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# Assessing the evolution of the Inter-American Court of Human Rights in the protection of migrants' rights: past, present and future

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**ABSTRACT**

The article contributes a critical analysis of the case law of the Inter-American Court of Human Rights (IACtHR), reviewing the protection of migrants' rights in the Inter-American Human Rights System. Specifically, the article's aim is to scrutinise the possible constraints upon growth as regards the role played by the IACtHR. It examines the main drivers behind the evolution of the case law and the key principles laid down in emblematic cases with a view to answering this question. The article also discusses the articulation of a judicial dialogue between the IACtHR and its European counterpart, which has developed the jurisprudence on both sides. Evidence demonstrates that the IACtHR is being innovative in creating its own authentic judicial dialogue with national constitutional courts. Other regional human rights systems, such as the African system, could learn from this. Finally, the article identifies the success and the pitfalls in the approach taken to protect migrants' rights.

**KEYWORDS**

Migrants' rights; Inter-American Court of Human Rights; Inter-American Commission on Human Rights; European Court of Human Rights; judicial dialogue; refugees and asylum seekers' rights



## 1. Introduction

Since it was established in 1979 by the American Convention of Human Rights (ACHR, also known as the 'San Jose Pact'),[1] the Inter-American Court of Human Rights (IACtHR, or the Court) has developed a rich case law following its first ruling in the Velásquez Rodríguez case in 1988, which inaugurated a period of incessant activity.[2]

Although the IACtHR focused initially on the investigation of mass human rights violations in cases of authoritarian regimes, it has extended the scope of its activities over the years to deal with cases concerning economic, social and cultural rights applying the Protocol of San Salvador on Economic, Social and Cultural Rights.[3] Hence, the IACtHR's case law has reflected the transition to democracy of many Latin American countries supporting the consolidation of democracy and the rule of law across the continent and has addressed other aspects of safeguarding human rights in the Americas. These include, among others, migrants' rights, environmental protection and indigenous peoples' rights. This extensive legacy of judicial activity permits a critical examination of the evolution in the exercise of the IACtHR's functions.

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The article's main aim is to contribute a thorough analysis of the case law of the IACtHR and to review relevant aspects concerning the recognition and protection of asylum seekers, refugees and migrants' rights in the Inter-American Human Rights System (IAHRS).[4] The article looks into the main drivers behind the evolution of the case law, identifying both the successes and the pitfalls in the methods of interpretation developed to protect migrants' human rights. Specifically, the article scrutinises the possible constraints upon growth as regards the role played by the IACtHR.

The article contends that, in its evolution, the IACtHR's activity has been driven by four factors: a flexible approach taken when applying various methods of interpretation; an increased judicial dialogue with the European Court of Human Rights (ECtHR) and contracting states' courts; an enhanced collaboration with the Inter-American Commission on Human Rights (IACHR, or the IA Commission); and the affirmation of core international human rights law principles through its advisory opinions. To scrutinise this evolution properly, the analysis focuses on the protection of migrants, an area in which the maturity of the IACtHR can be rightly appreciated. The Court's maturity relates to its evolving interpretations of regional and United Nations (UN) human rights instruments to broaden the scope of protection and the improvement of the compliance and monitoring procedures. Its role in the protection of migrants is of particular interest when we consider ongoing refugee crises in Europe and other regional areas. In examining the evolution, the early landmark cases have laid the groundwork for the development of steady case law on the protection of migrants' rights.

In particular, the article examines the key principles of the IACtHR's case law that can be inferred from an analysis of emblematic cases. It also discusses the articulation of a judicial dialogue between the IACtHR and the ECtHR. Evidence demonstrates that the IACtHR is not only emulating its European counterpart, but, that the ECtHR cites the IACtHR jurisprudence. More importantly, the IACtHR is being innovative and developing its own authentic judicial dialogue with national courts of the contracting states.[5]

This will be of interest to international jurists for several reasons, not least that the ECtHR has begun to draw innovative insights from IACtHR jurisprudence on procedural issues which concern migrants, such as its expansive interpretations of the principle of non-retroactivity and the right to a fair procedure before collective expulsion. Furthermore, the strong judicial dialogue which the IACtHR has established with the supreme and constitutional courts of its contracting states can provide a valuable model for other regional human rights systems.

The article first provides an overview of the evolution of the IACtHR's role in the institutional framework of the IAHRS in Section 2. Section 3 then analyses the protection of migrants' rights in the case law of the IACtHR, underscoring the main features in the practice of the Court. Finally, section 4 discusses and critiques the interpretation tools developed by the IACtHR to resolve human rights claims. Conclusions are summarised in section 5.

## 2. The IACtHR's evolution at a glance: finding a way to cope with teething troubles

Overall, the creation of the IACtHR represented significant progress in the protection of human rights within the institutional framework of the IAHRS.[6] Certainly, the IACtHR

completed the human rights system created under the Organization of American States (OAS), adding to the Inter-American Commission, which in 1959 began promoting and protecting human rights as an autonomous organ of the OAS and thus with competence to supervise the protection of human rights in all the member states.[7] The IACtHR as a treaty body with voluntary jurisdiction is designed as an international tribunal in charge of the monitoring of compliance with the respective treaty.

In contrast, the IACHR, as a committee of experts, has traditionally exercised a far-reaching role in the promotion and protection of human rights under Article 106 of the OAS Charter overseeing compliance with the 1948 American Declaration of the Rights and Duties of Man (ADHR) without the need for them to further ratify a treaty or accept its jurisdiction like in the case of the IACtHR.[8]

Precisely as Burgorgue-Larsen and Ubeda de Torres recall, unlike the European Commission on Human Rights that required acceptance of its jurisdiction for the submission of individual applications, 'the Inter-American Commission has adopted the opposite approach': acceptance is only a condition for inter-state claims but not for individual applications which are considered 'a sort of *actio popularis*'.[9] These central differences have allowed the IACHR to develop a more dynamic role in the protection of human rights than would have been feasible for its counterpart, the former Human Rights Commission in Europe.[10]

Although inspired by the ECtHR model, the role of the IACtHR in the IAHRS possesses specific features. Whereas the IACtHR can exercise its jurisdiction in contentious cases and hand down advisory opinions, its European counterpart was only recently endowed with advisory jurisdiction after the adoption of Protocol 16 in 2013.[11] Also, the role of the IACHR is quite different from the function played by the former Human Rights Commission in Europe. Remarkably, the IACHR, as the human rights body to which individuals have access, performs quasi-judicial functions over the admissibility of the claims and on the merits of the petitions. Individuals have access to the IACHR only during the submission of the petitions since the procedures before the IACtHR can only be set in motion by the state parties and the IACHR.[12]

Against this background, the IACtHR has evolved over the years from being a relatively inactive judicial organ at the beginning of its functions to become an active and innovative judicial body. Although the Court issued its first advisory opinion in 1982,[13] it was only in 1988, nearly ten years after its establishment in 1979, that the IACtHR pronounced its first ruling in a contentious case.[14] Since these early beginnings, the IACtHR has been progressively exercising its jurisdiction to settle contentious cases and has re-affirmed the significance of its role in the protection of human rights through advisory opinions.[15] This development has been prompted by various factors.

First, a flexible approach taken when applying various methods of interpretation has paved the way for progress, giving judges greater scope to develop inter-American human rights law in line with the ACHR. Hence, the IACtHR has pursued a progressive treaty interpretation of the ACHR by way of the various hermeneutical methods set out in the Vienna Convention on the Law of Treaties (VCLT) and in light of the principles of the ACHR. Hence, the IACtHR relies on a variety of interpretative methods, going beyond a constrictive interpretation of the wording or the ACHR. Through a progressive interpretation, according to which the wording should be construed in light of present conditions, the IACtHR has established thresholds and tests to protect and balance different rights in

conflict. Through this evolving interpretation of the ACHR, the Court has expanded the scope of protection. As Lixinski points out, this 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'.[16] In a similar vein, Burgorgue-Larsen and Ubeda de Torres submit that even if the IAHRS was inspired by its European counterpart, a more liberal approach to the optional acceptance of the jurisdiction and interpretation of the provisions was taken, construed around the essential principle of human dignity as demonstrated by the IACtHR case law.[17]

Consequently the *pro homine* principle represents the most relevant interpretative tool put forward in article 29.1 and article 1.1 of the ACHR, whereby legal provisions must be read in the most advantageous manner to protect the human being.[18] In its own words, the Court has established that the American Convention must be 'interpreted in favour of the individual, who is the object of international protection as long as such an interpretation does not result in a modification of the system'.[19] As Pasqualucci states 'under the pro homine principle, the dignity of the individual is of primary concern when interpreting the rights specified in international human rights law and in the American Convention, in particular'.[20]

Arguably, by way of this flexible interpretation the wording of the human rights treaties can be stretched ad infinitum. Hence, the issue of regional consent (understood as 'the consent of the relevant community of states as a factor in the interpretation of a human rights treaty') has been raised as a necessary element in the evolution of the IACtHR jurisprudence.[21] Neuman has voiced the criticism that the element of consensus is rarely present in the IAHRS.[22] As he points out 'the Court cannot easily borrow legitimation for its interpretations of the ACHR from the one OAS institution most heavily engaged in human rights promotion, the Inter-American Commission. The Commission is an expert body, not an intergovernmental body, and it cannot express political consent on behalf of the member states. Moreover, the Court's opinions generally treat the Commission as a hierarchical subordinate that proposes arguments for the Court's consideration, rather than as an independent source of expertise on the elaboration of human rights norms'.[23]

In Neuman's view, the reliance on a 'consensus building process' could improve the acceptance and effectiveness of the IAHRS.

Second, one can observe an increasing judicial dialogue between the IACtHR and the ECtHR.[24] In the 1980s and 1990s, the IACtHR was mirroring its European peer. At that time, there was a mere 'borrowing from the other Court'; today the IACtHR has arrived at a stage in which there are cross references between the ECtHR and the IACtHR. This translates into an incipient judicial dialogue. The IACtHR resorts to the case law of the ECtHR interpreted together with constitutional traditions of the state parties.[25] The ECtHR as discussed below has started quoting the IACtHR case law in some cases, including those relating to migrants' rights. This judicial dialogue in terms of migrants' rights does not necessarily indicate an entire convergence of the practice of both regional courts. From a socio-legal perspective, Dembour's comparative study between the EHRS and the IAHRS has underlined the differences between the respective approaches to migrants' rights. According to Dembour, whereas the Strasbourg case law considers 'the migrant applicant first of all as an alien who is subject to the control of the state, rather than just a human being'; in the IACtHR system the protection granted to migrants relies on the principle of equality before the law and the *pro-homine* principle.[26] This is,

the in words of Dembour, from an outsider's perspective 'one of the most striking features of the Inter-American case law'.[27]

Third, the judicial dialogue between the IACtHR and national courts (particularly supreme or constitutional courts) has been strengthened via the principle of 'interpretacion conforme' (consistent interpretation) and the 'control de convencionalidad' (conventionality control).[28]

By way of the first principle, national courts must align the interpretation of domestic law with the ACHR. Art. 29 b IACHR which requires consistent interpretation of human rights stan-dards whenever the national judge has to interpret a human rights provision.[29] The confor-mity with the ACHR has been at the centre of several cases brought before the Court.

Through the second mechanism, national courts scrutinise the legality of state parties' actions in light of the obligations assumed under the ACHR.[30] The 'control of conventionality' was developed from the IACtHR's judgment in *Almonacid Arellano et al. v. Chile*, where the IACtHR held that

> when a State has ratified an international treaty such as the American Convention, its judges, as part of the State, are also bound by such Convention. This forces them to see that all the effects of the provisions embodied in the Convention are not adversely affected by the enforcement of laws which are contrary to its purpose and that have not had any legal effects since their inception. In other words, the Judiciary must exercise a sort of 'conventionality control' between the domestic legal provisions which are applied to specific cases and the American Convention on Human Rights. To perform this task, the Judiciary has to take into account not only the treaty, but also the interpretation thereof made by the Inter-American Court, which is the ultimate interpreter of the American Convention.[31]

Both mechanisms have enabled constructive relationships and provided clarity and guidance for domestic courts in future proceedings, so it will be of interest to jurists seeking a suitable model for cooperation for other regional human rights systems. As Benvenisti and Down argue that this inter-judicial cooperation provides 'courts with a viable strategy for both protecting their authority and safeguarding the domestic democratic processes'.[32]

A common feature of these mechanisms is that they are built around the government's responsibility to ensure that the application of domestic law does not undermine the rights under the ACHR; at the same time, they reduce the margin of appreciation of national authorities because they should follow the interpretation by the IACtHR. Here, the term 'margin of appreciation' (discussed in depth in section 3) is used with the meaning coined in European human rights law: it refers to the space for manoeuvre that the ECtHR allows to national authorities, in order to fulfil their obligations under the European Convention on Human Rights.[33]

The judicial dialogue between the IACtHR and national courts is not however always smooth and clashes do take place as discussed in section 4. Notwithstanding that, like Benvenisti and Down proclaim 'while competition between the two sets of actors is probably inescapable, they are also increasingly dependent on each other and mutually vulnerable (…) international courts are likely to tolerate increased domestic court review'.[34]

Fourth, the interaction between the IACtHR and the IACHR has shaped the evolution of the case law. Different types of interaction and an enhanced collaboration occurred between the two main human rights monitoring bodies. Cooperation can be observed in the request for preliminary measures in cases of massive expulsions of immigrants. However, the complete agreement between the two human rights bodies should not be taken for granted.

The independence of the IACtHR has been asserted through the construction of its own legal arguments since, as a judicial organ, the IACtHR follows the prin-ciple *iura novit curia* and, therefore, it knows the relevant provisions to be applied inde-pendently of the law pleaded by the IACHR or the parties.[35]

From a procedural perspective, the recent reform of the ACHR's Rules of Procedure, concluded in 2013 after two years of intense discussions, brought new changes to the relations between the two main organs.[36] The main reason behind the reform was to tackle some weaknesses observed in the procedure before the IACHR. Although the reform was long-awaited, it raised concerns about undermining the IACHR's powers.[37] One aspect was especially contentious: the proposal contained provisions limiting the IACHR's powers to adopt precautionary measures in the event of a lack of agreement between the IACtHR and the IACHR.[38] The current text reads:

> 12. The Commission may present a request for provisional measures to the Inter-American Court in accordance with the conditions established in Article 76 of these Rules (…) 13. In the case of a decision of the Inter-American Court dismissing an application for provisional measures, the Commission shall not consider a new request for precautionary measures unless there are new facts that justify it. In any case, the Commission may consider the use of other mechanisms to monitor the situation.[39]

Taking into consideration the reform, these rules containing additional clarifications seem to have reinforced the IACtHR's functions, further empowering it.[40]

Finally, the IACtHR has affirmed core international human rights law principles in its advisory opinions. The controversial question here regards the effect that these advisory opinions have on the OAS member states' legal orders. While the IACtHR's judgments may become legal yardsticks for national legal systems, advisory opinions do not carry any binding force. In accordance with the provisions of the ACHR, the IACtHR exercises its contentious jurisdiction only over the signatories to the ACHR, which are mostly Latin American states. In ideal circumstances, the IACtHR should be considered as exercising its influence on all of the OAS member states. Nonetheless, the United States and Canada have not become parties to the ACHR, only a few Caribbean states have ratified it, and recently Venezuela denounced the treaty.[41]

The IACtHR has however asserted the exercise of its advisory jurisdiction as a way to convey a clear message to all OAS member states, including those who are not parties to the ACHR as will be discussed in detail below. In this quest for a comprehensive and mandatory legal solution, the main underlying feature is the attempt to identify and assert *jus cogens* principles that are binding upon all states and also project a horizontal effect on relations between private parties.[42] Hence, the IACtHR has issued, in particular, advisory opinions affirming principles of international human rights law, such as non-discrimination, equality before the law and *non-refoulement*.[43]

Furthermore, the IACtHR has relied on the horizontal effect or *drittwirkung* theory (that is, fundamental rights should be respected by both the public authorities and by individuals vis-à-vis other individuals),[44] which is re-affirmed in the advisory opinions concerning migrants' rights that are analysed in Section 4. Certainly, one of the issues that repeatedly emerges in the case law concerning migrants is the horizontal effect of human rights provisions.

In sum, the IACtHR's process of evolution has been harnessed through a variety of distinctive tools that have led to a particular scenario. On the one hand, the IACtHR has been eager to reinforce core principles through its decisions and advisory opinions, especially in a fast-fragmenting legal landscape that features increasingly important issues in the protection of human rights. On the other hand, founded by a specific treaty ratified by only certain OAS member states, the IACtHR has been scrambling to involve non-contracting states of the ACHR.

## 3. The protection of refugees, asylum seekers and migrants' rights in the case law of the IACtHR: between idealism and reality

Over the years, the IACtHR has spelt out normative standards for the protection of refugees, asylum seekers and migrants, contributing to regional and international human rights law in a progressive interpretation of human rights treaties.[45] Consequently, the IACtHR has given rise to a significant body of case law through both judgments and advisory opinions, as well as by the adoption of provisional measures aimed at protecting refugees and asylum seekers, extending the protection to all migrants (regardless of their migratory status) particularly those who face collective expulsions. Cantor and Barichello rightly point out that the IACtHR has built up a complementary protection regime in human rights law for persons who have international protection needs despite not being refugees.[46] In exercising its jurisdiction, the IACtHR has adopted inter-American human rights standards on the protection of the right to life, personal integrity, freedom of movement and residence of refugees and asylum seekers as well as undocumented migrants, their families and child migrants.[47]

The main tool used by the IACtHR has been a progressive interpretation not only of human rights treaties but also of other international treaties that might have an impact on the safeguarding of human rights. The Court has operated in two different manners. First and foremost, in the exercise of its contentious jurisdiction it has put forward an evolving and contextual interpretation of human rights instruments while examining cases submitted against state parties to the American Convention. Second, the Court has demonstrated its endeavours to hold other states to account through the adoption of a specific advisory opinion reinforcing the obligations of the states under the ADHR. In brief, the scope of the Court's advisory function comprises not only the states parties to the American Convention but all the OAS member states that have adopted the ADHR, irrespective of whether they have ratified the American Convention, and the organs of the OAS whose sphere of competence relates to the subject matter of the request.[48]

Another development is the *amicus curiae* (friends of the Court) submissions, specifically regarding the protection of refugees, asylum seekers and migrants' rights.[49] The *amicus curiae* briefs of non-governmental human rights organisations have 'demonstrated a clear tendency for liberal interpretation, a position eventually adopted by the Court'.[50]

Advisory Opinion (AO) 18/03, addressing the recognition of undocumented migrant workers' rights in the IAHRS, lies at the centre of this evolution. In this advisory opinion the Court, following the request by Mexico,[51] was called on to determine if a state could justify the denial of labour rights based on migratory status and whether ~~that status~~ the obligation to guarantee and protect human rights and the principle of equality and non-discrimination were to be considered expression norms of *jus*

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*cogens*.[52] More than 50 civil rights, migrants' rights and workers' rights organisations filed *amicus curiae* briefs.[53] This is probably one of the most cited advisory opinions of the Court and represents a significant contribution to the evolution of international human rights law.[54] Nevertheless, AO 18/03 has also stirred controversy about the Court's interpretation of *jus cogens* and *erga omnes* norms, as discussed below.[55]

Acting also within the scope of its advisory jurisdiction, the Court handed down AO 21/14 on the Rights and Guarantees of Children in the context of migration and/or in need of international protection,[56] upon the joint request by Argentina, Brazil, Paraguay and Uruguay which asked the IACtHR to determine the scope of state obligations regarding the rights of child migrants under the ACHR, the ADHR and the Inter-American Convention to Prevent and Punish Torture.[57]

This advisory opinion features several considerations that draw upon the precedents. Specifically, the IACtHR referred to the exercise of its advisory competence clarifying that:

> the broad scope of its advisory function, unique in contemporary international law, owing to which, and contrary to the attributes of other international courts, all the organs of the OAS listed in Chapter X of the Charter and the Member States of the OAS are authorized to request advisory opinions, even if they are not parties to the Convention. Another characteristic of the breadth of this function relates to the purpose of the consultation, which is not limited to the American Convention, but includes other treaties concerning the protection of human rights in the States of the Americas.[58]

Certain core aspects that stem from the Court's rulings in contentious cases and from the AO underpinning the protection of refugees, asylum seekers and migrants' rights that deserve special attention for the present analysis are: the doctrine of margin of appreciation; the nature of *jus cogens* of human rights provisions vis-à-vis refugees and undocumented migrants; the application of the principle of *non-refoulement* in the context of deportations; the consideration given to the vulnerability of the petitioners; reparations in case of violation of refugees, asylum seekers and migrants' rights and the monitoring of compliance with the Court's judgments.

### 3.1. Migrants' rights and margin of appreciation

Unlike in the EHRS, in the IAHRS the doctrine of margin of appreciation has traditionally had less influence.[59] Chiefly, this is due to the lack of express reference to the doctrine in the ACHR or the ADHR. Hence, the scholarship is divided as to the applicability of the doctrine. Núñez Poblete rightly reminds that while some scholars (such as Faundez Ledesma) have admitted that possibility; other doctrinal positions (led by Judge Cancado Trindade) have reduced the sphere of its application.[60] In practice, the broader or limited scope of the margin of appreciation in the IAHRS varies according to the rights protected. Clearly, there is no margin of appreciation possible in cases concerning mass violations of human rights which occurred during dictatorships in different Latin American countries and regarding amnesty laws.[61]

In recent years there have been attempts on the part of American states to affirm the application of the doctrine of the margin of appreciation when implementing their national migration policies. AO 18/03 of the IACtHR confirmed that American states enjoy a certain margin of appreciation while adopting their own migration policy, but

emphatically reiterated that they are bound to respect international human rights law and to observe the principle of equality before the law without discrimination.[62]

In *Haitians and Dominicans of Haitian Descent in the Dominican Republic* (2000), a landmark case in the protection of undocumented migrants, the Court ordered provisional measures to suspend collective expulsions upon the commission's request, granting interim relief to protect specific individuals.[63] On the margin of manoeuvre of the states, the Court determined that, although it is an attribute of the Dominican Republic to adopt sovereign decisions about its immigration policy, these must be compatible with the protection of human rights in light of the ACHR.[64]

Drawing on this previous case relating to the prohibition of collective expulsions as a clear limit to the margin of appreciation, in *Nadege Dorzema et al.* v. *Dominican Republic* (2012) the IACtHR held that the personal circumstances of each individual must be evaluated during deportation proceedings, in compliance with the prohibition of collective expulsions.[65] The Court concluded that in that case there had been a collective expulsion in violation of Article 22(9) of the ACHR, which had been alleged by the petitioners but not by the Commission.[66]

In AO 21/14, the IACtHR took the view that, when a child has a right to nationality or is legally residing in a country, the child's right to family life under the ACHR and the ADHR precludes the possibility that the child's parents will be expelled from the country in question due to immigration offenses.[67] At this point, the Court placed a restriction on states' margin of appreciation as they have the obligation to weigh its legitimate interests against those of the family in the context of each specific case, ensuring 'that the expulsion of one or both parents does not lead to an abusive or arbitrary interference in the family life of the child'.[68] The IACtHR urged American states to consider the immigration history, the duration of the stay and ties of the parent to the host country, the children's nationality, and the harm and disruption of the child's life that would occur if the family were divided 'to weigh all these circumstances rigorously in light of the best interest of the child in relation to the essential public interest that should be protected'.[69]

### 3.2. Jus cogens *norms and* erga omnes *obligations*

As a way of reaching out to all the American states regardless of their acceptance of the IACtHR's jurisdiction, the Court has heavily relied (with more or less success) on the identification of *jus cogens* norms and *erga omnes* obligations. Turning to the issue of *jus cogens* norms, in AO 18/03 the IACtHR submitted that the principle of non-discrimination and equal treatment belongs to *jus cogens*,[70] being thus 'applicable to all States, regardless of whether or not they are a party to a specific international treaty'.[71] Moreover, the Court took the view that this principle entails obligations *erga omnes* that apply to third parties, including states and individuals.[72]

The IACtHR discussed in detail the norms of international human rights law applicable to migrant workers, particularly the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW), identifying the principles in the light of which the status and the entitlement of rights of undocumented migrant workers should be considered. Furthermore, the IACtHR went on specifically to mention several labour rights that must be guaranteed to international migrant workers regardless of their immigration status, such as: the prohibition of forced labour; the

prohibition of child labour; special care for women workers; freedom of association and to organise and join a trade union, collective negotiation; fair wages for work performed; social security; judicial and administrative guarantees; a working day of reasonable length with adequate working conditions (safety and health), rest and compensation.[73]

In her study about the process leading to the adoption of AO 18/03, Beth Lyon submits that the IACtHR developed a non-discrimination balancing test, 'favoring parity of protection for unauthorized workers' based on their vulnerability.[74] At the same time, as a main criticism, she considers that even if the IACtHR mentioned several economic, cultural and social rights, there was not real upholding of such rights.[75]

In *Expelled Dominicans and Haitians* v. *Dominican Republic* (2014), the Court addressed the prohibition of non-discrimination as a *jus cogens* norm in the context of arbitrary detention and summary expulsion by the Dominican Republic of Haitians and Dominicans of Haitian descent, including children.[76] The IACtHR found that 'there were a number of impediments to how Haitian migrants could enrol their children born in Dominican territory' and to obtain Dominican citizenship by persons of Haitian descent born in the Dominican Republic, in contravention of American Convention and Recommendation 10 of the United Nations Committee on the Elimination of Racial Discrimination.[77]

Notably, one of the main controversial issues regards the IACtHR's position on *jus cogens* (or peremptory norms) and *erga omnes* obligations, that is, obligations which are the concern of all states (a concept introduced by the International Court of Justice in the 1970 *Barcelona Traction* case).[78] As Michael Byers contends, although *jus cogens* norms possess *erga omnes* effects, not all norms having an *erga omnes* effect belong to *jus cogens*.[79] There is also a long-held discussion amongst international law scholars as to the ways of creating *jus cogens* norms. De Wet argues that the IACtHR seems to have relied on natural law to uphold the 'universal acceptance' of the prohibition of discrimination.[80] It appears that whereas most of the international law scholarship sides with a more voluntarist approach (that is, *jus cogens* norms produced though customary law), following the IACtHR's position, *jus cogens* norms would derive from natural law principles. This brings us back to the issue of regional consent and to the effectiveness of *jus cogens* norms in the IAHRS. As De Wet rightly concludes 'practice has illustrated that the recognition of the peremptory status of a particular norm is no guarantee for effective enforcement of the norm and the values it represents'.[81] This controversy is further developed in section 4.

### 3.3. Non-refoulement *and procedural guarantees in cases of expulsion: the inter-American way*

Historically, the IACtHR has followed in the footsteps of the ECtHR in affirming the *non-refoulement* principle, that is, 'no one can be sent back to where they would face torture or human or degrading treatment or punishment contrary to article 3 of the ECHR'.[82] The application of this principle implies the prohibition of the expulsion or forced return ('refoulement') of a refugee to a country 'where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion'.[83] This principle has been recognised at international and at regional level in different human rights treaties.[84] Under the ECHR the principle does not admit

exceptions on grounds of public order or national security, initially allowed by article 33 of the 1951 Geneva Convention. At present, it can be said that there are conclusive arguments for considering the *non-refoulement* principle as part of customary international law.[85] In the context of immigration, the principle of *non-refoulement* implies the immediate verification (before removal) of whether the individual has the right to file an application to determine refugee status or to apply for complementary protection.[86]

In recent years, the IACtHR has generated a number of cases relating to procedural guarantees in the context of deportations upholding the protection of the principle of *non-refoulement*, widening the scope of protection accorded by the 1951 Geneva Convention.[87] As Cantor and Barichello explain, 'the Inter-American system has also developed a range of specialised human rights-based protections against removal to harm that are "complementary" to those that exist in international refugee law' and that are 'often termed "non-refoulement" in the literature'.[88]

Accordingly, in *Vélez Loor* v. *Panama* (2010),[89] a case involving the deportation of an Ecuadorian citizen by Panama's authorities after being allegedly tortured during his detention, the Court asserted that the state had violated the petitioner's rights to access to justice, personal liberty and freedom.[90] In *Pacheco Tineo Family* v. *Bolivia* (2013), the question at issue was the violation of the right to seek and be granted asylum, of the *non-refoulement* obligations and of the due process guarantees.[91] The highlight of the case is the IACtHR's interpretation of Article 22.8 of the ACHR, which prohibits the expulsion or return of any

> alien to a country, regardless of whether or not it is his country of origin (…) if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.[92]

In AO 21/14 the IACtHR acknowledged that in 'situations of a mass influx of persons', individual determination may be impracticable, but even in these cases, states should guarantee access to 'protection from *refoulement*, and basic humanitarian treatment'.[93] The requesting states specifically asked the IACtHR to provide its opinion on the procedures necessary to identify the needs of child migrants and child refugees; procedures used to assess requests for asylum or recognition of refugee status; the span of the principle of *non-refoulement* and the due process guarantees governing immigration proceedings, amongst other basic guarantees.[94] As for the principle of *non-refoulement*,[95] the IACtHR affirmed its nature as a *jus cogens* norm of customary international law legally binding on all states, which must implement positive measures to guarantee it.[96]

Henceforth, the Court widened the scope of the principle of *non-refoulement*, upholding the right of any alien (not only refugees) not to be returned when his or her life, integrity and/or freedom are at risk of being violated, without taking into account the person's legal status or migratory condition in the country where he or she is staying.

### 3.4. The vulnerability of the right-holder and the special protection granted to child migrants and refugees

In the protection of migrants' rights the vulnerability of the victims as right-holders constitutes a central element in the jurisprudence of the IACtHR. Although the ECtHR has also referred to the question of the vulnerability in alike cases, the manner in which the

concept is construed in the inter-American system has particular imprints, as appreciated in specific rulings.

At the outset, it should be noted that the concept of vulnerability in international human rights law remains vague. As argued by Peroni and Timmer, the concept has different meanings. For the purpose of this article the notion of human vulnerability is based

> on four assumptions: the inescapable vulnerability of human beings as embodied agents; the resultant dependency of humans on each other (…); the general reciprocity and social interconnectedness of the live world; and finally, the inevitable precariousness and fragility of social institutions.[97]

The protection of vulnerable groups has been referred to by the ECtHR in cases concerning asylum seekers and the situation of undocumented migrants according to Beduschi 'as one of the criteria allowing for the interpretation of ill-treatment under Article 3 of the ECHR' in cases like *Mubilanzila Mayeka and Kaniki Mitunga* v. *Belgium*, *Hirsi Jamaa and Others* v. *Italy* and *V. M. and others* v. *Belgium*.[98]

Before the IACtHR, the vulnerability of the victims has been relied upon to determine the violation of rights and the extension of the reparations. Precisely, in AO 18/03 the IACtHR based its legal reasoning on the vulnerability of undocumented migrants, emphasising that they are often victims of trafficking, discrimination and xenophobia because of their status and their lack of entitlement to basic rights. The IACtHR asserted that the irregular status of an individual cannot deprive him or her of the entitlement and exercise of fundamental rights (including the right to due process) granted in the ACHR and other international instruments, confirming previous case law.[99]

In the exercise of both adjudicatory and advisory jurisdiction, the IACtHR had to confront the complex question of the protection of child migrants, an area where severe cases of violation of human rights occur.[100] Again, the question of vulnerability is placed at the centre of the Court's analysis for it to lay down a specialised subset of normative standards aimed at protecting child migrants. Hence, in the landmark *Case of the Girls Yean and Bosico* v. *Dominican Republic* (2005) the IACtHR granted protection to two children born to Haitian parents in the Dominican Republic, whose immigration status was questioned by the Dominican authorities.[101] Before the IACtHR, the petitioners alleged that the Dominican Republic had denied Dominican nationality to children born on its soil even though the Dominican constitution is governed in this matter by the principle of *jus soli* and refused to register the children, because at their births their parents were present in the Dominican Republic as undocumented migrants and lacked the necessary documents to enrol them.[102] As a result, the children's legal condition was that of undocumented migrants subject to deportation.

What is relevant here is the technique used by the Court to grant protection to the children at risk. The IACtHR referred to the vulnerability of the two girls, describing their situation as a 'legal limbo', since they were stateless and at risk of being deported and separated from their families. In an innovative manner, the Court referred to the UN Convention against Statelessness as an interpretative tool, even though the Dominican Republic is not party to it.[103] The Court went on to assert that the right to a basic education must be guaranteed to all children regardless of their status, aligning the protection with the progressive development clause proclaiming that

> in the light of the Convention on the Rights of the Child and the Additional Protocol to the American Convention on Human Rights on Economic, Social and Cultural Rights, in relation to the obligation to ensure progressive development contained in Article 26 of the American Convention, the State must provide free primary education to all children in an appropriate environment and in the conditions necessary to ensure their full intellectual development.[104]

Building on AO 17/02 on the Juridical Status and Human Rights of the Child,[105] the IACtHR upheld the principle of non-discrimination and the superior interest of the child as core elements for the protection of child migrants. Specifically, it found that the Dominican Republic had discriminated against minors by denying them citizenship because of their Haitian background, acting 'arbitrarily, without using reasonable and objective criteria, and in a way that was contrary to the superior interest of the child'.[106] Moreover, the IACtHR explained that 'the obligation to respect and ensure the principle of the right to equal protection and non-discrimination is irrespective of a person's migratory status in a State'.[107]

Particularly, in AO 21/14 the request focused on the vulnerability of child migrants leaving Latin America and the Caribbean, underlying that both irregular migrants and children 'require (…) a special commitment on the part of states' taking into consideration the 'prevailing detention, criminalization, and treatment of child migrants'.[108]

In tackling the points raised in the request, the Court indicated that the ACHR and the ADHR oblige states to articulate initial evaluation processes to identify and address the individualised needs of child migrants to define the child's age, nationality, whether the child is unaccompanied or separated from its family, the reasons for the child's departure, and if the child needs international protection or special measures for protection.[109] Specifically referring to asylum seekers, the IACtHR held that states have a duty to 'provide children with real access to these procedures'.[110] These measures should include not impeding the child's entry into the country, giving individuals access to the entities that can determine their status, priority processing for children, health evaluations, examinations conducted in a manner that does not re-traumatise the child, providing accommodation, issuing an identity document to avoid return, and assigning an independent and trained guardian to the case.[111]

The IACtHR went on to set several standards of protection and to assert based on their vulnerability that states may not place child migrants in detention as a precautionary measure for solely 'migratory reasons' (a right which also extends to their families), since this constitutes an arbitrary deprivation of liberty against the ACHR and the ADHR.[112] In the Court's view, as a general rule the state has the duty to separate children from adults in accommodation centres, states should allow entry and exit and must provide housing, medical care, legal assistance, educational support, and specialised care to the children.[113]

In terms of procedural guarantees, the Court determined that the American Convention and Declaration require states to observe special guarantees of due process for children in migratory proceedings,[114] and that the decisions adopted must be in the child's best interest.[115]

### 3.5. Defining new forms of reparation and improving compliance

These are two interrelated aspects which hold the key to achieving the effectiveness of the judgments and to improving refugees' and migrants' lives. Notably, reparations represent

the crucial aspect in recent contentious cases relating to the protection of asylum seekers', refugees' and migrants' rights.[116] Adding to the traditional forms of reparations, the IACtHR has been innovative ordering concerned states to take different reparation measures. As Grossman et al. underline, the Court, through the 'creative' interpretation of Article 63 of the ACHR, has developed within the limits of its jurisdiction the law of reparation to include 'material and moral damages, symbolic measures of redress, as well as legislative changes when needed'.[117]

In *Velez Loor* v. *Panama*, the upshot of the ruling is that the IACtHR took on a panoply of reparation measures ordering the state in question to provide medical and psychological treatment; publish the judgment; investigate acts of torture and identify, prosecute, and punish those responsible; separate inmates imprisoned for immigration violations from those imprisoned for criminal offenses; bring prisons into compliance with international standards; train government officials; and ensure that immigration laws conform to the ACHR.[118] In *Pacheco Tineo* the IACtHR ordered measures such as to pay compensation to the petitioners, to publish the judgment and implement permanent training programmes directed towards government agents and officials who due to their functions might have contact with migrants and asylum seekers.

Whilst this ample catalogue of reparation measures may be perceived as progress by the petitioners, the non-compliance with the IACtHR rulings still constitutes the Achilles' heel of the system. In the Strasburg system the supervision of the execution of the judgments falls within the Parliamentary Assembly's functions, in the IAHRS the commission and the Court are in charge of monitoring compliance.[119]

In the IAHRS, domestic constraints related to the particular legal environment in which judgments need to be implemented are evident. Space precludes the author from a detailed and thorough analysis of the factors that may hinder the successful application of the rulings. Just to mention the most important from a purely legal perspective: compliance with the rulings depends on the particular approach to inter-American human rights law taken in the constitution. More broadly, Beduschi refers to the political and economic context of the contracting states as main factors behind the lack of compliance with the IACtHR's rulings.[120] However, generalisations are risky in this regard and may depict a distorted scenario as some contracting states are successfully implementing the Court's rulings. To illustrate, Baillie highlights that the 2001–2006 statistics (compiled by Basch et al.) show 47% compliance of victim-oriented reparations ordered (approximately 61% of the total) in countries from Argentina to Venezuela; whereas there was 24% compliance of the measures ordering an investigation of the violations (accounting for 15% of the total), except in the case of Mexico which complied with 67% of the orders to investigate and punish.[121] Compliance, therefore, is fragmented and depends on the type of measure ordered.

The IACtHR has tried to mitigate this circumstance by introducing the supervision of the judgments, allocating the task to a unit within the Court .[122] By using this method, the Court can guarantee the effectiveness of the rulings determining the degree of compliance with the judgment.[123] For instance, in the Court's report on the monitoring of compliance with the *Pachecho Tineo* judgment issued in 2015, the IACtHR established that Bolivia had completely fulfilled the obligations imposed.[124] The judgment in *Bosico* was monitored on several occasions (2007, 2009, 2010, 2011). This demonstrates that, at the stage of enforcing final decisions and judgments, the Court has substantially expanded

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its supervisory role ensuring that the judgments (which are legally binding on the parties) are complied with.[125]

Overall, it is clear from an assessment of the IACtHR's role in the safeguarding of migrants' rights that the Court has contributed very significantly to the standards incorporating the international *corpus juris* applicable to refugees, asylum seekers and migrant persons. The Court has defined international protection as the

> protection that a state offers to a foreign person because, in his or her country of nationally or habitual residence, that individual's human rights are threatened or violated and she or he is unable to obtain due protection there, because it is not accessible, available and/or effective.[126]

In asserting migrants' rights, the IACtHR has relied not only on the ACHR, but also on the Protocol of San Salvador on Economic, Social and Cultural Rights and other treaties that may have an impact on the protection of human rights. Against this background, the IACtHR stressed that states are bound to implement measures within domestic law that promote the well-being and development of child migrants.[127] Although problems in the implementation of judgments continue to be the main obstacle to their effectiveness, these judgments are now the object of ad hoc monitoring by the IACtHR. The new follow-up process regarding the implementation of the IACtHR's judgments in the domestic jurisdiction may strengthen the protection provided to migrants, ultimately by placing public pressure on those states found responsible of violations under the IACHR and the ADHR.[128]

## 4. Discussion: is the IACtHR suffering from growing pains?

In more than 30 years of evolution, the IACtHR has not only aided the democratisation of most Latin American states but also at present addresses the protection of social, economic and cultural rights. As a result of this evolution, when looking back over the different cases brought before the IACtHR, it is clear that the IACtHR has built up and enriched its legal arguments when protecting refugees, asylum seekers and migrants' rights according to the standard of 'vulnerability', which is defined by the particular situation of the right-holder (see the discussion in section 3 above). Notably, the protection of migrants' rights in the case law of the IACtHR unveils several key aspects in the evolution of the judicial mechanism.

The first crucial aspect in the protection of migrants involves the judicial dialogue processes in place, comprising the inter-regional dialogue (or horizontal dialogue) with the ECtHR and the vertical dialogue with the supreme and constitutional courts of the state parties to the ACHR.

As regards the interaction between regional human rights courts, the ECtHR has referred to the IACtHR's early landmark cases, that is, *Velásquez Rodríguez*, *Caballero Delgado*, *Villagran-Morales* on procedural issues (such as no retroactivity); human right standards[129] and other substantial aspects.[130] Nonetheless, perfect reciprocity does not exist, because the relationship is still unbalanced, as the IACtHR tends to rely more on its European counterpart than the other way around.[131] In addition, a more nuanced analysis is in order, as there are regional particularities.

The two regional human rights courts have converged in upholding certain principles that might constitute *jus cogens* as observed in the protection of 'core human rights', such

as the right to life.[132] For instance, the ECtHR cited the Advisory Opinion on the Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law concerning the implication of the guarantees of a fair procedure for Article 4 of the American Convention on Human Rights. In particular, regarding migrants' rights in *Hirsi Jamaa and Others* v. *Italy* before the ECtHR, the ruling on *Expelled Dominicans and Haitians* regarding the prohibition of collective expulsions was quoted in the Concurring Opinion of Judge Pinto de Alburqueque as follows:

> The due procedure provision of Article 4 of Protocol No. 4 is of much broader personal scope than the one provided for in Article 1 of Protocol No. 7, since the former includes all aliens regardless of their legal and factual status, and the latter includes only aliens lawfully resident in the expelling State.[133]

From a related perspective, one of the features predominant in the evolution of the IACtHR jurisprudence is that the Court is setting international standards and consolidating customary international law rules on a universal level as observed in recent contentious cases and advisory opinions. There is a confluence in the protection of migrants regarding particular issues, such as the prohibition of collective expulsions and the protection of children and unaccompanied minors. Put differently, both courts are forging the emergence of common universal standards contributing, in particular, to the codification of the 'ius migrandi'[134] in the case of the prohibition of collective expulsions.[135]

Concerning the protection of refugee children in the ECtHR's recent ruling in *Abdullahi Elmi and Aweys Abubakar* v. *Malta*, judge Pinto de Albuquerque's Separate Opinion[136] cited *Vélez Loor* and *Pacheco Tineo* as examples of a growing practice to protect migrants[137] in the event of mandatory detention of irregular migrants by ordering the states to verify, through an individualised evaluation, 'the possibility of using less restrictive measures'.[138] On the criminalisation of the migrants (crimmigration), Judge Pinto made also a reference to IACHR Resolution 03/08, citing that 'international standards establish that detention must be applied only as an exceptional measure and after having analysed the necessity in each case'.[139]

Beyond the EHRS and the IAHRS, a brief note on the practice of the African System of Human Rights (ASHR) is in order, as the ASHR has contributed a growing body of jurisprudence in the field.[140] The African Commission of Human Rights has addressed the protection of refugees (particularly of asylum-seeking women and children) in several cases applying the African Charter on Human and Peoples' Rights and the 1969 Convention Governing the Specific Aspects of Refugee Problems. However, there are obstacles in the submissions of complaints as Bekker underlines

> a distinction appears to be drawn between cases where an individual filing an application has been granted refugee status and those where the complainant is merely an asylum seeker, seeking redress against the country from which they had fled. In the latter case, the Commission appears to be reluctant to apply the constructive exhaustion of domestic remedies principle.[141]

This circumstance has reduced the number of petitions declared admissible. While the implementation of the commission's decisions is seen as a major pitfall of the ASHR, there are hardly any cases concerning refugees' rights brought before the African Court of Human Rights.[142] Even though there is no proper judicial dialogue established yet between the IAHRS and the ASHR, there is a convergence in the practice of regional

human rights bodies, for instance in the use of vulnerability as a tool to uphold the protection.

The other type of dialogue that the IACtHR entertains with supreme and constitutional courts consists of a process of a vertical dialogue or convergence that has been boosted through two mechanisms referred to previously, namely, the conventionality control and the consistent interpretation. In the field of migrants' rights, these two mechanisms are newly being introduced. The articulation of both mechanisms has had a deep impact on the manner in which the IACtHR is perceived by national courts and has paved the way for a more constructive relationship. As argued by Negishi, the *pro-homine* principle has played a significant role in articulating this judicial dialogue as domestic courts have to follow the most favourable interpretation when applying inter-American human rights law.[143] The IACtHR's rulings on migrants' rights cases can provide important clarity and guidance for domestic courts in future proceedings. These are the two main significant developments of inter-American human rights law that should be carefully appraised.

The control of conventionality and consistent interpretation appear straightforward: they reduce the room for manoeuvre of national courts and, at the same time, foster their active role in the building of the IAHRS.[144] Although charming in principle, these doctrines and the idea of a 'bottom up' judicial construction of the inter-American human rights legal system, as proposed by Dulitzky, may turn out to be a double-edged sword, especially taking into account two circumstances.[145] First, certain member states' high courts have being reluctant to follow inter-American case law reaffirming the doctrine of the margin of appreciation.[146] Second, it could then be problematic if a conflict arises between constitutional law and the IACHR and the national judge gives primacy to the latter, in which event ultimately the states' consent will prevail.[147]

In an assessment of the relations between the two main IAHRS bodies in the matter of migrant rights, three types of interaction have occurred. Two of them are the traditional requests for the adoption of provisional measures and the referral of cases to the Court. There is, to a certain extent, tension between the two bodies in asserting superiority in the exercise of the protective function. Evidently the IACtHR is still seen by certain member states as a 'fastidious watchdog' of domestic legal systems,[148] which may impede the implementation of provisional measures or final judgments.[149] Despite the disagreements between the IACtHR and the IACHR, one needs to bear in mind that, ultimately, inter-American human rights bodies are carrying all of the heavy tasks of promoting and protecting human rights. As Pascqualucci recalls, there is a lack of support on the part of the political organs to exert pressure on states to assure compliance with international and regional human rights law.[150]

In terms of building a body of jurisprudence on migrants' rights in inter-American human rights law, AOs 18/03 and 21/14 are regarded as masterpieces. In the IACtHR's view, these advisory opinions are not only addressed to American states: they purport to reflect principles of international human rights law belonging to *jus cogens*. AO 18/03 evidences the crystallisation of *jus cogens* norms, such as non-discrimination. In the last advisory opinion on child migrants, the IACtHR reaffirmed that, through advisory opinions it can reach states that are not parties to the pact. This is a subtle way to circumvent the jurisdictional problems, notably, that apart from Latin American states, the Caribbean states have scarcely recognised the Court's jurisdiction, and Canada and the United

States are not under the contentious jurisdiction. Referring to the *jus cogens* nature of the norms, Judge Cançado Trindade reaffirmed that

> the State cannot avail itself of the fact of not being a Party to a given treaty of human rights to evade the obligation to respect the fundamental principle of equality and non-discrimination, for being this latter a principle of general international law, and of *jus cogens*, which thus transcends the domain of the law of treaties.[151]

On the other hand, such states can simply ignore the IACtHR advisory opinions, which may make the IACtHR a paper tiger.

The IACtHR has signalled a clear turn from the past in the application of the *drittwirkung* theory by underlying the emergence and the scope of the obligations of protection *erga omnes* (in their horizontal and vertical dimensions).[152] Judge Cançado Trindade pointed out: 'The State is bound by the corpus juris of the international protection of human rights, which protects every human person *erga omnes*, independently of her statute of citizenship *(sic),* or of migration, or any other condition or circumstance' being binding on 'the public power and likewise to the private persons or individuals (e.g. employers), in the inter-individual relations'.[153]

Furthermore, in AO 21/14, the IACtHR held that

> Article 5 of the American Convention, read together with the obligations *erga omnes* to respect and ensure respect for the norms that protect human rights, reveals the obligation of the State not to deport, return, expel, extradite, or remove in any other way to another State a person who is subject to its jurisdiction, or to a third State that is unsafe, when there are grounds for believing that they would be in danger of being subjected to torture, or cruel, inhuman or degrading treatment.[154]

This particularly profuse manner of endorsing the peculiar characteristic of peremptory norms of international law by the IACtHR has attracted criticism in the international law scholarship. Referring to AO 18/03, Bianchi has warned of the risks of this 'somewhat axiomatic reasoning of the Court, linked with fairly vague notions of natural law (…) unlikely to foster the cause of *jus cogens*, particularly among the sceptics'.[155]

Notwithstanding this criticism in the international law scholarship, in AO 21/14, the IACtHR took a more cautious approach to *jus cogens*, referring to it only when mentioning two central principles for the protection of migrants' rights: the 'peremptory prohibition contained in customary international law of torture and cruel, inhuman or degrading treatment or punishment'[156] and the principle of 'non-return or non-refoulement'.[157]

As can be appreciated, with regard to the treaty interpretation in cases dealing with migrants' rights, the IACtHR has used the various methods encompassed in both article 31 of the VCLT and article 29 of the ACHR to extend the scope of protection. The judgments are imbued with a sense of social justice and equality that permeates the legal reasoning and indicates that the inter-American human rights law has experienced a transition. *Amicus curiae* briefs have also contributed to develop the IACtHR's legal reasoning. Even if the IACtHR is eager to embrace an expansive interpretation, however, there are constraints.

Thus, the IACtHR has alternated between two main conceptions: the voluntarist paradigm of state-based international law and the new *jus gentium* that reaffirms the ideal of justice based on general principles of law. As Hennebel points out: 'Cançado Trindade drew up the equations which governed the construction of the new *jus gentium*'.[158]

Whereas the 'consensus theory' has gained considerable support with scholarly works like Neumann's, which advocates in its favour, there are some alarming factors observed in the practice of the European human rights system, the doctrine of the margin of appreciation has been widely accepted. As Benvenisti rightly states, there is a risk that 'universal aspirations are, to a large extent, compromised by the doctrine of margin of appreciation'.15 In the inter-American system its use has been less fre-quent except in the field of migrant rights, in which a clear vindication of the right to a certain margin of manoeuvre on the part of the state parties is more evident.

In sum, the IACtHR seems to be perilously juggling different methodological approaches in its rulings without being fully aware of the unintended consequences. A more cautious approach is in order. Rather than looking at the IACtHR's methodology through rose-tinted lenses, embellishing the analysis with fancy adjectives, its practitioners/proponents should conclude that its maturity also requires developing a more conscious jurisprudential approach.

## 5. Conclusions

The analysis of the evolution of the IACtHR's case law demonstrates that the specialisation of the IAHRS has been based on the protection of migrants as a vulnerable group. This evolution has been fostered by the judicial dialogue between the IACtHR and the ECtHR, in which the ECtHR has at times drawn innovative insights from the jurisprudence of its counterpart, for example on procedural issues such as no retroactivity, or the right to a fair procedure during collective expulsion. Moreover, progress has also been advanced by the judicial dialogue with the supreme and constitutional courts of the contracting states, which has enabled constructive relationships and has provided clarity and guidance for domestic courts in future proceedings. Other regional human rights systems, such as the African model, could profit from these insights. This analysis also reveals that relations between the two main inter-American human rights bodies are complex and multifaceted.

In this recent and ongoing progress, the case law of the IACtHR relating to the protection of migrants' rights reflects the adoption of distinctive and important minimum standards for the protection of migrants regardless of their legal status. This set of basic human rights comprises such rights as the right to life, security of person, and procedural guarantees. In addition to safeguarding the exercise of fundamental rights in the case of undocumented migrants as shown through AO 18/03 and in the case of *Dilcia Yean and Violeta Bosico* v. *Dominican Republic*. Undoubtedly, the IACtHR has played a significant role in the expansion of the protection providing new grounds to upholding undocumented migrant workers' rights. The entitlement to certain economic, social and cultural rights has been endorsed by the Court, even though there is a twilight zone in which the entitlement to certain rights is still disputed.

The maturity of the Court is evident in this field. The case law demonstrates that the Court has extended the original scope of protection of undocumented migrants by relying on the evolving interpretation of the ACHR; one can conclude furthermore that there is continuity in building up a corpus of jurisprudence. Lessons may be learned for other regional systems. In particular, the introduction of a specific mechanism to assess compliance or non-compliance may be useful for other regional human rights systems

(such as the African one) to overcome difficulties experienced in this regard. One outstanding issue remains, however. There is the question of the interrelations between the Court's judgments and the moral force of the advisory opinions: although the Court has attempted to give teeth to the advisory opinions by reaffirming their binding nature, they are still considered by certain OAS member states as merely recommendatory.

The IACtHR has gradually developed its jurisprudence through its body of case law, aiming to bring new jurisprudential principles to bear upon the protection of migrants, broadening its mandate, and increasing the synergies with the IACHR. In doing so, the IACtHR has been progressively extending the scope of protection, but it must be acknowledged that the IACtHR is also facing growing pains. There are relevant contentious cases that are not brought before the IACtHR and, despite its tremendous efforts in applying the principles embodied in the advisory opinions, serious doubts remain in terms of some of the approaches taken, particularly with regard to the assertion of *jus cogens* as examined above. In a realistic appraisal of the system, the IACtHR (without restraining itself) could take account of the progress attained and adopt a more cautious and reasoned justification towards *jus cogens* norms in order to remain true to its mission.

Meanwhile, however, its distinctive achievements will be of interest to jurists in other human rights systems, not only to those working in the fields of undocumented migrant protection but also to all those interested in the evolution and expansion of core principles for the protection of fundamental human rights.



## Notes

1. American Convention on Human Rights, signed on 22 November 1969, in force since 18 July 1978. As of 9 August 2016, of the 35 states which make up the OAS, 23 are parties to the ACHR and 21 have accepted the Court's jurisdiction. This article summarises and develops the outcomes of the research project carried out at the European University Institute (EUI) in 2007–2009. Previous versions of the article were presented at the Advanced Seminar on International Human Rights Law organised in autumn 2007 and at the Max Weber lecture 'What Rights Are Illegal Migrants Entitled To?' held in February 2008. I am thankful to Professor Francesco Francioni for his mentorship and Professor Pierre M. Dupuy for his comments. Sections 3 and 4 develop the ideas put forward in the EUI Working Paper 2009/03 'The Rights of Undocumented Migrants in the Light of Recent International Practice in Europe and America' and were discussed at the Seminar 'Who Believes in the Human Rights of Migrants' convened by Marie Dembour and Tobias Kelly on 7–8 May 2009 at the International Institute for the Sociology of Law in Oñati (Spain). I would like to thank Professor Cesare Romano, the Loyola Law Clinic and the colleagues involved in the presentation of the amicus in *Nagede Dorzema* and Professor Eyal Benvenisti for hosting me at the Lauterpacht Centre for International Law (University of Cambridge) from April–June 2016. All errors remain mine.
2. IACtHR, *Velásquez Rodríguez* v. *Honduras*, Judgment of 29 July 1988. Dinah Shelton, 'The Jurisprudence of the Inter-American Court of Human Rights', *American University International Law Review* 10, no. 1 (1996): 333.
3. Protocol of San Salvador on Economic, Social and Cultural Rights, signed on 17 November 1988, in force since 16 November 1999. Shelton, 'The Jurisprudence', 334.
4. The terms have different meanings and imply different legal regimes. As for refugees, defined as 'people fleeing conflict or persecution' they are protected by the 1951 Refugee Convention and its 1967 Protocol which constitute the main legal framework as well as other regional instruments such as the 1969 OAU Refugee Convention or the 1984 OAS Cartagena Declaration on Refugees. Migrants are people who 'choose to move not because of a direct threat of

persecution or death, but mainly to improve their lives by finding work, or in some cases for education, family reunion, or other reasons' and are protected by customary international law and regional human rights instruments. See UNHCR, '"Refugee" or "Migrant" – Which is Right?', http://www.unhcr.org/uk/news/latest/2016/7/55df0e556/unhcr-viewpoint-refugee-migrant-right.html. In turn, the International Convention on Migrant Workers defines a migrant worker as 'a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national' (art 2.1).

5. Tania Groppi and Anna Maria Lecis Cocco-Ortu, 'Las referencias recíprocas entre la Corte Europea y la Corte Interamericana de Derechos Humanos: ¿de la influencia al diálogo?', *Revista de Derecho Político* 91 (2014): 183. See Lucas Lixinski, 'Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law', *European Journal of International Law* 21, no. 3 (2010): 585.
6. The literature on the Inter-American System of Human Rights is abundant, for an overview of the Inter-American Court of Human Right see generally Jo Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights*. 2nd ed. (Cambridge: Cambridge University Press, 2013).
7. IACHR, Rules of Procedure of the Inter-American Commission on Human Rights. Approved by the Commission at its 137th regular period of sessions, held from 28 October to 13 November 2009, and modified on 2 September 2011 and during the 147th Regular Period of Sessions, held from 8 to 22 March 2013, for entry into force on 1 August 2013.
8. The American Declaration of the Rights and Duties of Man was adopted by the Ninth International Conference of American States in 1948.
9. Laurence Burgorgue-Larsen and Amaya Ubeda de Torres, *The Inter-American Court of Human Rights. Case Law and Commentary* (Oxford: Oxford University Press, 2011), at 11.
10. Fabián Salvioli, 'Un análisis desde el principio pro persona, sobre el valour jurídico de las decisiones de la Comisión Interamericana de derechos humanos', in *En defensa de la Constitución: libro homenaje a Germán Bidart Campos* (Buenos Aires, Argentina: Ediar, 2003), 143–55. See also Mónica Pinto, 'The Role of the Inter-American Commission and Court of Human Rights in the Protection of Human Rights: Achievements and Contemporary Challenges', *Human Rights Brief* 20 (2013): 34.
11. Protocol No. 16 to the Convention on the Protection of Human Rights and Fundamental Freedoms, signed on 2 October 2013.
12. ACHR, article 61.1: 'Only the States Parties and the Commission shall have the right to submit a case to the Court.'
13. Advisory Opinion 1/82, *Otros tratados*, 24 September 1982.
14. Shelton, 'The Jurisprudence', at 333–72.
15. See the early landmark cases: *Viviana Gallardo*, Advisory Opinion 101/81 (1984); *Velásquez Rodríguez* v. *Honduras* (n. 2); *Godínez Cruz*, Judgment of 20 January 1989; *Fairén Garbi and Solís Corrales*, Judgment of 15 March 1989.
16. Lixinski, 'Treaty Interpretation', 490.
17. Burgorgue-Larsen and Ubeda de Torres, 'The Inter-American Court', at 11 and 19.
18. IACtHR, *Tradesmen* v. *Colombia*, Judgment of 5 July 2004 at para. 173. See also Luigi Crema, 'Disappearance and New Sightings of Restrictive Interpretation(s)', *European Journal of International Law* 21, no. 3 (2010): 681.
19. *Viviana Gallardo*, para. 16.
20. Pasqualucci, *The Practice and Procedure*, 12.
21. Gerald L. Neuman, 'Import, Export, and Regional Consent in the Inter-American Court of Human Rights', *European Journal of International Law* 19, no. 1 (2008): 101, at 102.
22. Ibid., 108.
23. Ibid.
24. Anne-Marie Slaughter, 'A Typology of Transjudicial Communications', *University of Richmond Law Review* 29 (1994): 99. See, also, Groppi and Lecis Cocco-Ortu, 'Las referencias recíprocas', 183.

25. María Belén Olmos Giupponi, 'Avances recientes del Sistema Interamericano en la protección de los derechos de los migrantes', *Revista de derecho migratorio y extranjería* 24 (2010): 249–74.
26. Marie-Bénédicte Dembour, *When Humans Become Migrants. Study of the European Court of Human Rights with an Inter-American Counterpoint* (Oxford: Oxford University Press, 2015), 5.
27. Ibid., 7.
28. Ariel Dulitzky, 'La aplicación de los tratados sobre derechos humanos por los tribunales locales: un estudio comparado', in *La Aplicación de los Tratados sobre Derechos Humanos por los tribunales locales*, ed. Abregú and Courtis (Buenos Aires: Del Puerto, 2004) 33.
29. Eduardo Ferrer Mc Gregor, 'Interpretación conforme y control difuso de convencionalidad. El nuevo paradigma para el juez mexicano', *Estudios Constitucionales* 9, no. 2 (2011): 531–622.
30. IACHR, *Control de Convencionalidad, Cuadernillo de Jurisprudencia de la Corte Interamericana de Derechos Humanos N° 7* (San Jose: IACtHR 2015). http://www.corteidh.or.cr/tablas/r33825.pdf. See Ariel Dulitzky, 'An Inter-American Constitutional Court? The Invention of the Conventionality Control by the Inter-American Court of Human Rights', *Texas International Law Journal Volume* 50, no. 1 (2015): 46.
31. IACtHR, *Almonacid Arellano et al.* v. *Chile*, Judgment of 26 September 2006.
32. Eyal Benvenisti and George W. Downs, 'National Courts, Domestic Democracy, and the Evolution of International Law', *EJIL* 20, no. 1 (2009): 59–72, at 65.
33. On the ECtHR margin of appreciation doctrine see Andrew Legg, *The Margin of Appreciation in International Human Rights Law. Deference and Proportionality* (Oxford: Oxford University Press, 2012). The doctrine was preceded by the *Lawless* case and geared in *Handyside*.
34. Benvenisti and Down, 'National Courts, Domestic Democracy', 70.
35. Neuman, 'Import, Export, and Regional Consent', 103. To support his arguments, Neuman mentions cases such as the *Five Pensioners Case*, Judgment of 28 February 2003, paras 146–8 (rejecting the commission's claim that reduction in pensions violated ACHR Article 26).
36. OAS Resolution 1/2013 – Reform of the Rules of Procedure, Policies and Practices.
37. IACHR, Rules of Procedure, article 25. 5. 'Prior to the adoption of precautionary measures, the Commission shall request relevant information to the State concerned, except where the immediacy of the threatened harm admits of no delay.'
38. Clara Burbano Herrera, *Provisional Measures in the Case Law of the Inter American Court of Human Rights* (Cambridge: Intersentia, 2010); Inter-American Commission of Human Rights, 'Process for Strengthening the IACHR: Methodology', 8 April 2012. http://www.oas.org/en/iachr/docs/pdf/PosicionFortalecimientoENG.pdf (accessed 12 August 2016).
39. IACHR, Rules of Procedure, article 25.
40. Due Process of Law Foundation (DPLF), *The Reform of the Inter-American Commission on Human Rights* (2014), Special Issue Number 19.
41. Diego Garcia-Lemos, 'Venezuela's Denunciation of the American Convention on Human Rights', *ASIL Insights* 17, no. 1 (2013). http://www.asil.org/insights/volume/17/issue/1/venezuelas-denunciation-american-convention-human-rights (accessed 12 August 2016).
42. See, for instance, IACtHR, AO 18/2003; Andrea Bianchi, 'Human Rights and the Magic of Jus Cogens', *European Journal of International Law* 19, no. 3 (2008): 491.
43. IACtHR, AO 18/03 and AO 21/14.
44. Eric Engle, 'Third Party Effect of Fundamental Rights (Drittwirkung)', *Hanse Law Review* 5, no. 2 (2009): 165.
45. Pasqualucci, *The Practice and Procedure*, 5. More from a socio-legal perspective based on the observation of practices, see Marie-Bénédicte Dembour, 'When Humans Become Migrants'.
46. Cantor and Barichello, 'The Inter-American Human Rights System', 689–706.
47. Inter-American Commission of Human Rights, Derechos humanos de migrantes, refugiados, apátridas, víctimas de trata de personas y desplazados internos: Normas y Estándares del Sistema Interamericano de Derechos Humanos, 31 December 2015.

48. Ibid., at para. 32.
49. Francisco Rivera Juaristi, 'The Amicus Curiae in the Inter-American Court of Human Rights (1982–2013)', 1 August 2014. http://dx.doi.org/10.2139/ssrn.2488073.
50. Charles Moyer, 'The Role of Amicus Curiae in the Inter-American Court of Human Rights', in *La Corte Inter-americana de Derechos Humanos: Estudios y Documentos* (San José, 1986)IACtHR,
51. See IACtHR, AO 18/03, Juridical Condition and Rights of the Undocumented Migrants, 17 September 2003.
52. AO 18/03, at para. 4.
53. Ibid., II. Proceeding before the Court, at paras 7–31.
54. The factual background of the request is also the United Supreme Court decision in *Hoffman Plastic Compounds, Inc.* v. *NLRB* issued in March 2002.
55. See Beth Lyon, 'The Inter-American Court of Human Rights Defines Unauthorized Migrant Workers' Rights for the Hemisphere: A Comment on Advisory Opinion 18', *New York University Review of Law & Social Change* 28 (2004): 595.
56. IACtHR, Advisory Opinion OC-21/14, *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, 19 August 2014. http://www.refworld.org/docid/54129c854.html (accessed 12 August 2016).
57. See IACtHR, AO 21/14, at para. 1.
58. IACtHR, AO 21/14 at para. 19, 23.
59. Eyal Benvenisti, 'Margin of Appreciation, Consensus, and Universal Standards', *New York University Journal of International Law and Politics* 31, no. 4 (1999): 843, 890. Manuel Núñez Poblete and Paola Acosta Alvarado, El margen de apreciación en el sistema interamericano de derechos humanos: proyecciones regionales y nacionales (México: Instituto de Investigaciones Jurídicas, 2012).
60. Manuel Núñez Poblete, 'Sobre la doctrina del margen de apreciación nacional. La experiencia latinoamericana confrontada y el thelos constitucional de una técnica de adjudicación del derecho internacional de los derechos humanos', in Núñez Poblete and Acosta Alvarado, *El margen de apreciación en el sistema interamericano* at 12 and 13.
61. Cristián Del Piano Ura and Jorge Quindimil López, 'La protección de los derechos humanos en Chile y el margen de apreciación nacional: fundamentos jurídicos desde la consolidación democrática', in Núñez Poblete and Acosta Alvarado, *El margen de apreciación en el sistema interamericano*, 155.
62. IACtHR, AO 18/03.
63. IACtHR, Provisional Measures of Protection, Resolution of 18 August 2000.
64. However, as Pasqualucci underlines, the Court's position in this case 'was more restrictive than its prior practice would support'. See Pasqualucci, *The Practice and Procedure*, 306.
65. IACtHR, *Nadege Dorzema et al.* v. *Dominican Republic*, Judgment of 24 October 2012 (Merits, reparations and costs).
66. Ibid., at para. 178.
67. Ibid., at para. 280.
68. Ibid. See also AO Status and Human Rights of the Child, at para. 72.
69. Ibid., at para. 279.
70. Ibid., at para. 101.
71. Ibid., at para. 173.4.
72. Ibid., at para. 109.
73. Ibid., at para. 157.
74. Three different tests on non-discrimination and equality before the law were proposed to the Court to analyse the questions: a fundamental rights analysis, a tiered scrutiny analysis and unitary balancing analysis. Lyon, 'The Inter-American Court of Human Rights Defines Unauthorized Migrant Workers' Rights for the Hemisphere', at 573–8.
75. Ibid., at 591–3.
76. IACtHR, *Case of Expelled Dominicans and Haitians* v. *Dominican Republic* (Preliminary Objections, Merits, Reparations and Costs), Judgment of 28 August 2014.

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77. Ibid.
78. Erika de Wet, 'Jus Cogens and Obligations Erga Omnes', in *The Oxford Handbook of International Human Rights Law*, ed. D. Shelton (Oxford: Oxford University Press, 2013), 541–61.
79. See the discussion in Michael Byers, 'Conceptualizing the Relationship between Jus Cogens and Erga Omnes Rules', *Nordic Journal of International Law* 66 (1997): 229, 239.
80. de Wet, 'Jus Cogens and Obligations Erga Omnes', 541–61.
81. Ibid., at 560.
82. See Geoff Gilbert in Erika De Wet and Jure Vidmar, *Hierarchy in International Law: The Place of Human Rights* (Cambridge: Cambridge University Press, 2012) 186. The ECHR has affirmed the absolute nature of Art. 3 in various cases, such as *Chahal* v. *United Kingdom* (1996) V, no. 22. On that occasion, the Strasbourg Court emphasised that: 'Article 3 enshrines one of the most fundamental values of democratic society (…) even in those circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct (…) Article 3 makes no provision for exceptions and no derogation from it is permissible under Art. 15 even in the event of a public emergency.'
83. Art. 33, 1951 United Nations Convention Relating to the Status of Refugees.
84. The 1951 Geneva Convention and its 1967 Protocol have been reinforced by the adoption of other international instruments such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), which provides in Art. 3.1 that 'No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.' For the Americas, see the American Convention on Human Rights (1969), Art. 22.7/22.8 and 1984 Cartagena Declaration on the rights of refugees. For Africa, see the African Charter on Human and Peoples' Rights (1981) Art. 12 and 1969 OAU Convention Governing the Specific Aspects of Refugee Problems.
85. See G.S. Goodwin-Gill, *The Refugee in International Law*, 3rd ed. (Oxford: Oxford University Press, 2007); and the UNHCR's submission to the European Court of Human Rights in the *Case T.I.* v. *the United Kingdom*, ECHR, admissibility decision of 7 March 2000.
86. See M. Foster, 'Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in Another State', *Michigan Journal of International Law* 28 (2007): 250–61.
87. On the protection of asylum seekers, see, among others, J. Hathaway, *The Rights of Refugees Under International Law* (Cambridge: Cambridge University Press, 2005), 75–83 and 147–53; Goodwin-Gill, 'The Refugee in International Law'; and G.S. Goodwin-Gill, 'The Dynamic of International Refugee Law', *International Journal of Refugee Law* 25 (2013): 651–66.
88. Cantor and Barichello, 'The Inter-American Human Rights System', 692.
89. *Case of Vélez Loor* v. *Panama*, Judgment of 23 November 2010 (Preliminary Objections, Merits, Reparations and Costs), at para. 97.
90. Ibid.
91. The case concerned the deportation of a Peruvian family based on their illegal entrance into Bolivian territory.
92. IACtHR, *Pacheco Tineo Family* v. *Bolivia*, at para. 129.
93. Case of *Vélez Loor* v. *Panama*, at para. 262.
94. Ibid., at para. 3.
95. See ibid., at para. 209.
96. See IACtHR, AO OC-21/14, at paras 211, 225, 242.
97. Bryan S. Turner, 'Human Vulnerability and Recognition', in *The Oxford Handbook of International Human Rights Law*, ed. D. Shelton (Oxford: Oxford University Press, 2013), 88.
98. Lourdes Peroni and Alexandra Timmer, 'Vulnerable Groups: The Promise of an Emergent Concept in European Human Rights Convention Law', *International Journal of Constitutional Law* 11 (2013): 1056–85.
99. Ibid., at para. 173.

100. Sveda Clark, 'Child Rights and the Movement from Status to Agency: Human Rights and the Removal of the Legal Disabilities of Vulnerability', *Nordic Journal of International Law – Special Edition on the Vulnerability of Children within International Law* 84 (2015): 183–220.
101. IACtHR, *Case of the Girls Yean and Bosico* v. *Dominican Republic* (Preliminary Objections, Merits, Reparations and Costs), Judgment of 8 September 2005. See IACHR, Admissibility Report No. 28/01, *Case 12.819, Dilcia Yean and Violeta Bosico (Dominican Republic),* Judgment of 22 February 2001. This case has similarities to the case of *Mubilanzila Mayeka and Kaniki Mitunga* v. *Belgium* (Application no. 13178/03), Judgment of 12 October 2006. http://www.unhcr.org/refworld/pdfid/45d5cef72.pdf (accessed 12 August 2016).
102. IACtHR, *Case of the Girls Yean and Bosico* v. *Dominican Republic*, at para. 3. On right to nationality, see Burgorgue-Larsen and Amaya Ubeda de Torres, 'The Inter-American Court', 563.
103. Lixinski, 'Treaty Interpretation', 598.
104. IACtHR, *Case of the Girls Yean and Bosico* v. *Dominican Republic*, at para. 185.
105. IACtHR, AO 17/02 on the juridical status and human rights of the child, at para. 26.
106. Ibid., at para. 166.
107. Ibid., at para. 155.
108. Ibid., at para. 2. AO 21/14. VI.
109. Ibid., at paras 82–6.
110. Ibid., at para. 261.
111. Ibid.
112. Ibid., at para. 154.
113. Ibid., at paras 180–2.
114. Ibid., at para. 114.
115. Ibid., at para. 116.
116. Reparation is the preferred international law terminology used in this section. As Professor Crawford indicates with regard to the International Law Commission Draft articles on International Responsibility, 'remedies' (as a direct translation from the French reme'des) has been used as an equivalent. However, 'this approach is more difficult in general international law, a system in which there is no a priori right to a court and where the particular consequences of responsibility in a given situation will usually be resolved outside any judicial context'.

    See James Crawford, *State Responsibility. The General Part* (Cambridge: Cambridge University Pres, 2013) at 596–97. For an interdisciplinary discussion on reparations see Dembour, 'When Humans Become Migrants', at 313.
117. Claudio Grossman et al., 'Reparations in the Inter-American System: A Comparative Approach Conference', *American University Law Review* 56, no. 6 (2007): 1375–468.
118. *Velez Loor* v. *Panama*.
119. See Mark W. Janis, Richard S. Kay, and Anthony W. Bradley, *European Human Rights Law. Text and Materials*, 3rd edn (Oxford: Oxford University Press, 2008), at 889–94.
120. Ana Beduschi, 'The Contribution of the Inter-American Court of Human Rights to the Protection of Irregular Immigrants' Rights: Opportunities and Challenges', *Refugee Survey Quarterly* 34 (2015): 45–74.
121. Cecilia M Baillie, 'Measuring Compliance with the Inter-American Court of Human Rights: The Ongoing Challenge of Judicial Independence in Latin America', *NJHR* 31, no. 4 (2013): 477–95, at 480. See Fernando Basch et al., 'The Effectiveness of the Inter-American System of Human Rights Protection: A Quantitative Approach to its Functioning and Compliance with its Decisions', *SUR, International Journal on Human Rights* 7, no. 12 (2010): 9–36.
122. I am thankful to my colleague Olger Gonzalez, clerk of the IACtHR, for the clarification provided on this issue.
123. IACtHR, *Resolución de Supervisión de Sentencia* (in Spanish), 13 February 2013. http://corteidh.or.cr/docs/supervisiones/Velez_13_02_13.doc
124. IACtHR, *Resolución de Supervisión de Sentencia*, 17 April 2015. http://www.corteidh.or.cr/docs/supervisiones/pachecotineo_17_04_15.pdf (accessed 12 August 2016).

125. See IACtHR, cases in the stage of monitoring of compliance: http://www.corteidh.or.cr/index.php/casos-en-etapa-de-supervision (accessed 12 August 2016).
126. Ibid., at para. 37.
127. Ibid., at para. 164.
128. Michael J. Camilleri and Viviana Krsticevic, 'Making International Law Stick: Reflections on Compliance with Judgments in the Inter-American System', *Derecho Internacional y Relaciones Internacionales* (2009): 235–245 at 245.
129. Eduardo Bertoni 'The Inter-American Court of Human Rights and the European Court of Human Rights: A Dialogue on Freedom of Expression Standards', *European Human Rights Law Review* 3 (2009): 332.
130. Antonio Augusto Cançado Trindade, 'Approximations and Convergences in the Case-Law of the European and Inter-American Courts of Human Rights', in *Le rayonnement international de la jurisprudence de la Cour européenne des droits de l'homme*, ed. Cohen-Jonathan and Flauss (Brussels: Bruylant-Nemesis, 2005) 101; Antonio Augusto Cançado Trindade, 'The Development of International Human Rights Law by the Operation and the Case-Law of the European and Inter-American Courts of Human Rights', *H.R.L.J.* 25 (2004): 157; Antonio Augusto Cançado Trindade, 'The Inter-American Court of Human Rights at a Crossroads: Current Challenges and Its Emerging Case-Law on the Eve of the New Century', in *Protection des droits de l'homme: la perspective européenne. Mélanges à la mémoire de Rolv Ryssdal*, ed. Mahoney et al. (Berlin: Carl Heymanns, 2000), 167.
131. The IACtHR has often referred to several ECtHR cases.
132. See *Nadege Dorzema* v. *República Dominicana*, at paras 157 and 163; *Pacheco Tineo* v. *Bolivia*, at para. 130.
133. Council of Europe Research Report, *References to the Inter-American Court of Human Rights in the Case-Law of the European Court of Human Rights* (Strasbourg: Council of Europe/Court of Human Rights, 2012). http://www.echr.coe.in (accessed 12 August 2016). *Hirsi Jamaa and Others* v. *Italy*, no. 27765/09, Judgment of 23 February 2012, Grand Chamber.
134. Ángel Chueca Sancho and Pascual Aguelo Navarro, 'Contenido y límites del 'Ius migrandi'', *Revista Electrónica Iberoamericana* 7, no. 2 (2013): 6.
135. International Law Commission, *Draft Articles on the Expulsion of Aliens, with Commentaries* (Geneva: United Nations, 2014), Article 9 Prohibition of collective expulsion.
136. Application nos 25794/13 and 28151/13. Judgment of 22 November 2016.
137. Preliminary Objections, Merits, Reparations and Costs, judgment of 25 November 2013, para. 131.
138. Preliminary Objections, Merits, Reparations and Cost), judgment of 23 November 2010, para. 171.
139. The Inter-American Commission, prompted by the approval of the EU Return Directive, adopted Human Rights Resolution 03/08.
140. Gina Bekker, 'The Protection of Asylum Seekers and Refugees within the African Regional Human Rights System', *AHRLJ* 13 (2013): 1–29.
141. Ibid., at 10. See also N.J. Udombana, 'So Far, So Fair: The Local Remedies Rule in the Jurisprudence of the African Commission on Human and Peoples' Rights', *American Journal of International Law* 97 (2003): 1.
142. See Application 001/2008, *Michelot Yogogombaye* v. *The Republic of Senegal*.
143. Yota Negishi, 'The Pro Homine Principle's Role in Regulating the Relationship between Conventionality Control and Constitutionality Control', *Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper* 13 (2016): 1.
144. Gonzalo Candia, 'Comparing Diverse Approaches to the Margin of Appreciation: The Case of the European and the Inter-American Court of Human Rights', 9 March 2014. http://ssrn.com/abstract=2406705 (accessed 12 August 2016).
145. Dulitzky, 'An Inter-American Constitutional Court?', 81.
146. See the decision of the Supreme Court of Uruguay arguing the doctrine of the margin of appreciation that the Judgment in *Gelman* v. *Uruguay* had limited binding effects,

Suprema Corte de Justicia, *M. L., J. F. F. O. – Denuncia – Excepción de inconstitucionalidad arts. 1, 2 y 3. de la Ley no. 18.831*, 22 February 2013.

147. Paula M. García Villegas Sánchez Cordero, ed., *El control de convencionalidad y las cortes nacionales. La perspectiva de los jueces mexicanos* (Mexico: Porrúa, 2013), at 30–9.
148. The Dominican Constitutional Court criticised the Yean and Bosico judgment, relying on article 46 of the VCLT; Tribunal Constitucional de República Dominicana, *TC/0256/14*, 4 November 2014.
149. The Brazilian Supreme Court took a restrictive view on the interpretation of the inter-American precedents in S.T.F., 2008/148623. See Renato Souza Dellova, 'Considerações sobre o cumprimento da decisão da Corte Interamericana de Direitos Humanos sobre a Lei de Anistia no Brasil', in *Rio Grande*, ed. Âmbito Jurídico (2013): XVI 109.
150. Pasqualucci, *The Practice and Procedure*, 528.
151. Ibid.
152. On the definition and relationships between the concepts of *jus cogens* and *erga omnes* nomrs, see, amongst others, Thomas Weatherall, *Jus Cogens: International Law and Social Contract* (Cambridge: Cambridge University Press, 2016), at 11 and 12; and Erika de Wet, 'Jus Cogens and Obligations Erga Omnes', in *The Oxford Handbook of International Human Rights Law*, ed. D. Shelton (Oxford: Oxford University Press, 2013), 541–61. See Erika De Wet and Jure Vidmar, *Hierarchy in International Law: The Place of Human Rights* (Oxford: Oxford University Press, 2012).
153. IACtHR, AO 18/03, at para. 85.
154. Ibid., at para. 226.
155. Bianchi, 'Human Rights and the Magic', 506.
156. AO 21/14, at para. 224.
157. Ibid., at para. 225.
158. Ludovic Hennebel, 'The Inter-American Court of Human Rights: The Ambassador of Universalism', *Quebec Journal of International Law* 57 (2011).
159. Benvenisti, 'Margin of Appreciation, Consensus, and Universal Standards', 843, 890.

## Disclosure statement

**AQ6** No potential conflict of interest was reported by the author