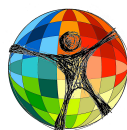


Contexts of Structural Discrimination in the Jurisprudence of the Inter- American Court of Human Rights



INTERNATIONAL HUMAN RIGHTS INTERNSHIP WORKING PAPER SERIES



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Introduction

On August 9, 2008, Fredy Villanueva, an 18 year-old Montrealer of Honduran origin, was shot dead by a police officer. His death could have been considered as an isolated incident. However, it was not. The immediate strong reactions against the police in Montreal Nord's neighbourhood, one of the poorest and more multi-ethnic of Montreal, and subsequent investigations,¹ have revealed a pattern of racial profiling and systemic discrimination against young Black, and more generally racialized youths in Quebec.

The relevance of these findings is not limited to racialized youths nor to Montreal: it can find echoes in other parts of the world, and regarding other segments of societies. Indeed, human rights violations are sometimes the manifestations of broader situations of violence or discrimination against certain groups of people, traditionally discriminated against or under-protected. Latin and Central America, being "a region of failing democracies and persistent violations of rights",² provides examples of such situations. In this essay, our objective is to identify how the Inter-American Court of Human Rights (the "IACHR" or, more simply, "the Court") has taken into account and addressed contexts of structural discrimination in its decisions. The IACHR is well-known for its creative and transformative reparations, which stand out in comparison with the narrow approach to remedies of the European Court of Human Rights (ECHR).³

In this paper, the concept of structural (or systemic) discrimination describes "legal rules, policies, practices or predominant cultural attitudes [...] which create relative

¹ See among others Commission des droits de la personne et de la jeunesse, "Racial Profiling and Systemic Discrimination of Racialized Youth. Report of the Consultation on Racial Profiling and Its Consequences" (Document adopted at the 566th session of the Commission, Montreal, 2011).

² Fernando Basch *et al*, "The Effectiveness of the Inter-American System of Human Rights Protection: A Quantitative Approach to its Functioning and Compliance With its Decisions" (2010) 7: 12 International Journal on Human Rights (English version) 9 [Basch].

³ Dinah Shelton, *Remedies in International Human Rights Law* (Oxford: Oxford University Press, 2006) at 17-22.

disadvantages for some groups, and privileges for other groups.”⁴ Structural discrimination is often deeply entrenched in social behaviour and organization, often involving unchallenged or indirect discrimination.⁵ But it “may also involve direct discrimination that is both widely tolerated and institutionalized.”⁶

An analysis of the recent case-law of the Court indicates that the Court has been asked to intervene in order to protect the rights of persons belonging to traditionally marginalized groups,⁷ who have often suffered from structural discrimination or inequalities. Through the analysis of four recent cases (*Yean and Bosico*, *Xákmok Kásek*, *Cotton Field*, and *Atala*), each one focusing on a traditionally marginalized group (migrants, indigenous people, women, and sexual minorities), we will show that the IACHR has tried to contribute to the transformation of structural discrimination or violence through various kinds of remedies. Beyond individual reparations (through monetary and non-monetary compensations, symbolic reparations and restitution of rights), the Court has adopted guarantees of non-repetition, which aim at preventing further violations of rights, and bringing systemic changes in the States’ institutions, laws, policies, and in societies.⁸ Such remedies include training public officers, introducing legal reforms, creating or reforming institutions, and raising social awareness. These remedies are the main tools through which the Court has been trying to transform structural situations of discrimination so far.⁹

⁴ Committee on Economic, Social and Cultural Rights, General Comment n°20, “Non-Discrimination in Economic, Social and Cultural Rights (art.2, para 2)”, 42nd sess, 2009, E/C.12/GC/20 at para 12 [CESCR, *General Comment n°20*].

⁵ *Ibid.*

⁶ Colleen Sheppard, *Inclusive Equality. The Relational Dimensions of Systemic Discrimination in Canada* (Montreal: McGill-Queen's University Press, 2010) at 6.

⁷ In this essay, we will not cover how the IACHR has approached the situation of persons with disabilities, but we refer the reader to the very recent *Case of Furlan and Family v Argentina. Preliminary Objections, Merits, Reparations and Costs*. Judgment of August 31, 2012. Ser C No 246.

⁸ Reparations must have a causal nexus with the facts of the case, the violations declared, the damages verified and the measures requested to repair the consequences of those damages. *Case of Atala Riffo and daughters v Chile. Merits, Reparations and Costs*. Judgment of February 24, 2012 Ser C No 239 at para 242.

⁹ Basch, *supra* note 2 at 12-14.

Although envisioned with a systemic focus, the impacts of the Court's remedies have generally been limited to bringing superficial changes rather than deep structural and societal ones. In addition, the effectiveness of remedies is contingent on State compliance and non-compliance is widespread regarding transformative court orders. Given the current limited scope and impacts of the Court's "systemic" remedies, we will conclude that the current approach of the IACHR is insufficient to effectively uproot structural discrimination. In these circumstances, we will briefly explore other avenues through which the Court could increase its contribution to the eradication of structural discrimination, including the Court's support to the work carried out by local actors through damage orders, as domestic NGOs are probably better placed to infuse systemic changes in the society than an international body.

We will first analyze the factors leading to systemic discrimination and its different forms or manifestations. We will then proceed to the analysis of the four above-mentioned cases, and show the range of systemic remedies adopted by the Court in contexts involving structural discrimination. Then, we will evaluate how transformative are the Court's guarantees of non-repetition, and even more importantly, assess their effectiveness. We will conclude on the need for a more concerted action to ensure transformative changes in situations of structural discrimination.

Part I. Factors and Modes of Structural Discrimination

In 1978, in its *Declaration on Race and Racial Prejudice*, UNESCO noted that

[R]acism, racial discrimination, colonialism and apartheid continue to afflict the world in ever-changing forms, as a result both of the continuation of legislative provisions and government and administrative practices contrary to the principles of human rights and also of the continued existence of political and social structures, and of relationships and attitudes, characterized by injustice and contempt for human beings and leading to the exclusion, humiliation and exploitation, or to the forced assimilation, of the members of disadvantaged groups [emphasis added].¹⁰

Thirty-five years later, unfortunately, this finding has kept its relevance. Still today, our societies are built around dominant norms, which tend to exclude or marginalize some groups and individuals. The dominant norms at the origin of the exclusion, which often materialize themselves in the domination of one group over another (or others), can derive – among other things – from a colonial past¹¹ or post-colonialism,¹² patriarchal values, and received ideas about some peoples' proper (eg. subordinate) place in society.¹³ As Colleen

¹⁰ UNESCO, *Declaration on race and racial prejudice*, 27 November 1978.

¹¹ According to Martín Hopenhayn, the Colombian society today resonates strongly with the social stratification of the colonial era during which the Afro-descendent population was at the very bottom of the hierarchy. Today, these groups have the worst economic and social indicators in the region, enjoy very little cultural recognition and have a limited access to education, employment, property and more broadly to public services. *Decision T-1090/05*, Constitutional Court of Colombia, October 26 2005 at 6.3.1 [*Decision T-1090/05*].

¹² In France, there is a distinction between immigrants from non-colonial countries and immigrants from post-colonial countries. While the first generations of immigrants seem to be all regarded as suspicious, only children of post-colonial immigrants keep the stigmata being called of "second or third generation" immigrants, and continue to be discriminated against through direct, structural and cultural violence, for being "different", and for not willing to "integrate". Pierre Tevanian and Saïd Bouamama, "Un racisme post-colonial. Rencontre-débat avec le Collectif Les mots sont importants" *Les Mots sont Importants.net* (22 February 2011) online: LMSI.net <<http://lmsi.net/Un-racisme-post-colonial>> [Tevanian].

¹³ Adelle Blackett, "Racial inequalities, labour rights, and decent work", Presentation at the United Nations Forum on Minority Issues: Minorities and Effective Participation in Economic Life, Human Rights Council, Forum on Minority Issues, Geneva, 14 December 2010 at 3. Blackett refers among other groups to racialized workers in Canada.

Sheppard explains, “[c]urrent inequalities are deeply tied to histories of exclusion and prejudice.”¹⁴

Overcoming historical dominations, ingrained discriminatory attitudes and stereotyped conceptions of individuals’ roles in the society, require deep societal and institutional changes. Calling for integration is not sufficient, as structural discrimination is often found in institutions themselves.¹⁵ As the Constitutional Court of Colombia described it, “systemic discrimination is often embedded in the normative language, in institutional and social practices, often to the point of being indistinguishable from the institutions themselves and the way of life of the community.”¹⁶

Johan Galtung’s concepts of direct, structural and cultural violence are useful to understand the pervasive and multi-layered dimensions and impacts of structural discrimination.¹⁷ Direct discrimination, as direct violence, is often the most visible part of broader context of discrimination. It can materialize itself through discriminatory acts against peoples on the basis of one or several prohibited grounds of discrimination.¹⁸

¹⁴ Colleen Sheppard, “Challenging Systemic Racism in Canada” in E Kennedy-Dubourdieu, ed, *Race and Inequality: World Perspectives on Affirmative Action* (Burlington, Vermont: Ashgate Publishing, 2000) at 43.

¹⁵ Tevanian, *supra* note 12:

[L]’intégration, telle qu’elle est généralement pensée, parlée et traduite en termes de politiques publiques, est moins souvent une alternative à la discrimination raciste qu’une formulation sublimée ou un instrument de légitimation de cette discrimination : si le racisme est le refus de l’égalité, l’intégration est précisément le mot d’ordre qui permet d’évacuer la question égalitaire. En effet, si être « intégré », être « inclus », avoir « sa place » vaut mieux que d’être purement et simplement exclu, ces termes ne disent pas de quelle place il s’agit. Un serviteur a « sa place », il est inclus et intégré - il n’en demeure pas moins subordonné, méprisé et exploité. Et de fait, dans de très nombreux contextes, parler de « problèmes d’intégration » sert essentiellement à ne pas prononcer d’autres mots, comme domination, discrimination ou inégalité (emphasis added).

¹⁶ *Decision T- 1090/05*, *supra* note 11 (free translation of the author).

¹⁷ Johan Galtung, “Cultural Violence” (1990) 27: 3 *Journal of Peace Research* 291.

¹⁸ The *American Convention on Human Rights* (“American Convention”, or “the Convention”) lists the prohibited grounds of discrimination in its Article 1:

Article 1. Obligation to Respect Rights

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

American Convention on Human Rights (Pact of San Jose), 22 November 1969, OAS TS 36 (entered into force 18 July 1978).

Discrimination or violence can also be indirect, through neutral laws or treatments that disproportionately impact the members of certain groups, even though on their face there is no sign of discrimination.¹⁹

Both direct and indirect discrimination is often reinforced by what Galtung calls “cultural violence,” which justifies the differential treatments given to certain groups in societies, through stereotypes and misconceptions about those groups of people. In Colombia for example, cultural violence against the Afro-descendent population is conveyed through offensive stereotypes against the Black people used in the media, arts, popular culture. It is also reflected in public policies as well as in the way the state allocates its limited resources.²⁰

Having clarified the concept of structural discrimination, let’s now turn to four recent cases of the Inter-American Court of Human Rights, where human rights violations were linked to a broader context of structural discrimination, and analyze how the Court has approached this broader context in its jurisprudence.

¹⁹ One can think of the famous Anatole France’s quote mocking how “[t]he law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.” Anatole France, *The Red Lily (Le Lys Rouge)*, 1894, chapter 7.

²⁰ Inter-American Commission of Human Rights, “Tercer informe sobre la situación de los derechos humanos en Colombia”, 1999, OEA/Ser.L/V/II.102, chapter 11. The report indicated that government investments in infrastructure, health, education, housing and welfare have been very low in areas inhabited mainly by Afro-Colombians. See also *Decision T-1090/05*, *supra* note 11 at 6.3.2.

Part II. The IACHR's Approach to Structural Discrimination in Cases Involving Migrants, Indigenous Peoples, Women, and Sexual Minorities

Latin America is a region that has suffered through many tragic events and eras, such as slavery and the eradication of its Indigenous peoples, which are clear examples of structural discrimination and violence. Today, the continent continues to face many situations of systemic discrimination and violence, in particular regarding Indigenous peoples, but also regarding other traditionally marginalized groups such as migrants, women, and sexual minorities. Has the IACHR, as a last resort Court for human rights violations in the region, taken into account the broader contexts of discrimination when deciding over individual cases? The analysis of the four cases below will highlight the Court's contextual understanding of the human rights violations, and provide examples of its systemic remedies and contextual interpretations of the American Convention, which aim at contributing to rectify situations of structural discrimination.

Case of the *Girls Yean and Bosico v Dominican Republic*

Migrants, as outsiders, have suffered differential treatments since immemorial times. In *Yean and Bosico*²¹, the first case against the Dominican Republic to deal with Haitian migrants, the IACHR was concerned with one particular aspect of the systemic discrimination against persons of Haitian origin in the Dominican Republic. In this case, the Court condemned the State's refusal to issue birth certificates for children who were born in the Dominican Republic but of Haitian origin. Although the words "systemic" or "structural" were not used in the decision, the Court did take into account the broader situation of children of Haitian origin, in particular through the remedies it ordered.

²¹ *Case of the Girls Yean and Bosico v Dominican Republic*. Judgment of September 8, 2005. Ser C No 130 [*Yean and Bosico*].

Yean and Bosico are two girls whose mothers are Dominicans but whose fathers are Haitians. The State, through its Registry Office authorities, had refused to issue birth certificates for the children, even though they were born within the State's territory, and the Constitution of the Dominican Republic posits a right to nationality based on the place of birth. Consequently, the children remained stateless for more than four years and four months. This situation placed them in a situation of extreme vulnerability, as regards the exercise and enjoyment of their rights. The oldest child was unable to attend school for one year owing to the lack of an identity document.²²

The violation of the right to non-discrimination in this case arose from the arbitrary and discriminatory application of the law in the late registration of birth of Yean and Bosico, by applying requirements that differed from those requisite for children under 13 years of age in order to obtain nationality.²³ However, the Court acknowledged that this harm took place in the broader context of vulnerability of the Haitian population and Dominicans of Haitian origin in the Dominican Republic, to which the victims belong.²⁴

To establish the context of structural discrimination against Haitians and Dominicans of Haitian origin in the Dominican Republic, the Court took into consideration, among other things, reports from the UN Committee on the Rights of the Child and the UN Commission on Human Rights, which expressed deep concern at the discrimination against children of Haitian origin born in the territory of the Dominican Republic or belonging to Haitian migrant families. These reports highlighted this population's limited access to housing, education and health services; they also noted that racism "is evident towards Haitians or those of Haitian origin whose families have, at times, been established for several generations and who

²² *Ibid* at paras 3, 166, 174.

²³ *Ibid* at paras 164-65 and 174.

²⁴ *Ibid* at para 168.

continue entering the country.” They alerted that very few Haitians, even those who have been living in the Dominican Republic since 1957, have obtained naturalization.²⁵

Although it was clear that the ethnic/national origin was at the origin of the discrimination,²⁶ the Court reaffirmed the right to non-discrimination from the point of view of migratory status. Having established that the right to non-discrimination applies to the right to citizenship,²⁷ the Court specified that “the obligation to respect and ensure the principle of the right to equal protection and non-discrimination is irrespective of a person’s migratory status in a State.”²⁸ In these circumstances, the Court declared how the right to nationality should be approached for children of migrants in the Dominican Republic, who, *de facto*, are mostly of Haitian origin. It considered that:

- (a) The migratory status of a person cannot be a condition for the State to grant nationality, because migratory status can never constitute a justification for depriving a person of the right to nationality or the enjoyment and exercise of his rights;
- (b) The migratory status of a person is not transmitted to the children, and
- (c) The fact that a person has been born on the territory of a State is the only fact that needs to be proved for the acquisition of nationality, in the case of those persons who would not have the right to another nationality if they did not acquire that of the State where they were born.²⁹

²⁵ *Ibid* at paras 169-70.

²⁶ *Ibid* at para 109(9). Indeed, “[o]wing to their Haitian ancestry, the children Dilcia Yean and Violeta Bosico, form part of a vulnerable social group in the Dominican Republic.”

²⁷ *Ibid* at para 141: the principle of the equal and effective protection of the law and non-discrimination determines that, “when regulating mechanisms for granting nationality, States must abstain from producing regulations that are discriminatory or have discriminatory effects on certain groups of population when exercising their rights [emphasis added].”

²⁸ *Ibid* at para 155 [emphasis added].

²⁹ *Ibid* at para 156 [emphasis added].

The Court also reminded the Dominican Republic that it is part of the State's obligation to prevent the creation of statelessness to ensure that children who are born on its territory can get a birth certificate and are not deprived arbitrarily from the right to nationality, no matter their origins or their parents' migratory status.³⁰

The Court's interpretation regarding the right to non-discrimination, that it should apply irrespectively of a person's migratory status within a state, could be used to claim equality of treatment in other areas of migrants' lives, in the Dominican Republic as well as in all Member States countries.³¹ This interpretation could have a clear transformative impact if argued in domestic litigation.

Guarantees of non-repetition

In addition to the potentially transformative interpretation given by the Court to the right to non-discrimination, the Court ordered guarantees of non-repetition in *Yean and Bosico* which aimed at modifying the norms of the late birth registration in the civil status registry "within a reasonable time," in order to eliminate the arbitrariness that led to the children's statelessness, and make the late birth registration accessible, simple and efficient.³² The Court asked that specific attention be paid to the "particularly vulnerable situation of Dominican children of Haitian origin."³³ These modifications should be accompanied by the

³⁰ *Ibid* at para 142.

States have the obligation not to adopt practices or laws concerning the granting of nationality, the application of which fosters an increase in the number of stateless persons. This condition arises from the lack of a nationality, when an individual does not qualify to receive this under the State's laws, owing to arbitrary deprivation or the granting of a nationality that, in actual fact, is not effective. Statelessness deprives an individual of the possibility of enjoying civil and political rights and places him in a condition of extreme vulnerability.

³¹ To the exception of the rights which are strictly limited to citizens in the law, such as the right to vote in Canada.

³² *Yean and Bosico*, *supra* note 21 at para 239.

³³ *Ibid* at paras 236-37, 240. The Court referred to the UN Committee on the Rights of the Child which recommended that the Dominican Republic "strengthen and increase its measures to ensure the immediate registration of the birth of all children", giving "special emphasis on the registration of children belonging to the most vulnerable groups, including children of Haitian origin or belonging to Haitian migrant families."

adoption of “permanent measures” to facilitate the early registration of children, “irrespective of their parentage or origin,” and the implementation of “a program to provide training on human rights, with special emphasis on the right to equal protection and non-discrimination, to the State officials responsible for registering births.”³⁴

Although the Court acknowledged the structural inequality endured by persons of Haitian origin in the Dominican Republic, who are seen as “transitory” migrants even though they have lived and worked in the country for several years, its remedies have very limited transformative potential. The Court’s orders aimed at eradicating discriminatory practices against persons of Haitian origin in civil births registration only, which is a narrow field of administrative law. Therefore, the Court tackled only the direct discrimination aspect, and did not consider remedying the indirect and cultural aspects of the discrimination suffered by persons of Haitian origin in the Dominican Republic.

Case of the *Xákmok Kásek Indigenous Community v Paraguay*

While the migratory status has often prompted discrimination well beyond the Dominican Republic, race has also been a factor of historical discrimination in many countries, in particular regarding indigenous peoples. *Xákmok Kásek*³⁵ is the most recent case of the IACHR against the Republic of Paraguay, and the third case dealing with the rights of Indigenous peoples in this country.³⁶ It relates to the State’s international responsibility for the failure to ensure the right of the *Xákmok Kásek Indigenous Community* and its members’ to their ancestral property. Indeed, the actions concerning the territorial

³⁴ *Ibid* at paras 241-42.

³⁵ *Xákmok Kásek Indigenous Community v Paraguay. Merits, Reparations and Costs*. Judgment of August 24, 2010. Ser C No 214 [*Xákmok Kásek*].

³⁶ *Case of the Yakye Axa Indigenous Community v Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Ser C No 125; *Case of the Sawhoyamaya Indigenous Community v Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Ser C No 146.

claims of the Community were being processed since 1990 and in 2010 “had not yet been decided satisfactorily.”³⁷

The facts chapter of the decision starts with the historical event of the colonization of the Chaco region in Paraguay. The starting point of the historical background in the decision indicates that the Court understood that the situation of the Xákmok Kásek Community at the time of the judgment resulted from decades of increasing exclusion of indigenous peoples from their traditional lands, due to the increase of private property and the multiplication of impediments barring access to and use of their ancestral lands. The Court mentioned a shocking injustice that happened when the State divided and sold two-thirds of the Chaco region, exclusively inhabited by Indigenous peoples at the time, without their knowledge and consent.³⁸ Since the privatization of the Chaco, indigenous communities have been kept in a vulnerable situation with regard to food, medicine and sanitation, continuously threatening the Xákmok Kásek Community’s integrity and the survival of its members.³⁹

Violation of the right to equality and non-discrimination

While the Inter-American Commission on Human Rights (“the Commission”) and the representatives expressly requested the Court to declare that there was a situation of systemic discrimination against Indigenous peoples in Paraguay,⁴⁰ the Court did not label the discrimination with the terms of “structural” or “systemic”. However, it did acknowledge that the members of the Community were in a situation of “extreme and special vulnerability”,⁴¹

³⁷ *Xákmok Kásek*, *supra* note 35 at para 2.

³⁸ *Ibid* at para 58.

³⁹ *Ibid* at para 2.

⁴⁰ *Ibid* at paras 265-66.

⁴¹ *Ibid* at para 273.

and that this situation resulted from the conjunction of various institutional, administrative and ideological factors. The Court observed the lack of adequate and effective remedies that protect the rights of the indigenous peoples in practice; the limited presence of the State institutions that are obliged to provide supplies and services to the members of the Community, particularly food, water, health care and education; the fact that the declaration of a private nature reserve on part of the land reclaimed by the Community did not take into account its territorial claim, and that the Community was not consulted about this declaration; and finally the prevalence of a vision of property that grants greater protection to the private owners over the indigenous peoples' territorial claims, which fails to recognize their cultural identity and threaten their physical subsistence.⁴²

These elements led the Court to conclude that there was “*de facto* discrimination against the members of the Xákmok Kásek Community, which has been marginalized in the enjoyment of [its] rights” and that “it is evident that the State has not taken the necessary positive measures to reverse that exclusion”, as requires the positive side of Article 1.1 of the Convention.

Reparations

Beyond ordering the State to address the immediate and very basic needs of the Community and to establish a permanent health clinic with the necessary medicines and supplies to provide adequate health care to the Community,⁴³ the Court aimed at infusing structural changes in the relationships between the State and the indigenous communities in Paraguay. The Court imposed a shift in the criteria used by the State's authorities when deciding land claims and, by implication, expropriation cases. While State authorities had decided expropriation cases so far by considering whether the land that was claimed was

⁴² *Ibid.*

⁴³ *Ibid* at para 306.

privately owned and rationally exploited, the Court ordered the State to take into account, in its expropriation decisions, the indigenous peoples' attachment to their ancestral lands because it is fundamental for their cultural subsistence and their food supply.⁴⁴ The Court specified that "[a]t no time should the decision of the domestic authorities be based exclusively on the fact that the land is owned privately or that it is being rationally exploited."⁴⁵

In addition, the Court ordered the adaptation of domestic property laws to the Convention, in particular to ensure that indigenous communities could claim their lands without facing undue obstacles. The order to establish "an effective system for indigenous peoples to claim their ancestral or traditional lands, which makes it possible to implement their right to property," as well as "a judicial authority [that] has the competence to decide the disputes that arise between the right to property of private entities and that of the indigenous peoples,"⁴⁶ goes clearly beyond the Xákmok Kásek Community to benefit all indigenous communities in Paraguay, by facilitating and legitimizing the process for claiming ancestral lands.

Ancestral lands are fundamental to indigenous peoples' identities and survival. By ordering the State to facilitate claims for ancestral lands, one can argue that the Court orders in *Xákmok Kásek* are much more encompassing than in *Yean and Bosico*, as they tend to address the three dimensions of structural discrimination (direct, indirect and cultural). Although the remedies cannot eradicate the historical inequalities suffered by indigenous peoples in Paraguay *per se*, they open the way to significant procedural changes which could, if implemented, lead to very substantial changes for indigenous communities: giving them back control over their lands can enable them to live according to their customs, to

⁴⁴ *Ibid* at paras 282, 309.

⁴⁵ *Ibid* at para 284.

⁴⁶ *Ibid* at para 310.

preserve their culture, and to engage more meaningfully and on an equal footing with the broader society, situation in stark contrast with their reality of second class citizens on the verge of extinction.

Case of *González et al ("Cotton Field") v Mexico*

Thinking that discrimination affects only or mainly minorities is incorrect and prejudicial. Gender based discrimination, in particular against women, has been a reality over the centuries, and across many societies. However, it is only in the last decades that this has been acknowledged, and that mentalities in this respect have started to evolve. *Cotton Field*⁴⁷ is the first case, in 2009, where the Court examined a situation of structural violence against women based on their gender, a violation defined in Article 1 of the *Convention of Belém do Pará*.⁴⁸

The case relates to the State's international responsibility for the disappearance and subsequent death of three women, whose mangled bodies were found in a cotton field in Ciudad Juárez on November 6, 2001. The State was considered responsible for

the lack of measures for the protection of the victims, two of whom were minor children, the lack of prevention of these crimes, in spite of full awareness of the existence of a pattern of gender-related violence that had resulted in hundreds of women and girls murdered, the lack of response of the authorities to the disappearance [...]; the lack of due diligence in the investigation of the homicides [...], as well as the denial of justice and the lack of an adequate reparation.⁴⁹

⁴⁷ *Case of González et al ("Cotton Field") v Mexico. Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 16, 2009. Ser C No 205 [*Cotton Field*].

⁴⁸ The *Convention of Belém do Pará* defines violence against women as "any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere." *Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Convention of Belém do Pará)*, 9 June 1994, OAS TS 1994 A-60 (entered into force 5 March 1995).

⁴⁹ *Cotton Field*, *supra* note 47 at para 2.

The broader context of violence against women in Ciudad Juárez played a big role in the decision. The Court established that Ciudad Juárez, an industrial city close to the US border, was characterized by social inequalities, high levels of insecurity and violence due to the development of different types of organized crime.⁵⁰

The Court noticed the stark reality of institutionalized violence against women in Ciudad Juárez after reviewing various reports from UN Treaty Bodies and Rapporteurs, Mexican public organs and the Inter-American Commission. More specifically, the Court concluded that, since 1993, there had been an increase in the murders of women, with at least 264 victims up until 2001, and 379 up to 2005. Noting the unreliability of those numbers, the Court expressed other concerns: the extreme levels of violence of these crimes, including of a sexual nature; and the fact that in general, these crimes “have been influenced [...] by a culture of gender-based discrimination which [...] has had an impact on both the motives and the method of the crimes, as well as on the response of the authorities.”⁵¹

The Court also noted that the culture of discrimination permeates the judicial and police authorities, as “the ineffective responses and the indifferent attitudes [...] in relation to the investigation of these crimes [...] have permitted the perpetuation of the violence against women in Ciudad Juárez.”⁵² The impunity surrounding these crimes was also of great concern as “up until 2005, most of the crimes had not been resolved, and murders with characteristics of sexual violence present higher levels of impunity.”⁵³

Regarding the specific victims of the case, the Court noted that they were young, underprivileged women, workers or students, as were many of the victims of the murders in

⁵⁰ *Ibid* at para 113.

⁵¹ *Ibid* at para 164.

⁵² Indeed, “officials of the state of Chihuahua and the municipality of Juárez made light of the problem and even blamed the victims for their fate based on the way they dressed, the place they worked, their behavior, the fact that they were out alone, or a lack of parental care.” *Cotton Field*, *supra* note 47 at para 151.

⁵³ *Ibid* at para 164.

Ciudad Juárez.⁵⁴ In so doing, the Court took judicial notice of a pattern of violence against women that were in a particularly vulnerable social position.

Regarding the structural factors that led to women's murders in Ciudad Juárez, the Court accepted the evidence brought by the State, which referred to the changes in family roles, as a result of women working in the maquila industries, and becoming the household providers. The State cited the CEDAW report to indicate that “[t]his social change in women’s roles has not been accompanied by a change in traditional patriarchal attitudes and mentalities, and thus the stereotyped view of men’s and women’s social roles has been perpetuated.”⁵⁵

The Court noted that gender-based stereotypes also contributed to exacerbate the state’s inaction at the start of the investigation, and “as a result of its consequences as regards the impunity in the case, this indifference reproduce[d] the violence that it claim[ed] to be trying to counter, without prejudice to the fact that it alone constitute[d] discrimination regarding access to justice.”⁵⁶ According to the Court:

[t]he impunity of the crimes committed sends the message that violence against women is tolerated; this leads to their perpetuation, together with social acceptance of the phenomenon, the feeling women have that they are not safe, and their persistent mistrust in the system of administration of justice.⁵⁷

Transformative reparation

Given the structural discrimination in which the violence against these three women

⁵⁴ *Ibid* at paras 230, 123.

⁵⁵ *Ibid* at para 129.

⁵⁶ *Ibid* at para 400.

⁵⁷ *Ibid* at para 400.

occurred, the Court made it clear that its remedies had a “rectification” or transformative objective. As the Court put it, the “reestablishment of the same structural context of violence and discrimination is not acceptable.”⁵⁸

450. The Court recalls that the concept of “integral reparation” [...] entails the re-establishment of the previous situation and the elimination of the effects produced by the violation, as well as the payment of compensation for the damage caused. However, bearing in mind the context of structural discrimination in which the facts of this case occurred, which was acknowledged by the State [...], the reparations must be designed to change this situation, so that their effect is not only of restitution, but also of rectification.⁵⁹

Consequently, the Court assessed the measures of reparation requested by the Commission and the representatives having in mind the particular need for transformative reparations: among the Court’s guidelines, were the guidelines that the reparations should be “(v) designed to identify and eliminate the factors that cause discrimination [and] (vi) adopted from a gender perspective, bearing in mind the different impact that violence has on men and on women [...].”⁶⁰

The first measure that embraced more victims than the ones in the case at hand, and with a transformative component, was the erection of a monument “to commemorate the women victims of gender-based murder in Ciudad Juárez, [...] as a way of dignifying them and as a reminder of the context of violence they experienced, which the State undertakes to prevent in the future,” and which should be built in the cotton field in which the victims of

⁵⁸ *Ibid* at para 450.

⁵⁹ *Ibid*.

⁶⁰ *Ibid* at para 451.

this case were found.⁶¹ This symbolic measure, although isolated, could contribute to raise awareness and reverse cultural discrimination.

The reparation that was the most potentially transformative in our sense was the order to provide gender-sensitive training for public officials and for the general public in the state of Chihuahua, on the long term. Contrary to other cases where orders for trainings in human rights were limited to the dissemination of information regarding human rights treaties, in *Cotton Field*, the Court aimed at *transforming* not only public officials' minds working with women, but also the general public, among which most stereotypes are ingrained. The Court also purported to develop a comprehensive training that would allow gender and gender violence to be understood in a concrete manner, and stereotypes to be uncovered and fought against. The Court ordered the State to submit annual reports regarding the implementation of these measures, and their effects.⁶²

Cotton Field is a landmark case regarding the Court's awareness of structural discrimination against women. It also provides examples of detailed and comprehensive transformative remedies. As detailed remedies are more likely to provide useful guidance for States and national Courts in the transformative process, we hope that future cases will adopt a similar comprehensive remedial approach to uproot structural discrimination.

However, we also have to note that training orders, even if aimed at the general public, remain limited transformative remedies. Education remains inaccessible for many, and reversing structural discrimination requires engaging with local discourses, normative structures and deeply rooted stereotypes, which is probably more than what an education program can achieve.

⁶¹ *Ibid* at para 471.

⁶² *Ibid* at paras 540-43.

Case of Atala Riffo and Daughters v Chile

Some discrimination grounds, such as ethnicity, race, and gender have been uncovered (although not necessarily fought against) for a long time. In recent years, awareness regarding new grounds of discrimination has emerged. Sexual orientation is one such ground of discrimination that has attracted more attention in many countries around the world recently, including in Latin American countries.

*Atala*⁶³, in 2012, is the first case where the Court dealt directly with a situation of structural discrimination based on sex orientation, nourished by deeply rooted societal and institutional stereotypes against homosexual individuals, and more broadly sexual minorities. This case attracted a great deal of attention as illustrate the huge numbers of *amicus* briefs that were sent to the Court (32), as well as the number of affidavits and of experts that took part in the Court's proceedings.⁶⁴

The facts of the case can be summarized as follows. In 2002, Ms. Atala and Mr. López Allendes decided to end their marriage. As part of the dissolution of their marriage, they established that Ms. Atala would maintain the care and custody of the three girls – an arrangement that was probably seen as “normal” given the traditional role of women in the family. A few months after, the same-sex partner of Ms. Atala began living in the same house with her, her three daughters and her eldest son. The father of the three girls then filed a custody suit with the Juvenile Court of Villarrica, considering that “the physical and emotional development [of the girls] was seriously at risk” should they continue to live in the care of their mother.⁶⁵ In the suit, Mr. Lopez's arguments for being given the custody of the children reflected deep stereotypes against homosexuals. In deciding to take the custody of the mother, the Juvenile Court referred to the “normal family routine” or traditional family

⁶³ *Case of Atala Riffo and daughters v. Chile. Merits, Reparations and Costs*. Judgment of February 24, 2012 Ser C No 239 [Atala].

⁶⁴ *Ibid* at para 10.

⁶⁵ *Ibid* at para 31.

made up of a father and a mother, and reproached to the mother to have given priority to her own well-being to the detriment of her daughters.⁶⁶ While the Juvenile Court's decision was appealed and reversed at the subsequent two appellate levels, the Supreme Court of Chile restored the Juvenile Court's judgment, granting the permanent custody to the father and restating the importance of the traditional, normal family.⁶⁷

This case was brought to the IACHR, alleging the international responsibility of the State for discriminatory treatment and arbitrary interference in the private and family life suffered by Ms. Atala due to her sexual orientation, in the legal process that resulted in the loss of care and custody of her three daughters.

Contrary to the preceding three cases, in our sense, the transformative potential of *Atala* does not mainly lie in the reparation chapter, but in the reasoning of the Court, and more specifically the interpretation it gave to the American Convention. In fact, the Court's interpretation of the American Convention is as binding on Member States as the Convention itself, through the "Convention control". As the Court explained it,

The judges and entities engaged in the administration of justice at all levels are required to undertake "Convention control" *ex officio* [by virtue of their role] between domestic law and the American Convention in the context of their respective competencies and the corresponding procedural regulations. In this task, the judges and other organs of the justice system must take into account not only the Convention, but also

⁶⁶ *Ibid* at para 41.

⁶⁷ *Ibid* at para 57 [references omitted]:

The [Supreme] Court also deemed the girls to be in a "situation of risk" that placed them in a "vulnerable position in their social environment, since clearly their unique family environment differs significantly from that of their school companions and acquaintances in the neighborhood where they live, exposing them to ostracism and discrimination, which would also affect their personal development." Therefore, the Court felt that the conditions described constitute "just cause" in accordance with Article 225 of the Civil Code, justifying awarding custody to the father [...]. The Court concluded that the challenged judges failed [...] by "having passed over the preferred right of the minors to live and grow within the bosom of a family that is structured normally and appreciated in the social environment, according to the proper traditional model, and have incurred serious fault or abuse, which must be corrected through admission of the instant complaint appeal."

the interpretation thereof by the Inter-American Court, in its role as the final authority on the interpretation of the American Convention.⁶⁸

An important initial step in the reasoning of the Court in *Atala* was to determine whether the sexual orientation of a person was a prohibited ground of discrimination under Article 1 (1) of the American Convention. The Court concluded, basing its analysis on the broader international human rights context, which considers sexual orientation as a prohibited ground of discrimination,⁶⁹ that the sexual orientation of persons is a category protected by the Convention, under the ground of “any other social condition” listed in Article 1 (1).⁷⁰ The Court refused the argument of the State according to which it was not bound by an interpretation that would include sexual orientation as a prohibited ground, as when the Supreme Court took its decision, there was not a consensus in this regard. The Court argued that the alleged absence of consensus, in some countries, “regarding full respect for the rights of sexual minorities cannot be considered a valid argument to deny or restrict their human rights or to perpetuate and reproduce the historical and structural discrimination that these minorities have suffered.”⁷¹ The Court was therefore well aware of the structural discrimination faced by sexual minorities, or Lesbian, Gay, Transsexual, Bisexual and Intersexual, and elaborated an approach in its decision in order to fight it.

Considering the arguments given in the Supreme Court of Chile’s and the Juvenile Court’s decisions, the Court concluded that there was a difference of treatment based on Ms. Atala’s sexual orientation.⁷² It then determined that the differential treatment was

⁶⁸ *Ibid* at para 282.

⁶⁹ The Court referred to recent resolutions passed within the Inter-American System requesting protection against discriminatory acts based on sexual orientation, the interpretation given by the European Court of “another condition” in Article 14 of the European Convention, which includes “sexual orientation” among the forbidden categories of discrimination, and the interpretation given by United Nations treaty bodies. *Ibid* at paras 86-91.

⁷⁰ *Ibid* at para 91.

⁷¹ *Ibid* at para 92 [emphasis added].

⁷² *Ibid* at paras 96-99.

discriminatory, violating Ms. Atala's right to non-discrimination,⁷³ based on several findings. The Court's findings' relevancy goes far beyond the case at hand, and can contribute, in our sense, to the transformation of a structural situation of discrimination against sexual minorities, in Chile and beyond.

First, the Court noted that the two national Courts had relied on "abstract, stereotyped, and/or discriminating arguments to justify their decisions."⁷⁴ But the Court declared the inadmissibility of "speculations, assumptions, stereotypes, or generalized considerations regarding the parents' personal characteristics or cultural preferences regarding the family's traditional concepts."⁷⁵ Equally, the legitimate goal of protecting the child's best interest cannot be "based on unfounded and stereotyped assumptions about the parent's capacity and suitability to ensure and promote the child's well-being and development."⁷⁶ These powerful statements, directed against what Galtung identified as cultural violence, constitute clear barriers to the use of stereotypes in Courts in order to justify differential treatments, and maintain situations of structural discrimination or inequality.

The Court recalled that the role of the state is to combat discrimination, and not to perpetuate or legitimize discriminatory treatments.⁷⁷ The Court also reminded the State that

⁷³ The Court concludes that the State violated the right to equality enshrined in Article 24, in conjunction with Article 1.1 of the American Convention, to the detriment of Karen Atala Riffo. *Ibid* at para 146.

In *Atala*, the Court clarified its analysis of the right to equality and non-discrimination:

[W]hile the general obligation of Article 1(1) refers to the State's duty to respect and guarantee "without discrimination" the rights included in the American Convention, Article 24 protects the right to "equal protection before the law". That is, Article 24 of the American Convention prohibits discrimination, by law or *de facto*, not only with regard to the rights enshrined in said treaty, but also in regard to all laws approved by the State and their application. In other words, if a State discriminates in the respect for or guarantee of a right contained in the Convention, it will be failing to comply with its obligation under in Article 1(1) and the substantive right in question. If, on the contrary, the discrimination refers to unequal protection by domestic laws, the fact must be analysed in light of Article 24 of the American Convention. *Ibid* at para 82 [references omitted].

⁷⁴ *Ibid* at para 146 [references omitted; emphasis added].

⁷⁵ *Ibid* at paras 109, 111.

⁷⁶ *Ibid* at para 111.

⁷⁷ *Ibid* at paras 119, 121.

it is its role as well as the law's to promote "social progress" and the acceptance and inclusivity of different lifestyles in the society, "otherwise there is a grave risk of legitimizing and consolidating different forms of discrimination that violate human rights."⁷⁸

Then, the IACHR criticized the two Chilean Courts' limited conception of the right to non-discrimination of homosexual persons. The IACHR specified that it "is not limited to the fact of being a homosexual per se, but includes its expression and the ensuing consequences in a person's life project."⁷⁹ Considering, as the Supreme Court of Chile and the Juvenile Court did, that Ms. Atala could openly declare herself a lesbian, but should not have put her own interests before those of her daughters by living with a same-sex partner, imposed on her a

'traditional' concept of women's social role as mothers, according to which it is socially expected that women bear the main responsibility for their children's upbringing and that in pursuit of this she should have given precedence to raising her children, renouncing an essential aspect of her identity.⁸⁰

Finally, regarding the argument that the best interest of the children required that they would grow up in a "traditional" – meaning heterosexual – family context, the Court said that "the American Convention does not define a limited concept of family, nor does it only protect a 'traditional' model of the family". It reaffirmed that "the concept of family life is not limited only to marriage and must encompass other [...] family ties in which the parties live together outside marriage."⁸¹ The Court found

that the language used by the Supreme Court of Chile regarding the girls' alleged need to grow up in a 'normally structured family that is

⁷⁸ *Ibid* at para 120 [references omitted; emphasis added].

⁷⁹ *Ibid* at para 133 [emphasis added]. It supported its interpretation with cases from the ECHR's jurisprudence among others.

⁸⁰ *Ibid* at paras 138-39.

⁸¹ *Ibid* at para 142.

appreciated within its social environment,' and not in an 'exceptional family,' reflects a limited, stereotyped perception of the concept of family, which has no basis in the Convention [...].⁸²

Guarantees of non-repetition

In this part of the reparations, the Court specifically referred to “the structural and historical discrimination suffered by sexual minorities,” in particular “in matters concerning access to justice and the application of domestic law,” which allows the perpetuation of stereotypes.⁸³ Therefore, it declared that “some reparations must have a transformative purpose, in order to produce both a restorative and corrective effect and promote structural changes, dismantling certain stereotypes and practices that perpetuate discrimination against LGBTI groups.”⁸⁴ This opening was promising, but the actual “transformative” reparations given were disappointing, mainly because the representatives and the Commission had made limited requests.

The transformative reparations requested by the Commission and the representatives were twofold: the training for public officials and the adoption of domestic measures, reforms, and adaptation of laws against discrimination. Regarding the first one, while noting some advances made by the State in its training programs, the Court ordered “the State to continue implementing continuous educational programs and training courses” in human rights, sexual orientation, non-discrimination, and protection of the rights of LGBTI community in order to overcome gender stereotypes of LGBTI persons and homophobia.⁸⁵ Although the Court referred to the need to uncover not only direct but also indirect discrimination against sexual minorities, it limited the targeted audience for the courses to

⁸² *Ibid* at para 145 [emphasis added].

⁸³ *Ibid* at para 267.

⁸⁴ *Ibid* [emphasis added].

⁸⁵ *Ibid* at paras 271-72 [emphasis added].

public and in particular judicial officials.⁸⁶ However, it was clear from the decisions at the national level that stereotypes against homosexuals were also strongly grounded in the general public itself.

Regarding the second request, the Court noted that “the representatives did not provide sufficient facts that would suggest that the violations resulted from a problem with the laws *per se*.” Therefore, it considered inappropriate to order the adoption, modification or adjustment of specific domestic laws, in the circumstances of the present case.⁸⁷

Probably aware of the limited scope of its guarantees of non-repetition in this case, the Court recalled that “based on the treaty control mechanism, legal and administrative interpretations and proper judicial guarantees should be applied in accordance with the principles established in the jurisprudence of this Court in the present case.”⁸⁸

The Convention control, presented as a simple reminder, seems in fact to us a powerful tool of transformation. It means that even though the transformative reparations *per se* are limited in some cases (in *Atala*, in particular), by the Convention control, the Court’s jurisprudence is more transformative than what the reparations chapters of its cases tend to indicate. The Convention control, for example, implies that sexual orientation has to be interpreted as a prohibited ground of discrimination pursuant to Article 1.1 of the American Convention in domestic legislation and policies. In countries with indigenous populations, the Convention control also implies that the right to property has to be

⁸⁶ *Ibid* at paras 271-72 [emphasis added].

⁸⁷ *Ibid* at para 280.

⁸⁸ *Ibid* at para 284 [references omitted].

interpreted as encompassing the indigenous peoples' traditional connections to their lands and the specific meaning of property for them.⁸⁹

This review of the Court's jurisprudence has allowed us to show that the Court has been attentive to situations of structural discrimination in the recent past, and has tried to adopt transformative remedies in order to eradicate them. However, we have seen that these remedies are rather limited in scope. We have also observed that the Court can contribute to overcoming stereotypes and structural inequalities through its evolutive and contextual interpretation of the American Convention, which can be useful in domestic litigations because of the Convention control as well as for comparative purposes.

Nevertheless, we have to question the ability of the IACHR to effectively contribute to the eradication of structural discrimination through its orders. Is the current approach of the IACHR sufficient to meaningfully uproot structural discrimination in Latin American countries?

⁸⁹ As explained in *Xákmok Kásek*, the Court

85. [...] has considered that the close relationship of indigenous peoples to their traditional lands and the natural resources relevant to their culture that are found there, as well as the intangible elements resulting from them, must be safeguarded under Article 21 of the American Convention.

87. Moreover, the Court has indicated that the concepts of property and possession in indigenous communities can have a collective meaning, in the sense that possession is "not focused on individuals, but on the group and its community." This concept of the ownership and possession of land does not necessarily correspond to the classic concept of property, but it deserves equal protection under Article 21 of the Convention. Failing to recognize the specific versions of the right to use and enjoyment of property that emanate from the culture, practices, customs and beliefs of each people would be equivalent to maintaining that there is only one way of using and enjoying property and this, in turn, would make the protection granted by Article 21 of the Convention meaningless for millions of individuals [emphasis added].

Xákmok Kásek *supra* note 35 at paras 85, 87 [references omitted].

Part III. Assessment of the Effectiveness of IACHR's Contribution to Uproot Structural Discrimination

The human rights violations that occurred in the four cases we analyzed took place in contexts of structural discrimination either against migrants, indigenous peoples, women or sexual minorities. Were the Court's remedies broad and far-reaching enough in order to address all the underpinnings of structural discrimination? We have already expressed some reservations in this regard. In addition, court orders can only bring meaningful changes if fully complied with. The implementation of transformative remedies requires a significant involvement from the States. Unfortunately, many Latin American States do not willingly comply with this part of the IACHR's orders. In these circumstances, how could the IACHR's contribution to the eradication of structural discrimination be improved? We will explore some avenues for future developments, through greater collaboration with domestic actors.

Limited Ability of the IACHR to Instigate Systemic Change, in Light of the Deep-rooted, Multidimensional Character of Structural Discrimination

In order to assess the Court's approach to situations of structural discrimination, we should remember that structural discrimination involves direct, indirect and cultural discrimination. Fully remedying situations of structural discrimination would therefore require a multifaceted approach, in all fields where the discrimination manifests itself – norms, practices, and discourses.⁹⁰ However, in the four cases we analysed, it appears that the

⁹⁰ This was underlined by the CESCR in its General comment regarding the elimination of systemic discrimination (CESCR, *General Comment n°20*, *supra* note 4 at para 39):

Tackling such discrimination will usually require a comprehensive approach with a range of laws, policies and programmes, including temporary special measures. States parties should consider using incentives to encourage public and private actors to change their attitudes and behaviour in relation to individuals and groups of individuals facing systemic discrimination, or penalize them in case of non-compliance. Public leadership and programmes to raise awareness about systemic discrimination and the adoption of strict measures against incitement to discrimination are often necessary. Eliminating systemic discrimination will frequently require devoting greater resources to traditionally neglected groups. Given the persistent hostility towards some groups, particular attention will need to be given to ensuring that laws and policies are implemented by officials and others in practice [emphasis added].

IACHR's systemic remedies focused on the transformation of the institutional and sometimes legal structures that facilitated the occurrence of human rights violations, but not on their underpinnings.

As socially and culturally discriminatory ingrained attitudes are often at the origin of systemic discrimination or structural violence, the Court could consider adopting measures specifically aiming at tackling these stereotypes. For example, the Court could order more regularly human rights education in schools and for the general public (such as in *Cotton Field*), that would aim at deconstructing notions of social, racial, gender, religious, etc. inferiority. The Court could also order the adoption of public-awareness campaigns.

However, even if these more comprehensive remedies were to be ordered systematically, it is uncertain that they could effectively reverse deep-rooted cultural norms. The effectiveness of the remedies depends entirely on States' compliance. And there can be no right without an effective remedy.⁹¹

State Compliance: the Achilles Heel of the IACHR's Remedies

The Supervisory Model of the IACHR

From its very first case *Velásquez-Rodríguez*,⁹² the Court has monitored compliance with its remedies by the States, by requiring them to submit periodic reports on the steps taken to comply with its orders. Since then, the Court has closed the files only when all the remedies had been complied with. However, knowing that the Court will be seized of a case until all its remedies are met is insufficient to conclude to the effectiveness of the remedies.⁹³

⁹¹ Robert J Sharpe and Kent Roach, *The Charter of Rights and Freedoms*, 4th ed (Toronto: Irwin Law Inc, 2009) at 373.

⁹² Case of *Velásquez-Rodríguez v Honduras*, *Reparations and Costs*, Judgment of July 21, 1989, Ser C No 7 at para 60(5): "The Court [...] [d]ecides that the Court shall supervise the indemnification ordered and shall close the file only when the compensation has been paid" [*Velásquez-Rodríguez*].

⁹³ Basch, *supra* note 2 at 9.

Low Levels of Compliance with the IACHR's Remedies

In order to assess the effectiveness of the IACHR's remedies, we rely on a study that was conducted in 2010 by a team of law professors, attorneys and a sociologist involved in a public interest litigation NGO, which analysed all the holdings of the Court between June 1, 2001 and June 30, 2006 with respect to Members States of the American Convention who have accepted the contentious jurisdiction of the Court.⁹⁴

The 41 judgements on the merits that the Court ordered during this period contained 257 remedies.⁹⁵ Out of them, 51 remedies were of a preventive nature (27 of these were for legal reforms; 13 orders called for institutional strengthening; 7 for official training and 4 for raising awareness.)⁹⁶

The research surveyed all the resolutions supervising compliance with the Court's holdings up until June 30, 2009, in which the Court evaluates the degree of compliance with each of the measures ordered.⁹⁷ A period of two and a half years was therefore allowed between the time when the remedies were ordered and when the supervision took place: this was considered to be a sufficient amount of time for States to comply with the ordered measures.⁹⁸ In order to determine whether or not the States had complied with the different remedies, the research followed the Court's conclusions in its supervisory resolutions of compliance.⁹⁹

⁹⁴ *Ibid.*

⁹⁵ *Ibid* at 11.

⁹⁶ *Ibid* at 17.

⁹⁷ *Ibid* at 12.

⁹⁸ *Ibid* at 11.

⁹⁹ *Ibid* at 12.

The results of the survey are worrying. Only 29% of the remedies ordered by the Court were fully satisfied, while 59% of the remedies were not implemented at all.¹⁰⁰ Regarding the details of the reparations, while monetary reparations were more highly complied with, prevention remedies – those remedies designed to cause structural changes – are those that were less implemented.¹⁰¹

The research noted discrepancies between countries regarding the degrees of compliance, which depend on the nature and objectives pursued by the remedies.¹⁰² It appears that States are more likely to comply with remedies agreed upon in approved friendly settlements (facilitated by the Inter-American Commission, which are also analysed in the report) than in those resulting from the Court holdings.

The report also noted that compliance varies depending on the identity of the litigants (individual complainants, local NGOs, international NGOs, Ombudsman offices and legal clinics, individually or combined). The few cases that were litigated by Ombudsman's offices register a level of total compliance noticeably greater than the average (71.4% vs 35.6%),¹⁰³ which indicate that involvement of local and governmental actors greatly help to increase compliance.

One can also posit that compliance will also probably be greater if the States acknowledge the situation of structural discrimination rather than if they deny it. In *Cotton Field*, the Mexican State itself provided the Court with evidence on the situation of structural gender based violence in the State of Chihuahua. Given this official recognition, a greater level of compliance can be expected from Mexico with the Court's remedies. On the

¹⁰⁰ *Ibid* at 20.

¹⁰¹ Non-compliance was observed in 50% of awareness raising measures; 57% of training measures; 84% of institutional strengthening measures, and 93% of legal reforms measures. *Ibid* at 21.

¹⁰² *Ibid* at 22-24.

¹⁰³ *Ibid* at 25-26.

contrary, the Dominican Republic has again categorically denied in 2012, both in its written submissions and oral pleadings, the existence of structural discrimination against persons of Haitian origin in the Dominican Republic.¹⁰⁴ This denial is coherent with the absence of compliance of the State with the systemic remedies ordered in *Yean and Bosico*, six years after the judgment, which aimed at reforming the late registration of birth in order to ensure that children of Haitian origin born in the Dominican Republic could acquire Dominican nationality upon birth.¹⁰⁵

The example of the Dominican Republic illustrates the lengthy delays for complying with remedies ordered by the Court. Although “the average time [according to the survey] for complying with remedies ordered in Court rulings was approximately 1 year and 8 months,”¹⁰⁶ the Dominican Republic’s example shows that delays in complying with systemic remedies can actually be much longer.

Delays in complying with the orders must also be added to the delays linked to the proceedings before actually getting a decision. The survey showed that 56% of the cases finalized by a Court ruling between 2001 and 2006 lasted from 5 to 8 years, while 15% lasted for 7 to 11 years, and another 15% lasted for more than 11 years. Only 14% of them lasted

¹⁰⁴ Listen to the final oral arguments of the State during the public audience of the case of *Nadege Dorzema et al (“Guayubín Massacre”) v Dominican Republic (Nadege)*, in June 2012 (online: <http://vimeo.com/album/1983425/video/44553160>).

¹⁰⁵ Since its decision in 2005, the Court has issued four resolutions monitoring the Dominican Republic’s compliance with the judgment in *Yean and Bosico*, in 2007, 2009, 2010 and 2011 (see IACHR’s website, online: Jurisprudence, monitoring compliance with judgments < <http://www.corteidh.or.cr/supervision.cfm?&CFID=1336528&CFTOKEN=37093398>>). Although the State had complied with the monetary order when the Court first monitored its compliance with the judgment in 2007, six years after the decision was made, at the end of 2011, the State still had not complied with the most transformative reparation. The Court therefore decided to “keep the proceedings on monitoring compliance open,” in regard to the “[a]doption by the State, within its domestic laws, of the legislative, administrative, and other measures needed to regulate the procedures and requirements for acquiring Dominican nationality upon late registration of birth” pending fulfilment. *Yean and Bosico*, *supra* note 21. *Monitoring Compliance with Judgment*. Order of the IACHR of October 10, 2011 at p 7.

¹⁰⁶ Basch, *supra* note 2 at 25.

from 2 to 5 years.¹⁰⁷ These figures indicate that the Court, unfortunately, “does not offer an effective and timely answer for those affected.”¹⁰⁸

Other Avenues to Increase the Court’s Contribution to the Eradication of Structural Discrimination

The limited compliance with the Court orders suggests that without the States’ collaboration in the implementation of remedies, the remedies are of little use. In addition, we have seen that the current limited scope of the Court’s transformative remedies does not allow to fully uproot structural discrimination. Transformative remedies of the IACHR may, at best, and if implemented, lead to incremental progress regarding equality. It is therefore worth exploring other avenues through which the Court could increase its contribution to the eradication of structural discrimination.

It should first be mentioned that the IACHR, although far from perfect, seems to acknowledge situations of structural discrimination on a more frequent basis than other courts today, such as the ECHR¹⁰⁹ and the Canadian Supreme Court.¹¹⁰ Therefore, the IACHR’s efforts to take into account structural discrimination should be valued and reinforced, rather than criticized for their lack of efficiency.

¹⁰⁷ *Ibid* at 26.

¹⁰⁸ *Ibid* at 28.

¹⁰⁹ In Europe, Roma people are known for having been discriminated against systematically, both through direct, structural, and cultural violence. However, until early 2004, the ECHR had never found a violation of the right to non-discrimination under Article 14 of the *European Convention on Human Rights* in a case involving allegations of racial discrimination. In 2008, in *D.H. and Others v Czech Republic*, the Grand Chamber of the ECHR considered that the fact that Roma children were – and still are – disproportionately schooled in “special schools” for children with intellectual disabilities amounted to “indirect discrimination,” and declared that it was a violation of Article 14. However, the ECHR limited its orders to 4000 Euros for each applicant and did not order systemic remedies. Regarding the ECHR’s relative blindness to systemic discrimination regarding Roma people, see Claude Cahn, “The Elephant in the Room: On Not Tackling Systemic Racial Discrimination at the European Court of Human Rights” (2006) 4 *European Anti-Discrimination Law Review* 13; Andrea Coomber, “Strategically Litigating Equality – Reflections on a Changing Jurisprudence” (2012) 15 *European Anti-Discrimination Law Review* 11.

¹¹⁰ In *Moore v British Columbia (Education)*, 2012 SCC 61, in a case related to the inaccessibility of public education for a child with dyslexia, the SCC declared: “A practice is discriminatory whether it has an unjustifiably adverse impact on a single individual or systemically on several [...]. The only difference is quantitative, that is, the number of people disadvantaged by the practice” (*ibid* at para 58) [emphasis added]. This declaration indicates a misunderstanding of what structural or systemic discrimination is, as it limits itself to the numbers of victims, without questioning the discriminatory structures or the norms.

Given the greater level of compliance with remedies agreed upon, as well as in cases involving domestic actors, the Court would probably benefit from including all interested parties in the elaboration of the remedies in situations involving structural discrimination. Given the complexity and specificities of structural discrimination in different contexts, inputs from various domestic governmental and non-governmental actors working in the field would be beneficial to design appropriate, comprehensive and useful remedies. This would generate a dialogue between interested parties and the State authorities, and allow the elaboration of remedies tailored for the specific contexts and needs.¹¹¹ The dialogue could ensure greater coordination among the various State institutions, anticipate non-compliance pretexts and reduce resistance to change, by civil as well as governmental actors. This process would surely add a few weeks/months to the overall delay, but could ensure – if remedies are agreed upon – a diligent and effective implementation afterwards. The dialogue process might involve some limited additional costs for the Court, but if remedies are complied with faster, the costs of supervision would decrease in the long run.

Another way to strengthen the Court's contribution to the eradication of structural discrimination would be to increase the incentives to comply with the Court's orders. In its costs orders, the Court has already ordered the reimbursement of part of the expenses incurred by the winning party in the proceedings (in general, the representatives of the victims and the Commission). However, the damage orders in this regard are usually relatively limited. In cases where there is no acknowledgment from the State regarding the situation of structural discrimination, and clear State reluctance to implement any transformative measure (eg the Dominican Republic), the IACHR could consider boosting its damage orders in favour of NGOs which took part in the proceedings, in order to increase the costs of non-compliance. In case a State would still not comply, and a similar case would

¹¹¹ Cavallaro wrote in this regard : "we contend [...] that supranational tribunals will generally have the greatest impact when their procedures and judgments are relevant to the actors working to advance specific human rights in these countries, including not only state agents but also human rights organizations, social movements, and the media." James Cavallaro and Stephanie Erin Brewer, "Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court" (2008) 102 AJIL 768 at 775 [Cavallaro].

be brought to the Court, the Court could consider to order, as a guarantee of non repetition, the funding or financial support of (a) NGO(s) working in the field to uproot structural discrimination. The Court would need to carefully assess which domestic actor(s) is (are) best able to bring transformative changes, and could ask the representatives of the victims and domestic intervenors to help in this regard.¹¹²

A complementary avenue to strengthen the IACHR's contribution to the eradication of structural discrimination would be to increasingly rely on domestic and international media. Media coverage decisions are published can generate popular support and compliance pressure around the cases.¹¹³ Successful strategic litigation requires a concerted action, often both at the domestic and international levels. Therefore, IACHR's decisions and supervisory resolutions should be part of "an integrated advocacy campaign involving the deployment of targeted international pressure at strategic moments" in order to "enhance the power of domestic advocates and other political actors to bring about change."¹¹⁴

Non-compliance is a major and very serious problem, but some adjustments are possible to remedy it. Some of these avenues would require some procedural changes in the Court's decisional process, but are worth exploring in order to increase the Court's impacts in the Latin American region, as well as to strengthen its legitimacy, as widespread non-compliance risks to deligitimize the work of the Court altogether.

¹¹² This guarantee of non repetition would certainly be quite controversial. However, this kind of remedy would not constitute a radical departure from the current remedial practice of the Court. For example, the Court has supported the creation of programs to strengthen the culture of the indigenous population (eg. *Case of the Río Negro Massacres v Guatemala. Preliminary Objection, Merits, Reparations, and Costs*. Judgment of September 4, 2012. Ser C No 250 at para 285). Similar programs or help could be considered in other contexts of structural discrimination.

¹¹³ Cavallaro, *supra* note 111 at 793.

¹¹⁴ *Ibid* at 792.

Conclusion

In its recent jurisprudence, the IACHR has shown a remarkable attention to the broader contexts of the human rights violations on which it has jurisdiction. In so doing, it has identified situations of structural discrimination against migrants, indigenous people, women and sexual minorities among others. It has also elaborated remedies with a transformative objective, in order to remedy partially or more fully these situations of structural discrimination. However, these remedies are insufficient to completely uproot entrenched structural discrimination. In addition, remedies' effectiveness hinges on States' willingness to comply, and non-compliance with transformative remedies is widespread. In these circumstances, we have suggested a few avenues the Court could explore, in order to enhance its contribution to the eradication of structural discrimination.

Among the avenues we have not mentioned above, litigating again, and again – until States comply with the orders and discriminatory attitudes and mentalities change – is surely one valid avenue. The *Nadege* case, dealing with the disproportionate use of military force against a group of Haitians at the Haitian-Dominican border which led to the death of seven people and wounded several others, is one such example of renewed litigation against the Dominican Republic.¹¹⁵ In this case, the Representatives of the victims and the Commission again described the broader context of discrimination and xenophobia in which the violence occurred.¹¹⁶ As illustrates the confronting attitude of the State in not complying with the transformative order of the 2005 decision, as well as the numerous evidence on the persistence of the anti-Haitian feeling in the Dominican Republic,¹¹⁷ much more awareness work has to be done in order to overcome stereotypes against people of Haitian descent.

¹¹⁵ Case of *Nadege Dorzema et al v Dominican Republic. Merits, Reparations and Costs*. Judgment of October 24, 2012. Ser C No 251 [*Nadege*].

¹¹⁶ *Ibid* at paras 40, 219-20.

¹¹⁷ As illustrates the various amicus briefs submitted to the Court for *Nadege*, as well as the submissions by the Inter-American Commission and the representatives of the victims.

Should more cases against the Dominican Republic related to discriminatory treatment against persons of Haitian origin be brought to the Court, the IACHR could support the work of local actors involved in uprooting ingrained discriminatory attitudes against persons of Haitian origin, and encourage a dialogue at the domestic level between governmental and non-governmental actors on how to make the Dominican society and institutions more inclusive.¹¹⁸

The Court's contribution to the eradication of structural discrimination should not be assessed only through the compliance with the Court's remedies. Indeed, the Court's jurisprudence is having more impacts on the ground than what a strict compliance analysis indicates. Through the Convention control, the Court is influencing the development of domestic jurisprudence, legislation and policies. In addition, the IACHR's case law is not only relevant for the countries involved in the cases, but also for all the Member States of the Convention. For example, the case of *Barrios Altos v Peru*¹¹⁹, in which the Court declared Peru's amnesty law invalid, had a very significant impact on the invalidity of amnesty laws not only in Peru but also in Argentina and Chile.¹²⁰

Comparative law is an increasingly important aspect not only of the IACHR's jurisprudence but also of other tribunals', including the ECHR. By strengthening its decisions on cases involving situations of structural discrimination, and refining its remedial approach in

¹¹⁸ In *Nadege*, the transformative remedies are still quite limited: the Court ordered permanent training programs for officials of the armed forces, border control agents and officials responsible of immigration proceedings, that would bear on the Court's jurisprudence, the principle of equality and non-discrimination, and due process in the arrest and deportation of illegal migrants. It also ordered a media campaign on the rights of regular and irregular migrants in the Dominican territory, as well as the adjustment of the domestic legislation on the use of force by law enforcement officials (*ibid* at para 307).

¹¹⁹ Case of *Barrios Altos v Peru*. *Merits*. Judgment March 14, 2001. Ser C No 75 [*Barrios Altos*].

¹²⁰ In this regard, Cavallaro mentioned that *Barrios Altos* "produced an immediate impact in the country." The decision was quickly followed by the detention of several alleged former members of the Colina death squad on murder charges, as well as by the annulation in the same year by the Supreme Council of Military Justice of its 1995 decision applying the amnesty laws to the *Barrios Altos* and *La Cantuta* cases (another case against Peru, from 2006). Regarding the advances in the wider region, Cavallaro noted that "Argentina's Supreme Court cited the *Barrios Altos* decision when declaring that country's amnesty laws unconstitutional in 2005." The *Barrios Altos* case was also successfully used in a subsequent case against Chile which challenged the validity of Chile's amnesty law (Case of *Almonacid-Arellano et al v Chile*. *Preliminary Objections, Merits, Reparations and Costs*. Judgment of September 26, 2006. Ser C No 154). Cavallaro concluded that the IACHR's judgments "lent support to the ongoing efforts by members of Chilean society, including important state actors, to limit the amnesty's effects." Cavallaro, *supra* note 111 at 820.

this respect, the IACHR would show the way to other tribunals. Human rights law can and should contribute to the transformation of societies to make them more inclusive, and more substantively equal. It is inherent to the role of Courts to make it happen.

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