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THE "ACTIVE" JURISPRUDENTIAL EVOLUTION OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS: FROM OPTIONAL TO MANDATORY JURISDICTION

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ABSTRACT

Article that discusses the active jurisprudential evolution of the Inter-American Court of Human Rights (IACHR Court). Through a literature review and within Public Law and the interface between Constitutional Law and International Law, the research has as its theme the jurisprudential evolution of the Inter-American Court, with the objective of analyzing the transition from an "optional" jurisdiction to qualify as a "mandatory" jurisdiction before the States Parties and International Human Rights Law. As a hypothesis, it is believed that the Inter-American Court of Human Rights "was born" as an "optional" jurisdiction at the international level; however, with the judgments and the jurisprudential construction, it came to be considered a "mandatory" jurisdiction for States in matters of human rights. As a result, it was found that the hypothesis of the was partially confirmed. The use of the jurisprudence of the Inter-American Court of Human Rights becomes an instrument of legitimacy for the ICC for the application of an international criminal law that seeks the protection of fundamental rights. This demonstrates that in order to be used as a source of human rights at the international level, the Inter-American Court of Human Rights establishes itself in the international arena as a true jurisdiction, whose effects transcend the reality of the States Parties and contribute to the construction of the normative acquis at the international level. It was noticed with the research that the Inter-American Court, through its jurisprudence, sought to qualify itself as a mandatory jurisdiction in matters of human rights, both before States and at the international level. This argumentative structure demonstrates the change in perspective of the Inter-American Court of Human Rights, which ceased to emphasize monetary reparations and began to concern itself with the material aspects of human rights, an indication that its "active" development has established it as a "mandatory" jurisdiction at the international level.

Keywords: Human Rights. Inter-American Court of Human Rights. Transition from Optional to Mandatory Jurisdiction.

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INTRODUCTION

This research is dedicated to appreciating the active jurisprudential evolution of the Inter-American Court of Human Rights (IACHR Court). Within Public Law and the interface between Constitutional Law and International Law, the research has as its theme the jurisprudential evolution of the Inter-American Court, with the objective of analyzing the transition from an "optional" jurisdiction to qualify as a "mandatory" jurisdiction before the States Parties and International Human Rights Law.

The considerations about the research lead to the following question, considering the problem of this research: should the Inter-American Court of Human Rights be considered a mandatory jurisdiction, whose judgments should be followed by the States?

To examine this perspective, as a hypothesis, it is initially considered that the Inter-American Court of Human Rights was "born" an "optional" jurisdiction at the international level; however, with the judgments and the jurisprudential construction, it came to be considered a "mandatory" jurisdiction for States in matters of human rights.

Thus, the transition from optional to mandatory jurisdiction in its jurisprudence will be appreciated by the research. Next, three points will be dedicated to the development of this mandatory jurisdiction, the first being in a specific way, the second in accordance with the rights provided for in the Convention and developed within the framework of the precedents.

Finally, it is dedicated to verifying how this aspect of the Inter-American Court of Human Rights is recognized by other international courts, especially by the jurisprudence of the ICC, an international court whose jurisdiction has been considered mandatory since its inception.

FROM THE "ORIGINAL ROLE" OF OPTIONAL JURISDICTION TO THE AFFIRMATION OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS AS MANDATORY JURISDICTION

The original commitment of the States Parties – which agreed to be part of the American Convention on Human Rights – was to respect, as provided for in Article 1, item 1, of that Convention, the rights and freedoms that were recognized therein. This obligation to respect includes the obligation to guarantee the realization of the rights of any human being under its jurisdiction, without discrimination on grounds of race, color, sex,

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language, religion, political or other opinions, such as national or social origin, economic position, birth, or any other social condition.

The Inter-American Court of Human Rights seeks to consolidate personal freedom and social justice as the foundations of respect for human rights. At first, this insertion is planned as an international protection, of a conventional nature, but of a supporting or complementary nature to the protection network that the national legal systems of the States Parties offer, as set out in the preamble of the Convention.

This supporting or complementary protection is demonstrated not only by the enunciation of the Preamble, but is reaffirmed by the provisions of the Convention, in particular by the duty to adopt the provisions of domestic law, provided for in Article 2 of the Convention. This is justified if the essential human rights mentioned in Article 1(1) of the Convention are not already guaranteed by legislative or other provisions. As a result, there would not be an immediate implementation of the international plan, but rather the commitment of the States Parties to undertake to adopt – in accordance with their constitutional norms and the normative provisions concerning the American Convention – the procedural measures necessary to make these essential human rights effective.

Another conventional provision that reaffirms this position is contained in Article 46 of the Convention, in particular with regard to the prior need to exhaust domestic remedies, in accordance with generally recognized principles of international law[3]. As the conventional provision itself emphasizes, the primacy is that the jurisdiction of the State Party is recognized as predominant, which is why the Court's action, in this conventional systematic context, is presented as subsidiary.

To emphasize this aspect, Article 62, item 1, of the Convention ensures that it is the prerogative of the State Party to recognize the jurisdiction of the Inter-American Court of Human Rights in all contentious cases concerning the interpretation or application of the Convention. This may be done at the time of deposit of your instrument of ratification of the Convention, of accession to it, or at any time thereafter. This declaration can be made unconditionally, or under the condition of reciprocity, for a fixed period or for specific cases.

[3] The exhaustion of domestic remedies is a preliminary exception recognized as articulated by the States Parties when presenting their defenses in the context of the judgment of the Inter-American Court of Human Rights. This Article 46 has undergone a rereading, based on Advisory Opinion No. 11, issued on August 10, 1990, which was requested by the IACHR Commission. In addition, the Inter-American Court, in several cases, has rejected this preliminary objection, either due to the lack of due process, or due to the recognition of the party's impediment to exhaust domestic remedies, or even due to the unjustified delay in deciding on such remedies (Article 46, item 2, of the Convention).

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It should be noted that, according to the conventional text, the Inter-American Court of Human Rights has jurisdiction to hear any case regarding the interpretation and application of the Convention, provided that the States Parties recognize such jurisdiction. It can be seen, from the systematic interpretation of the Convention, that the Inter-American Court of Human Rights was given subsidiary jurisdiction to assess and resolve cases in matters of human rights. With this condition, the Inter-American Court of Human Rights went through serious controversies about its institutional role, with political tensions caused by States that were in disagreement with the obligations to comply with the Convention[4].

In 1999, the Inter-American Court of Human Rights received two complaints sent by the IACHR Commission: the Ivcher Bronstein case and the case of the Constitutional Court – from the Republic of Peru (hereinafter Peru). In Ivcher Bronstein v. Peru, the victim – Mr. Bronstein – owned more than half of a major media outlet in Peru. However, as he was of Israeli nationality, he had to renounce his nationality and acquire Peruvian citizenship[5] in order to be the owner of his enterprise. As its media outlet linked reports on torture and other discredit against the State, Peru promoted a legislative change that culminated in the loss of Mr. Bronstein's naturalization, through the issuance of a decree that authorized the cancellation of the nationality of naturalized Peruvians.

In turn, in relation to the case of Constitutional Court vs. Peru, the Constitutional Court of the Republic of Peru went through a period of intense pressure from the real factors of power, with regard to the analysis of legislation on the election of the President of the Republic in Peru. After a controversial political dispute involving the analysis of the trial[6], three magistrates were removed from their positions, and a group of 27

[4] In this regard, the controversy reported by Cançado Trindade, at the time President of the Inter-American Court, should be highlighted, in which the State of Peru, led by the then former President Fujimori, began a massive campaign, at diplomatic levels in the international sphere, to retaliate and deconstruct the image of the Court, which led the Inter-American Court to initiate a series of institutional negotiations. and to modify the profile originally described by the American Convention (CANÇADO TRINDADE, Antônio Augusto. *El Ejercicio de la Función Judicial Internacional*: Memorias de la Corte Interamericana de Derechos Humanos. 2. ed. Belo Horizonte: Del Rey, 2003, p. 5-9).

[5] This is the case analyzed: "On September 17, 1984, he submitted to the Ministry of Foreign Affairs all the documents required to obtain Peruvian nationality. After an extensive internal process, the aforementioned Ministry issued the "supreme resolution" signed by the President of the Republic, architect Fernando Belaúnde. Subsequently, Mr. Ivcher had to renounce his Israeli nationality by public deed of December 6, 1984, a renunciation that he made before the notary public Luis Vargas. Based on this testimony, he was issued his title that bears the number 0644. The public deed is kept by the notary, who is responsible for recording it in the books" (I/A Court H.R. *Case of Ivcher Bronstein v. Peru*. Merit, Reparations and Costs. Judgment of 06/02/2001, Série C n. 74, parte referente à prova testemunhal).

[6] Check out the chronology of events in the Inter-American Court. *Case of the Constitutional Court v. Peru*. Competence. Judgment of 09/24/1999, Series C n. 55, §§ 2-3.

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parliamentarians from the Congress of the Republic of Peru filed the case before the Inter-American Commission.

In both cases, on July 16, 1999, the representative of the Republic of Peru before the Inter-American Court of Human Rights – the Ambassador of Costa Rica – returned the two cases, which contained a technical note dated July 15, 1999, signed by the representative of the Ministry of Foreign Affairs of the State of Peru, which describes the procedure adopted by the Republic of Peru.

The Congress of the Republic of Peru approved, through Legislative Resolution No. 27152, of 07/08/1999, the withdrawal of the recognition of the contentious jurisdiction of the Inter-American Court. On the same date, the Government of the Republic of Peru deposited – with the General Secretariat of the Organization of American States (OAS) – the instrument containing the withdrawal of the declaration recognizing the optional clause of submission to the contentious jurisdiction of the Inter-American Court. According to the technical note submitted to the Court, the withdrawal of the recognition of contentious jurisdiction from the Court's jurisdiction would take effect immediately from the date of the aforementioned instrument of deposit with the OAS General Secretariat (as of July 9, 1999) and would apply to all cases in which the Republic of Peru had not contested the claim brought before the Court's jurisdiction.

In considering the two cases in the respective judgments establishing their jurisdiction, the Inter-American Court of Human Rights considered that the Republic of Peru's claim to withdraw the declaration of recognition of the Court's contentious jurisdiction with immediate effect, as well as any consequences that derive from this act, was inadmissible[7].

In the present cases, the Inter-American Court of Human Rights has taken the position that, as it is a judicial body, it has the inherent power to determine the scope of its own jurisdiction. In the course of this position, the Court cannot abdicate this prerogative, since it recognizes it as a duty, imposed by the American Convention through Article 62, item 3, for the exercise of its functions[8].

[7] HDI cut. *Case of the Constitutional Court v. Peru*. Competence. Judgment of 09/24/1999, Series C n. 55, § 53 and Inter-American Court. *Ivcher Bronstein vs. Peru*. Competence. Judgment of 09/24/1999, Series C n. 54, § 54.

[8] HDI cut. *Ivcher Bronstein vs. Peru*. Competence. Ob. cit., §§ 32-33 and IACHR Court. *Case of the Constitutional Court v. Peru*. Competence. Ob. cit., §§ 31-32. The Inter-American Court of Human Rights was inspired by other international precedents – such as the ICJ's advisory opinion on the Convention on Genocide or the LaGrand Case – to affirm its jurisdiction as a jurisdiction. As the case was ongoing, the Inter-American Court of Human Rights was able to assert its competence, drawing inspiration from the

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The institutional role played by the Inter-American Court of Human Rights is to act with the purpose of preserving the integrity of the institute of acceptance of the optional clause of mandatory jurisdiction, provided for in Article 62, item 1, of the Convention. since the Court cannot be conditioned by facts other than its own actions. Thus, it would be inadmissible to subordinate its mandatory jurisdiction to restrictions and objections aggregated by the respondent States Parties at the end of the procedure for accepting the Court's contentious jurisdiction, since this would affect the effectiveness of the institute and prevent its progressive development[9].

In these judgments, the Inter-American Court of Human Rights has distinguished itself from international tribunals that have developed their jurisdiction within the framework of general international law. In this regard, the distinction under debate was made in relation to the ICJ, on which the Inter-American Court of Human Rights promoted an interpretative distance with regard to the performance of the States Parties in judicial litigation.

According to Article 36 of the ICJ Statute[10], the recognition of the ICJ's jurisdiction as mandatory may be made with conditions of reciprocity between the States Parties or for a fixed period. What the Inter-American Court of Human Rights developed, with the argumentative and institutional commitment placed on these demands, was to dispel any kind of analogy between the acceptance of the mandatory jurisdiction clause contained in

judgment of another court, confirming the coherence of international law (see, in this regard, CHARNEY, Jonatham I. Is International law threatened by multiple international tribunals? RCADI, volume 271, p. 101-382).

[9] HDI cut. *Ivcher Bronstein vs. Peru*. Competence. Ob. cit., §§ 34-35 and Inter-American Court. *Case of the Constitutional Court v. Peru*. Competence. Ob. cit., §§ 33-34.

[10] The jurisdiction of the Court covers all matters submitted to it by the parties, as well as all matters specifically provided for in the Charter of the United Nations or in treaties and conventions in force.

States, parties to this Statute, may at any time declare that they recognize as obligatory, ipso facto and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all controversies of a legal order which have as their object:

a) the interpretation of a treaty;

b) any point of international law;

c) the existence of any fact that, if verified, would constitute a violation of an international commitment;

(d) the nature or extent of the reparation due for the breach of an international commitment.

The above-mentioned declarations may be made purely and simply or on condition of reciprocity on the part of several or certain States, or for a fixed period.

Such declarations shall be deposited with the Secretary-General of the United Nations, who shall transmit them by copy to the Contracting Parties to this Statute and to the Registrar of the Court.

In relations between the contracting parties to this Statute, declarations made in accordance with Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed to constitute acceptance of the binding jurisdiction of the International Court of Justice for the period in which they are still in force and in accordance with its terms.

Any dispute over the jurisdiction of the Court shall be settled by the decision of the Court itself.

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the American Convention and the practice established by the States Parties within the ICJ and which had become a custom at the international level[11].

In fact, in order to demonstrate the normative nature of the American Convention, the Inter-American Court of Human Rights considers that the acceptance of its contentious jurisdiction is irreversible, and does not admit limitations, except for those expressly contained in the convention. This is because, in view of its importance for the system of human rights protection, this interpretation cannot be restricted to limitations that are not provided for and that are invoked by the States Parties for domestic reasons[12].

The construction of the identity of the Inter-American Court of Human Rights as an international court that hears controversies related to human rights involves the recognition of the differentiated obligations that States Parties must assume in relation to this matter. In particular, the States Parties bound by the Convention must ensure compliance with the normative content in the field of human rights and their respective effects, which the Inter-American Court of Human Rights calls *effet utile* (useful effect)[13] within the scope of national legal systems.

This parameter of action applies not only to the conventional provisions that refer to the material protection of human rights, but must also be conferred to the procedural norms contained in the Convention, in particular the mandatory jurisdiction clause. Therefore, this clause is considered by the Inter-American Court of Human Rights to be essential to the effectiveness of the international protection mechanism and must be understood and applied with the aim of being concretized in the constitutional reality, given the special character of the Convention, given the nature of a human rights treaty[14].

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[11] HDI cut. *Ivcher Bronstein vs. Peru*. Competence. Ob. cit., § 47 and Inter-American Court. *Case of the Constitutional Court v. Peru*. Competence. Ob. cit., § 46. Notwithstanding the position in these judgments, the Inter-American Court of Human Rights has jurisdiction over all countries that have adhered to the American Convention and the mandatory jurisdiction clause. On the other hand, as seen in its Statute, the ICJ has three situations of competence, in addition to specific treaties – such as the optional protocol of the CVRC – which distances it from the Inter-American Court in terms of discussion on the recognition of mandatory jurisdiction.

[12] HDI cut. *Case of the Constitutional Court v. Peru*. Competence. Ob. cit., § 35 and Inter-American Court. *Ivcher Bronstein vs. Peru*. Competence. Ob. cit., § 36.

[13] "In the interpretation of the Convention, the principle of practical effect, which is so relevant in the field of international law, acquires transcendental importance, and this has been emphasized by the Court," so that "the Inter-American Court has stressed that the Convention must be interpreted in terms of its specific nature as a treaty for the collective guarantee of human rights and fundamental freedoms, and that the object and purpose of this instrument for the protection of human beings require understanding and applying its provisions in a way that makes those requirements effective and concrete" (FAÚNDEZ LEDESMA, Héctor. *The Inter-American System for the Protection of Human Rights*: Institutional and Procedural Aspects. 3rd ed. San José, Costa Rica: Inter-American Institute of Human Rights (IIDH), 2004, p. 91).

[14] HDI cut. *Case of the Constitutional Court v. Peru*. Competence. Ob. cit., § 36 and Inter-American Court. *Ivcher Bronstein vs. Peru*. Competence. Ob. cit., § 37.

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Furthermore, the Vienna Convention on the Law of Treaties establishes as a general rule of interpretation, in its article 31, item 1, that the treaty must be interpreted in good faith, according to the common meaning attributable to the terms of the operative part in its context, and in accordance with the objectives and purposes sought in its normative provisions[15].

Based on this *standard* of general international law, the Inter-American Court argues that there is no rule in the American Convention that authorizes the States Parties to withdraw their declaration of acceptance of the Court's mandatory jurisdiction. Thus, a good faith interpretation of the normative content of the American Convention, in view of its objectives and purposes, indicates that a State Party can only disengage from its obligations assumed in accordance with the dictates of the treaty itself. In the case of the American Convention, the only way available to the State Party to disengage itself from the contentious jurisdiction of the Court is to denounce the entire content of the American Convention, in accordance with the precepts established in Article 78 of the Convention itself[16].

In a systematic view, the Inter-American Court of Human Rights uses the rules of interpretation provided for by the American Convention itself, in Article 29, item 1. In this regard, no provision of a convention may be interpreted as permitting any of the States Parties, persons or groups of persons, to suppress the enjoyment and exercise of the rights and freedoms recognized in the said Convention or to limit them to a greater extent than in the text provided for therein.

Thus, an interpretation of the American Convention in the sense of allowing a State Party to withdraw recognition of the Court's mandatory jurisdiction would imply the suppression of the exercise of the rights and freedoms recognized by the Convention. This situation causes a collision with the existing objectives and purposes of a human rights treaty, the consequence of which would have repercussions in the deprivation – to all beneficiaries of the Convention – of the additional guarantee of the protection of human rights through the action of their courts[17].

[15] Vienna Convention on the Law of Treaties, Article 31: "1. A treaty must be interpreted in good faith in accordance with the common sense attributable to the terms of the treaty in its context and in light of its aim and purpose."
[16] HDI cut. *Ivcher Bronstein vs. Peru*. Competence. Ob. cit., §§ 39-40.
[17] HDI cut. *Case of the Constitutional Court v. Peru*. Competence. Ob. cit., § 40.

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The Inter-American Court of Human Rights considers that the American Convention, as well as other human rights treaties, is inspired by superior common values[18], and that they are different from other treaties. This is justified because they are equipped with specific supervisory mechanisms and are applied in accordance with the notion of collective guarantee, with the aim of enshrining obligations of an objective nature[19]. Thus, this scenario demonstrates the existing and necessary distinction between the Inter-American Court of Human Rights and other international courts.

This, in fact, is the initial settlement of the position of the Inter-American Court, when examining Advisory Opinion No. 2, of 1982, in which it demonstrates this differentiation resulting from the content of human rights. Instead of the States Parties submitting to a multilateral legal system of the traditional type, with the reciprocal exchange of rights and obligations, arising from the search for the satisfaction of common interests among States, they are bound by another type of obligation. This obligation does not concern only other States, but in particular they are connected to persons under their jurisdiction[20].

Obligations related to the protection of human rights are independent of the nationality of the individual. They are directed against the national state itself or against other states. In this context, by approving this type of treaty on human rights, States are subject to a differentiated legal order, in which they do not assume obligations towards other States, but for the common good of the community[21], especially towards the

[18] Values that give rise to the reading of international law from the essential content of human rights. In this sense, check the opinion of CANÇADO TRINDADE, Antônio Augusto. *International Law for Humankind*: Towards a New *Jus Gentium*. General Course on Public International Law from The Hague Academy of International Law, vol. 316, 2005. Leiden/Boston: Martinus Nijhoff Publishers, 2006.
[19] HDI cut. *Ivcher Bronstein vs. Peru*. Competence. Ob. cit., § 42.
[20] HDI cut. Advisory Opinion No. 02, dated 09/24/1982. The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Articles 74 and 75) Requested by the IACHR, § 29.
[21] At this point, in relation to the criterion of sanctions, it is interesting to note that individuals will not be held responsible. They are only subject to protection under this type of treaty. The responsibility will be on the State, whose agent made a certain violation of the rights of the human person. On the other hand, Kelsen addresses the issue, pointing out that "international law does not institute a procedure aimed at objectively establishing that the conditions for the application of the sanction are well concluded, and, in particular, an objective instance, a jurisdiction before which this procedure would be pursued". Kelsen defends a position contrary to that established by international courts. For the author, States are not linked to the international community. The possibility of sanctioning one State would only be possible if applied by another State. For the international community to apply a sanction to a State, it should be equated (legally) to a State *stricto sensu* (KELSEN, Hans. The system relations between domestic law and public international law. Trad. Marcelo Dias Varella, Geilza Fátima Cavalcanti Diniz, Amábile Pierroti and Luiza Maria Rocha Nogueira. *Journal of International Law*, v. 8, n. 2, jul./dez. 2011, p. 81-83). In general, despite the evolution of international law, sanctions applicable to a State require the acquiescence of other States, which make up a certain scope of international action. Before the ICJ, it needs the approval of the Security Council. Within the framework of the European Court of Human Rights (ECtHR), the members of the Council of Ministers,

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individuals under their jurisdiction. They are obligations of an objective nature, intended to protect the fundamental rights of all human beings against violation by States[22].

The criterion of binding to the human person was not created exclusively by the Inter-American Court, but had already been developed by the ICJ itself, when dealing with the interpretation regarding the management of reservations by States in relation to the Convention on the Prevention and Punishment of the Crime of Genocide, of 1951[23]. In the opinion of the ICJ, in treaties with a human rights content, the contracting States Parties do not have their own interests, but common interests, which are embodied in the consolidation of the purposes that are the purpose of this type of Convention[24].

This constitutional development at the international level continued, especially with emphasis on the manifestation of the European System for the Protection of Human Rights. Within the framework of the European system, the obligations assumed by the States Parties within the framework of the European Convention have an objective character, aimed at protecting the essential content of human rights from violations by States, rather than creating reciprocal rights and obligations between them. Going further, the objective obligations established by the European Convention are transfigured into a collective guarantee[25].

Thus, the European Convention must be understood as a result of its specific character, as a commitment to the collective guarantee of human rights and fundamental freedoms. Thus, the object and purpose of this instrument of protection require understanding and applying its provisions in order to achieve the protection of the human person[26].

For this reason, the operation of the Inter-American Protection System gives special importance to the clause provided for in Article 62 of the American Convention. There are several ways to interpret the optional clause of mandatory jurisdiction of the Inter-

belonging to the Council of Europe. Before the Inter-American Court, it is necessary to submit the situation to the OAS. In all cases, the collegiate bodies are formed by States.

[22] HDI cut. Advisory Opinion No. 02, dated 09/24/1982. The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Articles 74 and 75) Requested by the IACHR, § 29.

[23] On the constitutional interpretation carried out by the ICJ, see the opinion of TRINDADE, Otávio Cançado. Kant in The Hague: the constitutional approach to international law by the International Court of Justice (1945-1990). *Revista Faculdade de Direito UFMG,* Belo Horizonte, n. 52, p. 299-328, jan./jun. 2008, p. 306-307.

[24] ICJ. Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (1951). Available at: <http://www.icj-cij.org>. Accessed in: 02/21/2014.

[25] EDH Cut. *Ireland v. United Kingdom.* Petition no. 5310/71. Merit. Judgment of 01/18/1978, § 239.

[26] EDH Cut. *Soering v. United Kingdom.* Petition no. 14038/88. Merit. Judgment of 07/07/1989, § 87.

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American Court. The Court chose the understanding that establishes the obligation of the States to guarantee the essential content of the substantive and procedural provisions of the American Convention[27]. This choice includes the appreciation of this perspective in the light of the object and purpose of the Convention as a human rights treaty, always seeking to achieve its "useful effect" through the consolidation of its normative character[28].

And, as a result, the Inter-American Court of Human Rights considers that the solution of cases entrusted to human rights tribunals[29], such as the Regional Protection Systems, does not admit equivalence with international dispute settlement bodies in a dispute involving only interstate relations. This is justified in view of the different context exposed, which is why the States Parties cannot count on the same criterion of discretion when the matter involves human rights[30]. With this position, the standard of Article 62 of the American Convention is thus configured as a normative provision defining the mandatory jurisdiction of the Inter-American Court.

Therefore, in the Ivcher Bronstein and Constitutional Court cases, both against the Republic of Peru, the Inter-American Court of Human Rights demonstrated its role as a Constitutional Court by outlining the protection system of the American Convention. With these judgments, the Inter-American Court of Human Rights attributed to itself the competence to define its jurisdiction as mandatory jurisdiction. In addition, it has made a distinction, in terms of the scope of action and institutional roles played by States before international tribunals, such as the ICJ.

This position allowed the development of the protection of human rights before the international system, with the interpretative reinforcement given to the Vienna Convention and the law of treaties. This evolution relied on the use of jurisprudential fertilization and

[27] It is important to note that in this regard, the Inter-American Court of Human Rights is changing the meaning contained in Article 62 of the American Convention. This provision provides that the State is optional to recognize the jurisdiction of the Inter-American Court of Human Rights to hear all cases relating to the application and interpretation of the American Convention as mandatory. Article 62, item 2, also provides for four specific situations for this declaration: (i) declaration can be made unconditionally; (ii) declaration made under the condition of reciprocity; (iii) declaration for a fixed period and (iv) declaration for specific cases. What will be seen in the course of the research is the tendency of the Inter-American Court of Human Rights not to respect the conditions contained in this article 62, such as the retroactive interpretation carried out in the case of Gomes Lund v. Brazil, for example.
[28] HDI cut. *Ivcher Bronstein vs. Peru*. Competence. Ob. cit., §§ 44-47. In turn, the normative nature of the American Convention (*Law-Making Treaty*) was inspired by the jurisprudence of the ECtHR, especially in the case of Loizidou vs. Turkey (ECtHR. *Case of Loizidou v. Turkey* Petition No. 15318/89. Preliminary Exceptions. Judgment of 03/23/1995, § 84).
[29] CANÇADO TRINDADE, Antônio Augusto. *The Exercise of the International Judicial Function*: Memories of the Inter-American Court of Human Rights. 2. ed. Belo Horizonte: Del Rey, 2003, p. 11.
[30] HDI cut. *Case of the Constitutional Court v. Peru*. Competence. Ob. cit., § 47 and Inter-American Court. *Ivcher Bronstein vs. Peru*. Competence. Ob. cit., § 48.

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theoretical support applied to the precedents of the European system for the protection of human rights, to concretize and strengthen the understanding of the normative force of the American Convention and the development of the role of the Inter-American Court as a mandatory jurisdiction.

Faced with the scenario constructed in the Ivcher Bronstein and Constitutional Court cases, the Inter-American System continued with the evolution of this model of mandatory jurisdiction[31]. In this regard, the case of Hilaire, Constantine, Benjamin and others v. Trinidad and Tobago is a product of the accumulation of 03 cases that were submitted separately by the Inter-American Commission against the State of Trinidad and Tobago on 05/25/1999, 02/22/2000 and 10/05/2000.

The claims before the Inter-American Commission on Human Rights (IACHR) have their origin in 32 complaints, filed between July 1997 and May 1999, whose alleged violations are of a specific nature and concentrated in values such as: (i) the prohibition of the death penalty (32 cases); (ii) the possibility of pardon (31 cases); (iii) the delay in the judicial provision (25 cases); (iv) the holding of a fair trial (26 cases); (v) conditions of detention (21 cases); and (vi) unavailability of technical assistance for the proposition of constitutional appeals (11 cases).[32]

The lawsuit filed by the Inter-American Commission before the Inter-American Court of Human Rights aims, in this regard, to interfere in the internal judgment of the alleged victims, in particular so that the death penalty is not the final solution in their cases before the domestic criminal jurisdiction. The purpose of the demand is that the parties may have the option of requesting institutes such as amnesty, pardon, or even the commutation of their sentences, as well as rediscussing violation of rights due to the delay in processing cases in a reasonable period, in addition to indicating the need for a fair trial[33].

With regard to the establishment of its jurisdiction, the Inter-American Court of Human Rights was faced with a more drastic situation in relation to the diplomatic conflict experienced with Peru. In this case, the State of Trinidad and Tobago – which had

[31] In this regard, the critical overview was carried out, from a methodological perspective, by PETERS, Anne. International Dispute Settlement: A Network of Cooperational Duties. *European Journal of International Law (EJIL),* vol. 14, n. 1, p. 1–34, 2003, p. 20–21.
[32] This can be exemplified according to the table, extracted from the judgment of the Inter-American Court of Human Rights, and placed in Annex I of this research (Inter-American Court. *Case of Hilaire, Constantine, Benjamin and others v. Trinidad and Tobago*. Merits, Reparations and Costs. Judgment of 06/21/2002, Series C n. 94, §§ 1-3).
[33] HDI cut. *Case of Hilaire, Constantine, Benjamin and others v. Trinidad and Tobago*. Merits, Reparations and Costs. Judgment of 06/21/2002, Series C n. 94, §§ 4-11.

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deposited its instrument of ratification of the American Convention on May 28, 1991 and recognized the contentious jurisdiction of the Inter-American Court on May 26, 1998 – filed the complaint with the American Convention, pursuant to Article 78[34] thereof.

According to Article 78, item 1, there is the possibility for the States Parties to denounce the Convention after the period of 05 years from the entry into force of the protective provision, and upon 1 year's notice, in which the Secretary General of the OAS will inform the other parties. However, in accordance with Article 78(2), such denunciation shall not have the effect of disconnecting the State Party from the obligations contained in the American Convention. This hypothesis occurs when acts that violate the text of the agreement have been committed by the State Party prior to the date on which the denunciation will take effect.

In this context, the complaint would take effect as of 05/26/1999. However, the facts of the present case occurred prior to that date, so that the complaint made by the State will not have normative effect in relation to the text of the American Convention[35].

Although the State of Trinidad and Tobago refused to recognize the IACHR Court for the consideration of these cases, the IACHR Court strengthened its jurisprudence, and implemented the understanding established in the Ivcher Bronstein and Constitutional Court cases, on the need to recognize its jurisdiction as mandatory. Using the perspective of a good-faith interpretation of the convention, the normative force of Article 62 of the Convention qualifies it as a mandatory jurisdiction. The Court's intervention has the scope of making the definition of its competence compatible with the purposes and objectives of the protection of human rights provided for in the conventional text[36].

The argument consolidated in this case has the legitimate purpose of promoting the theoretical distancing of the development of the mandatory jurisdiction of the Inter-American Court of Human Rights from the voluntarism of the States Parties. This action is intended to promote the formation of a cohesive and institutionalized international

[34] Article 78 of the American Convention provides:
"1. States Parties may denounce this Convention after the expiry of the five-year period, from the date in force of the Convention and upon one year's prior notice, notifying the Secretary-General of the Organization, who shall inform the other Parties.
2. Such denunciation shall not have the effect of disconnecting the State Party concerned from the obligations contained in this Convention with respect to any act which, although it may constitute a breach of those obligations, was committed by it prior to the date on which the denunciation takes effect."
[35] HDI cut. *Case of Hilaire, Constantine, Benjamin and others v. Trinidad and Tobago*. Merits, Reparations and Costs. Judgment of 06/21/2002, Series C n. 94, §§ 12-13.
[36] HDI cut. *Case of Hilaire, Constantine, Benjamin and others v. Trinidad and Tobago*. Merits, Reparations and Costs. Judgment of 06/21/2002, Series C n. 94, §§ 14-20.

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community, the consequence of which is the movement of an international law – previously available by the States Parties – to an international sphere focused on the formation of *jus cogens*[37].

And, based on this perspective, it is necessary to envision the implementation of this model of permanent mandatory international jurisdiction, through an examination of the jurisprudence developed by the Court, especially with regard to the strengthening of the provisions of the American Convention, for the formation of an inter-American public order in matters of human rights.

THE CONSTRUCTION OF INTER-AMERICAN PUBLIC ORDER BASED ON THE PROFILE OF MANDATORY JURISDICTION OF THE INTER-AMERICAN COURT

European public order reveals the essential requirements for the formation of fundamental values in society. The jurisprudential construction outlined by the European Court of Human Rights (ECtHR) established the conceptual pillars of European public order, so that the conditions for its formation and the establishment of its function in the European area for the protection of human rights were determined. The constitution of this public order based on common values has allowed the ECtHR to become a binding jurisdiction among States in matters of human rights.

In this regard, in order to consolidate itself as a mandatory jurisdiction, the ECtHR used the construction of human rights undertaken by the Inter-American Court, either through conventional texts (Convention on the Enforced Disappearance of Persons) or through the use of the grounds contained in its judgments (especially the concept of forced disappearance undertaken in the Velásquez Rodríguez vs. Honduras case).

This aspect demonstrates not only the jurisprudential dialogue between the Courts belonging to the regional systems for the protection of human rights[38], which strengthens the ECtHR as a mandatory jurisdiction. It also reveals that the material content developed by the Inter-American Court of Human Rights is useful and effective – including for another regional system – credentials that also qualify the Inter-American Court as a mandatory jurisdiction in matters of the protection of human rights.

[37] CANÇADO TRINDADE, Antônio Augusto. *The Exercise of the International Judicial Function*: Memories of the Inter-American Court of Human Rights. 2nd ed. Belo Horizonte: Del Rey, 2003, p. 12-16.
[38] See, a esse respeito, GROPPI, Tania; COCCO-ORTU, Anna Maria Lecis. The reciprocal references between the European Court and the Inter-American Court of Human Rights: from influence to dialogue? *Revista de Derecho Público*, v. 80, p. 85-120, 2014, p. 91.

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However, there is a variation in interpretation among the regional protection systems, considered natural due to the genesis of the respective cultural formations. The human rights highlighted as being more relevant to the concept of European public order (life and protection from torture), although they are provided for in the American Convention, have different connotations, since the countries of the inter-American system have their peculiarities.

The construction of this inter-American public order – as in Europe – is based on the observance of human rights. As a rule, international instruments provide for the mechanisms – conditions of form and substance – in which the material content of human rights can be manifested[39]. The general norm from which this material conformation derives derives from article 29, item 2, of the Universal Declaration of Human Rights, whose document conforms the exercise of human rights to the requirements of morality, public order and the well-being of a democratic society.

In this context, public order at the inter-American level has two perspectives of analysis. The first concerns the procedural nature of the system, which refers to the formation of the process, the function of the parties and the nature of the sentence. In turn, the second perspective concerns the material meaning, that is, the placement of public order in the context of the idea of democratic society, in the realization of human rights.

From a procedural perspective, the Inter-American Commission plays an important role in public order in the protection of human rights, in competition and in collaboration for the implementation of reparations by States to victims[40]. In this procedural aspect, the duty to make reparation is an important element in inter-American public order. Even if the victim forgives the perpetrator of the damage, when it is in the public interest, the State is obliged to sanction the perpetrator of the crime, considering that the process involving human rights is in the interest of public order[41].

An interesting situation for this argument arises when the victim withdraws from the process before the sentence. In the case of human rights matters involving public order, is the Inter-American Court of Human Rights authorized to issue the sentence? There are 02

[39] PINTO, Mónica. The pro homine principle. Criteria of hermeneutics and guidelines for the regulation of human rights. In: *La aplicación de los tratados de derechos humanos por los tribunales locales*, Buenos Aires, editores del Puerto, 1997.
[40] GARCÍA RAMÍREZ, Sergio. The Jurisprudence of the Inter-American Court of Human Rights on Reparations. In: Inter-American Court. *The Inter-American Court of Human Rights* – A Quarter of a Century: 1979-2004. San José, Costa Rica: Inter-American Court, 2005, p. 17.
[41] GARCÍA RAMÍREZ, Sergio. The Jurisprudence of the Inter-American Court of Human Rights on Reparations. Ob. cit., 2005, p. 21.

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positions for discussion. At first, the Inter-American Court of Human Rights accepted the withdrawal of the lawsuit, but with reservations. With a different composition – presented as a more objective court[42] – in the case of Maqueda vs. Argentina, the Inter-American Court allowed the victim to withdraw the request made in the Inter-American System. The central issue of the case was the offense to Mr. Maqueda's right to liberty. With the agreement reached with the Argentine State, the Inter-American Court of Human Rights considered that there was no violation of the text or spirit of the American Convention[43] . However, even with the withdrawal of the case, the concern for human rights remained with the Inter-American Court. The Court reserved the right to reopen and continue the processing of the case if there are changes in the circumstances that led to the preparation of the agreement.

The current rules of the Inter-American Court of Human Rights retain some of these characteristics, but their wording gives the Court greater breadth of interpretation. That is, the recent provisions give the Inter-American Court of Human Rights a subjective character as a court and provide it with the construction of a top-down discourse in the field of human rights[44]. Article 61 of the Rules of Procedure[45] establishes that upon receipt of the request for withdrawal, the Inter-American Court of Human Rights must hear the opinion of all those involved in the proceeding, in order to decide on the merits of this request and its legal effects. It should be noted that the wording allows the Inter-American Court of Human Rights to reject the request for withdrawal.

Another point to be explored involving issues of public interest contained in the discourse of the Inter-American Court of Human Rights is the recognition of the request – formulated by the victim and presented by the Inter-American Commission – arising from the State responsible for the violation of human rights. Article 62 of the current regulation[46]

[42] The logic of the court being objective or subjective is described by Koskenniemi. Currently, the Inter-American Court of Human Rights presents itself as a subjective court, in which it approximates its judgments to the universal morality of humanity, in an exercise of utopia, with the descending discourse on human rights. However, in previous compositions, the more objective behavior of the Inter-American Court of Human Rights can be verified, with the aim of closing the discourse in accordance with the legal norm, in an ascending logic. In particular, the source of this argument can be found in KOSKENNIEMI, Martti. *From Apology to Utopia*. The Structure of International Legal Argument. Cambridge: Cambridge University Press, 2005, p. 30-38.
[43] HDI cut. *Case of Maqueda vs. Argentina*. Preliminary Exceptions. Resolution of 01/17/1995, § 27.
[44] KOSKENNIEMI, Martti. *From Apology to Utopia*. Ob. cit., 2005, p. 30-38.
[45] Article 61. Withdrawal of the case: "When the person who presented the case notifies the Court of its withdrawal, the latter will decide, after hearing the opinion of all those involved in the process on its merits and its legal effects."
[46] Article 62. Acknowledgment: "If the respondent communicates to the Court his acceptance of the facts or his total or partial acceptance of the claims contained in the submission of the case or in the written record of

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– as well as Article 61 – requires the hearing of the parties involved in the proceeding on the acceptance of the facts and the total or partial acceptance of the claims contained in the initial document, an opportunity in which the Inter-American Court of Human Rights on the merits and its legal effects.

The Inter-American Court of Human Rights considered this situation in the case of La Cantuta vs. Peru. In presenting its response, Peru partially acknowledged international responsibility for certain offenses raised by the IACHR, especially with regard to the forced disappearance of the victims described in its defense[47]. However, the Inter-American Court of Human Rights chose to proceed with the judgment, in order to form a precedent on the subject, to contribute to the preservation of historical memory, to obtain reparation for the families of the victims, and to contribute to preventing similar events from happening[48] again.

The continuity of the case to form the precedent – with the aim of consolidating the jurisprudence on the subject of forced disappearance of persons – demonstrates the top-down logic adopted by the Inter-American Court of Human Rights in its discourse on human rights. This not only makes the Inter-American Court of Human Rights increasingly a subjective court[49], which is closer to the utopia of universal morality belonging to humanity, with open discourse to be adapted in each concrete case, but also presents itself as an interpretative danger. With this danger, the Inter-American Court of Human

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the alleged victims or their representatives, the Court, after hearing the opinion of the other parties involved in the case, shall decide, at the appropriate procedural time, on their merits and their legal effects."

[47] As mentioned in the Peruvian State: "[i]t is evident, in the light of the investigations initiated as early as 1993, then suspended and subsequently resumed by the Public Prosecutor's Office of the Peruvian State, a body empowered by the Political Constitution of the State and the Organic Law of the Public Prosecutor's Office for that activity, and in the two criminal proceedings underway in the Judicial Branch, that the American Convention has been violated in Articles 4, 5, 3, 7, 8, and 25, respectively, in connection with Article 1(1) of the aforementioned treaty, by various acts and omissions of the Peruvian State over the course of 14 years." (Inter-American Court. *Case of La Cantuta v. Peru*. Merit, Reparações e Custas, Judgment of 29/11/2006. Series C n. 162, § 41).

[48] In this sense, it is extracted from the body of the Court of Human Rights that the Inter-American Court of Human Rights "considers that issuing a judgment in which the facts and all the elements of the merits of the case are determined, as well as the corresponding consequences, constitutes a way of contributing to the preservation of historical memory, of reparation for the relatives of the victims and, at the same time, to contribute to preventing similar events from happening again" (I/A Court H.R. *Case of La Cantuta v. Peru*. Ob. cit., Série C n. 162, § 57).

[49] The qualification of the Inter-American Court of Human Rights as a subjective court is not a linear process. Depending on the case and the composition of its judges, the Inter-American Court of Human Rights may render judgment of an objective nature. An example of this objectivity can be seen in the case of Mejía Idrovo v. Ecuador, in which the reparation for the damage established by the Court was objective and respected the legal approach taken by the domestic legal system in relation to the victim's position in the scale of power of the Armed Forces (IACHR Court. *Mejía Idrovo v. Ecuador case*. Preliminary Objections, Merits, Reparations and Costs. Judgment of 07/05/2011, Series C n. 228).

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Rights begins a process of isolation, in which its attempt to elaborate arguments directed to community values will seem to be a way of imposing a certain disguised imperialism, even if it is in human rights[50].

On the other hand, this exaggerated interpretation of human rights is relativized when it comes to procedural issues. Even if the State establishes the recognition of the facts, it must indicate whether this recognition is restricted to the merits only or whether it will cover reparations for the victims and their families, in addition to procedural costs. This is because if the recognition concerns only the merits of the matter, the Inter-American Court of Human Rights has a procedural duty to assess the continuity of the claim, as to reparations and procedural costs[51].

The friendly settlement of the lawsuits brought before the Inter-American Court of Human Rights is also an element of debate on the formation of inter-American public order. In this respect, the top-down logic of the legal discourse on human rights is not prevalent. Article 63 of the Rules of Procedure confers discretion on the Inter-American Court of Human Rights to assess the merits of the friendly settlement and its legal effects[52]. On the one hand, since it is a private interest, the agreement between the parties also belongs to public policy, so that, since it does not have the competence to suspend the judicial process, the Inter-American Court of Human Rights has the possibility of granting a period of time for the parties to reach an agreement[53].

On the other hand, when dealing with the public interest protected by the American Convention – such as the arbitrary detention and execution of a teacher, in the case of Benavides Cevallos vs. Ecuador[54] – the Inter-American Court of Human Rights adopted a different procedure to safeguard the public interest. Even with the agreement reached between the Ecuadorian State and the victim's relatives, which took place before the public

[50] KOSKENNIEMI, Martti. *From Apology to Utopia*. Ob. cit., 2005, p. 476. To contextualize Koskenniemi's critique, the research will use the terms interpretation or exacerbated defense of human rights to express the content of the criticism raised by the author with the use of "disguised imperalism".
[51] This position was outlined in an Inter-American Court of Human Rights. *"Mapiripan Massacre" vs. Colombia Case*. Judgment of 09/15/2005, Series C n. 134, § 66 and Inter-American Court. *Goiburú and others vs. Paraguay*. Merits, Reparations and Costs. Judgment of 09/22/2006, Series C n. 153, § 47.
[52] Article 63. Friendly settlement: "When the Commission, the victims or alleged victims, or their representatives, the respondent State, and, as the case may be, the requesting State in a case before the Court, inform the Court of the existence of a friendly settlement, agreement, or other fact suitable for resolving the dispute, the Court shall, at the appropriate procedural time, on its origin and its legal effects."
[53] This hypothesis can be verified in the Inter-American Court. *Garrido and Baigorria vs. Argentina case*. Reparations and Costs. Judgment of 08/27/1998, Series C n. 39, §§ 28-30.
[54] HDI cut. *Benavides Cevallo vs. Ecuador case*. Merits, Reparations and Costs. Judgment of 06/19/1998, Series C n. 38.

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hearing on the merits of the claim was held, the Inter-American Court of Human Rights decided to hold two hearings for different purposes.

This case demonstrates that the Court's downward purpose of protecting human rights through its discourse continues. However, it also contains elements of valuing the autonomy of the defendant State – which causes a coexistence between the community arguments of the descending logic with the liberal logic defended by the States. Thus, the objectivity of international law practiced by the Inter-American Court of Human Rights in this lawsuit is shown[55], which makes this demand the first case in which friendly settlements have developed within the Inter-American Court, forcing the Court to use instruments that have not been carried out before[56].

In relation to the material aspect, the top-down logic for the construction of the community argument on the discourse of human rights continues to be the key element[57]. The concept of public order is placed by the Inter-American Court of Human Rights as an element of legitimacy in the construction of its human rights jurisprudence. With the recognition of inter-American public order, the possibility of overcoming the will of the States Parties is highlighted. Thus, by recognizing the existence of an inter-American public order, the Inter-American Court asserts the need for the protection system to verify not only the formal conditions of the acts. The emphasis that the Court seeks concerns the nature and gravity of the alleged violations, the requirements and interests of justice, the specific circumstances surrounding the case, the actions and positions of the parties, with the aim that the judgment conforms to the purposes that the inter-American system seeks to fulfill[58].

For this reason, all acts that depend on the will of the States may be subject to filter by the Inter-American Court. Thus, the community argument is placed as prevailing over

[55] KOSKENNIEMI, Martti. *From Apology to Utopia*. Ob. cit., 2005, p. 30-38.
[56] SALGADO PESANTES, Hernán. The Friendly Settlement and the Inter-American Court of Human Rights. In: The Inter-American System for the Protection of Human Rights on the Threshold of the XXI Century – Seminar Report. Available at: <http://biblio.juridicas.unam.mx/libros/libro.htm?l=2454>. Acesso em: 10/10/2015, p. 100.
[57] KOSKENNIEMI, Martti. *From Apology to Utopia*. Ob. cit., 2005, p. 30-38.
[58] This argument can be verified in the following cases: Inter-American Court. *Kimel vs. Argentina case*. Merits, Reparations and Costs. Judgment of 05/02/2008, Series C n. 177, § 24 and Inter-American Court. *Case of Ticona Estrada y otros v. Bolivia*. Merits, Reparations and Costs. Judgment of 11/27/2008. Series C n. 191, § 21. This position is not dissonant from the ECtHR and the ICJ, which carry out this type of procedural and substantive analysis. What will be different in relation to the ECtHR will be the level of objectivity. While the ICJ is the most objective of the international courts in comparison, the Inter-American Court of Human Rights is the most subjective court, in terms of the openness of the argument (KOSKENNIEMI, Martti. *From Apology to Utopia*. Ob. cit., 2005, p. 30-38).

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the autonomy of States, even if the latter does not harm the human rights of the victims or their families. This is highlighted in Article 64 of the Rules of Procedure[59], which authorizes the Inter-American Court of Human Rights to proceed with the examination of the case – even if there is a withdrawal, recognition of the merits of the request or a friendly settlement between the parties – due to the Court's responsibility in matters of human rights. That is, with the prevalence of the community argument of descending logic, based on the universal morality of humanity, the Inter-American Court of Human Rights decides to proceed with the case, even if there are no valid procedural elements.

The purpose of this argumentative structure is to create precedents that can convert this top-down logic – founded on the universal values of the protection of humanity – into a bottom-up logic, which has as its perspective the justification in a source of international law[60]. With this, the Inter-American Court of Human Rights seeks legitimacy not only in the American Convention, but in its interpretation of the conventional text, through the systematic use of precedents.

As an example, the right to life is read from an evolutionary perspective, in the scope of ensuring the protection of dignified life[61], dignified death[62] and the life project[63]. On the other hand, protection against torture triggers different interpretative procedures, which reflect on the alteration of the constitutional process of the States[64]. This position makes it possible to argue that the development of the essential content of the right to life is connected to the prohibition of acts of torture. This is justified in view of the fact that,

[59] Article 64. Continuation of the examination of the case: "The Court, taking into account its responsibilities in the area of the protection of human rights, may decide to continue its examination of the case, even in the presence of the situations indicated in the preceding articles."
[60] KOSKENNIEMI, Martti. *From Apology to Utopia*. Ob. cit., 2005, p. 30-38.
[61] Specifically, it does not refer to the construction of the idea of human dignity itself, but of the right to life as access to conditions that guarantee a dignified existence. This understanding is dealt with in the Inter-American Court. *"Street Children" case (Villagran-Morales et al.) v. Guatemala*. Merit. Judgment of 11/19/1999. Series C No. 63, § 144.
[62] From the perspective of ensuring the proper treatment of the person's remains, according to the local culture. See, in particular, one of the first cases in which the issue is addressed: Inter-American Court. *Case of Bámaca Velásquez v. Guatemala*. Merit. Judgment of 11/25/2000. Series C n. 70, § 200.
[63] In the conception of the Inter-American Court, the life project is associated both with personal fulfillment and with the options that must be offered to the person, in order for him or her to achieve his or her personal development, in order to structure the essentiality of the life project for the development of a dignified life, with consequences for the recognition of the integrity and dignity of the human person (See, in particular, the Inter-American Court. *Loayza-Tamayo v. Peru case.* Reparations and Costs. Judgment of 11/27/1998. Series C n. 42, §§ 147-150 and Inter-American Court. *"*Street Children*" case (Villagran-Morales and others) v. Guatemala*. Merit. Judgment of 11/19/1999. Series C n. 63. Separate vote of Judge Cançado Trindade, § 8.
[64] The Inter-American Court of Human Rights inaugurated the debate on torture based on the Cantoral Benavides Case (IACHR Court. *Cantoral Benavides vs. Peru Case*. Merit. Judgment of 08/18/2000. Series C n. 69).

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when dignity is analyzed as an essential aspect of the right to life, the right not to be tortured becomes part of the essential content of the right to life, given that a dignified life implies respect for the moral, physical and mental integrity of the individual, in a true fusion of Articles 4 and 5 of the Convention[65].

In fact, in the material sense, the Inter-American Court of Human Rights constructs the concept of public order based on the assessment of human rights in each concrete case. Thus, the Inter-American Court of Human Rights uses the term public order to legitimize the development of the human right analyzed. Examples are the right of association[66], freedom of expression of the press in a democratic society[67], the relationship between human dignity and public order[68], regional control over emergency situations in other states[69], as well as the principle of equality and non-discrimination – considered a norm of *jus cogens* and the foundation of the construction of public [70]order. These cases present the way in which the Inter-American Court of Human Rights constructs its concept of public order. Even with the descending purpose, the legal discourse can be legitimized in the ascending format, due to the making of precedents containing the discussion of this theme.

From this perspective, the Inter-American Court of Human Rights argues that the international community and the values it represents constitute the foundation of the highest level of norms in the international order, so that this premise reinforces the protection of the duties that are erected around it[71]. For this reason, the development of

[65] SILVA, Alice Rocha da; ECHEVERRIA, Andrea de Quadros Dantas. Attempts to contain judicial activism of the Inter-American Court of Human Rights. *Brazilian Journal of Public Policies*, v. 5, n. 2, 2015.
[66] HDI cut. *Case of Baena Ricardo and others v. Panama*. Merits, Reparations and Costs. Judgment of 02/02/2001, Series C n. 72. In this case, there is an interesting conflict between the concept of public order defined by the Inter-American Court of Human Rights and the concept of public order sustained by the State in its constitutional legal system, in order to legitimize the legislative measures regulating the right of association questioned in the case.
[67] HDI cut. *Ivcher Bronstein vs. Peru*. Merits, Reparations and Costs. Judgment of 02/06/2001, Series C n. 74.
[68] MEDINA QUIROGA, Cecilia. The obligations of States under the American Convention on Human Rights. In: Inter-American Court. *The Inter-American Court of Human Rights* – A Quarter of a Century: 1979-2004. San José, Costa Rica: Inter-American Court, 2005, p. 210.
[69] MEDINA QUIROGA, Cecilia. Ob. cit., 2005, p. 269
[70] Inter-American Court of Human Rights. *Case of Yatama v. Nicaragua*. Exceções Preliminares. Merit, Reparations and Costs. Judgment of 23/06/2005, § 184: "The principle of equal and effective protection of the law and non-discrimination constitutes an outstanding feature in the system of protection of human rights enshrined in many international instruments and developed by international doctrine and jurisprudence. At the current stage in the evolution of international law, the fundamental principle of equality and non-discrimination has entered the domain of jus cogens. On it rests the legal scaffolding of national and international public order and permeates the entire legal system."
[71] HDI cut. *Goiburú and others vs. Paraguay*. Merits, Reparations and Costs. Judgment of 09/22/2006, §§ 131-132.

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the concept of inter-American public order allows the recognition of the Inter-American Court of Human Rights not only as a court responsible for the implementation of human rights at the level of States. It allows the jurisdiction of the Inter-American Court of Human Rights to contribute to the normative acquis[72] at the international level. There is the advance of the top-down purpose, but contained in bottom-up arguments, as well as the strengthening of the community argument to the detriment of the argument of autonomy of the States. This logic is now understood – and in part adopted – by other international courts, such as the ICC.

THE RECOGNITION OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS AS JURISDICTION BY THE INTERNATIONAL CRIMINAL COURT

An element that demonstrates the importance of the judgments of the Inter-American Court of Human Rights and the strengthening of its precedents as a source of international law is the jurisprudential dialogue presented by the ICC with the Inter-American Court. Article 21 of the Rome Statute of the ICC gives a singular relevance to the jurisprudence of other protection systems (such as the ECtHR and the Inter-American Court). Its item 3 establishes that the different legal sources outlined by Article 21 must be compatible with the human rights recognized by international law[73].

It should be noted that international criminal jurisdiction is inspired by other international courts. The circulation of precedents in the field of international criminal justice is not limited to the Inter-American Court. There is the importation of precedents from different jurisdictions, covering different legal systems. These are judicial dialogues,

[72] REZEK, Francisco. *Public International Law.* 15. ed. São Paulo: Saraiva, 2014.
[73] "Article 21 – Applicable Law
1. The Court shall apply:
a) Firstly, this Statute, the Constituent Elements of the Crime and the Procedural Regulations;
(b) second, where appropriate, the applicable treaties and principles and norms of international law, including the principles laid down in the international law of armed conflict;
(c) in the absence of these, the general principles of law which the Court derives from the domestic law of the various existing legal systems, including, where appropriate, the domestic law of the States normally exercising their jurisdiction over the crime, provided that those principles are not incompatible with this Statute, international law, or internationally recognized norms and standards.
2. The Court may apply principles and rules of law as they have already been interpreted by the Court in previous decisions.
3. The application and interpretation of the law under this Article shall be consistent with internationally recognized human rights, without discrimination on grounds such as gender as defined in paragraph 3 of Article 7, age, race, colour, religion or creed, political or other opinion, national origin, economic situation, birth or other condition."

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which emphasize interactions with courts whose jurisdiction is not hierarchical[74]. Thus, certain cases of the ICC former Yugoslavia[75] served as inspiration for the Almonacid Arellano case considered by the Inter-American Court[76]. The ICC-Rwanda[77], for example, is inspired by several precedents of the ECtHR to resolve the substantive issue[78]. Important precedents for the international level – such as the Handyside case – have been cited in several jurisdictions[79], including in the field of international criminal justice[80].

On the other hand, there are criticisms about the use of international precedents by international criminal justice. There was an increase in the use of external judicial precedents, but it was accompanied by inconsistencies and, in some cases, contradictions related to the merits of the judgment[81]. For this reason, the focus of the research is to verify how the judgments of the Inter-American Court of Human Rights are used by an international jurisdiction considered binding on States from the beginning of their respective binding.

In this regard, in relation to the Inter-American Court, provisions of the American Convention – such as Article 8, referring to the procedural guarantees of the accused related to the fundamental right to due process, and Article 7, relating to the fundamental right to liberty – played a prominent role during the first five years of the ICC's operation[82].

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[74] PEREIRA, Ruitemberg Nunes. *The Global Circulation of Precedents*: Outline of a Theory of Jurisprudential Transpositions in Human Rights Matters. 634 f. Thesis presented in the Master's and Doctorate Program in Law at the University Center of Brasília [UniCEUB], under the supervision of Prof. Marcelo Dias Varella. Brasília: UniCEUB, 2014, p. 439-440.

[75] In this regard, the following cases stand out: Prosecutor vs. Zoran Kupreskic, Mirjan Kupreskic, Vlatko Kupreskic, Drago Josipovic, Dragan Papic, Vladimir Santic, alias "Vlado" – Trial Chamber II – Done No. IT-95-16, of 01/14/2000; Prosecutor vs. Milorad Krnojelac – Trial Chamber II – Done no. IT-97-25, dated 03/15/2002 and Prosecutor vs. Anto Furundzija – Trial Chamber II – Done no. IT-95-17/1, dated 12/10/1998.

[76] HDI cut. *Case of Almonacid Arellano et al. v. Chile*. Preliminary Objections, Merits, Reparations and Costs. Judgment of 09/26/2006, Series C n. 15.

[77] TPI-Rwanda. Caso Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze vs. Procurador. Feito n. ICTR-99-52-A, from 03/12/2003.

[78] As representative of the controversy, see ECtHR. Zana v. Turkey. Petition No. 69/1996/688/880. Judgment on 11/25/1997.

[79] MILLER, Nathan. An international jurisprudence? The operation of “precedent” across international tribunals. *Leiden Journal of International Law*, v. 15, n. 03, p. 483-526, 2002.

[80] The following ICC cases Ex-Yugoslavia used the judicial transposition of the Handyside precedent: Done no. IT-02-54-R77.5-T (case against Ms. Florence Hartmann); Done no. IT-02-S4-R77. S-A (case against Ms. Florence Hartmann); Prosecutor v. Radoslav BRDANIN & Momir TALIC (Decision of 25/07/2000); Done no. IT-05-87-A, Attorney vs. Nikola SAINOVIC, Dragoljub OJDANIC, Nebojsa PAVKOVIC, Vladimir LAZAREVIC, Sreten LUKIC (Decision of 22/03/2011).

[81] BORDA, Aldo Zammit. Precedent in International Criminal Court and Tribunals. *Cambridge Journal of International and Comparative Law*, v. 2, n. 2, p. 287-313, 2013.

[82] OLÁSOLO ALONSO, Héctor; GALAIN PALERMO, Pablo. Jurisprudential dialogue on access, participation and reparation of victims between the inter-American system for the protection of human rights and the system for the application of international criminal law of the Rome Statute. In: FERRER MAC-GREGOR, Eduardo; HERRERA GARCÍA, Alfonso (coord.). *Jurisprudential Dialogue on Human Rights*: between Constitutional Courts and International Courts. Valencia, Spain: Tirant Lo Blanch, 2013, p. 1263.

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In fact, the ICC's use of the jurisprudence of the Inter-American Court of Human Rights is not restricted to these provisions of the American Convention. The ICC has been inspired by the jurisprudential development on the concept of full reparation, outlined by the Inter-American Court. This concept allows the Inter-American Court a wide margin of judicial discretion to determine the measures of reparation, taking into account the nature and consequences of the violation of the rights belonging to the victims[83]. This demonstrates the relevance of the Inter-American Court of Human Rights in the international scenario, especially through the use of its jurisprudence by another international court, such as the ICC.

Thus, the main highlight of the ICC in relation to the broad jurisprudence of the Inter-American Court of Human Rights in the matter of reparations refers to the Lubanga Case[84]. This fact is expressly supported by the concepts of reparation developed by the Aloeboetoe and others v. Suriname[85] and Velásquez Rodríguez vs. Honduras[86]. In this regard, in this Lubanga Case the best way to appreciate the significance of the impact of the Inter-American Court of Human Rights in terms of reparations is verified. Through the interface between the Courts, the ICC considers that the general concepts on reparations established by the jurisprudence of the Inter-American Court of Human Rights can be a useful guide for the development of the matter in its judgments[87].

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[83] Inter-American Court of Human Rights. *Case of Baena Ricardo et al. v. Panama*. Competência. Judgment of 28/11/2003, Series C n. 104, § 64: "This provision grants the Inter-American Court a wide margin of judicial discretion to determine the measures that will make it possible to repair the consequences of the violation."

[84] TPI. Situação na República Democrática do Congo no Caso Procurador vs. Thomas Lubanga Dyilo. Câmara de Julgamento I. Feito n. ICC-01/04-01/06, de 07/08/2012. Decisão estabelecendo os princípios e os procedimentos para aplicar as reparações, § 195: “In order to determine whether a suggested ‘indirect victim’ is to be included in the reparations scheme, the Court should determine whether there was a close personal relationship between the indirect and direct victim, for instance as exists between a child soldier and his or her parents. It is to be recognised that the concept of ‘family’ may have many cultural variations, and the Court ought to have regard to the applicable social and familial structures. In this context, the Court should take into account the widely accepted presumption that an individual is succeeded by his/her spouse and children.”.

[85] Inter-American Court of Human Rights. *Case of Aloeboetoe et al. v. Suriname*. Reparações e Custas. Sentença of 10/09/1993, Série C n. 15, § 62: "It is a common rule in most legislations that a person's successors are his children. It is also generally accepted that the spouse shares in the property acquired during the marriage and some laws also grant him or her a right of inheritance together with the children. If there are no children or spouse, the common private law recognizes the ascendants as heirs. These rules, generally accepted in the concert of nations, must be applied, at the discretion of the Court, in the present litigation in order to determine the successors of the victims with regard to compensation."

[86] HDI cut. *Velásquez Rodríguez vs. Honduras case*. Reparation and Costs. Judgment of 07/21/1989, Series C n. 07, § 13. In this paragraph, the Inter-American Court of Human Rights lists ten resolutive points, with the objective of seeking the data of the victim's relatives, as well as with the scope of knowing how the private legal system of Honduras works regarding the receipt of compensation and inheritance.

[87] TPI. Situação na República Democrática do Congo no Caso Procurador vs. Thomas Lubanga Dyilo. Câmara de Julgamento I. Feito n. ICC-01/04-01/06, de 07/08/2012. Ob. cit., § 186, nota n. 377: “While

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In this case, the different types of reparation (restitution, indemnity, rehabilitation, satisfaction, guarantees of non-repetition, among others) that are adopted by the Inter-American Court of Human Rights are listed. Thus, the ICC uses several precedents of the Inter-American Court of Human Rights to define the elements of reparation.

The first of them concerns the concept of *restitutio in integrum*, developed in the González and others vs. Mexico Case[88]. The ICC uses the concept of full reparation in this case of the Inter-American Court to reinforce the idea of the need to re-establish the previous situation and eliminate the effects produced by the violation of human rights. In addition to compensation as a way of compensating for the damage caused, reparations must be presented as a new way of transforming the situation of vulnerability, in order to achieve the restitutive and corrective effects. With this, it seeks to avoid the return of the structural situation of violence and discrimination[89].

The second situation presented by the ICC concerns the concept of compensation, taken from the "Las Dos Erres" Massacre Case vs. Guatemala[90], which must include all possible forms of damage and loss, including material, physical, and psychological

human rights courts such as the IACtHR and the ECtHR have the power to order reparations against States rather than individuals, general concepts relatmg to reparations which have been established through the jurisprudence of these courts can provide useful guidance to the ICC".

[88] Inter-American Court of Human Rights. *Case of González et alras ("Campo de Algodão") v. Mexico*. Exceção Preliminar, Mérito, Reparações e Custas. Judgment of 16/11/2009, Série C n. 205, § 450: "The Court recalls that the concept of "integral reparation" (restitutio in integrum) implies the restoration of the previous situation and the elimination of the effects that the violation produced, as well as compensation as compensation for the damage caused. However, taking into account the situation of structural discrimination in which the events that occurred in the instant case are framed and which was recognized by the State (...), the reparations must have a transformative vocation of that situation, in such a way that they have not only a restorative but also a corrective effect. In this sense, a restitution to the same structural situation of violence and discrimination is not admissible. Similarly, the Court recalls that the nature and amount of the reparation ordered depend on the damage caused in both the material and non-material levels. Reparations may not enrich or impoverish the victim or his or her family members, and must be directly related to the violations declared. One or more measures may repair a specific damage without them being considered a double reparation."

[89] ICC. Situation in the Democratic Republic of Congo in the Prosecutor vs. Thomas Lubanga Dyilo Case. Trial Chamber I. Done no. ICC-01/04-01/06, of 07/08/2012. Ob. cit., § 223, note n. 407.

[90] Inter-American Court of Human Rights. Case of Massacre of "Las Dos Erres" v. Guatemala. Exceção Preliminar, Mérito, Reparações e Custas.Sentença of 24/11/2009, Series C n. 211, § 226: "The Court considers that due to the denial of justice to the detriment of the victims of very serious human rights violations, such as a massacre, there are a variety of effects both in the individual and collective spheres. In this sense, it is evident that the victims of prolonged impunity suffer different effects in the search for justice, not only of a material nature, but also other suffering and damage of a psychological, physical and life project, as well as other possible alterations in their social relations and the dynamics of their families and communities. This Court has pointed out that these damages are intensified by the lack of support from the state authorities in the effective search and identification of the remains, and the impossibility of properly honoring their loved ones. In view of this, the Court has considered the need to grant various measures of reparation, in order to compensate the damages in a comprehensive manner, so that in addition to pecuniary compensation, the measures of satisfaction, restitution, rehabilitation and guarantees of non-repetition have special relevance due to the seriousness of the effects and the collective nature of the damages caused."

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damage.[91] Regarding the definition of physical damage, the ICC relied on the understanding of the Velásquez Rodríguez v. Honduras[92] to ascertain the effects and quantify the respective compensation[93].

Still on the issue related to damages, the International Criminal Court bases the construction of reparations on at least three themes developed by the Inter-American Court. The first of them refers to immaterial damage, which must have included in its concept physical, mental and emotional suffering[94]. Then, in the Amparo v. In Venezuela[95], the development of the concept of material damage is taken advantage of from the perspective of loss of profits, which includes the loss of job opportunities, the perception of remuneration, the individual ability to exercise a trade and savings[96].

Regarding material damage, the third theme is related to the loss of a chance, specifically the loss of opportunities, whether they refer to jobs, educational development and social benefits. Also in this concept, as outlined in the cases of Loayza Tamayo[97] and

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[91] TPI. Situação na República Democrática do Congo no Caso Procurador vs. Thomas Lubanga Dyilo. Câmara de Julgamento I. Feito n. ICC-01/04-01/06, de 07/08/2012. Ob. cit., § 229 e nota n. 412: “Consistent with internationally recognised human rights law, compensation requires a broad application, to encompass all forms of damage, loss and injury, including material, physical and psychological harm.”.

[92] HDI cut. *Velásquez Rodríguez vs. Honduras case*. Merit. Judgment of 07/29/1988, Series C n. 04, §§ 156, 175 and 187.

[93] ICC. Situation in the Democratic Republic of Congo in the Prosecutor vs. Thomas Lubanga Dyilo Case. Trial Chamber I. Done no. ICC-01/04-01/06, of 07/08/2012. Ob. cit., § 230, letter "a" and note n. 414.

[94] ICC. Situation in the Democratic Republic of Congo in the Prosecutor vs. Thomas Lubanga Dyilo Case. Trial Chamber I. Done no. ICC-01/04-01/06, of 07/08/2012. Ob. cit., § 230, letter "b" and note n. 415. The following cases were cited as references: Inter-American Court of Human Rights. *Garrido and Baigorria vs. Argentina case*. Reparations and Costs. Judgment of 08/27/1998, Series C n. 39, § 49; HDI cut. *Plan de Sánchez Massacre vs. Guatemala Case*. Repairs. Judgment of 11/19/2004, Series C n. 116, §§ 80-89 and 117; and HDI Court. *Case "Youth Reeducation Institute" vs. Paraguay*. Preliminary Objections, Merits, Reparations and Costs. Judgment of 09/02/2004, Series C n. 112, § 295.

[95] HDI cut. *Amparo vs. Venezuela case*. Reparations and Costs. Judgment of 09/14/1996, Series C n. 28, §§ 28-30.

[96] TPI. Situação na República Democrática do Congo no Caso Procurador vs. Thomas Lubanga Dyilo. Câmara de Julgamento I. Feito n. ICC-01/04-01/06, de 07/08/2012. Ob. cit., § 230, letra “c” e nota n. 416: “Material damage, including lost earnings and the opportunity to work; loss of, or damage to, property; unpaid wages or salaries; other forms of interference with an individual's ability to work; and the loss of savings.”.

[97] Inter-American Court of Human Rights. *Case of Loayza Tamayo v. Peru*. Reparações e Custas. Judgment of 27/11/1998, Série C n. 42, §§ 147-148: "With regard to the claim for damage to the 'life project', it should be noted that this concept has been the subject of analysis by recent doctrine and jurisprudence. It is a different notion of 'consequential damage' and 'loss of profit'. Certainly it does not correspond to the patrimonial affectation derived immediately and directly from the facts, as is the case in the 'consequential damage'. With regard to "loss of earnings", it should be noted that while it refers exclusively to the loss of future economic income, which can be quantified on the basis of certain measurable and objective indicators, the so-called 'life project' attends to the integral realization of the affected person, considering his or her vocation, aptitudes, circumstances, potentialities and aspirations. that allow him to reasonably set certain expectations and accede to them. The 'life project' is associated with the concept of personal fulfillment, which in turn is based on the options that the subject may have to lead his life and achieve the destiny he proposes. Strictly speaking, options are the expression and guarantee of freedom. It is difficult to say that a person is truly free if he lacks options to direct his existence and bring it to its natural culmination. These

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Cantoral Benavides[98] vs. Peru, the loss of social position and interference with fundamental rights are included, especially when it comes to the maintenance of discriminatory practices[99].

In this regard, as a highlight of the theme of reparations, another relevant point in the ICC judgments in relation to the use of the jurisprudential development of the Inter-American Court is the right to a life project[100]. For the ICC, the jurisprudence of the Inter-American Court of Human Rights is of high importance with respect to: (i) the need to compensate the victims' families for the immaterial damage suffered, either because they are successors or for their own damage; (ii) establish a "flexible" standard of proof in

options have, in themselves, a high existential value. Therefore, their cancellation or impairment implies the objective reduction of liberty and the loss of a value that cannot be alien to the observation of this Court."

[98] Inter-American Court of Human Rights. *Case of Cantoral Benavides v. Peru*. Reparações e Custas. Judgment of 03/12/2001, Série C n. 88, § 80: "The Court considers that the most suitable way to re-establish the life project of Luis Alberto Cantoral Benavides is for the State to provide him with a scholarship for higher education or university, in order to cover the costs of the professional career that the victim chooses 'as well as the latter's living expenses during the period of such studies' in a recognized academic quality chosen by mutual agreement between the victim and the State."

[99] TPI. Situação na República Democrática do Congo no Caso Procurador vs. Thomas Lubanga Dyilo. Câmara de Julgamento I. Feito n. ICC-01/04-01/06, de 07/08/2012. Ob. cit., § 230, letra “d” e nota n. 418: “Lost opportunities, including those relating to employment, education and social benefits; loss of status; and interference with an individual's legal rights (although the Court must ensure it does not perpetuate traditional or existing discriminatory practices, for instance on the basis of gender, in attempting to address these issues).”

[100] ICC. Situation in the Democratic Republic of Congo in the Prosecutor vs. Thomas Lubanga Dyilo Case. Trial Chamber I. Done no. ICC-01/04-01/06, of 18/04/2012. Observations on Reparation Issues Filed by the Office of the Public Defender for Victims, §§ 47-60. In particular, the reference to Paragraph 47: "None of existing forms of compensation is able to provide the former child soldiers with full reparations for the harms suffered as a result of the loss of their childhood. In this regard, the concept of "project of life" as developed by the international jurisprudence seems to be the most appropriate approach to be adopted by the Chamber for the purpose of determining a relevant form of compensation to be applied in respect of former child soldiers." The concept of damage to the life project was inspired by the Inter-American Court. *Case of Loayza Tamayo v. Peru*. Reparations and Costs. Ob. cit., § 147, as cited above.

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relation to the alleged damage, which allows inferences derived from circumstantial evidence,[101] and (iii) define measures of a symbolic nature[102].

Also in relation to the Loayza Tamayo case[103] (which also includes the Barrios Altos case[104]), the ICC refers to the cost of the process and other expert expenses, as well as those related to medical, psychological and social assistance services[105]. Still on medical treatment, to resolve the controversy over the treatment of HIV and AIDS, psychological and psychiatric care, as well as social assistance for trauma support, the ICC resorts to the cases of the Massacre of Mapiripan[106] and La Rochela[107] vs. Colombia, in addition to

[101] TPI. Situação na República Democrática do Congo no Caso Procurador vs. Thomas Lubanga Dyilo. Câmara de Julgamento I. Feito b. ICC-01/04-01/06, of 18/04/2012. Ob. cit., §§ 40-42. As references, the concepts contained in the Inter-American Court of Human Rights were used. *Case of Castillo-Petruzzi et al. v. Peru*. Merit, Reparations and Costs. Judgment of 30/05/1999, Series C n. 52, § 62; Inter-American Court of Human Rights. *Case of Loayza Tamayo v. Peru*. Reparações e Custas. Ob. cit., § 51; Inter-American Court of Human Rights. *Case of Paniagua Morales et al. ("Panel Blanca") v. Guatemala*. Merit. Judgment of 08/03/1998, Série C n. 37, § 72; Inter-American Court of Human Rights. *Case of Blake v. Guatemala*. Merit. Judgment of 24/01/1998, Series C n. 36, § 49; Inter-American Court of Human Rights. Case of Gangaram-Panday v. Suriname. Merit, Reparations and Costs. Judgment of 21/01/1994, Series C n. 16, § 49 and I/A Court H.R. Case of Cantoral-Benavides v. Peru. Merit. Judgment of 18/08/2000, Série C n. 69, § 47: "In addition to direct evidence, whether testimonial, expert or documentary, international tribunals - as well as domestic courts - may base their judgment on circumstantial evidence, indicia and presumptions, provided that solid conclusions can be drawn from them on the facts. In this regard, the Court has already stated that in the exercise of its jurisdictional function, in the case of obtaining and evaluating the evidence necessary for the decision of the cases before it, it may, in certain circumstances, use both circumstantial evidence and indications or presumptions as the basis for its pronouncements, when consistent conclusions can be drawn from them on the facts."

[102] TPI. Situação na República Democrática do Congo no Caso Procurador vs. Thomas Lubanga Dyilo. Câmara de Julgamento I. Feito b. ICC-01/04-01/06, of 18/04/2012. Ob. cit., §§ 108-110. As references, the Inter-American Court of Human Rights cases were mentioned. *Case of Velásquez Rodríguez v. Honduras*. Reparação e Custas. Ob. cit., § 36: "Moreover, the Court understands that the judgment on the merits of July 29, 1988 constitutes, in itself, a form of reparation and moral satisfaction of significance and importance for the relatives of the victims." *Case of Massacre Plan de Sánchez v. Guatemala*. Reparações. Ob. cit., § 93.

[103] HDI cut. *Case of Loayza Tamayo v. Peru*. Reparations and Costs. Ob. cit., § 129, letter "d".

[104] HDI cut. *Barrios Altos vs. Peru case*. Reparations and Costs. Judgment of 11/30/2001, Series C n. 87, § 42.

[105] TPI. Situação na República Democrática do Congo no Caso Procurador vs. Thomas Lubanga Dyilo. Câmara de Julgamento I. Feito n. ICC-01/04-01/06, de 07/08/2012. Ob. cit., § 230, letra “e” e nota n. 419: “Costs of legal or other relevant experts, medical services, psychological and social assistance, including, where relevant, help for boys and girls with HIV and Aids”.

[106] Inter-American Court of Human Rights. *Case of "Massacre de Mapiripan" v. Colômbia*. Judgment of 15/09/2005, Série C n. 134, § 312: "The Court considers that it is necessary to order a measure of reparation that seeks to reduce the psychological suffering of all the relatives of the executed or disappeared victims. In order to contribute to the reparation of these damages, the Court orders the obligation on the State to provide, free of charge and through the national health services, the appropriate treatment required by such persons, after expressing their consent for these purposes, as of the notification of this Judgment to those who are already identified, and from the moment they make their identification in the case of those who are not currently identified, and for as long as necessary, including the provision of medicines. When providing psychological treatment, the particular circumstances and needs of each person must be considered, so that they are provided with collective, family and individual treatments, according to what is agreed with each of them and after an individual evaluation."

[107] Inter-American Court of Human Rights. *Case of Massacre de La Rochela v. Colômbia*. Merit, Reparations and Costs. Judgment of 11/05/2007, § 302: "In order to contribute to the reparation of physical and psychological damages, the Court deems it necessary to establish the obligation on the State to provide, free

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the Massacre Plan de Sánchez vs. Guatemala case[108] to establish these concepts of rehabilitation[109]. In this regard, in addition to rehabilitation, the ICC develops jurisprudence on the reintegration into society of former child soldiers, who need to return to their communities in accordance with the reparation programs under development[110].

Finally, the ICC uses two other types of reparation inspired by the Inter-American Court. For the Criminal Court, the conviction and sentence of an international court are examples of reparation due to the meaning it has for the victims, families and communities in general[111]. On the other hand, the wide publication of the sentence of conviction can serve to reach public opinion about the criminal phenomenon and, from this scenario, constitute an important step towards its prevention[112].

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of charge and immediately, through its specialized health institutions, the medical and psychological treatment required by the relatives declared victims, and by the surviving victim Arturo Salgado Garzón. Medical physical health treatment must be provided by personnel and institutions specialized in the care of the ailments presented by such people to ensure that the most appropriate and effective treatment is provided. Psychological and psychiatric treatment must be provided by personnel and institutions specialized in the care of victims of acts of violence such as those that occurred in the present case. Such medical and psychological treatment must be provided for as long as necessary, include the supply of the medications that are required, and take into consideration the ailments of each of them after an individual evaluation."

[108] HDI cut. *Plan de Sánchez Massacre vs. Guatemala Case*. Repairs. Ob. cit., § 110.

[109] TPI. Situação na República Democrática do Congo no Caso Procurador vs. Thomas Lubanga Dyilo. Câmara de Julgamento I. Feito n. ICC-01/04-01/06, de 07/08/2012. Ob. cit., § 233 e nota n. 422: “Rehabilitation shall include the provision of medical services and healthcare (particularly in order to treat HIV and Aids); psychological, psychiatric and social assistance to support those suffering from grief and trauma; and any relevant legal and social services”.

[110] TPI. Situação na República Democrática do Congo no Caso Procurador vs. Thomas Lubanga Dyilo. Câmara de Julgamento I. Feito n. ICC-01/04-01/06, de 07/08/2012. Ob. cit., § 236 e nota n. 425: “The steps taken to rehabilitate and reintegrate former child soldiers may also include their local communities, to the extent that the reparations programmes are implemented where their communities are located. Programmes that have transformative objectives, however limited, can help prevent future victimisation, and symbolic reparations, such as commemorations and tributes, may also contribute to the process of rehabilitation”. Foi utilizado como referência o caso Corte IDH. *Caso Barrios Altos vs. Peru*. Reparações e Custas. Ob. cit., § 42.

[111] ICC. Situation in the Democratic Republic of Congo in the Prosecutor vs. Thomas Lubanga Dyilo Case. Trial Chamber I. Done no. ICC-01/04-01/06, of 07/08/2012. Ob. cit., § 237 and footnote 426: "The conviction and the sentence of the Court are examples of reparations, given they are likely to have significance for the victims, their families and communities". The HDI Cut-off cases were used as a parameter. *Velásquez Rodríguez vs. Honduras case*. Merit. Ob. cit., § 36; HDI. *Plan de Sánchez Massacre vs. Guatemala Case*. Repairs. Ob. cit., § 80; HDI cut. *Case of Juan Humberto Sánchez vs. Honduras*. Preliminary Objection, Merits, Reparations and Costs. Judgment of 06/07/2003, Series C n. 99, § 172 and Inter-American Court. *Tibi vs. Ecuador case*. Preliminary Objections, Merits, Reparations and Costs. Judgment of 07/09/2004, Series C n. 114, § 243: "International jurisprudence has repeatedly established that the sentence constitutes per se a form of reparation".

[112] TPI. Situação na República Democrática do Congo no Caso Procurador vs. Thomas Lubanga Dyilo. Câmara de Julgamento I. Feito n. ICC-01/04-01/06, de 07/08/2012. Ob. cit., § 238 e nota n. 427: “The wide publication of the Article 74 Decision may also serve to raise awareness about the conscription and enlistment of children under the age of 15 and their use to participate actively in the hostilities, and this step may help deter crimes of this kind”. O caso de inspiração foi Corte IDH. *Caso Radilla-Pacheco vs. México*. Exceções Preliminares, Mérito, Reparações e Custas. Sentença de 23/11/2009, Série C n. 209, §§ 345-347.

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It is noted, in line with Article 75 of the Rome Statute, that the jurisprudence of the Inter-American Court of Human Rights has had a significant impact on the way in which the ICC first shaped the material content of the victims' right to reparation. And this finding is relevant to the configuration of the Inter-American Court of Human Rights as an international jurisdiction, insofar as the ICC has given precedence – in its references – to the Inter-American Court, which attributes to the right of victims to reparation a significantly broader content than the jurisprudence of the ECtHR[113].

On the other hand, it is important to emphasize that it is not only in the matter of reparations that the ICC seeks inspiration from the Inter-American Court of Human Rights for the preparation of its judgments. At least three jurisprudential creations of the Inter-American Court of Human Rights served as inspiration for the ICC: (i) the right to truth; (ii) the right to justice; and (iii) the right to a life project.

Regarding the right to the truth, the ICC understands that the central core of the victim's interest lies in the determination of the facts, the identification of those responsible and the respective declaration of their responsibility. These three elements constitute the foundations of the right to truth for the ICC, with regard to victims of serious human rights violations[114]. In this respect, the central interest of victims in the search for the truth is only satisfied when: (i) those responsible for committing the crimes are found guilty and (ii) those who are not responsible for the crimes are acquitted, so that the search for those who are responsible can continue[115].

As explained in the judgment, the right to the truth included in these grounds has its origin in Articles 32[116] and 33[117] of Additional Protocol I to the Geneva Conventions of

[113] OLÁSOLO ALONSO, Héctor; GALAIN PALERMO, Pablo. Ob. cit., 2013, p. 1312.
[114] TPI. Situação na República Democrática do Congo no Caso Procurador vs. Germain Katanga e Mathieu Ngudjolo Chui. Câmara de Instrução I. Feito n. ICC-01/04-01/07, de 13/05/2008. Decisão sobre o conjunto de direitos processuais ligadas à situação processual da vítima na fase de Instrução do Caso, § 32: “In this regard, the Single Judge underlines that the victims' core interest in the determination of the facts, the identification of those responsible and the declaration of their responsibility is at the root of the well-established right to the truth for the victims of serious violations of human rights”.
[115] TPI. Situação na República Democrática do Congo no Caso Procurador vs. Germain Katanga e Mathieu Ngudjolo Chui. Câmara de Instrução I. Feito n. ICC-01/04-01/07, de 13/05/2008. Ob. cit., § 36: “In this regard, the Single Judge considers that the victims' central interest in the search for the truth can only be satisfied if (i) those responsible for perpetrating the crimes for which they suffered harm are declared guilty; and (ii) those not responsible for such crimes are acquitted, so that the search for those who are criminally liable can continue.”.
[116] "Article 32 – General Principle
In the implementation of the present Session, the activities of the High Contracting Parties, the Parties to the conflict and the international humanitarian organizations mentioned in the Conventions and in the present Protocol shall be motivated primarily by the right of families to know the fate of their members."
[117] "Article 33 – Missing persons

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1949, adopted on June 10, 1977, and was subsequently developed at the national and international levels, especially in cases of forced disappearance of persons.

In this regard, the role played by the Inter-American Court of Human Rights is relevant, especially in the cases of Bàmaca-Velásquez vs. Guatemala[118], Barrios Altos vs. Peru[119], Massacre of Mapiripan vs. Colombia, [120] and Almonacid-Arellano vs. Chile[121]. In the ECtHR, the right to truth was addressed in the case of Hugh Jordan v. United Kingdom[122].

As a result of this recognition by international human rights instruments, by the jurisprudence of regional protection systems, certain authors argue that the victims' right to

1. As soon as the circumstances permit, no later than the end of active hostilities, each Party to the conflict shall search for persons reported to have disappeared by an adverse Party. In order to facilitate such a search, this adverse Party shall transmit all pertinent information about such persons.

2. For the purpose of facilitating the obtaining of information - in accordance with the provisions of the preceding paragraph, each Party to the conflict shall, in respect of persons enjoying more favourable conditions by virtue of the Conventions or this Protocol.

(a) to record, in the manner provided for in Article 138 of the Fourth Convention, information on such persons who have been detained, imprisoned, or held in any other form of captivity for more than two weeks as a result of hostilities or occupation, or who have died during a period of detention;

(b) To the greatest extent possible, facilitate and, if necessary, carry out the search and recording of information relating to such persons if they have died in other circumstances as a result of hostilities or occupation.

3. Information on persons whose disappearance has been notified in accordance with paragraph 1, and requests for such information, shall be transmitted directly, or through the Protecting Power or the Central Tracing Agency of the International Committee of the Red Cross, or through the National Red Cross Societies (Red Crescent (Red Crescent Lion and Red Sun). Where information is not transmitted through the International Committee of the Red Cross and its Central Tracing Agency, each Party to the conflict shall ensure that such information is also provided to that Agency.

4. The Parties to the conflict shall endeavour to agree on arrangements to enable groups formed for the purpose of search to identify and recover the dead in areas of the battlefield; such provisions may provide, where appropriate, for such groups to be accompanied by personnel of the adverse Party when carrying out such missions in the areas controlled by the opposing Party. The personnel of such groups shall be respected and protected as long as they are exclusively engaged in such missions."

[118] Inter-American Court of Human Rights. *Case of Bàmaca Velásquez v. Guatemala*. Merit. Judgment of 25/11/2000, Series C n. 70, § 201: "In any case, in the circumstances of the present case, the right to the truth is subsumed by the right of the victim or his next of kin to obtain from the competent organs of the State the clarification of the violating facts and the corresponding responsibilities, through the investigation and prosecution provided for in Articles 8 and 25 of the Convention."

[119] HDI cut. *Barrios Altos vs. Peru case*. Merit. Judgment of 03/14/2001, Series C n. 75, § 48.

[120] Inter-American Court of Human Rights. *Case of "Massacre de Mapiripan" v. Colômbia*. Ob. cit., § 297: "The Court reiterates that the State is obliged to combat this situation of impunity by all available means, since it encourages the chronic repetition of human rights violations and the total defenselessness of the victims and their families, who have the right to know the truth of the facts. This right to the truth, when recognized and exercised in a specific situation, constitutes an important means of reparation. Therefore, in the present case, the right to the truth gives rise to an expectation of the victims, which the State must satisfy."

[121] HDI cut. *Almonacid-Arellano vs. Chile case*. Preliminary Objections, Merits, Reparations and Costs. Judgment of 09/26/2006, Series C n. 154, § 148.

[122] EDH Cut. *Hugh Jordan v. United Kingdom*. Petition no. 24746/94. Third Section. Merit. Judgment of 08/04/2001, § 93.

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the truth is presented as an emerging customary norm, as well as a general principle of international law[123].

Regarding the right to justice, the ICC considers that the interests of the victims go beyond determining what happened and identifying those responsible for the crime. Victims seek the certainty that there will be a certain degree of punishment for those responsible for the perpetration of the crimes that have suffered damage[124]. These interests – the nominal identification, punitive prosecution, prosecution and punishment of those responsible for the crime – constitute the foundations of the right to justice, applicable to victims of serious human rights violations, whose different regional protection systems have developed the constituent elements of this right[125]. In this regard, the ICC uses as a basis several judgments of the Inter-American Court, such as Velásquez-Rodríguez v. Honduras[126], Moiwana Community vs. Suriname[127], Vargas-Areco vs. Paraguay, [128] and La Cantuta vs. Peru[129].

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[123] A esse respeito, conferir a opinião de NAQVI, Yasmin. The right to the truth in international law: fact or fiction?. *International Review of the Red Cross*, v. 88, n. 862, p. 245-273, 2006.

[124] TPI. Situação na República Democrática do Congo no Caso Procurador vs. Germain Katanga e Mathieu Ngudjolo Chui. Câmara de Instrução I. Feito n. ICC-01/04-01/07, de 13/05/2008. Ob. cit., § 38: "(…) the interests of victims go beyond the determination of what happened and the identification of those responsible, and extend to securing a certain degree of punishment for those who are responsible for perpetrating the crimes for which they suffered harm".

[125] TPI. Situação na República Democrática do Congo no Caso Procurador vs. Germain Katanga e Mathieu Ngudjolo Chui. Câmara de Instrução I. Feito n. ICC-01/04-01/07, de 13/05/2008. Ob. cit., § 39: "These interests - namely the identification, prosecution and punishment of those who have victimised them by preventing their impunity - are at the root of the wellestablished right to justice for victims of serious violations of human rights, which international human rights bodies have differentiated from the victims' right to reparations."

[126] Inter-American Court of Human Rights. *Case of Velásquez Rodríguez v. Honduras*. Merit. Ob. cit., §§ 162-166 and 174: "The State has a legal duty to prevent, in a reasonable manner, violations of human rights, to seriously investigate violations committed within the scope of its jurisdiction with the means at its disposal in order to identify those responsible, to impose the appropriate sanctions and to ensure adequate reparation for the victim."

[127] HDI cut. *Moiwana Community vs. Suriname case*. Preliminary Objections, Merits, Reparations and Costs. Judgment of 06/15/2005, Series C n. 124, § 204.

[128] Inter-American Court of Human Rights. *Case of Vargas-Areco v. Paraguay*. Judgment of 26/09/2006, Série C n. 155, § 153: "This Court has invariably pointed out that the State has the duty to prevent and combat impunity, characterized as "the failure as a whole to investigate, prosecute, capture, prosecute and convict those responsible for violations of the rights protected by the American Convention." Impunity must be combated by all available legal means, taking into account, together with the need to do justice in the specific case, that it leads to the chronic repetition of human rights violations and the total defenselessness of the victims."

[129] Inter-American Court of Human Rights. *Case of La Cantuta v. Peru*. Merit, Reparations and Costs. Judgment of 29/11/2006, § 222: "The State is obliged to combat the situation of impunity that prevails in the present case by all available means, since it encourages the chronic repetition of human rights violations and the total defenselessness of the victims and their families, who have the right to know the full truth of the facts, including who are all responsible for them. This right to the truth, when recognized and exercised in a specific situation, constitutes an important means of reparation and gives rise to a fair expectation of the victims, which the State must satisfy."

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FINAL CONSIDERATIONS

From the set analyzed, it can be seen that the use of the jurisprudence of the Inter-American Court of Human Rights becomes an instrument of legitimacy of the ICC for the application of an international criminal law that seeks the protection of fundamental rights[130]. This demonstrates that in order to be used as a source of human rights at the international level, the Inter-American Court of Human Rights establishes itself in the international arena as a true jurisdiction, whose effects transcend the reality of the States Parties and contribute to the construction of the normative acquis at the international level[131].

It is important to highlight that the meaning of the ICC's inspiration in the Inter-American Court transcends the matter worked on in the trials. The ICC's use of the jurisprudence of the Inter-American Court of Human Rights is not justified only because precedents allow for influence and legitimacy for the resolution of disputes. The use of the precedents of the Inter-American Court demonstrates the methodological aspect, in which the jurisdiction of the Inter-American Court of Human Rights is strengthened in the international scenario because its jurisprudence is a normative source and is considered by another international court as part of the normative body to be used.

In turn, it was noticed with the research that the Inter-American Court, through its jurisprudence, sought to qualify itself as a mandatory jurisdiction in matters of human rights, both before States and at the international level.

It should be noted that in this process of transition from optional to mandatory jurisdiction, the validation of the transformation of the Inter-American Court of Human Rights did not occur only through its jurisprudence. There was, on the part of other courts (such as the ICC), the recognition of the Inter-American Court of Human Rights as an international jurisdiction. This occurred with the use of the precedents of the Inter-American Court of Human Rights by these courts, to justify their normative constructions and also to assert themselves as prominent jurisdictions in the international sphere.

In addition, the peculiarity of the Inter-American Court of Human Rights was observed with regard to the formation of inter-American public order. In the Inter-American System, two perspectives were identified to be analyzed. The procedural character of the system – with the active contribution of the IACHR Commission, with regard to the

[130] OLÁSOLO ALONSO, Héctor; GALAIN PALERMO, Pablo. Ob. cit., 2013, p. 1313.
[131] REZEK, Francisco. *Public International Law*. Ob. cit., 2014.

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formation of the process, the performance of the role of the parties – and the material sense, with the judgments of the Inter-American Court of Human Rights contextualizing human rights in a democratic society, are the aspects to be highlighted in its formation.

The nature of the Court of Human Rights as a subjective court was observed. When it came to discussions about the content of human rights, even with the State's recognition of the violation – which occurred in the case of La Cantuta v. Peru – the Inter-American Court of Human Rights continued with the judgment on the merits, with the aim of establishing a precedent on the subject. The justification would be in the contribution to the preservation of historical memory, to prevent similar facts from happening again and to obtain reparation for the families of the victims. This continuity of the case to form the precedent demonstrated the downward argument adopted by the Inter-American Court of Human Rights in its discourse on human rights, which confirms the nature of a subjective court. With this scenario, it approaches the utopia of universal morality belonging to humanity, with open discourse – to be adapted in each concrete case – but it also presents itself as an interpretative danger. With this danger, the Inter-American Court of Human Rights begins a process of isolation, in which its attempt to elaborate arguments directed to community values will seem to be a way of imposing a certain disguised imperialism, even if it is in human rights.

This argumentative structure demonstrates the change in perspective of the Inter-American Court of Human Rights, which ceased to emphasize monetary reparations and began to concern itself with the material aspects of human rights, an indication that its "active" development has established it as a "mandatory" jurisdiction in international law.

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