THE CONTRIBUTION OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS TO THE PROTECTION OF IRREGULAR IMMIGRANTS' RIGHTS: OPPORTUNITIES AND CHALLENGES

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Abstract

This article aims to re-evaluate and clarify the significance of the contribution of the Inter-American Court of Human Rights to the protection of irregular immigrants' rights. It argues that this Court has placed itself at the forefront of a renewed approach to immigration, confirming its potential to promote an extended form of protection of irregular immigrants' rights in Latin America. However, the actual protection of irregular immigrants' rights promoted by the Court depends on Latin American countries' capability to overcome several important challenges, in particular with respect to the compliance with judicial decisions and the effectiveness of the protection of rights. These challenges, which are not purely legal or institutional, are strongly dependent on the Latin American cultural, political and societal context. They may therefore hinder the impact of a stronger human rights-based approach to the protection of irregular immigrants' rights in Latin America.

Keywords: Inter-American Court of Human Rights, irregular immigration, human rights, compliance, effectiveness, Latin America

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1. Introduction

Irregular immigration is not a new phenomenon. However, the flow of irregular immigrants[1] seeking a better life has been growing constantly in the past years.[2] From a human rights perspective,[3] regardless of the fact that they have formally breached immigration laws, these immigrants, as all human beings, have rights. Yet, the exact content and scope of these rights are not well understood. Part of the problem arguably lies in the general perception of irregular immigrants as individuals who are appropriately deprived of – or at least less entitled to – human rights. International courts and specifically regional human rights courts have an important role to play in shaping the content and scope of rights applicable to irregular immigrants. Their jurisprudence can considerably support a general recognition of human rights for migrants, including those in irregular situations regarding immigration laws.

In this sense, as suggested by Marie-Bénédicte Dembour, the Inter-American Court of Human Rights (IACtHR) "seems far more inclined to push for the recognition of migrants' rights".[4] The Court has indeed pushed the boundaries of its *pro-homine* approach[5] to the realm of international migration. Interestingly, the Court's proactive position was not limited to refugees; it has also considered the protection of rights of irregular immigrants as falling within its sphere of competence.[6] As a result, the Court has placed itself at the forefront of a renewed approach to immigration via the recognition of irregular immigrants' human rights. It

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1 An irregular immigrant is understood as "a person who owing to unauthorized entry, breach of a condition of entry, or the expiry of his or her visa, lacks legal status in a transit or host country" as per International Organization for Migration (IOM), Glossary on Migration, available at: https://www.iom.int/key-migration-terms (last visited 24 Aug. 2015).

2 IOM, *International Migration Outlook*, Paris, Organisation for Economic Co-operation and Development (OECD) Publishing, 2013, available at: http://www.oecd-ilibrary.org/social-issues-migration-health/international-migration-outlook-2013_migr_outlook-2013-en (last visited 24 Aug. 2015); IOM, *International Migration Outlook*, Paris, OECD Publishing, 2014, available at: http://www.oecd.org/els/international-migration-outlook-1999124x.htm (last visited 24 Aug. 2015); the United Nations High Commission for Refugees (UNHCR), "Mediterranean Crisis 2015 at six months: refugee and migrant numbers highest on record", press release available at: http://www.unhcr.org/5592b9b36.html (last visited 24 Aug. 2015); J.A. Baer, "Documenting the Undocumented within Latin America", Council on Hemispheric Affairs (COHA), 2014, available at: http://www.coha.org/documenting-the-undocumented-within-latin-america/ (last visited 24 Aug. 2015).

3 See M-B. Dembour, *When Humans Become Migrants. Study of the European Court of Human Rights with an Inter-American Counterpoint*, Oxford, Oxford University Press (OUP), 2015, at 4 (discussing the implications of a human rights-based approach to migration); M-B. Dembour, "What are Human Rights? Four Schools of Thought", *Human Rights Quarterly*, 32(1), 2010, 1–20 (proposing a framework of analysis based on four human rights schools of thought, namely natural law school, deliberative school, protest school, and discourse school).

4 M-B. Dembour, *When Humans Become Migrants*, above footnote 3, at 1.

5 *Ibid.*, at 6.

6 *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18, the IACtHR Series A No. 18 (17 Sep. 2003) (hereafter referred to as the "Advisory Opinion OC-18").

recognized that the right to non-discrimination and to equality of treatment, [7] as well as the right to a due process[8] and the minimum guarantees in case of detention[9] and expulsion,[10] also apply to irregular immigrants.

This article aims to reassess and clarify the contribution of the IACtHR to the protection of irregular immigrants' rights in Latin America.[11] It aims to investigate whether the IACtHR has the capability to promote an extended form of protection of irregular immigrants' rights in Latin America[12] and whether this protection can be deemed effective and efficient. It also seeks to clarify to what extent the principles developed by the Inter-American jurisprudence have the potential to have an impact on jurisdictions outside Latin America.[13]

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[7] Advisory Opinion OC-18, above footnote 6 at para. 110; *Rights and Guarantees of Children in the Context of Migration and/or in need of International Protection*, Advisory Opinion OC-21/14, the IACtHR (19 Aug. 2014) (hereafter referred to as the "Advisory Opinion OC-21") at para. 113; *Dozerma v. Dominican Republic* (Merits, Reparations and Costs) the IACtHR (24 Oct. 2012) at para. 159; *Case of Expelled Dominicans and Haitians v. Dominican Republic* (Objections, Merits, Reparations and Costs) the IACtHR (28 Aug. 2014) at para. 402.

[8] *Case of Expelled Dominicans and Haitians v. Dominican Republic*, above footnote 7 at para. 397; *Velez Loor v. Panama* (Preliminary Objections, Merits, Reparations and Costs) the IACtHR (23 Nov. 2010) at para. 139.

[9] *Velez Loor v. Panama* (Preliminary Objections, Merits, Reparations and Costs) the IACtHR (23 Nov. 2010) at paras. 221–245.

[10] *Case of Expelled Dominicans and Haitians v. Dominican Republic* above footnote 7, at para. 398; *Dozerma v. Dominican Republic*, above footnote 7 at paras. 152–167.

[11] The jurisprudence of the Inter-American Commission on Human Rights, although remarkable, does not fall within the scope of this article. The IACtHR's jurisprudence constitutes the primary focus of this study. See (for a detailed analysis of the role of the Inter-American Commission on Human Rights) R.K. Goldman, "History and Action: The Inter-American Human Rights System and the Role of the Inter-American Commission on Human Rights", 31(4), *Human Rights Quarterly*, 2009, 856–887; Inter-American Commission on Human Rights, Rapporteurship on the Rights of Migrants, decisions of the Inter-American Commission available at: http://www.oas.org/en/iachr/migrants/decisions/iachr.asp (last visited 24 Aug. 2015) (for a detailed list of decisions in the field of migrants' rights).

[12] The protection of refugees and asylum-seekers' rights does not constitute the principal focus of this study and will only be considered with respect to the situations of "mixed flows". According to the IOM, mixed flows are "complex population movements including refugees, asylum-seekers, economic migrants and other migrants concerning irregular movements of population which do not have visas or necessary documentation and cross borders irregularly": see the IOM, "Irregular Migration and Mixed Flows: IOM's Approach", 19 Oct. 2009, MC/INF/297, available at: http://www.iom.int/jahia/webdav/shared/shared/mainsite/about_iom/en/council/98/MC_INF_297.pdf (last visited 24 Aug. 2015). For an extensive analysis of the Inter-American jurisprudence regarding refugees and asylum-seekers, see D.J. Cantor & S. Barichello, "The Inter-American Human Rights System: A New Model for Integrating Refugee and Complementary Protection?", 17 *International Journal of Human Rights*, 17 2013, 689–706; D.J. Cantor & S. Barichello, "Protection of Asylum-Seekers under the Inter-American Human Rights System" in A. Abass & F. Ippolito (eds), *Regional Approaches to the Protection of Asylum-Seekers: An International Legal Perspective*, London, Ashgate, 2014, 267.

[13] This article notably takes the European context for comparison. This choice is justified by the similarities between the IACtHR and the jurisprudence of the European Court of Human Rights (ECtHR) relating to irregular immigrants and by the scarcity of decisions and mechanisms of protection of irregular immigrants' rights in other regional systems of protection of human rights. However (for a general overview of the protection of human rights in cases of deportation in the context of the African Commission on Human and Peoples' Rights) see: African Commission on Human and Peoples' Rights (ACommHPR), *Institute for Human Rights and Development in Africa (on behalf of Mr Esmaila Connateh and 13 others) v. Republic of Angola*, (Communication No. 292/2004), 43rd Ordinary Session, 7–22 May 2008, at para. 84; ACommHPR, *Good v. Republic of Botswana* (Communication No. 313/05), 47th Ordinary Session, May 2010, at para. 13; See also (for general information about the "Special Rapporteur on Refugees, Asylum Seekers, Migrants and Internally Displaced Persons

In order to achieve the principal objective of this article, the political and institutional framework of the Inter-American system of human rights will be examined in the second section. It is argued that the peculiar political context of Latin American countries has, surprisingly, favourably shaped the construction of the Inter-American system. The third section investigates the extent and significance of the jurisprudence of the IACtHR in the field of the protection of irregular immigrants' rights. The impact of this jurisprudence within and outside the Inter-American sphere is critically analysed. The fourth section examines whether, despite its progressive character, the IACtHR still faces important obstacles, in particular with respect to compliance with judicial decisions and the effectiveness of the protection of rights. The analysis of these challenges is not purely legal or institutional, but also refers to the Latin American cultural, political, and societal context, as compliance and effectiveness of rights appear to be strongly related to these general considerations. Finally, the article draws conclusions on the actual relevance of the IACtHR's general contribution to the protection of irregular immigrants' rights.

2. A peculiar political and institutional framework

Prior to examining the content and scope of the protection of irregular immigrants' rights by the IACtHR, it is important to understand the context of the creation and development of this court within the Inter-American human rights system. It is suggested that the particularities of the Latin American continent have an impact on the recognition and effectiveness of the protection of human rights, including those of irregular immigrants.

Since its creation in 1948,[14] the Inter-American human rights system has evolved against the backdrop of many brutal dictatorial Latin American regimes engaged in systematic violations of human rights.[15] One of its readily apparent paradoxes is that many of its founding

established in the context of the African Charter on Human and Peoples' Rights"), available at: http://www.achpr.org/mechanisms/refugees-and-internally-displaced-persons/ (last visited 24 Aug. 2015).

[14] The Organization of American States (OAS) was established with the adoption of its Charter on 30 Apr. 1948. The American Declaration of the Rights and Duties of Man (ADRDM) was adopted by the OAS Member States in 1948.

[15] See E. Lutz & K. Sikkink, "International Human Rights Law and Practice in Latin America", *International Organization*, 54(3), 2000, 633–659, at 637; E. Lutz and K. Sikkink, "The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America", *Chinese Journal of International Law* 2, 2001, 1–34, at 3; D. Pion-Berlin, "To Prosecute or to Pardon? Human Rights Decisions in the Latin American Southern Cone", *Human Rights Quarterly*, 16(1), 1994, 105–130, at 106; L. Burgorgue-Larsen, "Les nouvelles tendances dans la jurisprudence de la Cour interaméricaine des droits de l'homme" *Curso de Derecho Internacional y Relaciones Internacionales de Vitoria-Gasteiz Universidad del Pais Vasco, Bilbao*, 2009, 149, at 149.

States had been ruled by oppressive dictatorships.[16] Consequently, one may consider it essential to establish why American States were inclined to, first, adopt international instruments on the protection of human rights, establish institutions with the competence to monitor the implementation of these instruments, and, finally, fund the functioning of the whole system.

Historically, American States fought for the proclamation of human rights in the aftermath of the Second World War.[17] Since April 1948, American States not only decided to create an international organization, the Organization of American States (OAS), by adopting a constitutive Charter,[18] but also adopted a declaration of rights, the American Declaration of the Rights and Duties of Man (ADRDM).[19] The ADRDM, therefore, precedes the Universal Declaration of Human Rights (UDHR) by a few months.[20] The OAS later adopted the American Convention on Human Rights (ACHR) during the Inter-American Specialized Conference on Human Rights in San José, Costa Rica, on 21 November 1969.[21] The ACHR entered into force on the 18 July 1978 and is today the main regional instrument for the protection of human rights in the Americas. Only 23 of the 35 OAS Member States have ratified the Convention, with the United States (US) and Canada notably among those States refusing to ratify it.[22] The ACHR has been complemented by the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador),[23] and the Protocol to the American Convention on Human Rights to Abolish the Death Penalty.[24]

In a similar way to the European Convention on Human Rights (ECHR), the ACHR sets forth mainly civil and political rights.[25] Unlike the ECHR, the ACHR explicitly provides for

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[16] See S. Mainwaring, D. Brinks & A. Perez-Linan, "Classifying Political Regimes in Latin America, 1945–2004", in G.L. Munck (ed.), *Regimes and Democracy in Latin America: Theories and Methods*, Oxford, OUP, 2007, 123.

[17] Goldman, "History and Action", above footnote 11, 859.

[18] Charter of the OAS, 119 UNTS 3.

[19] ADRDM, Res XXX, Final Act of the Ninth International Conference of American States reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System OAS/Ser L V/II.82 Doc 6 Rev 1 at 17 (1992).

[20] The UDHR was adopted on 10 Dec. 1948, UNGA Res 217 A(III), art 5.

[21] The OAS ACHR, 22 Nov. 1969, 1144 UNTS 123.

[22] See the OAS website for information on membership of the ACHR, available at: http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm (last visited 12 August 2015).

[23] Opened for signatures by the General Assembly of the OAS during its 18th regular session in 1988.

[24] Approved by the General Assembly of the OAS in its 20th regular session in 1990.

[25] Including the right to life (art. 4 ACHR; art. 2 ECHR), freedom from torture, inhuman and degrading treatment (art. 5 ACHR; art. 3 ECHR), freedom from slavery (art. 6 ACHR; art. 4 ECHR), right to a fair trial (art. 8 ACHR; art. 6 ECHR), and right to privacy (art. 11 ACHR; art. 8 ECHR).

freedom of association for labour purposes[26] and also encompasses a progressive development clause, according to which the full realization of economic, social and cultural rights is to be progressively achieved by the Member States.[27] In the field of aliens' rights, unlike the ECHR, the ACHR expressly provides for "the right to seek and be granted asylum",[28] thereby codifying this right in the Inter-American system.[29] Both the ECHR and ACHR contain provisions relating to procedural safeguards relating to expulsion of aliens lawfully staying in the territory of a State party to the Convention,[30] and to the protection against collective expulsions of aliens.[31] In addition, in the European sphere, the European Court of Human Rights (ECtHR) has developed a form of indirect protection (*protection par ricochet*)[32] of aliens' rights in cases of the existence of serious risk of violation of human rights in the context of expulsion, deportation or extradition.[33]

In contrast, the Inter-American system of human rights is twofold: it comprises the Inter-American Commission on Human Rights (hereafter referred to as 'the Inter-American Commission' or 'the Commission'),[34] created by the OAS in 1959, and the IACtHR, established in 1979. The IACtHR has two main functions – adjudicatory and advisory. Regarding its adjudicatory competence, it should be noted that Member States shall accept the Court's contentious jurisdiction at the time of ratification or at any time thereafter.[35] There is

[26] Art. 16 (1) ACHR. The ECtHR has, however, decided that "the right to form and to join trade unions is a special aspect of freedom of association" provided for by art. 11 ECHR, even though this article does not explicitly say so: *Young, James and Webster v. UK* App no. 7601/76 and 7806/77 (ECHR, 13 Aug. 1981) at para. 52; *Sigurdur A Sirgurjonsson v. Iceland* App no. 16130/90 (ECHR, 30 Jun..1993) at para. 35; *Gustafsson v. Sweden* App no. 15573/89 (ECHR, 25 Apr. 1996) at para. 45; *Sorensen and Rasmussen v. Denmark* App nos 52562/99 and 52620/99 (ECHR, 11 Jan. 2006) at para. 54.

[27] Art. 26 ACHR.

[28] Art. 22(7) ACHR.

[29] Art. 22(8) ACHR which is similar to the provision of article 33(1) of the Geneva Convention relating to the Status of Refugees. See D.J. Cantor & S. Barichello, "The Inter-American human rights system", above footnote 10, at 695 (arguing that the ACHR is influenced directly by the provisions of international refugee law). See also *Pacheco Tineo v. Bolivia* (Preliminary objections, merits, reparations and costs) IACtHR (25 Nov. 2013) at para. 128 (the first decision of the IACtHR relating to right of asylum in which it is decided that the motivation and form used by the applicant for applying for asylum cannot be used by a State to deny the right to a fair trial to the applicant).

[30] Art. 22(6) and (9) ACHR; art. 1 Protocol 7 ECHR.

[31] Art. 22 (9) ACHR; art. 4 Protocol 4 ECHR.

[32] F. Sudre, *Droit européen et international des droits de l'homme*, Paris, PUF, 2011, at 662.

[33] See notably *Soering v. UK* App no. 14038/88 (ECHR, 7 Jul. 1989); *Chahal v. United Kingdom* App no. 2414/93 (ECtHR, 15 Nov. 1996); *Jabari v. Turkey* Application no. 40035/98 (ECtHR, 11 Jul. 2000); *Othman (Abu Qatada) v. UK* Application no. 8139/09 (ECtHR, 17 Jan. 2012). See M-B. Dembour, *When Humans Become Migrants*, above footnote 3, at 112.

[34] According to Article 41 of the ACHR, the Inter-American Commission can receive individual petitions, and monitor the situation of human rights in Member States and in relation to thematic areas. See generally Goldman, "History and Action", above footnote 11.

[35] Art 62(1) ACHR; L. Burgorgue-Larsen & A. Ubeda de Torres, *The Inter-American Court of Human Rights. Case Law and Commentary*, Oxford, OUP, 2011, at 9.

no direct contentious mechanism under the Inter-American system.[36] Individuals can submit allegations of human rights violations to the Inter-American Commission, which will examine the case and decide on the admissibility and on the merits;[37] it may also propose friendly settlements.[38] Only the Inter-American Commission, and more rarely States,[39] can submit a report initiating the case before the IACtHR, requesting the Court's decision.[40] The Inter-American Commission tends, however, to systematically refer cases to the Court when the State in question has accepted its jurisdiction.[41] In its advisory competence, the IACtHR has adopted influential opinions throughout the years, notably in the field of the protection of aliens' rights.[42]

At the time of the creation of the Inter-American system of human rights, the biggest challenges were related to the omnipresence of dictatorial military regimes notorious for their serious and widespread human rights violations. The situation in the 21st century has changed. With a few exceptions, such as Cuba, Latin American countries have engaged in extensive democratization and are trying to overcome the horror of the dictatorship period.[43] However, other problems have followed, such as endemic corruption,[44] emergence of mafias and uncontrollable organized crime,[45] and social inequality.[46] In other words, Latin America is still

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[36] In this sense it resembles the ECHR mechanism prior to the entry into force of Additional Protocol No. 11 in 1998. See R. Bernhardt, "Reform of the Control Machinery under the European Convention on Human Rights: Protocol No. 11", *American Journal of International Law*, 89, 1995, 145–154, at 145.

[37] Arts. 44–47 ACHR.

[38] Art. 48(1) ACHR.

[39] Art. 51(1) ACHR; L. Burgorgue-Larsen & A. Ubeda de Torres, above footnote 36, at 29.

[40] Art. 50 ACHR.

[41] Art. 45(1) of the Rules of Procedure of the Inter-American Commission on Human Rights states: "If the State in question has accepted the jurisdiction of the Inter-American Court in accordance with Article 62 of the American Convention, and the Commission considers that the State has not complied with the recommendations of the report approved in accordance with Article 50 of the American Convention, it shall refer the case to the Court, unless there is a reasoned decision by an absolute majority of the members of the Commission to the contrary."

[42] For example, *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16, IACtHR Series A No. 16 (1 Oct. 1999) (hereafter referred to as the "Advisory Opinion OC-16"); Advisory Opinion OC-18, above footnote 6; *Rights and Guarantees of Children in the Context of Migration and/or in need of International Protection*, Advisory Opinion OC-21, above footnote 7.

[43] Notably via the establishment of Truth Commissions. See J. Pasqualucci, "The Whole Truth and Nothing But the Truth: Truth Commissions, Impunity and the Inter-American Human Rights System", *Boston University International Law Journal*, 12, 1995, 321.

[44] See generally K. Weiland, "The Politics of Corruption in Latin America", *Journal of Democracy*, 9(2), 1998, 108–121; J.M. Ruhl, "Political Corruption in Central America: Assessment and Explanation", *Latin American Politics and Society*, 53, 2011, 33–58.

[45] See generally B. Bagley, "Globalisation and Latin American and Caribbean Organised Crime" 6 *Global Crime*, 6 (1), 2004, 32–53; J. Bailey & M. Taylor, "Evade, Corrupt, or Confront? Organized Crime and the State in Brazil and Mexico", *Journal of Politics in Latin America*, 1(2), 2009, 3–29.

[46] See K. Hofmann & M.A. Centeno, "The Lopsided Continent: Inequality in Latin America", *Annual Review of Sociology*, 29, 2003, 363–390.

plagued by rampant violations of human rights. These are all issues which the IACtHR needs to take into account when imposing respect for human rights in the Latin American region, including respect for aliens' rights.

3. The establishment of a significant jurisprudence on the protection of irregular immigrants' rights

The IACtHR developed an important line of decisions relating to the protection of irregular immigrants' rights. Its origins can be traced back to the Advisory Opinion OC-18,[47] which relied to a large extent on the concept of *jus cogens*. Despite its disputable legal basis (Section 3.1), this Advisory Opinion is considered an influential authority in the field, as it is fairly invoked both within and outside the Inter-American system (Section 3.2). This was followed by a continuous development of the IACtHR's jurisprudence in the field, notably lying in the recognition of irregular immigrants' vulnerability (Section 3.3). As a result, the IACtHR was able to impose an ambitious and diverse range of obligations upon States (Section 3.4).

3.1. A controversial starting point: the Advisory Opinion OC-18

The IACtHR was not oblivious to the situation of irregular immigrants in the Americas. On the contrary, it acknowledged the difficulties endured by economic immigrants in search of better life conditions in Advisory Opinion OC-18.[48] The IACtHR considered that:

> […] undocumented migrant workers, who are in a situation of vulnerability and discrimination with regard to national workers, possess the same labor rights as those that correspond to other workers of the State of employment, and the latter must take all necessary measures to ensure that such rights are recognized and guaranteed in practice.[49]

[47] Advisory Opinion OC-18, above footnote 6.

[48] Already in his concurring opinion to the Advisory Opinion OC-16 of 1 Oct. 1999, Judge Cançado Trindade expressed his concerns about the "condition of particular vulnerability" that aliens experience and reaffirmed these concerns in his concurring opinion to the Advisory Opinion OC-18. At the same time, Judge García Ramírez expressed his sympathy with immigrants who "are very often almost totally helpless, owing to their lack of social, economic and cultural knowledge of the country in which they work, and to the lack of instruments to protect their rights". See: Advisory Opinion OC-16, above footnote 42 (Concurring Opinion of Judge A.A. Cançado Trindade) at para. 23; Advisory Opinion OC-18, above footnote 6 (Concurring Opinion of Judge A.A. Cançado Trindade) at para. 14; *Ibid*., Reasoned Concurring Opinion of Judge Sergio García Ramírez, at para. 9.

[49] Advisory Opinion OC-18, above footnote 6, at para. 160.

As emphasized by Beth Lyon, "in OC-18, the IACtHR substantially altered the definition of rights of unauthorized workers in the Americas".[50] In this Advisory Opinion, the IACtHR indeed ruled that although Member States can control the entry of, and deny work permits to, immigrants, once these persons are physically present in their territory and once a working relationship (even illegal) has been established, they are entitled to "labour human rights".[51]

The Court found the justification for such an affirmation in the application of the principle of equality and non-discrimination to irregular immigrant workers. According to the Court, this principle "belongs to the realm of *jus cogens* and is of a peremptory character, [and it] entails obligations *erga omnes* of protection that bind all States and give rise to effects with regard to third parties, including individuals".[52] In order to reach this conclusion, the Court built upon the principle of human dignity and the general obligation to respect and guarantee human rights.[53]

The Court's legal arguments are not, however, fully convincing. Three main points can be challenged: the use of the concept of *jus cogens*, the recognition of obligations *erga omnes*, and the imposition of horizontal obligations by the Court.

3.1.1. The use of the concept of jus cogens

The IACtHR seems to misuse the concept of *jus cogens* while applying it to all situations related to the prohibition of discrimination, including discrimination on the grounds of nationality.[54] Peremptory norms or norms of *jus cogens* "are rules of customary law that cannot be set aside by treaty or by acquiescence but only through the formation of a subsequent customary rule of the same character".[55] Article 53 of the Vienna Convention on the Law of Treaties (VCLT) provides for a legal basis for these norms. It states:

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and

[50] B. 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, 547, at 595.

[51] Advisory Opinion OC-18, above footnote 6, at para. 133.

[52] *Ibid.*, at para. 110.

[53] In the Inter-American system this obligation is enshrined in arts. 1 and 2 ACHR.

[54] Advisory Opinion OC-18, above footnote 6, at para. 100.

[55] J. Crawford, *Brownlie's Principles of Public International Law*, Oxford, OUP, 2012, at 594.

which can be modified only by a subsequent norm of general international law having the same character.

In order to qualify the principle of non-discrimination as *jus cogens*, it would be necessary to show that this characterization is "accepted and recognized by the international community of States as a whole".[56] The IACtHR drew upon the nature of the principles of equality and non-discrimination, which it considered as "fundamental for the safeguard of human rights in both international and domestic law".[57] It held that "[t]he principle of equality before the law and non-discrimination permeates every act of the powers of the State, in all their manifestations, related to respecting and ensuring human rights".[58] The Court did not offer more detailed evidence of the supposed acceptance by the international community of non-discrimination as a peremptory norm of international law. It imposed, however, its own interpretation of international human rights law, in all likelihood inspired by the positions adopted by Judge Cançado Trindade, then President of the IACtHR.[59]

As pointed out by Andrea Bianchi, "reference to *jus cogens* may have been instrumental in reaching out to the United States, not a party to the Inter-American Convention on Human Rights".[60] It is indeed interesting to note that the request for advisory opinion was formulated in very general terms by Mexico, without any specific reference to the US.[61] However, the Mexican demand implicitly related to the situation of undocumented Mexican immigrant workers in the US and the outcome of the US Supreme Court decision of *Hoffman Plastic Compounds v. NLRB.*[62] In this decision the US Supreme Court held that undocumented immigrants were not entitled to back pay under domestic law in cases of dismissal motivated by the participation in trade union activities.[63] The IACtHR, on the contrary, held that these

[56] Art. 53 VCLT. See A. Orakhelashvili, *Peremptory Norms in International Law*, Oxford, OUP, 2006; G.I. Hernandez, "A Reluctant Guardian: The International Court of Justice and the Concept of 'International Community'", *The British Yearbook of International Law*, 84(1), 2013, 13–60, at 37–57.

[57] Advisory Opinion OC-18, above footnote 6, at para. 88.

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

[59] See Judge Cançado Trindade's views on the notion of *jus cogens*: A.A. Cançado Trindade, "Jus Cogens: The Determination and the Gradual Expansion of its Material Content in Contemporary International Case-Law", available at: <www.oas.org/dil/esp/3%20-%20cancado.LR.CV.3-30.pdf> (last visited 24 Aug. 2015); A.A. Cançado Trindade, "Uprootedness and the Protection of Migrants in the International Law of Human Rights", *Revista Brasileira de Política Internacional*, 51, 2008, 137–168.

[60] A. Bianchi, "Human Rights and the Magic of *Jus Cogens*", *European Journal of International Law*, 19(3), 2008, 491–508, at 506.

[61] Advisory Opinion OC-18, above footnote 6, at paras. 1–4.

[62] *Hoffman Plastic Compounds v. NLRB* 535 US 137 (2002). For an analysis of the implications of this decision see B. Lyon, "The Inter-American Court of Human Rights", above footnote 50, at 560–570.

[63] *Hoffman Plastic Compounds v. NLRB* 535 US 137 (2002) at 14.

undocumented immigrant workers have rights arising from their employment.[64] Importantly, one of the consequences of the IACtHR's analysis is that these rights could also be evoked before US courts given that under this view, they are based on *jus cogens* norms and not on treaty-based provisions.[65]

3.1.2. The recognition of obligations erga omnes

The recognition of the *erga omnes* character of the norm can also be questioned. It follows from the IACtHR's reasoning that the general principle of equality, entailing a general obligation by States to respect and protect human rights without discrimination, has crystalized as a peremptory norm of international law or *jus cogens*.[66] The next step in its reasoning consisted of deducing that this general principle of equality, as per its nature, also generates obligations towards the international community as a whole, in other words, *erga omnes* obligations.[67] Accordingly, the Court affirmed that "the general obligation to respect and ensure the exercise of rights has an *erga omnes* character".[68] Once more, the Court gave little evidence to support this statement,[69] which, in addition, did not contribute to the clarification of the ongoing doctrinal debate around the relationship between the concept of *jus cogens* and the imposition of *erga omnes* obligations.[70]

It is true that in the *Barcelona Traction* case, the International Court of Justice (ICJ) referred to the prohibition of racial discrimination as encompassing an *erga omnes* obligation.[71] It has indeed held that "the principles and rules concerning the basic rights of the human person,

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[64] Advisory Opinion OC-18, above footnote 6, at para. 134.

[65] However, the use of *jus cogens* norms in US domestic litigation is still a matter of dispute. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 124 S.Ct. 2739, 732 (2004) (recognizing that international norms must be specific, universal and obligatory to be evoked in domestic litigation); *Sarei et al v. Rio Tinto Plc et al*, No. 02-56256, F.3d, 19321, 19333 (9th US Circuit Court of Appeals, 2011) (concluding that claims of crimes against humanity arising from a blockade and racial discrimination claims do not fall within the limited federal jurisdiction created by the US Alien Tort Statute); *Kiobel et al. v. Royal Dutch Petroleum Co. et al.* 569 US slip op. at 14 (2013) (concluding that even where claims based on the application of international law touch and concern the territory of the US, they must do so with sufficient force to displace the presumption against extraterritorial application).

[66] Advisory Opinion OC-18, above footnote 6, at para. 100.

[67] *Ibid.*, at para. 109.

[68] *Ibid.*

[69] Advisory Opinion OC-18, above footnote 6, at paras. 109–110.

[70] See C. J. Tams, *Enforcing Obligations Erga Omnes in International Law*, Cambridge, Cambridge University Press (CUP), 2005, at 146–149; A. Bianchi, "Human Rights and the Magic of Jus Cogens", above footnote 60, at 502; G. Neuman, "Import, Export, and Regional Consent in the Inter-American Court of Human Rights", *European Journal of International Law*, 19(1), 2008, 101–123; at 121; M. Byers, "Conceptualizing the Relationship between *Jus Cogens* and *Erga Omnes* Rules", *Nordic Journal of International Law*, 66, 1997, 211–239, at 229; E. de Wet, "*Jus Cogens* and Obligations *Erga Omnes*", in D. Shelton (ed.), *The Oxford Handbook of International Human Rights Law*, Oxford, OUP, 2013, 541–561.

[71] *Barcelona Traction, Light and Power Company Ltd (Belgium v. Spain)* [1979] ICJ Rep 3, 32, at para. 34.

including protection from slavery and racial discrimination" were to be considered as imposing *erga omnes* obligations.[72] The ICJ's statement with regard to the *erga omnes* status of the prohibition of racial discrimination has been generally accepted and can be considered correct as a matter of law.[73] Nonetheless, it is still debatable whether non-discrimination on the grounds of nationality – a much broader principle in its scope – may be considered as amounting to such an obligation.[74]

There are a number of reasons for this scepticism. States can impose their own rules governing the attribution and acquisition of nationality.[75] States can also impose rules regarding the entry, residence and expulsion of foreigners.[76] In addition, differences in treatment may be justified insofar as the individual behaviour of the foreigner constitutes a serious threat to public order, national security or public health.[77] In order to be justified, the difference in the treatment of a foreigner entailing interference with his rights must be provided by law, pursue a legitimate aim and be necessary in a democratic society.[78] Accordingly, a difference of treatment based on the nationality of the individual may be justified, whereas a difference of treatment exclusively based on the race of an individual would not be objectively justified in a contemporary, democratic society built on the principles of pluralism and respect for different cultures.[79] Therefore, it would appear that the *erga omnes* nature of the prohibition of racial discrimination does not extend to the prohibition of discrimination in general or even to the prohibition of discrimination on the grounds of nationality.

3.1.3. The imposition of horizontal obligations

[72] *Ibid.*

[73] See, e.g. M. Ragazzi, *The Concept of International Obligations Erga Omnes*, Oxford, OUP, 2000, at 119–131; Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (2001), in *Yearbook of the ILC*, 2001, vol II, part two, at 127, commentary to art 48, at para. 9; C. J. Tams, *Enforcing Obligations Erga Omnes in International Law*, Cambridge, CUP, 2005, at 117–118.

[74] Crawford, above footnote 59, at 645.

[75] *Nottebohm (Liechtenstein v. Guatemala)* (Second Phase), [1955] ICJ Rep. 4, at para. 23.

[76] *Chahal v. UK*, above footnote 33, at para. 73; *Saadi v. UK* App no. 13229/03 (ECHR, 29 Jan. 2008) at para. 44; *Suso Musa v. Malta* App no. 42337/12 (ECHR, 23 Jul. 2013) at para. 90.

[77] *Chahal v. UK*, above footnote 33, at para. 76; *Boultif v. Switzerland* App no. 54273/00 (ECHR, 2 Aug. 2001) at para. 46; *Üner v. The Netherlands* App no. 46410/99 (ECHR, 18 Oct. 2006) at para. 54.

[78] *Gaygusuz v. Austria* App no. 17371/90 (ECHR, 16 Sep. 1996) at para. 42.

[79] *Timishev v. Russia* App no. 55762/00 and 55974/00 (ECHR, 13 Dec. 2005) at para. 58; *D.H. and others v. The Czech Republic* App no. 57325/00 (ECHR, 13 Nov. 2007) at para. 176.

Finally, the horizontal effect of this norm, as adopted by the IACtHR in its Advisory Opinion OC-18,[80] may also be questioned.

In principle, a norm which is ordinarily destined to produce legal effects between the State and the individual (vertical relationship) may also apply to situations where both parties are individuals (horizontal relationship). Accordingly, this norm will create obligations and engage the responsibility of individuals, even though it was not ordinarily designed to apply to these situations. This is the case with regards to certain provisions established by international treaties relating to the protection of human rights. In principle, these provisions should only engage the State parties to the international treaty. However, because of the nature of the obligations and rights contained in these provisions, they may also produce effects vis-à-vis purely private situations (between two or more individuals).[81]

For instance, inspired by the German theory of *Drittwirkung*,[82] the ECtHR has, recognized the possibility of the effect of certain ECHR provisions vis-à-vis individuals.[83] When the interference with a right guaranteed by the ECHR is not directly attributable to the State but follows from an action or omission of a third party (a legal person or a natural person), the responsibility of the State can be still be engaged in certain circumstances. Two main situations can be distinguished. On the one hand, international responsibility of a State may be engaged because of its inaction which had in turn enabled the breach of an ECHR provision by a third party. One example of this is the case of pollution caused by a private company because of the construction of a waste-treatment plant allowed by the State, even though the company failed to fulfil all the legal requirements such as obtaining a municipal licence.[84] On the other hand, a State may be internationally responsible because its domestic law rendered the breach of the ECHR possible. One example of this is the case of dismissal of employees who failed to comply with the condition of mandatory membership to a trade union provided by a closed-shop agreement.[85] The basis of the State responsibility in the European system also arises out of the general obligation to respect human rights. However, in the European system, this obligation

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[80] Advisory Opinion OC-18, above footnote 6, at para. 110.

[81] See J.H. Knox, "Horizontal Human Rights Law", *American Journal of International Law*, 102(1), 2008, 1–47; Eric Engle, "Third Party Effect of Fundamental Rights (Drittwirkung)", *Hanse Law Review*, 5(2), 2009, 165–173. See in the context of comparative constitutional law S. Gardbaum, "The 'Horizontal Effect' of Constitutional Rights", *Michigan Law Review*, 102(3), 2003, 387–459.

[82] *Lüth Case*7BVerfGE 198 (1958); D.P. Kommers and R.A. Miller, *The Constitutional Jurisprudence of Federal Republic of Germany* (2012), at 60–61.

[83] *Young, James and Webster v. UK* App no. 7601/76 and 7806/77 (ECHR, 13 Aug. 1981).

[84] *Lopez Ostra v. Spain*, App no. 16798/90 (ECHR, 9 Dec. 1994), at paras. 52–56.

[85] *Young, James and Webster v. UK*, above footnote 83, at para. 54.

is provided for by Article 1 of the ECHR. The 47 Member States of the Council of Europe have ratified the ECHR (and by doing so, they have also recognized the compulsory jurisdiction of the ECtHR).

This is not the case in the Inter-American system. The IACtHR affirmed in Advisory Opinion OC-18 that the obligation to respect human rights without discrimination gives rise to "effects with regard to third parties, including individuals".[86] In the context of the Advisory Opinion, this affirmation seems to arise out of the sole recognition by the IACtHR of this norm as *jus cogens*.[87] Peremptory norms of international law may under certain circumstances produce effects horizontally.[88] However, it is important to note that unlike the ECtHR, the IACtHR relies solely on the concept of *jus cogens* and does not discuss the horizontal effect of treaty-based norms.[89] As argued above, the use of the concept of *jus cogens* by the IACtHR in this Advisory Opinion is not supported by unquestionable evidence or authority, which weakens the recognition of the horizontal effect of this precise norm.[90]

3.2. An interesting middle point: the impact of Advisory Opinion OC-18 within and outside the Inter-American system

Advisory Opinion OC-18 has had some interesting, although modest, repercussions. As Sarah Cleveland pointed out, this Advisory Opinion has an important, persuasive authority that can serve as a powerful interpretive tool for domestic and international courts and organizations, scholars and decision-makers. [91] This has indeed been the case.

In the Inter-American sphere, for example, the Inter-American Commission referred to Advisory Opinion OC-18 in the case of *Margarita Cecilia Barberia Miranda v. Chile*.[92] This reference was not only formal, but constituted the basis of the reasoning of the Commission relating to the nationality requirement for the practice of law by attorneys in Chile. The Inter-American Commission insisted that because non-discrimination is a peremptory norm of

[86] Advisory Opinion OC-18, above footnote 6, at para. 110.

[87] *Ibid*. Which is comforted by the Concurring Opinion of Judge A.A. Cançado Trindade, paras.76–85 (notably para. 77).

[88] See C. J. Tams, *Enforcing Obligations Erga Omnes in International Law*, above footnote 70, at 146–149; A. Bianchi, "Human Rights and the Magic of Jus Cogens", above footnote 60, at 502.

[89] Despite citing articles 1 and 2 ACHR with regard to the general obligation to respect and guarantee human rights Advisory Opinion OC-18, above footnote 6, at paras. 70, 76, and 78.

[90] See above Section 3.1.1.

[91] S. Cleveland, "Legal Status and Rights of Undocumented Workers: Advisory Opinion OC-18/03", *American Journal of International Law*, 99(2), 2005, 460–465, at 464.

[92] *Margarita Cecilia Barberia Miranda v. Chile* (Merits) Inter-American Commission on Human Rights, Report no. 56/10 (18 Mar. 2010) at paras. 35–36.

international law, States have a positive obligation to combat discrimination and to adopt all measures necessary to ensure equality before the law.[93] Applying the technique of consensual interpretation,[94] the Inter-American Commission arrived at the conclusion that the majority of OAS Member States did not require practising attorneys to have the nationality of the Member State in which they practise law.[95] Consequently, it restrained Chile's margin of appreciation and concluded that the State was responsible for the violation of the right to equal protection as a result of the application of a discriminatory norm that prevented the applicant from practising her profession "exclusively because she was a foreigner".[96] In *Resolution 03/08 on Human Rights of Migrants, International Standards and the Return Directive of the EU*, the Inter-American Commission went even further and "exhort[ed] the Parliament and the Council of the EU to modify the Directive (Returns)".[97] In order to reach this conclusion, the Inter-American Commission based its legal analysis on the obligation of respect of human rights without discrimination.[98] It again explicitly referred to the IACtHR's Advisory Opinion OC-18.[99]

The effects of Advisory Opinion OC-18 have also been felt across the Atlantic. In *Souza Ribeiro v. France*, a case about the expulsion of an undocumented Brazilian immigrant, two

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[93] *Ibid*., at para. 36.

[94] The technique of consensual interpretation consists of examining whether member States to an international treaty on human rights have the same position (legislations and policies) in a particular subject. If Member States have similar consistent positions, their margin of appreciation to implement an obligation arising out of the treaty is deemed to be less important. Conversely, Member States' margin of appreciation is supposedly more extended in cases where they do not have similar positions in a particular subject. The use of consensual interpretation by the IACtHR considerably resembles the application of consensual interpretation and the doctrine of margin of appreciation by the ECtHR. For a critical approach to the ECtHR's use of consensual interpretation, see F. Sudre, *Droit Européen et international des droits de l'homme,* above footnote 32, at 235; F. Sudre, "*A propos du dynamisme interprétatif de la Cour européenne des droits de l'homme*", *Juris-Classeur périodique – La Semaine Juridique, édition générale*, 2001 I 335; G. Letsas, "Two Concepts of the Margin of Appreciation", *Oxford Journal of Legal Studies*, 26(4), 2006, 705–732.

[95] *Margarita Cecilia Barberia Miranda v. Chile,* above footnote 92, at para. 37.

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

[97] Inter-American Commission on Human Rights, *Resolution 03/08 Human Rights of Migrants, International Standards and the Return Directive of the EU*, 25 Jul. 2008, at 2. Naturally, the Inter-American Commission has no jurisdiction over European Union (EU) law and this resolution is not legally binding in the EU. In any circumstances, the jurisprudence of the Court of Justice of the European Union (CJEU), the only judicial authority with powers to interpret EU law in the EU in relation to the Returns Directive, follows the same line of arguments proposed by the Inter-American Commission regarding guarantees of due process and immigration detention. In its two landmark decisions in the cases of *El Dridi* and *Achughbabian*, the CJEU has interpreted that the Returns Directive imposes immigration detention as a last resort measure which should not hinder or render less effective the removal of irregular immigrants from Member States. Directive 2008/115/EC of 16 Dec. 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L348. Case C-61/11/PPU *Hassen El Dridi, alias Soufi Karim* [2011] ECR I-3015 at paras. 34–41; Case C-329/11 *A. Achughbabian v. Prefet du Val-de-Marne* [2011] OJ C 32, 12 at para. 36.

[98] *Ibid*., at 1.

[99] *Ibid*., at 2.

judges of the ECtHR, Judges Pinto de Albuquerque and Vučinić, explicitly referred to the Advisory Opinion OC-18 in a separate opinion.[100] In her partially dissenting opinion in *Georgia v. Russia (I)*, Judge Tsotsoria similarly held that "the principle of respect for and protection of human rights on a non-discriminatory basis is recognized as an international legal standard. Prohibition of discrimination has crystallised into a *jus cogens* norm".[101] It is noteworthy that – in contrast to her fellow judges in the *Souza Ribeiro* case cited above – she did not expressly refer to Advisory Opinion OC-18 to support her position.

Scholars have also commented a great deal on Advisory Opinion OC-18. Most of them have expressed critical views about the use of the concept of *jus cogens* by the IACtHR.[102] Some have, however, taken it at face value and built upon it to develop their own positions on other subjects, such as the applicability of human rights between private parties,[103] or ethnic cleansing.[104]

Finally, certain Latin American States have acknowledged the importance of Advisory Opinion OC-18. In the request for an advisory opinion on migrant children presented by Argentina, Brazil, Paraguay, and Uruguay before the IACtHR,[105] Advisory Opinion OC-18 is expressly mentioned.[106] These States formally requested the IACtHR to:

> [T]ake into special consideration certain general principles of international human rights law, among others: […] the principle of non-discrimination, which prohibits unreasonable restrictions on fundamental rights owing to different factors, such as nationality or the immigration status of the person and which calls for the consideration of identifying features of the person, for instance, age, cultural background and gender.[107]

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[100] *Souza Ribeiro v. France* App no. 22689/07 (ECHR, 13 Dec. 2012) Concurring Opinion of Judge Pinto de Albuquerque joined by Judge Vučinić, at para. 12.

[101] *Georgia v. Russia (I)* App no. 13255/07 (merits) (ECHR, 3 Jul. 2014) Partly Dissenting Opinion of Judge Tsotsoria, at para. 18.

[102] For example, Bianchi, above footnote 60, at 506; Neuman, "Import, Export, and Regional Consent", above footnote 70, at 117–122; G. Noll, "Why Human Rights Fail to Protect Undocumented Migrants", *European Journal of Migration and Law*, 12, 2010, 241–272, at 261.

[103] C. Courtis "The Applicability of Human Rights Between Private Parties" in Y. Donders and V. Volodin (eds), *Human Rights in Education, Science and Culture. Legal Developments and Challenges* Paris/Aldershot, UNESCO/Ashgate, 2008, 153-182, at 156.

[104] S. Marmin, *Le Nettoyage Ethnique. Aspects de Droit International*, Paris, L'Harmattan, 2014, at 103.

[105] Institute for Public Policy in Human Rights "Request for Advisory Opinion on Migrant Children before the Inter-American Court of Human Rights", 2011, available at: http://www.corteidh.or.cr/solicitudoc/solicitud_eng.pdf (last visited 14 Jan. 2015).

[106] *Ibid.*, at para. 13.

[107] *Ibid*.

This reference is by no means anodyne; it could be seen as reflecting the common belief of these States about the nature and the content of the principle of non-discrimination. According to this request, the principle of non-discrimination encompasses the prohibition of discrimination not only on the grounds of nationality but also in relation to immigration status.[108] This is tangible evidence of the impact of Advisory Opinion OC-18. The four founding States of Mercosur[109] (Argentina, Brazil, Paraguay, and Uruguay) recognized the existence of the very pro-immigrant jurisprudence of the IACtHR, which is remarkable; however, how they implement this jurisprudence in their domestic legal orders is another matter. These States acknowledged that there was a lack of legislation and public policies in this area. [110] Therefore, they seem to seek to obtain a sort of stamp of legitimacy for their own legislation and policies. They were certainly inviting the IACtHR to adopt a general position on a very sensitive and important question, also affecting States that are not party to the ACHR, such as the US.[111] This is exactly what the IACtHR did. In its Advisory Opinion OC-21, the Court recalls that its advisory function aims, "above all, to support the Member States and the organs of the OAS so that they are able to meet their relevant international obligations fully and effectively, and to define and implement public policies in the area of human rights".[112] Accordingly, Member States may be willing to refer to the IACtHR's jurisprudence to justify the need for new domestic legislation and policies in the field of immigration. States may also blame the Court for imposing these changes, which would just reinforce the common misuse of human rights in the political discourse.

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[108] *Ibid*.

[109] Mercosur ("Southern Common Market" or "Mercado Común del Sur" in Spanish) is a customs union and free trade area between Argentina, Brazil, Paraguay, Uruguay, Bolivia and Venezuela. Chile, Peru, Colombia, Equator, Guiana and Suriname are associated countries to the Mercosur. See http://www.mercosur.int/ (last visited 24 Aug. 2015); E. Amann & W. Baer, "Market Integration Without Policy Integration: A Comparison of the Shortcomings of Mercosur and the Eurozone", *Latin American Business Review*, 15 (3), 2014, 327–335, at 329; W. Baer & P. Silva, "Mercosul: Its Successes and Failures During Its First Two Decades", *Latin American Business Review*, 15 (3), 2014, 193–208, at 195

[110] Institute for Public Policy in Human Rights "Request for Advisory Opinion on Migrant Children before the Inter-American Court of Human Rights", above footnote 105, at para. 2.

[111] For example, see the following instructive blog post about the situation of migrant children at US borders: D.J. Cantor, "Gangs: The Real 'Humanitarian Crisis' driving Central American Children to the US", *The Conversation*, 22 Aug. 2014, available at: http://theconversation.com/gangs-the-real-humanitarian-crisis-driving-central-american-children-to-the-us-30672 (last visited 24 Aug. 2015). See also D.J. Cantor, "The New Wave: Forced Displacement Caused by Organized Crime in Central America and Mexico", *Refugee Survey Quarterly*, 33(3), 2014, 34–68

[112] Advisory Opinion OC-21, above footnote 7, at para. 29.

3.3. A continuous development: the emphasis on the recognition of the vulnerability of irregular immigrants

The IACtHR has continued to develop its jurisprudence in line with a human rights-based approach to immigration, notably via the recognition of the condition of vulnerability of irregular immigrants.

The IACtHR is not the only Court to recognize that immigrants and asylum-seekers are subjected to conditions of extreme vulnerability.[113] The ECtHR has also recognized the vulnerability of aliens, as discussed below. However, it is suggested that the IACtHR seeks to promote an extended form of protection of vulnerable immigrants based on the expansion of the grounds of non-discrimination, in line with its Advisory Opinion OC-18.

In the case of *Velez Loor v. Panama*,[114] the IACtHR built on the argument put forward by Advisory Opinion OC-18, according to which undocumented immigrants should be considered as a "group in a vulnerable situation".[115] In this case, the IACtHR affirmed that this qualification is appropriate as irregular immigrants are "vulnerable to potential or actual violations of their rights and, as a result of their situation, they suffer a significant lack of protection of their rights".[116] The IACtHR reiterated this position in the case of *Pacheco Tineo v. Bolivia*,[117] relating to the deportation of asylum-seekers, and the case of *Dozerma v. Dominican Republic*,[118] relating to the treatment of Haitian citizens in an irregular situation in the Dominican Republic and the protection of their rights. In *Bosico v. Dominican Republic*, the IACtHR also observed the "particularly vulnerable situation of Dominican children of Haitian origin" and urged the State to take this into consideration when establishing the requirements for late registration of birth.[119] In its Advisory Opinion OC-21, the IACtHR has extended even further the concept of vulnerability, affirming that migrant children may find

[113] Recognition of the vulnerability of irregular immigrants was also at stake on a recent UK Supreme Court (UKSC) case *Hounga v. Allen and another* [2014] UKSC 47, [2014] WLR (D) 353. In this case, the UKSC decided that a victim of trafficking can claim compensation on the grounds of non-discrimination statutory provisions, despite having illegally entered the UK. The vulnerability of the applicant, a 14-year-old girl who was brought to England in order to work illegally as a sort of au pair in conditions amounting to forced labour, was emphasized by the majority.

[114] *Velez Loor v. Panama*, above footnote 9. See notably (for a comprehensive analysis of the main findings of the case) G. de Leon, "Contributions and Challenges for the Inter-American Court of Human Rights for the Protection of Migrants' Rights: The Case of *Velez Loor v. Panama*", *Inter-American and European Human Rights Journal*, 2, 2014, 39–53.

[115] Advisory Opinion OC-18, above footnote 6, at para. 114.

[116] *Velez Loor v. Panama,* above footnote 9, at para. 98.

[117] *Pacheco Tineo v. Bolivia*, above footnote 29 at para. 128.

[118] *Dozerma v. Dominican Republic,* above footnote 7, at para. 152.

[119] *Bosico v. Dominican Republic* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights (8 Sep. 2005) at para. 240.

themselves in a "situation of additional vulnerability"[120] as they are at the same time migrants and children and for this reason doubly vulnerable.

The ECtHR also takes into account the vulnerability of irregular immigrants. For instance, in the case of *Aden Ahmed v. Malta*, relating to the conditions of detention of asylum-seekers and irregular immigrants in Malta, the Court expressly considered "that the applicant was in a vulnerable position, not only because of the fact she was an irregular immigrant and because of her specific past and her personal circumstances, but also because of her fragile health".[121] In the case of *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*,[122] the ECtHR also highlighted the particular situation of "extreme vulnerability" of unaccompanied children.[123] In addition, in *Hirsi Jamaa and others v. Italy*,[124] the ECtHR underlined the vulnerability of the applicants while assessing the violation of Article 3 of the ECHR in relation to the risk of arbitrary repatriation to Somalia and Eritrea.[125] Therefore, the vulnerability of the irregular immigrant's situation seems to be considered by the ECtHR as one of the criteria allowing for the interpretation of ill-treatment under Article 3 of the ECHR (provision prohibiting torture, inhuman and degrading treatments or punishments).[126] In *Siliadin v. France*,[127] a case concerning modern slavery, the ECtHR also insisted on the vulnerability of the victim while examining the existence of a violation of Article 4 of the ECHR (provision prohibiting slavery and forced labour). In a slightly different context, in *M.S.S. v. Belgium and Greece*, the ECtHR accentuated that asylum-seekers (and not all irregular immigrants) form "a particularly underprivileged and vulnerable population group in need of special protection".[128] The

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[120] *Rights and Guarantees of Children in the Context of Migration and/or in need of International Protection*, Advisory Opinion OC-21/14, Inter-American Court of Human Rights (19 Aug. 2014) at para. 71.

[121] *Aden Ahmed v. Malta* App no. 55352/12 (ECHR, 23 Jul. 2013).

[122] *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium* App no. 13178/03 (ECHR, 12 Oct. 2006) at paras. 53–55.

[123] *Ibid.*, at para. 55.

[124] *Hirsi Jamaa and others v. Italy* App no. 27765/09 (ECHR, 23 Feb. 2012) at para. 155.

[125] Judge Pinto de Albuquerque went even further and qualified irregular immigrants in general as "especially vulnerable persons" in his concurring opinion to this case: *Ibid.*, (Concurring Opinion of Judge Pinto de Albuquerque) at para. 77.

[126] According to well-established case law, the European Court considers that "ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 ECHR. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc." *Ireland v. UK* App no. 5310/71 (ECHR, 18 Jan. 1978) at para. 162.

[127] *Siliadin v. France* App no. 73316/01 (ECHR, 26 Jul. 2005) at para. 126: the European Court emphasized that "as a minor, she (the victim) had no resources and was vulnerable and isolated, and had no means of living elsewhere than in the home of Mr and Mrs B., where she shared the children's bedroom as no other accommodation had been offered. She was entirely at Mr and Mrs B.'s mercy, since her papers had been confiscated and she had been promised that her immigration status would be regularised, which had never occurred".

[128] *M.S.S. v. Belgium and Greece* App no. 30696/09 (ECHR, 21 Jan. 2011) at para. 251; *M.S.S. v. Belgium and Greece* App no. 30696/09 (ECHR, 21 Jan. 2011) (Partly Concurring and Partly Dissenting Opinion of Judge Sajó)

decisions adopted in *Tarakhel v. Switzerland*[129] and *V. M. and others v. Belgium*[130] in 2014 and 2015, respectively, confirmed the main findings put forward by the ECtHR in the *M.S.S.* case, stressing the vulnerability of the situation of asylum-seekers in Europe. Accordingly, the ECtHR's approach generally corresponds to the position taken by the IACtHR.

However, besides recognizing the vulnerability of irregular immigrants, the IACtHR has also drawn the necessary conclusions relating to their precise situation. It considered that the position of vulnerability may lead to impunity for the perpetrators of human rights violations, as irregular immigrants would be less inclined to seek police protection or judicial remedy for fear of being arrested and removed from the host country.[131] The IACtHR considered that "the legal and factual obstacles that make real access to justice illusory"[132] and, together with cultural factors and the power structure in the society, contribute to the reinforcement of this sense of impunity.[133]

Therefore, the IACtHR seems to find the need to reinforce the affirmation that human rights, and notably due-process guarantees, also apply to irregular immigrants.[134] In this respect, the IACtHR clearly affirmed that States can take action against migrants who do not abide by the domestic immigration rules; [135] however, "upon adopting the relevant measures, States should respect human rights and guarantee their exercise and enjoyment to all persons who are within their territory, *without discrimination based on their regular or irregular status*, or their nationality, race, gender or any other reason".[136]

As a consequence, in contrast to the ECtHR's position analysed above, the IACtHR seems more inclined to promote an extended form of protection of irregular immigrants' rights, based

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at para. 100 (in which he expresses his disapproval concerning the categorization of asylum-seekers as a vulnerable group of people). See also G. Clayton, "Asylum Seekers in Europe: *M.S.S. v. Belgium and Greece*", Human Rights Law Review, 11(4), 2011, 758–773, at 769.

[129] *Tarakhel v. Switzerland* App no. 29217/12 (ECHR, 4 Nov. 2014) at paras. 99 and 118.

[130] *V.M. and others v. Belgium* App no. 60125/11 (ECHR, 7 Jul. 2015) at paras. 137–138 and 162.

[131] *Velez Loor v. Panama,* above footnote 9, at para. 98.

[132] *Ibid.*; *Dozerma v. Dominican Republic,* above footnote 7, at para. 153.

[133] *Ibid.*

[134] Advisory Opinion OC-18, above footnote 6, at para. 121.

[135] Comparatively, the ECtHR has adopted a position according to which "[c]ontracting States have the right, as a matter of well-established international law and subject to their treaty obligations including the Convention, to control the entry, residence and expulsion of aliens": *Chahal v. UK*, above footnote 78, at para. 73; *Saadi v. UK*, above footnote 78, at para. 44; *Suso Musa v. Malta* , above footnote 78, at para. 90. States are, however, bound to "secure to everyone within their jurisdiction"[135] the rights and freedoms provided by the ECHR (Art. 1 ECHR). This includes aliens that can be found within the State parties' jurisdiction. See *Soering v. UK* App no. 14038/88 (ECHR, 7 Jul. 1989) at para. 86. For the interpretation of art. 1 ECHR see e.g. *Ilascu and others v. Moldova and Russia* App no. 48787/99 (ECHR, 8 Jul. 2004) at para. 311.

[136] *Velez Loor v. Panama,* above footnote 9, at para. 100 (emphasis added).

on the enlarged application of the principle of equality and non-discrimination.[137] The IACtHR added a new ground for non-discrimination based on the migratory status of the individual. By doing so, the IACtHR upheld and implemented the main argument put forward by Advisory Opinion OC-18.[138] This implementation is also complemented by the imposition of a variety of obligations upon States.

3.4. An ambitious destination: the imposition of a diverse range of obligations upon States

The IACtHR has placed itself at the forefront of the recognition of a diverse range of obligations upon States in the field of irregular immigrants' rights. The Court's approach is certainly original. As Laurence Burgorgue-Larsen has persuasively argued, "the Inter-American approach to reparations is, to say the least, innovative and forward looking".[139] It is submitted that this unconventional approach is even more noteworthy in comparison with the one adopted by the ECtHR in similar cases. In general, remedies imposed by the IACtHR have been classified in 13 different groups:

1) monetary economic compensation;
2) non-monetary economic compensation;
3) symbolic reparations;
4) restitution of rights;
5) prevention through training public officials;
6) prevention through raising social awareness;
7) prevention through legal reforms;
8) prevention through strengthening, creating, or reforming public institutions;
9) prevention through unspecified measures;
10) investigation and punishment with legal reform;
11) investigation and punishment without legal reform;

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[137] Comparatively, the ECtHR's jurisprudence is based on the general obligation to secure the protection of human rights without discrimination arising purely from conventional obligations relating to articles 1 and 14 of the ECHR (Article 14 guarantees equal treatment in the enjoyment of the other rights provided for by the ECHR). See S. Besson, "Evolutions in Non-Discrimination Law within the ECHR and the ESC Systems: 'It Takes Two to Tango in the Council of Europe'", *American Journal of Comparative Law*, 60(1), 2012,147–180; M. Cartabia, "The European Court of Human Rights: judging non-discrimination", *International Journal of Constitutional Law*, 9(3–4), 2011, 808–814; F. Sudre & H. Surrel (eds) *Le droit à la non-discrimination au sens de la Convention Européene des Droits de l'Homme*, Bruxelles, Bruylant, 2008. See also *Bah v. UK* App no. 56328/07 (ECHR, 27 Sep. 2011) at para. 37; *Gaygusuz v. Austria* App no. 17371/90 (ECHR, 16 Sep. 1996) at para. 42 (both decisions stressing that a difference of treatment based exclusively on the the grounds of nationality or sex would be more difficult to justify).

[138] Advisory Opinion OC-18, above footnote 6, at para.

[139] L. Burgorgue-Larsen & A. Ubeda de Torres, above footnote 35, at 224.

12) protection of victims and witnesses; and

13) other.[140]

In the specific field of the protection of irregular immigrants' rights, the IACtHR goes further than its European counterpart in imposing, for example, that the State:

> [M]ust implement, in a reasonable period of time, a formation and training program that deals with international standards related to the human rights of migrants, due process guarantees, and the right to consular assistance for the personnel of the National Migration and Naturalization Service, as well as for officials that given their jurisdiction in the matter, handle issues related to migrant persons.[141]

Another common feature of the Inter-American case law is to impose on States the obligation to perform a "public act of acknowledgment of international responsibility and public apology".[142] Practical actions, such as imposing that "the State must organize a media campaign on the rights of regular and irregular migrants",[143] may also be required. Similarly, there may be the imposition of symbolic measures, such as building memorials in honour of the victims,[144] and the organization of a public ceremony broadcast by the national television network.[145] More controversial is the fact that the IACtHR can also order that a "State must, within a reasonable time, adapt its domestic laws".[146] It is submitted that this type of measure can be seen as a disproportionate interference in domestic affairs, although Articles 1(1)[147] and

[140] F. Basch, L. Filippini, A. Laya, M. Nino, F. Rossi & B. Schreiber, "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 of Human Rights*, 12, 2010, 8–36, at 12–14.

[141] *Velez Loor v. Panama,* above footnote 9, at operative para. 16.

[142] *Dozerma v. Dominican Republic,* above footnote 7, at operative para. 6.

[143] *Ibid*., at operative para. 8.

[144] *Villagran Morales and others v. Guatemala* Reparations) Inter-American Court of Human Rights (26 May 2001) (*"Street Children Case"*) at operative para. 7.

[145] *Gonzalez and others v. Mexico "Cotton Field Case"* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights (16 Nov. 2009) at para. 469.

[146] *Ibid*., at operative para. 9.

[147] Article 1(1) ACHR: "1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition."

2 of the ACHR[148] are interpreted by the IACtHR as entailing a general obligation of States to adapt their domestic legislation to the ACHR.[149]

It is argued that all these measures of satisfaction seem to be connected to a broader point: the acknowledgement of the victims' suffering.[150] The explicit recognition of the violation of victims' rights and of their suffering can be seen as a powerful form of reparation in the context of severe impunity reigning in Latin America. Some of the actions imposed on States also have the goal of educating civil servants and governmental agents for the future. In addition, the recognition by the IACtHR of new categories of harm, such as the damage to the "life project" of the victim,[151] reinforces the relevance of the imposition of different forms of reparation. The IACtHR also allows specific reparations to be awarded not only to direct victims of violations but also to groups, considered as collective beneficiaries.[152] Irregular immigrants are considered by the IACtHR as a vulnerable group,[153] which is certainly at the origin of the imposition of forms of reparation benefiting the whole group of existent and future irregular immigrants, such as the obligation to organize and run specific training for civil servants working with immigrants.[154]

These forms of reparations are justified in law. As the IACtHR has stated, "it is a principle of international law that all violations of an international obligation which cause damage must be adequately make reparations".[155] Reparations are "measures tending to eliminate the effects of the violations committed".[156] They are calculated in relation to the characteristics of the

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[148] Article 2 ACHR: "Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms."

[149] Advisory Opinion OC-21, above footnote 7, at para. 65. See L. Lavrysen, "Positive Obligations in the Jurisprudence of the Inter-American Court of Human Rights", *Inter-American and European Human Rights Journal*, 2, 2014, 95–115, at 96–97;

[150] This is also the case in transitional justice at the international level, and restorative justice in some domestic legal orders such as in the UK; A. Ashworth, "Responsibilities, Rights and Restorative Justice", *British Journal of Criminology*, 42(3), 2002, 578–595; S. Winter, "Towards a Unified Theory of Transitional Justice", *International Journal of Transitional Justice*, 7(2), 2013, 224–244; R. Uprimny & M.P. Saffon, "Transitional Justice, Restorative Justice and Reconciliation. Some Insights from the Colombian Case", *University of Wisconsin Working Paper Series*, available at: http://www.global.wisc.edu/reconciliation/library/papers_open/saffon.pdf (last visited 14 Jan. 2015); Ministry of Justice, Restorative Justice Action Plan for the Criminal Justice System (Nov. 2012), available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/217311/restorative-justice-action-plan.pdf (last visited 14 Jan. 2015).

[151] *Loaysa Tamayo v. Peru* (Reparations and Costs) IACtHR (27 Nov. 1998).

[152] L. Burgorgue-Larsen & A. Ubeda de Torres, above footnote 36, at 227.

[153] Advisory Opinion OC-18, above footnote 6 at para. 114.

[154] See e.g. *Velez Loor v. Panama*, above footnote 9, at operative para. 16.

[155] *Gutiérrez-Soler v. Colombia* (Merits, Reparations, and Costs) IACtHR (12 Sep. 2005) at para. 61.

[156] *Ibid.*, at para. 64.

violation and correspond to the nature of the damage (pecuniary or non-pecuniary). Reparations arise from States' obligations to respect, protect and fulfil human rights, and also encompass guarantees of non-repetition.[157] Reparations can take the form of *restitutio in integrum* or full restitution, which implies the return to the state of affairs prior to the infringement.[158] However, in the large majority of cases and as a consequence of the nature of violations, per se, full restitution is not always possible or feasible.[159] Accordingly, international courts can order other forms of reparation. For instance, the ECtHR can impose measures of just satisfaction.[160] The IACtHR can also impose these types of remedies. However, its powers go beyond the European model as it may order a more diversified range of reparations.

Comparatively, the ECtHR can be seen as more conservative; it does not normally impose measures of this sort. Financial compensation is the main tool that the ECtHR utilizes when seeking to impose reparations. However, through the development of the doctrine of positive obligations,[161] the ECtHR can decide *in concreto* whether States have undertaken all the appropriate substantive and procedural measures in order to respect, protect and fulfil human rights obligations. In doing so, the ECtHR is able to impose rather intrusive measures upon States, including the obligation to provide material conditions to the reception of asylum-seekers once there is a legal basis for such an obligation in domestic law.[162] Nonetheless, in the field of the protection of immigrants' rights, the ECtHR does not seem inclined to use the doctrine of positive obligations to impose a general positive obligation to protect human rights upon States.[163]

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[157] *Ibid*., at para. 63 ("the positive measures that the State must adopt to prevent repetition of the harmful events").

[158] *Ibid*.

[159] *Ibid.*

[160] Art. 41 ECHR provides: "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party." Just satisfaction is not automatically imposed every time the European Court finds that a contracting State has violated conventional rights. On the contrary, the European Court has a certain leeway to determine whether another form of reparation is necessary because it is just (*équitable* in the French version of the text). Just satisfaction may be granted on the grounds of pecuniary damage, non-pecuniary damage, and costs and expenses. Compensation for pecuniary damage can relate to the loss already suffered (*damnum emergens*) and the loss of reasonably expected gains (*lucrum cessans*). Compensation for non-pecuniary damage normally involves the determination of the payment of a sum of money by the State, although the Court may establish that just satisfaction is attained by the mere declaration of violation of rights.

[161] A. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, London, Hart Publishing, 2004.

[162] *M.S.S. v. Belgium and Greece*, above footnote 127, at para. 250; *Tarakhel v. Switzerland*, above footnote 128, at 96; *V.M. and others v. Belgium*, above footnote 129, at para. 136.

[163] In the Chamber decision *Sisojeva and others v. Latvia* App no. 60654/00 (ECHR, 16 Jun. 2005) at para. 104, the European Court seemed to suggest that positive obligations could be imposed upon States in the context of the right to the protection of family life of a foreigner facing deportation, contradicting the Court's traditional approach in the field. See J-F. Akandji-Kombe, Positive Obligations under the European Convention on Human

Ultimately, it is submitted that the IACtHR imposes stronger obligations upon its Member States in the field of the protection of irregular immigrants' rights. The root of this different approach may lie in the particularities of the Latin American societal context. Trivialization of violence and a widespread feeling of impunity are common features in many Latin American countries. This is a terrible scourge which young Latin American democracies are still facing.[164] Undoubtedly, this is reflected in the IACtHR's case law. This Court has dealt, for example, with violent massacres of indigenous populations,[165] kidnapping, torture and murder of street children by police officers,[166] forced disappearance,[167] and, in what directly relates to this article's subject, violent and unlawful killing of irregular immigrants and potential asylum-seekers.[168] Extreme poverty, organized crime and the development of a gang culture certainly do not help to secure respect for human rights in the region. Presumably, the IACtHR's response to violations of human rights in this societal context needs to be robust. Indeed, as pointed out by Burgorgue-Larsen and Ubeda de Torres, the IACtHR's approach to reparations "can be summed up in just five words: exceptional crimes justify exceptional reparations".[169] In comparison to the ECtHR, the Inter-American case law on reparations appears to be far more aggressive; it may, however, suffer to a greater extent from problems linked to its judicial authority and to compliance.

4. A contribution partially eroded by legal, institutional and societal limitations

The IACtHR has certainly developed an important jurisprudence aimed at imposing an extended form of protection of irregular immigrants' rights. However, it is still necessary to

Rights, Human Rights Handbooks no. 7, Council of Europe, 2007, at 40. However, the Chamber decision was later overturned by the Grand Chamber in *Sisojeva and others v. Latvia* App no. 60654/00 (ECHR, 15 Jan. 2007) which does not mention the possibility of imposing positive obligations on States in this domain. See M-B. Dembour, *When Humans Become Migrants*, above footnote 3, at 459–464. But see M-B. Dembour, *When Humans Become Migrants*, above footnote 3, at 112 (discussing the possibility of imposition of positive obligations upon States in the ambit of Article 8 ECHR in relation to admission into their territory of relatives of settled immigrants).

[164] See F. Lessa *et al.*, "Overcoming Impunity: Pathways to Accountability in Latin America", *International Journal of Transitional Justice*, 8, 2014) 75–98; J. Pasqualucci, above footnote 44.

[165] *Moiwana Community v. Suriname* (Preliminary Objections, Merits, Reparations and Costs) IACtHR (15 Jun. 2005).

[166] *Street Children Case*, above footnote 143.

[167] *Goiburu v. Paraguay* (Merits, Reparations and Costs) IACtHR (33 Sep. 2006).

[168] *Dozerma v. Dominican Republic*, above footnote 7.

[169] L. Burgorgue-Larsen & A. Ubeda de Torres, above footnote 35, at 224.

analyse whether this protection can be considered effective and efficient. It is submitted that the imposition of a variety of obligations upon States is not sufficient to eliminate limitations imposed by State practice. It follows that legal and institutional limitations may still restrain the full application of the Inter-American jurisprudence in this field. Three main limitations can be identified: restricted membership of the ACHR; inadequacy of compliance with the IACtHR's decisions; and circumscribed effectiveness of human rights in the Americas.

4.1. Limited membership of the ACHR

Limited membership is undoubtedly one of the main problems faced by the Inter-American system as a whole, which naturally, limits the scope of recognition and implementation of irregular immigrants' rights.

The fact that Canada and the US, the two wealthiest States on the North American continent, refused to accede to the system may be seen as a tremendous handicap for the legitimacy of this regional system. The US signed the ACHR in 1977 but it has never ratified it. Canada refused to accede to the ACHR.[170] In addition to the negative image it creates, not having these two North American countries on board also leads to a dramatic impact on the funding of the IACtHR and the Inter-American Commission. As Robert Goldman states, "the OAS is an organization in perpetual financial crisis".[171] Indeed, the vast majority of OAS members and the ACHR parties are developing countries. Therefore, funding the functioning of an international court with a reduced budget is a difficult juggling exercise.[172] It has been submitted that "continuing financial limitations may be hampering the tribunal's ability to achieve [its] goals".[173] The IACtHR may certainly face difficulties in providing great service as it has a limited number of attorneys to be instructed on cases, and it lacks permanent staff.

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[170] See the OAS website for information on membership of the ACHR, available at: http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm (last visited 14 Jan. 2015).

[171] Goldman, above footnote 11, at 883.

[172] By way of comparison, the IACtHR's budget for 2014 amounts to 2,661,100 US dollars according to the OAS 2014 budget: 2013 Budget, 10, available at: http://www.oas.org/budget/2014/Budget%202014%20Eng%20V2.%20Final.pdf (last visited 14 Jan. 2015). The ECtHR's budget for 2014 amounts to 67,650,400 euros according to information available at: http://www.echr.coe.int/Pages/home.aspx?p=court/howitworks&c=#newComponent_1346157778000_pointer (last visited 14 Jan. 2015).

[173] J. Cavallaro & S. Brewer, "Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court", *American Journal of International Law*, 102(4), 2008, 768–827, at 795.

The situation is even more complex in the context of an expanded workload due to an increased number of communications referred by the Inter-American Commission.[174]

In addition, partial membership of the ACHR creates a sort of *à la carte* system, opposed to the universality of human rights claimed by international bodies.[175] As pointed out by Jo Pasqualucci, "lack of universality complicates the functioning of the Inter-American Commission, which must apply somewhat different criteria depending on whether a State is or is not a party to the American Convention".[176] This is certainly also the case of the IACtHR, as the recourse to the concept of *jus cogens* in Advisory Opinion OC-18 confirms. Furthermore, the lack of universality indicated above may lead to a double standard of protection of human rights in the Americas. It can be argued that human rights would not be protected in the same manner all over the region, as some countries are not party to the Convention.[177] This risk should, however, be counterbalanced by the fact that some of the States that are not party to the ACHR have their own domestic instruments of human rights protection.[178] These instruments are, in general, inspired by the UDHR, which has acquired the status of customary international law.[179]

4.2. Inadequate or partial compliance with the IACtHR's decisions

Another crucial limitation to the protection of irregular immigrants' rights established by the IACtHR's jurisprudence relates to the lack of full State compliance with the Court's decisions.

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[174] For example, in 2013 the Inter-American Commission referred 11 cases to the IACtHR (Inter-American Commission on Human Rights, *Annual Report 2013*, ch. 1, Point C, at para. 40). This is considered an increase in the workload of the Court compared with previous years. For example, in the period 1979–1986 the IACtHR did not refer a single case to the IACtHR: L. Burgorgue-Larsen & A. Ubeda de Torres, above footnote 35, at 37.

[175] Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna on 25 Jun. 1993, I, 5.

[176] J. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights*, Cambridge, CUP, 2013, at 26.

[177] See the OAS website for information on membership of the ACHR, available at: http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm (last visited 14 Jan. 2015).

[178] Canadian Human Rights Act (RSC 1985, c H-6); US Bill of Rights (US Const. amend. I-X) and US Const amend XI-XXVII.

[179] *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)* (Merits) [1980] ICJ Rep 3, at para. 42. See H. Hannum, "The Status of the Universal Declaration of Human Rights in National and International Law", *Georgia Journal of International and Comparative Law*, 25, 1995–1996, 287; J. Von Bernstorf, "The Changing Fortunes of the Universal Declaration of Human Rights: Genesis and Symbolic Dimensions of the Turn to Rights in International Law", *European Journal of International Law*, 19(5), 2008, 903–924, at 913.

Compliance may be understood as "a causal relationship between the contents of judicial decisions and State practice, leading to a convergence of the two".[180] According to Article 68(1) of the ACHR: "The States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties". States are thus required to implement the measures imposed by the IACtHR; however, in reality, they fail to comply or only comply partially with the IACtHR's decisions.

It is suggested that compliance is inadequate in Latin America for three main reasons: the imposition of a far too vast a range of measures of reparations upon States, the lack of an independent monitoring body, and the attitude of States in practice.

First, imposing a wide range of measures of reparations is certainly necessary and beneficial to the victims of human rights violations. As examined above, these measures may encompass not only financial compensation but also structural and symbolic actions.[181] Yet, the imposition of such measures alone may not be sufficient. Structural measures may be more lengthy and difficult to implement. Changes in domestic legislation may be in many cases dependent on internal strategies and political will. Furthermore, account should be taken of the economic and financial situation of Latin American States. Some States may feel less inclined to comply with obligations that directly interfere with their domestic budgetary plans, such as the construction of memorials for victims of massacres, or the introduction of new training programmes for civil servants.[182] On a spectrum, it seems that States are more inclined to comply with the obligation to pay financial compensation to victims, but less inclined to provide for the more forceful measures imposed.[183]

For instance, in the *Velez Loor* case, concerning the detention of irregular immigrants, the IACtHR ordered Panama to pay compensatory indemnities within a period of six months, publish the judgment in national media, carry out criminal investigations, adopt measures to create establishments for the purposes of detention of irregular immigrants, implement an education and training programme on the human rights of immigrants, and implement training programmes on the obligation to initiate *ex officio* investigations.[184] Panama has not yet fully

[180] Y. Shany, "Assessing the Effectiveness of International Courts: A Goal-Based Approach", *American Journal of International Law*, 106(2), 2012, 225–270, at 261.

[181] See above Section 3.4.

[182] F. Basch, L. Filippini, A. Laya, M. Nino, F. Rossi & B. Schreiber, above footnote 139, at Chart no. 5.

[183] L. Burgorgue-Larsen & A. Ubeda de Torres, above footnote 36, at 184.

[184] *Velez Loor v. Panama*, above footnote 9, at operative paras 12–18.

complied with the Court's orders.[185] In this case, the IACtHR insisted that the State should adopt measures to ensure that detention facilities should be "adapted to migrants, staffed by duly trained and qualified civilian personnel" in order to ensure that migrants would not be detained together with ordinary criminals.[186] This measure was ordered to ensure non-repetition of human rights violations. In 2013, only two detention centres had been established and the country had not given clear indications as to its compliance with the specific measures regarding adequacy of detention facilities and training of civil servants.[187]

Similarly, in *Bosico v. Dominican Republic*, the IACtHR imposed a significant range of measures upon the State, including the organization of a "public act acknowledging its international responsibility and apologizing to the victims", and the adoption of "legislative, administrative and any other measures needed to regulate the procedure and requirements for acquiring Dominican nationality based on late declaration of birth"[188] The State has not yet complied with these two measures and it seems that there is no political will to fully implement them domestically.[189]

Second, unlike the European system, in which the Committee of Ministers of the Council of Europe has the explicit competence to monitor the execution of the ECtHR's decisions,[190] the ACHR does not establish a specific body to monitor compliance with the IACtHR's decisions. Despite the fact that the IACtHR recognized its own competence to monitor compliance with its decisions in the case of *Baena Ricardo,* this mechanism is not optimal.[191] The Court established a twofold mechanism: it encompasses a first stage in which the State submits a report to the Court; this is then followed by the Court's assessment of the State's engagements and progress in the field. Accordingly, this is mainly a judicial mechanism, as opposed to the political mechanism in place in the European system. Therefore, there is little place for political pressure in the Inter-American system, as the OAS General Assembly receives but does not analyse in depth the annual reports submitted by the IACtHR. As pointed out by Jo Pasqualucci, the General Assembly has never issued a comment on State non-

[185] *Velez Loor v. Panama* (Monitoring Compliance with Judgment) Order of the IACtHR (13 Feb. 2013) at paras 18–25.
[186] *Ibid*.
[187] *Ibid*., at para. 18.
[188] *Bosico v. Dominican Republic*, above footnote 118, at operative paras. 7 and 8.
[189] *Bosico v. Dominican Republic* (Monitoring Compliance with Judgment) Order of the IACtHR (10 Oct. 2011) at paras 11 and17.
[190] Art. 46(2) ECHR.
[191] *Baena-Ricardo and others v. Panama* (Competence) IACtHR (28 Nov. 2003) at para. 114.

compliance with Court judgments.[192] The IACtHR is thus responsible for imposing obligations upon States and for monitoring States' compliance with its own decisions. This can be challenging, particularly insofar as the IACtHR has a very limited budget[193] and cannot afford to have an extended team of attorneys to help with the analysis of country reports. For instance, in *Pacheco Tineo v. Bolivia*, relating to the expulsion of former refugees who have entered the country illegally, the Court imposed several measures of reparation, including specific training for civil servants.[194] The State has complied with one financial measure imposed, but the Court has not yet monitored compliance with any other specific measure, including the one relating to training of civil servants.[195]

Third, it is submitted that States do not always make the necessary efforts to comply with the IACtHR's decisions in practice. As observed by Cavallaro and Brewer: "Governments may openly reject certain orders, but even more commonly they assert that they will comply or are in the process of complying, yet fail to take the steps necessary to bring their practices into line with the requirements of the Court's judgment".[196] This seems to be the case in relation to measures adopted in the context of the protection of irregular immigrants' rights. For instance, Panama has not fully complied with the totality of measures imposed by the IACtHR in the *Velez Loor* case.[197] Similarly, the Dominican Republic has yet to comply with the totality of measures imposed by the IACtHR in the *Bosico* case, which was already 10 years ago.[198] Although, as Hawkins and Jacoby have persuasively argued, "international rules display some degree of effectiveness even when compliance is low (by inducing behavioural changes)",[199] the attitude of Latin American political elites is still not fully satisfactory. They may indeed consider respect for human rights as a powerful tool to promote their image and reputation in the international arena.[200] Panama, for instance, fiercely presented a list of efforts made by its

[192] J. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights*, above footnote 179, at 28.

[193] See above footnote 175.

[194] *Pacheco Tineo v. Bolivia* (Preliminary objections, merits, reparations and costs) the IACtHR (25 Nov. 2013) at operative para. 9.

[195] *Pacheco Tineo v. Bolivia* (*reintegro al fondo de asistencia legal de víctimas*) Resolution of the IACtHR (26 Jan. 2015).

[196] J. Cavallaro & S. Brewer, above footnote 172, at 785.

[197] *Velez Loor v. Panama* (Monitoring Compliance with Judgment), above footnote 185, at paras. 18–25.

[198] *Bosico v. Dominican Republic* (Monitoring Compliance with Judgment) Order of the IACtHR (10 Oct. 2011) at paras. 11 and 17.

[199] D. Hawkins & W. Jacoby, "Partial Compliance: A Comparison of the European and Inter-American Courts of Human Rights", *Journal of International Law and International Relations*, 6, 2010, 35–95, at 39.

[200] C. Hillebrecht, "The Domestic Mechanisms of Compliance with International Human Rights Law: Case Studies from the Inter-American Human Rights System", *Human Rights Quarterly*, 34(4), 2012, 959–985, at 960.

government in the field of immigration to the United Nations Human Rights Council[201]on the occasion of its Universal Periodical Review,[202] in 2010.[203] Likewise, the Dominican Republic depicted a fairly positive picture of the situation vis-à-vis the protection of migrants' rights in its national report presented to the United Nations Human Rights Council in 2013.[204] Yet, none of these countries have fully complied with important measures imposed by the IACtHR in these very same areas.[205]

Lack of full compliance with the IACtHR's orders may also reinforce the feeling of impunity within many Latin American countries, and hinder the effectiveness of the ambitious form of protection of irregular immigrants' rights established by the IACtHR.

4.3. Circumscribed effectiveness of human rights protection in Latin America

Effectiveness of the protection of human rights is another great challenge faced by Latin American countries. It is argued that the inadequacy of the protection of human rights, including those of irregular immigrants, is largely related to the general culture of improbity and corruption prevalent in Latin America.[206]

First, it is important to note that some of the Latin American countries have only re-established democratic processes very recently.[207] As a consequence, the culture of corruption and improbity flows from those years of dictatorial or authoritarian regimes. A deep societal change is thus needed. Non-governmental organizations (NGOs), charities and human rights defenders should all be involved in the process. Civil society should be involved in a multilevel

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[201] The United Nations Human Rights Council is "an inter-governmental body within the United Nations system made up of 47 States responsible for the promotion and protection of all human rights around the globe", available at: http://www.ohchr.org/en/hrbodies/hrc/pages/hrcindex.aspx (last visited 24 Aug. 2015)

[202] Universal Periodical Review (UPR) is a process of review of the human rights records of all UN Member States. "The UPR is a State-driven process, under the auspices of the Human Rights Council, which provides the opportunity for each State to declare what actions they have taken to improve the human rights situations in their countries and to fulfil their human rights obligations", available at: http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx (last visited 24 Aug. 2015).

[203] Panama, National Report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council resolution 5/1, 27 Sep. 2010 (A/HRC/WG.6/9/PAN/1/Rev.1), available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/165/43/PDF/G1016543.pdf?OpenElement (last visited 24 Aug. 2015). at para 112-114.

[204] Dominican Republic, National Report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council resolution 5/1, 8 Nov. 2013 (A/HRC/WG.6/18/DOM/1), available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G13/184/87/PDF/G1318487.pdf?OpenElement (last visited 24 Aug. 2015), at paras. 88–91.

[205] *Velez Loor v. Panama* (Monitoring Compliance with Judgment) above footnote 185; *Bosico v. Dominican Republic* (Monitoring Compliance with Judgment) above footnote 198.

[206] Weiland, above footnote 44; Ruhl, above footnote 44.

[207] For instance, Brazil, Argentina, Chile, and Uruguay were governed by dictatorial regimes until the mid and late 1980s.

process of promotion of human rights values. Cavallaro and Brewer's viewpoint is of great assistance in this matter. They submit that advances in human rights practices in the majority of Latin American countries have historically depended on the ability of social movements and human rights advocates on the ground to exert pressure on authorities to implement change.[208] As one of the possible solutions, they advocate that the Court should be more concerned with "maximizing the relevance and implementability of its jurisprudence",[209] notably by making it more accessible to the public and also more in touch with the social context of the countries to which it is addressed. This is certainly the direction in which the IACtHR's case law should evolve, notably in the field of the protection of irregular immigrants' rights.

Second, it is necessary to take into account the considerable gap between law and practice often present in certain Latin American countries. Despite the adoption of comprehensive constitutions, expressly recognizing human rights,[210] the protection of these rights is not fully effective in practice. The Brazilian Constitution, for instance, proclaims an extensive catalogue of rights, encompassing civil and political rights, as well as economic and social rights.[211] This does not mean that in practice these fundamental rights are effectively guaranteed. For example, Article 5 (XLIX) states that "prisoners are ensured respect for their physical and moral integrity".[212] However, the reality of detention conditions in several Brazilian prisons shows that prisoners' physical and moral integrity are not effectively protected. In relation to migration detention, Law No. 6.815/1980 sets out the provisions for the imprisonment of foreigners for reasons of irregular immigration.[213] There are currently no detention centres or dedicated facilities for foreigners available in Brazilian territory. Irregular immigrants are thus detained in ordinary prisons, together with all sorts of criminals. Prisons in Brazil are well known for their undignified and overcrowded facilities.[214] Accordingly, common prisoners and

[208] J. Cavallaro & S. Brewer, above footnote 172, at 788.

[209] *Ibid.*, at 817.

[210] For example: Constitution of Peru (1993), art. 2; Constitution of Argentina (1994), Article 8; Constitution of Uruguay (2002), Articles 7–39; Constitution of Chile (2010), Articles 19–23.

[211] Brazilian Federal Constitution (1989), Title II, Chapters 1–5.

[212] Original version in Portuguese: '*é assegurado aos presos o respeito à integridade física e moral*'.

[213] Lei No 6.815/1980 de 19 de Agosto de 1980, Define a *situação jurídica do estrangeiro no Brasil, cria o Conselho Nacional de Imigração*, available at: http://www.planalto.gov.br/ccivil_03/Leis/L6815.htm (last visited 24 Aug. 2015) at Articles 61(1) and 73(1).

[214] After a visit to Brazil in Mar. 2013, the United Nations Working Group on Arbitrary Detention expressed its "concern at the excessive use of deprivation of liberty in Brazil, which has one of the world's largest prison populations" and concluded that "as a result of excessive detention, detention facilities are usually overcrowded. In some cases, the number of detainees exceeds capacity by 100 per cent": United Nations Working Group, *Mission to Brazil* (30 Jun. 2014) UN Doc. A/HRC/27/48/Add.3.

detained migrants alike are subjected, in practice, to a situation that is certainly not in line with either the Brazilian constitution, or the ACHR.[215]

Ultimately, the effectiveness of the protection of irregular immigrants' human rights, is undoubtedly a major challenge for Latin American countries.

5. Conclusion

This article has shown that the IACtHR has the potential to promote a sustained form of protection of irregular immigrants' rights in Latin America. It has also been demonstrated that the IACtHR has extended its human rights-based approach to the protection of irregular immigrants' rights.

Its jurisprudence has developed in line with its landmark Advisory Opinion OC-18 handed down in 2003. This article has also suggested that principles developed by the Inter-American jurisprudence can have an impact, although modest, outside the Latin American sphere.[216] The IACtHR's proactive interpretation of sources of international law[217] has moderately influenced judicial authorities, practitioners and academics within and outside its jurisdiction. Nonetheless, this article has demonstrated that the IACtHR's analysis of legal concepts at the basis of its dynamic jurisprudence is not immune from criticism. Its interpretation of the legal effects of peremptory norms of international law, and the qualification of non-discrimination on the grounds of origin or nationality as a norm of *jus cogens*, is not free from significant errors. Yet, it has given the IACtHR the opportunity to build upon its own jurisprudence and promote a far-reaching system of protection of irregular immigrants' rights, focused on their vulnerability and imposing important obligations upon States.

However, it is submitted that the protection of irregular immigrants' rights proposed by the IACtHR suffers from certain inefficiencies. This protection is indeed highly dependent on Latin American countries' capability to overcome several important challenges, in particular with respect to their compliance with judicial decisions and the effectiveness of measures to protect the human rights of irregular immigrants. These challenges are not only purely legal or institutional but are also strongly dependent on cultural, political and societal issues. The Latin American socio-economic context cannot be disassociated from State practice in the field of protection of irregular immigrants' rights. Endemic corruption, organized crime, and pervasive

[215] Notably article 5 ACHR (right to humane treatment).
[216] See above section 3.2.
[217] H. Thirlway, *The Sources of International Law*, Oxford, OUP, 2014, at 154.

gang culture cannot be isolated from the broader panorama of human rights protection in Latin America. In the specific field of immigration, these elements can serve at the same time as drivers of migration[218] and barriers to the effective implementation of immigrants' rights protection.

The comparison of the IACtHR with its European counterpart has shown that the Costa Rica-based institution has certainly many areas in which to improve. Compliance with its decisions and the effectiveness of the measures it takes to protect rights are the issues of main concern. However, its forward-looking jurisprudence in the field of the protection of irregular immigrants' rights may also serve as a guide to the European judges, notably in relation to irregular immigrant workers' rights and migrant children's rights.[219]

Overall, the ambitious system of protection of irregular immigrants' rights designed by the IACtHR finds itself in a difficult situation: on the one hand, the Court should continue to establish its authority and impose necessary sets of obligations upon States, thereby elevating the level of protection of human rights in the continent; on the other hand, however, the Court should take into account the reality of the protection of human rights in Latin America, and act even more firmly on instances relating to non-compliance with its decisions by States.

[218] See D.J. Cantor, "The New Wave", above footnote 111.
[219] See above section 3.2; See also Advisory Opinion OC-18, above footnote 6; Advisory Opinion OC-21, above footnote 7.