Walking the Line of Legitimate Interpretation: The Inter-American Court of Human Rights' Holistic Approach to Its *Lex Specialis*

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In this Article, I examine the main arguments advanced by a vocal chorus of state actors and legal scholars who question the interpretative legitimacy and, as a result, criticize the authority of one of the most successful international human rights courts, the Inter-American Court of Human Rights, to read and interpret the American Convention on Human Rights in the manner that it does. Because the main contestations are variations of an argument related to the Court's duty to provide a consistent, authoritative, and valid interpretation of treaties, I refine the argument to convey the widely accepted idea that, in order to ensure authority and normative compliance with its decisions, the IACtHR must read the American Convention rationally, using basic interpretative norms and adhering to the 1969 Vienna Convention on the Law of Treaties' standard of interpretation. To determine whether the Court typically adheres to the aforementioned criteria, the Article focuses on the variables and characteristics that contribute to the Court's interpretative authority and legitimacy, and also on the Court's interpretive strategies and explanations for their usage. The methodology used to develop this analysis is mostly empirical, with a focus on case law when considering the analytical framework provided by scholarship.

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I. INTRODUCTION

We live in an era of skepticism towards international courts, manifested in declarations and actions by political actors that were unthinkable just a decade ago. Recent actions, such as those of U.S. President Donald Trump, have jeopardized the survival of a successful international system that has taken decades to negotiate and establish. This is despite international courts' and tribunals' overall success in elevating the level of international adjudication, their tremendous contributions in defining the form and content of international law, and their accomplishments in rule harmonization or the development of law in specific contexts.[1] The long battle over Brexit was in no small part dictated and justified by the British government's desire to be free of obligations imposed by two of the most successful international adjudication systems in existence, the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU). Other important international courts have also faced hostility from States in recent years, such as the Appellate Body of the World Trade Organization, which has seen an effective impossibility to render final

1. *See* discussion on the role played by international courts and tribunals in the development of international law in, e.g.: Dinah L. Shelton, *Form, Function, and the Powers of International Courts*, 9 CHI. J. INT'L L. 537 (2008); Armin Von Bogdandy and Ingo Venzke, *On the Functions of International Courts: An Appraisal in Light of Their Burgeoning Public Authority*, 26 LEIDEN J. OF INT'L L. *42* (2013); Karen J. Alter, *The Multiple Roles of International Courts and Tribunals: Enforcement, Dispute Settlement, Constitutional and Administrative Review in* INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: SYNTHESIZING INSIGHTS FROM INTERDISCIPLINARY SCHOLARSHIP (Jeffrey L. Dunoff and Mark A. Pollack, eds. (2013) 345; Eric A. Posner and John C. Yoo, Judicial Independence in International Tribunals, 93 CALIF. L. REV. 8 (2005); Francis A. Boyle, WORLD POLITICS, HUMAN RIGHTS, AND INTERNATIONAL LAW (2021); Laurence R. Helfer and Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CALIF. L. REV. 899 (2005); Philippe Gautier, *The Role of International Courts and Tribunals in the Development of Environmental Law*, 109 Proceedings of the Annual Meeting (American Society of International Law) 190, 190-193 (2015).

adjudications due to Member States' practical refusal to renew its bench,[2] or even the International Court of Justice (ICJ), which has faced difficulties appointing new judges.[3] This contestation is not limited to Western countries, which were instrumental in the past in establishing successful international adjudication systems for decades, but extends to countries globally.[4] In Africa, for example, the Southern African Development Community Tribunal (SADC Tribunal) has been suspended, while the International Criminal Court (ICC), the African Court on Human and Peoples' Rights (ACtHPR), and the East African Court of Justice (EACJ) have all been strongly attacked. Indeed, in the global South, where there are few very successful international adjudication systems, such criticism has been leveled at the Inter-American Court of Human Rights (IACtHR).[5] For the IACtHR's opponents, in particular for governments of the region, it appears that it makes no difference that this Court, like other international human rights courts, was established to protect human rights, or that the IACtHR's goal in adjudication was "geared primarily toward the victims, toward the rights of human beings and not of the States."[6] It also does not appear to matter that the IACtHR is not just "another" human rights Court or an ordinary international adjudicatory body, but the Human Rights Court "par excellence," dealing with all of the repercussions of post-modernity or late modernity's 'governance' failures in the Global South. In this

2. *See* Gregory Shaffer et al., *The Extensive (But Fragile) Authority of the WTO Appellate Body*, 79 L. & CONTEMP. PROBS. 1, 237-273 (2016).

3. Dapo Akande, *ICJ Elections 2017: UN General Assembly and Security Council Elect Four Judges to the ICJ But Fail to Agree on a Fifth, Yet Again! + Trivia Question*, Blog of the EUR. J. OF INT'L L. (Nov. 11, 2017), https://www.ejiltalk.org/icj-elections-2017-un-general-assembly-and-security-council-elect-four-judges-to-the-icj-but-fail-to-agree-on-a-fifth-yet-again-trivia-question/.

4. *Id.*

5. *See*, e.g., Fernando Basch Felipe, *The Doctrine of the Inter-American Court of Human Rights Regarding States Duty to Punish Human Rights Violations and Its Dangers*,' 23 AM. UNIV. INT'L L. REV., 195-229 (2013); Andreas Follesdal, *The Legitimacy Deficits of the Human Rights Judiciary: Elements and Implications of a Normative Theory*, 14 THEORETICAL INQUIRIES L., 339 (2013); Ligia De Jesús Castaldi, *Partial U.S. sanctions on Inter-American Commission on Human Rights*, OXHRH BLOG, (August 2019), available at: http://ohrh.law.ox.ac.uk/partial-u-s-sanctions-on-inter-american-commission-on-human-rights/; Lucas Lixinsky, *Treaty Interpretation by the Inter-American Court of Human Rights: Expansion at the Service of the Unity of International Law*, 21 EUR. J. OF INT'L L. 585 (2010); Ezequiel Malarino, *Judicial Activism, Punitivism, and Supranationalization: Illiberal and Antidemocratic Tendencies of the Inter-American Court of Human Rights*, 12 INT'L CRIM. L. REV. 665 (2012); Christina Binder, *The Prohibition of Amnesties by the Inter-American Court of Human Rights*, 12 GER. L.J. 1203 (2011).

6. Gómez Paquiyauri Brothers v. Peru, Separate Opinion, Inter-Am. Ct. H.R. (Ser C) No 110 (July 8, 2004).

regard, the manifestations of gross human rights violations in Latin America that the IACtHR has had to deal with since its inception, such as massacres, forced disappearances, extrajudicial executions, illegal detentions, torture, illegal child labor, political executions, or abuses on the rights of ethnic groups, should have been sufficient to shield the Court from such attacks. However, it is not only the human rights issues that the IACtHR has had to deal with since its inception that make it an exceptionally successful court for external observers. Its path to justice has been fraught with difficulties, as the Court has often had to contend with powerful state authorities, corruption, weak national judiciaries, dictatorial governments and military dictatorships common in Latin American states. Despite these struggles, the IACtHR has made significant developments through its interpretative activity that have positively influenced the international human rights environment and universal jurisdiction. These achievements should have garnered more consideration from the Court's detractors, but unfortunately, this has not been the case. Nevertheless, the criticism and attacks leveled against the IACtHR are, in some ways, exemplary for this era of skepticism toward international courts' work. They deserve attention as they bring international courts' interpretative work into the spotlight. A study of the criticism leveled at this Court, as well as an assessment of its "value" based on the IACtHR's adjudicative activity, are thus not only overdue in scholarship, but also useful for comprehending the criticism leveled at this Court, and the denunciation that other, if not all, international specialized courts face today. Criticism of the IACtHR's interpretative activity generally centers on accusations of 'activism' and overstepping of powers granted to this court by the American Convention. Such criticism is typically leveled by populist governments named and shamed in the Inter-American Court's decisions.[7] These governments seek to eliminate or at

7. *See* on this aspect, e.g., Simon Zschirnt, *Justice for All in the Americas? A Quantitative Analysis of Admissibility Decisions in the Inter-American Human Rights System*, LAWS 10.3 (2021): 56; Ángel Oquendo, *The Politicization of Human Rights: Within the Inter-American System and Beyond*, 50 N.Y. U. J. OF INT'L L. & POL. 1 (2017); Carlos Enrique Arévalo Narváez and Paola Andrea Patarroyo Ramírez, *Treaties over Time and Human Rights: A Case Law Analysis of the Inter-American Court of Human Rights*, ANUARIO COLOMBIANO DE DERECHO INTERNACIONAL, vol. 10, 295-331 (2017), available at: 10.12804/revistas.urosario.edu.co/acdi/a.5290; Mikael Rask Madsen, Pola Cebulak, and Micha Wiebusch, *Backlash Against International Courts: Explaining the Forms and Patterns of Resistance to International Courts*, 14 INT'L J. OF L. IN CONTEXT, 197 (2018); Paola Limón, *Retroactive Compliance? An Inter-American Blunder in the Case of Maldonado Ordóñez vs. Guatemala*, July 26 2018, HUM. RTS. CENTRE BLOG, available at: https://hrcessex.wordpress.com/2018/07/26/retroactive-compliance-an-inter-american-blunder-in-the-case-of-maldonado-ordonez-vs-guatemala/.

least drastically limit the delegation of powers to international courts, usually on the basis of a static view of treaties, and of states' consent to treaties as expressed at the moment of adoption of the treaties, which has been debunked already in scholarship as flying in the face of practice.[8] Such criticism of the IACtHR's interpretative activity is often politically motivated, although some critique may also be found in a stream of scholarship.[9]

In scholarship, it is important to maintain at least a modicum of objectivity when critically evaluating an international court's interpretative ethos. Such objectivity requires a clear description and understanding of what the court does in terms of interpretation. However, in both political and scholarly variants, the criticism is not accompanied by any study of what the Inter-American or regional international courts do in terms of treaty interpretation or how the courts adjudicate rights infringement. This results in harsh condemnations of 'activist' judicial interpretations without any coherent explanation of the interpretative criteria that would make judicial interpretations of treaties 'valid'. Thus, there is a paradox in which political decisions are apparently taken on the basis of court interpretations, but no analyses of judicial interpretation moves or standards of 'valid interpretations' are given, even though political judgments are assumed to be based on such analyses or criteria. In contrast to such a method, and based on a comprehensive review of case-law decided by the IACtHR and scholarly opinions, this Article

8. *See* e.g. Daniel Costelloe and Malgosia Fitzmaurice, *Lawmaking by Treaty: Conclusion of Treaties and Evolution of Treaty Regimes in Practice, in* RESEARCH HANDBOOK ON THE THEORY AND PRACTICE OF INTERNATIONAL LAWMAKING (Catherine Brölmann and Yannick Radi (eds.), (2016), 111-132, at 132, noting that changes introduced to treaties in a manner that departs from the text of the instrument and its meaning at the time of its conclusion is no longer an activity reserved to states but a purview of international courts as well.

9. *See* e.g. Ximena Soley & Silvia Steiniger, *Parting Ways or Lashing Back? Withdrawals, Backlash and the Inter-American Court of Human Rights*, 14 INT'L J. L. CONTEXT 237 (2018); Caroline Helmund, *Why Latin America Is Refusing to Follow the U.S. on Human Rights*, FOREIGN POL'Y J., (2014); Samuel Moyn, NOT ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD, Harvard University Press (2018); Mikael Rask Madsen, Pola Cebulak, and Micha Wiebusch, *Backlash Against International Courts: Explaining the Forms and Patterns of Resistance to International Courts*, INT'L J. L. CONTEXT, 197 (2018); Miranda da Cruz, Paula Baldini, *Trackers and Trailblazers: Dynamic Interactions and Institutional Design in the Inter-American Court of Human Rights*, 11 J. INT'L DISP. SETTLEMENT, 69 (2020); Diarmuid F. O'Scannlain, *On Judicial Activism*, OPEN SPACES Q., (Feb. 29, 2004), available at: On Judicial Activism|Open Spaces (open-spaces.com); Alexandra Huneeus, *Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights*, 44 CORNELL INT'L L.J., 493 (2011); Bailliet M. Cecilia, *Measuring Compliance with the Inter-American Court of Human Rights: The Ongoing Challenge of Judicial Independence in Latin America*, 31 NORDIC J. OF HUM. RTS. 477 (2013).

proposes to remove this gap, identifying the essential aspects that contribute to an interpretative human rights approach that is valid and authoritative. In this light, it should be noted that within the international law 'epistemic' and 'interpretative communities', the rules enshrined in the 1969 Vienna Convention on the Law of Treaties (VCLT) constitute 'disciplining rules' that govern an interpretative activity and define the 'interpretative community' itself, which consists of those who recognize the rules as authoritative."[10] While scholars debate sometimes the degree of clarity of VCLT rules,[11] it is accepted that international institutions, including the international courts, have a large degree of semantic authority in the attribution of meaning to treaty texts.[12] Nevertheless, at a minimum, the use and respect of the VCLT general rules ("Vienna rules") of interpretation should give both authority and legitimacy to a court's interpretation of international treaties, at least among the scholars forming the epistemic community of international law. Consequently, for international law scholars at least, the detection of observance and utilization of the VCLT rules in the process of interpretation should be an indicator of the authority and legitimacy of a courts' interpretation. Thus, one major concern of the present analysis is whether the IACtHR's interpretation of the human rights enshrined in the American Convention on Human Rights (ACHR,; "the American Convention,"; "The Convention") generally conforms to the universal methodology of treaty interpretation stipulated in the VCLT. Respectively, whether the Court applies routinely the standard of interpretation reflected therein, which significantly contributes to an authoritative and legitimate treaty interpretation, at least among the "epistemic," "interpretative

10. *See* e.g. Owen Fiss, *Conventionalism*, 58 S CAL. L. REV. 177 (1985), 184. Also, Owen Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1981-1982), 745. *See* also Michael Waibel, *Uniformity Versus Specialization (2): A Uniform Regime of Treaty Interpretation? in* RESEARCH HANDBOOK ON THE LAW OF TREATIES (Christian J. Tams, Antonios Tzanakopoulos and Andreas Zimmermann, eds., 2014), 375, noting that by this token, anyone who routinely applies the VCLT could be regarded as forming part of the interpretive community of international lawyers.

11. *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW (6th ed, 2003), at 602, observing that "[m]any of the rules and principles offered are general, question-begging and contradictory"*." See* Michael Waibel, *Demystifying the Art of Interpretation*, 22 EUR. J. INT'L L. 517, 574 (2011). Noting that "codification in the VCLT occurred at the level of principles, and leaves considerable degrees of freedom to interpreters."

12. *See* INGO VENZKE, HOW INTERPRETATION MAKES INTERNATIONAL LAW*,* 76-87 (1st ed, 2012). *See* e.g. Chapter III.A., explaining this large degree of semantic authority in the attribution of meaning to treaty texts, in a very dynamic international environment, far from the static and immovable dimensions attributed to this environment including in matters related to treaties by the politicians who criticize, for example, international courts' interpretations of treaties.

communities." Thus, the primary goal of this study is to analyze the interpretative methods and techniques that the IACtHR uses on a regular basis in the interpretation of the American Convention, and to assess whether the manner in which they are applied imprints an authoritative and valid character on the Court's human rights interpretation. The study will determine whether this Court follows the VCLT universal methodology of treaty interpretation when dealing not just with human rights defined in the American Convention, but also with rights that are not explicitly stated, yet fall under the protection of this Convention. Its primary goal is thus to answer a basic question: From an international law standpoint, what strengthens the authority and normative legitimacy of the IACtHR's interpretation of the American Convention's human rights provisions? What factors are responsible in the interpretative act for ensuring that the IACtHR's judicial interpretation is consistent, uniform, authoritative, and valid, i.e., carried out in line with a reasonable and objective set of rules and principles?

Based on case law analyses and scholarly opinions, this Article shows that the IACtHR usually takes a holistic, constructive interpretative approach to the rights and safeguards enshrined in the American Convention, basically relying on the VCLT standard of interpretation. It illustrates how this approach necessitates taking into account not only the context in which the norm under interpretation is applied, but also other factors such as the context of other norms within a legal system (international or national), precedents of judicial bodies, legal history of the community ("interpretative community"—the existence of an already assumed interpretation on a text, respectively what other authoritative interpreters have held similar texts to mean), and social norms.[13] The investigation will uncover the methods, rules, and principles of interpretation that the IACtHR typically adopts to resolve human rights interpretive disputes. It will look at the Court's techniques and strategies for applying interpretative methods, rules, and principles, as well as the rationale behind their application, and how such techniques and strategies can help to ensure authoritative and valid treaty interpretations, which have a direct impact on compliance with the Court's decisions. Because the IACtHR is accustomed to relying on "external sources," particularly general principles of international law, to elucidate the meaning of the human rights enshrined in the American Convention, the Article also examines how such sources are used by the Court to address and resolve

13. Norms of a social nature is in reference to norms other than those of a legal nature, including those that may reflect the individual morality of the interpreter (i.e. judges' personal characteristics, such as beliefs, legal culture, training, or experience).

human rights issues on "systemic integration" basis, under Article 31 (3)(c) of the VCLT, and how this interpretive approach contributes to providing consistent, authoritative, and valid interpretations of the American Convention.

This Article presents the idea that, in order to ensure normative compliance with its decisions, the IACtHR must read the American Convention on Human Rights rationally, using basic interpretative norms, and adhering to the VCLT standard of interpretation. It does not evaluate the IACtHR's legitimacy in general, nor its empirical legitimacy. Instead, it focuses on the variables and qualities responsible for boosting among the "epistemic" "interpretative communities" the Court's normative legitimacy and authority. The analysis concludes that, if the Court is generally consistent with itself, using the same rules, principles, and techniques, and adhering to the standard of interpretation prescribed by the VCLT on a case-by-case basis, its interpretations of the American Convention are authoritative and valid (legitimate), and therefore the most vehement of the current criticisms of the Court's interpretive ethos should be rendered obsolete. The present Article, I hope, will intervene in and contribute to recent debates concerning the potential activism and the overstepping of powers by an international court other than those conferred by the treaty text, in this case the Inter-American Court of Human Rights, and by extension all regional human rights bodies or specialized international courts. It also contributes to existing scholarship on human rights law and treaty interpretation by international courts and the theory of the authority and legitimacy of such courts.

This study is divided into Parts and subparts that correspond to the points made in examining the factors and elements that the IACtHR considers when interpreting the American Convention on Human Rights, as well as their role in establishing authority and legitimacy in this Court's treaty interpretation. It begins with an introduction that discusses the relevance of international courts in the evolution of international law and challenges to this function in the current political climate, with a focus on the Inter-American Court of Human Rights.

Part II contains the IACtHR's background and presents an overview of current criticism leveled at this Court. Part III seeks to identify the patterns of treaty interpretation that the IACtHR has developed and usually follows. It examines whether the IACtHR's interpretation of the American Convention, in addition to special human rights-related rules of interpretation, is typically guided by the VCLT methodology of interpretation, and whether the Court consistently adheres to the VCLT standard of interpretation required by this methodology. This Part also

discusses the techniques for applying the traditional rules and methods of interpretation of public international law. These include both explicit and implicit techniques, as well as the technique of "overbuilding interpretation." The analysis shows that the IACtHR, like the ECtHR, WTO, and ICJ,[14] frequently employs the overbuilding interpretation technique—which entails using more methods of interpretation than the Court initially declared necessary in each case—to ensure a holistic approach of the American Convention's human rights provisions. Part IV looks into how the IACtHR uses external sources comprised in corpus juris, such as general international law principles accepted by civilized nations and the practice of other judicial bodies, to interpret the human rights guaranteed by the American Convention, and how such a reliance is important for providing a comprehensive, authoritative, and justifiable human rights interpretation. The aim is to show how the IACtHR's approach to reading the American Convention's rights and safeguards (including rights and safeguards not explicitly stated in the Convention but subject to its protection) in a broader context of international law through "systemic integration," in addition to the VCLT standard of interpretation, should imprint an authoritative and legitimate character on its interpretation. The final Part (V) draws conclusions by claiming that the IACtHR normally adopts a holistic, pro homine interpretation of the American Convention based on the VCLT interpretative methodology and Article 29 of this Convention, and that criticism of this Court's deviating interpretive position is frequently overblown. Methodologically, in contrast to the approach commonly used in scholarship, which seeks a strong analytical frame first and then uses snapshots of cases to prove their theoretical points, a methodological frame that is antithetical to both common law and the empirical method in science, I begin this Article by analyzing the cases without any preconceived analytical frame and then develop the analytical framework based on what I observed in the cases. Thus, while not novel, the methodology I am employing is largely empirical and emphasizes examples of cases when offering an analytical framework, augmenting the primarily qualitative framework proposed in recent literature with a much-needed empirical core.

14. LILIANA E. POPA, PATTERNS OF TREATY INTERPRETATION AS ANTI-FRAGMENTATION TOOLS: A COMPARATIVE ANALYSIS WITH A SPECIAL FOCUS ON THE ECTHR, WTO AND ICJ (2018).

II. IACTHR AND ITS DISCONTENTS

As an autonomous judicial organ, the IACtHR is the "final interpreter" of the Pact of San Jose in the inter-American system of human rights protection. Its interpretations of the norms comprised in the American Convention achieve the same direct level of effectiveness as the text of the American Convention itself. In brief, the Inter-American Court's interpretations serve two purposes: first, to ensure the effectiveness of the Convention in the specific case with subjective effects, and second, to establish general effectiveness with the impacts of interpreted standards.[15] The outcome of the interpretation of the American Convention constitutes the Court's jurisprudence, which is binding on all signatories to the American Convention.[16]

In the last decade, scholars have begun to discuss a "compliance crisis" within the Inter-American Human Rights System (IAHRS), referring to governments in the region that frequently refuse to comply with or abide by the Inter-American Human Rights System's requirements, for various reasons, ignoring the rulings and orders issued by the Inter-American Commission and Inter-American Court.[17] For example, the Inter-American Commission on Human Rights (IACHR) has recently been targeted with political attacks for its involvement in contentious human rights matters such as the establishment of abortion rights, and as a result, has suffered partial U.S. sanctions.[18] Furthermore, the Inter-American Court of Human Rights has increasingly been accused of being an overly "activist"' judicial Court, deviating from its well-established norm, by adopting novel, expansive interpretations of legal rules and notions in the American Convention on Human Rights, thus exceeding its mission.[19]

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15. *See Cabrera García and Montiel Flores v. Mexico*, Concurring Opinion, Inter-Am Ct. H.R. (Ser C) (Nov. 26, 2010).

16. *Id.* at para 51.

17. Par Engstrom, *Reconceptualising the Impact of the Inter-American Human Rights System*, 1250-1285 (2017); Alexandra Huneeus, *Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights*, 44 CORNELL INT'L L.J. 493, 493-533 (2011).

18. Ligia De Jesus Castaldi, *Partial U.S. Sanctions on Inter-American Commission on Human Rights*, (Aug. 2, 2019), https://ohrh.law.ox.ac.uk/partial-u-s-sanctions-on-inter-american-commission-on-human-rights/.

19. *See* Lucas Lixinski, T*reaty Interpretation by the Inter-American Court of Human Rights: Expansion at the Service of the Unity of International Law*, 21 EUR. J. OF INT'L L., 585, 585-604 (2010). *See* Paula Baldini and Mirana da Cruz, *Trackers and Trailblazers: Dynamic Interactions and Institutional Design in the Inter-American Court of Human Rights*, 11 J. OF INT'L DISP. SETTLEMENT, 69, 69-90.

Nonetheless, Member States have advanced more elaborated arguments against the IACtHR and its "activist" role. Several Latin American countries, for example, have recently complained that the Inter-American Commission and the Court meddle too much in their domestic policies, disregarding their national constitutional law, a violation of the principle of subsidiarity under which both of these human rights protection organs operate.[20] Even more, in April 2019, Argentina, Brazil, Chile, Colombia, and Paraguay filed a joint declaration with then IACHR Executive Secretary Paulo Abrão, expressing their concern for an apparent lack of compliance with some basic principles established by the Convention, including the principles of subsidiarity of Inter-American bodies and proportionality of reparations.[21] This criticism is unsurprising, given that the IACtHR (and the Commission), unlike the ECtHR, has dealt with egregious violations of human rights committed by State parties to the American Convention from the start, compelling this Court to adopt a very dynamic policy of compliance and interaction (as well as involvement) with national law, which has resulted in the gradual redesign or reinterpretation of domestic law norms (e.g. on amnesty).[22] Nonetheless, the presence of weak national judiciaries and inaction by local judges and prosecutors over implementation of the IACtHR's rulings throughout the Latin American region are recognized as the key factors for troublesome compliance by Member States. Other factors include a persistent lack of rule of law, high levels of corruption and impunity, as well as dilemmas related to institutional fragmentation and power separation.[23] Through active participation, the IAHRS mechanism has developed a technique for the condemnation of crimes that is perceived by critics as "aggressive." Such a technique evolved from a policy of exposing the crimes ("naming and showing") of abusive dictatorial regimes to a more sophisticated condemnation of human rights

20. De Jesús Castaldi, *supra* note 18.

21. *Id.*

22. Diego Garcia-Sayan, *The Inter-American Court and Constitutionalism in Latin America*, 89 TEXAS 1835, 1835-1862 (2015); Judge Sayan observed, for example, that on various occasions (e. g. Barrios Altos v Peru, 2001; Gomez Lund et al.) the IACtHR has indicated that amnesties constitute major obstacle to full compliance with the international obligation to guarantee human rights. S*ee also Provisional Measures and Monitoring Compliance in Aldea Chichupac Village Members and Neighboring Communities of the Rabinal v. Guatemala; Molina Theissen v. Guatemala*—where the IACtHR stated that such measures contravene the jus cogens established in international law, the jurisprudence of the Inter-American Court of Human Rights, the political constitutions of various states in Latin America, and various international law instruments.

23. *Id.*

abuses by state institutions and actors, relying on an evaluation of their acts against the framework provided by a human rights-based democracy.[24] For example, critics see the IACtHR's practice of frequently going beyond simply redressing the harm caused to specific victims and ordering the State to take "non-repetitive measures" (which sometimes involve radical legal or political changes) to ensure the non-recurrence of similar injuries,[25] as simply overstepping its treaty-based authority rather than constructively shaping Member States' domestic policies.

Aside from the foregoing, the requirement to comply with the IACtHR's rulings has sparked other criticism. Compliance with a court's verdicts is fundamental to establishing the rule of law in any legal system, whether domestic or international.[26] Thus, by pushing for compliance with its own rulings, the IACtHR has drawn significant criticism and contestation of its authority from Latin American states. Because the IACtHR operates in a region where many states lack or are not fully committed to the rule of law, [27] it is unsurprising that this Court's unique, "activist" system of closely monitoring compliance (including the remedies system) is frequently contested or repudiated by the states in cause. Such attitudes are observed to be expressed particularly when the IACtHR issues a specific order to a State to investigate, prosecute, and punish those guilty for the crimes at the core of a dispute before this Court, and the State then refuses to follow such an order.[28] Nonetheless, because the IACtHR is primarily concerned with determining the source of state responsibility, it has emphasized, in its practice, the importance of Member States' obligations to ensure the protection of the rights and freedoms guaranteed by the American Convention, which requires the obligation to prevent, investigate, and punish grave human rights violations.[29] This aspect is certainly consistent with what Article 1 of the American Convention prescribes as a Member State's obligation to respect the rights and freedoms enshrined in the American Convention and to ensure their free and full exercise, as well as with Article 2 of the Convention, which requires States to "adopt . . . such legislation or other

24. Engstrom, *infra* note 117.

25. Huneeus, *supra* note 9; observed by the author, states such as Argentina, Chile, and El Salvador have shown no-compliance *vis-à-vis* specific orders to prosecute issued by the IACtHR.

26. *Id.*

27. *Id.*

28. *Id.* 508-511. The author observed that the IACtHR "has never declared that a state has fully complied with an order to investigate, try, and punish those responsible for the crimes underlying a case." *See* more on this aspect in Madsen, Cebulak, and Wiebusch, *supra* note 9.

29. Diego Garcia-Sayan, *supra* note 22, 1840.

measures as may be necessary to give effect to those rights and freedoms."[30] Thus, domestic courts play an important role in this process by harmonizing and coordinating domestic rules and the actions of state authorities with voluntary international commitments made by the States parties to them. On the other hand, domestic courts serve as guarantors for the implementation of human rights established by international treaties to which states are parties.[31] It is documented that domestic courts strengthen respect for human rights through their judicial review process, and Latin America is regarded as one of the regions in the world where domestic judiciaries shape how international human rights law is applied domestically.[32] Furthermore, domestic courts have become authoritative key actors in human rights protection, with the potential to intervene in curbing legislative and executive abuses of human rights as a result of the constitutional incorporation of international human rights treaties.[33] By activating human rights treaties and interpreting international norms in the light of domestic conditions, domestic courts are thought to engage dynamically in reforming domestic human rights legislation that supports a true democracy.[34]

It is widely accepted, however, that international courts and tribunals will always find it more difficult to gain the level of acceptance and confidence bestowed upon domestic courts (or tribunals), because these international bodies cannot fully reflect the value diversity of all States subject to them. [35] It follows that, to strengthen domestic democracy and human rights regimes, a double movement at the international and municipal levels is required, as well as a continuous judicial dialogue between domestic courts and international human rights courts. Within this movement, international courts' interpretations could only bolster the authority and strength of domestic courts' application of human rights regimes. Thus, the most vehement criticism of international human rights courts appears to be misguided, because—contrary to the opinions of critics who see international human rights law as undemocratic or, worse, aggressive and antidemocratic (fearing that a supranational human rights legal code applied across national jurisdictions is incompatible with the

30. *See American Convention on Human Rights*, Arts. 1 and 2.

31. Garcia-Sayan, *supra* note 22, 1838.

32. JAMIE MAYERFELD, THE PROMISE OF HUMAN RIGHTS: CONSTITUTIONAL GOVERNMENT, DEMOCRATIC LEGITIMACY, AND INTERNATIONAL LAW, 191 (2016).

33. *Id.*; FIONA DE LONDRAS, DETENTION IN THE 'WAR ON TERROR': CAN HUMAN RIGHTS FIGHT BACK?, 289 (2011).

34. Engstrom, *supra* note 17.

35. Ian Johnstone, *Treaty Interpretation: The Authority of Interpretive Communities,* 12 MICH. J. INT'L L. 371, 374 (1990).

democratic right of nation-states to choose their own laws and policies)—international human rights law strengthens democracy.[36] It is commonly agreed that only when a country's "popular government" is bound by human rights can one speak of true democracy in that country—a constitutional democracy with a "built-in commitment to human rights."[37] So, recognizing that human rights are inalienable and that fundamental human rights are rights superior to the law of the sovereign State[38] is critical for the establishment of democracy in a country. As observed in the scholarship, a country's level of respect for fundamental human rights reflects the level of democracy and respect for the rule of law that a country has attained.[60] According to the former president of the IACtHR, Judge Cancado Trindade, the fact that many Latin American states are reluctant to have their own human rights situations exposed and lack a national permanent mechanism for implementing IACtHR decisions allows such states to avoid compliance with the Court's decisions,[39] especially if the decisions sharply contradict fundamental constitutional principles of the states in question.[40] In this regard, Article 27 of the VCLT supports the international law principle that "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."[41] Furthermore, there is some leeway in member states' following the IACtHR's rulings. Certain judgments demand domestic policy adjustment modifications or legal reform, and the intricacies of the legal reform required by a state are cited as one of the reasons why certain states take longer to comply with such judgments.[42]

In addition to the dissatisfactions described above, there is another area of contention with the IACtHR that relates to the "doctrine of conventionality control," developed as a technique to improve the efficiency of States' compliance with this Court's decisions.[43] Given the preceding concerns, the criticism aimed at the conventionality control

36. Mayerfelld, *supra* note 32, 187.

37. *Id.*

38. HERSH LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS, 60 (1st ed. 1950).

39. ANTONIO AUGUSTO CANCADO TRINIDADE, EL EJERCICIO DE LA FUNCION JUDICIAL INTERNACIONAL: MEMORIAS DE LA CORTE INTERAMERICANA DE DERECHOS HUMANOS, 37 (2017).

40. Jorge Contesse, *Contestation and Deference in the Inter-American Human Rights System*, 79 L. & CONTEMP. PROBS. 123, 123-145 (2016).

41. *See Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in Danzig Territory*, Advisory Opinion, 1931 P.C.I.J. (Feb. 1932).

42. Bailliet, *supra* note 9, at 480.

43. Jorge Contesse, *The International Authority of the Inter-American Court of Human Rights: A Critique of the Conventionality Control Doctrine*, 22 INT'L J. HUM. RTS. 1168 (2018), 1176.

doctrine is merely a version of the doctrine of compliance's criticism. Faced with "widespread impunity and unresponsive domestic institutions"[44] since its inception, the IACtHR developed the doctrine of "conventionality control," according to which all member states of the American Convention have a duty to review domestic laws in accordance with the American Convention and to not apply laws that conflict with or violate the Convention.[45] Under the conventionality control doctrine, the IACtHR is considered as involving itself in engaging all state actors in supervising compliance with the American Convention, respectively with its judicial interpretations of this Convention and rulings.[46] The IACtHR defines the conventionality control doctrine as "an instrument for applying international law" that enables national judges to directly apply international norms and interpretive standards.[47] Through this doctrine, the IACtHR has recently made significant efforts to increase the influence and effectiveness of various sources of law in the Inter-American System at the domestic level.[48] Essentially, by adopting the doctrine of conventionality control, the IACtHR established the notion that international human rights law is superior to domestic law.[49] In this light, the Court acknowledged that in the event of a conflict between domestic norms and the American Convention, national judges must give precedence to the norms of the American Convention.[50] Recently, for example, in the *Case of Gorigoitía v. Argentina* (2019), the IACtHR restated that "all the authorities of a State Party to the Convention have the obligation to exercise conventionality control, so that the interpretation and application of national law is consistent with the international obligations of the State regarding human rights," and that "a State cannot claim its federal structure to stop complying with an international obligation."[51] As the conventionality control doctrine is not

44. Engstrom, *supra* note 17.

45. *Id.*

46. *Id.*

47. Contesse, *supra* note 43.

48. PABLO GONZÁLEZ-DOMINGUEZ, THE DOCTRINE OF CONVENTIONALITY CONTROL BETWEEN UNIFORMITY AND LEGAL PLURALISM IN THE INTER-AMERICAN HUMAN RIGHTS SYSTEM , (2018), 1-12.

49. *Id*. at 16.

50. *Id*.

51. IACtHR, *Case of Gorigoitía v. Argentina, Preliminary Objection, Merits, Reparations and Costs*, Judgment of September 2, 2019. Series C No. 382, para 55; The author observes that the IACtHR identified (in the *Amanocid* case) as the basis of the conventionality control doctrine in two key principles of international law in the VCLT: 1) that treaties are binding upon states, the *pacta sunt servanda* principle, in Article 26; and 2) that states may not use their

enshrined in the text of the American Convention, Member States frequently perceive it as intrusive, a tool used by the IACtHR to exercise a type of "supranational judicial review," or a means "to transfer authority to domestic judges bypassing domestic legislatures."[52]

The idea that the IACtHR, rather than domestic courts, has the authority to decide whether domestic authorities are bound by international law is also frequently questioned. In this sense, many states see this Court as granting itself "superior, constitutional authority over states," based on a morally superior position in relation to states.[53] Indeed, such states believe that the IACtHR does not need to impose a "prescriptive task" through the conventionality control doctrine because Latin American states have internalized international human rights law to the point where the Court should simply state it, using instead a "descriptive task."[54] However, the IACtHR clarifies its position on the conventionality control doctrine, acknowledging, for example, in its order in the *Case of Gelman v. Uruguay* (2013), that the Court does not exercise "superior, constitutional authority over states" through this doctrine because:

> the claim that the duty of the domestic courts to carry out control of constitutionality is at odds with the control of conventionality carried out by the Court is in reality a false dilemma, since once the State has ratified an international treaty and recognized the competence of its oversight bodies, precisely through its constitutional mechanisms, these become part of its legal system. *Therefore, control of constitutionality necessarily implies control of conventionality, exercised in a complementary manner*.[55]

Furthermore, in relation to the obligation of domestic judiciary to comply with international responsibilities, the IACtHR reiterates in the *Case of Gelman* that its judgments are final, binding on the parties to a case, and without appeal.[56] The Court stated unequivocally that

domestic norms as an excuse for their lack of compliance with international obligations, in Article 27 VCLT.

52. Contesse, *supra* note 43. The author observes that the IACtHR identified (in the *Amanocid* case) as the basis of the conventionality control doctrine in two key principles of international law in the VCLT: 1) that treaties are binding upon states, the *pacta sunt servanda* principle, in Article 26; and 2) that states may not use their domestic norms as an excuse for their lack of compliance with international obligations, in Article 27 VCLT.

53. *Id.*

54. *Id.*

55. *Order of the Inter-American Court of Human Rights, (Gelman v. Uru.)*, Order, 2013, 2019, Inter-Am. Ct. of H. R. (Mar. 20, 2013).

56. *Id.* para 59.

"according to International Law which the State has accepted in a democratic and sovereign manner, it is unacceptable that once the Inter-American Court has issued a judgment with the authority of *res judicata*, the domestic law or the State's authorities should seek to leave it without effects."[57] So, because the IACtHR's authority is "essentially international," and in order to be accepted as valid and normatively legitimate, as Judge Contesse observed, this Court must establish a stronger authority than domestic courts.[58] The IACtHR's authority is thought to increase if it realizes a "collaboration," i.e., a "trans judicial dialogue between states and the Court," rather than using a constitutional authority or a "centralized supra-constitutional tribunal to exert its authority."[59] However, in order to overcome any resistance that states may have, and especially to increase their compliance with the Inter-American Court's decisions, this Court must be able to justify the exercise and scope of its legal authority.[60] The IACtHR is considered capable of accomplishing this task by situating its jurisprudence within the political and legal context in which it operates.[61] As Alexandra Huneeus pointed out, this aspect implies the possibility of the IACtHR's engaging in more direct dialogue with national judges and prosecutors, and thereby recognizing national justice systems as compliance partners.[62]

Finally, some scholars see the IACtHR (as well as the ECtHR) as a "supranational human rights constitutional court" tasked with standardizing interpretations of the rights enshrined in the American Convention.[63] Similarly to the European Convention on Human Rights, the American Convention on Human Rights is thought to impose objective obligations for contracting States for the protection of human rights in a specific region (here, Latin America) through its interpretation and application by the IACtHR, with the goal of becoming the region's constitutional bill of rights.[64] As a result, contracting States are held accountable for meeting particular conditions in how they treat their own people, thereby complying with human rights standards and norms

57. *Id.* para 90.

58. Contesse, *supra* note 43, at 8.

59. *Id.* at 30.

60. *Id.* at 8.

61. *Id.* at 22.

62. Huneeus, *supra* note 9. *See* also Bailliet, *supra* note 9, at 218-226. *See also* Alejandro Saiz Arnaiz (Coord.), Joan Solanes, Jorge Roa (eds.), Diálogos Judiciales en el Sistema Interamericano de Derechos Humanos, Valencia: Tirant lo Blanch, 2017.

63. *Id.*

64. DAVID HARRIS ET AL., HARRIS, O'BOYLE AND WARBRICK: LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS, (5th ed. 2023).

drawn from the basic international human rights treaties.[65] In this light, international human rights courts need to be viewed as institutions with the authority to act against states that fail to comply with human rights standards and norms, since such courts are entrusted with the power to constrain violations of human rights standards and norms, while their decisions are binding. As the IACtHR's experience demonstrates, this Court does not operate solely outside and above national courts but rather participates in judicial discourse with the domestic courts of the American Convention's member states, taking into account the constitutional peculiarities of the states involved. While the opposition of some state authorities to the implementation of the IACtHR's judgments is ultimately a political act, these state authorities cannot claim superior legitimacy to this Court solely on the basis of popular representation (elections), because, as we have seen, human rights are the fundamental norms required to enable a democratic society. Furthermore, as the IACtHR's rulings can demonstrate, while imposing orders, remedies, and so on, this Court works in constant communication with local courts, adjusting them to the local context of which the Court is well informed and aware.[66] It is therefore unreasonable for the IACtHR to overlook or dismiss local constitutional traditions and particularities. In other words, it cannot be claimed that the Court imposes alien ideals, principles, and norms on local communities through its decisions.

Overall, the remarkable changes made in Latin America by the IAHRS in terms of human rights implementation in domestic legal systems, as well as the growing number of complaints relating to human rights violations submitted, indicate that this mechanism is necessary and matters, casting doubt on the criticism leveled against it.[67] The IACtHR has developed a strong jurisprudence on the right of victims of human rights violations to reparations by ordering investigations, criminal trials, measures to ensure non-repetition, such as legal reforms and human rights education for public servants, rehabilitation for victims, and a variety of symbolic measures, such as public apologies.[68] The Inter-American Court is therefore a part of an international mechanism whose rich jurisprudence inspires today's jurisdictional reasoning of Latin America's most relevant courts as well as that of other international courts around the world. Although the ECtHR has inspired the IACtHR through its practice in

65. *Id.* at 346.
66. *See* Huneeus, *supra* note 9.
67. *Id.*
68. Garcia-Sayan, *supra* note 22, at 1839.

dealing with States in human rights violations since its inception,[69] the IACtHR has been forging its own path, aspiring to equal participation in an emerging international human rights system.[70] Notable in this regard is that, unlike the ECtHR, which generally limits its reparatory measures regime to the application of monetary compensation, the IACtHR has developed a unique reparations regime (though viewed as "activist" by some states and scholars) in response to specific factors such as systematic state-sponsored mass crimes and transitional justice, both of which this Court has dealt with in general. The reparatory measures regime entails ordering extensive and detailed equitable remedies, in addition to moral and monetary compensations, which the IACtHR considers insufficient, as well as ongoing supervision of compliance with its own rulings ("supervisory rulings").[71] In summary, the goal of this "dual regime of equitable remedies" is to persuade states to take action through their national judiciaries in order to correct violations of the American Convention.[72] In more than two-thirds of cases, before deciding that full compliance with its ruling was achieved, the IACtHR ordered a national judge to take action, which was accomplished through investigation, finding perpetrators, trial, prosecution and/or punishment.[73] Unlike the European Court of Human Rights, which gives states greater discretion in the application of remedies and delegated compliance to a separate body (the Committee of Ministers), the Inter-American Court supervises compliance with its rulings after the issuance of a reparatory ruling, with *compliance* being the work of the Court itself.[74] Although criticism of the IACtHR has taken many forms concerning its mission, mechanism of function, or activities, it appears that contestations based on activism, compliance, and conventional control doctrine frequently miss the mark entirely. We are left with arguments and criticism concerning this Court's interpretative ethos, which appears to be of the utmost importance, because authoritative and legitimate interpretations, presumably, have a direct impact on Member

69. George Letsas, *The ECHR as a Living Instrument: Its Meaning and Its Legitimacy*, *Constituting Europe. The European Court of Human Rights in a National, European and Global Context (Andreas Føllesdal,Birgit Peters and Geir Ulfstein eds., 2013) 106* (2012); Malgosia Fitzmaurice, *Interpretation of the European Convention on Human Rights: Lessons from the Naït-Liman Case*, 739-771, (Nov. 12, 2020), Queen Mary Law Research Paper No. 346, https://ssrn.com/abstract=3729485 or http://dx.doi.org/10.2139/ssrn.3729485.

70. *Id.*

71. Huneeus, *supra* note 9, at 501-502.

72. *Id.*

73. *Id.* at 502-503.

74. *Id.* at 501, 508.

States' compliance with its decisions. Thus, one major scholarly concern is that the IACtHR may become an overly "expansionist" court, promoting "radical" expansionist interpretations. Some scholars see such attitude as an expansion of the rules and concepts in the American Convention, whereas others see it as the IACtHR becoming an "activist" court, issuing "illegitimate" interpretations that do not conform to the American Convention, as well as the 1969 VCLT methodology of interpretation (canons of interpretation) and its established case law.[75] According to the scholarship, in order to be labeled as an "activist," the IACtHR should routinely promote innovative or expansive interpretations that exceed its interpretational powers, [76] which is not the case. While some scholars regard such "innovative," "expansive" interpretations (particularly those resulting from approaches on human rights issues not initially covered by the American Convention) as approaches exceeding the IACtHR's jurisdictional competence, others consider them as conforming with the VCLT methodology of interpretation and thus legitimate and necessary for the development of human rights standards in Latin America.[77] When it comes to "judicial activism" in the sense of deviations from accepted interpretative methodology (the VCLT), it is worth noting that the interpretative approaches adopted by the IACtHR are usually justified by the Court itself on the basis of the VCLT methodology of interpretation. The Court predominantly employs this methodology in an appropriate manner, with regard to the interpretive standard it demands. Furthermore, if "judicial activism" is defined as a failure to follow precedent (by disregarding or contravening precedent), the IACtHR's practice evidences that in interpreting the American Convention on Human Rights, this Court has consistently relied on its own established jurisprudence, and also on the jurisprudence of other international courts, as the analysis in this article will show.[78] However, simple allegations of the IACtHR's "judicial activism" based on one or a few IACtHR decisions that are seen as deviations from this Court's well-established case law, such, "off-the-wall decisions," cannot be considered absolute proof that this Court is moving in the direction of "activism."

75. *See* Fitzmaurice, *supra* note 69.

76. See Cruz and Baldini, *supra* note 9.

77. *See* Fitzmaurice, *supra* note 69; *See also* Cruz and Baldini, *supra* note 9.

78. *See* the judicial activism discussion in Keenan D. Kmiec, *The Origin and Current Meanings of "Judicial"*, 92 CALIF. L. REV. 1441, 1441-1447 (2004). Kmiec identified five core meanings of "judicial activism": (1) invalidation of the arguably constitutional actions of other branches, (2) failure to adhere to precedent, (3) judicial "legislation," (4) departures from accepted interpretative methodology; and (5) result-oriented judging.

Moreover, such "deviations" cannot be understood as reflecting the IACtHR's *pro homine* interpretive trend in the sense of substantially altering it. Especially when it comes to extending rights not expressly stated in the American Convention, for which the IACtHR has yet to establish precedent, their perception as "deviations" should instead be viewed as positive human rights approaches in response to developments in international human rights law made in accordance with the times and advancements in the field of human rights. Nonetheless, because deviant tendencies in treaty interpretation allegedly undermine the IACtHR's treaty-based authority, it is timely and necessary to examine in greater depth how this Court typically employs the VCLT general framework of treaty interpretation, in particular the interpretive standard mandated by it, while maintaining coherence in its case law. Thus, using case law and scholarly opinions, the following Parts and subparts analyze various interpretive aspects observed in the IACtHR's practice of interpreting the American Convention to assess what such aspects render authority, legitimacy, and validity in the interpretation of the American Convention, as well as whether this Court promotes "expansive interpretations" through its overall interpretive approach. For this purpose, special emphasis is to be placed on the close relationship between the IACtHR's interpretative strategies and the VCLT customary rules of interpretation, as well as the manner in which they are applied to reading the American Convention's human rights, including new rights extended by this Court as needed.

III. IACTHR'S PATTERNS OF INTERPRETATION

The act of discovering what the human rights embedded within an instrument always designed to safeguard represents, as remarked by George Letsas, the *moral reading* of that human rights instrument.[79] The text of the American Convention on Human Rights, as well as the text of the European Convention on Human Rights, does not clearly give a methodology for interpreting its provisions, nor does it indicate the applicability of the VCLT general methodology of treaty interpretation. There is only Article 29 of the American Convention that contains certain rules proposing restrictions that the IACtHR must keep in mind when interpreting the Convention, from which interpretative rules, resembling to some extent the Vienna norms, can be deduced.[80] A review of IACtHR

79. *Serrano-Cruz Sisters v. El Salvador*, Dissenting Opinion of Judge Cancado Trindade, Inter-Am. Ct. H.R. (Ser C) No. 131, ¶ 7 (Sept. 9, 2005).

80. *American Convention on Human Rights supra* note 30, Art. 29.

case law reveals that when interpreting the American Convention, this Court is primarily guided by the customary rules and methods of interpretation expressed in Articles 31-33 of the VCLT.[81] The rules comprised in these articles are used either expressly or implicitly, alongside the special rules.[82] The IACtHR has used a variety of interpretive techniques to interpret the American Convention, some of which were presented in the VCLT general rule of interpretation, which consists of Articles 31, 32, and 33, known as the "Vienna rules."[83] The Court usually resorts to all methods of interpretation prescribed by Vienna rules: *teleological*—which focuses on the object and purpose; *textualist*—which is based on the ordinary meaning of the terms in their context, and *subjective* (contextualist/systematic)—which requires ascertaining the parties' common intention from the context of the treaty, including its drafts (the *travaux préparatoires*) and legal system. The rule established in Article 29 (Restrictions Regarding Interpretation), paragraph b of the American Convention[84] has essentially the same effect as Article 31(3)(c) of the VCLT, which provides for "systemic integration."[85] The IACtHR frequently invokes this rule, which supports the subjective method and provides an interpretation that takes the American Convention's normative context into account. Although the Court is required to consider only instruments applicable to the State concerned in accordance with Vienna rules of interpretation (as provided in Article 31), the IACtHR frequently considers the broader context of the international legal system to effectively interpret the American Convention.[86] As Article 29(d) indicates, the American Convention is to be interpreted consistently with other relevant international instruments that recognize

81. *See* Malgosia Fitzmaurice and Panos Merkouris, *Canons of Treaty Interpretation: Selected Case Studies from the World Trade Organization and the North American Free Trade Agreement*, in TREATY INTERPRETATION AND THE VIENNA CONVENTION ON THE LAW OF TREATIES: 30 YEARS ON, (Fitzmaurice, Merkouris eds., Brill Nijhoff (2010), 153-237; Richard K. Gardiner, TREATY INTERPRETATION, Oxford University Press, (2d ed., 2015).

82. *See* Popa, *supra* note 14.

83. *See* e.g., Fitzmaurice, *supra* note 69; Fitzmaurice and Merkouris, *supra* note 81; Tom Farer, *The Rise of the Inter-American Human Rights Regime: No Longer a Unicorn, Not Yet an Ox*, 19 HUM. RTS. Q., 510, 510-546 (1997).

84. Article 29(d) of the American Convention: "No provision of this Convention shall be interpreted as: . . . excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have."

85. Lucas Lixinski, *Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law*, 21 EUR. J. INT'L. L. 585, 585-604 (2010).

86. *Id.*

rights and freedoms through the "systemic integration" process.[87] In this respect, the IACtHR is responsible for applying and interpreting the inter-American *corpus juris*, which encompasses various international instruments such as treaties, conventions, declarations, and sources other than the American Convention, including comparative law and domestic policies.[88] Although this characteristic had, arguably, the potential to extend its treaty-based authority and consequently to undermine this Court's authority and legitimacy, it could, however, reinforce these features, thus increasing the credibility and reliability of the system.[89] So, when the circumstances of a case require it, those external instruments and sources are used as aids in precisely defining the content and even expanding the scope of the rights established in this Convention.[90] This makes sense since, on the one hand, the American Convention could not include all human rights, and on the other, all human rights are interconnected. Furthermore, because human rights treaties are written in abstract, general terminology and may contain design flaws, it is the responsibility of the judge to adapt the meaning of such treaties to modern changes in legal and social concepts, as well as to discover the true nature and content of human rights protected by such instruments through interpretation.[91]

In general, interpretation by international human rights courts must become a process of "*persuading the relevant interpretative community to adopt a particular meaning of a standard protected under an international human rights treaty*."[92] This process indicates that the interpretation of a human rights treaty by a human rights court must be done primarily in *good faith*. According to Letsas, performing an interpretation in good faith entails attempting "to discover the principles that underline and justify human rights and apply them to the case at hand," as well as "to justify its decisions according to a scheme of

87. *Id.*

88. *Gonzales Lluy et al. v. Ecuador*, Preliminary Objections, Merits, Reparations and Cost, Inter-Am. Ct. H.R. (ser C) No 298 (Sept. 1, 2015).

89. *See* Fernando Felipe Basch, *The Doctrine of the Inter-American Court of Human Rights Regarding States' Duty to Punish Human Rights Violations and Its Dangers*, 23 AM. U. INT'L L. REV, 195 (2007).

90. *See Gonzales Lluy et al. v. Ecuador supra* note 88.

91. *See* Letsas' view on this discussion related to the Strasbourg Court's interpretation of ECHR, in Geroge Letsas, *Strasbourg's Interpretive Ethic: Lessons for the International Lawyer*, 21 EUR. J. INT'L. L., 509 (2010).

92. John William Tobin, *Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation*, 23 HARV. HUM. RTS. J. 13 (2010).

principles that represent an intelligible and coherent vision of justice."[93] Furthermore, under the good faith principle, it is permissible to consider "the evolution of treaty concepts, and the limits within which terms may properly be implied in a treaty as necessarily inherent in the instrument."[94] This is an approach known as "evolutionary interpretation," which is frequently used by human rights courts in the interpretation of human rights treaties in accordance with Article 31(3)(c) of the VCLT.[95] Case law analyzed at the IACtHR reveals that, like the European Court of Human Rights, the Inter-American Court frequently takes an evolutive (dynamic) approach in interpreting its lex specialis (the American Convention), notably as a way to encompass new situations on the basis of pre-existing rights. By adopting this approach, the Inter-American Court believes that human rights instruments must be viewed as dynamic ("living instruments") and read in light of contemporary legal and social circumstances.[96] It means that the IACtHR looks to find in its interpretative process "a way to identify the common will of the parties as it would have resulted if they had renegotiated the agreement taking into account the circumstances that have since evolved."[97] Aside from these interpretative peculiarities, a human rights adjudicating body must be consistent with itself in interpreting the provisions of the instrument assigned, in the sense that such a body simply "cannot rely on one principle to decide a case and then offend that very same principle to decide the next case."[98] An examination of the IACtHR's practice reveals that the Court usually does not change the principles on which it bases its decisions in cases before it, but rather respects the same principles, their scope, and their purpose, applying them uniformly from one case to the next, which is at the heart of consistency, validity, and authority in its interpretations.

Furthermore, in interpreting human rights treaties, human rights fora have developed several tools that are reflected not only in the VCLT and specific doctrines, but also in "consensus" as a method of interpretation, which plays an important role in enhancing consistency, authority, and validity in their case law. Lucas Lexinski, for example,

93. *Id.*

94. EIRIK BJORGE, THE EVOLUTIONARY INTERPRETATION OF TREATIES, 64 (2014).

95. *Id.*

96. Lucas Lixinski, *The Consensus Method of Interpretation by the IACtHR*, 3(1) CAN. J. OF COMPAR. L. 65 (2019).

97. Pierre-Marie Dupuy, *Evolutionary Interpretation of Treaties: Between Memory and Prophecy*, *in* INTERPRETATION OF TREATIES, THE LAW OF TREATIES BEYOND THE VIENNA CONVENTION (Enzo Cannizzaro, ed. 2011), 123

98. Letsas, *supra* note 69.

identifies different categories of "consensus" methods that international human rights fora adopt with respect to using international law, comparative law, and domestic policies.[99] In contrast to the Strasbourg Court (ECtHR), which is said to adhere to "consensus interpretation" and to regard it as fundamental to the interpretation of the European Convention on Human Rights, the IACtHR is criticized for not taking this interpretative tool seriously in its case law, particularly in relation to "internal democratic consensus" on political views within particular states, as opposed to a region.[100]In other words, , the IACtHR is thought to use "international consensus" as "a means to disregard strong internal consensus."[101] The IACtHR's reliance on the domestic law of member states is believed to be limited, particularly when dealing with issues not covered by the American Convention.[102] In general, the idea of not giving credit to "internal democratic consensus" is seen to be rooted in the IACtHR's reluctance to trust regimes in the Latin American region that barely are "democratic," as they exercise a limited protection of fundamental rights.[103] Although such an attitude attracted criticism in respect of the Inter-American Court's judgments and its subsidiarity role,[104] there are various important human rights issues, not expressly provided by the American Convention, which this Court is observed to rely on the "consensus" method, as are, for example, Indigenous peoples' rights or the right to a healthy environment. The following sections provide detailed references to IACtHR judicial decisions and relevant scholarly opinions to identify the IACtHR's interpretive trends and to assess, on their basis, whether this Court promotes holistic, and thus valid, authoritative approaches to the interpretation of the American Convention.

A. Within the Framework of Interpretation: Keeping Account of Special Features

Scholars have argued, especially in the last two decades, that given the special characteristics of human rights treaties, their interpretation

99. Lixinski, *supra* note 79, at 68. Lexinski identifies five types of consensus interpretation in the ECtHR's practice: (1) consensus among states parties of the Council of Europe, (2) international consensus identified by international treaties, (3) international consensus within a State, (4) expert consensus, and (5) consensus among ECtHR judges.

100. *Id.* at 82.

101. *Id.*

102. *Id.* at 82.

103. *Id.*

104. *Id.* at 87.

should follow rules that are different from those applied to other treaties. However, both the practice of the human rights courts (mostly the ECtHR's and IACtHR's) and the doctrine can illustrate that the 1969 VCLT's universal methodology of treaty interpretation is applied by human rights fora as a guideline to interpret their specific human rights treaties' difficulties. According to Malgosia Fitzmaurice, one common and important feature which renders the interpretation of human rights treaties *special* in comparison with the interpretation of other treaties, is given by their so-called constitutional nature, in particular, by the "non-reciprocal" nature of the rights and obligations enshrined in the human rights treaties.[105] This "non-reciprocal nature" is influencing the "object and purpose" of human rights treaties. That is, certainly, determinative in human rights tribunals' adoption of an often strong teleological approach to interpretation.[106] As Fitzmaurice observes, the "object and purpose" also influence the emphasis which human rights fora put on the effectiveness principle and on the development of the so-called pro homine (pro-persona) or ad personam approach.[107] Hence, a pro homine approach of interpretation is directly supported by the teleology of human rights treaties—in other words, by the purpose they are intended to serve.[108] The significance of this aspect is that, being interpreted in accordance with the principle of pro homine (or pro persona), the human rights treaties aim to establish a system for the protection of *human dignity*.[109] In this respect, the IACtHR, like the ECtHR, in interpreting its treaty, has adopted the pro persona principle as a fundamental guiding principle for the interpretation of the American Convention on Human Rights. The IACtHR has regularly emphasized in its jurisprudence that the American Convention clearly establishes specific rules of interpretation under Article 29, which gives priority to the pro persona principle. As underlined above, according to this principle, "no

105. Fitzmaurice, *supra* note 58. *See* e.g. *Case of the "Mapiripan Massacre" v. Colombia* (Judgment of September 15, 2005, Merits, Reparations, and Costs) where the IACtHR underlined the distinction between the *special character* of human rights treaties and treaties of general character, which is due to their different purposes.

106. *Id.*

107. *Id.* Fitzmaurice observes that it is generally admitted that "human rights instruments require a more expansive attitude toward their interpretation than has been applied when interpreting of other types of international law treaties."

108. *See* Lixinski, *supra* note 96, at 68, commenting on the IACtHR's approach to interpretation.

109. Alejandro Fuentes, *Expanding the Boundaries of International Human Rights Law. The Systemic Approach of the Inter-American Court of Human Rights*, 14 (Apr. 15, 2018), European Society of International Law (ESIL) 2017 Annual Conference (Naples), available at SSRN: https://ssrn.com/abstract=3163088 or http://dx.doi.org/10.2139/ssrn.3163088.

provision of the Convention may be interpreted as restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said States is a party" or "excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have."[110] Furthermore, since the purpose of the American Convention, as stated in the Preamble, is "*to consolidate in this hemisphere [Latin America], within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man,"* the Inter-American Court is required to adopt a pro homine approach of interpretation of the American Convention and of other international instruments of the same nature, that is "in the way which is most protective of human rights."[111] Given this, as Lexinsky points out, the pro-individual approach envisaged by the drafters of the American Convention rejects an interpretation of this human rights instrument "according to the ordinary meaning of its words [the primary rule of interpretation] or any other traditional cannons of interpretation, instead directly serving the teleology of the instrument."[112]

Another common feature of human rights treaties relates to the *subject matter,* which appears to have a fundamental impact well beyond that of most, if not all, other treaties, conferring a pro homine character upon its interpretation.[113] Such characteristics, which distinguish human rights treaties from other types of treaties, certainly imprint a peculiar character on the human rights treaties' interpretation. Specific human rights labels for interpretive techniques developed by the European Court of Human Rights to give meaning to the European Convention—such as "pro homine," "autonomous meaning," "special character," "living instrument," "practical and effective rights," "dynamic/evolutive interpretation," "margin of appreciation," or "commonly accepted standards"[114]—were imported by the IACtHR into its context since the

110. *See Article 29 of the ACHR*. The IACtHR expressly stated this approach in many of its judgments, e.g*., Case of the Serrano-Cruz Sisters v. El Salvador*, *supra* note 75; *Case of Mapiripari v. Colombia* (2005); *Case of Vargas-Areco v. Paraguay* (2006), Advisory Opinion OC-21/14, *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection(2014); Case of Muelle Flores v. Peru,* Judgment of 6 May 2019, Preliminary Objections, Reparations and Costs (2019).

111. Lixinski, *supra* note 96, at 68.

112. *Id.*

113. Fitzmaurice, *supra* note 69.

114. Letsas, *supra* note 69. *See also* on this aspect in Fitzmaurice and Merkouris, *supra* note 81, at 153-237.

beginning of its practice, alongside the VCLT's general rules of treaty interpretation. However, unlike the Strasbourg Court, which started to supervise human rights implementation and compliance in a region where States were already committed to democracy, and thus to the rule of law, the IACtHR came into function dealing with a completely different political context and gross violations of human rights, such as systematic state-sponsored mass crimes stemming from dictatorial States and military regimes.[115] Hence, functioning in a radically different context, the IACtHR had to develop its own techniques and path of interpretation and its own application of the American Convention. Respectively, this Court had to adjust the specific methods and doctrines of interpretation, imported from the ECtHR, to matters such as enforced disappearance; extrajudicial execution; amnesties; the victim's right to the truth; the obligation of States to investigate, find, and prosecute perpetrators; judicial guarantees; and remedies or reparations, consequently becoming highly influential on these matters to other courts and tribunals.[116] For example, with the addition of new members from the Central and Eastern regions of the European continent (such as Greece or Turkey), currently the ECtHR finds in the IACtHR a model of inspiration on how to deal with such matters.[117]

Essentially, in respect of the human rights interpretation by human rights tribunals, is the fact that these fora assert with frequency that their interpretative methods are consistent with the 1969 Vienna Convention customary rules of interpretation.[118] Nevertheless, it has been observed that despite a general compliance with these VCLT rules, human rights fora have sometimes adopted interpretative positions that are hard to reconcile with the human rights treaties' provisions before them.[119] As already mentioned in this Article, the IACtHR has become criticized for sometimes adopting interpretative positions that allegedly extend the base authority of its treaty, by frequently seeking guidance from various

115. Huneeus, *supra* note 9, at 500.

116. *Id.*

117. *See* the opinion of Judge Medina (at the IACtHR) *in* THE INTERNATIONAL JUDGE—AN INTRODUCTION TO THE MEN AND WOMEN WHO DECIDE THE WORLD'S CASES (Daniel Terris, Cesare P.R Romano, and Leigh Swigart, eds. 2007), 189 (2007); Christina Cerna, *The Inter-American System for the Protection of Human Rights*, 16 FLA. J. INT'L L., 195, 200, (2004); Laurence Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, 19 EUR. J. INT'L. L. 125, 132 (2008).

118. Fitzmaurice, *supra* note 69.

119. United Nations General Assembly, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, ¶ 428, U.N. Doc. A/CN.4/L.682 (July 18, 2006).

sources of international law (international instruments of varied content and juridical effects, binding and non-binding). Moreover, since the IACtHR does not always spell out the extent of such influence, or what source(s) most influence(s) its decision-making process, this Court is often perceived to be creating uncertainty vis-à-vis its interpretative methodology, and, hence, unpredictability in the norm's interpretation and application. This aspect, arguably, might affect the authority and legitimacy of the Court, making it less credible in the public eye, primarily towards the member States.[120] As one commentator put it, the less predictable the effect of a norm is as result of interpretation, the more its addressees (litigants and non-litigants) will perceive that norm as arbitrarily handled if it is applied.[121] In other words, concerned States and the general public may feel that their legitimate expectations are violated if the law, i.e., treaty, is applied inconsistently, not acting rationally, that is abiding by core interpretative norms.[122]

Also, changes in the perception of human rights as a result of the emergence of unanticipated circumstances and attitudes in society that differ from those acknowledged at the time the American Convention was drafted, as well as the expansion of norms that need to cover various aspects related to individual and collective rights (e.g. the right to a healthy environment; the right to abortion; the rights of indigenous peoples to property, culture, and land) may influence human rights fora to adopt interpretative approaches that seem beyond the framework of treaty interpretation established by the VCLT.[123] Such positions—which are considered to be at least expanding on traditional methods of interpretation, if not introducing interpretative techniques outside the VCLT provisions[124]—could certainly lead some scholars to consider human rights regimes, including the IACtHR, as "self-contained," promoting "expansionism" or "judicial activism." Nevertheless, there is

120. Marijke De Paw, *The Inter-American Court of Human Rights and the Interpretive Method of External Referencing: Regional Consensus v. Universality, in* THE INTER-AMERICAN COURT OF HUMAN RIGHTS: THEORY AND PRACTICE, PRESENT AND FUTURE, 3-24 (Yves Haeck et al. 2016).

121. Christoph Engel, *Inconsistency in the Law: In Search of a Balanced Norm* 1-58 (Max Planck Institute for Research on Collective Goods, Working Paper Bonn 2004/16).

122. *Id.*

123. Arévalo Narváez, Carlos Enrique, and Paola Andrea Patarroyo Ramírez, *Treaties over Time and Human Rights: A Case Law Analysis of the Inter-American Court of Human Rights*, 10 ANUARIO COLOMBIANO DE DERECHO INTERNACIONAL 295 (2017).

124. Fitzmaurice, *supra* note 69. According to the author such positions are possible due to two reasons: one is because the VCLT rules of interpretation are themselves far from clear and fluid in their relationship to each other, and the other is because the concept of human rights and the treaty formulations of the rights are frequently general, vague, and subjective.

a perceived move today towards a uniform methodology of interpreting human rights treaties by human rights tribunals.[125] This is seen as the human rights tribunals' compliance with the VCLT rules of interpretation, which, according to Fitzmaurice, develops "possibly, in a rather expansive, *but nevertheless legitimate manner*" a feature upon which we are witnessing an emerging consensus among international scholars.[126] Regarding this, the statement of the former IACtHR President, Judge Cancado Trindade, in his dissenting opinion in the *Case of the Serrano-Cruz Sisters v. El Salvador* (2004),[127] honoring the value of contemporary international law in interpreting human rights treaties, is particularly relevant. He emphasizes that:

> By protecting fundamental values shared by the international community as a whole, contemporary international law has overcome the anachronic voluntarist conception belonging to a distant past. Contrary to what some rare, nostalgic survivors of the apogee of positivism-voluntarism presume, the methodology of interpreting human rights treaties developed on the basis of rules of interpretation embodied in international law (as those stipulated in Articles 31 to 33 of the 1969 and 1986 Vienna Conventions on the Law of Treaties) applies to both the substantive provisions (on the protected rights) and the clauses that regulate international protection mechanisms on the basis of –the principle ut res magis valeat quam pereat (which corresponds to the so-called effet utile; sometimes called the principle of effectiveness), amply supported by international case law.[128]

The IACtHR is known to have emerged at the end of the 1970s, following the adoption of the 1969 VCLT, but prior to this Convention's coming into force in 1980. Although this Court could apply the interpretation procedures and rules adopted specifically for human rights treaties by the ECtHR, it should also use the interpretative rules supplied by the VCLT if it does not want to overstep its treaty-based authority. The following subsections investigate in detail, using case law analysis and scholarly opinions, how the IACtHR typically engages in a holistic reading of the American Convention by employing various strategies in

125. *Id.*

126. *Id.* (emphasis added). *See Vienna Convention on the Law of Treaties*, U.N. Doc A/CONF.39/27 (1969), 1155 U.N.T.S. 331, signed at Vienna on May 23, 1969, entered into force January 27, 1980.

127. IACtHR, *Case of the Serrano-Cruz Sisters, supra* note 79.

128. Dissenting Opinion of Judge Cancado Trindade in the *Case of the Serrano-Cruz Sisters, supra* note 79, para 7, p.14. (emphasis added).

the use of the VCLT's customary rules of treaty interpretation, and how such strategies are critical in developing an authoritative and valid treaty interpretation.

B. Distinguishing Between an Explicit and Implicit Approach

It should be remembered that the VCLT general rules of interpretation simply define how the judge should argue to reach a conclusion about the meaning of the interpreted treaty provision.[129] Thus, when combined with the specific rules of human rights interpretation, the Vienna general rules of interpretation empower the judge to resolve international disputes in an objective manner.[130] An examination of the IACtHR's case law reveals a distinction between explicit and implicit wording used by this Court in judgments, advisory opinions, and orders when applying Vienna rules to the interpretation of the American Convention.[131] When the Court utilizes express and frequently explicit, language to defend its interpretations, an explicit approach is proven, whereas an implicit approach develops when there is no express, technical reference to *Vienna rules*, but they can be deducted from the Court's adopted rationale in the current case. The IACtHR, like the ECtHR, WTO, and ICJ, uses both procedures, sometimes combining them in a single case.[132] Indeed, when applying the VCLT general rules of interpretation, the IACtHR may favor one of these rules or methods over another (depending on the circumstances of the case), but this does not indicate the Court's sole preference for the rule or method emphasized in the given case. For example, it has been observed that the specificity of human rights treaties justifies the adoption of a strong teleological method of interpretation by human rights forums such as the IACtHR or ECtHR. Despite the emphasis on the teleological method, it is usually supplemented by the textualist (literal) and subjective (contextualist or systematic) methods. In this subsection, several selected decisions will be examined to reveal how the IACtHR usually approaches the VCLT

129. VCLT general rules facilitate the interpretation and developing the law. *See* Ulf Linderfalk, On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties, (2007); *See* Matthew Saul, *Identifying Jus Cogens Norms: The Interaction of Scholars and International Judges,* 26 ASIAN J. INT'L L. 54 (2015).

130. *See* e.g., Fitzmaurice, *supra* note 69; Fitmaurice and Merqouris, *supra* note 81; Letsas, *supra* note 91; Linderfalk, *supra* note 129.

131. *See* Popa, *supra* note 114 for an analysis on treaty interpretation at the ECtHR, WTO, and ICJ.

132. *Id.*; *See* Fitzmaurice, *supra* note 69.

general rules and methods of interpretation on various human rights issues, both provided and not specifically provided in the American Convention. The analysis will differentiate between the explicit and implicit techniques for applying the VCLT rules and methods, concluding that both tactics have an equal impact on the consistency, and consequently the authority and legitimacy of the Court's interpretation.

1. The Relevancy of the VCLT Rules of Interpretation

The recent case of *Cuscul Pivaral et al. v. Guatemala* (2018)[133] is notable because it clearly and thoroughly displays the IACtHR's assignment of a crucial role to the VCLT universal methodology of interpretation in its interpretation of the American Convention on Human Rights. In this case, the Court recalls that all Vienna general rules and methods of interpretation are relevant and serve to supplement the body of specific human rights interpretative tools.[134] It offers an explicit and comprehensive model of interpretation of human rights provisions enshrined in the Convention, outlining each interpretive step it aims to take, in a pedagogical manner, basically guided by the Vienna customary rules of interpretation. The Court's task in this case was to determine the alleged international responsibility of the State of Guatemala for the total lack of State medical care for a group of people living in poverty with HIV (forty-nine people diagnosed with HIV between 1992 and 2003, some of whom died as a result of this lack), an omission that had a serious impact on their health, life, and personal integrity, in violation of Articles 26(4), (5), and 1(1) of the American Convention.[135] To this end, the IACtHR explicitly adopts a holistic interpretation, first recalling the guiding rules and methods on which it has traditionally relied in its jurisprudence and how they apply to the facts of the present case. The adopted interpretive framework is explained as follows:

> the Court will resort to the Vienna Convention on the Law of Treaties (hereinafter the "Vienna Convention"), which includes the general and customary rule of interpretation of international treaties, which implies the simultaneous and joint application of good faith, the ordinary meaning of the terms used in the treaty in question, their

133. IACtHR, *Case of Cuscul Pivaral v. Guatemala,* Preliminary Objection, Merits, Reparations and Costs, Judgment of August 23, 2018, Series C No. 359. *See* similar approach, i.e., in the *Case* of *Oliviera Fuentes v. Peru,* Preliminary Objections, Merits and Costs, IACtHR, Judgment of February 4, 2023.

134. *Id.* at para 27.

135. *Id.*

> object, and the object and purpose of the treaty in question. Therefore, as is its constant jurisprudence, the Court will make use of the methods of interpretation stipulated in Articles 31 and 32 of the Vienna Convention to carry out such interpretation. Likewise, the Court will use, as appropriate, the rules of interpretation that are derived from Article 29 of the American Convention.[136]

Furthermore, relying on a large body of case law from its own practice, the IACtHR states in this case that in relation to Article 26 of the American Convention, "a literal, systematic, and teleological interpretation" allows the Court to conclude that this Article "protects those rights that derive from the economic, social, and educational, science, and cultural norms contained in the OAS Charter."[137] The Court explains that the scope of the rights under interpretation "must be understood in relation to the rest of the other clauses of the American Convention,"[138] emphasizing the context of this instrument as a whole.[139] Thus, in order to better clarify and confirm the meaning given to the terms of Article 26, the Court believes it is necessary to adopt the contextualist (systematic) method. It allows for an interpretation of this provision in the context of the entire Convention, as well as the system to which it belongs. The Court elaborates on this holistic approach as follows:

> when interpreting a treaty not only the agreements and instruments formally related to it are considered [second paragraph of Article 31 of the Vienna Convention], but also the system within which it registers [third paragraph of Article 31], that is, the inter-American system for the protection of human rights. In the framework of a systematic interpretation of the Convention, all the provisions that comprise it and the agreements and instruments formally related to it must be taken into account, such as, for example, the American Declaration of the Rights and Duties of Man [also ahead of time "American Declaration"], since they make it possible to verify whether the interpretation given to a specific norm or term is consistent with the meaning of the other provisions.[140]

Despite the fact that the Court appears to be emphasizing the context rule in the *Case of Cuscul Pivaral*, respectively the contextualist approach, it states that a teleological approach is equally required to

136. *Id.* at para 75 (emphasis added).
137. *Id.* at para 97.
138. *Id.*
139. *Id.*
140. *Id.* at para 82.

complete the interpretation.[141] The teleological interpretation entails a consideration of the object and purpose of the relevant norm (Article 26 of the Convention) in relation to the object and purpose of the treaty itself (the American Convention), as well as the goals of the regional human rights protection system (all the provisions that comprise the American Convention and the agreements and instruments formally related to it).[142] The Court specifies that such an interpretation must be carried out in accordance with the principles emphasized in Article 29 of the American Convention, including the pro persona principle. It essentially calls for a liberal interpretation of the Convention's rights in favor of the individual, with the intention of furthering the Convention's object and purpose.[143] Indeed, the *Case of Cuscul Pivara* reveals the textualist approach, a reading of the provision according to the ordinary meaning of the terms in their context. For example, when the IACtHR reiterates that—because human rights treaties are not traditional multilateral treaties concluded on a reciprocal exchange of rights for the benefit of the contracting parties, but rather their object and purpose are the protection of human rights both against the State and against other States—a literal interpretation of the American Convention that "uses the principle of the primacy of the text" is clearly appropriate.[144] Furthermore, the Court acknowledges in this case that all VCLT methods of interpretation matter because they complement one another, so they must have an equal interpretative value, albeit a different weight, in issuing a final, relevant, and valid interpretation. This point is highlighted in the Court's reference to the meaning and scope of Article 26 when stating that:

> A teleological interpretation of the norm would be in accordance with the conclusion reached by means of a literal and systematic interpretation, in the sense that Article 26 recognizes the existence of "rights" that must be guaranteed by the State to all persons, subject to its jurisdiction in the terms provided by the American Convention. The recognition of these rights and the jurisdiction of the Court to resolve disputes in relation to them have the objective of consolidating a regime of personal liberty and social justice founded on respect for the essential rights of man recognized in the OAS Charter, which is clearly compatible with the object and purpose of the American Convention.

141. *Id.* at para 73.
142. *Id.* at para 90.
143. *Id.* at para 92.
144. *Id.* at para 77.

In a final step in the interpretation of the economic, social, and cultural rights referred to in Article 26, the IACtHR recalls the confirming role of the customary rules provided for in Article 32 of the VCLT, which are thus applied "in a subsidiary way." [145] According to the Court, Article 32, "the complementary means of interpretation, particularly preparatory work for the treaty, are used to confirm the meaning resulting from the interpretation made in accordance with the methods indicated in Article 31."[146] Based on this interpretive criteria, the Court concluded that the contents of Article 26 of the Convention, which had been the subject of intense debate among the States during its preparatory work (*travaux préeparatoires*),[147] do not contradict the thesis that Article 26 in effect recognizes "rights" that are subject to the general obligations that States have under Articles 1.1 and 2 of the American Convention and are therefore justiciable.[148] The IACtHR issued in the *Case of Cuscul Pivaral* a pro homine interpretation of the rights at stake, essentially aided by the Vienna rules of interpretation applied harmoniously in combination, in a holistic exercise. [149]

2. The Explicit Technique

In many of its judgments, the IACtHR has displayed an express and comprehensive approach to treaty interpretation (as the one displayed in the previous subpart), with some of these approaches frequently referred to by the Court as models of interpretation in cases before it, similarly to the ECtHR, ICJ, and WTO.[150] The IACtHR appears to provide such models, particularly when dealing with challenges in interpreting the text of the American Convention, such as ambiguity, vagueness, and silence. For instance, in its *Advisory Opinion Requested by the United Mexican States* (1999),[151] the IACtHR expressly refers to the VCLT general rules of interpretation, applying them alongside specific human rights rules of interpretation.[152] The interpretation issue was related to *the right to*

145. *Id.* at para 96.

146. *Id.* at para 94.

147. *Id.* at para 96.

148. *Id.*

149. *Id.*

150. *See* Popa, *supra* note 11.

151. IACtHR, *Advisory Opinion OC-16/99,* Requested by the United Mexican States, *On the Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law,* October 1, 1999.

152. For a similar interpretive approach (where the IACtHR expressly employed Vienna rules of interpretation) *see*, e.g., Case of *Genie-Lacayo v. Nicaragua,* Judgment of January 29, 1997, Merits, Reparations and Costs; IACtHR, *Blake v. Guatemala Case*, *Interpretation of*

information on consular assistance within the framework of the guarantees of due process of law, which is not explicitly stipulated in the American Convention but can be deduced from the provisions of Article 64(1) of this Convention.[153] In response to, inter alia, Mexico's request for an advisory opinion on whether Article 36 of the Vienna Convention on Consular Relations should be interpreted as containing provisions relating to the protection of human rights in American States in accordance with Article 64(1) of the American Convention, the IACtHR recalls that it has competence to interpret, in addition to the American Convention, other treaties relating to the protection of human rights in the American States. The IACtHR declares that the VCLT's "general rule of interpretation," especially Article 31, is the applicable customary rule to the issue at hand and the starting point for its interpretation.[154] The Court also recalls the pro homine approach that must be adopted in order to give full meaning and effect to the provision at issue (Article 64(1)), in accordance with the principle of effectiveness—*ut res magis valeat quam pereat*—as reflected in the object and purpose of the American Convention. According to the Court, Article 31 of the Vienna Convention on the Law of Treaties provides that:

> [A] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. The object and purpose of the American Convention is effective protection of human rights. Hence, when interpreting that Convention, the Court must do it in such a way that the system for the protection of human rights has all its appropriate effects (effect utile).[155]

The Court proceeds to interpret Article 36 of the Vienna Convention on Consular Relations in accordance with its declared framework of interpretation, combining the teleological, textualist, and contextualist methods. While suggesting the context rule to be applied at both the

Judgment on Reparations (Article 67 America Convention), Judgment of October, 1999; IACtHR, *Advisory Opinion OC-20.09*, of September 29, 2009, Requested by the Republic of Argentina (*Article 55 of the American Convention of Human Rights*); IACtHR, *Case of the "White Van" (Paniagua-Morales et al.) v. Guatemala*, Judgment of January 25, 1996, Preliminary Objections; IACtHR, *Case of Herrera-Ulloa v. Costa Rica*, Judgment of July 2, 2004, Preliminary Objections, Merits, Reparations and Costs; IACtHR, *Case of the 19 Merchants v. Colombia*, Judgment of July 5, 2004, Merits, Reparations and Costs; IACtHR, *Case of the Gomez-Paquiyauri Brothers v. Peru*, Judgment of July 8, 2004, Merits, Reparations and Costs; IACtHR, *Case of Caballero-Delgado and Santana v. Colombia*, Judgment of December 8, 1995, Merits, Reparations, and Costs.

153. *American Convention on Human Rights* art. 64(1), Nov. 22, 1969, 1144 U.N.T.S. 123.

154. *Advisory Opinion OC-16/99, supra* note 5, para 58.

155. *Id.* at para 59.

provision and treaty levels as a whole, the Court articulates the principle of good faith reflected in Article 31 of the VCLT.[156] It specifies that *good faith* is a "general principle of international law" to be observed in the interpretation of a treaty,[157] which is also recognized in Article 26 of the same 1969 Vienna Convention.[158] This interpretive strategy is explained by the Court as follows:

> For purposes of this Advisory Opinion, the Court must determine whether this treaty [Vienna Convention on Consular Relation] concerns the protection of human rights in the 33 American States that are Party thereto; in other words, whether it has bearing upon, affects or is of interest to this subject matter. In analyzing this issue, the Court reiterates that the interpretation of any norms is to be done in *good faith in accordance with the ordinary meaning to be given to the terms used in the treaty in their context and in the light of its object and purpose (Article 31 of the Vienna Convention on the Law of Treaties) and that an interpretation may, if necessary, involve an examination of the Treaty taken as a whole*.[159]

Because the text of Article 36 of the Vienna Convention on Consular Relations is not precise in language[160] and the IACtHR's task is to determine whether this provision concerns the protection of human rights, the Court considers it necessary to adopt a broader contextualist interpretation. It suggests that the Court reads the provision in question in the context of the entire treaty and the legal system in effect at the time of interpretation.[161] It should be noted that the VCLT's general rule of interpretation distinguishes between a context properly speaking (*stricto sensu*), which refers to the treaty in question, and elements to be taken into account from outside the treaty text and be treated as a kind of broader context (*lato sensu*).[162] The context in a broader sense may refer, for example, to subsequent agreements and practices between the parties regarding the interpretation and application of the treaty, the norms of general international law that developed after the treaty that is to be interpreted, international law in development, general principles of law,

156. *Id.* at para 58.

157. *Id.* at para 128.

158. *See* Article 26 of the VCLT, entitled: *Pacta sunt servanda*. "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."

159. *Advisory Opinion OC-16/99, supra* note 151, para 72. *See also* para 134 for illustration of the rule of context of the whole treaty.

160. *Id.* at para 106.

161. *Id.* at para 72.

162. *Vienna Convention on the Law of Treaties*, art. 31, May 23, 1969, 1155 U.N.T.S. 331.

customary law, or local practice as an element of interpretation.[163] *Stricto sensu*, the rule of context is applied in the present case at the level of provision. For example, when the IACtHR considers that "[s]ubparagraphs (b) and (c) of Article 36(1) of the Vienna Convention on Consular Relations concern consular assistance in one particular situation: deprivation of freedom," and that "these subparagraphs need to be examined separately."[164] Also, *stricto sensu*, the Court employs the rule of context at the level of the treaty (as a whole), when, for example, it links Article 36 to Article 5 of the Vienna Convention on Consular Relations.[165] As the Court states, it is evident from this approach that the Treaty under interpretation "recognizes *assistance* to a national of the sending State for the defense of his rights before the authorities of the host State to be one of the paramount functions of a consular officer."[166] To give meaning and effect to the interpreted treaty provision, the Court supplements the contextualist method with the teleological method, which focuses on the scope and purpose of the interpreted treaty, according to its declared interpretive framework. Based on this combined approach, the Court concludes that the Vienna Convention on Consular Relations concerns the protection of an individual's fundamental rights in the American hemisphere, because a human rights treaty can concern the protection of human rights regardless of its primary purpose.[167] Indeed, the Court's ruling clearly demonstrates the employment of the textualist approach, that is reading the provision at issue according to the ordinary meaning of its terms in the context of their use. For example, the Court claims that "*the Vienna Convention on the Law of Treaties* provides that unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory," so accordingly "no intention to establish an exception to this provision [Article 36] can be read from either *the letter* or *the spirit* of the Vienna Convention on Consular Relations."[168]

Furthermore, the Court expressly employs *travaux préparatoires* as supplementary means of interpretation, and thus, the subjective ("intentions") method, to ascertain and confirm the true intention of the

163. Robert Kolb, INTERPRÉTATION ET CRÉATION DU DROIT INTERNATIONAL—ESQUISSES D'UNE HERMÉNEUTIQUEC JURIDIQUE MODERNE POUR LE DROIT INTERNATIONAL PUBLIC 467 (2006); *See* Article 31, paragraphs 2 and 3, of the VCLT.

164. *Advisory Opinion OC-16/99, supra* note 151, para 81.

165. *Id.* at para 77.

166. *Id.* at para 80.

167. *Id.* at para 76.

168. *Id.* at para 140 (emphasis added).

parties with regard to the relevant treaty provision. Examining the *travaux préparatoires* for the preamble of the Vienna Convention on Consular Relations, the IACtHR discovers, for example, that "individuals to whom the preamble refers are those who perform consular functions."[169] The Court finds also that Article 36 of the said Convention endows a "detained foreign national with individual rights that are the counterpart to the host State's correlative duties," and that "[t]his interpretation is supported by *the article's legislative history*[;] . . . in the end the view was that there was no reason why that instrument should not confer rights upon individuals."[170] To support this interpretative result, the IACtHR expressly refers to the *effet utile* principle (known as the effectiveness principle) as it is reflected in Article 31 of the VCLT. Accordingly, the Court states that in light of the application of a general principle of interpretation which international jurisprudence has repeatedly affirmed, it will interpret Article 36 so that those appropriate effects (*effet utile*) are obtained.[171] As noted by the Court, the preparatory works for Article 36 of the Vienna Convention on Consular Relations confirm and support its conclusion that this provision clearly concerns the protection of individual rights.[172] In particular, the "inclusion of the obligation to inform a detained foreign national of his rights under that article 'without delay' . . . as a means to help ensure that the detained person was made duly aware of his right to request that the consular officer be advised of his arrest for purposes of consular assistance"—clearly constitutes, in the Court's opinion, the appropriate effect (*effet utile*) of the rights recognized in Article 36.[173]

As is well known, the VCLT general rules of treaty interpretation allow for flexibility in the combination of elements to be selected in a particular context of interpretation,[174] entailing interpretation in both limited and broader contexts. In this Advisory Opinion, the IACtHR

169. *Id.* at para 74.

170. *Id.* at para 84 (emphasis added); *See* also paras 90, 100, 103, 123 for an express reliance of the Court on the *travaux préparatoires* as supplementary means of interpretation in clarifying the meaning of Article 36 of the *Vienna Convention on Consular Relations.*

171. *Id.* at para 104.

172. *Id.* at paras 90-91; *See* Judge Cancado Trindade's sharing this view, in his Concurring Opinion of *Advisory Opinion OC-16/99*, *supra* note 151, para 16 According to him, all the intervening states, with the sole exception of the United States, effectively sustained the relationship between the right to information on consular assistance and human rights.

173. *Id.* at para 103.

174. Kolb, *supra* note 142, at 485. Kolb observes that the Convention's drafters ensured a "viable balance" between the imposition, by way of legal norms, of a degree of certainty and order in the interpretative process, as well as flexibility in the combination of elements and adaptation.

specifically adopts a broader contextualist approach, implying that elements beyond the treaty under interpretation must be taken into account through "systemic integration," as defined in Article 31(3)(c) of the VCLT.[175] In accordance with the VCLT framework of interpretation, the Court goes on to use the evolutive interpretation to determine "the nature of the nexus between the right to information on consular assistance and the inherent rights of the individual as recognized in the International Covenant on Civil and Political Rights and the American Declaration and, through the latter, in the Charter of the OAS"[176]—the request made by Mexico in this case.[177] The Court expressly states that the International Covenant on Civil and Political Rights and the OAS Charter must be construed in line with Article 31 of the 1969 VCLT since they are treaties in the sense that this Convention defines.[178] Emphasizing the principle of evolutionary interpretation, the Court concludes that, under Article 31 of the VCLT, "the interpretation of a treaty must take account not only of the agreements and instruments related to it (Article 31(2)) but also of the system of which it forms part (Article 31(3))."[179] Similarly to the ECtHR in interpreting its assigned treaty, the IACtHR tends to use an evolutionary interpretation in interpreting the rights and obligations of the American Convention when it wishes to emphasize the Convention as a "living instrument." As the IACtHR explains in the present Advisory Opinion:

> [t]his guidance is particularly relevant in the case of international human rights law, which has made great headway thanks to an evolutive interpretation of international instruments of protection. That evolutive interpretation is consistent with the general rules of treaty interpretation established in the 1969 Vienna Convention. Both this Court, in the Advisory Opinion on the Interpretation of the American Declaration of the Rights and Duties of Man (1989), and the European Court of Human Rights, in *Tyrer v. United Kingdom* (1978), *Marckx v. Belgium* (1979), *Loizidou v. Turkey* (1995), among others, have held that human rights treaties are living instruments whose interpretation must consider the changes over time and present-day conditions.[180]

175. *Advisory Opinion OC-16/99, supra* note 151.
176. *Id.* at paras 110, 108.
177. *Id.*
178. *Id.* (emphasis added).
179. *Id.* at para 113.
180. *Id.* at para 114 (emphasis added).

As can be seen in this Advisory Opinion the IACtHR provides a model for applying the VCLT's "general rule of interpretation" to difficulties in reading the text of the American Convention. However, the Court's interpretative approach in this case, as in many others, attests to the recognition of a phenomenon much deeper than the sole recourse per se to rules and methods of interpretation of treaties[181] is taking place. The position taken by the Court here promotes a systematic, dynamic, and evolving integration of the rights and guarantees that are protected by the American Convention. According to Judge Cancado Trindade, this Advisory Opinion constitutes:

> an important contribution of the International Law of Human Rights to the evolution of a specific aspect of contemporary international law, namely, that pertaining to the right of foreigners under detention to information on consular assistance in the framework of the guarantees of the due process of law.'[182] The Court admits in this respect that '[t]he intermingling between Public International Law and the International Law of Human Rights gives testimony of the recognition of the centrality, in this new *corpus juris*, of the universal human rights, what corresponds to a new *ethos* of our times.[183]

It should be recalled that the Vienna rules of interpretation are a set of guiding principles that enable a correct "moral reading" (or interpretation) of human rights, thereby ensuring their full meaning and effectiveness.[184] At times, the IACtHR is constrained to articulate the significance of the Vienna customary rules of interpretation in assisting the "moral reading" of the human rights entrenched in the American Convention, highlighting one rule or another, depending on the circumstances of the case. For example, in the *Cas*e of *Herrera-Ulloa v. Costa Rica* (2004),[185] involving a journalist found guilty by the Court of San Jose of publishing insults constituting defamation of an important state official of a Costa Rican agency, the IACtHR emphasizes the importance of the Vienna rules of interpretation in achieving maximum and optimum respect for and enforcement of rights and freedoms enshrined in the American Convention.[186] The Court expressly clarifies,

181. *Id.*

182. *Id. See* Judge Cancado Trindade sharing this opinion in paragraph 1 of his concurring opinion of this advisory opinion.

183. *Id.* at para 34.

184. *See* Letsas, *supra* note 91.

185. *Case of Herrera-Ulloa v. Costa Rica, supra* note 151.

186. *See* Concurring Opinion of Judge Sergio Garcia Ramirez in the Judgment of the IACtHR in the *Case of Herrera-Ulloa, supra* note 152, paras 8.

via the rationale provided by the Vienna rules, the specific character of *limitations (restrictions) in the area of freedom of thought and expression* within Article 13 (paragraphs 2, 4, and 5) of the American Convention.[187] The Court distinguishes between *specific limitations* and *generic limitations* that pertain to various rights and freedoms within the American Convention.[188] It emphasizes the teleological method, asserting that specific limitations must be interpreted strictly in accordance with their own object and purpose, as well as in accordance with the object and purpose of the Convention (as required by the rules of Article 31 of the VCLT) for these limitations to have full effect.[189] Furthermore, based on its own jurisprudence and the relevant international jurisprudence, the Court concludes that specific restrictions may not be imposed except "in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established" (Article 30 of the American Convention).[190] According to Judge Garcia Ramirez' concurring opinion on this case, the IACtHR adopted the correct rationale, admitting that specific limitations must be interpreted strictly, in accordance with the Vienna general rules of interpretation, because:

> The rules for interpreting treaties, with the special importance they have in the case of human rights, strive for maximum and optimum respect for and enforcement of rights and freedoms, in keeping with the object and purpose of the corresponding treaty. Hence, limitations must be understood and applied by a narrow criterion and by the strictest standards of reasonableness, opportunity and moderation. This point, too, is explored in international case law and echoed in the decisions of the Inter-American Court.[191]

Also, in interpreting Article 8(2)(h) of the American Convention, given the right to appeal to a higher court and the remedy contemplated within this provision, the IACtHR proceeds, in the Case of Herrera-Ulloa, to employ all required basic methods of interpretation comprised in Article 31(1) of the VCLT: textualist, teleological, and subjective. Although the Court emphasizes the "object and purpose" at the level of both the provision and the Convention, as well as the principle of

187. *Id.*

188. *Case of Herrera-Ulloa v. Costa Rica, supra* note 152., paras 120-129.

189. Concurring Opinion of Judge Sergio Garcia Ramirez *supra* note 186, para 8. *See* paras 112-126 for the court's interpretation.

190. *Id.*

191. *Id.*

effectiveness which underpins the teleological method, it gives equal interpretive value to all the VCLT general rules and methods adopted. As stated by the Court:

> *In keeping with the object and purpose of the American Convention, which is the effective protection of human rights*, the remedy contemplated in Article 8(2)(h) of the Convention must be an effective, ordinary remedy whereby a higher judge or court corrects jurisdictional decisions that are not in keeping with the law. While States have a margin of discretion in regulating the exercise of that remedy, they may not establish restrictions or requirements inimical to the very essence of the right to appeal a judgment. The Court has established that the "*formal existence of remedies is not sufficient; these must be effective*;" in other words, they *must provide results or responses to the end that they were intended to serve*.[192]

In this case, the Court expressly and explicitly applies the Vienna general rules in a way that is both harmonious and complementary to the special rules (particularly the "margin of appreciation"), providing a pro homine interpretation of the provisions at issue and thus giving them full effect within their intended scope.

3. The Implicit Technique

A review of the IACtHR's decisions can evidence that, regardless of how the Vienna general rules of interpretation are approached—explicitly or implicitly—these rules are critical in ensuring the protection of human rights guaranteed by the American Convention. As previously noted in this Article, the IACtHR, like the ECtHR (as well as the ICJ and WTO), does not always spell out during its judgment all the methods and rules of interpretation on which it bases its reading the American Convention. Neither does the Court always specify whether it must base its interpretation solely on specific rules to the exclusion of others. At times, the IACtHR adopts interpretative techniques based on the VCLT general rules of interpretation without making any technical reference to them, but instead implicitly and flexibly combines them in a single operation with the specific HR rules of interpretation.[193] As its precedents can show, the Court adopts this strategy regardless of the challenges it encounters in reading the text of the American Convention's provisions, such as unclear

192. *Case of Herrera-Ulloa*, *supra* note 152, para 160-161.

193. *See* Popa, *supra* note 14.

text or silence in the text, not providing for the circumstances of the case.[194]

The following analysis illustrates that when *Vienna rules* are not expressly and explicitly applied, and only deduced from the language of the rulings, the IACtHR follows the same rationale scheme provided by these rules. It can be observed that this implicit approach reaches the same level of effectiveness as the express one, which is predominantly used in the interpretation of the American Convention. Such implicit technique is frequently adopted by the IACtHR in a similar manner to that of the ECtHR, WTO and ICJ in interpreting their treaties.[195] For example, in the case of *Fontevecchia and D'Amico v. Argentina* (2011),[196] the IACtHR, relying on its own established interpretive patterns, combines the customary rules of interpretation (reflected in Articles 31 and 32 of the 1969 VCLT) with the special rules (particularly the "margin of appreciation") in an implied manner on the contents of *freedom of thought and expression* stipulated in Article 13(2) of the American Convention. The case involved two journalists who claimed protection under Article 13 of the Convention and were subjected to civil penalties in Argentina for the publication of two articles (in 1995) in a renowned news magazine about the private life of the country's then president.[197] Although the Court does not explicitly mention the Vienna rules of interpretation or the framework of interpretation it intends to follow in this case, the Court's language and reasoning indicate that the general rules and methods of interpretation reflected in the 1969 Vienna Convention will serve as a guiding basis. For example, when the IACtHR links the rights to freedom of thought and expression in Article 13 to the right to private life in Article 11 of the American Convention, the contextualist approach based on the "context" rule is implicitly applied and thus revealed. Because reading in the "context" is a general rule of interpretation that must be considered when interpreting a treaty, the Court reiterates that "every fundamental right must be exercised in light of other fundamental rights.[198] Hence, in order to determine the extent to which *restrictions on the right to freedom*

194. *Id.*

195. *Id.*

196. IACtHR, *Case of Fontevecchia and D'Amico v. Argentina*, Judgment of November 29, 2011, Merits, Reparations and Costs; *See also* an implicit application of the VCLT general rules of interpretation in, e. g., IACtHR*, Case of Ivcher-Bronstein v. Peru,* Judgment of February 6, 2001, Merits, Reparations and Costs*; The Mayagna (Sumo) Awas Tingni Community v. Nicaragua,* Judgment of August 31, 2001, IACtHR, Ser. C No.79.

197. IACtHR, *Case of Fontevecchia and D'Amico v. Argentina*, Judgment of November 29, 2011, Merits, Reparations and Costs.

198. *Id.* at para 53.

of thought and expression in Article 13(2) can be imposed, given that this right is not an absolute right, and to assess the application of additional liability in this case, the Court looks to the context of the American Convention, taking it as a whole.[199] Based on this (implicit) VCLT interpretive approach, the Court concludes that:

> public officials, like everyone else, are covered by the protection afforded by Article 11 of the Convention, which recognizes, *inter alia*, the right to private life. Article 13(2)(a) of the Convention sets forth that 'the respect of the rights [. . .] of others' may be the grounds for establishing subsequent liability in the exercise of the freedom of thought and expression. Consequently, the protection of privacy life of any person is a legitimate purpose consistent with the Convention.[200]

Furthermore, the above statement demonstrates that the Court indirectly applies the rule of context by relating the interpretation it has reached of Article 13 to the object and purpose of the Convention, as an interpretation in context entails taking into account the Convention's object and purpose as stated in its preamble.[201] This rule is reflected in Article 31(2), of the VCLT, which reads: "[t]he context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes . . . ." Thus, in addition to the special rule of "margin of appreciation," the Court applies the "context" and "object and purpose" rules, respectively, the contextualist and teleological methods of interpretation, to examine the meaning of the constraints on freedom of thought and speech alluded to in Article 13 of the American Convention.[202] The "margin of appreciation" special rule of interpretation, also can only be inferred in this case, for example, from the Court's assertion that it must strike a balance between private life and freedom of expression—two fundamental rights guaranteed by the Convention and vital in a democratic society.[203] According to the Court, such a balance presupposes a process of harmonization in which the State has a key role in trying to determine responsibilities and impose sanctions as may be necessary to achieve such purpose."[204] However, the Court clarifies that the need to protect rights that may be jeopardized as a result of an abuse

199. *Id.*
200. *Id.*
201. *Id.*
202. *Id.* at para 21.
203. *Id.*
204. *Id.*

of free expression "requires the proper observance of the limits established in this regard by the Convention itself."[205] Thus, based on the "margin of appreciation" and the "context" and the "object and purpose" rules, the Court concludes that it is the State's law that "must establish the restrictions on freedom of expression and only to achieve the ends that the Convention itself says."[206] The Court adds that the law must be written with "sufficient precision to enable people to regulate their conduct so as to be able to predict with a degree that is reasonable under the circumstances, the consequences that a given action may entail."[207] It is to be observed that the Court's employment of the textualist approach, which entails the Court's reliance on the customary rule of "ordinary meaning of the terms in their context" under Article 31(1) of the VCLT, is also revealed in this case and supports the other approaches. As with the other rules in this case, the Court resorts to the "ordinary meaning" rule tacitly, thus without a technical reference to Article 31(1) of the VCLT, to shed light on the meaning and scope of various terms related to the rights protected by Articles 11 and 13 of the American Convention. For instance, the Court states that it "has adopted the standard that for a restriction to freedom of expression to be compatible with the Convention, it must be necessary in a democratic society, the term '*necessary'* being the existence of a pressing social need to justify the restriction."[208] In addition, the IACtHR imports the Strasbourg Court's conclusion on the interpretation of Article 10 (the rights to freedom of expression) of the European Convention on Human Rights, which states that it is not enough to prove that a restriction is "useful," "reasonable," or "desirable," but it must also be "necessary."[209] Based on the textualist interpretation and the "margin of appreciation" special rule, the IACtHR holds that "the *necessity* and, hence, the legality of restrictions imposed under Article 13(2) on freedom of expression, depends upon a showing that the restrictions are required by a compelling governmental interest."[210]Hence, the implicit technique of approaching the Vienna rules of interpretation draws equally to the explicit technique regarding the consistency, authority, and validity of the Court's interpretations.

205. *Id.* at para 50. *See* para 88 for the Court's explanation of the incompatibility of the domestic rule, also Jorge Contesse, *The International Authority of the Inter-American Court of Human Rights: A Critique of the Conventionality Control Doctrine*, 22 INT'L J. HUM. RTS. 1168. 1176 (2018).

206. *Id.* at para 53, para 89.

207. *Id.* at para 53, para 90.

208. *Id.* at para 54.

209. *Id.* at para 53.

210. *Id.* at para 53.

And, certainly, these strategies achieve such results when Vienna rules are properly applied according to the standard of interpretation and in conjunction with the special human rights interpretation rules—expressly, implicitly, or both. To summarize, the case studies in these subsections reveal that there is no difference in the Court's logic and rationale for approaching difficulties of interpretation encountered in the text of the Convention (e.g. insufficiently clear, dubious, inconsequential, vague, or silent language) on the basis of the Vienna customary rules, with both express and implied techniques being efficient for the Court in issuing a pertinent interpretation. As a result, the Court's specific human rights interpretative ethos is shaped by both implicit and explicit strategies of applying Vienna customary rules of treaty interpretation. The case law examples provided above, as well as others depicting the standard of interpretation that will be discussed further, can provide us with useful insights into the Inter-American Court's patterns of approaching Vienna rules of interpretation, which are critical in building consistency, authority, and legitimacy in its human rights interpretation.[211] Next, the focus shifts to how the Court usually applies the VCLT standard of treaty interpretation.

C. Compliance with the VCLT Standard: Underlying the Holistic Interpretation

To ensure authoritative interpretations of the treaties that international courts are called to interpret, and thus normative compliance with their rulings, such courts must generally adhere to a certain universal standard of justice.[212] Such a standard requires, first and foremost, that international courts interpret treaties rationally, adhering to core interpretative norms and a particular standard of interpretation, which is provided by the 1969 Vienna Convention on the Law of Treaties in its "general rule of interpretation" (Articles 31 through 33).[213] According to this standard, which are reflected in Article 31 of the VCLT, the general rules of interpretation, when performing a treaty interpretation *an interpreter must give full meaning and effect to all the terms of the treaty,* which includes: the *text*, *context, object, and purpose*, taking the

211. *See* Popa, *supra* note 14.

212. *See* TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS (2002); Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCH. 375, 375-400 (2006); Nienke Grossman, *The Normative Legitimacy of International Courts*, 86 TEMPLE L. REV. 61 (2013).

213. *Id.*

treaty as a whole.[214] According to scholarship, this is a fundamental principle of treaty interpretation that is regarded as the effectiveness principle—*ut res magis valeat quam pereat.*[215] It implies that an interpreter (e.g. court, tribunal) must take into account, in addition to the text, the context of provision , object, purpose, and the context of the entire treaty (including the preparatory work of the Convention) and must not limit the rights and obligations of the treaty by ignoring this standard.[216] As observed by Malgosia Fitzmaurice and Panos Merkouris, in accordance with this principle, the treaty must be taken "as a *whole* and each of its provisions must be taken as intended to achieve some end," with the essence of interpretation being that "no part of a treaty can be interpreted out of context."[217] According to these authors, treaties must be:

> interpreted with reference to their declared or apparent object and purpose, and particular provisions are to be interpreted as to give fullest effect consistent with the normal sense of the words and with other parts of the text, in such a way that a reason and meaning are to be attributed to every part of the text.[218]

In contrast, "an interpretation that would render the text ineffective to achieve its object" is considered "suspicious."[219] It should be noted that Article 32 of the VCLT relates to Article 31, paragraphs 2 and 3, which likewise refers to material outside the text of a treaty in order to include it into the *context* of the treaty, whereas the specified (supplementary) material is given a lower value as being purely additional.[220]

The case law analyses offered in this part show that regardless of the degree of difficulty encountered in the American Convention treaty text construction (e.g., unclear, ambiguous, inconsequential, obscure or silent language), the Court usually abides by the VCLT standard of interpretation. When adopting this standard, the IACtHR may emphasize one or more of this standard's elements: text, context, object, and purpose, depending on the facts of the case and the degree of difficulty in the text

214. Which also implies resort to the *travaux préparatoires*.

215. *See* Fitzmaurice and Merkouris, *supra* note 81.

216. *Id.*

217. *Id.* at 155 (emphasis added). The authors clarify that according to the principle of integration, "treaties are to be interpreted as a whole, and particular parts, chapters or sections also as a whole."

218. *Id.* at 155.

219. *Id.*

220. *See* Oliver Dörr & Kirsten Schmalenbach, *Supplementary Means of Interpretation*, Article 32 *in* VIENNA CONVENTION ON THE LAW OF TREATIES. A COMMENTARY (2011), 571.

construction of the provision(s) under interpretation. The practice of the IACtHR demonstrates that the Court normally treats all rules of interpretation related to these elements with equal interpretive value, albeit with varying weight. For instance, in *Blake v. Guatemala* (1999), the IACtHR explicitly acknowledged the standard of interpretation mandated by the VCLT as applicable to the human rights enshrined in the American Convention.[221] Contesting the interpretation suggested by Guatemala, which was solely based on a textualist approach (the State affirmed that, according to Article 31.1 of the VCLT, the general rule holds that "the terms should be interpreted according to their *ordinary meaning*"), the IACtHR points out that the standard of interpretation is the correct rule an interpreter should follow when interpreting any treaty provision.[222] The Court recalls that Article 31(1) of the 1969 VCLT does not establish a single criterion for interpretation, because fundamentally, treaties should be interpreted "in *good faith* and in accordance with the *ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."*[223] The Court clarifies that the ordinary meaning of the terms, their context, the context of the entire Convention, and its object and purpose, rules reflected in Article 31(1) of the VCLT, constitute the basis of interpretation for all the Convention's provisions, which must be applicable in any given case.[224] The view put forward by the Court is that the first and second paragraphs of Article 31 of the VCLT must be read as *a whole* and as *a single logical operation*, because each of this provision's rules must be considered and placed on the same footing, with each being relevant in reaching a pertinent, valid interpretation. In contrast, the VCLT general rule of interpretation and Article 29 of the American Convention prohibit a restrictive interpretation, that is a limited reading based on a single method of interpretation to the exclusion of others. For example, in the *Case of Lagos Del Campo* (2017), the IACtHR was not completely true to the holistic approach under the VCLT, which it has established and

221. IACtHR, *Blake*, *supra* note 151.

222. *Id.* at para 21.

223. *Id.* (emphasis added). The IACtHR expressly applied the standard of interpretation in many of its cases, e.g., *Case of the 19 Merchants*, *supra* note 152, para 172; *Case of Genie Lacayo, supra* note 152 para 94.

224. *Id. See* a similar approach in the first series of cases at the IACtHR: *Case of Velásquez-Rodríguez v. Honduras*, Merits, Judgment of July 29, 1988 and *Case of Fairén-Garbi and Solís-Corrales v. Honduras,* Judgment of March 15, 1989—commented in Gabriel Orellana Zabalza, THE PRINCIPLE OF SYSTEMIC INTEGRATION TOWARDS A COHERENT INTERNATIONAL LEGAL ORDER (2012), 190.

dominantly implemented in its practice.[225] In attempting to determine specific labor rights under Article 26, the IACtHR limited its interpretation to one method, "leaving aside one of the most basic rules of public international law, such as the Vienna Convention on the Law of Treaties."[226] Notably, the Court's reasoning focused on "the use of a single interpretative method to arrive at an interpretation of the treaty," namely the evolutionary interpretation.[227] In his partial dissenting opinion in the *Case of Lagos Del Campo*, Judge Sierra Porto stated that to interpret a norm holistically as required, "it is not sufficient to use just one of the different methods of interpretation that exist, because these methods are *complementary and all of equal rank.*"[228] However, such deviating interpretations from the VCLT standard demonstrate that the IACtHR occasionally takes a different position, and that they do not represent or define the general pro homine interpretive trend established through its entire practice. Such isolated interpretations do not constitute enough proof that the IACtHR is taking an expansionist stance exceeding its treaty-based powers.

From its earlier practice, the IACtHR has indicated how the VCLT standard of interpretation must be approached in order to elucidate the meaning of the rights and safeguards provided by the American Convention and how the special rule of "living instrument" supplements that standard.[229] For example, in the *Case of Velasquez Rodriguez v. Honduras* (1987),[230] the Court points out that "the process of treaty interpretation—narrowed down to the *first paragraph of Article 31 of the VCLT was to be considered* as *a single operation,"* and "[a]s a result, procedural rules of the ACHR could not be applied without taking into account their context, object and purpose as the interpretative basis for all applicable provision in any given case."[231] Moreover, in order for the Court to ensure "the effective protection of the human person,"[232] the

225. *Case of Lagos Del Campo v. Peru*, Judgment of August 31, IACtHR, 2017.

226. *Id.* at para 24.

227. *See* Judge Sierra Porto's Partial Dissenting Opinion in the *Lagos Del Campo Case*.

228. Partial Dissenting Opinion of Judge Humberto Antonio Sierra Porto in the *Case of Lagos Del Campo*.

229. *See* e.g. Liliana E. Popa, *A Consistent Treaty Interpretation by the Inter-American Court of Human Rights in Light of Corpus Juris*, 52 DENV. J. INT'L L. & POL'Y, 207 (2023-2024)- for an in-depth analysis of case law based on the holistic VCLT approach used by the IACtHR, with emphasis on the "living instrument" doctrine.

230. *Case of Velásquez-Rodríguez, supra* note 224.

231. *Id.* at para 83.

232. Zabalza, *supra* note 224, at 231. *See* this approach clearly explained and adopted by the IACtHR in *Artavia Murillo et al. ("In Vitro Fertilization") v. Costa Rica*, 28 November 2012,

interpretation of the Convention's provisions must be approached *holistically*, within a larger context of the international legal system. As previously stated in this article, the context in a broader sense (*lato sensu*) is consistent with Article 31(3)(c) of the VCLT (systemic integration), as well as Article 29(d) of the American Convention. It entails, as the IACtHR held in the *"In Vitro Fertilization"* case (2012),[233] considering "an *evolutive interpretation* of international instruments for the protection of human rights." In general, such a broad contextualist approach allows the regional human rights courts to treat the human rights treaties that they are tasked with interpreting as "living instruments," and to adopt an interpretation that does not deprive human rights of their essential content, and thus of their effective protection.[234]

The IACtHR occasionally provides a thorough perspective on how the principle underlying the standard of interpretation should be understood and approached for the interpreted provision to be effective and achieve its intended goal. As in the *Case of Manuel Cepeda Vargas v. Colombia* (2010),[235] the IACtHR emphasizes that attributing reason and meaning to every part of the provision under interpretation can only be done by taking into account the *context of the whole Convention* because all human rights provisions within the instrument are interconnected.[236] In dealing with an extrajudicial execution of a political leader carried out by members of the Colombian military and paramilitary groups, the Court was asked to hold Colombia responsible for violation of the victim's right to life, personal integrity, judicial guarantees, protection of honor and dignity, freedom of thought and expression, freedom of association, political rights, and judicial protection as recognized in the American Convention (Articles 4, 5, 8, 11, 13, 16, 23, and 25 in relation to Article 1 of the same instrument).[237] In this decision, the Court emphasizes the context of the treaty, and thus the holistic reading imposed by the VCLT standard as the necessary approach to be pursued. It assumes that:

> Although each of the rights contained in the Convention has its own sphere, meaning and scope, it sometimes becomes necessary to

Preliminary Objections, Merits, Reparations and Costs, Judgment of 28 November 2012, Series C No. 257, para 17.

233. *"In Vitro Fertilization" Case, supra* notes 189, 232.

234. Fuentes, *supra* notes 5, 109.

235. *Case of Manuel Cepeda Vargas v. Colombia*, Preliminary Objections, IACtHR, Merits, Reparations and Costs, Judgment of May 26, 2010.

236. Fitzmaurice and Merkouris, *supra* note 81. The authors note that "treaties are to be interpreted as a whole, and particular parts, chapters or sections also as a whole." (This was regarded as the principle of integration.)

237. *Case of Manuel Cepeda Vargas*, *supra* note 235.

> analyze them together, owing to the specific circumstances of the case or the necessary interrelation among certain rights, in order to make an appropriate assessment of the possible violations and their consequences. In the instant case, the Court will examine the dispute that subsists concerning the alleged violation of political rights, freedom of expression, and freedom of association together, in the understanding that these rights are of fundamental importance under the inter-American system, because they are closely interrelated and, together, make democracy possible.[238]

Demonstrating more obviously how the VCLT standard of interpretation should be understood—as the basic, logical, and reasonable interpretative guideline for the American Convention—is perhaps the *Case of the "White Van" v. Guatemala* (1996).[239] In this case, involving acts of kidnapping, arbitrary detention, inhuman treatment, torture, and murder committed by agents of the State of Guatemala against eleven victims, the IACtHR sought to establish the State's responsibility and demand reparations from Guatemala for violations of the right to life, the right to humane treatment, the right to a fair trial, and the obligation to respect rights stipulated in the American Convention on Human Rights (Articles 4, 5, 8, and 1, paragraph 1).[240] The Court recalls that a proper interpretation of each of the provisions in question should be governed by the rules of "ordinary meaning," "context," and "object and purpose," as reflected in the VCLT "general rule of interpretation." It clearly explains that, in order to give full meaning and effect to the concerned rights and safeguards enshrined in the Convention, these customary rules, while having equal interpretive value, must be pondered and adjusted in accordance with the circumstances of the given case, and the principle of effectiveness (derived from Article 31 of the VCLT), which ensures a correct application of the VCLT standard of interpretation.[241] In the Court's words:

> It is not possible to apply the procedural rules of the American Convention without giving their proper weight to its context, object, and purpose, as a basis for the interpretation of all the applicable provisions in a given case. 'What is essential,' as the Court has pointed out, is "that the conditions necessary for the preservation of

238. *Id.* at para 171 (emphasis added).
239. *Id.*
240. *Id.*
241. *Id.* at para 174.

> the procedural rights of the parties not be diminished or unbalanced, and that the objectives of "the different procedures be met."[242]

Furthermore, the IACtHR justifies its pro homine interpretation in the *Case of the "White Van"* by highlighting the "object and purpose," which amply supports the principle of effectiveness.[243] This principle, implemented under the VCLT standard of interpretation—the reasonable interpretative basis for giving full legal effect to the rights and obligations of the American Convention—is articulated by the Court as follows:

> the ordinary meaning of the terms, the context, and the object and purpose, in the interpretation of treaties, are elements to be taken into account. These elements are inter-connected in Article 31(1) of the Vienna Convention of the Law of Treaties, indicating that the process of interpretation should be taken as a whole. It would be contrary to the object and purpose of the Convention, and would fail to take into account its context, to apply the regulatory norms without the criterion of reasonableness, resulting in an imbalance between the parties and compromising the realization of justice.[244]

Recent case law at the IACtHR shows how the VCLT customary interpretation rules help to better establish the meaning of values embedded in human rights issues that are not clearly articulated in the American Convention but which fall within its scope, ensuring their protection.[245] This is explained, for example, in the *Advisory Opinion* (2017)[246] requested by Colombia on a matter concerning *state obligations in relation to the environment in the context of the protection and guarantee of the rights to life and personal integrity*. In this case, the IACtHR confirms that the VCLT's general rule of interpretation is the embodiment of the customary rules of treaty interpretation that have been

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242. *Id.* (emphasis added). *See* the IACtHR's approach in the *Case of Velasquez Rodriguez v. Honduras*, Preliminary Objections, Judgment of June 26, 1987, Series C No.1, para 33; *Fairen-Garbi and Solis-Corrales Case*, Preliminary Objections, Judgment of June 26, 1987, Series C No. 3, para 38 and the *Godinez-Cruz Case*, Preliminary Objections, Judgment of June 26, 1987, Series C No. 3, para 36.

243. *See* the IACtHR's approach in *Case of Velasquez Rodriguez*.

244. *Case of the "White Van," supra* note 152, para 40.

245. *See* e.g., Liliana E. Popa, *A Consistent Treaty Interpretation by the Inter-American Court of Human Rights in Light of Corpus Juris*, 52 DENV. J. INT'L L. & POL'Y 207 (2023-2024).

246. *See* IACtHR, Advisory Opinion OC-23/17 of November 15, 2017, Requested by Republic of Colombia, *The Environment and Human Rights (State Obligation in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity: Interpretation and Scope of Articles 4(1) and 5(1) in Relation to Articles 1(1) and 2 of the American Convention on Human Rights)*.

used to interpret the American Convention since its inception.[247] In addition, the Court provides a thorough model for the application of the VCLT standard of interpretation to the human rights provisions of the Convention.[248] It emphasizes that the VCLT general rules are interwoven with and complemented by human rights-specific rules of interpretation.[249] Also, the Court admits and stresses further that the *special character* of the American Convention as a *living instrument*, as well as the *good faith* and *effectiveness principles* are features it always considers, since they are reflected in the object and purpose of the Convention—that is, *the effective protection of human beings' fundamental rights*.[250] Relying on its own relevant case law, the Court resumes its adopted holistic approach based on the VCLT general rule of interpretation in the current case, as follows:

> To issue its opinion on the interpretation of the legal provisions cited in the request, the Court will have recourse to the Vienna Convention on the Law of Treaties, which contains the general and customary rules for the interpretation of international treaties.[251] This involves the simultaneous and joint application of the criteria of good faith, and the analysis of the ordinary meaning to be given to the terms of the treaty in question "in their context and in the light of its object and purpose." Accordingly, the Court will use the methods set out in Articles 31 and 32 of the Vienna Convention to make this interpretation.[252]

Within the framework of the VCLT interpretation, the Court explains its pro homine view vis-a-vis the rights to life and to personal integrity in the face of potential environmental damage, by stating that:

> In the specific case of the American Convention, the object and purpose of this treaty is "the protection of the fundamental rights of the human being" and, to this end, it was designed to protect the human rights of individuals, regardless of their nationality, before their own State or any other State. In this regard, it is essential to

247. *Id.* at para 43.

248. *Id.* at para 75.

249. *Id.*

250. *Id.* at para 40.

251. IACtHR, Advisory Opinion OC-21/14, *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, at 52 (2014); IACtHR, Advisory Opinion OC-22/16, at 35 (Ser A) (Feb. 26, 2016), Requested by the Republic of Panama; *see Indonesia v. Malaysia*, at 37 (Dec.17, 2002); *see Mexico v. the United States of America*, at 83 (March 31, 2004).

252. *Advisory Opinion OC-23/17, supra* notes 199, 246.

> recall the specificity of human rights treaties which create a legal system under which States assume obligations towards the persons subject to their jurisdiction, and complaints may be filed for the violation of such treaties by those persons and by all the States Parties to the Convention by the lodging of a petition before the Commission, and even before the Court, all of which signifies that the provisions must also be interpreted using a model based on the values that the inter-American system seeks to safeguard, from the "best perspective" for the protection of the individual.[253]

The analysis in this subpart illustrated that the IACtHR's application compliance with the VCLT standard of interpretation, in addition to the human rights-specific interpretation criteria, is crucial in establishing authority and legitimacy in its human rights interpretations. However, to present a more detailed picture on the modalities in which the IACtHR applies the VCLT general rule of interpretation, an additional analysis based on case law and scholarly opinions is provided below. It shows how the Court usually resorts to a complex scheme of interpretation, employing more interpretive techniques than were originally stated in each case or deemed necessary to arrive at the intended meaning, and it explains why the Court does so.

D. Overbuilding Interpretation

This subpart examines the way the IACtHR, in its holistic approach of interpreting the American Convention, employs the technique of "overbuilding."[254] Through this technique the IACtHR, explicitly or implicitly, adopts the VCLT rules and methods of interpretation gradually and in complementarity with the special human rights rules/doctrines of interpretation. Nevertheless, the IACtHR often employs this overbuilding interpretation, using certain rules to determine the meaning of a particular provision (the VCLT standard of interpretation), and others simply to reinforce or confirm the meaning reached under other rules. An examination of the IACtHR decisions reveals a pattern of applying this technique of interpretation to all types of difficulties which the Court encounters in the text construction of the American Convention (e.g. insufficiently clear, ambiguous, inconsequential, vague/obscure or silent),

253. *Id.* at para 41. The Court refers to the *Case of González et al. ("Cotton Field") v. Mexico,* Preliminary Objection, Merits, Reparations and Costs, Judgment of November 16, 2009, Series C No. 205, para 33, and *Advisory Opinion OC-21/14*.

254. *See* Popa, *supra* note 14, for a comparative analysis on the overbuilding interpretation technique used by the ECtHR, WTO, and ICJ.

in order to determine and confirm the meaning and scope of the interpreted provision—a feature also shared by the ECtHR, WTO, and ICJ.[255] Most notably, the IACtHR uses the overbuilding interpretative approach even when human rights issues that are addressed insufficiently or not at all in the American Convention (silence in the text) and that come within its protection are at stake. In its *Advisory Opinion* (2009),[256] requested by the Republic of Argentina, for example, the IACtHR applies, both expressly and implicitly, a comprehensive framework of interpretation based on the Vienna rules to an issue not addressed by Article 55 of the American Convention: *the right to appoint a Judge ad hoc to the Court in cases originating from individual petitions*. Argentina asked the Court to interpret Article 55(3) of the American Convention, which establishes that "among the judges called upon to hear a case none is a national of any of the States Parties to the case, each of the latter may appoint a Judge ad hoc."[257] The Court's task in determining the scope and meaning of the right under consideration is to verify whether it guarantees the States Parties in a contentious case the possibility of appointing a Judge *ad hoc* in controversies arising from individual petitions. Because Article 55 does not specify this aspect, the Court believes it is important to provide a detailed explanation of the interpretive scheme it intends to adopt to clarify the meaning and scope of this provision.

First, the Court establishes that to determine "the meaning of the treaty's *silence* on the matter is a complex task that necessitates the Court's performing an analysis that takes into account the rest of the provisions of the American Convention as well as the nature of the matter not covered by said treaty."[258] Second, it recalls the VCLT interpretative methodology which an interpreter should use as the foundation for interpreting a treaty provision.[259] To elucidate the meaning of Article 55 of the American Convention, the Court reiterates that it will "use, as it has on numerous occasions, the methods of interpretation of international law provided in Article 31 and 32 of the Vienna Convention on the Law of Treaties."[260] Third, the Court emphasizes the unity of these provisions,

255. *Id.*

256. IACtHR, *Advisory Opinion OC-20/09*, September 29, 2009, Requested by the Republic of Argentina, Article 55 of the *American Convention of Human Rights*. *See also* a similar holistic approach regarding an issue not covered sufficiently by the American Convention in the case of *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua,* Judgment of August 31, 2001, IACtHR, Ser. C No.79.

257. *Id.*

258. *Id.* at para 79 (emphasis added).

259. *Id.*

260. *Id.* at para 22. (emphasis added).

because "*Article 31 integrates different elements that form a general rule of interpretation, which in turn may be supported by the complementary rule enshrined in Article 32 of said instrument*."[261] As noted earlier in this paper, the IACtHR favors a holistic interpretation that incorporates the traditional (customary) methods of interpretation: textual, teleological, and subjective (contextualist or systematic). It has also been suggested that this combined approach is consistent with the dynamic, or evolutive, interpretation of the Convention that the Court should apply in the context of the whole legal system under "systemic integration" (Article 31(3)(c) of the VCLT). In dealing with an omission (silence) in the text of the treaty (Article 55 of the ACHR) in this Advisory Opinion, the Court feels compelled to reaffirm and highlight on this occasion that the textualist method is only one among several methods of interpretation, and that, contrary to Argentina's claim, Article 31(1) of the VCLT does not prescribe a preference for the textualist method over the other methods.[262] The Court stresses that the *context* of the entire treaty—the American Convention—is decisive in ensuring a harmonious and current interpretation of Article 55, so that the "ordinary meaning of the terms cannot be a rule in itself, but must be considered within a context, particularly within the object and purpose of the treaty."[263] Hence, in order to give full meaning and effect to the terms of Article 55(3), the key route suggested by the Court is to take this provision "as a whole," *contextually* (holistically), which implies an analysis of its subsections, in "connection with the remaining provisions of the treaty," including its object and purpose.[264] Fourth, while the Court emphasizes the importance of adhering to the VCLT standard of interpretation and the principle of effectiveness in clarifying a treaty provision, it acknowledges in this Advisory Opinion that to do otherwise "*would lead to a fragmented interpretation of the standard that ignores the logic of the interpretative function, according to that general rule contained in Article 31 of the Vienna Convention*."[265] This holistic (contextualist) approach is also evident when the Court concludes that:

261. *Id.*

262. *Id.* at para 26.

263. *Id.*

264. *Id.* at para 27.

265. *Id. See* paras 25-34 for illustration of the IACtHR's compliance with Article 31 of the VCLT rules of "ordinary meaning of the terms," 'context', "object and purpose," and "any relevant rules of international law," and paras 40-44 to see the IACtHR's compliance with Article 32 of the VCLT, referred to as a supplementary means of interpretation.

> An interpretation in conformity with the ordinary meaning of the terms of Article 55 of the Convention, in harmony with the other provisions of this treaty, leads to the assertion that the plural expression "States Parties," which serves as a presumption to the hypotheses contained in Article 55 . . . is applicable only to contentious cases originated in inter-state communications.[266]

In an additional interpretive step, the Court implicitly employs the "systemic integration" principle embodied in Article 31(3)(c) of the VCLT. It states according to "systemic integration" that Article 55 "must be considered as part of a whole whose meaning and scope must be established based on the legal system to which it belongs."[267] This approach entails a broad contextualist reading of Article 55 in light of the entire legal system, both past and present, including the decisions of international courts and tribunals, as well as contemporary conditions and changes in international law. As stated by the Court, in order to clarify the term "Judge ad hoc" mentioned in Article 55, it should refer to "the background of the figure of the Judge ad hoc," because "[t]his institution was conceived in international law for the resolution of classic disputes between States," and "Article 31 of the Statute of the International Court of Justice expressly recognizes this figure."[268] Moreover, since the standard of interpretation allows for the use of the confirmatory tools provided for in Article 32 of the VCLT, which supports the subjective method of interpretation, the Court turns to this provision to determine with certainty whether the contracting parties intended to provide a special meaning to the terms "States Parties" within Article 55(3). In the Court's words*:*

> The preparatory work of the American Convention confirms the meaning that results from the previous interpretation. In this regard Article 32 of the Vienna Convention on the Law of Treaties provides that "[r]ecourse may be had to the supplementary means of interpretation, including preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31."[269]

The Court's holistic interpretation of Article 55(3) is reflected not only in its use of the main elements of the treaty—text, context, object and purpose, and *travaux préparatoires* as a confirmatory tool (Articles

266. *Id.* at para 33 (emphasis added).
267. *Id.*
268. *Id.* at para 34.
269. *Id.* at para 41.

31, 32e of the VCLT)—but also in the equal interpretive value that the Court attaches to these elements and their complementary relationship (each contributing, albeit to varying degrees, to the full effectiveness of the provision). This characteristic is summarized by the IACtHR as follows:

> In the view of the foregoing, it may be concluded that Article 55(3) of the Convention, within the framework of the text of Article 55 in its entirety, the context, object and purpose of the treaty and the preparatory work, are unequivocally geared toward the same meaning. Thus, it is possible to assert that this provision applies with an exceptional character, only in contentious cases resulting from inter-state communications, and therefore its application cannot be extended to controversies initiated through an individual petition.[270]

Furthermore, the Court's interpretation is supported by an implicit reference to Article 31(4) of the VCLT, that is, without an explicit reference to it.[271] This provision which stipulates that "a special meaning shall be given to a term if it is established that the parties so intended," is used by the IACtHR to elucidate various terms within the provision under interpretation.[272] For example, in accordance with this general rule of interpretation, the Court establishes that the terms "States Parties" contained in Article 55(3) of the Convention, followed by the expression "each of the latter" within this provision, must be interpreted as referring "to the assumption that it is a proceeding originated in an inter-state communication," and that the American Convention does not mention whether the contracting parties' intention was to provide a special meaning to these terms.[273] As can be observed in the judgment, the IACtHR uses more methods and customary rules of interpretation, reflected in the VCLT methodology of interpretation, than it initially declared, all harmoniously blended in a holistic and logical exercise leading to a coherent, valid interpretation.

The IACtHR, like other international courts such as the ICJ, the ECtHR, and the WTO,[274] has developed a pattern of strengthening the

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270. *Id.* at para 45 (emphasis added). *See* also para 66 for an express reference of the IACtHR to the rules of "ordinary meaning," context of the provision and the treaty as a whole, the object and purpose, and the preparatory work of the American Convention.

271. *Id.* at para 33.

272. *See* Article 31 of the *Vienna Convention on the Law of Treaties*.

273. *Advisory Opinion OC-20/09, supra* note 256, para 40. *See* para 29 for an illustration of the textualist method, based on the ordinary meaning rule, to establish the meaning of certain terms within Article 50(1) of the ACHR.

274. *See* Popa, *supra* note 14.

coherence, and thus the authority, of its human rights interpretations and case law by gradually resorting to more VCLT methods of interpretation (explicitly, implicitly, or both) than were initially declared or required for interpreting the provision in question.[275] These interpretive aspects, combined with the fact that the IACtHR systematically and extensively relies on international law and the practice of other international courts, add considerable weight to the consistency/uniformity, authority and legitimacy of its interpretations, as the next part will detail based on case-law analysis and academic perspectives.

IV. REFERENCE TO GENERAL PRINCIPLES OF INTERNATIONAL LAW, CUSTOMARY LAW, AND OTHER INTERNATIONAL COURTS' PRAXIS

The practice of international courts and tribunals shows that when treaty texts are unclear, inconsistent, ambiguous, or do not provide for the circumstances of the particular case, general international law always remains in the background, particularly general principles of law recognized by civilized nations, which are used primarily as "gap fillers."[276] However, resolving difficulties in treaty text construction (e.g., inconsistency, ambiguity, vagueness, or silence), which entails applying a general, abstract rule to a more specific, contextualized case, is regarded as a hermeneutical exercise.[277] The complexity of this task increases progressively with the degree of complexity of a given case, implying an increasing number of rules that an interpreter can legitimately use to solve it.[278] Judges of international courts and tribunals are bound by the principle of judicial integrity[279] to render relevant and consistent interpretations. Such interpretations must not contradict the scope and purpose of the norms provided for in the treaties that international bodies are called to interpret, as well as their own established precedents, in order for such bodies to gain the necessary authority and to enable them to

275. *See* Popa, *supra* note 14 for analysis of the "overbuilding interpretation" technique used by the ECtHR, WTO, and ICJ and for a comparison to the technique followed by the IACtHR.

276. *See* on this discussion *International Law Commission*, *supra* note 119.

277. Engel, *supra* note 121.

278. *Id.*

279. *See* RONALD DWORKIN, LAW'S EMPIRE (1986), 225. According to Dworkin,

> [t]he adjudicative principle of integrity instructs judges to identify legal rights and duties, so far as possible, on the assumption that they were all created by a single author −the community personified−expressing a coherent conception of justice and fairness. According to law as integrity, propositions about law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice.

function properly.[280] Thus, integrity in adjudication is a legal reasoning ideal that instructs judges to decide cases by interpreting legal norms and precedents in a coherent, consistent, and legitimate manner.[281]

An examination of judicial reasoning at the IACtHR (in its advisory opinions, disputes, and orders) provided in this section will give us an insight into *how*, *when*, and *why* the IACtHR appeals to general rules and principles of international law, customary international law, principles derived from domestic law, and the practices of other international courts, on a variety of human rights issues covered by the American Convention, while promoting human rights interpretive models.[282]The IACtHR frequently refers to such sources that are external to the American Convention to better determine or clarify certain aspects of human rights contained in the Convention, or that fall under its protection, as well as to confirm its interpretations and (re)enforce their authority.[283] As observed by the International Law Commission, customary international law and general principles of law are of particular relevance to the interpretation of a treaty, applied by virtue of "systemic integration" (covered by Article 31(3)(c) of the VCLT), particularly "*where the treaty rule is unclear or open-textured*; *the terms used in the treaty have a recognized meaning in customary international law or under general principles of law*; *[or] the treaty is silent on the applicable law* . . . ."[284] However, the IACtHR's interpretative practice demonstrates that, regardless of the nature of the obstacles encountered by the Court in interpreting the text of the American Convention, and regardless of the nature of human rights (whether expressed, not clearly expressed, or not expressed at all in the Convention), its interpretations are always based on the rules and principles of international law and on customary international law to clarify them.

280. *See* on the duty of international courts to respect the VCLT standard of interpretation in the interpretation of treaties, e.g., Fitmaurice and Merqouris, *supra* note 81. *See* Venzke, *supra* note 1 for analyzing the role of practice in treaty interpretation by international courts and their authority.

281. *See* Juliano Zaiden Benvenido, ON THE LIMITS OF CONSTITUTIONAL ADJUDICATION: DECONSTRUCTING BALANCING AND JUDICIAL ACTIVISM (2010), 268.

282. *See id.*

283. *See* e.g. Lexinski , *supra* note 96; Fuentes, *supra* note 109.

284. International Law Commission, *supra* note 119, 411-414, paras 237-251.

A. The Underlying General Principles of Law Recognized by Civilized Nations and Customary Law

The evidence of the IACtHR's reliance on *general principles of law recognized by civilized nations* as sources of international law appears to be overwhelming in this Court's dealings with both substantive and procedural human rights matters.[285] An examination of a few case examples may suffice to give us an idea of how general principles of international law and customary international law become essential to the IACtHR in clarifying the meaning of the Convention's human rights provisions and in imprinting authority and normative legitimacy in its interpretation.[286] For example, in its recent *Advisory Opinion* (2017)[287] regarding state obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity, the IACtHR emphasizes the general principle of international law *pacta sunt servanda* ("agreements must be kept") to support the argument that this principle is directly relevant upon rendering an effective protection of the human rights enshrined in the American Convention.[288] The Court recalls the obligation of all contracting States to take the American Convention as it stands, in its letter and spirit, considering that:

> the *pacta sunt servanda* principle requires the parties to a treaty to apply it "*in a reasonable way and in such a manner that its purpose can be realized*."[289] Consequently, the States Parties to the American Convention should not act in a way that hinders other States Parties from complying with their obligations under this treaty. This is important not only with regard to acts and omissions outside its territory, but also with regard to those acts and omissions within its territory that could have effects on the territory or inhabitants of another State.[290]

Good faith is another essential general principle of international law that the IACtHR places at the core of its interpretation and application of

285. *See e.g.* Fuentes, *supra* note 109, Lexinski, *supra* note 96.

286. *Id.*

287. *Advisory Opinion OC-23/17, supra* note 246.

288. *See Encyclopaedia Britannica*, available at https://www.britannica.com/topic/pacta-sunt-servanda*; pacta sunt servanda* is regarded as a general principle of international law, on the basis of which all agreements (conventions/treaties) are made, implying that they are binding or enforceable. Without such a rule, no international agreement would be binding or enforceable.

289. ICJ, *Case Concerning the Gabčikovo-Nagymaros Project (Hungary/Slovakia)*. Judgment of September 25, 1997, para 142.

290. IACtHR, *Advisory Opinion OC-23/17, supra* note 246, para 94 (emphasis added).

the human rights enshrined in the American Convention. The *Case of Cantoral-Benavides v. Peru* (1998)[291] is instructive here, as the IACtHR clearly recognizes the necessity of the criterion of good faith for an effective interpretation of the Convention's human rights, as required by Article 31(1) of the VCLT. The Court emphasizes that "in accordance with the principle of good faith that must prevail in an international proceeding, it is necessary to avoid any ambiguous statement that could result in confusion."[292] Another important precedent in this regard is the case of *Herrera-Ulloa v. Costa Rica* (2004),[293] where the Court explains that the principle of good faith must also be applied in the situation of an American Convention State Party that is required to comply with both the Inter-American Court's and the Inter-American Commission's recommendations. As established by the Court:

> [. . .] in accordance with the principle of good faith, embodied in the aforesaid Article 31(1) of the Vienna Convention, if a State signs and ratifies an international treaty, especially one concerning human rights, such as the American Convention*, it has the obligation to make every effort to comply with the recommendations of a protection organ such as the Inter-American Commission*, which is, indeed, one of the principal organs of the Organization of American States, whose function is "to promote the observance and defense of human rights" in the hemisphere (OAS Charter, Articles 52 and 111).[294]

Furthermore, in its Order on Monitoring Compliance with the Decision in the *Case of Gelman v. Uruguay* (2013),[295] the IACtHR emphasizes that even the obligation to comply with the American Convention is governed by "[t]he international public law principles of *good faith* and *practical effects*, which also involve the principle of *pacta sunt servanda*."[296] As reaffirmed by the Court in this case, these three principles constitute "*international tenets to ensure that the international treaties are complied with by the national States and have been repeated*

291. IACtHR, *Case of Cantoral-Benavides v. Peru*, Judgment of September 3, 1998, Preliminary Objections.

292. *Id.* paras 30-31.

293. IACtHR, *Case of Herrera-Ulloa, supra* note 152. *See also* a detailed reference to the good faith principle in the IACtHR, *Advisory Opinion OC-16/99*.

294. *Id.* at paras 186 and 185.

295. *Case of Gelman v. Uruguay*, Order of the Inter-American Court of Human Rights, March 20, 2013, Monitoring Compliance with Judgment, para 89 (emphasis added).

296. *Id.*

constantly in the case law of the Inter-American Court."[297] Reasoning in consideration of these essential international law principles, the Court concludes that "[t]he compliance obligation under treaty-based law is binding for all the domestic authorities and organs because the State as a whole responds and acquires international responsibility when it fails to comply with the international instruments to which it has acceded."[298]

In its case law on the matter of *state responsibility*, the IACtHR most likely alludes to the general international law rules that govern it. Because its primary function is to determine how a State's responsibility arises when violations of the American Convention occur, the IACtHR finds itself compelled to reaffirm in almost every case before it, particularly to remind the perpetrator State of its human rights violations and that the rules and principles of international law apply to human rights instruments so they must be respected in the same way. Importantly, in its recent *Advisory Opinion* (2020)[299] related to the obligations in matters of human rights of a state that has denounced the American Convention on Human Rights and the Charter of the Organization of American States, the IACtHR makes it clear that Article 43 of the Vienna Convention establishes that:

> it is incumbent on the State "to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of the treaty" [. . .] In this regard the Court observes that some obligations stipulated by the American Convention coincide with those pertaining to customary norms of international law. The same applies to the general principles of law [. . .] and to jus cogens norms. These provisions will continue to bind the denouncing State under general international law, as independent sources.[300]

Thus, in addition to general international law principles, the IACtHR often invokes the general principle of law and customary law that has developed in domestic legal systems to clarify certain human rights aspects within the American Convention. For example, in the *Case of Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (2001)[301] the IACtHR first addresses the issue of *state attribution* in relation to

297. *Id.*

298. *Id.* at para 90, para 89.

299. *Advisory Opinion OC-26/20* of November 9, 2020, requested by the Republic of Colombia, the obligations in matters of human rights of a state that has denounced the American Convention on Human Rights and the Charter of the Organization of American States.

300. *Id.* at para 100.

301. IACtHR, *The Mayagna (Sumo) Awas Tingni Community Case, supra* note 256.

violations of land rights by State against an Indigenous community,[302] in accordance with "the rules pertaining to the international responsibility of the State and applicable under International Human Rights Law."[303] In conformity with such rules, as the Court recalls, "actions or omissions by any public authority, whatever its hierarchic position, are chargeable to the State which is responsible under the terms set forth in the American Convention."[304] Second, the IACtHR relies on a general principle of law and customary law developed in domestic legal systems to establish *the right to property of an Indigenous community*—a right not specified in the American Convention.[305] Notably, the Court emphasizes the importance of customary practices in relation to the Awas Tingni Community's right to land that must be taken into consideration.[306] It concludes that "possession of the land should suffice for indigenous communities lacking real title to property of the land to obtain official recognition of that property, and for consequent registration."[307] The *Mayagna (Sumo) Awas Tingni Community* case, like many others at the IACtHR, attests to the recognition that international law always assists in the background to fill "gaps" in the text of the Convention's rights and safeguards.[308] Also, most recently, in the *Case of Oliviera Fuentes v. Peru* (2023),[309] the IACtHR had to elucidate a case of discrimination based on the right to determine sexual orientation and gender identity—'sexual minorities' human rights not expressly stipulated in the American Convention.[310]

302. *Id.* at para 3. The case relates to the alleged series of measures taken by Nicaragua against the Awas Tingni Community with regards to their ancestral lands and natural resources, as well as this community's property rights, in violation of several of the Convention's provisions.

303. *Id.* at para 154 (emphasis added). *See* a similar restatement of the international law principle underlying the provisions of Article 1(1) of the American Convention, in the *Case of Ivcher-Bronstein v. Peru*, Merits, Reparations and Costs, Judgment of February 6, 2001, paras 165-168.

304. *Id.*

305. *Id.* at para 154.

306. *Id.* at para 164.

307. *Id.* at para 151. *See also* at para 163 the Court's reference to the international law principle that "any violation of an international obligation which has caused damage carries with it [the] obligation to provide adequate reparation for it."

308. *Id.*

309. *Case of Oliviera Fuentes, supra* note 133.

310. *Id.* SOGI -A term that is used to describe people with gender behaviors, appearances, or identities that are incongruent with those culturally assigned to their birth sex. See for an explanation, e.g., International Justice Resource Center, available online at: Sexual Orientation & Gender Identity—International Justice Resource Center. According to this source, "[c]urrently, no international human rights treaty specifically protects the rights of LGBTI persons. Nevertheless, the absence of a specialized convention does not mean that sexual minorities' human rights are not protected under international human rights law."; Anthony Tirado Chase, (2016). Human

Here, the IACtHR states that it has established in its case law that, "at the current stage of evolution of international law, the fundamental principle of *equality* and *non-discrimination* has entered the domain of *jus cogens*, because the whole legal structure of national and international public order rests upon it and permeates all laws."[311] It adds that: "[s]ince the judgment in the case of *Atala Riffo and Daughters v. Chile*, in 2012, the Court has established that sexual orientation and gender identity are protected by the Convention under the term 'any other social condition,' set forth in Article 1(1)."[312]

Even more, in the recent *Advisory Opinion* (2020) mentioned above,[313] the IACtHR articulates, relying on the International Court of Justice,[314] that *jus cogens* is essential for the interpretation of the American Convention's human rights, since:

> *Jus cogens* is presented as the legal expression of the international community as a whole, based on universal and superior values, which embodies basic standards that guarantee essential or fundamental human values related to life, human dignity, peace and security. The prohibition against acts of aggression, genocide, slavery and human trafficking, torture, racial discrimination and apartheid, crimes against humanity, as well as the right to self-determination, together with the norms of international humanitarian law, have been recognized as norms of *jus cogens*, which protect fundamental rights and universal values without which society would not prosper, and therefore produces obligations *erga omnes*.[315]

In cases where human rights abuses are a cause of non-international armed conflicts and human rights, such as the right to life, the prohibition of torture, the right to justice, the right to property, or the protection of vulnerable people, are at stake, the IACtHR applies via systemic integration, international humanitarian law principles (*jus in bello* and *jus ad bellum*), also not stipulated in the American Convention.[316] For

rights contestations: sexual orientation and gender identity, 20 INT'L J. HUM. RTS. 703 (2016)-for a discussion of contestations of SOGI at international level.

311. *Id.* at para 86.

312. *Id.* at para 96. *See also Case of Atala Riffo and Daughters v. Chile,* Merits, Reparations and Costs, Judgment of February 24, 2012. Series C No. 239, para 91.

313. Advisory Opinion OC-26/20, *supra* note 300.

314. *Id.* at para 108.

315. *Id.* at para 105.

316. *See* e.g. Fuentes, *supra* note 109; Popa, *supra* note 245—for detailing this aspect in the IACtHR's practice of treaty interpretation.

example, in the *Case of Las Palmeras v. Colombia* (2001),[317] concerning the extrajudicial execution of seven absolutely defenseless citizens by national policemen during a period of domestic armed conflict, the IACtHR determined that:

> the general and fundamental duty of Article 1(1) of the American Convention finds a parallel in other treaties of human and of International Humanitarian Law, particularly in the four Geneva Conventions of 1949 on International Humanitarian Law (Article 1) and the Additional Protocol I of 1977 to these latter (Article 1(1)).[318]

It is worth noting that the IACtHR routinely leans on fundamental principles of international law to clarify both *substantive* and *procedural* concerns of human rights interpretation under the American Convention.[319] Such a reference can be found, for example, in the *Case of Genie-Lacayo v. Nicaragua (*1997)[320] to the *principle of subsidiarity*—a general legal principle on which international human rights law is based,[321] and which is referred to in the Preamble of the American Convention. Here, the IACtHR alludes implicitly to the principle of subsidiarity to clarify its position as a court that determines whether a State has infringed on an individual right entrenched in the American Convention. The Court clarifies that:

> [i]n accordance with general international law, the Inter-American Court does not act as an appellate court or as a court for judicial review of rulings handed down by the domestic courts. All it is empowered to do in this Case is call attention to the procedural violations of the rights enshrined in the Convention . . . .[322]

Indeed, many of the IACtHR's judgments reflect a recognition that the human rights interpretation of this regional Court often draws on

317. *Case of Las Palmeras v. Colombia,* IACtHR, Merits, Judgment of December 6, 2001, Series C No. 90.

318. *Id.* at para 9.

319. *See* e.g. Lexinski, supra note 96; *supra* note 109; Popa, *supra* note 245.

320. IACtHR, *Case of Genie-Lacayo, supra* note 152. The case relates to a youth, 16 years old and a resident of Managua, Nicaragua, who, when driving home, came upon a convoy of vehicles transporting military personnel who, in response to his attempts to pass them, fired on him and left him to die on the highway.

321. *See* on the principle of subsidiarity, e.g., *See* Paul G. Carozza, *Subsidiarity as Structural Principle of International Human Rights*, 97 AJIL 38 (2003).

322. *Case of Genie-Lacayo*, *supra* note 321, para 94. *See* also the principle of subsidiarity explained by the IACtHR in the *Case of Manuel Cepeda Vargas*, *supra* note 235; *Acevedo-Jaramillo et al. v. Peru (Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs*), Judgment of November 24, 2006. Series C No. 157, para 66.

general principles of law developed in domestic jurisdictions to clarify the scope and purpose of human rights procedural rules. For instance, in the *Case of Castillo-Petruzzi et al. v. Peru* (1998),[323] the IACtHR resorts to *iura novit curia* ("the court knows the law")—a fundamental principle of legal procedure—in relation to the objection of the respondent State (Peru) concerning "ambiguity in the manner of submitting the application."[324] Taking into account its own relevant precedents in which it has referred to this general principle,[325] the IACtHR reaffirms that it "can and should, in accordance with the principle of *iura novit curia* examine the document in its entirety and consider its character and the meaning of the request made by the applicant, so as to duly evaluate and resolve them."[326] More recently, in the *Case of Dial et al. v. Trinidad and Tobago* (2022),[327] the IACtHR states that the *iura novit curia* principle is "firmly supported by international case law," particularly the International Court of Justice's practice, and that this principle:

> has been cited by the Court on numerous occasions in relation to possible violations of the provisions of the Convention that have not been alleged by the parties in their briefs, in the understanding that they have had the opportunity to state their respective positions in relation to the facts underlying such violations.[328]

It is worth recalling that the IACtHR bases its decisions on general principles of national and international procedural law on a wide range of human rights issues, including those which are either inadequately addressed or not addressed at all by the American Convention.[329] Another such an example is the Order issued in the *Case of Genie-Lacayo v. Nicaragua* (1997),[330] in which the IACtHR attempts to clarify the concept of *remedy of revision* in relation to a verdict. The Court holds that the Statute of the International Court of Justice and the Rules of the European Court of Human Rights provide insights into this matter, as they expressly admit that: "*pursuant to the general principles of both domestic and*

323. *Case of Petruzzi et al v. Peru*, Judgment of September 4, 1998, para 92.

324. *Id.*

325. *Id. See also Velasquez Rodriguez Case* (1988), para 163, and *Godinez-Cruz Case* (1989), para 173, where the IACtHR refers expressly to the general principle of law *iura novit curia*, relying on its own jurisprudence and also on the relevant PCIJ's and ECtHR's jurisprudence.

326. *Case of Petruzzi*, *supra* note 324, para 92.

327. IACtHR, *Case of Dial et al. v Trinidad and Tobago*, (Merits and Reparations), Judgment of November 21, 2022.

328. *Id.*

329. *See generally* IACtHR, *Case of Dial et al., supra* note 327.

330. IACtHR, *Case of Genie-Lacayo v. Nicaragua*, Order of the Court of September 13, 1997, Application for Judicial Review of the Judgment of Merits, Reparations and Costs.

international procedural law, and, in accordance with the criterion of generally accepted doctrine, the decisive or unappealable character of a judgment is not incompatible with the existence of the remedy of revision in some special cases."[331]

Regarding the *remedy* and *reparations* regime, reflected in Article 63(1) of the American Convention, the IACtHR restates in the *Case of Yvon Neptune v. Haiti* (2008),[332] that "[i]t is a principle of international law that any violation of an international obligation that results in damage establishes the obligation to repair it adequately," and that: "[a]ll aspects of this obligation to make reparation are regulated by international law."[333] The IACtHR's reliance on general principles of law recognized by civilized States is often reinforced not only by a systematic resort to its own practice, but also by a frequent resort to the practice of other international judicial bodies. Among other things, such a reliance helps in countering the charge that the IACtHR often promotes "judicial activism" in interpreting the American Convention (departing from its own established precedents and the VCLT methodology of interpretation) and clearly strengthens the authority and normative legitimacy of the Court's judicial interpretations. The case law study below will seek to better demonstrate this argument.

B. Reliance on Other International Judicial Bodies' Practice on Various Human Rights Issues

It is customary for the IACtHR to refer to the practice of other international tribunals in both substantive and procedural matters. A close reading of IACtHR judgments reveals that, to render effective interpretations of the human rights enshrined in the American Convention, the Court frequently refers to general principles of law recognized by civilized nations and customary international law, which find expression in the practices of other international courts. Such a technique is typically used by the Court to explain, define, or confirm concepts related to human rights issues, as well as to extend rights where necessary. For example, the ECtHR's interpretative approach has had a considerable influence on the IACtHR's practice in terms of substantive issues, such as the right to freedom of thought and expression protected by Article 13 of the American Convention, which the IACtHR regularly

331. *Id.* at para 9 (emphasis added).

332. *Case of Yvon Neptune v. Haiti,* Merits, Reparations and Costs, Judgment of May 6, 2008.

333. *Id.* at para 152.

addresses.[334] The *Case of Ivcher-Bronstein v. Peru* (2001)[335] is relevant here, as the IACtHR looks to the practice of the ECtHR and the United Nations Human Rights Committee to clarify the provisions of Article 13 of the American Convention, respectively, to determine what meaning was given to the right to free thought and expression in similar contexts. Based on this research, the IACtHR concludes that the two international bodies "have recognized that freedom of expression is not limited to allowing acceptable ideas and opinions to circulate, but also those that are unpopular and minority."[336]

Analogously, in the *Case of Tibi v. Ecuador* (2004)[337] the IACtHR resorts to the practice of the ECtHR and other sources of international law such as other treaties (e.g. the second, fourth, and the tenth United Nations Principles for the Protection of All Persons under Any Form of Detention or Imprisonment) to elucidate the concept of unlawful and arbitrary detention or arrest.[338] For example, based on its own and the ECtHR's jurisprudence the IACtHR concludes that:

> Both the Inter-American Court and the European Court of Human Rights have highlighted the importance of prompt judicial control of detentions. He who is deprived of his liberty without judicial control must be released or immediately brought before a Judge. *The European Court of Human Rights has asserted that while the term "immediately" must be interpreted according to the special characteristics of each case,* no situation, no matter how serious, empowers the authorities to unduly extend the detention period,

334. Eduardo Andreas Bertoni, *The Inter-American Court of Human Rights and the European Court of Human Rights: A Dialogue on Freedom of Expression Standards*, 3 EUR. HUM. RTS. L. REV. 332 (2009).

335. IACtHR, the *Case of Ivcher-Bronstein v. Peru*, Merits, Reparations and Costs, Judgment of February 6, 2001, paras 152, 153. The case relates to a naturalized Peruvian citizen, majority shareholder, and director of a television channel, who was arbitrary deprived by the State of Peru of his nationality and editorial control position, restricting his freedom of expression on the ground, which he manifested by denouncing grave violations of human rights and acts of corruption. *See also* IACtHR, *Case of Uzcategui et al v. Venezuela*, Merits and Reparations, Judgment of September 3, 2012, on the state's obligation to guarantee the free and full exercise of the right of freedom of expression in a democratic society. The IACtHR invokes the European Court of Human Rights: *Case of Otegi Mondragón v. Spain,* no 2034/07, March 15, 2011, para 58.

336. *Id.* at para 143.

337. IACtHR, *Case of Tibi v. Ecuador*, Preliminary Objections, Merits, Reparations and Costs, Judgment of September 7, 2004. Dealing with the unlawful arrest of a man (a gem merchant) without a court order by police officers who detained and tortured him repeatedly to force him to confess to his participation in a drug trafficking case.

338. *Id.* at paras 95-96.

> because this would breach Article 5(3) of the European Convention.[339]

Indeed, in the *Case of Tibi,* when addressing the issue of *torture*—another type of human rights violation that the IACtHR frequently addresses—the Court considers, for example, that a criterion of imprisonment conditions for a state member to follow in relation to detained persons has already been established by the Strasbourg Court, which is worth applying to this case.[340] This criterion, according to the IACtHR, instructs that:

> under [Article 3 of the Convention], the State must ensure that a person is detained in conditions which are compatible regarding for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured by, among other things, providing him with the requisite medical assistance.[341]

Furthermore, because the IACtHR has been particularly confronted with the issue of *torture* in its practice, it often resorts to the ECtHR's practice to clarify what acts of inhuman or degrading treatment can be classified as *torture.* In the *Case of Cantoral-Benavides v. Peru (*2000),[342] for example, the IACtHR dives into the ECtHR's logic for defining acts of torture, taking into account the threshold demanded by a democratic society and the fact that a human rights treaty must be interpreted in light of contemporary circumstances.[343] Inferring that the American Convention should always be regarded as a "living instrument," the IACtHR considers the European Court of Human Rights' conclusions as relevant to the case, notably that:

> certain acts that were classified in the past as inhuman or degrading treatment, but not as torture, may be classified differently in the future, that is, as torture, since the growing demand for the protection of fundamental rights and freedoms must be accompanied by a more

339. *Id.* at para 115.

340. *Id.* at para 155.

341. *Id.*

342. IACtHR, *Case of Cantoral-Benavides v. Peru*, Judgment of August 18, 2000, Merits. The case concerns the cruel, inhuman, and degrading treatment of a Peruvian citizen held in detention during a criminal investigation into the crimes of treason against the fatherland and of terrorism applied to the victim.

343. *Id.* at para 99.

> vigorous response in dealing with infractions of the basic values of democratic societies.[344]

Later, in clarifying the notion of ill-treatment and inhuman treatment, in the case of *Valle Jaramillo and others et al. v. Colombia* (2008),[345] the IACtHR reaffirmed the principle that a *mere threat of a violation of the right to life* may constitute inhuman treatment when it is sufficiently real and imminent.[346] To shed more light on the erga omnes nature of the State's obligations under the American Convention, respective to the State's obligation to take preventive measures to protect individuals in their relations with each other, the IACtHR refers to the Strasbourg Court's opinion that:

> for a positive obligation to arise it must be established that the authorities knew or ought to have known, at the time, of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.[347]

Also, the *Case of Vera Vera v. Ecuador* (2011)[348] is worth mentioning in relation to torture in the forms of grave acts not specifically stated in the American Convention. Here, the IACtHR invokes the ECtHR's jurisprudence to check this Court's opinion on matters related to *ill treatment and negligence by State authorities in administering medical treatment to persons deprived of liberty*—as related to the act of torture. In interpreting Article 5, paragraphs 1 and 2, of the American Convention which refers to the rights to human treatment and personal integrity, in relation to Article 1 of the same instrument, the IACtHR holds that it is:

> useful to refer to the jurisprudence of the European Court of Human Rights in cases where there has been *negligent or inadequate medical treatment of persons deprived of liberty to such an extent*

344. *Id.* (emphasis added).

345. *Case of Valle Jaramillo et al. v. Colombia,* Judgment of November 27, 2008, Merits, Reparations, and Costs.

346. *Id.* at para 108.

347. *Id.* at paras 62 and 63.

348. *See* IACtHR in *Case of Vera Vera v. Ecuador,* Judgment of May 19, 2011, Preliminary Objections, Reparations and Costs. The case relates to a citizen of Ecuador, who, after receiving a gunshot wound and while under the state's custody, was refused adequate medical attention and who consequently died.

> *that the European Court* has held that States have incurred a violation of Article 3 of the European Convention on Human Rights, which enshrines *the prohibition of cruel, inhumane, and degrading treatment*, among other things.[349]

A reading of the case law at the IACtHR can reveal that on many issues of human rights interpretation, both substantive and procedural, the Court looks to external sources. In particular, the Court examines the practice of other international courts, not only in order to better clarify the meaning of the provisions of the American Convention, but also as a source of validation or confirmation of the meaning that the Court has arrived at through interpretation, or as a source of support or clarification of new circumstances that the Court is dealing with in relation to human rights.[350] For the last situation, an example can be found in the *Case of the Yakye Axa Indigenous Community v. Paraguay* (2005),[351] in which the IACtHR deals with Indigenous peoples' rights not stipulated in the American Convention. Here, the IACtHR sees in the ECtHR's practice confirmatory evidence that human rights conventions should be interpreted dynamically, in an evolutionary manner. According to the IACtHR, the Strasbourg Court has similarly stated that "human rights are live instruments, whose interpretation must go hand in hand with the evolution of the times and of current living conditions," and that this evolutionary interpretation is "consistent with the general rules of interpretation embodied in Article 29 of the American Convention, as well as those set forth in the Vienna Convention on Treaty Law."[352]

A strong reliance of the IACtHR on the ECtHR's practice can also be evidenced in relation to *procedural* aspects such as the *compensation for damages* and *a reasonable time frame within which the trial must be conducted.* For example, in the *Case of Genie-Lacayo* (1997) the IACtHR considers the criterion established by the ECtHR for determining "a reasonable time within which the trial must be conducted," as provided in Article 8 of the American Convention (the "right to a fair trial") to be relevant to the question of interpretation. [353] The IACtHR holds that:

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349. *Id.* at paras 75 and 76.

350. *Id.* at para 119.

351. IACtHR, *Case of the Yakye Axa Indigenous Community v. Paraguay,* Judgment of June 17, 2005, Merits, Reparations and Costs. The case relates to the Yakye Axa community, a Paraguayan Indigenous community, whose right to property over ancestral land was violated by the State of Paraguay, which failed to adopt adequate measures to ensure its domestic law guaranteed the community's effective use and enjoyment of their traditional land.

352. *Id.* at paras 125, 126, 127.

353. *Id.* at para 126, IACtHR, *Case of Genie Lacayo*, *supra* note 152, para 95.

> Article 8(1) of the Convention also refers to reasonable time. This is not an easy concept to define. In defining it, one may invoke the points raised of the European Court of Human Rights in various decisions in which this concept was analyzed, this article of the American Convention being equivalent in principle to Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. According to the European Court, three points must be taken into account in determining a reasonable time within which the trial must be conducted: a) the complexity of the matter; b) the judicial activity of the interested party; and c) the behavior of the judicial authorities.[354]

It is commonly known that general principles of law acknowledged by civilized nations pertaining to general international law find expression in the practice of all international courts.[355] So, when the IACtHR refers to the practice of other courts, it appears to be done with the intention of proving that the human rights provisions enshrined in the American Convention are inseparable from general international law, since human rights are based on legal principles belonging to general international law. In another instance, in the *Case of Aloeboetoe et al. v. Suriname* (1993),[356] the IACtHR invokes the ICJ's jurisprudence to shed light on the customary law on which Article 63(1) of the American Convention is founded—a provision applicable to reparations as procedural aspect.[357] Concerning acts of cruel, inhuman, and degrading treatment perpetrated against an ethnic group, the IACtHR basically refers to the ICJ's relevant precedents to confirm what it has already established through its own practice in relation to the meaning of Article 63(1), namely that this provision:

> codifies a rule of customary law which, moreover, is one of the fundamental principles of current international law, as has been

354. *Id.* at paras 77 and 81 (emphasis added). The IACtHR relied on: Eur. Court H.R., Motta judgment of 19 February 1991, Series A no. 195-A, para 30; Eur. Court H.R., *Ruiz-Mateos case v. Spain* judgment of 23 June 1993, Series A no. 262, para 30.

355. *See* on this aspect, e.g., Fitzmaurice, *supra* note 69; Gardiner, *supra* note 81; Popa, *supra* note 14.

356. IACtHR, *Case of Aloeboetoe v. Suriname*, Judgment of September 10, 1993, Reparation and Costs. The case relates to twenty unarmed males belonging to a tribe in Suriname, who were attacked, abused, beaten with riflebutts, and wounded with bayonets and knives by a group of soldiers. Some were detained on suspicion of belonging to a subversive group. The IACtHR was asked to fix Suriname's responsibility for the violation described herein and award just compensation to the victims' next of kin in accordance with the terms of the Convention.

357. *Id.* at para 43.

> recognized by this Court (cf. Velásquez Rodríguez Case, Compensatory Damages) . . . and the case law of other tribunals..[358]

The *Case of Aloeboetoe* exemplifies the IACtHR's resort to general principles of law governing the *remedy and reparations* regime to clarify concepts such as "injured parties" and "next of kin" of victims of serious human rights breaches that are not defined in the American Convention. In this regard, by analyzing comparable standards from other domestic legal systems, the Court defines the concept of "beneficiaries," as well as who the beneficiaries are, in order to establish the manner of compensations and remedies under Article 63(1) of the American Convention.[359] As the Court points out, because "under international law there is no conventional or customary rule that would indicate who the successors of a person are," it "has no alternative but to apply *general principles of law* (Art. 38(1)(c) of the Statute of the International Court of Justice)," in order to give a decision in the immediate case.[360] Furthermore, the IACtHR emphasizes the critical role that the rules generally accepted by the community of nations play in enabling the Court to make significant contributions on the notions of "reparations and compensation", "injured parties", and "beneficiaries" contained in the American Convention but not defined therein. For example, the Court established in connection to the concept of "next of kin" that:

> It is a norm common to most legal systems that a person's successors are his or her children. It is also generally accepted that the spouse has a share in the assets acquired during a marriage; some legal systems also grant the spouse inheritance rights along with the children. If there is no spouse or children, private common law recognizes the ascendants as heirs. It is the Court's opinion that *these rules, generally accepted by the community of nations*, should be applied in the instant case, in order to determine the victims' successors for purposes of compensation.[361]

The IACtHR concludes in *Case of Aloeboetoe* that the obligation contained in Article 63(1) of the American Convention is entirely

358. *Id.* (emphasis added). The IACtHR referred to: Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9, p. 21; Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17, p. 29; Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Second Phase, Advisory Opinion, I.C.J., Reports 1950, p. 228.

359. *Id.* at para 62, para 67.

360. *Id.* at para 61. *See also* for similar Court's approaches, the cases of *Velasquez Rodriguez* (Compensatory Damages, Judgment of 21 Julie 1989, Ser. C, No. 7) and *Godinez-Cruz* (Compensatory Damages, Judgment of 21 Julie 1989, Ser. C, No.8).

361. *Id.* at para 62.

governed by international law principles in all "its scope, characteristics, beneficiaries, and so on."[362] Thus, based on its own jurisprudence, as well as the ICJ's jurisprudence and other sources, the IACtHR establishes the respondent State's incumbent obligation to comply with the Court's ruling and provide compensation to the victims' successors. In the Court's words:

> this judgment must be understood to impose international legal obligations, compliance with which shall not be subject to modification or suspension by the respondent State through invocation of provisions of its own domestic law . . . .[363]

Analogously, in the *Blake v. Guatemala Case* (1999) on reparations and costs,[364] when faced with a procedural aspect of interpretating a prior judgment, the IACtHR consults, in addition to its own relevant practice,[365] the practice of the ECtHR to confirm that *the interpretation of a judgment cannot modify obligatory aspects of that judgment*.[366] Looking at the experience of the ECtHR, the IACtHR considers particularly relevant the criterion established by that Court, according to which the interpretation of a judgment entails "not only the precision of the text of the rulings of the judgment, but also the determination of the scope, meaning, and intention of the ruling, according to the relevant consideration."[367] In addition, the IACtHR finds support and confirmation in the ECtHR's conclusion that "the subject matter of the interpretation of a judgment cannot modify obligatory aspects of the judgment."[368] Moreover, in addition to its own practice, the IACtHR looks in this case to the practice

362. *Id.* at para 44.

363. *Id.*

364. IACtHR, *Case of Black v. Guatemala,* Judgment of 22 January 1999, Reparations and Costs. The case was concerned with the alleged detention and death of a citizen of Guatemala which occurred prior to Guatemala's acceptance of the compulsory jurisdiction of the Court as well as with violations of the Convention resulting from the effects, conduct, and acts (relating to the victim's fate) which occurred after Guatemala's acceptance of the compulsory jurisdiction of the Court.

365. *Id.* at para 18. The IACtHR refers to *Velasquez Rodriguez Case*, *Interpretation of the Judgment on Compensatory Damages* (Article 67 of the Inter-American Convention on Human Rights), Judgment of August 17, 1990, Series C No. 9, para 26; *Godinez-Cruz Case, Interpretation of the Judgment on Compensatory Damages* (Article 67 of the Inter-American Convention of Human Rights), Judgment of August 17, 1990, Series C no. 10, para 26.

366. *Id.*

367. *Id.* at para 18. The IACtHR invokes the ECtHR's *Case of Ringeisen v. Austria (Interpretation) Judgment of 22 June 1972), Judgment of 23 June 1973*, Series A, Vol. 16.

368. *Id.* at para 18*,* para 19. The IACtHR invokes the ECtHR, *Case of Allenet de Ribemont v. France,* (*Interpretation), Judgment of 7 August 1996*) and the ECtHR's *Case of Hentrich v. France (Interpretation)*, *Judgment of 3 July 1997*, Reports on Judgments and Decisions 1997-IV.

of other courts to shed more light on the criteria necessary to determine moral damages, as the Court has previously acknowledged that:

> there are numerous cases in which other tribunals have determined that a judgment of condemnation constitutes adequate reparation per se for moral damages (for example from the case law of the European Court of Human Rights).[369]

Furthermore, in the *Case of Black v. Guatemala,* the IACtHR invokes the ICJ to confirm that Article 63(1) of the American Convention, which stipulates the right to remedies and compensation to the injured party, "codifies a rule of customary law which, moreover, *is one of the fundamental principles of current international law on the responsibility of States*."[370] And again, the IACtHR resorts to other international courts' practice and international law principles on the matter of reparations and injured parties as a reliable source to elucidate these concepts in the context of the case.[371] According to Judge Cancado Trindade, the Inter-American Court has succeeded in the *Black v. Guatemala* case (both in the judgment on reparations and in the previous judgment on the merits), in providing important clarification on the treatment of the crime of forced disappearance of person vis-a-vis the concepts of *"*reparations" and *"*injured party."[372] By reference to international law, the practice of the ICJ and other international courts, as the IACtHR concludes, it has been able to:

> Contribute—in relation to a specific aspect—to the jurisprudential treatment of the crime of forced disappearance of person, to the extent that it gives precisions to, and consolidates, the position of the relatives of the disappeared person also as victims and titularies of the rights protected by the American Convention on Human Rights. All those who were withdrawn from the protection of law—the disappeared person as well as relatives—form thus, the "injured party," in the sense of Article 63(1) of the American Convention, as recognized in the present Judgment on reparations of the Court.[373]

369. *Id.* at para 55.

370. *Id.* at para 33 (emphasis added). The Court relies on its own relevant practice, i.e., *Aloeboetoe et al*. *Case*, *supra* note 304, para 43. It also relies on PCIJ/ICJ precedents, such as those of *Factory at Chorzow*, Jurisdiction, Judgment No.8, 1927, Series A, No.9, p.21, and *Factory at Chorzow*, Jurisdiction, Judgment No.13, 1928, Series A, No. 17, p.29. *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports 1949, p.184.

371. *Id.* at para 55.

372. Separate Opinion of Trinidade in the *Blake v. Guatemala Case*, *supra* note 365, para 41.

373. *Id.* (emphasis added).

It has also been observed that the IACtHR has sought guidance from the practice of other international courts in clarifying the meaning of *exhaustion of domestic remedies*, the first step by an individual in seeking redress for human rights violations through the use of available domestic remedies, as required by the American Convention. In this regard, the *Case of Castillo-Petruzzi et al. v. Peru* (1998)[374] is relevant, as the IACtHR refers to the ECtHR, which established the criterion of when an objection to the inadmissibility of an individual's complaint can be raised before the Inter-American Commission.[375] Although the State of Peru did not allege a failure to exhaust domestic remedies before the Commission, the IACtHR concludes that:

> it waived a means of defense that the Convention established in favor and made a tacit admission of the non-existence of such remedies of their timely exhaustion, *as has been stated in proceeding before organs of international jurisdiction (such as the European Court which has maintained that objection to inadmissibility should be raised at the initial stage of the proceedings before the Commission, unless it proves impossible to interpose them at the appropriate time for reasons that cannot be attributed to the Government*).[376]

Thus, for the interpretation of a treaty's norm to gain more consistency, and consequently, authority and normative legitimacy, it should consider other norms within a legal system, and the usual mechanism for doing so is systemic integration, as reflected in the VCLT's universal methodology of interpretation. The IACtHR's consistently employs systemic integration, drawing on external sources, including general principles of law, customary international law, customary law from other domestic legal systems, and the jurisprudence of other international courts- to clarify the meaning and scope of human rights under the American Convention. The Court's justification for expanding this approach serves as a crucial tool for enhancing the consistency of its interpretations and case law, thereby strengthening its interpretive authority and legitimacy.

374. IACtHR, *Case of Castillo-Petruzzi et al v. Peru*, Judgment of September 4, 1998, Preliminary Objections. The case relates to a group of six people who, despite not being Peruvian, were tried and convicted of the "crime of treason against [the] fatherland" and sentenced to life imprisonment by an incompetent tribunal under military jurisdiction in Peru. Peru thus violated their right to nationality and, respectively, their right to a fair trial.

375. *Id.*

376. *Id.* at para 56. (emphasis added).

V. CONCLUSION

Resolving difficulties such as contradictions, ambiguities, vagueness, or silence in interpreting the text of a treaty is always a problematic task for an interpreter, since it involves applying a general, abstract rule to a more specific, contextual case. This task is characterized as a complex act of legal reasoning and interpretation.[377] Its complexity gradually increases with the complexity of a given case, which may be subject to a variety of growing legal regimes, meaning an increasing number of rules that an interpreter can legitimately apply to decide the issue of the case.[378] To attain the full effect of the applied law, the context should be critical for the interpreter, who is engaged in a holistic interpretation of the relevant law.[379] While this research stressed the significance of context in interpretation, its primary purpose was to discover what provides and strengthens the authority and normative legitimacy of the IACtHR's interpretation of the American Convention's rights and safeguards provisions.

This Article's analysis of the techniques and sources of interpretation employed by the IACtHR in interpreting the American Convention identifies several key factors that bestow authority and legitimacy in this Court's treaty interpretation. First, the idea that interpretation implies an approach that cannot be reduced to a mechanical application of interpretation rules to address indeterminacies in a treaty provision. This is so because the VCLT rules of interpretation are themselves far from clear and fluid in their relationship to each other, and because the concept of human rights and the treaty formulations of these rights are frequently general and vague.[380] Hence, interpretation rather

377. *See* Raime Sitala, A THEORY OF PRECEDENT: FROM ANALYTICAL POSITIVISM TO POST-ANALYTICAL PHILOSOPHY OF LAW (2000).

378. *See* Engel, *supra* note 121.

379. For a discussion in this regard *See* TIMOTHY A. O. ENDICOTT, VAGUENESS IN LAW (2000). Also, Timothy A. O. Endicott, *Legal Interpretation*, *in* ROUTLEDGE COMPANION TO PHILOSOPHY OF LAW 109 (Andrei Marmor ed., 2012); Alejandro Fuentes, *Systemic Interpretation of International Human Rights Law in the Jurisprudence of the Inter-American Court of Human Rights, Lund University* (2019); Ronald Dworkin, *Judicial Discretion*, 60 J. PHIL., INC., 624 (1963); Malgosia Fitzmaurice et al., *Canons of Treaty Interpretation: Selected Case Studies from the World Trade Organization and the North American Free Trade Agreement*, *in* TREATY INTERPRETATION AND THE VIENNA CONVENTION ON THE LAW OF TREATIES: 30 YEARS ON 153-237 (Martinus Nijhoff 2010); Peter Bosch, *Vagueness is Context-Dependence. A Solution to the Sorites Paradox*, *in* APPROACHING VAGUENESS (T. T. Ballmer, and M. Pinkal eds 1983), 189; Hanne Weismann, *How Vague Are International Agreements? Introducing a Method for Systematic Comparison*, Inaugural-Dissertation, Darmstadt, Technische Universitat Darmstadt, (2017).

380. *See* on this aspect Brownlie, *supra* note 8; *also*, Fitzmaurice, *supra* note 69; Fitzmaurice and Merkouris, *supra* notes 68, 81.

requires a rational, holistic, and constructive approach to the provision(s) under the interpretation that implies keeping account of various elements. Such elements could be the context in which the norm under interpretation is applied (circumstances of a case); the context of other norms within a legal system (international or national); the precedents of judicial bodies; the legal history of the community; or in the case of an "interpretative community," the existence of an already assumed interpretation on a text, respectively what other authoritative interpreters have held similar texts to mean; and the social norms. As evidenced by the case law analysis and scholarly views provided in this article, the IACtHR typically adopts a holistic and constructive interpretative approach to the rights and safeguards guaranteed by the American Convention, based on the VCLT methodology of interpretation and Article 29 of the said Convention. The Court usually performs such an interpretation regardless of the type of difficulty encountered in the text construction of the American Convention's provisions, such as insufficient clarity, inconsistency, ambiguity, vagueness, or silence. It systematically applies the VCLT rules and methods, known in academic circles as the "canons of acceptability," to the interpretation of the American Convention's rights and safeguards, including those that, while not expressly listed in the Convention, are deemed by the Court to come within this instrument's scope. The present article has shown that the IACtHR employs the explicit and implicit techniques (or a combination of both in the same case) of applying the VCLT general rules of interpretation and the special rules and doctrines of interpretation (e.g., living instrument, autonomous meaning, margin of appreciation, or practical and effective rights), and that both techniques have the same impact on the consistency, and thus, on the authority and validity of interpretation. Moreover, the Court normally approaches both these techniques and rules in accordance with the overall common values and principles that it is tasked with promoting through the interpretation and application of the American Convention. As the cases examined in this Article evidence, a consistent, authoritative, and normatively legitimate interpretation of the American Convention's rights and safeguards is primarily achieved through the IACtHR's systematic adoption of a holistic interpretation, which implies adherence to the VCLT standard of interpretation (examining the text, context, object, and purpose of the treaty). Thus, consistent interpretative techniques in accordance with the VCLT interpretation standard and Article 29 of the Convention are critical to the IACtHR's authority and normative legitimacy, as well as to the public's image of the IACtHR as a legitimate court, and Member States' compliance with its decisions.

Second, this study evidences that the IACtHR frequently utilizes a more sophisticated interpretative scheme based on the VCLT approach than was initially stated in that specific case before the Court to determine and validate the intended meaning of the provision under review. The IACtHR has developed an interpretative framework to employ such a scheme, called in this article "overbuilding interpretation." It was underlined that this framework can be regarded as a strategy of gradually applying more VCLT rules and techniques of interpretation than the Court first declared to be sufficient to address the question of interpretation at hand, either explicitly or implicitly. Sometimes the Court applies this strategy with the sole purpose of demonstrating to the parties involved in the dispute that all the VCLT rules and methods of interpretation applied lead in the same direction, with some of them applied only to confirm or reinforce the interpretation it has already arrived at based on the rules and methods initially declared. At other times, the Court relies on an overbuilding interpretation to resolve problematic construction of texts within the American Convention that contain ambiguities, vagueness, or even gaps/silence in relation to the circumstances of the case before it. This interpretive path followed by the IACtHR is also common in the practice of the ECtHR, the WTO, and the ICJ[381] and is responsible, among other factors, for the consistency, predictability, and effectiveness of the IACtHR's interpretations of the American Convention. All these qualities contribute to defining an interpretation as authoritative and valid, hence strengthening Member States' trust in the Court's decisions.

Third, this Article also evidences that the IACtHR's holistic approach, applied systematically, in accordance with general principles of international law, its own established practice, as well as the practice of other international courts (on specific issues), increases the authority and legitimacy of its interpretation of the American Convention. Conversely, it was argued that the Court could not provide a coherent and consistent interpretation of the Convention's provisions under clarification if it applies the general rules and methods of interpretation inconsistently. In other words, if the Court focuses entirely on one rule or method (e.g. textualist or evolutive) of interpretation rather than the VCLT standard, it will neglect the other VCLT rules and methods, which are deemed to work together to build a holistic approach that the Court must always adopt. That the VCLT rules of interpretation are far from clear and fluid in their relationship to one another does not justify the Court's relying on a particular method of interpretation reflected in the VCLT methodology

381. *See* Popa, *supra* note 14.

while ignoring the other methods, which result in conflicting interpretations. However, such conflicting interpretations or departures are uncommon in the IACtHR's practice. Even the fact that the accusations of expansionism or judicial activism come from one or a few IACtHR cases that were deemed to vary from the Court's well-established practice proves that the Court does not deviate on a regular basis. Otherwise, the Court's adversaries would have more instances to point to as examples of its aberrations. Hence, such "off-the-wall decisions" should not be interpreted as absolute proof that this Court favors expansionism or activism. At the very least, deviating interpretations can demonstrate that the IACtHR occasionally takes a different position, but they cannot provide enough evidence that the Court is taking an expansionist stance, exceeding its treaty-based powers, since they do not represent or define the general pro homine interpretative trend established through its entire practice. Such deviations can alternatively be considered as unique situations in which the Court chooses to take a different interpretation position as a matter of policy, particularly in human rights issues where established case law does not yet exist (e.g. abortion rights, Indigenous peoples' rights, environmental rights, or social and economic rights). When it comes to "judicial activism," that claim deviations from accepted interpretative methodology (the VCLT rules), it is worth noting that the interpretative approaches adopted by the IACtHR are usually justified by the Court itself based on the VCLT methodology of interpretation. This article shows that the Court predominantly employs the VCLT methodology in an appropriate manner regarding the interpretative standard it demands. Furthermore, if "judicial activism" is seen as a failure to follow precedent, by disregarding it,[382] the IACtHR's practice evidences that in interpreting the American Convention on Human Rights, this Court has consistently relied on its own established jurisprudence (precedents), as well as the jurisprudence of other international courts. This reliance is a vital aspect that guarantees the Court's interpretations are consistent with the normativity of the American Convention, making them authoritative and valid/legitimate.

This study also states that judges of international courts and tribunals are bound by the principle of judicial integrity to issue interpretations that are consistent with the scope and purpose of the norms provided in the treaties that such bodies are entrusted to interpret. In this regard, it was

382. *See* in this regard Kmiec, *supra* note 78, for identifying the five core meanings of "judicial activism": (1) invalidation of the arguably constitutional actions of other branches, (2) failure to adhere to precedent, (3) judicial "legislation," (4) departures from accepted interpretative methodology; and (5) result-oriented judging.

concluded that the IACtHR has established a path to apply the same interpretive criteria, rules, principles, and methods of interpretation from case to case, as well as an extensive reliance on its own jurisprudence (practice) and the jurisprudence of other international (and national) courts, all of which are critical in enhancing the authority and validity of its human rights interpretation. Moreover, the analysis in this Article concludes that the IACtHR's interpretation of the American Convention is more consistent and uniform, and therefore apt to acquire authority and legitimacy, because of its own well-established path of relying on various international instruments and sources that comprise the *corpus juris of international human rights law*. The interpretative practice of the IACtHR shows that, regardless of the type of difficulties in the text of the American Convention (ambiguity, vagueness, or silence on the applicable law), its interpretations always revolve around sources of interpretation external to the ACHR, such as the general rules and principles of international law, customary law, other treaties, soft law, and the practice of other courts, to clarify substantive and procedural aspects of interpretation of the Convention's rights and safeguards. It implies that, when dealing with human rights issues that are not expressly stated in the American Convention (silence in the text), the IACtHR usually approaches them, similarly to the rights stated within it, through the perspective of the evolution of fundamental human rights in contemporary international law. Such interpretations, carried out through systemic integration within the framework of the VCLT methodology of interpretation, should not be viewed as departures from the original purpose of the American Convention's drafters, but rather as legitimate interpretations performed by the Court based on preexisting rights and in accordance with the American Convention's objectives. It should be admitted that the IACtHR's application in general of a holistic and evolutive pro homine reading of the American Convention in the context of the international law system, within the framework and scope of Article 29 of the Convention and the VCLT general rule of interpretation, serves to strengthen its own authority and legitimacy. By taking a systematic, holistic approach, the IACtHR contributes significantly to the corpus juris of international human rights law, as well as to the better integration of regional human rights standards in the Americas and their alignment with international human rights benchmarks and global jurisdiction.