/02, Friendly Settlement, *Mercedes Julia Huenteao Beroiza et al. v. Chile*, 11 Mar. 2004. The original petition illustrating this claim, along with other documents in the case, is available at the website of the Centre for International Environmental Law (CIEL), which was conducting the litigation in the case: see www.ciel.org (last accessed 7 Oct. 2009).

[48] I/A Court H.R., *Case of the Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of 28 Nov. 2007, Series C No. 172, at paras 11–17.

[49] This case is in several aspects very similar to App. No. 116/1996/735/932, *Guerra and others v. Italy* (ECtHR), judgment of 19 Feb. 1998.

[50] I/A Court H.R., *Case of Claude-Reyes et al. v. Chile*, Merits, Reparations, and Costs, Judgment of 19 Sept. 2006, Series C No. 151, at para. 76.

on access to information, public participation in decision-making, and access to justice in environmental matters to support the argument that information on foreign investment and information which affects the environment are particularly important types of information, the denial of which is a serious interference with Article 13 ACHR.[51] After making the proportionality analysis required by this provision, the Court concluded that there had been a violation of the victims' right to receive information.[52] The right to receive information in this case was 'boosted' by the fact that the information at hand was environmental, and the existence of specific instruments on access to environmental information strengthened this claim.

In *Kawas Fernández v. Honduras*, the Court analysed the violation of the right to freedom of association of an environmental activist who had been murdered because of her activities. The claim was that the deprivation of her life had also brought with it the violation of her right to associate with others.[53] The Court connected her work as an environmental activist with that of a human rights defender, putting environmental rights within the category of ESCR, as the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ('Protocol of San Salvador') declares the right to a healthy environment in its Article 11.[54] The Court acknowledged the causal relationship between the murder of Jeanette Kawas Fernández by state agents and the interference with her right to freedom of association. It also mentioned the chilling effect that this interference had on other environmental activists.[55] Based on this, it declared that there had been a violation by the state of the victim's freedom of association.[56]

Therefore, even though there had been no decisions by any of these bodies declaring breach of the right to life by a state on the grounds of environmental harm, it is important to bear in mind that this link has not been discarded, and has indeed been admitted. And other cases have brought in environmental concerns as a background for the importance of a given claim, in a similar fashion to the use of international criminal law by the Court in the case of amnesties for crimes against humanity. Environmental protection is thus not yet within the self-delimited mandate of the Court, but it certainly informs the factual matrix against which the violation of rights of the American Convention is assessed.

3 Minority/Indigenous Protection

The cases on minority rights usually concern indigenous rights in the Inter-American system. In the pioneer case before the Inter-American Court, the *Awas Tingni Case*, the Court relied upon two core ideas to bring indigenous rights within the scope of the American Convention. The first of them is the idea that human rights instruments

[51] *Ibid.*, at para. 81.
[52] *Ibid.*, at para. 103.
[53] I/A Court H.R., *Case of Kawas-Fernández v. Honduras,* Merits, Reparations, and Costs, Judgment of 3 Apr. 2009, Series C No. 196, at para. 140.
[54] *Ibid.*, at paras 147–148.
[55] *Ibid.*, at paras 152–153.
[56] *Ibid.*, at para. 155.

must be interpreted in accordance with present-day conditions, and thus evolve.[57] The second is the idea contained in Article 29(b) of the Convention, which opens the door for the use of other instruments (international or national) as relevant tools and, in the words of the Court, precludes restrictive interpretations of the American Convention.[58] In this specific case, the Court invoked Article 29(b) to enable the use of the Nicaraguan Constitution as an interpretive tool.[59] In a subsequent case, the Court also used the ILO Convention (No. 169) on Indigenous and Tribal Peoples, but making the observation that the Convention had been ratified by the state against which the case was being brought.[60] This makes one wonder whether the only way the Convention could have been invoked would have been if it had been ratified.[61]

Another important interpretive tool used in the context of indigenous peoples is the general provision of the American Convention on the Guarantee and Safeguard of Human Rights (Article 1(1)). This new line of jurisprudence began with the *Case of the Yakye-Axa Community v. Paraguay*, in which the Court said, in *obiter dictum*, that the right to equality, as guaranteed by the general provision on the respect for human rights of Article 1(1), imposed on states an obligation to undertake measures to accommodate cultural differences.[62] This was later developed in the *Case of López Álvarez v. Honduras*, in which the Court gave full meaning to the confused expression of the earlier case to say that a right to the enjoyment of one's culture was indeed contained within the general provision of Article 1(1), and that measures preventing an individual from expressing himself in his indigenous language amounted to a violation of the right to freedom of expression in conjunction with the general provision.[63]

[57] I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua,* Merits, Reparations, and Costs, Judgment of 31 Aug. 2001, Series C No. 79, at para. 146.

[58] *Ibid.,* at para. 148.

[59] *Ibid.,* at para. 153.

[60] *Sawhoyamaxa Indigenous Community, supra* note 20, at para. 117; and I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay,* Merits, Reparations, and Costs, Judgment of 17 June 2005, Series C No. 125, at para. 130 (using the ILO Convention to interpret the right to property).

[61] I mean here ratification in the international sense of Art. 14 VCLT. Even though the Court does refer to the municipal legislative acts which promoted the 'constitutional' or 'internal' ratification of the instrument, the Court does not offer much detail on the transposition of the instruments into municipal law, rather focusing on a more general idea of ratification which is in consonance with the international legal meaning of the term.

[62] *Yakye Axa Indigenous Community, supra* note 60, at para. 51. This para. deserves full transposition: '51. In view of the fact that the instant case addresses the rights of the members of an indigenous Community, the Court deems it appropriate to recall that, pursuant to Articles 24 (Right to Equal Protection) and 1(1) (Obligation to Respect Rights) of the American Convention, the States must ensure, on an equal basis, full exercise and enjoyment of the rights of these individuals who are not subject to their jurisdiction. However, it is necessary to emphasize that to effectively ensure those rights, when they interpret and apply their domestic legislation, the States must take into account the specific characteristics that differentiate the members of the indigenous peoples from the general population and that constitute their cultural identity. The Court must apply that same reasoning, as it will do in the instant case, to assess the scope and content of the Articles of the American Convention, which the Commission and the representatives allege were breached by the State.'

[63] I/A Court H.R., *Case of López-Álvarez v. Honduras,* Merits, Reparations, and Costs, Judgment of 1 Feb. 2006. Series C No. 141, at paras 169 and 174.

Thus, the IACtHR derives the ability to protect cultural specificities from a general provision and the requirements of equality. This is a very welcome development, in the sense that all aspects of cultural identity can be protected under all rights of the Pact of San José. The Court is also not shy about invoking other instruments, and more specifically the special regime of ILO Convention (No. 169). However, when it comes to this instrument, unlike in the use of other instruments in other types of cases, the Court seems to be attached to the ratification of the instrument which, even though framed as a requirement by the language of Article 29 of the ACHR, has not always been observed as such.

In the *Case of the Yean and Bosico Girls v. the Dominican Republic*, for instance, the Court invoked the UN Convention against Statelessness as a relevant instrument for ascertaining the Dominican Republic's obligations with regard to the right to a nationality protected by the ACHR (Article 20), even though the Dominican Republic was not a party to the instrument.[64] One possible explanation is the sensitivity of this area, given that indigenous rights are still a hotly debated political issue in most Latin American countries. But the reasons for this slight reticence of the Court are unclear.

4 Investors' Rights

The case law of the Inter-American Court on investors' rights does not really rely upon other international treaties, but it nevertheless offers interesting insights when it comes to the interpretation of the American Convention. Whether investors' rights can be adjudged to be human rights concerns as a matter of principle is a question beyond the scope of this article;[65] what is relevant is that cases pointing in this direction have been documented in both the Inter-American and European systems.[66]

One of the issues regarding the treatment of investors in the Inter-American System is their standing to appear before the organs of the system. The American Convention, in Article 1(2), defines person in a way which excludes companies and other juridical persons. In this way, only investors who are natural persons are able to bring claims before the bodies of the Inter-American system. This is a rather literal interpretation of the American Convention, and one which is not in tune with the Court's tendency

[64] I/A Court H.R., *Case of the Girls Yean and Bosico v. Dominican Republic,* Preliminary Objections, Merits, Reparations, and Costs, Judgment of 8 Sept. 2005, Series C No. 130, at para. 140.

[65] A typical position is to show a certain reluctance in accepting investors, who are primarily economic actors, as bearers of human rights because of their condition as economic actors. While several constitutional traditions (notably those of Germany and Austria) recognize rights related to economic initiative as fundamental rights, this is still a somewhat controversial category of rights-bearers, since many investors (particularly transnational corporations) are often human rights violators themselves. A possible way to reconcile this tension and award investors access as such to human rights jurisdictions is to think that, by allowing investors to appear before human rights courts, one eliminates in practice the bias of these bodies against economic actors. If they were put on the same level as those whose human rights they affect, investors would then not have the option of rejecting accusations against them brought by human rights bodies, because they had been given the status of rights-bearers themselves. This position retains most of the principled reticence to accepting investors, but still allows them access to human rights bodies.

[66] For a collection of essays on the topic see P.-M. Dupuy, F. Francioni, and E.-U. Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (2009).

to broaden its scope of protection.[67] It is, however, consistent with the case law of the Court when it comes to collective entities, in which the Court has always granted victim status to the individual members of a community[68] or even of a political party,[69] but rarely, if ever, to the collective entity as such.[70]

In one case the Court analysed the conflict between an obligation imposed by a bilateral investment treaty (BIT) and the American Convention. In the *Sawhoyamaxa Community Case*, the Court was faced with an argument by the Paraguayan government that it had been unable to return the traditional lands of an indigenous community to that community because of its obligations under a BIT. The Court, while disregarding this argument mainly on procedural grounds (Paraguay failed to produce evidence of the existence of this BIT), also asserted the superior hierarchy of human rights treaties, based on the assumption that the human rights regime is a general regime, with law-making effects (as opposed to the 'contractual effects' of a BIT, which is essentially based on reciprocity).[71]

The protection of investors' rights is yet another area in which the Inter-American Court has expanded its jurisdiction, and it has done so through an interpretation of the right to property. It has, however, been a more timid expansion, in the sense that a more conservative interpretation of a procedural requirement (consistent with the case law of the Court in general, and not exclusive to investors' rights cases) does not allow for companies to appear before the organs of the Inter-American system, only individuals. But the right to property, as interpreted by the Court, has generally been protected in favour of the investors as natural persons.[72]

[67] As documented by Nikken, 'Balancing of Human Rights and Investment Law in the Inter-American System of Human Rights', in *ibid.*, at 246, 253.

[68] See, for instance, *Sawhoyamaxa Indigenous Community, supra* note 20 (regarding indigenous communities); and I/A Court H.R., *Case of the Pueblo Bello Massacre v. Colombia,* Merits, Reparations, and Costs, Judgment of 31 Jan. 2006, Series C No. 140 (regarding the population of a village raided by paramilitary forces in Colombia, where these forces perpetrated a massacre, besides other acts violating human rights).

[69] See I/A Court H.R., *Case of Yatama v. Nicaragua,* Preliminary Objections, Merits, Reparations, and Costs, Judgment of 23 June 2005, Series C No. 127, at paras 140–141.

[70] The notable exception is the *Case of the Saramaka Community v. Suriname*, *supra* note 48, at paras 78–86 and 188–189, in which the Court granted reparations to the entire community as such, as opposed to naming each of its members. It must be noted, though, that the recognition of the community as a victim in its entirety only appears in the part of the judgment dealing with reparations, there lacking a more explicit recognition of the possibility of abstract entities as such being victims of human rights violations. It is also important to note that, in the specific circumstances of the case, Suriname municipal law granted the community the status of a legal right-bearing entity. See also Nikken, 'Balancing of Human Rights and Investment Law in the Inter-American System of Human Rights', in Dupuy, Francioni, and Petersmann (eds), *supra* note 66, at 260 (mentioning precedents of the Commission in which an abstract entity – the Venezuelan TV channel *Globovisión* – was the beneficiary of provisional measures).

[71] For a more detailed account see *ibid.*

[72] A collection of case law can be found in *ibid.* A more recent precedent is the *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, in which the right to property of investors and company owners was found to be violated by the state by a seizure of property in the context of a criminal investigation of drug trafficking: see I/A Court H.R., *Case of Chaparro-Álvarez and Lapo-Íñiguez v. Ecuador,* Preliminary Objections, Merits, Reparations, and Costs, Judgment of 21 Nov. 2007, Series C No. 170, at paras 173–218.

5 *Economic, Social, and Cultural Rights*

The protection of Economic, Social, and Cultural Rights (ESCR) falls right within the domain of human rights law, even though its enforcement at the international level has not been fully developed yet.[73] Even though the American Convention does contain a provision on ESCR (Article 26),[74] this provision requires only the progressive development of the economic, social, educational, scientific, and cultural standards set out in the OAS Charter. It is, however, the provision which has to be interpreted and applied in individual cases, even though it may be applied in conjunction with other provisions.

In *Acevedo Buendía and others v. Peru*, the Inter-American Court considered the topic of social security benefits. Instead of framing social security as an ESCR issue, it chose to look at it from the perspective of the right to property.[75] The Court adopted a broad understanding of the reach of property, developed in other cases.[76] It, however, did take ESCR considerations into account when giving content to the right to property in the case. When mentioning the idea that property can be limited by law, it mentioned in a footnote that the San Salvador Protocol to the American Convention (on ESCR) opens the possibility for limitations of ESCR on similar grounds to those on the right to property.[77] The Court eventually found that the failure of the state to comply with its own constitutional law (as interpreted by the Peruvian Constitutional Court), which protected social security as a property interest, violated the American Convention.[78] It is interesting to note that again, in a case dealing with a politically sensitive issue (ESCR), similarly to indigenous issues, the Court relied on internal law as a means of giving content to the American Convention.

[73] Noteworthy in this sense is the approval in Sept. 2009 of the Additional Protocol to the ICESCR, which for the first time gave the Committee on Economic, Social and Cultural Rights the power to adjudicate individual communications regarding alleged violations of ESCR. Before that, the only adjudicatory body with a clear ESCR mandate was the African Commission on Human and Peoples' Rights.

[74] The full text of the provision is the following: '*Article 26. Progressive Development.* The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.'

[75] I/A Court H.R., *Case of Acevedo Buendía et al. ('Discharged and Retired Employees of the Office of the Comptroller') v. Peru,* Preliminary Objection, Merits, Reparations, and Costs, Judgment of 1 July 2009, Series C No. 198, at paras 80–91.

[76] *Ibid.*, at para. 84. See for instance the cases in the section above, where the ownership of company shares was considered to be property (a few examples being I/A Court H.R., *Case of Ivcher-Bronstein v. Peru,* Merits, Reparations, and Costs, Judgment of 6 Feb. 2001, Series C No. 74, paras 120–122, at paras 120–122; *Salvador-Chiriboga, supra* note 6, *v. Ecuador*. Preliminary Objections and Merits. Judgment of May 6, 2008 Series C No. 179, at para. 55; and *Chaparro-Álvarez and Lapo-Íñiguez, supra* note 72, at para. 174) , and also I/A Court H.R., *Case of Palamara-Iribarne v. Chile,* Merits, Reparations, and Costs, Judgment of 22 Nov. 2005, Series C No. 135, analysed below (on intellectual property rights).

[77] *Acevedo Buendía et al.*, *supra* note 75, at para. 84 (n. 72).

[78] *Ibid.*, at para. 91.

But the Court in this case also considered separate claims under Article 26 of the American Convention. Using an unusual tool for the Inter-American system, it looked at the drafting history of Article 26 to argue that this history suggested a real commitment to the protection of ESCR by the drafting states, which wanted to give 'certain binding force' to the provision.[79] Another interesting interpretive tool used by the Court to reinforce the allegation of binding force of the provision is looking at the placing of Article 26 within the Convention. By observing that Article 26, even though in a different chapter from the other justiciable provisions of the American Convention, is still within Part I of the instrument, called 'Duties of the States and Protected Rights', the Court argued that this provision also generated obligations upon the States Parties.[80]

It finally recalled the idea of interdependence of human rights, the case law of the European Court of Human Rights on positive obligations, and the general observations of the UN Committee on Economic, Social, and Cultural Rights.[81] After all these arguments, the Court differentiated between the obligation of progressive realization of ESCR and the immediate enforceability of the right to property, and stated that these were different obligations, and only the protection of property had been actually violated in the case.[82]

Another case against Peru, *Acevedo Jaramillo and others v. Peru*, brought the idea of the interpretation of ESCR closer to previous jurisprudence of the Court in other areas. The representatives of the victims in the case argued that Article 29(b) of the Convention determined that international rules and case law developed in the area of ESCR should be incorporated by the Inter-American Court when interpreting Article 26 of the American Convention, as did the requirement of interpretation *pro homine*.[83] The case concerned the rights of 418 laid-off employees of a Peruvian company, who argued that their labour rights, as protected by Article 26 of the American Convention interpreted in the light of other international instruments, required their reinstatement. The Court, however, did not enter into the merits of considering labour rights as an ESCR issue, instead limiting itself to saying that it would consider these issues when determining the reparations due.[84]

It must be noted that this type of reasoning is not unheard of in the jurisprudence of the Court. In the *Plan de Sánchez Massacre Case*, the Court took the Genocide Convention into consideration, but fell short of actually using it to interpret the American Convention, simply stating that the considerations regarding genocide against the Mayan people would be taken into account when reparations were assessed.[85] This

[79] *Ibid.*, at para. 99.

[80] *Ibid.*, at para. 100.

[81] *Ibid.*, at paras 101–103.

[82] *Ibid.*, at paras 105–106.

[83] I/A Court H.R., *Case of Acevedo-Jaramillo et al. v. Peru,* Preliminary Objections, Merits, Reparations, and Costs, Judgment of 7 Feb. 2006, Series C No. 144, at para. 283.

[84] *Ibid.*, at paras 285 and 278.

[85] I/A Court H.R., *Case of the Plan de Sánchez Massacre v. Guatemala,* Merits, Judgment of 29 Apr. 2004, Series C No. 105, at para. 51.

may be interpreted as meaning that, when tackling difficult issues, the Court will sometimes avoid considering 'foreign' instruments directly, but will take them into account in the reparations phase. If one remembers that it was precisely in the reparations phase that the Court made its first recognition of the quality of an abstract entity as a victim (in the *Saramaka Community Case*),[86] this suggests that the reparations part of the Court's judgments can be thought of as a 'less controversial' section in which the Court can push its jurisprudence further.

In *Palamara Iribarne v. Chile*, the Court considered the confiscation of a book on intelligence services which, according to the state, revealed sensitive information regarding the operation of the Navy. In addition to the printed copies of the book, the author's computer hard drive, where the originals were, was also confiscated.[87] The Court determined that a broad understanding of the right to property in Article 21 of the American Convention included intellectual property, and that other international instruments (including the International Covenant on Economic, Social and Cultural Rights (ICESCR), as well as the Berne Convention on the Protection of Literary and Artistic Works) also protected intellectual property concerns.[88] Based on these considerations, and having analysed the factual specificities of the case, the Court concluded there had been a violation of Article 21 of the American Convention.[89]

When it comes to Economic, Social, and Cultural Rights, therefore, the Court has a tendency to focus on the property impacts of a violation of ESCR, rather than directly address the violation of an ESCR. This is partly due to the difficult enforceability of ESCR, and it impacts negatively on the interpretation of this vague provision of the American Convention. Even though interpretive tools the Court does not usually refer to (such as drafting history) are part of its considerations on ESCR, ultimately the interpretation of this provision by the Court suggests that ESCR interests are best served when translated into effects upon property. The protection of property then becomes an important tool for the protection not only of investors, but also of ESCR generally.

4 Interpretation, Fragmentation, and Unity

A summary of the interpretation methodology of the ACHR by the Inter-American Court could be the following: the Inter-American Court applies general cannons of interpretation, but it derives them from the specific rules of interpretation of Article 29, instead of the VCLT. The Vienna Convention is used by the Court as a means to establish its connection to general international law, but at the same time the Court makes it clear that the human rights system is separate from, and even arguably superior to, general international law.

[86] See *supra* note 70 and accompanying text.

[87] I/A Court H.R., *Case of Palamara-Iribarne v. Chile,* Merits, Reparations, and Costs, Judgment of 22 Nov. 2005, Series C No. 135, at para. 96.

[88] *Ibid.*, at para. 104.

[89] *Ibid.*, at para. 111.

Instead of using the Vienna Convention's basic tenet of interpretation in accordance with the ordinary meaning of the words of the treaty (first part of Article 31(1) of that instrument), the Court uses the teleological tool referred to at the end of the same provision of the Vienna Convention. It does not therefore subscribe to a more conservative application of Article 31(1) in the same way as other international tribunals. This justifies the position of the Court in adopting its *pro homine* approach.

The Court has systematically invoked treaties outside the Inter-American system as a means to expand its jurisdiction, using Article 29 of the American Convention as a catapult for expanding its mandate. But there is some variation in the ways in which this will happen. In more politically delicate contexts, such as indigenous rights and economic, social, and cultural rights, municipal law (or internalized international treaties) seems to play a larger role in interpreting the American Convention. In other areas, such as international humanitarian law, the Court has more easily referred to other international treaties as interpretive aids, but it has also shown some reluctance in invoking international criminal law, using it only as part of the 'factual matrix' of the case, rather than directly affecting the interpretation of provisions of the Convention.

Cases in which Article 1(1) of the American Convention have been reinterpreted, such as the *Bámaca Velázquez* case, are the strongest instances of a 'foreign' instrument becoming part of the normative universe of the Inter-American Court. More often than not, these outside instruments play a role in reinforcing legal points that would be arrived at by the Court in any case, and in this case the Court can be seen as paying a tribute of sorts to the rest of the international legal system. It does not generally create new rights through this bringing in of external instruments; rather, it just adds new dimensions to pre-existing rights (the notable exception being the case of indigenous rights, which has recently even added a group rights dimension to the case law of the IACtHR in the *Saramaka* case). But this exercise of bringing in other instruments is important to the unity of the international legal order, and for putting the law of the Inter-American system into a better perspective, that is, as part of a larger normative universe.

The fact that the ACHR is given some sort of 'preferential' or even an apparent 'hierarchically superior' treatment is easily explained once one considers the normative mandate of the Inter-American Court, which gravitates precisely around the American Convention. If the Court is meant to interpret the American Convention, all other instruments it uses are to be looked at from the perspective of the ACHR, and it is therefore to be expected that the practice of the Court will put the Convention at the very top of its considerations. But the fact that the IACtHR is willing to look so much outside the constraints of its constitutive instrument is nevertheless a laudable characteristic of the system.

The conclusion of the Court that human rights are *lex specialis* to general international law fits perfectly in this context. Any argument for a self-contained regime of international human rights law then becomes fallacious, as the dialogic relationship between general international law (or the many other branches of international law, to the extent that it is very difficult to define what 'general international law' would actually be) seems to govern the adjudicatory practice of the Inter-American Court.

The Court, by acting in the way it does, performs a service in favour of the 'defragmentation' of international law, while not unauthorizedly expanding its mandate. It therefore promotes the unity of international law while preserving its own institutional constraints.

One of the reasons the Court is so aware of the need to preserve its institutional constraints is the idea that it is ultimately better to keep states within the system by more 'cautious' or 'safer' interpretations of the ACHR, rather than force them to denounce the instrument after pushing its limits too far. The events surrounding Trinidad and Tobago's withdrawal from the American Convention[90] are precisely what the Court seems to have in mind when considering the importance of keeping states within the system.

Another reason would be the idea that the Court could arguably itself breach the American Convention if it pushed it too far at once. This would generate outrage, and would lead to the discredit of the Court and reduce compliance with its judgments. Ultimately, this would erode the system, and give reasons for states to abandon it.

5 Concluding Remarks

All in all, the expansion of the jurisdiction of the Inter-American Court, while very tangible, happens within controlled boundaries. The use of foreign instruments is more often than not a search for external validation rather than an actual excursion into waters not charted by the American Convention. New dimensions are added to pre-existing rights, but rarely does the Court actually engage in creating new rights. The Court seems very aware of the need to place itself in a larger normative universe and use that to advance its mandate of human rights protection, but it is very cautious not to strain it.

Generally, then, even the often-assumed progressiveness of the Inter-American Court is checked by moderate concerns to accommodate more sensitive subjects. This seems to be a wise move by the Inter-American Court in its quest for greater human rights protection, which bears in mind that having states as a part of the system and complying with decisions is every bit as important as progressive, *pro homine* interpretations of the American Convention.

[90] These events are well explained in I/A Court H.R., *Case of Hilaire v. Trinidad and Tobago*, Preliminary Objections, Judgment of 1 Sept. 2001, Series C No. 80, at paras 43–98.