



FACULTY OF LAW
Lund University

Pedro León Gutiérrez

Equality and the Inter-American Court of Human Rights: what is the Ideology?

Master thesis
30 credits (30 ECTS)

Anna Bruce

Master's Programme in International Human Rights Law

Spring 2010

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Summary

This work analyzes the jurisprudence of the Inter-American Court of Human Rights in connection with equality and non-discrimination. The thesis has two major parts. The first part discusses a possible pattern or standard to predict the results of the Inter-American Court in connection with equality and non-discrimination. The author revised cases from this Court in order to predict when the Court will find that certain behaviour violates the rights to equality and non-discrimination of the American Convention of Human Rights. The work claims that the identification by the Court of certain groups as “vulnerable” is the key to find a violation of the rights to equality and non-discrimination. The second part aims to make a theoretical analysis in connection with these findings. The author studies what are the possible ideological constructions that can be found in the Court’s jurisprudence. This part uses concepts and ideas developed by Slavoj Žižek in relation to Ideology. After explaining what is ideology for Žižek, the author analyzes if this ideology as constructed by Žižek is present in the work of the Court. The theoretical analysis is done through three sections. The first section analyzes ideological constructions found in the work of the Inter-American Court. The second attempts to explain the ideological constructions found in the Court’s jurisprudence connected with equality and non-discrimination. The last chapter analyzes the ideology found in the research and claims put forward in the first section of the thesis.

1 Abbreviations

<i>ACHR</i>	<i>American Convention of Human Rights</i>
<i>ECHR</i>	<i>European Convention of Human Rights</i>
<i>ECHR</i>	<i>European Court of Human Rights</i>
<i>IACHR</i>	<i>Inter-American Commission of Human Rights</i>
<i>IACtHR</i>	<i>Inter-American Court of Human Rights</i>
<i>ICCPR</i>	<i>International Covenant on Civil and Political Rights</i>
<i>UN</i>	<i>United Nations</i>

2 Introduction

A young couple leave their house to work in Mexican tobacco fields. They live in an indigenous community in the State of Nayarit. They have two children travelling with them. They work in the field day and night. They stay in the fields with their two children. They are not well nourished and do not have access to clean water. They bath in the rivers and channels used to collect residual waters from the fields. The use of pesticides is completely extended. The first reaction to this situation is of course complete shock and indignation. If one has some interest in the law, there is also a sense that this situation must be entirely illegal. If one actually studies and works with human rights law this picture of illegality becomes clearer. Surely, Mexican domestic law and International human rights law must allow the protection of such horrid unequal situation. This becomes particularly pressing since this young family is not the only one affected by the situation. There is a pattern of discrimination faced by indigenous families in this State. It must then be fairly straightforward to do something legally to remedy this situation.

The first impulse is to blame the employer of these workers. This person is surely obliged to provide better working conditions. One learns that the employer is a humble Mexican peasant that is also struggling to sustain his family. He actually provides water and some food to the family besides the salary. When interviewing him he strikes as a good-hearted person. The young family seems to share this opinion as well. Then the responsibility must be of the employer of the Mexican peasant. One learns he has not employer. He merely sells his product to a tobacco company. Even more, the tobacco company actually provides him with certain social security and other rights. Labour and civil law offer little help to this situation. Still, law must provide mechanisms to protect this people. The answer of course lies in the State. Mexico has an obligation to guarantee that this family enjoys its human rights. One has learned that we are all equal and we have fundamental and universal rights that must be protected and guaranteed by the State. Mexico has signed numerous treaties involving human rights and accepted the jurisdiction of different organisms to review its obligations. Moreover, one knows that if Domestic Institutions fail in this mission, the International community is there.

Yet the answer is a bit more complicated than this. One learns that it is difficult to connect State responsibility for actions and omissions of private parties. These actions and omissions involve rights such as access to a healthy environment that seem not to be well received by Courts. One also learns that the road to get the attention of International Institution is long and difficult. One has to exhaust all domestic remedies (Mexico as a democratic State of course is in position to provide relief to victims through the use of appropriate legal actions). After understanding all these complications, the young family, one of the few to be willing to do

something to remedy their situation, do not see the point in continuing. Involved actors waiting for the answer from the law and human rights are also discouraged. Was it not true that we are all equal? Was it not true that International human rights organizations will help us to achieve this right? One learns that matters are a bit more complicated.

This of course offers an oversimplified picture of the problem. Yet it is not that far from reality.¹ This story shows that human rights norm and Institutions perhaps do not work as one would actually think. This is precisely the focus of this research: the analysis of possible failures in human rights discourse. The focus is not failures in implementation but failures in human rights discourse itself. The figure chosen to carry out this study is the use of equality and non-discrimination by Courts. The region is the American continent. The object, the use of equality by the Inter-American Court of Human Rights (IACtHR of the Court herein after). The framework, legal and philosophical studies concerning the Court's reasoning. The research purports to analyze the possible ideological constructions that can be found in the Inter-American Court cases dealing with equality and non-discrimination.

The purpose is not only to make an academic exercise. It is perhaps difficult to justify why one would embark into theoretical analysis of human rights when there is so much suffering in the world. As the story clearly points out, there are many human rights problems affecting every part of the world. Thus, it seems puzzling that human rights lawyers instead of aiming to deal with practical problems embark in theoretical and pointless academic analysis. This was one of the major problems conflicting the author of this thesis. Why write in connection to these issues when one could actually be doing something useful for human rights? Hoffmann clearly explain that the absence of human rights has traditionally donated intolerable human suffering and “as this absence was the usual state of affairs, the need to ‘do’ human rights seemed never to diminish, with the challenge being so immense that it seemed capricious to engage in petty arguments on relativism or cultural imperialism.”²

This proposition is best described in the following terms “as long as there was an endless supply of the weeping children, frightened-looking women and beaten-up men that, to this day, decorate the websites of the better-known human rights NGOs, there did not seem to be a moment's time for critical reflection”.³ The argument is made that as long as the core of human rights is unrealized, “‘playing around’ with esoteric concepts is at best useless and at worst detrimental to the ‘cause’”. Thus, critical accounts are

¹ The author does not contend that these persons do not have a case under human rights law. Rather, the purpose is to illustrate human rights enforcement is not simple.

² Florian F. Hoffmann, ‘Human Rights, the Self and the Other: Reflections on a Pragmatic Theory of Human Rights’ in Anne Orford (ed) *International Law and its Others* (Cambridge University Press, Cambridge 2006) p. 221.

³ *Ibid*, 222.

read as “bookish extravagances that fly in the face of the real needs of the victims of human rights violations.”⁴

In short, as long as families as the one portrayed here continue to suffer, human rights lawyers should focus in protect them rather than making theoretical analyses. Yet, from the initial picture one also learns that achieving protection trough human rights is not as simple as one might think. In fact the process can be complicated and extenuating both for the family and for human rights activists accompanying them. Sometimes human rights law’s theories themselves might complicate this issue. This paradox then justifies the need to analyze and question human rights rhetoric itself. This exercise can allow us to make substantive changes in the system that will provide beneficial results in the equal enjoyment of human rights. Perhaps by making this type of analysis, it will be possible to visualize different ways to achieve human rights goals and be aware of obstacles present in the discourse itself that should be avoided.

It seems of course that still this reflection will be pointless to the people who were portrayed at the beginning of this introduction. Unfortunately, human rights norms, standards and work of human rights lawyers have also been pointless for them. This is especially true for equality. As it has been rightfully exposed, despite many elaborate treaties and decisions, discrimination persists in our societies.⁵ As such it is important to make different studies that might underline “untouched” problems and thus contribute to the achievement of human rights goals. Unfortunately, this paper deals exclusively with the “problems” and does not really put forward answers. The thesis does not explain how should the Court act in connection to equality and non-discrimination.

Using different perspectives and methods to analyze human rights implementation can help achieving their goals. As David Kennedy points out the question now should not be how “evil” people violates human rights, but rather how “good people, well-intentioned people in good societies, can go wrong, can entrench, support, the very things they have learned to denounce”. This evaluation requires an assessment of “our most sacred humanitarian commitments, tactics and tools”.⁶ Clearly, equality and non-discrimination is one of these sacred rules of human rights law. In the same sense, the Inter-American Court represents an Institution with good reputation towards victims of human rights violations in America. Therefore, this research pretends to study possible problems in the practice of this Institution. One should not be afraid to criticize human rights. Problems posted by human rights will not be solved by avoiding their assessment.⁷

⁴ Ibid 226-227.

⁵ Oddny Mjöll Arnardóttir, *Equality and Non-discrimination under the European Convention of Human Rights* (Kluwer Law International, the Netherlands 2003) 19.

⁶ David Kennedy, “The International Human Rights Movement: Part of the Problem?” (Spring 2002) HHRJ 121, 122.

⁷ Ibid.

The research's direction was influenced by the reasons generating the interest in this topic. At first, the author was simply interested in proving how Courts in general acted in an arbitrary matter when dealing with discrimination. The purpose was to show that the standard of providing "reasonable and objective" justifications to classify something as differential treatment and not as discriminatory was everything but objective and reasonable.⁸ The focus of the research has come a long way from this premise. The present paper aims to answer one main research question: what are the possible ideological constructions behind the Inter-American Court understanding of equality and non-discrimination? In order to answer this question, the research needs to analyze two issues. First, whether there is a logic in the Inter-American Court jurisprudence in connection with equality? And if so, what is this logic? After finding these answers it will be possible to analyze their ideological implications.⁹

Thus, chapter one deals with the rights to equality and non-discrimination in the Inter-American system. The chapter explains that indeed there is a logic or pattern in the Court's jurisprudence on equality and non-discrimination. This logic is explained by the Court's identification of certain groups as "vulnerable". This chapter analyzes a great quantity of cases using the rights to equality and non-discrimination to explain how the Court's findings support the existence of this logic.¹⁰ The author also discusses other theories used to explain cases related to equality and non-discrimination but that could not explain the IACtHR's jurisprudence and were not applied in this research.

Chapter two corresponds to the theoretical analysis of the Court's jurisprudence on equality and non-discrimination. It provides an analysis of ideological constructions that can be found in the Court's jurisprudence. The chapter is based on Slavoj Žižek's ideas related to ideology. The chapter has three sections. The first deals with the ideological constructions affecting

⁸ The terms "objective" and "subjective" are frequently used in this paper. By objective one should understand something free of external influences to the matter that one is analyzing. Thus and "objective" application of the law is used to express that the Law was applied without taking into account social, moral or other issues. Subjective is understood as the opposite: an application of the law taking into account issues other than law. The author does not claim that this is the "correct" meaning of objective application of the law. Such discussion is not relevant for this paper. The purpose here is simply to explain what is understood with this term.

⁹ The word logic is used as defined by the Oxford English Dictionary: reasoning conducted or assessed according to strict principles of validity. Thus when the author claims that the Court's jurisprudence has a logic it means that its reasoning can be assessed and validated applying certain principles.

¹⁰ It is not possible to claim that the research covers all cases dealing with equality and non-discrimination. Yet the author can fairly believe that most cases dealing with these rights are covered. All cases put forward in different articles by Zuloaga, Dulitzky, González and Parra, Courtis, and Zuloaga, two thesis dealing with this topic and a study by CEJIL have been analyzed. Moreover, other cases not included in these articles have also been included in this research. The author has made a direct review of the findings of all the cases included here.

law, human rights law and the Inter-American Court in general. This section only contains those ideas that were thought to derive from the analysis of the Court's cases. The second section deals with the ideological constructions of the Court's logic and standards dealing with equality and non-discrimination. The third section is a self-assessment of the ideological constructions found in the analysis of this paper's first chapter. This last section was not planned until very late during the research project. By reading the different ideas put into this chapter, the author realized that the research made in the first chapter perfectly explained some of them. Thus, this own research is included as an object of study for analysis.

Thus chapter two deals with varied topics. It analyzes for example why is law seen as necessary? what are the ideological implications of identifying a group as vulnerable and why is this important? It also pretends to explain why there seems to be a need to find a logic in legal decisions? All these topics are analyzed through an application of Žižek ideas to the Court's jurisprudence on equality and non-discrimination. Thus even if some of the topics seem broad they are limited by the Court's findings in connection to those cases. This thesis will not provide final answers to such general questions; rather it will attempt to show what could be some of the answers through an analysis of the American jurisprudence. The most important claims and findings relate to the ideological consequences of the Court's specific understanding of equality and non-discrimination.

Originally the idea was to make an analysis of the Court's findings through two other ideas. The first one was to analyze if the Court's findings were "subjective". The second one was to analyze if they supported the idea that equality is an empty concept. These two ideas were discarded during the research as the topic became too broad. Moreover, the analysis provided by finding a logic in the Court and analyzing the ideological implications of this situation was considered more useful. Perhaps it might seem strange to bring about the issues that were taken out of this research, yet the author considers that this "transparency" has some value. Research must be considered as a process and not merely as a result or a static object. The final object represented by the following pages is influenced by these ideas that were lost in the way. The definition of a thing is not composed only by its content but also by the possibilities and lost opportunities that were not considered. These "lost opportunities are part of what [the research is], they qualify it (in all meanings of the word)".¹¹

There is still extensive room to continue this research, yet it is materially impossible to carry this project any further. The thesis will thus limit itself to the cases of the Inter-American Court without analyzing the cases from the Inter-American Commission. Another limit has been that the author has not checked all cases in their original versions. All cases have been checked in English.¹² Finally, the analysis on ideology is limited to mainly two

¹¹ Slavoj Žižek, *For They Know Not What They Do* (2nd edn Verso, London 2008) 190.

¹² Most of the Court's cases were drafted in Spanish and then translated into English. At least from Zuloaga's article it is possible to see that sometimes the meaning of the Court's

books exposing Žižek's ideas on these matters. Yet the literary work of this author is truly broad.¹³ There are many issues that can be analyzed in connection to equality: the notion of equality, the types of discrimination, terminology issues. This research will focus only in the pattern or formula to determine if something violates the right to equality and what is the ideology behind this pattern. All other aspects of this right will not be analyzed.

judgments change from one version to the other. Only in connection to concepts and ideas that seem highly surprising did the author checked the original in Spanish.

¹³ It could also be claim that the lack of knowledge of the author in terms related to psychoanalysis has been a limit to the research. Yet the contention here is that the use of terms outside of legal science do not entail an obstacle to understand the concepts used in this research.

3 Equality and non-discrimination in the American System.

The American Convention of Human Rights (ACHR herein after) contains two articles dealing with equality and non-discrimination: articles 1.1 and 24. The first article establishes:

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. (Emphasis added)

Article 24 states:

Article 24. Right to Equal Protection

All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.

Article 1.1 is the so-called “subordinated non-discrimination clause” and article 24, the “independent non-discrimination clause”.¹⁴ As such, article 1.1 prohibits discriminatory treatment in connection with the rights protected in the American Convention. This means that an analysis on the violation by this article must be done in connection with another right of the Convention. Article 24 prohibits discriminatory treatment in any action carried out by the State, regardless of whether this action falls in the scope of a specific right protected by the Convention.¹⁵ The Court has used both articles in its analysis of equality and non-discrimination. Nevertheless, the IACtHR has not had a clear picture on the differences between both clauses.¹⁶ There are different positions on whether equality and non-discrimination are the same principle or not; or whether they provide different legal protection or not. Although this is an important debate, for purposes of this paper the answer to such question is not relevant.¹⁷

¹⁴ Marianne González Le Saux and Óscar Parra Vera, ‘Concepciones y cláusulas de igualdad en la jurisprudencia de la Corte Interamericana. A propósito del Caso Apitz’ (2008) 47 IAIHRJ 146.

¹⁵ Ibid 147-149.

¹⁶ Unfortunately this falls outside the scope of this research. For people interested in the matter see González and Parra (n 14) 149.

¹⁷ For people interested on this topic it could be useful to review the following articles: González and Parra (n 14); Anne Bayefsky ‘The Principle of Equality and Non-discrimination in International Law’ (1990) 22 HRLR 1.

The purpose of this chapter is to show the logic or the use of equality and non-discrimination by the IACtHR. The main hypothesis is that the jurisprudence of the Court can be predicted and understood with its use of what the Court refers to as “vulnerable groups”. This terminology might be controversial but to keep with the Court’s terminology, the term “vulnerable groups perspective” will be used in this research. This term refers to the Court’s attitude to characterize a specific group who has faced discrimination as “vulnerable”. The idea is that this identification has specific consequences in the IACtHR’s decisions that will be explained further on.

Accordingly, the chapter will analyze the cases from the Inter-American Court dealing with equality and non-discrimination that use and do not use this “vulnerable groups perspective”. The IACtHR has not been consistent in the use of articles 1.1 and 24. There are cases relevant for equality and non-discrimination not using these articles. This section will thus cover both both types of cases.

This understanding of the Court’s jurisprudence was inspired by Professor Oddny Mjöll Arnardóttir’s theories. Arnardóttir explains that non-discrimination in human rights law has moved towards a “multidimensional disadvantage model” or a “substantive disadvantage model”.¹⁸ This model is “a contextual approach that focuses on the asymmetrical structures of power, privilege and disadvantage that are at work in society”. Therefore this approach aims at achieving equality in results. It sees accommodation of differences as necessary elements of the right to equality, rather than exceptions to the general formula claiming that equals should be treated equally.¹⁹ On this sense, this framework pretends to analyze discrimination cases from the perspective of the needs and specific disadvantaged situation faced by a person. Such posture highlights States’ obligations to take positive measures to correct discriminatory situations.²⁰ This is precisely the framework used by the Inter-American Court, as it will be shown in the following sections. This approach “analyses whether the measure under scrutiny [...] ‘operates to increase or decrease the conditions of disadvantage of a disadvantaged group’”.²¹

Arnardóttir claims that findings from the European Court of Human Rights (ECHR herein after) connected with equality and non-discrimination are influenced by three factors. This research will deal with the second factor of her theory: the “particular discrimination ground”.²² This paper’s position is

¹⁸ Oddny Mjöll Arnardóttir, ‘A Future of Multidimensional Disadvantage Equality?’ in Oddny Mjöll Arnardóttir and Gerard Quinn (eds) *The UN Convention on the Rights of Persons with Disabilities* (Martinus Nijhoff Publishers and VSP, Leiden 2009) 54.

¹⁹ Ibid 54, 62-63. The other feature of the model is its acceptance of interaction of more than one ground of discrimination in a specific case. However, this last characteristic is not relevant for this study.

²⁰ Ibid 55.

²¹ Arnardóttir (n 5) 27.

²² Oddny Mjöll Arnardóttir, ‘Multidimensional equality from within. Themes from the European Convention on Human Rights’ in Dagmar Schiek and Victoria Chege (eds)

that for the Court, this discrimination ground or the badge of differentiation is the almost exclusive influencing factor in the IACtHR's findings. However, this concept of discrimination ground should not be read in a narrow way. This ground should be read as whether a person bringing a claim belongs to what the Court identifies as a "vulnerable group". Arnardóttir indeed mentions that one influencing factor in the ECHR's decisions is the existence of a situation of "socially marginalised or disadvantaged position".²³ Yet, for the IACtHR this is the basic factor determining the reasoning of its findings.

Arnardóttir has been very critical towards studies focusing exclusively in the "badge of differentiation" as the factor explaining the ECHR jurisprudence.²⁴ However, this research does not fall under this criticism. Arnardóttir understands "badge of differentiation" as the ground alleged in a complaint of discrimination. This means that this factor just explains whether a case is connected to discrimination on the basis of sex, religion, ethnic origin or other grounds. The claim here is that the Court's decisions are based on whether a person can be identified as "vulnerable" or not. In other words, the particular discriminatory ground should not be understood in a symmetric way. This means that the protected ground for the Court is not "ethnic origin" but indigenous people; not gender, but women. As such, the particular ground is constituted by a specific "vulnerable" group and not by a category of people.²⁵

This analysis will explain the Court's jurisprudence. It will be possible to comprehend that its main concern with equality relates to the situation of "vulnerability" of different groups in the hemisphere. Thus, when dealing with these groups, the Court is willing to expand the scope and the contents of different rights protected by the Convention. Under this perspective, it can be understood that once the Court identifies a group as "vulnerable" this has clear effects on its findings. This fact becomes more evident when the Court finds a violation of the right to equality and non-discrimination in cases involving a "vulnerable group" and not in cases not involving a "vulnerable group".

Therefore the cases can be divided in three categories: 1) cases analyzing the merits of a violation of articles 1 or 24 involving a "vulnerable group"; 2) cases analyzing the merits of a violation of articles 1 or 24 not involving a "vulnerable group"; and 3) cases involving a "vulnerable group" that do not analyze the merits of a violation of articles 1 or 24. The connection to equality of this last group is that the sense of "vulnerability" used in those cases derives from equality, at least in the Court's understanding. Moreover,

European Union Non-Discrimination Law: Comparative Perspectives on Multidimensional Equality Law. (Cavendish Publishing, Abingdon Oxon 2009) 58. A broader analysis of her theory is shown in 2.4.1.

²³ However this is mentioned as a sub-factor among the third factor in her theory. Arnardóttir (n 5) 168.

²⁴ Ibid 66-67.

²⁵ González and Parra (n 14) 132.

many of the Court's findings in those cases derive from this situation of "vulnerability" and are connected to equality. Then the difference of many of those cases and the first group is simply the lack of a formal finding of a violation of the right to equality. The largest number of cases dealing with equality is located in this third group. Then it is needed to make a further division according to the different group involved in a case. The study will contain first the facts and findings of each case and then the analysis of this information.

It is necessary to make two precisions before the following analysis. First, the term "vulnerable group perspective" is not used by the IACtHR. The Court merely refers to "vulnerable groups". The author is simply identifying this Court practice as a perspective or framework for the use of the right to equality when dealing with human rights violations. Second, the following judgments deal with equality and non-discrimination in different ways. They contain findings relevant for different aspects of this right. The following analysis will not provide an overview of all matters related to equality and non-discrimination. It will only describe those findings supporting this research's argument: there is a logic, a pattern, in the Court's findings on equality, and that logic is explained by its use of the "vulnerable group perspective".

3.1 Cases using the right to equality (articles 24 or 1 of the Convention) involving a "vulnerable group".

This section contains cases analyzing a possible violation of the right to equality contained in articles 1.1 and 24 of the Convention. Thus, here the Court asserts if there was a violation or not of this article. There are other cases where the Court mentions article 24 or 1.1 in some part of its reasoning. Yet in those cases it does not analyze a possible violation of the right to equality.²⁶ Those cases will not be included in this section. They will be located in section 2.3.

This group is put first because it contains the Court's most complete analysis of equality. These cases use the main equality tool of the Court, its "vulnerable group perspective", and also find a violation of the right to equality. Then, they can show how these two elements interact with each other. This is particularly relevant in comparison with cases dealing with violations of the right to equality not involving a "vulnerable group". The cases in this section show what is the effect of this "vulnerable perspective" in the Court's jurisprudence. The group's common characteristic is the

²⁶ There are of course other cases using article 1.1 not included at all in this research. This article not only refers to equality and non-discrimination, but it also contains the general obligation to protect and respect human rights. Thus, this article is present in all the cases of the Court.

finding of a violation of the right to equality and the use of the “vulnerable group perspective” in the same judgment.

3.1.1 Facts and findings.

The first case is *Advisory Opinion 18 on the Juridical Condition and Rights of Undocumented Migrants* (OC-18 herein after).²⁷ The case concerned a request for an advisory opinion on the meaning of the principles of equality and non-discrimination under several international treaties, including the International Covenant on Civil and Political Rights (ICCPR from now on) and the American Convention in relation with undocumented migrants and migrant workers in general. This was the opinion with the highest level of participation in the Court’s history.²⁸

The Court established that only differential treatment that does not have an objective and reasonable basis is discriminatory. It quoted the ECHR to assert that having “an objective and reasonable” basis means following a legitimate aim and having a sense of proportionality between this aim and the contested measure.²⁹ This standard by the Court should be later referred as the “objective and reasonable standard”. The Court did not apply this test to analyze the differential treatment between nationals and migrants, or between undocumented and documented migrants. The Court justified its posture by claiming that it was not dealing with a concrete case of differential treatment. The IACtHR just pointed out that differential treatment is acceptable between these categories as long as it is “objective, reasonable, proportionate and does not harm human rights”.³⁰

It is possible to claim that the only criterion for the Court to establish differential treatment between these groups is their common condition as workers. The Court asserted that everybody who enters a remunerated activity becomes a worker and thus acquires the rights that are inherent to this situation, without taking other considerations into account.³¹ It seems that once a person becomes a worker it must be treated in complete “sameness”, as differentiations unrelated to the amount of work a person does, would not be relevant or “objective and reasonable”. Judge García Ramírez’s Opinion supports this conclusion. He argues that “it is

²⁷ *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18, Inter-American Court of Human Rights Series A No 18 (17 September 2003). The Court deals with many issues connected with equality that will not be analyzed in this paper, such as if equality and non-discrimination are part of jus cogens. For a detailed analysis of the Court’s findings see Beth Lyon, ‘The Inter-American Court of Human Rights Defines Unauthorized Migrant Workers Rights for the Hemisphere: a comment on Advisory Opinion 18’ (2004) 28 NYURLSC 547.

²⁸ Concurrent Separate Opinion of Judge Cançado Trindade, *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18, Inter-American Court of Human Rights Series A No 18 (17 September 2003) para 1.

²⁹ OC-18 (n 27) paras 89-93.

³⁰ Ibid para 119.

³¹ Ibid para 133.

discriminatory [...] to provide some individuals with all measures of protection that the performance of lawful work merits and deny such measures to other individuals who perform the same activity, on grounds that are unrelated to the work itself, such as those arising from their migratory status”.³² (emphasis added) He further adds that non-compliance with migratory provisions “should not produce effects in areas that are unrelated to the matter of the entry and residence of migrants”.³³ The Court itself asserted that States have the obligation to guarantee migrant workers with all the rights recognised and guaranteed domestically and internationally for workers in general.³⁴

The Court affirmed that distinctions “based on *de facto* inequalities” could be established as they can constitute protection measures for “those who should be protected, considering their situation of greater or lesser weakness or helplessness”.³⁵ Later, the Tribunal more clearly held that “States are obliged to take affirmative action to reverse or change discriminatory situations that exist in their societies to the detriment of a specific group of persons”.³⁶ This includes protection from actions by third parties that create, maintain or promote discriminatory situations with the tolerance or acquiescence of States.³⁷

Then the Court broadly explained the general situation of “vulnerability” faced by all migrants, undocumented and documented.³⁸ It highlighted this “vulnerability” throughout its Opinion.³⁹ Therefore, the Tribunal explained that “the regular situation of a person in a State is not a prerequisite for that State to respect and ensure the principle of equality and non-discrimination”.⁴⁰ This “vulnerable group perspective” is further developed in Judge Cançado Trindade’s concurrent opinion.⁴¹

The Court gave examples of acceptable and unacceptable treatment for this group. As acceptable, the Court pointed out to differences in political rights and in admission measures and requirement⁴². As unacceptable or discriminatory, the Court established the following: refusing the right to a pension; refusing judicial guarantees in Court procedures⁴³; and refusing the

³² Concurrent Separate Opinion of Judge García Ramírez, *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18, Inter-American Court of Human Rights Series A No 18 (17 September 2003) para 20.

³³ Ibid para 24.

³⁴ OC-18 (n 27) para 155.

³⁵ Ibid para 89.

³⁶ Ibid para 104.

³⁷ Ibid. The willingness of the Inter-American Court to impose obligations and international responsibility to States regarding non-state actors can be seen from the first Contentious case of the Court: *Velasquez Rodríguez case*, (Merits) Inter-American Court of Human Rights Series C No 1 (1989).

³⁸ OC-18 (n 27) paras 112-117.

³⁹ Ibid paras 131-132, 136 and 160.

⁴⁰ Ibid para 118.

⁴¹ Separate Opinion Judge Cançado Trindade (n 28).

⁴² OC-18 (n 27) para 119.

⁴³ Ibid para 154.

right to file complaints for human rights violations.⁴⁴ It can be argued that the Court would not accept differential treatment neither in relation to: prohibition of forced labour, prohibition of child labour, special care for women workers; and treatment related with the rights of “freedom of association, collective bargaining, fair wages for work performed, social security, judicial and administrative guarantees, a working day of reasonable length with adequate working conditions, rest and compensation”.⁴⁵

The second case, the *Girls Yan and Bosico* case,⁴⁶ concerns the denial of birth certificates to two Dominican girls of Haitian origin by different Dominican authorities. Both children were under thirteen years old.⁴⁷ In Dominican Republic, the requisites for obtaining a birth certificate were different for children under and over thirteen years old. Nevertheless, Dominican authorities asked both of them for more requisites than the ones they had to fulfil.⁴⁸ The Court’s main focus was the right to nationality and the position of children as stateless persons. Yet, the Court found violations of articles 24, 19 (rights of the children) and 20 (right to nationality).

The Court established that States ought not to enact regulations that have discriminatory effects on certain groups of the population.⁴⁹ Later on, the IACtHR held that the denial of birth certificates had been discriminatory⁵⁰ and that “for discriminatory reasons [...] the State failed to grant nationality to the children, which constituted an arbitrary deprivation of their nationality”.⁵¹ The Court classified the treatment as discriminatory since the State acted in an arbitrary manner, without any objective and reasonable justification.⁵² Afterwards, the IACtHR pointed out that this discriminatory treatment was “situated within the context of the vulnerable situation of the Haitian population and Dominicans of Haitian origin in the Dominican Republic, to which the alleged victims belong”.⁵³

The third case, *Plan de Sánchez Massacre* concerned the massacre of the inhabitants of the *Plan de Sánchez* village, all of indigenous origin, during

⁴⁴ Ibid para 170.

⁴⁵ Ibid para 157. The Court does not phrase these factors as aspects related to which it does not accept differential treatment. It points out that these lists of rights assume a fundamental importance to migrant workers and yet they are frequently violated.

⁴⁶ *Girls Yean and Bosico case* (Merits, reparations and costs) Inter-American Court of Human Rights Series C No 130 (8 September 2005) This case had an extra difficulty for the Court. When the Dominican authorities denied the birth certificates to the Yan and Bosico girls, the Dominican Republic had not accepted the contentious jurisdiction of the IACtHR. Therefore, the Court could not establish that those acts had been discriminatory or breaches of the American Convention, but rather it evaluated those measures’ effects after the State accepted the Court jurisdiction.

⁴⁷ Ibid paras 161 and 164.

⁴⁸ Ibid para 146.

⁴⁹ Ibid para 141.

⁵⁰ Ibid para 166.

⁵¹ Ibid para 174.

⁵² Ibid paras 161 and 166.

⁵³ Ibid para 168.

the Guatemalan internal conflict.⁵⁴ Guatemalan soldiers came to the town on a Sunday, separated the men, women and young women and then shot at everyone wantonly. They raped and sexually abused younger women and later killed them. Afterwards, they forced few survivors and other community members who arrived later to bury the remains of their relatives and set them on fire.⁵⁵

The State accepted its responsibility for all the facts of the case. Therefore, the Court found a violation of article 24, among others, without making any substantial legal analysis. The Court justified its finding by claiming that all controversy between the parties had ended.⁵⁶ In connection with article 24, the Commission argued that the massacre was committed “within the framework of a genocidal policy of the Guatemalan State carried out with the intention of totally or partially destroying the Mayan indigenous people”.⁵⁷ The Commission explained that the State actions were based on racist beliefs, specifically in an idea of inferiority of indigenous communities in Guatemala.⁵⁸ The IACtHR did recognize the discriminatory context of the case. The Court held that “facts [...] which gravely affected the members of the *Maya achi* people in their identity and values and that took place within a pattern of massacres, constitute[d] an aggravated impact”.⁵⁹

The fourth and last case is *Yatama*.⁶⁰ Yatama was an organization composed by members of indigenous groups that wanted to participate in the Nicaraguan elections. The State did not allow them as the law established that only political parties could participate in the elections. The Court found a violation of article 24 in connection with article 23 (political rights).⁶¹

Regarding the “vulnerable group perspective”, the IACtHR found that States have to adopt “necessary measures” considering the “weakness or helplessness of members of certain social groups”.⁶² Subsequently, it held that the case’s victims were members of “indigenous and ethnic communities [...] who differ from most of the population [and] face serious difficulties that place them in a situation of vulnerability and marginalization”.⁶³ This was the framework for the analysis of the case under the right to be elected.

⁵⁴ *Plan de Sánchez Massacre case* (Application of the Inter-American Commission of Human Rights) Inter-American Court of Human Rights Series C No 105 (29 April 2004).

⁵⁵ *Plan de Sánchez Massacre case* (Merits) Inter-American Court of Human Rights Series C No 105 (29 April 2004) paras 42(15)- 42(21).

⁵⁶ *Ibid* paras 46-47.

⁵⁷ *Ibid* para 2.

⁵⁸ *Plan de Sánchez Massacre case* (Application of the IACHR) (n 54) 45-46.

⁵⁹ *Plan de Sánchez Massacre case* (n 55) para 51.

⁶⁰ *Yatama case* (Merits, reparations and costs) Inter-American Court of Human Rights Series C No 127 (23 June 2005).

⁶¹ *Ibid* paras 229 and 178.

⁶² *Ibid* para 201.

⁶³ *Ibid* para 202.

In connection with the main issue, the IACtHR established that political parties are not a form of organization “characteristic of the indigenous communities of the Atlantic Coast”.⁶⁴ Then it held that Nicaragua should recognize other forms of participations in elections “when this is pertinent and even necessary to encourage or ensure the political participation of specific groups of society, taking into account their special traditions and administrative systems”.⁶⁵ The Court described the participation of these groups as essential, since otherwise they would be excluded from participating.⁶⁶ Consequently, the Court held that Nicaragua unduly restricted the right to be elected of the members of YATAMA, as political parties were alien to their practices, customs and traditions.⁶⁷ The IACtHR further added that the case’s circumstances were “not necessarily comparable to the circumstances of all political groups”.⁶⁸

The Opinion of Judge García-Sayán further supports this proposition. He explains that the State “failed to comply with its obligation [...] to produce the appropriate conditions and mechanisms for the participation in public affairs of those who wished to be candidates in the Atlantic Coast of Nicaragua as members or representatives” of indigenous peoples of that region.⁶⁹ Judge Jackman did not endorse this last finding. He claimed that it was “completely irrelevant whether that requirement can or cannot be complied with by groups with a different form of organization”. He explained that the protection granted by the Court “should be available to every ‘citizen’, irrespective of ‘his culture, customs or traditional forms of association’”.⁷⁰

3.1.2 Analysis of the findings.

This is the first clue to claim that the “vulnerable group perspective” is the Court’s main equality tool. In all cases the lack of respect of the right to equality were mainly based in a group’s situation of “vulnerability”. Only in *Advisory Opinion OC-17*, the Court made a comprehensive analysis in connection with articles 1.1 and 24, all other cases used the “vulnerable group perspective” without applying the Court’s own standards in connection to equality and non-discrimination.

In this group, the Court found a violation of article 24 in all cases. Still this finding was not reached under the “objective and reasonable standard” but on the basis of the Court’s vulnerable groups perspective. When the Court

⁶⁴ Ibid para 214. The organization YATAMA obtained registration for the elections in the local elections in 2000. Still the Court considered the expert witnesses’ evidence in the sense that is a form of organization alien to this group.

⁶⁵ Ibid para 215.

⁶⁶ Ibid para 217.

⁶⁷ Ibid para 218.

⁶⁸ Ibid para 219.

⁶⁹ Concurrent Separate Opinion of Judge García-Sayán, *Yatama case* (Merits, reparations and costs) Inter-American Court of Human Rights Series C No 127 (23 June 2005) para 11.

⁷⁰ Partly Dissenting Opinion of Judge Jackman, *Yatama case* (Merits, reparations and costs) Inter-American Court of Human Rights Series C No 127 (23 June 2005) 2.

mentioned that a specific treatment had not been “reasonable and objective” as in *Yan and Bosico*⁷¹, it did not apply this standard as it had developed in *OC-18*. Even in *OC-18*, the Opinion where the Court developed the standard, it made the same mistake. It held that certain differential treatment for undocumented migrants was not acceptable;⁷² however, it did not explain why such differential treatment was not objective and reasonable.

The Court did not explain why such differential treatment would not be “objective and reasonable”. Some of the measures seem rather obvious such as prohibition of child and forced labour; still there are other more controversial such as social security.⁷³ It must be kept in mind that the Court reached all these conclusions on the basis that migrants (undocumented and documented) are a “vulnerable group” worthy of protection.

The *Yan and Bosico case* seems to provide an analysis of equality without resorting to the “vulnerable group perspective”. However, the Court’s reasoning in connection to equality is unclear. The IACtHR pointed out that States should not enact legislation with discriminatory effect on the population, but it did not relate this fact to its finding of discriminatory treatment.⁷⁴ The IACtHR simply established that the denial of birth certificates had been discriminatory as it had been arbitrary.⁷⁵ The link to equality is thus unclear at first sight. One can believe that the violation of the right to equality originated from the Court’s identification of the victims as members of a “vulnerable group”.⁷⁶ Nevertheless, it can be argued that the Court simply stated that a different result in treatment between a person of Haitian origin and the rest of the population is discriminatory.

Nonetheless, the Court is not clear with this connection. It does not explain the reasons behind its finding. One of the few clues available for the reader is the Court’s “vulnerable perspective”. The IACtHR explains that Haitians and Dominicans of Haitian origin face discrimination in the Dominican Republic.⁷⁷ Thus, it locates the children’s treatment within this pattern of discrimination. This could then be the main factor in finding a violation of the right to equality, even when the Court could have argued this violation in a different manner.

The *Plan de Sánchez massacre case* is one of the most obvious examples of the use of equality to highlight societal problems without making any legal analysis on this right’s substance. Here, the Court did not make any substantial analysis of the merits of the case as the State recognised its responsibility.⁷⁸ Judge García Ramírez expressed its concern about the

⁷¹ *Yan and Bosico case* (n 46) paras 161 and 166.

⁷² *OC-18* (n 27) paras 154, 157 and 170.

⁷³ *Ibid* para 157.

⁷⁴ *Yan and Bosico case* (n 46) 141.

⁷⁵ *Ibid* paras 161 and 166.

⁷⁶ *Ibid* para 168.

⁷⁷ *Ibid*.

⁷⁸ *Plan de Sánchez Massacre case* (n 55) paras 146-147.

importance of making this analysis.⁷⁹ As such, it is hard to establish whether this case supports or contradicts the hypothesis of this research.

Still, the Court did point out the connection between the facts of the case and the discriminatory attitude towards indigenous communities in Guatemala.⁸⁰ The Court accepted most claims brought before it. There was just one exception: the Court refused to classify the actions of the case as genocide. The IACtHR held that it had jurisdiction to find violation of the American Convention and other instruments of the Inter-American system, but not the UN Convention against genocide.⁸¹ Nevertheless, the Court framed the case in a context of discrimination. Therefore, the “vulnerable group” perspective was still present in this judgment.

The last case, *Yatama*, is one of the clearest examples of the influence of the “vulnerable group” perspective in the Court’s judgments. There, the Court made a great development on the right to compete for public office. It held that States have the obligation to guarantee that indigenous communities compete in public elections.⁸² As such, the refusal to let *Yatama*, an indigenous organization, participate in the elections was found to violate the ACHR. This analysis was not done through the use of the “objective and reasonable standard”.

It can be argued that the expansion of this right derived from the fact that the victims were members of indigenous communities. The Court clearly explained that the circumstances of this case were “not necessarily comparable to the circumstances of all political groups” present at every country.⁸³ This finding was directly linked to article 24 in connection with article 23 (political rights).⁸⁴ Thus, the “vulnerable perspective” expanded the right to hold public office in favour of indigenous communities.

These four cases involved the use of articles 1 and 24 of the American Convention and the use of the Court’s “vulnerable perspective”.⁸⁵ In all cases, the IACtHR found violations of the right to equality. Most findings of the Court were inspired in the use of its “vulnerable group perspective” as a framework to expand the content of human rights.

Therefore, it is possible to argue that the most influential standard or legal criterion explaining the Court’s reasoning was the use of this “vulnerable perspective”. This becomes more evident in this group since the Court also

⁷⁹ Concurring Separate Opinion of Judge García Ramírez. *Plan de Sánchez Massacre case* (Merits) Inter-American Court of Human Rights Series C No 105 (29 April 2004) paras 14-15.

⁸⁰ *Plan de Sánchez Massacre case* (n 55) para 51.

⁸¹ *Ibid* para 51.

⁸² *Yatama case* (n 60) paras 215 and 218.

⁸³ *Ibid* para 219.

⁸⁴ *Ibid* para 220.

⁸⁵ To use the “vulnerable group perspective” means that the Court identified the victims of a case as “vulnerable”. This identification has an impact in the outcome of a case. The effects will be explained according to each case or group.

used articles 24 and 1 directly in its Judgment and yet it did not use the “objective and reasonable standard” in its reasoning.

3.2 Cases analyzing only the right to equality (articles 1.1 and 24) without using a “vulnerable group perspective”.

There are ten cases in this group. Here the Court makes an analysis to find whether the right to equality and non-discrimination protected by articles 1 and 24 of the ACHR was violated. The common characteristic is that the victims are not members or at least are not treated as members of a “vulnerable” group.

3.2.1 Facts and findings.

The first case is *Advisory Opinion OC-4/84 (OC-4/84 herein after)*.⁸⁶ The case concerned the regulation of naturalization procedures in Costa Rica. Costa Rica asked the Court to evaluate if certain Constitutional changes were compatible with the American Convention. The analyzed changes were: 1) Giving preference in naturalization procedures to persons from Ibero- America; 2) Making a difference between Ibero-American people by naturalization or by birth; 3) Creating additional requisites for the naturalization procedure; and 4) Making a distinction for spouses of male and female Costa Rican nationals.⁸⁷

This was the first time the Court dealt with the right to equality under article 24 of the Convention. Here the Court established its first understanding of equality and non-discrimination:

“The notion of equality springs directly from the oneness of the human family and is linked to the essential dignity of the individual. That principle cannot be reconciled with the notion that a given group has the right to privileged treatment because of its perceived superiority. It is equally irreconcilable with that notion to characterize a group as inferior and treat it with hostility or otherwise subject it to discrimination in the enjoyment of rights which are accorded to others not so classified. [...]

There may well exist certain factual inequalities that might legitimately give rise to inequalities in legal treatment that do not violate principles of justice. They may in fact be instrumental in achieving justice or in protecting those who find themselves in a weak legal position. [...]

⁸⁶ *Proposed Amendments to Naturalization Regulation in Costa Rica on the*, Advisory Opinion OC-4, Inter-American Court of Human Rights Series A No 4 (19 January 1984).

⁸⁷ *Ibid* para 52.

Accordingly, no discrimination exists if the difference in treatment has a legitimate purpose and if it does not lead to situations which are contrary to justice, to reason or to the nature of things. It follows that there would be no discrimination in differences in treatment of individuals by a state when the classifications selected are based on substantial factual differences and there exists a reasonable relationship of proportionality between these differences and the aims of the legal rule under review. These aims may not be unjust or unreasonable, that is, they may not be arbitrary, capricious, despotic or in conflict with the essential oneness and dignity of humankind.⁸⁸ (Emphasis added)

The Court held that the first three matters posted by Costa Rica did not constitute discrimination and the last one did. First, the IACtHR decided that stipulating less strict requirements to Central Americans, Ibero-Americans and Spaniards over other aliens in naturalization procedures was not discriminatory. This was based on the fact that “viewed objectively” they shared closer bonds with Costa Ricans, which could be assumed to facilitate the assimilation process into society⁸⁹.

On the second issue, the Court held that granting preferential treatment to birth nationals over naturalized nationals was not discriminatory. Yet, the Court questioned the grounds for such differentiation. The Court seems to have found that this differential treatment was based on considerations regarding the strictness of other countries naturalization rules. Thus, it accepted the possibility that being a naturalized national of Ibero-American countries was not a guarantee to secure close ties with Costa Rica.⁹⁰ Judge Burgenthal dissented on this point. He argued that this differential treatment was not reasonable as the damage caused was not proportional to the end sought by the State. He explained that Costa Rica already practiced exams to guarantee the applicants’ close ties with the State.⁹¹ He emphasized that the requisite was based on the assumption that some applicants might have acquired naturalized nationalities by fraud. In his view very few cases would fall under this category. Thus punishing other possible applicants for the actions of few people did not seem “fair”.⁹²

On the third issue, the Court held that the additional requirements of having ability to “speak, write and read” Spanish as well as passing an exam on the history and values of Costa Rica was not discriminatory. The Court also held doubts on this finding as it argued that it was a very restrictive requisite, which was open to “arbitrary and subjective judgments” when applying such standards.⁹³ Nevertheless, it found that in consideration of the margin of appreciation of the State such requirements did not seem to be

⁸⁸ Ibid paras 55-57.

⁸⁹ Ibid para 60.

⁹⁰ Ibid para 61.

⁹¹ Dissenting Opinion Judge Burgenthal. *Proposed Amendments to Naturalization Regulation in Costa Rica on the*, Advisory Opinion OC-4, Inter-American Court of Human Rights Series A No 4 (19 January 1984) paras. 4-8.

⁹² Ibid.

⁹³ OC-4 (n 86) para 63.

“*prima facie*” discriminatory.⁹⁴ Judge Piza rejected this argument. He considered that this requirement was discriminatory as it was not reasonable to restrict such “privilege for reasons of education level”, which in his opinion had nothing to do with national integration. Additionally, he argued that the context surrounding the reform made it possible to foresee that the standard would be used to reduce granting nationality only to individuals with high intellectual capacities.⁹⁵ To reach this conclusion Judge Piza also considered the general context of Costa Rican society in which not all nationals know how to write, read or even speak Spanish.⁹⁶ He further added that the only objective standard that could be taken into account on such matters had to be related to “greater or lesser assimilation in the national community”.⁹⁷

On the fourth issue, the Court held that granting “special considerations” to wives of Costa Rican men and not to husbands of Costa Rican women was discriminatory. The IACtHR found that such treatment was not justified as it was based on prejudices and assumptions of gender roles. It explained the evolution of gender equality in the International and the Regional context to base its argument.⁹⁸ There was an attempt to give a “vulnerable group” connotation to the case, but the Court did not accept it.⁹⁹ The IACtHR established that it would not deal with the alleged discriminatory background of the legislation against Central American refugees and migrants seeking protection in Costa Rica.¹⁰⁰

The second case, *Castañeda Gutman*,¹⁰¹ concerns a failed request to seek independent candidacies in Mexico. Jorge Castañeda wanted to participate as an “independent candidate” in the Presidential elections of 2006.¹⁰² His request was refused as only political parties could nominate candidates for election.¹⁰³ He argued that this was an undue restriction of his political rights, and a violation of the rights to equality and non-discrimination.¹⁰⁴ The Court held that article 24 and 23 (political rights) were not violated. It only found violations of articles 8 and 25. The Commission did not claim violations of articles 24 and 23, only of articles 8 and 25.¹⁰⁵

⁹⁴ Ibid para 62.

⁹⁵ Dissenting Opinion of Judge Piza, *Proposed Amendments to Naturalization Regulation in Costa Rica on the*, Advisory Opinion OC-4, Inter-American Court of Human Rights Series A No 4 (19 January 1984) para 25.

⁹⁶ Ibid para 23.

⁹⁷ Ibid para 36.

⁹⁸ OC-4 (n 86) paras 64-67.

⁹⁹ Ibid para 40.

¹⁰⁰ Ibid.

¹⁰¹ *Castañeda Gutman case* (Merits, reparations and costs) Inter-American Court of Human Rights Series C No 184 (6 August 2008).

¹⁰² In this case, independent candidate is used to define a person who wishes to participate in the elections without being nominated by any political party.

¹⁰³ *Castañeda Gutman case* (n 101) paras 81-82.

¹⁰⁴ Ibid para 4.

¹⁰⁵ Ibid para 3.

The Court firmly stated that this case and *Yatama*¹⁰⁶ were not the same, and were not even analogous, as they did not share the same characteristics.¹⁰⁷ It emphasized that *Yatama* concerned a political organization of indigenous people, who represented a marginalized group of society, whereas the applicant was neither indigenous nor represented any marginalized group.¹⁰⁸ The IACtHR held that the applicant could have participated in the elections through other means.¹⁰⁹

The analysis of article 23 (political rights) is also relevant for the research. Article 23 establishes that political rights can “only” be regulated on the basis of “age, nationality, residence, language, education, civil and mental capacity, and sentencing by a competent court in criminal proceedings”.¹¹⁰ The applicant argued that States could only limit the right to be elected based in one of those grounds. As being a member of a political party or being nominated by a political party was not one of the grounds, he considered that such limitation was prohibited by the Convention.¹¹¹ The Court held that States could impose other restrictions to these rights as States had the obligation to organize the electoral system needed to enjoy article 23.¹¹² It asserted that these limitations have only one purpose “to avoid the possibility of discrimination against individuals in the exercise of their political rights”.¹¹³ It added that this paragraph “evident[ly] refers to the enabling conditions that the law can impose to exercise political rights”.¹¹⁴ The Court supported its finding by claiming that the American Convention does not impose a specific political system for States. Thus, States can allow or prohibit “independent” candidates. To reach this conclusion the Court considered the position of different American States on the matter.¹¹⁵

The IACtHR also analyzed a possible violation of article 24 of the Convention. The victim based its allegation on Federation/State differences.¹¹⁶ He explained that some States in Mexico allowed independent candidates whereas others and the Federation did not. He argued that the situation between the three groups was not significantly different, thus the existence of independent candidates on some States and not in others or in the Federation was unjustified.¹¹⁷ The Court simply held that federal and local elections could not “be compared” and as such it could not rule on a violation of the right to equality.¹¹⁸

¹⁰⁶ *Yatama case* (n 60) also concerned a request to grant access to people not registered by political parties.

¹⁰⁷ *Castañeda Gutman case* (n 101) paras 170-171.

¹⁰⁸ *Ibid* para 172.

¹⁰⁹ *Ibid*.

¹¹⁰ The specific equality issues raised by this provision (for example in connection to people with disabilities) fall outside the scope of this research.

¹¹¹ *Castañeda Gutman case* (n 101) para 135.

¹¹² *Ibid* para 161.

¹¹³ *Ibid* para 155.

¹¹⁴ *Ibid* para 155.

¹¹⁵ *Ibid* paras 197-202.

¹¹⁶ Mexico is a Federal Republic composed of 31 States and 1 Federal District.

¹¹⁷ *Castañeda Gutman case* (n 101) para 175.

¹¹⁸ *Ibid* para 212.

The third case is *Mayagna (Sumo) Awas Tingni*.¹¹⁹ It relates to the recognition of an indigenous community ownership rights over its traditional land. The Commission argued that “[n]on-recognition of the equality of property rights based on indigenous tradition is contrary to the principle of non-discrimination set forth in article 1(1) of the Convention”.¹²⁰ The Court found a violation of article 21 (right to property) without referring to equality and non-discrimination or to indigenous people as a “vulnerable” group. The Court reasoned that article 21 (right to property) also protected the collective ownership of land as understood by indigenous peoples.¹²¹

The Commission also argued, in relation to article 25 (Judicial guarantees) that “Nicaragua does not allow the indigenous groups access to the Judiciary, and therefore it discriminate against them”. It elaborated that access to an effective legal remedy was especially important for indigenous people given their “conditions of vulnerability”.¹²² The Court did not analyze these issues.

The fourth case, *Genie Lacayo*¹²³, concerned preferential treatment in judicial proceedings to members of military forces in Nicaragua. The Commission argued that these preferences were discriminatory.¹²⁴ The Court solved that it could not make an abstract analysis of the law since the articles giving the preferences were not applied.¹²⁵ The Court established that it could only analyze a violation of article 24 in connection with the procedural rights of the applicant.¹²⁶

The fifth case, *Advisory Opinion OC-11/90*¹²⁷ (*OC-11* herein after), concerned a request to determine if “indigents” (this is the term used by the Court to refer to people who cannot afford exhaustion of legal remedies) must exhaust domestic remedies before bringing a case to the Commission, even when their economical situation prevents them from doing so.¹²⁸ The Court analyzed this matter using articles 1(1), 24 and 8. It established that demanding exhaustion of domestic remedies before bringing a claim to the

¹¹⁹ *Mayagna (Sumo) Awas Tingni case* (Merits, reparations and costs) Inter-American Court of Human Rights Series C No 79 (31 August 2001).

¹²⁰ *Ibid* para 140.b.

¹²¹ *Ibid* para 148.

¹²² *Ibid* paras 104.h and 104.n.

¹²³ *Genie Lacayo case* (Merits, reparations and costs) Inter-American Court of Human Rights Series C No 30 (29 January 1997).

¹²⁴ *Ibid* paras 72, 15.e.c., and 38.c.

¹²⁵ *Ibid* paras 72 and 86.

¹²⁶ *Ibid* para 88.

¹²⁷ *Exceptions to the Exhaustion of Domestic Remedies (Arts. 46 (1), 46 (2)(a) and 46 (2)(b) American Convention on Human Rights*, Advisory Opinion OC-11, Inter-American Court of Human Rights Series A No 11 (10 August 1990) The reference to This case was obtained from Tojo, Liliana and Martinez M. Claudia “Sumarios de Jurisprudencia/ Igualdad y No Discriminación”. Center for Justice and International Law- CEJIL, 2009, p. 17.

¹²⁸ *OC-11* (n 127) para 2.

Commission to people who were prevented from exhausting them for economic reasons was discriminatory.¹²⁹ It elaborated that if “an indigent” needs legal counsel and the State does not provide it free of charge, the State discriminates against this person.¹³⁰ This obligation is applicable only when such counsel is needed to guarantee a “fair hearing”.¹³¹

The sixth case, *López Álvarez*¹³², concerns the detention of a Honduran national for drug trafficking. Mr. López was a member of a minority group in Honduras: the *garifuna*¹³³ group. He was not allowed to use his own language with other prisoners and visitors when he was imprisoned.¹³⁴ The Commission claimed that such treatment was discriminatory and in violation of article 24 of the Convention. The Court connected the violation of article 24 with article 13 (freedom of expression).¹³⁵

The Court first determined that such treatment did not allow the victim to express “himself in the language of his choice”, in an unjustified manner.¹³⁶ The IACtHR added that States cannot “limit, in an unjustified manner, the freedom of the people to express themselves” through the means they choose.¹³⁷ The Court stated that this prohibition was especially serious since the limitation had affected the language of a minority group and thus affected the “personal dignity” of the victim.¹³⁸ This was held to be discriminatory.¹³⁹ Consequently the Court found a violation of articles 13 and 24 of the American Convention.¹⁴⁰ In his concurring opinion, Judge García Ramírez supported the Court’s reasoning and added that article 24 served to “characterize” the violation of the right of freedom of expression.¹⁴¹

The seventh case is *Advisory Opinion OC-17 (OC-17 herein after)*.¹⁴² The case concerns a request from the Commission to define children’s field of protection under the American Convention and other human rights

¹²⁹ Ibid para 25.

¹³⁰ Ibid.

¹³¹ Ibid para 26.

¹³² *López Álvarez case* (Merits, reparations and Costs) Inter-American Court of Human Rights Series C No 141 (1 February 2006).

¹³³ Ibid para 54 (1). The *garifunas* are people of African and Indigenous descent living in the North part of the Atlantic coast of Honduras.

¹³⁴ Ibid para 54 (49).

¹³⁵ Ibid para 157.

¹³⁶ Ibid para 166.

¹³⁷ Ibid para 168.

¹³⁸ Ibid para 169.

¹³⁹ Ibid para 172.

¹⁴⁰ Ibid para 174.

¹⁴¹ Concurring Opinion of Judge García Ramírez, *López Álvarez case* (Merits, reparations and Costs) Inter-American Court of Human Rights Series C No 141 (1 February 2006) para 45.

¹⁴² *Juridical Condition and Human Rights of the Child*, Advisory Opinion OC-17, Inter-American Court of Human Rights Series A No 17 (28 August 2002). Judge Jackman dissented even with the study of this request. He believed that the Court should not have heard the questions posted as they referred to matters of academic speculation.

instruments (mainly The Convention on the Rights of the Child).¹⁴³ Mexico, Costa Rica and other actors requested the Court to “specify the meaning and scope of the principle of equality” in connection to children.¹⁴⁴ The Court thus solved if differential treatment for children could be considered discriminatory.¹⁴⁵

The IACtHR held that there are “factual inequalities” that justify differential treatment without constituting discrimination. It held that in fact this distinct treatment could protect those “who must be protected” in connection with the situation of weakness in which they find themselves.¹⁴⁶ The Court found that children, besides having all rights of human beings, have “special rights derived from their condition”.¹⁴⁷ Finally, the Court asserted that considering the conditions of children, differential treatment between them and adults “is not discriminatory *per se*”.¹⁴⁸

The eighth case, *De la Cruz Flores*¹⁴⁹, relates to the detention and subsequent trial under charges of terrorism of María Teresa De la Cruz Flores, a physician, for actions related to the practice of her medical profession.¹⁵⁰ The victim of the case was at the time of the judgment facing a new trial for terrorism charges.¹⁵¹ The Commission argued that Peru had treated Mrs. De La Cruz differently than four other physicians accused under the same process, for similar facts and with similar evidence.¹⁵² The IACHR claimed that the principle of equality is violated when different treatment is given to equal circumstances without any reasonable basis; or when similar facts are interpreted in contradictory ways.¹⁵³ The Commission explained that unequal application of the law to similar situations under the same criminal process and similar sources of evidence is a violation of the principle of equality.¹⁵⁴ The Commission thus claimed that the State failed to give the same treatment to Mrs. De la Cruz Flores and as such it violated article 24 in connection with article 1 of the Convention.¹⁵⁵

The Court asserted that it “d[id] not have competence to replace the domestic judge to decide whether the circumstances in which some individuals were acquitted and others convicted were exactly the same and merited the same treatment and, therefore, that the existence of a violation

¹⁴³ *OC-17* (n 142) para 1.

¹⁴⁴ *Ibid* para 43.

¹⁴⁵ *Ibid* paras 46-50

¹⁴⁶ *Ibid* para 46.

¹⁴⁷ *Ibid* para 54.

¹⁴⁸ *Ibid* para 55.

¹⁴⁹ *De la Cruz Flores case* (Merits, reparations and costs) Inter-American Court of Human Rights series C No 115 (18 November 2004). This case was not initially on this research until it was seen in CEJIL’s book (n 127).

¹⁵⁰ *De La Cruz Flores case* (n 149) para. 3.

¹⁵¹ *Ibid* para 116.

¹⁵² *Ibid* para 115; *De la Cruz Flores case* (Application of the Inter-American Commission) paras 147 and 149-150.

¹⁵³ *Application De La Cruz Flores case* (n 152) para 150.

¹⁵⁴ *Ibid* para 152.

¹⁵⁵ *Ibid* para 156.

of Article 24 of the Convention ha[d] not been sufficiently proved”.¹⁵⁶ In connection with the new trial faced by Mrs. De la Cruz Flores, the Court decided that the victim’s status under this trial depended on the Peruvian domestic Courts and could not make any further analysis about it.¹⁵⁷

The ninth case, *Acosta Calderón*,¹⁵⁸ concerns the detention of a person accused of drug trafficking and the subsequent extended period of time he spent in preventive detention.¹⁵⁹ Mr. Acosta Calderón was left in prison after charges against him were dropped as the law on narcotics did not allow the release of prisons accused of drug trafficking in these circumstances.¹⁶⁰ The Commission argued that Ecuador violated articles 24 and 2 (Domestic Legal Effects) “due to the discriminatory treatment against Mr. Acosta Calderón as a person accused of violations to the law on narcotics.”¹⁶¹ Article 2 establishes States’ obligation to adopt legislative and other necessary measures to give effects to the rights and freedoms of the American Convention. The Commission claimed that the victim did not benefit of immediate release once the charges were dropped against him because he was accused of drug trafficking. It explained that this constituted discriminatory treatment as “other members of the prison population, detained for crimes not classified in the drug law, could be freed immediately after the dismissal of the accusations”.¹⁶² The representatives supported this position¹⁶³ and added that Ecuador had “a political determination to discriminate the detainees for crimes related with drug trafficking”, which affected Mr. Acosta Calderon.¹⁶⁴

The Court found only that article 2 was violated. It did not claim anything in connection with the alleged violation of the right to equality. The IACtHR explained that the challenged law did not “grant a certain category of defendants access to a right enjoyed by the majority of the prison population”. It asserted that this rule cause undue harm to Mr. Calderón Acosta and thus violated article 2 of the Convention.¹⁶⁵ Judge Cançado Trindade criticized the lack of finding a violation of the right to equality. He explained that article 2 had been violated “precisely because [the Ecuadorian Criminal Code] was discriminatory”, and thus such law also violated article 24 of the Convention.¹⁶⁶

¹⁵⁶ *De La Cruz Flores case* (n 149) para 115.

¹⁵⁷ *Ibid* para 172.

¹⁵⁸ *Acosta Calderón case* (Merits, reparations and costs), Inter-American Court of Human Rights Series C No 129 (24 June 2005). This case was not included in this research until it was seen in CEJIL’s book (n 127).

¹⁵⁹ *Acosta Calderón case* (n 158) para 3.

¹⁶⁰ *Ibid* paras 128 (a)-(b).

¹⁶¹ *Ibid* para 128 (a).

¹⁶² *Ibid* para 128 (b).

¹⁶³ *Ibid* para 129 (d).

¹⁶⁴ *Ibid* para 129 (c).

¹⁶⁵ *Ibid* para 135.

¹⁶⁶ Separate Concurring Opinion of Judge Cançado Trindade, *Acosta Calderón case* (Merits, reparations and costs), Inter-American Court of Human Rights Series C No 129 (24 June 2005) paras 6-7.

The tenth and last case, *Apitz Barbera et al*¹⁶⁷, concerned the removal from office of Judges of an Administrative Court in Venezuela on the basis that they committed an “inexcusable judicial error” in one of their decisions. The Venezuelan Court had five members, three were removed and two were allowed to continue their judicial activities. There were two claims connected with equality.¹⁶⁸ First, that Venezuela violated the right to equality of the three removed Judges in connection with their right of access to public office by giving differential treatment in their dismissal and in their access to new posts.¹⁶⁹ Second, that the State violated their right to equality by solving the appeal submitted by one of the non-dismissed Judges much faster than theirs.¹⁷⁰ The Court did not find a violation of the right to equality.

In connection with the first issue, the Court found that Venezuela did not provide a “reasonable and objective” justification for the differential treatment of the Judges. The State argued that two Judges were not removed since they were eligible for retirement.¹⁷¹ The Court held that retirement was something completely external to the disciplinary proceedings in this case.¹⁷² It established that the five Judges “should be considered as identically situated as regards the commission of the disciplinary infringement”.¹⁷³ Nevertheless, the IACtHR found that it did not have “jurisdiction” to solve if the differential treatment applied to the Judges was a violation of article 24. It held that article 24 “does not grant the alleged victims the right to demand the imposition of the disciplinary sanction of removal from office against” the two Judges not part of the case before the Court. Consequently, it held that it could not make a judgment connected with article 24.¹⁷⁴

In connection with the right to equal access to public office, the Court held that the prohibition of reincorporation into public office of those who have been dismissed is an “objective and reasonable condition whose ultimate objective is to guarantee the correct exercise of the judicial task.”¹⁷⁵ Therefore, it concluded that the criteria provided by the State to prevent “access to the Judiciary for the three judges” was objective and reasonable.¹⁷⁶ On the second issue, the Court found that solving the appeal from one of the non-removed Judges faster had not been discriminatory. The IACtHR held that the arguments given by the parties were different in

¹⁶⁷ *Apitz Barbera et al case* (“First Court of Administrative Disputes) case (Merits, reparations and costs) Inter-American Court of Human Rights Series C No 182 (5 August 2008). The reference to this case was obtained from the important article of González and Parra (n 14).

¹⁶⁸ *Apitz Barbera case* (n 167) para 2.

¹⁶⁹ *Ibid* paras 186-187 and 201.

¹⁷⁰ *Ibid* para 208.

¹⁷¹ *Ibid* para 193.

¹⁷² *Ibid* paras 197-198.

¹⁷³ *Ibid* para 200.

¹⁷⁴ *Ibid*.

¹⁷⁵ *Ibid* para 206.

¹⁷⁶ *Ibid*.

nature and as such they could not be compared.¹⁷⁷ The main difference was that the fastly solved appeal claimed that the Judge had fulfilled the requisites for retirement, and the other *apellos* did not.¹⁷⁸

3.2.2 Analysis of the findings.

These cases show that the Inter-American Court is less willing to find a violation of the right to equality when it does not identify the victims as members of a “vulnerable” group. This statement can be supported with three trends from the previous cases: the low number of violations of the right to equality; the involvement of “vulnerable” groups when the Court found a violation; and the Court’s reasoning in cases not involving a “vulnerable” group.

In connection with first trend of this right, the Court found a violation of this right only in two occasions: *OC-4* and *López Álvarez*.¹⁷⁹ Moreover, in *OC-4* the Court found a violation only in connection to one of four hypotheses.¹⁸⁰ It could be said that the Court also declared a violation in *OC-11*. There the IACtHR established that people who cannot afford to exhaust domestic remedies to bring a claim before the Commission are exempted from this requisite, as acting on the contrary would be discriminatory.¹⁸¹ Yet, the Court dealt with procedural matters of exhaustion of remedies before bringing a claim to the Inter-American system and not with the violation of a substantive right of the Convention. Then there are only two cases that establish violations of the right to equality. Thus it can be said that the Court is less willing to find a violation of the right to equality when it deals with cases without using its “vulnerable group perspective”; that is cases not involving a “vulnerable” group.

With the second trend, cases containing a violation of the right to equality involved “vulnerable” groups. In *López Álvarez* the IACtHR dealt with discriminatory treatment towards tribal peoples. Even if it did not mention that Mr. López Álvarez was a member of a “vulnerable group”, it highlighted that he was member of a minority group.¹⁸² Therefore, it can be argued that this “vulnerable group perspective” was somewhat present in the judgment. In *OC-11* the Court dealt with discriminatory treatment towards “indigents”.¹⁸³ In *OC-17* the Court dealt with the situation of children. As such, it established that requiring differential treatment for this group was

¹⁷⁷ *Ibid* paras 208 and 215.

¹⁷⁸ *Ibid* para 215.

¹⁷⁹ *OC-4* (n 86) paras 64-67; *López Álvarez case* (n 132) para 174. In *OC-4* in connection with differential treatment between male and female spouses of Costa Rican nationals; in *López Álvarez* in connection with prohibition to use native language in prison.

¹⁸⁰ Only in connection with differential treatment between male and female spouses. *OC-4* (n 86) paras 64-67.

¹⁸¹ *OC-11* (n 127) para 25.

¹⁸² *López Álvarez case* (n 132) para 54 (1).

¹⁸³ *OC-11* (n 127) para 2.

not discriminatory.¹⁸⁴ The finding in *OC-4* related to discriminatory treatment involved discrimination against women.¹⁸⁵

These findings thus support the idea that the Court is more likely to find violations of the right to equality when it identifies a “vulnerable” group. This hypothesis is sustained by the Court’s treatment of migrants in *OC-4*. The Court did not identify migrants as a “vulnerable” group in its Advisory Opinion. Even more, it expressly rejected the proposition of taking into account the alleged discriminatory context in the case.¹⁸⁶ The IACtHR simply held that it would not deal with this issue without giving any explanation. This situation sharply contrasts with other Advisory Opinion where the Court considered migrants as “vulnerable”.¹⁸⁷ It is possible to argue that if the Court had identified the subjects of this legislation as members of a vulnerable group, its findings could have been different. Then this case shows that the identification of a group as “vulnerable” is not merely a formality. Even when the Court is dealing with a “vulnerable” group if it does not identify it as such, there could be less chances of finding a violation of the right to equality.

Third, the Court made a stricter reading of equality in cases not involving a member of a “vulnerable” group. In *Castañeda Gutman, Genie Lacayo, De la Cruz Flores, Acosta Calderón* and *Apitz*, the victims were members of the general population who could not be identified with a disadvantaged, marginalized or minority group. Moreover, in the first and last case, the victims can be identified as part of “privileged groups”.¹⁸⁸ *Castañeda Gutman* and *Apitz* contain detailed analysis connected with equality. It is hard to analyze the effects of *Genie Lacayo* since the decision did not consider any substantial analysis. The Court simply stated that the specific articles alleged to be discriminatory had not been applied in this case and thus it could not make an abstract analysis.¹⁸⁹ On the contrary, *Apitz* and *Castañeda Gutman* can provide an explanation for this third argument. Even when both *De la Cruz Flores* and *Acosta Calderón* do not contain a detailed analysis of equality they also serve to sustain the explanation put forward in this paper.

In *Apitz* the Court made a full analysis of the right to equality. The IACtHR established that the differential treatment given to the victims in that case did not have objective and reasonable justifications. Yet, it did not find a violation of the right to equality. The Court justified its position by claiming that it did not have jurisdiction to solve if the differential treatment was a violation of article 24.¹⁹⁰ González and Parra perfectly explain the flaws of this argumentation. They showed how the Court mainly based its position in

¹⁸⁴ *OC-17* (n 142) para 55.

¹⁸⁵ *OC-4* (n 86) paras 164-167.

¹⁸⁶ *Ibid* para 40.

¹⁸⁷ *OC-18* (n 27).

¹⁸⁸ In the first case, the victim was a former Foreign Minister of Mexico; in the second, the victims were former Judges of a Venezuelan Court.

¹⁸⁹ *Genie Lacayo case* (n 123) paras 62 and 78.

¹⁹⁰ *Apitz case* (n 167) para 200.

a wrong understanding of the prohibition of the fourth instance. This rule explains that the IACtHR is not a domestic Court making a general review of domestic authorities' decisions. Its power to review these decisions relates with the existence of a violation of the American Convention.¹⁹¹ The Court clearly held that the victims of this case were treated differently without any objective and reasonable justification. It is obvious that such fact entails a violation of the right to equality as protected by the American Convention. Consequently, the IACtHR should have found a violation of article 24 of the Convention.¹⁹² The “vulnerable group perspective” offers an explanation for this finding. As the victims were not members of a “vulnerable” group, the Court was less willing to find a violation of the right to equality. The same happened in *De la Cruz Flores*, if less developed. The Court also established that it did not have jurisdiction to rule on a violation of article 24. It held that it could not replace the domestic judge in deciding if the circumstances for acquittal of some individuals were the same and merited the same treatment.¹⁹³ The lack of will to deal with equality is more apparent when considering that these statements were made without having a subheading connected to article 24 and the right to equality. Once again, a possible explanation for this result is that Mrs. De la Cruz Flores was not identified as part of a “vulnerable group”.

In *Acosta Calderón* the Court established that the application of a law prevented the victim from enjoying a right enjoyed by the majority. It thus held that this law violated article 2 of the Convention. Yet, it did not analyze the alleged violation of the right to equality.¹⁹⁴ This could be explained by claiming that the case did not involve a “vulnerable group”.

Castañeda Gutman is perhaps the clearest case showing the difference in the Court's approach to cases involving and not involving “vulnerable groups”. In *Yatama*¹⁹⁵ the Court dealt with very similar circumstances. Both cases concerned participation in elections through different means than the ones established by law. Mexico and Nicaragua established that only political parties could propose candidates to be elected for public office.¹⁹⁶ The main difference between both cases is that *Yatama* involved indigenous people and *Castañeda Gutman* did not. The result of both cases is completely opposite as the Court found violations of articles 23 and 24 in *Yatama* and not in *Castañeda*.

In *Yatama* the Court held that not allowing an indigenous organization to participate in the elections had been discriminatory, as political parties were organizations alien to their customs and traditions.¹⁹⁷ In *Castañeda*, the IACtHR held that the restriction not to allow independent candidates to

¹⁹¹ *González and Parra* (n 14) 140.

¹⁹² *Ibid* 141.

¹⁹³ *De La Cruz Flores case* (n 149) para 115.

¹⁹⁴ *Acosta Calderón case* (n 158) para 135.

¹⁹⁵ *Yatama case* (n 60).

¹⁹⁶ *Ibid* paras 178 and 229; *Castañeda Gutman case* (n 101) paras 81-82.

¹⁹⁷ *Yatama case* (n 60) paras 214-218.

participate in elections was permitted by the ACHR and that Mexico provided sufficient justifications for it.¹⁹⁸ The Court went as far as to state that Mr. Castañeda Gutman had other alternative means to participate in the elections.¹⁹⁹ The Court failed to notice that at the end all options depended on the will of political parties to nominate a specific candidate. *Castañeda's* strict analysis on the right to compete for public office shows the added value by equality with the “vulnerable group perspective”. It can be said that if Jorge Castañeda had been a member of a marginalized or vulnerable group, the Court would have been willing to expand the content of article 23, as it did in *Yatama*. Since he was not, the Court applied a stricter interpretation of his rights. Based on *Castañeda*, it becomes clear that the findings under *Yatama* were highly influenced by equality and the Court’s “vulnerable group perspective”.

The Court’s position in *Castañeda* is questionable without taking into account the Court’s use of its “vulnerable group perspective”. The Court even refused to compare its findings in *Yatama* to *Castañeda*. The IACtHR established that the nature of both cases was different as the former case involved access to elections of indigenous people. This difference is of course true. Yet, it is hard to sustain that this difference can justify a complete lack of analysis on the applicability of *Yatama's* findings to *Castañeda Gutman*. This is especially true taking into account that Judge Jackman had brought up this precise question under its separate Opinion in *Yatama*. He explained that the right of access to public office was unrelated to whether a person belongs to an indigenous group or not.²⁰⁰ Yet, in *Castañeda Gutman*, the Court did not refer to his opinion. Another difference between both judgments caused by this situation is that in *Castañeda Gutman* the Court holds that it cannot find a violation of article 23 because the ACHR does not demand a specific political system from States.²⁰¹ There, the Court recognises the right of every State to choose its political system. Nevertheless, in *Yatama* the Court did not make these considerations in connection to the Nicaraguan political system. Under this analysis, it would not be possible to understand the findings in *Castañeda*. The “vulnerable group perspective” provides a plausible explanation to understand the differences between the findings.

Still, there is a case that does not support this explanation: *Mayagna*. This case was about the lack of recognition of property rights to an indigenous community.²⁰² Indigenous peoples are one of the clearest “vulnerable groups” of the Court.²⁰³ Yet, the Court did not identify the group as such. Even when the Commission requested the Court to find violations of the right to equality, the Court remained silent on this matter.²⁰⁴ This attitude is

¹⁹⁸ *Castañeda Gutman case* (n 101) paras 155 and 161.

¹⁹⁹ *Ibid* para 202.

²⁰⁰ Separate Opinion Judge Jackman in *Yatama* (n 70) 2.

²⁰¹ *Castañeda Gutman case* (n 101) paras 197-202.

²⁰² *Mayagna case* (n 119) para 140.b.

²⁰³ *Yatama case* (n 60) para 202. See also 2.3.1.

²⁰⁴ *Mayagna case* (n 119) paras 140.h, 140.n, and 148.

contrary to the Court's general willingness to find violations of this right when there are "vulnerable groups" involved and the parties request such violations. The ideas put forward in this paper would explain that this result was caused by a lack of characterization of this indigenous community as a "vulnerable group". However, there could be other reasons for this difference.

3.3 Cases using a "vulnerable group perspective" without finding a violation of the right to equality.

This is the biggest group of the research. Most cases where the Court uses its "vulnerable rights perspective" do not contain a violation of the right to equality. This will seem contradictory to this research's hypothesis. However this is a misleading conclusion. In these cases, the Court uses this perspective to expand the rights of "vulnerable" groups and require specific measures for them. The IACtHR established very clearly, in most cases, that these constructions derived from the "vulnerability" of the group involved. In other occasions, the Court simply uses its perspective to highlight a discriminatory problem. Therefore the only difference with the previous group involving "vulnerable" groups (section 2.1) is that here the Court does not establish a violation of the right to equality. The IACtHR did not make any analysis regarding a possible violation on the right to equality in these Judgments. Thus, these cases do not imply that the Court analyzed the factual situation, involved its "vulnerable group perspective" and held that the right to equality had not been violated.

The specific link to equality is precisely the sense of "vulnerability" given by the Court to the victims in each case. The Court identified the victims here as "vulnerable" or in a disadvantaged situation. In some cases, the Court explains that this sense of vulnerability derives from the rights to equality and non-discrimination. Thus, the author claims that in the following cases when the Court identifies a victim as part of a "vulnerable group" this identification derived from the right to equality. This, independently of whether the Court expressly claims this or not. It is sufficient that the Court made this explicit link in some of its cases to understand that there is a link between equality and non-discrimination.

The cases will be shown in sections corresponding to the group involved. There are cases where the victims belong to different groups. They will be analyzed under the group that had a bigger influence in the findings. The jurisprudence has touched upon the following groups: indigenous and tribal people, women, children, people with disabilities, and internally displaced people.

3.3.1 Indigenous and Tribal peoples.

There are four cases in this group. The first case is *Moiwana*.²⁰⁵ It concerns a massacre carried out in the “N’djuka Maroon village of Moiwana”. State agents killed more than forty persons, (men, women and children) and completely destroyed the village. Those who escaped fled into the forest and later became internally displaced in Suriname or sought refuge in neighbouring countries.²⁰⁶ The massacre was carried out in the context of an internal armed conflict in Suriname.²⁰⁷ The Court made several considerations to the specific harm caused to the victims as indigenous people.²⁰⁸

Under the reasoning of article 5 (right to humane treatment), the Court took into account “specific” hardships experienced by the victims as members of this community. First, it considered that the members of the community felt they were discriminated against and that they did not have the same rights as other people in the Country.²⁰⁹ The IACtHR also took the following circumstances into account: the need to “avenge” the wrongs done to them; the extreme importance of justice; the inability to perform burial rituals; and the subsequent separation of the community from its land.²¹⁰

The second case is *Yakye Axa*.²¹¹ It concerns the lack of recognition of the traditional lands of the Yakye Axa community and the situation of “vulnerability” caused by this situation.²¹² Due to this situation, members of the community abandoned their houses to protest for the recognition of their traditional land. The protesters were living in public roads in extreme poverty situations. Paraguay declared that the community was in an emergency situation.²¹³

The Court first established that to ensure article 24, States “must take into account the specific characteristics that differentiate the members of the indigenous peoples from the general population and that constitute their cultural identity”.²¹⁴ This understanding was done before the analysis on the merits under a section identified as “Prior considerations”.²¹⁵ The IACtHR

²⁰⁵ *Moiwana Community case* (Merits, reparations and costs) Inter-American Court of Human Rights Series C No 124 (15 June 2005).

²⁰⁶ *Ibid* para 3.

²⁰⁷ *Ibid* paras 82.12-82.14.

²⁰⁸ Already in the “Proven Facts” section, the Court includes a section called “b) Aspects of N’djuka culture relevant to the instant case”. *Ibid* 29.

²⁰⁹ *Ibid* para 94.

²¹⁰ *Ibid* paras 95-96, 98-100, and 101-103.

²¹¹ *Yakye Axa Indigenous Community case* (Merits, reparations and costs) Inter-American Court of Human Rights Series C No 142 (17 June 2005).

²¹² *Ibid* para 2.

²¹³ *Ibid* paras 73.61- 73.74.

²¹⁴ *Ibid* para 51; *Sawhoyamaya Indigenous Community case* (Merits, reparations and Costs) Inter-American Court of Human Rights Series C No 146 (29 March 2006) paras 59-60.

²¹⁵ This “Prior considerations” is not a permanent section in the Court’s Judgments.

held that States and the Court itself must assess the scope and content of the American Convention using this procedure.²¹⁶

This case developed specific obligations and measures in connection with articles 21 (right to property) and 4 (right to life) for Tribal peoples. The Court held that States must take into account the community's "specificities", "vulnerability", customary law, values, customs and economic and social characteristics.²¹⁷ These specific circumstances were taken into account as follows: in relation with article 21 and the "special meaning of communal property" for indigenous peoples²¹⁸; in relation to the culture and specific way "of being, seeing, and acting in the world" of indigenous communities²¹⁹; and in relation to the need to take into account the connection between land and basic aspects of life of indigenous communities.²²⁰ The Court also established that States must create procedures for land claims; and protect tribal peoples ties with the land and natural resources "associated with their culture".²²¹

In connection with the right to property, the IACtHR established four things. First, "that indigenous territorial rights encompass a broader and different concept that relate to the collective right to survival as an organized people, with control over their habitat as a necessary condition for reproduction of their culture, for their own development and to carry out their life aspirations".²²² Second, that disregarding these rights can affect the "very survival" of the communities.²²³ Third, that restrictions on the right to private property might be necessary to preserve "cultural identities in a democratic and pluralist society".²²⁴ And fourth, that when restricting their rights, States must grant compensation "guided primarily by the meaning of the land" for indigenous people.²²⁵

Regarding the right to life, the Court asserted that States must consider the "vulnerable" situation of indigenous people "given their different manner of life, different worldview system than those of Western culture including their close relationship with the land" and their life aspirations, both individual and collective.²²⁶ The Court found a violation of the right to life since the victims were living in extremely precarious conditions.²²⁷

²¹⁶ *Yakye Axa case* (n 211) para 51.

²¹⁷ *Ibid* para 63.

²¹⁸ *Ibid* para 124; *Sawhoyamaya case* (n 214) para 118

²¹⁹ *Yakye Axa case* (n 211) para 135.

²²⁰ *Ibid* paras 154 and 167.

²²¹ *Ibid* para 137; Similar treatment was established in *Sawhoyomaya case* (n 214) paras. 118-121.

²²² *Yakye Axa case* (n 211) para 146.

²²³ *Ibid* para 147.

²²⁴ *Ibid* para 148.

²²⁵ *Ibid* para 149.

²²⁶ *Ibid* para 163.

²²⁷ The dissenting Judges also wanted to find a violation of the right to life directly linked with the death of several individuals of the community. Dissenting Opinion of Judges Abreu Burrelli, Cançado Trindade, and Ventura Robles. *Yakye Axa Indigenous Community*

The IACtHR also highlighted the “vulnerable” situation of children and the elderly.²²⁸ The Court underlined that transmission of culture is entrusted to the elderly in this community.²²⁹ It thus held that States must take measures to ensure the “continuing functionality and autonomy” of the elderly.²³⁰

The third case, *Sawhoyamaxa*, has exactly the same facts as *Yakye Axa*.²³¹ The findings of the Court are almost identical. Only additional considerations will be pointed out here. The IACtHR asserted additional measures in favour of indigenous communities. It held that traditional possession of land is equivalent to a full property title; that this possession allows indigenous people to demand official recognition of property title; that if the community unwillingly abandoned its land it still maintains property rights; and that if their land was lawfully given to third parties, they deserve compensation.²³² The Court held that the right to claim property rights lasts as long as indigenous peoples’ “unique relationship” with the land exists.²³³

The Court found a violation of the right to life in relation to people who were sick and died while living in this “vulnerable” situation.²³⁴ The IACtHR also pointed out that measures needed for the community were different, in view of their urgent nature, to measures towards the general population and other communities.²³⁵ Finally, the Court highlighted the “vulnerability” of children and pregnant women without adding anything further.²³⁶

The last case is *Saramaka*.²³⁷ The case concerns the lack of recognition of the Saramaka people to use and enjoy their territory, with a special emphasis in natural resources. The government had given authorizations to logging and mining companies in Saramaka territory without the community’s participation.²³⁸ The IACtHR held that the Saramaka people are a tribal community and as such they require “special measures” to guarantee “the full exercise of their rights”.²³⁹ It asserted that “the aim and purpose of the special measures required on behalf of the members of indigenous and tribal communities is to guarantee that they may continue living their traditional way of life, and that their distinct cultural identity, social structure,

case (Merits, reparations and costs) Inter-American Court of Human Rights Series C No 142 (17 June 2005).

²²⁸ *Yakye Axa* case (n 211) paras 172 and 175.

²²⁹ *Ibid* para 175.

²³⁰ *Ibid*.

²³¹ *Sawhoyamaxa* case (n 214) para 2

²³² *Ibid* para 128.

²³³ *Ibid* para 131.

²³⁴ *Ibid* para 176.

²³⁵ *Ibid* para 173.

²³⁶ *Ibid* para 177.

²³⁷ *Saramaka people case* (Merits, reparations and costs) Inter-American Court of Human Rights Series C No 172 (28 November 2007).

²³⁸ *Ibid* paras 2 and 77.

²³⁹ *Ibid* paras 84 and 86.

economic system, customs, beliefs and traditions are respected, guaranteed and protected by States”.²⁴⁰

The Court established the following “special measures” regarding the right to property of this tribal community:

1. Indigenous and tribal peoples have the right to use the natural resources they have traditionally used in their territory and are necessary for their survival.²⁴¹
2. The State can limit their right to enjoy their natural resources in the same manner as their right to property. The State may restrict this right and the right to property only when this “does not deny their survival as a tribal people.”²⁴²
3. States have to ensure effective participation through the customs and traditions of the affected people, in any “development, investment, exploration or extraction plan” that might affect their right to property.²⁴³
4. When different plans are carried out in Saramaka territory, the State must guarantee that they receive a “reasonable benefit”.²⁴⁴
5. States “must ensure that no concession [is] issued within Saramaka territory unless and until independent and technically capable entities [...] perform a prior environmental and social impact assessment”.²⁴⁵
6. States have the duty to make consultations with Saramaka people before carrying out a plan that may affect their territory. The procedure must have the following characteristics: consulting at early stages; taking into account the methods and procedures of the group; disseminating information; making sure the group is aware of the risks created by the project; consulting with a view to reach an agreement, among others.²⁴⁶
7. Regarding “large-scale development or investment projects that would have a major impact within Saramaka territory”, Suriname has a duty to obtain the “free, prior, and informed consent” of the Saramakas, “according to their customs and traditions”.²⁴⁷

Lastly, the State argued that providing “special measures” for tribal people may be discriminatory for the rest of the population. The Court disregarded this argument on two grounds. First, it claimed that it “is a well-established

²⁴⁰ Ibid para 121.

²⁴¹ Ibid paras 121 and 122. The necessity to protect the natural resources had already been established in *Yakye Axa case* (n 211) para 137. In *Saramaka* the Court added the link to the survival of the community.

²⁴² *Saramaka people case* (n 237) para 128.

²⁴³ Ibid para 129.

²⁴⁴ Ibid paras 129 and 138. This obligation is different to previous findings of the Court. Before the Tribunal had found that if States could not give their traditional land to indigenous people, they had to compensate them. In this case, the economic benefit refers to any type of plan carried out in their land.

²⁴⁵ Ibid para 129.

²⁴⁶ Ibid para 133.

²⁴⁷ Ibid para 134.

principle of international law that unequal treatment towards persons in unequal situations does not necessarily amount to impermissible discrimination”. Second, it held that since it had already established the obligation to take “special measures” to protect the rights of this group, this argument was without merit.²⁴⁸

3.3.1.1 Analysis of the findings.

This group of cases is relevant for two things. First, they show the link between equality and the Court’s “vulnerable group perspective”. Second, they contain clear examples of specific measures benefiting indigenous communities that derive from this “vulnerable group perspective”.

In connection with the link, *Yakye Axa* and *Sawhoyamaxa* contain the Court’s explanation of the relationship between equality and the “vulnerable perspective”. The IACtHR established that the need to take into account the specific characteristics of indigenous people in connection with all the rights of the Convention derives from the right to equality.²⁴⁹ This statement is extremely important to directly link “specific considerations” for indigenous communities and the right to equality. It clearly supports the idea that the extended interpretation done by the Court in cases related to, at least, indigenous communities derives from the right to equality. This can also be explained from the Court findings in relation with the right to property in *Sawhoyamaxa*. There the Court clearly asserted that the time limit for indigenous people to claim their right to property extends as long as their specific relationship with the land exists.²⁵⁰ Thus, this specific measure directly derived from the specific considerations States need to make in connection with indigenous people. It can be argued that the other developments in connection with the right to property also derived from these considerations. Therefore, the link between equality and the “vulnerable group perspective” is essential to understand and explain these developments by the Court. On this sense, the author did completely create the “vulnerable group perspective” as the explanation to the Court’s jurisprudence. The original relationship between this situation of “vulnerability” and equality was made by the Court.

On the second issue, from these cases it is possible to see the Court’s willingness to expand the content of human rights. This is most evident in *Saramaka*. This is the case with the most expanded interpretation of a Conventional right in favour of an indigenous community. Here, the “vulnerable group perspective” was the first step in the Court’s analysis.²⁵¹ The Court found that the right to property imposed an obligation for States to carry out environmental impact assessment in projects affecting the natural resources of indigenous people. It also held that States are obliged to obtain consent from communities when carrying out projects in their lands. Certainly, these two rights are not easy to derive from the right to

²⁴⁸ Ibid para 103.

²⁴⁹ *Yakye Axa case* (n 211) para 51; *Sawhoyamaxa case* (n 214) paras 59-60.

²⁵⁰ *Sawhoyamaxa case* (n 214) para 131.

²⁵¹ *Saramaka people case* (n 237) paras 84 and 86.

property.²⁵² A possible explanation for the Court's conduct is the involvement of a "vulnerable group". When these groups are involved, the Court is more willing to expand the content of different human rights.

Lastly, sometimes when the Court highlighted the "vulnerable" situation of these groups, the specific developments by this "vulnerability" were unclear. For example, in *Yakye Axa* and *Sawhoyamaxa* the Court establishes that children and pregnant women were in a "vulnerable" situation. Yet it did not establish anything else. Moreover, the source of the "vulnerable" situation of these communities was also unclear. The members of both communities were living in terrible conditions and they were even considered to be in a state of emergency. In fact, in *Sawhoyamaxa*, the Court pointed out that the measures ordered for the community were different, in view of their urgent nature, to measures in favour of the general population or of other communities.²⁵³ The ambiguity as to which measures derived from the extreme poverty of the communities and which from their specific characteristics as indigenous people is disappointing.²⁵⁴ In the same sense, the Court did not expressly use its "vulnerable group perspective" in the *Moiwana massacre* case. Yet the Court considered different hardships experienced by the victims as indigenous peoples when finding a violation of article 5, as it had done in cases using the "vulnerable group perspective".²⁵⁵ Thus, the practice of taking into account specific hardships experienced by a group that could be classified as "vulnerable" remained present in the Judgment. Yet the link between equality and these specific considerations is not evident on this case as this paper claims.

Thus the importance of this last finding is that it contradicts the explanation put forward on this paper on the effects of equality and the Court's "vulnerable group perspective". Nevertheless, the effects of this proposition should not be undermined. From other cases such as *Sawhoyomaxa* and *Saramaka* it is possible to argue that the Court is more willing to expand the content of several rights when they involve "vulnerable" groups, and that this willingness derives from the right to equality.

3.3.2 Internally displaced people.

There is only one case in this "section", the *Mapiripán massacre*.²⁵⁶ It concerns an attack by a non-state actor known as "Unified forces of Colombia" to the town of *Mapiripán*, with help from State agents. There, a group of armed individuals took control of this town from July 15 to July 20. During this time they tortured, disappeared, dismembered and killed

²⁵² *Saramaka people case* (n 237) paras 129 and 134.

²⁵³ *Sawhoyamaxa case* (n 214) para 173.

²⁵⁴ Ariel E. Dulitzky, 'A Region in Denial: Racial Discrimination and Racism in Latin America' in Dzidzienyo, Anani and Suzanne Oboler (eds) *Neither Enemies Nor Friends: Latinos, Blacks Afro-Latinos* (Palgrave Macmillan, New York 2005) 9.

²⁵⁵ *Moiwana case* (n 205) 29, paras 95-96, 98-100 and 101-103.

²⁵⁶ *Mapiripán massacre case* (Merits, reparations and costs) Inter-American Court of Human Rights Series C No 134 (25 September 2005).

approximately 49 people. They did not allow people to leave and everybody had to live on a state of terror by these actions. At the end, they threw the victims' remains to a river next to the town. The survivors fled in fear of reprisals and further attacks against them. They became what is identified in Colombia as "internally displaced" people.²⁵⁷

The Tribunal used its *vulnerable group* perspective in connection with children²⁵⁸ and internally displaced people.²⁵⁹ From the internally displaced perspective, the Court constantly emphasized the victims' "acute" sense of vulnerability.²⁶⁰ The Court also connected this "vulnerability" with the "rural origin" of the people. It mentioned the deeper effects in relation to women, girls, boys, youth and elderly persons.²⁶¹ The Court established a list of negative effects associated with internal displacement.²⁶² Therefore, the Court held that this group lives in a situation of "*de facto* [...] lack of protection" in relation with others in similar situations.²⁶³ The Court added that this situation lead to differences in access to "public resources managed by the State".²⁶⁴ Lastly, it claimed that this vulnerability "is reproduced by cultural prejudices that hinder the integration of the displaced population in society and that can lead to impunity" of human rights violations.²⁶⁵

Under its analysis of the rights to equality and non-discrimination, the Court found that States have the obligation "to give [internally displaced people] preferential treatment and to take positive steps to revert the effects" of their situation, including in relation with private individuals.²⁶⁶ The IACtHR also held that article 22 (right to residence) could be interpreted as creating a right not to be "internally displaced".²⁶⁷ Both findings were done under the analysis of the situation of internal displacement.

From the children's perspective, the Court analyzed the massacre's and displacement's specific effects on the children. In relation to the massacre, the IACtHR held that children were the "least prepared to adapt or respond" to armed conflicts,²⁶⁸ and that the massacre affected the children in an

²⁵⁷ Ibid paras 2, 96.29-96.47 and 96.63.

²⁵⁸ Ibid paras 155-156 and 161-163.

²⁵⁹ Ibid paras 175-189.

²⁶⁰ Ibid paras 175, 177 and 186.

²⁶¹ Ibid para 175.

²⁶² Ibid. The list is: "(i) loss of [...] land and [...] houses, (ii) marginalization, (iii) loss of [...] household, (iv) unemployment, (v) deterioration of living conditions, (vi) [greater number of] illness[es] and higher mortality, (vii) loss of access to common property [...], (viii) food insecurity, and (ix) social disintegration, as well as impoverishment and accelerated deterioration of living conditions".

²⁶³ Ibid para 177.

²⁶⁴ Ibid.

²⁶⁵ Ibid.

²⁶⁶ Ibid para 179. Equality and non-discrimination are mentioned both as rights and as principles in the Court's jurisprudence. In this paper, the term rights will be used. Yet, the discussion on whether they are rights or principles is not relevant for this research.

²⁶⁷ Ibid para 188.

²⁶⁸ Ibid para 156.

“especially intense manner”.²⁶⁹ It pointed out that the children had been “partially orphaned”. As internally displaced children, the Court stated that they suffered rejection, poor living conditions and many of them had to take care of younger siblings as their mothers went to work.²⁷⁰ Thus, the Court held that Colombia had breached its obligation to prevent situations that might lead to violations of the right to life of children, as it did not take necessary steps to guarantee them “a decent life, but rather exposed them to a climate of violence and insecurity”.²⁷¹

3.3.2.1 Analysis of the findings.

This case further confirms the conclusion from the previous group. It supports the link between equality and the “vulnerable perspective” and develops specific measures derived from the “vulnerable group perspective”. In relation to the first point, the judgment clearly mentions the principles of equality and non-discrimination in its reasoning. Yet it mentions them without articles 1 or 24 of the Convention.²⁷² The general thread of not finding a violation of the right to equality will be analyzed under the general conclusions of all groups. The important point here is that the link between the “vulnerable perspective” and the right to equality was clearly established in the case.

In connection with the second point, the Court provided specific measures for this group. As such the effects of the “vulnerable group perspective” are easy to identify. It held for example that States need to provide “preferential treatment” for this group, and that discrimination of this group reproduces “cultural prejudices”.²⁷³ Perhaps the greatest expansion developed in the case was to derive a right not to be internally displaced from the right to residence.²⁷⁴ In connection with children, it took into account the specific hardships caused to them by internal displacement. It pointed out for example that children had to take care of their younger siblings as their single parent needed to work to support the family.²⁷⁵

3.3.3 Persons with disabilities.

There is only one case in this group: *Ximenes Lopes*.²⁷⁶ The case concerns the treatment and living conditions of Damião Ximenes Lopes in a psychiatric institution. Mr. Ximenes Lopes had an intellectual impairment and was interned in the hospital by his mother to obtain psychiatric treatment. There, he was beaten and attacked by hospital workers as a

²⁶⁹ Ibid para 160. The Court here just described different acts that children witnessed during the massacre.

²⁷⁰ Ibid para 161.

²⁷¹ Ibid para 162.

²⁷² Ibid para 179.

²⁷³ Ibid paras 179 and 177.

²⁷⁴ Ibid para 188.

²⁷⁵ Ibid paras 160-161.

²⁷⁶ *Ximenes Lopes case* (Merits, reparations and costs) Inter-American Court of Human Rights Series C No 146 (44 July 2006).

disciplinary measure. He died while in custody in consequence of these attacks.²⁷⁷

The IACtHR, held under a “prior considerations section”, held that “any person who is in a vulnerable condition is entitled to special protection, which must be provided by [...] States [...] to comply with their general duties to respect and guarantee human rights”.²⁷⁸ This includes the obligation to adopt positive measures.²⁷⁹ Prior to the merits, the IACtHR explained specific situations arising in connection with this group and obligations owed to them. It held that there was a strong link between poverty, social exclusion, and the development of “mental disabilities”.²⁸⁰ It asserted States’ obligation to prevent disabilities “which may be prevented”, and to give “preferential treatment” to persons with mental disabilities.²⁸¹ It found that States must take all actions to prevent discrimination against this group and to promote their “full integration” into society.²⁸² The Court emphasized that this group is highly vulnerable to torture and mistreatment in psychiatric institutions²⁸³ and thus States must “supervise” these institutions, whether they are private or public.²⁸⁴

Under the merits, the Court established specific obligations towards persons with mental impairments. It held that: States must provide them with health services;²⁸⁵ treatment should aim to the patient’s welfare and be guided by the respect to his intimacy and autonomy;²⁸⁶ restrain measures can be used only as a last resort, with the least restrictive techniques and for the time absolutely necessary to protect the safety of the patient or other people;²⁸⁷ persons under custody have a right to have a “decent life”,²⁸⁸ “special” care should be provided for the health condition and improvement of people with mental impairments;²⁸⁹ and that psychiatric hospitals must be regulated and supervised to take care of the people who are interned in them.²⁹⁰ Then, the Court recognised that the right to autonomy of persons with disabilities is

²⁷⁷ Ibid paras 2, 112.4-112.12.

²⁷⁸ Ibid para 103.

²⁷⁹ Ibid.

²⁸⁰ The Court throughout the Judgment refers to persons with “mental disabilities”. In this paper, the term persons with mental or intellectual impairments would be preferred, but still the Court terminology will be used when quoting. For an analysis on the terminology debates around persons with disabilities see: G. Quinn, ‘Disability and Human Rights: A New Field in the United Nations’ in Catarina Krause and Martin Sheinin (eds), *International Protection of Human Rights: A Textbook* (Åbo Akademi University Institute for Human Rights, Finland 2009); R. Kayess and P. French, ‘Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities’ (2008) 8 Human Rights Law Review 1.

²⁸¹ *Ximenes Lopes case* (n 276) para 104.

²⁸² Ibid para 105.

²⁸³ Ibid para 106.

²⁸⁴ Ibid paras 107-108.

²⁸⁵ Ibid para 128.

²⁸⁶ Ibid para 130.

²⁸⁷ Ibid paras 134-135.

²⁸⁸ Ibid para 138.

²⁸⁹ Ibid paras 139-140.

²⁹⁰ Ibid para 141.

not absolute, as sometimes they cannot grant consent. As such, it allowed the possibility that other people take decisions on their behalf.²⁹¹

3.3.3.1 Analysis of the findings.

This case also confirms the previous conclusions. Yet its support is less clear than *Mapiripán*. The Court used the same format as in *Yakye Axa* and *Sawhoyamaxa* and set out its “vulnerable perspective” in a section called “Prior considerations”. However, the Court did not make a link between equality and non-discrimination and the “special attention” needed by persons with disabilities.²⁹² Yet, the Court mentioned the need to prevent discrimination, to provide preferential treatment, and to promote integration into society in relation to people with disabilities.²⁹³ Moreover, the IACtHR did not bring in any other right in connection with these considerations. Equality and non-discrimination are the principles that more easily justify the findings of the Court. Thus, this case follows the same pattern as *Mapiripán*.

This argument is also supported by the Concurring Opinions of Judges García Ramírez and Cançado Trindade. Judge García Ramírez highlights that people with an intellectual impairment, interned in psychiatric hospitals need the most attention and care from the State.²⁹⁴ Judge Cançado Trindade emphasized the importance of the principles of equality and non-discrimination for “disabled people”.²⁹⁵ Taking into account these two Opinions the lack of an analysis of a violation of the right to equality is enigmatic.

The Court also developed specific measures and took into consideration specific characteristics of the victim. It established that States must provide persons with mental impairments with health treatment, that the treatment must respect the autonomy of the person, and that restrain measures should be used as a last resort and in the least restrictive manner.²⁹⁶ The Court also emphasized the high risk of persons interned in psychiatric hospitals.²⁹⁷ Therefore, equality served to develop the content of the American Convention and to take into account the specific circumstances of persons with disabilities.

²⁹¹ Ibid para 130.

²⁹² Ibid para 59. Even if this link is missing, it is clear that the debate of disability as a human rights issue or a medical one is not present in the Court’s decision for obvious reasons. Moreover, the lack of this link is not something present solely in this case.

²⁹³ Ibid paras 104-106.

²⁹⁴ Concurring Opinion of Judge García Ramírez, *Ximenes Lopes case* (Merits, reparations and costs) Inter-American Court of Human Rights Series C No 146 (44 July 2006) para 17.

²⁹⁵ Concurring Opinion of Judge Cançado Trindade, *Ximenes Lopes case* (Merits, reparations and costs) Inter-American Court of Human Rights Series C No 146 (44 July 2006) para 43.

²⁹⁶ *Ximenes Lopes case* (n 276) paras 130, 134-135 and 128.

²⁹⁷ Ibid para 106.

3.3.4 “Street” children.

There is one case in this group, the *Street Children (Villagrán Morales) case*.²⁹⁸ The case concerns the detention, torture and murder of five children living in the street by Guatemalan Police agents.²⁹⁹ The Court established that, at the time of the facts, there “was a common pattern of illegal acts perpetrated by State security agents against ‘street children’”.³⁰⁰

Under the analysis of article 19 of the Convention (rights of the child), the Court quoted several provisions of the UN Convention on the Rights of the Child and highlighted that Guatemala had violated measures related with “non-discrimination, the special assistance of children deprived of their family environment [...] and the social rehabilitation of all children who are abandoned or exploited”.³⁰¹ The IACtHR elaborated that States should increase measures to prevent crimes by minors and should guarantee their rehabilitation.³⁰² This focus on the “vulnerability” of children and the need to protect them was highlighted during the Joint concurring opinion of Judges Cançado Trindade and Abreu Burelli.³⁰³ Moreover, the Court highlighted that the murders were linked to a pattern of violence against “street children” in Guatemala.³⁰⁴

3.3.4.1 Analysis of the findings.

There are more cases dealing with children, but it is hard to distinguish when the “specific measures” found by the Court derived from the right to equality and its “vulnerable group perspective” or from article 19 of the Convention. Article 19 already requires that States must take “special measures” to protect the rights of the child. Thus, the practice of the Court to highlight the vulnerability of “children” and the need to take special measures is likely to derive from that article. *Villagrán Morales* provides an example where the Court actually made a link between equality and non-discrimination and the sense of “vulnerability” of children. Therefore, this case also serves to support the research’s claim on the effects of the “vulnerable group perspective” and its connection to equality and non-discrimination.

Here the IACtHR found that the principle of non-discrimination contained in the UN Convention on the Rights of the Child had been breached in connection with the situation of the victims as “street children”.³⁰⁵ It also held that the human rights violation of the case had been committed in a

²⁹⁸ “*Street Children*” case (Merits) Inter-American Court of Human Rights Series C No 64 (10 November 1999).

²⁹⁹ Ibid paras 80-83, 128 and 143.

³⁰⁰ Ibid para 79.

³⁰¹ Ibid para 196.

³⁰² Ibid para 197.

³⁰³ Concurring Separate Opinion of Judge Cançado Trindade, “*Street Children*” case (Merits) Inter-American Court of Human Rights Series C No 64 (10 November 1999) paras 1-3.

³⁰⁴ “*Street Children*” case (n 298) paras 189-190.

³⁰⁵ Ibid para 196.

context of violence against this group. Thus the link between the “vulnerable group perspective” and equality becomes clear. The situation of the children living in the streets generates the sense of vulnerability of the group. Likewise, this “vulnerability” or situation of living in the street is a breach of equality and non-discrimination. Lastly the Court also found specific breaches of the American Convention in connection with the situation of this “vulnerable” group. It held that Guatemala had not provided the necessary “special assistance” to children deprived of a “family environment” or the social rehabilitation of abandoned children. The Court also found that Guatemala should increase the measures to prevent crimes by minors and guarantee their rehabilitation.³⁰⁶

3.3.5 Women.

There are two cases in this group. The first case is *Miguel Castro Castro Prison*.³⁰⁷ The case concerned an attack by police forces against prisoners accused of terrorism and the subsequent extrajudicial execution and inhuman prison conditions imposed to the victims.³⁰⁸ The IACtHR pointed out to situations that caused specific suffering to women during these actions. The case analyzed six specific events related to women: “a) the suffering of pregnant women during the attack; b) the fact that women were forced to be nude in front of armed men in the Hospital; c) the fact that some women were not provided any hygienic supplements; d) the [rape of a victim]; e) the confinement; and f) the lack of pre- and post-partum attention to the pregnant women”.³⁰⁹

The Court found a violation of article 5 in connection to these actions. The IACtHR highlighted the particular suffering of women during its judgment. Specifically, the Court classified the fact that women were forced to be nude in front of armed men as sexual violence.³¹⁰ It found that the vaginal inspection practiced to one of the victims was rape, and thus sexual violence and torture.³¹¹ Additionally, the Court held that Peru violated article 7 (b) of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Belém do Pará Convention herein after) as States have the obligation to conduct effective investigation of violence against women.³¹²

³⁰⁶ Ibid para 196-197.

³⁰⁷ *Miguel Castro Castro Prison case* (Merits, reparations and costs) Inter-American Court of Human Rights Series C No 160 (25 November 25 2006).

³⁰⁸ Ibid paras 197 (16), 197 (37-38), and 197 (41-59).

³⁰⁹ Karla I. Quintana Osuna, ‘Recognition of Women’s Rights before the Inter-American Court of Human Rights’ (2008) 21 *Harvard Human Rights Journal* 304. Content in brackets was added to the quote.

³¹⁰ *Miguel Castro Castro Prison case* (n 307) para 308.

³¹¹ Ibid para 312.

³¹² Quintana Osuna (n 309) 305-306.

The second case is *Gonzalez et al (Cotton Field* herein after).³¹³ The case relates to the murder of three young women in Ciudad Juárez, Mexico, under a pattern of “gender-related violence that had resulted in hundreds of girls and women murdered”.³¹⁴ The Court first established the existence of a pattern of abduction, sexual violence, rape, and murder against young, impoverished women, working in the assembly industry, whom were often migrants working in the city.³¹⁵

It then made an extensive analysis on the “gender” factor in these murders. Thus, the IACtHR held that authorities handling criminal cases in connection with murders of women had a discriminatory attitude.³¹⁶ It quoted several reports by International organizations and NGO’s explaining that a big part of these murders were caused by hatred and discrimination against women.³¹⁷ The Court concluded that it was “a matter of concern that some of these crimes appear to have involved extreme levels of violence, including sexual violence and that, in general, they have been influenced [...] by a culture of gender-based discrimination which [...] has had an impact on [...] the motives and [...] method of the crimes [and] on the response of the authorities”.³¹⁸ Thus, the IACtHR held that the murdered women in this case had been victims of “violence against women”. It also found that their murders “were gender-based and [had been] perpetrated in an acknowledged context of violence against women in Ciudad Juárez”.³¹⁹

During its analysis of the criminal procedures, the Court asserted that officials had stereotyped the victims as they made comments about having gone with their boyfriends, about having led “a disreputable life” and about the victims’ “sexual preferences”.³²⁰ The IACtHR concluded that the obligation to investigate crimes is wider when dealing with a “woman” who is a victim of a crime under the “framework of a general context of violence against women”. It explained that this investigation must be pursued with vigour and impartiality “having regard to the need to reassert continuously society’s condemnation of racism”.³²¹ It added that the State had failed to take into account the general context of violence against women in its procedures.³²²

The Court’s judgment has a subheading with the title “Obligation of non-discrimination and respect and guarantee of rights embodied in Articles 4, 5

³¹³ *González et al (“Cotton Field”) case* (Merits, reparation and costs) Inter-American Court of Human Rights Series C No 205 (16 November 2009).

³¹⁴ *Ibid* para 2.

³¹⁵ *Ibid* paras 122-127.

³¹⁶ *Ibid* paras 147-154.

³¹⁷ *Ibid* paras 128-145.

³¹⁸ *Ibid* para 164. This finding is a bit controversial since earlier the Court stated that it would not make a general statement as to which murders constituted general discrimination; rather, it would stick to the three particular cases before it. Para. 144.

³¹⁹ *Ibid* para 231.

³²⁰ *Ibid* para 208.

³²¹ *Ibid* para 293.

³²² *Ibid* paras 366-369.

and 7 of the American Convention and access to justice in accordance with Articles 8 and 25 thereof”.³²³ The Court argued that States should adopt “comprehensive measures” in cases of “violence against women”, which include “having an appropriate legal framework for protection” and prevention of such crimes.³²⁴ These measures included risks factors’ prevention. As such, the IACtHR held that Mexico had not taken effective measures of protection that would have diminished the “risk factors for [...] women”.³²⁵ Yet, it stated that the State could not be held responsible for the abduction of the victims even though they had been part of a vulnerable group in a context of generalized violence.³²⁶

Finally, the Court found that the violence against women committed in this case was discriminatory and thus violated article 1.1 in connection with articles 4, 5, 7, 8 and 25 of the Convention.³²⁷ In its reasoning, the Court quoted a European case in which the ECHR held that discrimination exists when a certain measure disproportionately affects women, whether there is discriminatory intent or not.³²⁸ The Court also held that the “judicial ineffectiveness” in this case “encourage[d] an environment of impunity that facilitate[d] and promote[d] the repetition of acts of violence in general and sen[t] a message that violence against women [was] tolerated and accepted as part of daily life”.³²⁹

3.3.5.1 Analysis of the findings.

Cases involving discrimination or violence against women generally do not follow the proposition put forward in this paper in connection with the se of equality and non-discrimination by the Court. Both cases deal with issues connected to equality without using articles 1 and 24 or the Court’s “vulnerable group perspective”. This is especially true for *Castro Castro prison*. In *Cotton field* the Court briefly identifies the victims as part of a “vulnerable group” and also mentions the principles of equality and non-discrimination in its reasoning.³³⁰ Yet in both cases the Court points out to specific legal obligations that were breached by the States in connection to women and to specific facts affecting women. This working method is very similar as the one used by the Court with its “vulnerable perspective”. Perhaps the reason why the Court does not identify women as a “vulnerable group” is the existence of a specific Convention to combat violence against women: the Belém do Para Convention. This could lead the Court to think it is unnecessary to further highlight the “vulnerability” of this group. Therefore it can be argued that the use of this Convention substitutes the identification of women as a “vulnerable group”. Thus, these two cases will continue to support the claims of this research. Both cases establish a link to

³²³ Ibid para 232, subheading 4.

³²⁴ Ibid para 258.

³²⁵ Ibid paras 258 and 279.

³²⁶ Ibid para 282.

³²⁷ Ibid para 402.

³²⁸ Ibid para 396; *Opuz v Turkey* (App 33401/02) ECHR 9 June 2009 patas 180, 191 and 200 as quoted in *Cotton field case* (n 313) para 396.

³²⁹ *Cotton field case* (n 313) para 388.

³³⁰ Ibid paras 282 and 232.

equality and contain expansions of different rights for the protection of this group. Yet, it is clear that this link is much weaker and more speculative than with the other groups.

Castro Castro analyzed how six circumstances specifically affected women in the enjoyment of their right to personal integrity.³³¹ It also expanded the interpretation of the American Convention and established that rape was a form of sexual violence against women and a form of torture.³³² Finally the Court held an additional violation of the Belem do Pará Convention for the lack of investigation of violence against women.³³³ Thus it can be claimed that the Court was willing to take into consideration specific circumstances affecting women and to expand the content of the Convention.

These conclusions are clearer in *Cotton field*. Here, the Court establishes the link between equality and the case. The judgment has a subheading dealing with equality and non-discrimination and the Court finds that the violence against women committed in this case was discriminatory.³³⁴ Indeed, the IACtHR classified the treatment given to women in the case as discriminatory in different parts of its judgment.³³⁵ It could then be claimed that here actually the Court uses article 1 and the principles of equality and non-discrimination. Yet, this situation is not clear from the Judgment. It is not possible to clearly assert that article 1.1 was used in connection to the right to equality or in connection with the general obligation to respect and to protect rights. Moreover the Court merely quotes a judgment of the European Court explaining that measures disproportionately affecting women were discriminatory.³³⁶ However, it fails to explain if the situation in *Cotton field* was the same as in that case. For these reasons, it is not possible to claim that the Court actually found a violation of the right to equality as protected by article 1.1 of the Convention.

The Court also takes into account the specific circumstances of women and makes specific findings in connection to this situation. The Court held that the murders had been gender-based and committed in a context of violence against women. It also found that the authorities had discriminatory and prejudiced attitudes towards the victims. Furthermore, the Court expanded the obligation to investigate crimes against women by holding that this obligation becomes wider when there is a context of violence against this group and by claiming that States must take into account this context in their investigations.³³⁷ Thus it is easy to see that the Court was willing to expand the scope of the American Convention and to take into account specific circumstances affecting women.

³³¹ *Quintana Osuna* (n 309) 304.

³³² *Miguel Castro Castro prison case* (n 307), para 312.

³³³ *Quintana Osuna* (n 309) 305-306.

³³⁴ *Cotton field case* (n 313) paras 232 and 402.

³³⁵ *Ibid* paras 147-154, 164, 231 and 402.

³³⁶ *Ibid* para 396.

³³⁷ *Ibid* paras 231, 208, 293, 366-369.

3.3.6 Common analysis of all “vulnerable” groups.

These cases confirm the link between the “vulnerable group perspective” and equality even when they do not use articles 1 or 24 in their reasoning. The “vulnerable group perspective” is used for two things. First, the Court uses it to expand the content and the obligations of the American Convention to benefit “vulnerable groups”. Second, the Court uses it to take into consideration particular circumstances affecting different “vulnerable” groups when finding human rights violations.

As such, these cases are not much different from those in the first group of this research (Cases using the rights to equality and involving a “vulnerable group”). It is easy to imagine that the Court could have found a violation of the right to equality and non-discrimination in all these cases in a similar manner as in the first group. It might not have even been necessary to add new considerations to the Judgments. For example in cases as *Cotton field*, the Court actually established that the actions of the State were discriminatory and contrary to the principles of equality and non-discrimination.³³⁸ Thus, the only difference between this case and for example *OC 18* is that the Court did not declare a violation of articles 1 or 24 in the *Cotton Field*. In both *OC 18* and *Cotton Field*, the Court identified the victims as “vulnerable”, and established that specific actions were discriminatory and contrary to equality and non-discrimination.³³⁹

The same could be said from cases where the Court established that States failed to implement a specific measure in favour of a “vulnerable” group. The only thing missing in those cases is to declare a violation of either article 1 or 24 of the American Convention. For instance, in *Mapiripán* the Court also established that internally displaced people were “vulnerable”. That this situation of “vulnerability” made them live in a situation of lack of protection in relation with others, which lead to differences in access to public resources. In connection with this situation, the Court finally held that Colombia had the obligation to take “positive steps” to alleviate their situation. This last finding was done in relation to the rights to equality and non-discrimination.³⁴⁰ Therefore, it is possible to sustain that there exists a relationship between a group’s sense of “vulnerability” and the rights to equality and non-discrimination. Hence, the only thing missing from this judgment was, as in *Cotton field*, a formal finding of a violation of articles 1 or 24 of the Convention. The IACtHR established the need to take positive measures in favour of this group, and it connected this finding with equality and non-discrimination. The missing aspect is then the lack of a violation of the rights to equality and non-discrimination.

³³⁸ Ibid para 402.

³³⁹ *OC-18* (n 27) paras 131-132, 157 and 170; *Cotton field case* (n 313) paras 402.

³⁴⁰ *Cotton field case* (n 313) paras 175, 177, 186, and 179.

This is the major criticism to the use of this tool by the Court: the lack of a finding of a violation of the right to equality. This is not merely an academic problem, in search of perfectly argued legal problem. This lack generates a specific practical problem. Dulitzky has rightly pointed out that, without a specific finding on discrimination, the State's obligation to investigate human rights violations does not have to involve the discriminatory factor.³⁴¹ Thus States only need to involve in its investigations the rights that were violated without looking into the discriminatory circumstances that might be generating those problems. Unfortunately, it is not possible to explain with all certainty why the Court declares a violation of the right to equality in the first group and not in this one. A possible explanation is that the cases of the present group the Commission and the representatives did not ask the Court to find a violation of the right to equality. In the previous cases involving the "vulnerable group perspective" and a violation of the right to equality, the Commission or the victims requested this violation. There, the Court did not have any problem finding the violation, sometimes without much analysis on the issue. It could be argued that in the cases that were just analyzed if the Commission or the representatives had claimed a violation of the right to equality, the Court would have established this violation.

3.4 Concluding analysis.

This chapter pretended to explain the logic or understanding of equality and non-discrimination in the Court's jurisprudence. It has been found that the most important feature in the Court decision-making is the identification of the alleged victims as members of a vulnerable group. It has been shown that this identification has clear consequences in the IACtHR's reasoning. Yet this explanation is not as straightforward. First, this is not the only criterion that could be used to understand the Court's jurisprudence. There are other theories and analysis that could help in this matter but were not used in the research. In this section, an overview of this other theories and the reasons why they were not used will be explained. Additionally as it could be seen from the differences between cases involving a "vulnerable" group finding a violation of the right to equality and those who did not contain this finding, the explanation presented in this paper is not perfect. Therefore, the second part of this concluding analysis will elaborate in the shortcomings of this criterion. This part will contain other cases from the Court's jurisprudence that could not be explained with the ideas put forward in the research.

³⁴¹ Ariel Dulitzky, 'El Principio de Igualdad y No Discriminación. Claroscuros de la Jurisprudencia Interamericana' [2007] *Anuario de Derechos Humanos de la Universidad de Chile* 14.

3.4.1 Theories and criteria not used in the research.

There are two major patterns presented by other people that could be used to analyze the Court's jurisprudence and were not used in this research. The first relates to the Court's own standards and tests of equality and non-discrimination. The second is Professor's Arnardóttir full theory to explain the European Court jurisprudence in connection to equality.

The first theory is the Court's own understanding of equality. The IACtHR has explained that differential treatment will not be discriminatory when the classification is based in substantial factual differences and there is a "reasonable relationship of proportionality between these differences and the aims of the legal rule under review".³⁴² It established that only differential treatment that does not have an objective and reasonable basis is discriminatory. The Court quoted its European counterpart to assert that having "an objective and reasonable" basis means following a legitimate aim and having a sense of proportionality between this aim and the contested measure.³⁴³ Taking these considerations into account, the first idea to analyze the jurisprudence of the Court is to see how it has applied this "objective and reasonable standard." However from the previous cases it is very easy to see that rarely the Court applied this standard. Therefore, this standard could not be used as the basis to analyze the Court's decisions. If this standard had been used as our organizing factor, the findings of this research would have been that in most cases the Court applied its own standards in connection to equality in discrimination. There is at least another study looking at this issue.³⁴⁴ Thus, it seemed necessary to look for other criteria.

Papers analyzing the Court's jurisprudence from this perspective have qualified the cases as "confusing" and "contradictory".³⁴⁵ The European Court has similarly faced strong criticism in connection with its jurisprudence on the right to equality. The European Court's judgments have been criticized as "subjective" and as based on whether some treatment is "shocking" rather than on the application of a legal standard.³⁴⁶ Arnardóttir has criticized the use of this standard by the European Court.³⁴⁷ She explains that is practically impossible "to make sense of the case-law" of the European Court by following this analytical test.³⁴⁸ The same author adds that this test does "not capture or explain the true substantive reasoning

³⁴² *OC-18* (n 27) paras 55-57.

³⁴³ *Ibid* paras 89-93.

³⁴⁴ *Dulitzky* (n 341) 14.

³⁴⁵ See *Dulitzky* (n 341) to see a broad criticism to the Inter-American Court of Human Rights on this issue.

³⁴⁶ Arnardóttir (n 5) 16, citing *Danièle Lochak* 7th International Colloquy on the European Convention of Human Rights, 1990.

³⁴⁷ Arnardóttir (n 5).

³⁴⁸ *Ibid* 55.

governing the outcome of cases but rather functions to mask it”³⁴⁹ The same criticism could be done to the Inter-American Court. It is obvious that if one makes a study on the Court’s jurisprudence with this perspective, the finding will be very simple: the Court does not apply this standard; therefore the judgments are illogical and contradictory. Yet, such reading fails to analyze the true motives influencing the outcome of the Court’s decisions.

The second theory that could have been used is Arnardóttir’s full analysis of the European Court’s jurisprudence on equality. She made a throughout study of all cases regarding equality and non-discrimination heard by the European Court. Arnardóttir claims that the key to understand the outcome of these cases is “the strictness of review” applied in every case.³⁵⁰ In her study, Arnardóttir analyzes the variations in the strictness of review in connection to three elements: 1) the burden of proof and the strictness of review; 2) the strictness of review and its influencing factors; and 3) the necessity of review.³⁵¹ The first element, the burden of proof refers to the applicant’s need to establish a *prima facie* case of discrimination. Under this section, Arnardóttir analyzes when the burden of proof changes from the applicant’s obligation to establish a case to the State’s obligation to justify its actions.³⁵² Professor Arnardóttir considers that before assessing what are the factors influencing the strictness of review it is necessary to know when the State is obliged to provide such justification.³⁵³ This is precisely the element analyzed under this part. Her major conclusion is that the question of the burden of proof is deeply connected with the question of the influencing factors affecting the actual objective justification review.³⁵⁴ She considers that both analyses cannot be separated.³⁵⁵ This means that to establish the State’s need to justify an alleged discriminatory treatment, the ECHR takes into consideration whether that case indicates strict or lenient scrutiny according to the factors affecting the case.

Under the second section of its analysis, Arnardóttir studies the factors influencing the “objective justification review” of the EChHR. She contends that a finding from this Court connected with equality depends on three factors: “(a) a claim of a particular type of discrimination; (b) based on a particular discrimination ground; and (c) relating to a particular type of interest.”³⁵⁶ These are the influencing factors analyzed under this part of her study. She explains that the European Court strictness of review in discrimination cases varies in accordance with these elements. Finally, she contends that such approach explains “the many perceived complexities” of

³⁴⁹ Ibid 41.

³⁵⁰ Ibid.

³⁵¹ Ibid 3.

³⁵² Ibid 68.

³⁵³ Ibid 182.

³⁵⁴ Ibid 183. Arnardóttir uses the term “objective justification” in reference of the Court’s exercise of evaluating the reasons given by States to justify allegedly discriminatory treatment.

³⁵⁵ Ibid.

³⁵⁶ Arnardóttir (n 22) 58.

the European case law.³⁵⁷ The first factor is the type of discrimination alleged. Under Arnardóttir scheme, this refers to whether the case concerns active, passive or indirect discrimination.³⁵⁸ According to the type of behaviour complained the strictness of review changes. She argues that the ECHR gives a heavier scrutiny to cases involving active discrimination than to those involving passive or indirect discrimination.³⁵⁹ The second influencing factor is “the badge of differentiation and the similarity or difference of situations at stake in the case”.³⁶⁰ There Arnardóttir explains the different grounds or badges that indicate strict or lenient scrutiny by the Court.³⁶¹ In her analysis, she highlights that still badges indicating a certain level of scrutiny might be changed by other influencing factors explained under her model.³⁶² The third influencing factor is the interest at stake in a case. Here, Arnardóttir studies “various considerations that may become relevant to the strictness of review”.³⁶³ She particularly focuses in cases involving the same badge of differentiation and the same type of claim but with different levels of scrutiny.³⁶⁴ Therefore, she seeks to bring in other factors that might affect the level of scrutiny given to certain cases. There, she simply analyzes specific circumstances found in the European Court’s case law that might affect its decisions, without establishing any generalization. She points that the involvement of property rights, privileged or disadvantaged persons, or a situation of emergency are situations that might affect the level of scrutiny given to a certain case.³⁶⁵ In her conclusions she recognizes that this influencing factor has less weight than the other two in the scrutiny level given by the ECHR.³⁶⁶

The third element of her study relates to the necessity of review. Arnardóttir explains that the necessity of review in a given case is connected with the scrutiny level given to the case by the European Court.³⁶⁷ Thus, the necessity of review is not only a procedural matter. She claims that if the ECHR deals with a case suggesting strict scrutiny, it will analyze the case from an equality perspective even if normally it would have not been necessary.³⁶⁸ This is a brief summary of Arnardóttir’s full methodology to analyze the European Court’s jurisprudence. As it has been said, this study

³⁵⁷ Arnardóttir (n 5) 17.

³⁵⁸ Ibid 120, 184-185. It is not necessary to give a broad explanation of these terms for this paper. Yet, it is important to explain what Arnardóttir means by them. Active discrimination is “discrimination that results from identifiable acts of state agents”. Passive discrimination is discrimination that “results from the failure of state agents to act”. This means discrimination for not respecting positive obligations of the State. Indirect discrimination refers to measures that are formally neutral but when applied, they produce disproportionate negative effects in a certain part of the population.

³⁵⁹ Ibid 185-186.

³⁶⁰ Ibid 186.

³⁶¹ Ibid 128-129.

³⁶² Ibid 186.

³⁶³ Ibid 159.

³⁶⁴ Ibid 160.

³⁶⁵ Ibid 186.

³⁶⁶ Ibid.

³⁶⁷ Ibid 187.

³⁶⁸ Ibid.

gave raise to the methodology used in this research. Yet, the full methodology could not be applied to the Inter-American case for the following reasons.

First, the methodology's first and third elements connected with the burden of proof and the necessity of review cannot be translated to the jurisprudence of the Inter-American Court. The IACtHR does not follow a step when it is established that the burden of proof shifts from the applicant to the State. The interaction of this factor with the margin of appreciation explained by Arnardóttir is not applicable as well. The IACtHR does not apply a margin of appreciation theory. In connection with the necessity of review it is not possible to distinguish two sections in the Court cases: one where the Court establishes the existence of a relevantly similar or different treatment, and another where it evaluates whether the State provides an acceptable justification or not. Furthermore, the Court does not systematically analyze whether it is relevant to analyze a violation of the right to equality or not. In some cases, the Court indeed establishes that it is not relevant to analyze the violation of some right as it already covered such analysis under other article.³⁶⁹ The Court has never found that it would not analyze a possible violation of the right to equality since it already covered its analysis under other article. Therefore, in connection to equality it is not possible to claim that the Court makes this analysis on its cases. Thus, it would not be possible to analyze the interaction between the level of scrutiny in a case and the necessity of review.

The second element of her theory, "the influencing factors", cannot be applied in its fullness to the Inter-American Court. This author's research thus only covers the second influencing factor: the badge of differentiation. The first influencing factor, "the type of discrimination alleged", is not applicable to the IACtHR's jurisprudence. Arnardóttir explains that the European Court is more willing to act in cases regarding active discrimination, rather than cases dealing with indirect and passive discrimination.³⁷⁰ This is not the case of the IACtHR. The Inter-American Court does not have the same attitude as its European counterpart towards cases not involving active discrimination. Whereas the European Court has been reluctant to act in these cases,³⁷¹ this situation is indifferent for the Inter-American Court. As it can be seen from the previous analysis, the IACtHR is very willing to find broad obligations in connection with the need of States to take measures in order to guarantee the enjoyment of the right to equality. The determinant factor on those findings remains whether the alleged victims are members of a "vulnerable" group or not. The determinant factor is not whether the violation implied a breach of positive or negative obligations of States. Furthermore, Arnardóttir asserts that the

³⁶⁹ For example in *Miguel Castro Castro Prison*, the Court established that it would not analyze the violation of articles 12 and 13 of the Convention since it already took into account the applicant's arguments under other article. *Miguel Castro Castro Prison case* (n 307) para 368.

³⁷⁰ Arnardóttir (n 5) 185-186.

³⁷¹ *Ibid* 92, 99, 105 and 126.

European Court puts more lenient scrutiny in cases requiring bigger changes and resources than in isolated cases that can easily be solved. This conduct is not present in the Inter-American Court and as such it could not be considered a standard to differentiate one case from the other. The IACtHR has in many occasions require comprehensive measures from States requiring structural changes and requiring large number of economic resources. For example in *Yatama* the Court require Nicaragua to take all legislative and other measures necessary in order to guarantee the access of indigenous organizations to the election process.³⁷²

The third influencing factor, described as the “interests at stake”, is not possible to apply entirely. Even when Arnardóttir tries to explain this factor in a systematic way, she recognises that the “case-law, however, does not give rise to wide reaching inductions of influencing factors belonging to this category”.³⁷³ Furthermore, she states that these factors “primarily seem to function to support an already existing indication towards either strict or lenient review, rather than being the primary indication themselves”. Yet, Arnardóttir then qualifies this statement and claims that despite this the importance of these factors cannot be underestimated, their influence can be classified as minimal.³⁷⁴ One of the elements considered under this “interest at stake” is the claimant’s sense of vulnerability. Arnardóttir claims that the European Court is less willing to provide protection to people in “privileged” situations.³⁷⁵ Additionally, the existence of a situation of “socially marginalised or disadvantaged position” is described as a factor indicating strict scrutiny.³⁷⁶ However, these statements are still qualified by her general conclusion as to the marginal influence of this situation in the ECHR decisions. This is an entirely contrasting situation to the IACtHR. For this Court, the sense of vulnerability is the most important factor in its analysis of discrimination. The other interests at stake involved (involvement of property rights or a situation of emergency) are not elements present in the Court’s jurisprudence.³⁷⁷

Therefore, this research only deals in general terms with one of the influencing factors identified by Arnardóttir: “the badge of differentiation”. Arnardóttir has been very critical towards studies focusing exclusively in the “badge of differentiation” as the factor explaining the ECHR jurisprudence. The badge of differentiation can be understood as the ground on which discrimination is argued (sex, race or religion). She claims that such studies are “simplistic presentations” of the problem which do not address the other factors influencing that Court decisions.³⁷⁸ She adds that application of scrutiny levels “based only on the badge of differentiation at stake would miss the various other factors that can and should continue to

³⁷² *Yatama case* (n 60) para 259.

³⁷³ Arnardóttir (n 5) 172.

³⁷⁴ *Ibid.*

³⁷⁵ *Ibid* 164.

³⁷⁶ *Ibid* 168.

³⁷⁷ *Ibid* 186.

³⁷⁸ *Ibid* 66-67.

be able to influence the strictness of review”.³⁷⁹ Nevertheless, the great significance of the “badge of differentiation” is maintained under her framework. Arnardóttir asserts that most violations found in relation with the right to equality by the ECHR concern the existence of a clearly established badge of differentiation as relevant.³⁸⁰ The position of this paper is that the badge of differentiation is the almost exclusive influencing factor for the IACtHR.

Yet, this research’s does not fall under the previous criticism. Arnardóttir understands “badge of differentiation” as merely the ground alleged in a discrimination complaint. This means that the badge just explains whether discrimination is connected to sex, religion, ethnic origin or other ground. This research does not claim that the IACtHR decisions are based exclusively on this issue. Rather, they are based on whether the victim can be identified as member of a “vulnerable group”. On this sense, the approach taken for the research can be resumed as a mix between what Arnardóttir calls “badge of differentiation” and the sense of vulnerability of a specific group. Both situations are not analyzed as separate elements since they are extremely interrelated. (It is hard to separate the vulnerability of indigenous groups from the ethnic factor for example). This explanation is also provided by González and Parra by claiming that “suspect categories” should not be understood in “symmetrical terms”, but rather they should be constituted by a particular “disadvantaged” group.³⁸¹

Finally this position can be defended by Arnardóttir’s own advocacy for a “substantive equality approach”. She has recently claimed that Courts should base their decisions connected with discrimination in accordance with the social disadvantage experienced by a specific group. She sustains that the qualification of something as discriminatory should be heavily based on its consequences towards the level of disadvantage of a specific group.³⁸² The focus is in the interaction between the “badge of differentiation” and the sense of disadvantage. This position does not affect Arnardóttir’s findings in relation to the ECHR. The elements identified to understand the ECHR jurisprudence were developed on the basis of its case law. Her latest theory on the other hand concerns what Arnardóttir would consider the “desired” understanding behind equality and non-discrimination.

3.4.2 Shortcomings of the theory.

The outcome of all cases dealing with equality and non-discrimination cannot be explained by the theory put forward by this paper: the Court’s “vulnerable group perspective”. Moreover, the theory itself is not exempted

³⁷⁹ Ibid 155.

³⁸⁰ Ibid 158.

³⁸¹ González and Parra (n 14) 132.

³⁸² Arnardóttir (n 5) 27.

from criticism. This section will show the Court's findings that cannot be explained by this theory and the general criticism to the theory itself.

3.4.2.1 Cases contradicting the theory.

There are seven cases that contradict this research's findings. First, there are two cases not included in the previous explanations where the Court made statements important for equality without linking them to articles 1 or 24 or to its "vulnerable perspective". The first case is *Aloeboetoe*.³⁸³ This case concerns an attack by Military forces against a group of Tribal people known as Saramakas, under a context of internal disturbances in Suriname between the government and several opposition groups. The soldiers identified the victims as members of the *Jungle Commando* fighting against the government and thus beat them up and killed some of them.³⁸⁴ The Court did not make any analysis of the merits as the State accepted its responsibility in the violations claimed by the Commission.³⁸⁵

The IACtHR took the group's customs into account to determine what "children", "spouse" and "ascendant" meant, rather than Surinamese law.³⁸⁶ The Court explained that it would take into account this custom as far as it did "not contradict the American Convention".³⁸⁷ Therefore, it clarified that when referring to ascendants it would "make no distinction as to sex, even if that might be contrary to *Saramaka* custom". The Court also rejected arguments claiming that the killings "were racially motivated". It explained that the parties had not given enough evidence to determine that there was a "racial factor" involved in these killings. An expert witness had explained the existence of a conflict between the community and the Government.³⁸⁸ The IACtHR affirmed that the origin of the facts was not in some "racial issue" but rather in a "subversive situation".³⁸⁹ It stated that even when all the victims of the case had been members of the *Saramaka* tribe, this "circumstance itself [did] not lead to the conclusion that there was a racial element".³⁹⁰

The second case is *Advisory Opinion OC-16 (OC-16 herein after)*.³⁹¹ It concerns a request to rule if the obligation to inform an alien of his or her right to consular assistance in relation to crimes punishable by death, was part of the fundamental guarantees protected under due process of law. The

³⁸³ *Aloeboetoe case* (Merits) Inter-American Court of Human Rights Series C No 11 (4 December 1991).

³⁸⁴ *Ibid* paras 11-14.

³⁸⁵ *Aloeboetoe case* (n 383). This practice changed in the future as the Court chose to make determinations on the merits even when States make partial or total acceptances of responsibility.

³⁸⁶ *Aloeboetoe case* (Reparations and costs) Inter-American Court of Human Rights Series C No 15 (10 September 1993) para 62.

³⁸⁷ *Ibid*.

³⁸⁸ *Ibid* para 82.

³⁸⁹ *Ibid*.

³⁹⁰ *Ibid*.

³⁹¹ *The Right to Information to Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16, Inter-American Court of Human Rights Series A No 16 (1 October 1999).

request explicitly addressed the situation of Mexican nationals in the United States of America.³⁹² The Court held that “the judicial process must recognize and correct any real disadvantages that those brought before the bar might have”. It explained that the presence of “real disadvantages” needs measures to reduce and eliminate these circumstances. Otherwise those who have a disadvantage will not enjoy due process of law in equal manner as those who do not have them.³⁹³ Judge García Ramírez explained that it is not enough to grant the same procedural rights to nationals and aliens; as aliens need additional rights to be on an equal footing with others without facing their cultural, language, environmental and “other very real” restrictions.³⁹⁴

These cases are important because both contain findings connected to equality and yet the Court did not use article 1 or 24 or what is identified as its “vulnerable group perspective”. Both cases involved “vulnerable groups” and the Court did not formally identify them as such. The failure to identify the victims in *Alaboetoe* as “vulnerable” is the most surprising. The Court even rejected a claim to consider that the murders were connected with racial origin. This attitude contradicts the Court’s general willingness to take into consideration the “vulnerability” and discriminatory practices of indigenous groups.³⁹⁵ Additionally, the Court failed to take into account another discriminatory situation against women in this case. The Court failed to evaluate whether the Saramaka practice of polygamy was compatible with the American Convention. This issue was relevant to determine which persons had the right to receive compensation for the human rights violations.³⁹⁶ The practice of polygamy in the community was limited only to men. The Court failed then to make the same qualification about this situation as it had done in relation with who could be considered as ascendant. Perhaps an explanation for this last issue is that this reading allowed more people to benefit from the Court’s measures. The second case involved aliens, another “vulnerable group” that was not identified as such. This failure is less grave since the Court at least followed its practice of expanding the content of the American Convention when dealing with these groups. The Court made a wide recognition of the obligation of States to take measures in order to correct any disadvantage that aliens might face in the enjoyment of their right to fair trial.³⁹⁷ Therefore these two cases cannot be explained through the explanation put forward in this paper. Both cases touch upon issues dealing with equality without connecting them to the appropriate articles of the Convention or to the Court’s vulnerable perspective. Their reasoning cannot be explained through the theory put forward here.

³⁹² Ibid para 1.

³⁹³ Ibid para 119.

³⁹⁴ Separate Concurring Opinion of Judge García Ramírez, *The Right to Information to Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16, Inter-American Court of Human Rights Series A No 16 (1 October 1999) 2.

³⁹⁵ See for example: *Yatama* (n 60), *Saramaka* (n 237) and *Yakye Axa* (n 211).

³⁹⁶ *Aloboetoe case* (n 386) para 63.

³⁹⁷ *OC-16* (n 391) para 119.

There are other five cases that were presented before that cannot be explained with the theory put forward in this paper. One of this paper's major claims is that the Court is willing to expand the content of the American Convention for "vulnerable groups". Four cases show that this is not always the case: *Cotton field*, *Plan de Sánchez massacre*, *OC-4* and *Mayagna*. In *Cotton field* the Commission and the representatives requested the Court to establish that the murders and abductions of young women who were murdered under a context of violence against women was responsibility of the State.³⁹⁸ The Court only stated that Mexico failed to take measures to diminish the risks faced by women in this region. The Court also failed to take into account two possibly discriminatory treatments against a "vulnerable group". *Cotton field* concerned the abduction of, in the words of the Court, "young, underprivileged women, workers or students".³⁹⁹ Yet, the IACtHR did not analyze if the State's actions were discriminatory under the ground of economic status. Finally, the Court explained that Mexico had a policy to classify disappearances of women as "high risk" if it could be proven that the disappeared woman had a "stable" routine.⁴⁰⁰ Yet, it did not analyze whether this classification was compatible with equality and non-discrimination. Thus, the IACtHR was not willing to expand the content of the Convention to protect this group.

In *Plan de Sánchez massacre* the Court refused to rule on whether the actions of Guatemala could be classified as genocide or not. It asserted that it had jurisdiction only to find violations of the American Convention and other Inter-American instruments.⁴⁰¹ Even if the Court would not find a violation of the UN Convention on the Prohibition of Genocide, taking into account its willingness to expand the scope of human rights in connection to "vulnerable groups", it could have characterized the facts of the case in this manner. In *OC-4*, the Court dealt with Costa Rican legislation in connection to migrants. It was argued before the Court that the purpose of the changes in Costa Rican legislation was to discriminate against migrants and refugees seeking to go into Costa Rica.⁴⁰² The Court held that it would not take those claims into account even if many of those issues "reveal[ed] the overall purpose sought to be achieved by the amendment and expose differences of opinion on that subject".⁴⁰³ Therefore, the Court refused to expand the content of the American Convention against this alleged discriminatory intention.

Perhaps the most striking contradiction to this theory is found in *Mayagna*. This case involved lack of recognition of the right to property of indigenous communities.⁴⁰⁴ The Commission requested the Court to find violations of

³⁹⁸ *Cotton field case* (n 313) para 282.

³⁹⁹ *Ibid* para 230.

⁴⁰⁰ *Ibid* paras 205-206.

⁴⁰¹ *Plan de Sánchez massacre case* (n 55) para 51.

⁴⁰² *OC-4* (n 86) para 40.

⁴⁰³ *Ibid*.

⁴⁰⁴ *Mayagna case* (n 119) para 140.b.

the right to equality in connection with the right to property and the right to judicial guarantees.⁴⁰⁵ Yet the Court refused to find these violations, as it did not even analyze the Commission's claims. The previous explanation claiming that the Court simply did not identify the group as "vulnerable" and thus was not willing to expand the rights of the Convention is not sufficient. Indigenous people are a clear "vulnerable group" under the Court's jurisprudence. Moreover the Commission actually argued that finding access to a judicial remedy was especially important for indigenous people because of their sense of "vulnerability".⁴⁰⁶ This contradiction is particularly grave since it involves a refusal to find a violation of the right to equality requested by a "vulnerable group". This research claims that the only difference between cases involving "vulnerable groups" finding and not finding a violation of the right to equality was that in the latter group the Commission or the representatives requested this violation.⁴⁰⁷ Thus, *Mayagna* totally contradicts this argument. Perhaps, the findings of this case were an isolated mistake by the Court. Yet one must remain watchful over other cases with similar circumstances. Then, from this last group of cases it is possible to see that the explanation put forward in this paper cannot explain all the Court findings.

3.4.2.2 General criticism to the Court's "vulnerable group perspective".

The author can list two major criticisms to the "vulnerable perspective" of the Court. The first is the lack of finding a violation of the right to equality in cases involving vulnerable groups. This criticism has already been explained. Thus the focus will be in the second issue: the lack of protection of groups not considered to be "vulnerable" under this framework. Equality and non-discrimination is a human right that must be enjoyed by everyone, as such it cannot be applied selectively. Thus, giving protection to people who are considered to be "vulnerable" and not to those who are not considered to be in this situation is a major shortcoming of the Court's jurisprudence. From the Court's jurisprudence, this limitation has had two results: the lack of protection of the general population and the lack of protection of groups that could be identified as "unworthy".

This section's focus is this second side. The lack of protection of the general population could be considered a logical consequence of the "vulnerable perspective". This is particularly true when cases involved "privileged" categories of individuals as in *Apitz* (Judges) and *Castañeda* (a former Minister of Foreign Affairs). Of course this does not change the fact that those people were not protected by the Court, at least in connection to equality, because they were not considered to be part of a "vulnerable" group. What is more surprising from the Court's jurisprudence is the lack of protection of groups of people that could not be classified as "privileged".

⁴⁰⁵ Ibid paras 140.h, 140.n, and 148.

⁴⁰⁶ Ibid paras 104.h and 104.n.

⁴⁰⁷ See section 2.3.6, fourth paragraph.

The two groups that have lacked this protection are detainees for drug trafficking and people identified as “subversive”.⁴⁰⁸

In *Suárez Rosero*⁴⁰⁹ and *Acosta Calderón*⁴¹⁰ the Court dealt with two persons accused of drug trafficking in Ecuador that could not benefit from a general rule allowing the release of prisoners who had not been judged for a long period of time. This situation was caused because both individuals were accused under the law on Narcotics, which did not allow this type of release.⁴¹¹ The Court found in both cases that this law was contrary to the American Convention as it “deprive[d] a part of the prison population of a fundamental right, on the basis of the crime [they were] accused and hence, intrinsically injures everyone in that category”.⁴¹² Thus the IACtHR found a violation of article 2 in both cases.⁴¹³ Yet, it failed to find a violation of the right to equality. This attitude was particularly grave in *Acosta Calderón* since the Commission argued that Ecuador had violated this right.⁴¹⁴ The attitude of the Court could not be more negative as it did not even address the Commission’s request.⁴¹⁵ Moreover, the representatives of Mr. Acosta Calderón actually argued that the State had a deliberate policy to discriminate against “detainees for crimes related with drug trafficking”.⁴¹⁶ The Court did not address this claim either.

In *De la Cruz Flores* the Commission argued that Peru had discriminated against the victim and thus violated article 24 of the Convention.⁴¹⁷ Mrs. De la Cruz Flores had been sentenced by terrorism and was facing a new trial for the same crime at the time of the Court’s judgement.⁴¹⁸ The Court justified its inaction by claiming that it did not have jurisdiction to review the proceedings of a domestic trial.⁴¹⁹ This conduct, as was clearly explained in González and Parra’s criticism towards *Apitz*, is hardly convincing. The argument is based on a wrong reading of the prohibition of a “fourth instance”.⁴²⁰ In *Aloeboetoe*, the Court held that the motive behind the massacre against an indigenous community was triggered by the identification of this group as “subversive”.⁴²¹ The Court failed to analyze

⁴⁰⁸ The Court has protected “subversive” groups in numerous occasions. This lack of protection only relates to the right of equality and not to other rights such as due process.

⁴⁰⁹ *Suárez Rosero case* (Merits) Inter-American Court of Human Rights Series C No 35 (12 November 1997) para 1.

⁴¹⁰ *Acosta Calderón case* (Merits, reparations and costs), Inter-American Court of Human Rights Series C No 129 (24 June 2005) para 3.

⁴¹¹ *Suárez Rosero case* (n 409) para 95; *Acosta Calderón case* (n 410) paras 128 (a)-(b).

⁴¹² *Suárez Rosero case* (n 409) para 98.

⁴¹³ *Ibid* paras 98-99.

⁴¹⁴ *Acosta Calderón case* (n 410) para 128 (a).

⁴¹⁵ *Ibid* para 39.

⁴¹⁶ *Ibid* para 129 (c).

⁴¹⁷ *De la Cruz Flores case* (n 149) para 115; *De la Cruz Flores case* (n 152) paras 147 and 149-150.

⁴¹⁸ *De La Cruz Flores case* (n 149) para 116. The Court held that her first trial had violated articles 8 and 25 of the Convention.

⁴¹⁹ *Ibid* para 115.

⁴²⁰ González and Parra (n 14) 140.

⁴²¹ *Aloeboetoe case* (n 386) para 82.

the implications of this treatment for equality. Thus it could be claimed that “subversives” are not considered to be a “vulnerable group” or a group worthy of the Court’s protection under the right to equality. “Subversive” has not been classified as a “vulnerable group” by the Court. Even if it were not possible to consider “subversive” as a “vulnerable” category, the Court should have protected the victims’ right to equality as members of the general population who requested the Court’s protection.

These cases show that the main problem with this tool is that the protection of the right to equality depends entirely on what the Court identifies as a “vulnerable group”. Thus, the tool can serve to completely deprive groups that are considered to be “privileged” or “unworthy” of the Court’s protection.

4 Ideology and its involvement.

Legal criticism of a Court's jurisprudence traditionally focuses in the analysis of the application of a certain standard or understanding to different cases. It is based in finding out what are the attributes and elements used by Courts to reach their findings. It aims at "understanding" Courts decisions. This, at the same time, is done in order to find predictability. One wants to know how a Court will react to different claims. Uncertainty is not something highly appreciated in legal practice. Yet, explanations about divergences when interpreting law, and international law in particular, are always present. Thus, it is possible to find a basic paradox here: one learns that law can be interpreted in different ways; yet one expects predictable and consistent results from Courts.

These ideas are not only applicable to people reading the Court's judgments. Courts themselves believe they must act in a consistent and uniform manner. Studies trying to understand Courts' work abound. This is not only applicable to equality and non-discrimination. Nevertheless, research involving this right is very concerned with this topic.⁴²² This is especially true for critical studies connected with equality and non-discrimination. Still under these studies there are always cases that break the logic and standards put forward by different authors and cannot be classified. These cases are depicted as "exceptional", "unclear", "puzzling", or "unexplainable".

Dulitzsky wrote an article explaining the lack of consistency and the arbitrariness of the Court's jurisprudence.⁴²³ The outlook of the article was to find what is the Court's understanding of equality and then to analyze if the Court had uniformly applied such understanding. The present research departed from the same point: the use of Arnardóttir's ideas to analyze the use of equality and non-discrimination by the Court. This theory was quite useful in "understanding" the Court's jurisprudence. It provided a possible framework to analyze the Court's decisions. A study applying the Court's own understanding of discrimination and equality would not have provided any criteria to classify and distinguish different cases.

Nevertheless, even if Arnardóttir's ideas gave much needed clarity and inspiration there were cases that could not be explained with her ideas. Therefore, even the theoretical and legal tools created to understand jurisprudence connected to equality could not explain everything. There is always something in the Court's cases that does not make sense, that does

⁴²² See Arnardóttir (n 5), González and Parra (n 14), Dulitzki (n 341), and Patricia Palacios Zuloaga, 'The Contribution made by Advisory Opinion 4 and Advosory Opinion 18 by the Inter-American Court of Human Rights to the Concept of Discrimination within the Inter-American System for the Protection of Human Rights' Paper prepared for the Advanced Course on the International Protection of Human Rights, (Institute for Human Rights Åbo Akademi University, Finland 2004). Available at <<http://www.cdh.uchile.cl/publicaciones/articulos/>> accessed on 22 May 2010.

⁴²³ Dulitzsky (n 341).

not “fit” with the rest. The object of this second chapter is precisely this “something”. The purpose is to comprehend why there are cases that do not follow standards that were already established to solve them. The explanation will not be simply to claim that sometimes the Court is inconsistent. Such explanation is obvious and unsatisfactory. The purpose here is to grasp why is it that this inconsistency is present? The point of departure is that such result is unavoidable. The idea that Courts can create a legal standard and subsequently apply it in a completely uniform, systematic, objective and predictable manner would be put into question. Moreover, it is the contention of this research that such understanding should not be considered as the ideal to follow.

The chapter is based on Slavoj Žižek’s writings in connection to ideology. The two books constituting the basis of this analysis are: “The Sublime Object of Ideology”⁴²⁴ and “For they know not what they do”.⁴²⁵ Žižek considers that to talk about one of these books is necessary to talk about the other.⁴²⁶ This implies that this chapter will contain several terms from outside “strictly legal” science. Many ideas connected with psychoanalysis and Hegelian dialectics will be used in the paper. One should not react negatively from the outset to these ideas as something foreign to Law. One should remember Žižek’s own justification: “One should always bear in mind that the subject of psychoanalysis is not some primordial subject of drives, but – as Lacan pointed out again and again –the modern, Cartesian subject of science”.⁴²⁷ Perhaps it is necessary to give a bit more information about the authors just mentioned. Slavoj Žižek was born in Slovenia. He studied German philosophy and psychoanalysis. It has been claimed that he created a complex analytical framework that can be applied to analyze “practically any cultural phenomena” through mixing his both influences.⁴²⁸ He has been called an “intellectual rock star”, a “stand-up philosopher” and “the Elvis of cultural theory”. He is a doctor in philosophy and uses psychoanalysis as the basis of its theories.⁴²⁹ Jacques Lacan was a renowned French psychoanalyst. He is considered an “original interpreter” of Sigmund Freud and became very famous for its seminars given in the University of Paris.⁴³⁰

One of the points of departures of this research could be resumed as: everything is subjective, there is not truth in anything. One of the main purposes of the research was thus to show how law was not stranger to this process. Yet, at a certain point the risks of such position were uncovered. This uncovering was shown by Professor Marti Koskenniemi and Slavoj

⁴²⁴ Slavoj Žižek, *The Sublime Object of Ideology* (9th edn Verso, London 2002).

⁴²⁵ Slavoj Žižek (n 11).

⁴²⁶ Ibid XI.

⁴²⁷ Slavoj Žižek, ‘The Spectre of Ideology’ in Slavoj Žižek (ed) *Mapping Ideology* (Verso, London 1994) 29.

⁴²⁸ Ian Parker (n, *Slavoj Žižek: a critical Introduction* (Pluto Press, London 2004) 2-3.

⁴²⁹ Encyclopedia Britannica <<http://www.britannica.com/EBchecked/topic/1446643/Slavoj-Žižek>> Accessed 12 September 2010.

⁴³⁰ Encyclopedia Britannica <<http://www.britannica.com/EBchecked/topic/327112/Jacques-Lacan>> Accessed 12 September 2010.

Žižek. The present chapter will attempt to break from this initial position. It will make statements about the Court's jurisprudence without qualifying this research from the outset as "subjective". It is not that "truth" will be found here. The purpose is to avoid the trap of talking from a safe position, without taking a risk to expose one's ideas to other people's criticism by qualifying all knowledge as "entirely subjective" from the outset.⁴³¹ There are other reasons to avoid this attitude. Žižek articulates that the last trap of ideology is to make us believe that the only "non-ideological position is to renounce the very notion of extra-ideological reality and accept that all we are dealing with are symbolic fictions [...] never reality". He qualifies such procedure as "ideological *par excellence*".⁴³² As such one should avoid falling under this construction.

The chapter will then use Žižek's ideas as a theoretical framework to analyze the findings of the previous chapter. The ideas explained by Žižek are taken as a given. It is not the purpose of this research to analyze whether Žižek's understanding of different concepts is right or not. Rather, the purpose is to use his theories in order to illustrate different ideas that are considered to be working in the Inter-American jurisprudence. With these ideas, the chapter pretends to illustrate two things: 1) the Inter-American Court cannot have a consistent and entirely predictable case law in relation to equality; 2) The Court's strong focus in "vulnerable groups" through its jurisprudence has specific ideological consequences. It is possible that this analysis can be applied to other similar legal terms such as freedom or justice. Nevertheless, those implications fall outside the scope of this research. The purpose here is to apply a theoretical framework from outside strictly legal sources in order to obtain new perspectives connected with equality and with the Court's work. There are many rules, many cases, many decisions in connection with equality and non-discrimination; yet discrimination and inequality persist. Perhaps by looking into different directions it would be possible to obtain new perspectives for this problem. This is precisely the motive behind this research.

Consequently, the focus of this chapter will not follow "the usual 'criticism of ideology' trying to deduce the ideological form of a determinate society from the conjunction of its effective social relations" but rather it will use what Žižek calls "analytical approach" and will aim "above all at the ideological fantasy efficient in social reality itself".⁴³³ This means that the focus would not be to find what is the Court's ideology, is it liberal, conservative, communist? Rather the research's focus is finding the conceptual constructions that allow the Court to work. This focus follows Žižek's fundamental definition of ideology:

⁴³¹ Žižek (n 424) 155. Subjective should be understood for purposes of this paper as knowledge considered to be influenced by a person's beliefs or ideas or other external factors.

⁴³² Žižek (n 427) 17.

⁴³³ Žižek (n 424) 36.

“Ideology is not a dreamlike illusion that we build to escape insupportable reality; in its basic dimension it is a fantasy-construction which serves as a support for our ‘reality’ itself: an ‘illusion’ which structures our effective, real social relations and thereby masks some insupportable, real, impossible kernel (conceptualized by Ernesto Laclau and Chantal Mouffe as ‘antagonism’: a traumatic social division which cannot be symbolized). The function of ideology is not to offer us a point of escape from our reality but to offer us the social reality itself as an escape from some traumatic, real kernel”.⁴³⁴

The true important element of ideology is not ideology itself, but the element it seeks to hide and repress. Therefore, the main purpose is not to “discover” what the Court is saying with its Judgments, but rather what is covering with them. What is the social antagonism that is being blocked with the Tribunal’s decisions related to equality and non-discrimination?

This antagonistic social relationship is explained by the Court’s opinion in relation to “vulnerable” and “not vulnerable groups”. There is a clear distinction between the treatment of one group and the other. This distinction seems not to pose many problems to legal scholars. There has been suggestion to qualify the unequal treatment of “non-disadvantaged” persons as merely arbitrary and not as discriminatory.⁴³⁵ Thus it seems safe to claim that the Court supports the idea that “vulnerable groups” deserve more attention and resources from the State than the general population. It is clear for everyone that the social “real” conditions of one group and the other are completely different. At first sight it would seem that such understanding is valid and favourable for the protection of “vulnerable groups”. Nonetheless, this might be repressing society’s and the Court’s implicit support for the social relations and the unequal conditions present in American society. The Court could be saying: it is of course very valid not to protect “privileged people” from unequal treatment since their situation of privilege would already protect them from any harm that could be done to them. Put in simpler terms: it is ok to discriminate against this group because it does not matter for them. They will not suffer and their privileged situation will allow them to overcome whatever treatment they receive.

Then for this other group that is not “privileged” one actually expects discrimination. The group itself expects to be discriminated. The whole social and legal networks accept that these people would be discriminated. What is missing then from the Court’s analysis are the possible consequences for the maintenance of this system of social relations. What this assumption could be hiding is the “unconscious” or “repressed” support for these social conditions. This is thus precisely the impossible *kernel* hidden by the ideological equality fantasy constructed by the Court: that discrimination of certain groups is *necessary* for the normal functioning of our societies. This is the basic claim that will be developed in this chapter. This idea is developed from Žižek’s proposition explained a few paragraphs earlier claiming that ideology serves to hide a social division that cannot be

⁴³⁴ Žižek (n 424) 45.

⁴³⁵ González and Parra (n 14) 128.

otherwise explained.⁴³⁶ Thus this paragraph's is an attempt to materialize what would be this idea in the case of the IACtHR's jurisprudence on equality.

Perhaps the most systematic way to do this analysis would be to present the different concepts from Žižek's theories that would be used and then to apply them to our specific case. Nevertheless, time and space do not allow us to make such an ambitious project. Furthermore, an abstract explanation of Žižek's ideas without referring to examples from the Court's jurisprudence would be quite complicated and difficult to follow. It is likely that after several pages, the reader would still be confused as to the purpose of all those theories. As such, the ideas and concepts will be developed as they are used in the research. The purpose is to understand them through the Court's jurisprudence. Additionally, Žižek does not give a single formula to analyze this figure, ideological fantasies can be identified through different means. It of course explains basic elements that should be looked at, but it mostly gives different examples showing different ideologies at work. Accordingly, this chapter will use such examples to criticize the Court's ideology. Žižek has an extensive literature in relation to law, ideology, politics and society. It would be impossible to summarize all his ideas on the topic. Therefore, the focus would be on those ideas that are considered to be relevant and helpful for the analysis of the Court's jurisprudence in connection to equality.

Žižek explains that ideology can be framed around three axes: "ideology as a complex of ideas (theories, convictions, beliefs, argumentative procedures); ideology in its externality, that is, the materiality of ideology, Ideological State Apparatuses; and finally, the most elusive domain, the 'spontaneous' ideology at work at the heart of social 'reality' itself".⁴³⁷ The analysis of this chapter spins around these three axes. The first section covers the second axis, that of externalities giving content to the ideology. In the present case such externalities are the Law and the Inter-American Court of Human Rights. Here, general analysis as to the ideological fantasies of both figures would be analyzed.⁴³⁸ The second section will cover the first axis: ideology as a theory and a conviction. This part of the ideology is reflected in the Court's construction of its "vulnerable groups perspective". The second section will analyze the ideological consequences of this particular theory. Finally, the third section will cover the "quasi-'spontaneous' presuppositions and attitudes that form an irreducible moment of the reproduction of 'non-ideological' [...] practices".⁴³⁹ This "spontaneous ideology" consists in the ideological analysis of the present research done in the first chapter. Thus, the third section will analyze the ideological fantasies and consequences at work in legal research as the one done in the previous chapter.

⁴³⁶ Žižek (n 424) 45.

⁴³⁷ Žižek (n 427) 9.

⁴³⁸ Ibid 12.

⁴³⁹ Ibid 14.

4.1 The first axis: the Law, the Court and Ideology.

This section will seek to analyze the part of ideology reflected in its externality, in the Institutions who actually carry out ideology. In the present research, Law, human rights law and the Inter-American Court occupy this figure. The section's main concern is to explain why law, human rights law and the Court offer appealing ideological constructions to individuals.⁴⁴⁰ The section will accordingly explain why these appeals should be rejected. The appeal of Law in general will be covered first and the appeal of human rights law and the Court.

4.1.1 The appeal of the Law.

Žižek explains that it is false to recognise law as something true, yet this belief is necessary for a “normal” functioning of the law.⁴⁴¹ He argues that “‘External’ obedience of the Law is [...] not submission to external pressure, to so-called non-ideological ‘brute force’, but obedience to the Command in so far as it is ‘incomprehensible’, not understood; in so far as it retains a ‘traumatic’, ‘irrational’ character”. Yet, in order for law to function, this fact must be repressed. The “ideological, imaginary experience of the ‘meaning of the Law’ of its foundation in Justice, Truth”, and one could add equality, is what allows the repression of Law’s irrational character.⁴⁴² To put it more clearly “what is ‘repressed’ then, is not some obscure origin of the Law but the very fact that the Law is not to be accepted as true, only as necessary – the fact that its authority is without truth.”⁴⁴³ Pascal here explains that it should be enough to follow law because it is law, but as people are not willing to accept such proposition, it is necessary to believe that truth resides in the law.⁴⁴⁴ The claim is that we are aware of law’s inconsistencies but we still want to believe in law. There is an idea that the senseless inconsistencies of law are only exceptions and not necessary parts to make Law work. Moreover, we constantly try to make sense of such inconsistencies by claiming the existence of a hidden logic behind the Law.

Žižek thus claims that the “hidden chasm of this [...] appears at its purest under the guise of *tautology*: ‘law is law’”. He clearly asserts that the “ultimate truth about the reign of law is that of an usurpation, and all classical politico-philosophical thought rests on the disavowal of this violent act of foundation.” On this sense, the origin of law remains concealed in order to maintain law’s functioning. This is so because law functions in so

⁴⁴⁰ The word appeal is not random. It was chosen precisely because it covers both “negative” and “positive” aspects. It is not the point here to classify the reasons to keep an ideology working as “good” or “bad”. Thus a neutral term has been chosen.

⁴⁴¹ Žižek (n 424) 38.

⁴⁴² Ibid.

⁴⁴³ Ibid.

⁴⁴⁴ Ibid citing Blaise Pascal, *Pensées* 52.

far as its subjects are deceived and experienced law's authority as authentic.⁴⁴⁵ Such illusion is created in order to "obscure the fact that any given field of symbolically structured meaning in a way always presupposes and precedes itself".⁴⁴⁶ Therefore law would be as any other set of rules or ideas and not as a set of rules with authentic authority. Law can be taken as something that must be followed because of its mere form. It is not difficult to understand such propositions. What remains more complicated to understand is why an individual would follow such ideas?

Žižek's answer is that this is possible only as the ideological ideas are experienced "as a traumatic, senseless injunction". He explains that what confers Law "its unconditional authority, which [...] sustains what we might call the ideological *jouis-sense*, enjoyment-in-sense (enjoy-meant), proper to ideology" is the senseless character of the law. It is Law's part that cannot be symbolized or put inside the logic that it is being developed.⁴⁴⁷ This will claim that people are attracted to this figure precisely because of this lack of "objective" explanation. Such proposition is even more controversial than the one before. It basically claims that there are people who accept the authority of the law just because it is law, and that the reason to do so is precisely that there is no other reason. This of course still does not explain why is one willing to accept such determination, what is one earning or what is one getting from such processes? Žižek's answer is that "before being caught in the identification, in the symbolic recognition/misrecognition, the subject [...] is trapped by the Other through a paradoxical object-cause of desire in the midst of it [...], through this secret supposed to be hidden in the Other: [...] the Lacanian formula of fantasy".⁴⁴⁸ This means that one is willing to confer this power to law because one sees that one can satisfy one's desires through it.

Another appeal of subjecting oneself to the ideological fantasy of the law is the liberation from "fully assuming the impossibility constitutive of desire".⁴⁴⁹ Law "bridles desire" in the following way: "the desire to be 'checked' by the law is not the subject's desire but the desire of its Other, of Mother as 'primordial Other'; before the intervention of the Law, the subject is at the mercy of the 'whim' of the Other, the all-powerful Mother".⁴⁵⁰ Rather than trying to understand the use of "Mother" and "primordial other", one should pay attention to the conducts explained by these figures. This statement aims to illustrate that law serves to liberate from "randomness". After the law, one is not longer trapped in this uncertainty of not knowing whether one's actions are doing something or not. After Law "the subject is no more at the mercy of the Other's

⁴⁴⁵ Žižek (n 11) 204.

⁴⁴⁶ Ibid 203.

⁴⁴⁷ Žižek (n 424) 43.

⁴⁴⁸ Ibid 44.

⁴⁴⁹ Žižek (n 11) 267.

⁴⁵⁰ Ibid 265.

whim”.⁴⁵¹ There is finally something concrete, an established network of rules and standards that we can refer to.

Yet one should not forget that such position entails that one is still trapped in the ideological fantasy. The construction of the “Other’s whim” and that of the Law are only ways “*to avoid the lack in the Other*”. They are ways to avoid facing an impossibility. In our case, this impossibility is the antagonistic nature of society. The way this works is that Law and the “Other’s whim” act as prohibitions that prevent the fulfilment of our desires, that prevent the organic functioning of society; if it were not for these prohibitions, it would be possible to fulfil such desires. They work as excuses that allow individuals to avoid their responsibility. Conclusively, the attitude that individuals should take is that of “death-drive”, that of enduring the confrontation with the Real and the impossibility constitutive of desire.⁴⁵² Of course it is then very easy to understand the advantages of living under the ideological fantasy. By taking personal responsibility into a specific action we are put into a position “full of anxiety”. This set of rules and excuses are used to avoid this anxiety. It is only natural that one wishes to avoid this position. By not falling in this ideological trap we are put in the position of knowing that something is wanted from us but we do not know what this is. As such, every individual is “compelled to assume the risk of freely determining (sic) the co-ordinates of [his or her] desire”.⁴⁵³

The final lesson here is that one should avoid falling under this ideological trap. One should not accept to follow law just because it is the law. Even if this attitude can be appealing one should face her present responsibility for these ideologies. For example then one must reject the idea of the given nature of human rights. The truly ethical stance is not to actually believe that human rights are naturally “universal, indivisible, inherent”, and so on. Neither it is to affirm that their existence naturally derives from human dignity. This attitude falls under the same criticism explained in the previous paragraphs of accepting law as a given natural authority. Thus, this attitude could be classified as an ideological fantasy created to prevent us from facing the impossibility of human rights and our personal responsibility. The truly ethical stance is thus to accept the emptiness of the discourse purported by human rights: human rights are just occupying an empty space; they are a social construction that has been made popular by ‘Western Liberal Democracies’.⁴⁵⁴ The next step is to claim that “nevertheless” such “irrational”, or more precisely such “contingent” nature, one actually believes that the “cause” supported by this ideology is worth defending and supporting. As such, the subjects would be finally taking responsibility for the effects of this ideology. As human rights are not presented as natural concepts, one would need to justify and to constantly evaluate the different consequences caused by them. “Human rights” would then stop being “sublime” ideological objects that cannot be touched, gazed

⁴⁵¹ Ibid.

⁴⁵² Ibid 266-267.

⁴⁵³ Ibid LVI.

⁴⁵⁴ Kennedy (n 6) 111-112.

or questioned in any way. As Kennedy would claim whatever problems the human rights movement has they would not be solved by treating the movement as a “frail child, in need of protection from critical assessment”.⁴⁵⁵

4.1.2 The appeal of Human Rights Law and the Court.

The desire or “real kernel” that is being concealed by Law’s fantasy has been defined as “antagonism: a traumatic social division which cannot be symbolized”.⁴⁵⁶ Thus when one speaks of the “real kernel” avoided through ideology one talks about a specific social antagonistic situation that has even disappeared as antagonism. The usual example given by Žižek is “class struggle”. The antagonism that cannot be symbolized under our liberal democracies is that “class struggle” has disappeared as a problem. One is not aware of the unequal situations, of the “class struggle” that is being permitted and promoted, or to put it more clearly that is necessary, for the “normal” functioning of our society.⁴⁵⁷ On this sense, this kernel is that there cannot be a “perfect” society. If one applies this idea to the Court’s Jurisprudence on equality, what could be some hidden impossibilities? It can be argued that the main idea supported by this jurisprudence is the existence of an organically, integrated, functioning society. The desire thus consists in the belief that there is a society in which respect for equality and non-discrimination is possible. Thus, this ideological fantasy allows us to make such determinations. Applying the same reasoning it is possible to argue two other more general impossibilities hidden by the Court: the existence of entirely objective judgments, judgments resulted from the exclusive application of the law without influence of other factors such as Judges positions in connection to human rights; and the existence of complete respect for human rights.

The presence of these ideas is somehow very negative for law. Ideology has acquired negative connotations in the legal field. Law is not supposed to be ideological. Ideology then is thought to be present as an illusion, as a construction to distort or to escape reality. Nevertheless, this hides the true object of ideology. Ideology is not there to help us “escape insupportable reality”, rather is a construction to support “our ‘reality’ itself”. The purpose of this structure is to mask a social antagonism; thus its function is to “offer us the social reality itself as an escape from some traumatic kernel”.⁴⁵⁸ Therefore, an ideology is not “inherently bad”. The idea that we must live in a “post-ideological, objective” world only prevents us from facing the social antagonistic structures present in our time. As such, the Court itself has many “ideologies”. First, as a Court of human rights law, it necessarily supports the idea that it is possible to achieve full enjoyment of human

⁴⁵⁵ Kennedy (n 6) 121.

⁴⁵⁶ Žižek (n 424) 45.

⁴⁵⁷ Žižek (n 427) 23; Žižek (n 11) LXXVII.

⁴⁵⁸ Žižek (n 424) 45.

rights in our societies by respecting human rights law. This hides the basic antagonistic nature of our societies that do not permit us to function as perfectly organic machines. Second, in relation to equality, it necessarily believes that inequality and discrimination result from non-respect of societal norms and historical discriminatory processes. On this sense, it fails to seriously analyze if such discriminatory practices are a “necessary” element of our civilizations.

It is clearly extremely difficult for a human rights Court to be “aware” of these situations or to be able to do something about them. The effectiveness of a certain ideology and a certain system highly depend in the ignorance of this “kernel” that prevents a complete social functioning. More specifically in order for law to function “normally”, the traumatic fact, the contingent character “must be repressed into the unconscious, through the ideological, imaginary experience of the ‘meaning’ of the Law, of its foundation in Justice [and] Truth”.⁴⁵⁹ It would indeed be even more disturbing to learn that the Court has knowledge of these circumstances and still maintains this mechanism. Furthermore, taking into account the Court’s position it would not be “legally appropriate” for it to deal with such issues. Still the IACtHR is not only an abstract Institution, specific individuals compose it. This group of people is not constrained by the same legal origin of the Court and thus they have their own ideologies. It can easily be claimed that the Court has historically been composed by “liberal, progressive”, well-intentioned individuals that truly believe in the human rights project.⁴⁶⁰ For example the Court has faced problems that require systemic changes in society in cases such as *Cotton Field*. There the Court highlights the prejudices present in society in relation to gender.⁴⁶¹ This of course is done through the background of an already firm set of International rules that address States’ role in generating this change. However, the application of these rules still requires the Court’s will to articulate the need for change in a specific area of society. This can indeed be the first step to acknowledge the need to make substantial changes to truly achieve this “organic” respect for human rights. This paradoxical situation of the Inter-American Court, as an Institution that could be established to maintain the current political system, and the Court’s will to assert the need for changes in this very system, makes this study on “ideology” relevant.

The Court’s ideology in relation to human rights could be better understood by what Žižek calls the “quilting process of ideology”. This process explains how an ideology is “created”. He explains that “ideological space is made of non-bound, non-tied elements, ‘floating signifiers’ with open identities. These floating signifiers are then organized in a structured manner through the intervention of a certain “master signifier” or “nodal

⁴⁵⁹ Ibid 38.

⁴⁶⁰ For a picture of this one only needs to see many of the Concurring Opinions elaborated by Judges Cançado Trindade, García Ramírez, Piza, Jackman, Abreu Burelli, Burgenthal, Medina Quiroga and others mentioned in the previous chapter.

⁴⁶¹ *Cotton field case* (n 313) paras 231, 208, 293, 366-369. The Court made similar statements in *OC-4* (n 86) paras 64-67.

point”, which “quilts them”, puts them together, fixing their meaning and preventing them from sliding or changing. This quilting is when “these free floating [...] ideological elements [...] become parts of the structured network of meaning”.⁴⁶² What is at stake in such process is “which of the ‘nodal points’ [...] will totalize [...] these free-floating elements”. Applying this to the Inter-American Court, the element giving meaning to the Court’s ideology would be human rights law. Everything acquires significance in connection to human rights. This concept acts as the connection making the system work. What makes this process ideological is that it once again conceals the existence of an antagonistic structure in the symbolic network.

Nevertheless, the Court itself evidences the impossibility of this human rights project. Even if the Court indeed has the goal of promoting and achieving human rights enjoyment in the continent, the Court remains being a Court. That is, its purpose is to entertain petitions for human rights violations. This assumes that human rights violations will occur. Nobody even considers that the Court can be a “temporary” Institution until we achieve human rights enjoyment. It is obvious then that it is accepted that there will always be human rights violations. The fact that this is an International Court with subsidiary jurisdiction only aggravates this perspective. This means that not only States and individuals would violate human rights; but States will fail in protecting and repairing these violations.

Additionally, the Court position is also different from the general human rights movement. The Court rather than having a human rights ideology, it has a human rights “Law” ideology. Thus human rights law tool to mask this impossibility is the creation of standards, criteria, rules and tests to distinguish human rights violations from not human rights violations. This is the system’s tool of giving positive content to this impossibility and at the same time hiding it. This is the way Law claims that is not that human rights universal enjoyment is impossible, rather it is just that a particular case happens not to be a human rights violation. This is then a perfect ideological fantasy: a fantasy where real-descriptive situations point out to the impossibility of this particular ideology, and yet the system’s viability remains unchallenged.⁴⁶³ The paradox of all is that these standards legitimize the system. The functioning of the standards in a consistent manner serves to provide us with peace and belief. If one perceives the Court to be applying uniform standards, then human rights are being protected, and its decisions are legal and objective. Therefore, there is still trust in the system. Yet, in truly “Žižekian” fashion, there are gaps in this “organic system”. One finds cases that do not match the logic, and still one just disregards them as “exceptions”, and “mistakes”. One refuses to believe in the impossibility of such system. Judges of the Inter-American Court are preys to this ideological function as well. The clearest example is perhaps Judge Cançado Trindade, arguably the most “liberal” or “progressive” Judge of the Court. In his dissenting and concurring opinions, he points out to

⁴⁶² Žižek (n 224) 87.

⁴⁶³ Ibid 49.

something else outside human rights law as the source of the problem in finding human rights violations. As such, the problem is not human rights law itself or the Court, or the system giving origin to the Court, but rather “conservative” readings of human rights by Justices unwilling to see the unstoppable evolution of human rights.⁴⁶⁴

Yet, perhaps this ideological position is not entirely surprising. Before being under the fantasy of the Law, an individual is before another more “terrifying injunction”. Žižek describes that the “true superego injunction is – in contrast to the Law’s precise prohibitions (‘you shall not kill, steal...’) – just the truncated ‘You shall not!’ – do what?” As such, a gap opens up: “you yourself should know or guess what you should not do so”. Therefore, one is put in a position of being under suspicion of having violated an unknown prohibition.⁴⁶⁵ Yet, this fantasy construction is not there to merely conceal “the real of some trauma”. Rather, fantasy “is not primarily the mask which conceals the Real behind it but, rather, *the fantasy of what is hidden behind the mask*”.⁴⁶⁶ The truly difficult thing of “going through the fantasy” is not facing the “Real” itself; it is rather that such operation implies that we face the “real”, but of our desires. It could be said that one lives “in an” ideology not to face this “real of our *jouissance*”. This is precisely the appeal of maintaining the “symbolic truth”.⁴⁶⁷ The psychoanalytical expression “there is no big Other” should be read: “there is no ultimate code regulating our exchanges”.⁴⁶⁸

Accordingly, believing a specific ideology allows individuals to pass their belief to the “big Other [...] which therefore believes in their place”. This “big Other” should be understood as the symbolic or social network organizing our different experiences. With this individuals can maintain a certain distance to the official discourse that believes for them. If they were to lose this belief “they would have to jump in and *directly assume the belief themselves*”.⁴⁶⁹ Under this research, this phenomenon is explained by the role given to the Inter-American Court in the continent. As it has been claimed the Court is perceived as the solution for multiple problems in the continent. People think the Court really believes in the human rights project and strives to achieve this belief. If we take away the Court, it is us, people who believe in the human rights project, who would need to take responsibility for fulfilling the human rights project.

Finally, the Court or the Judge appeal can also be identified with what Žižek denominates “traditional authority”. This is precisely the power of attraction of the form itself: the belief in the Law because it is the Law. Individuals know that “constitutional Authority is better, however faulty in its content,

⁴⁶⁴ See for example: Separate Concurring Opinion of Judge Cançado Trinda, *Moiwana Community case* (Merits, reparations and costs) Inter-American Court of Human Rights Series C No 124 (15 June 2005) para 46.

⁴⁶⁵ Žižek (n 11) LXV.

⁴⁶⁶ *Ibid* CIII.

⁴⁶⁷ *Ibid* LXVII.

⁴⁶⁸ *Ibid* LXVIII.

⁴⁶⁹ *Ibid* LXX.

than authority which is fortuitously ‘fair’, yet without support in an Institution”.⁴⁷⁰ This idea was already explained but it is necessary to analyze another element. Žižek claims that this authority is “founded in the power of the signifier, not in the immediate force of coercion”; as such this authority implies “a certain surplus of trust, a certain “if He knew about it (about the wrongdoings carried out in His name, about the injustices we have to suffer), He would set things right without delay”.⁴⁷¹ It is clear that many authorities in America do not have this “surplus trust” anymore. However, the Inter-American Court still possesses this mysticism. Victims of human rights, human rights organizations and the Court itself believe that this Institution can indeed solve the human rights problems in the Continent. It can be claimed that there is a belief that if a particular case reaches the Court justice will be found. As such, the Court has been spared from a lot of criticism, since there is a belief in the “goodness” of its work.

Therefore, Žižek argues that a “true ‘cultural revolution’ should be conducted [...] by depriving them [people] of support in the ‘big Other’, in the institutional symbolic order”.⁴⁷² The key lies in the relationship between the individual and the social sphere involved in a specific society. In the present case, this “cultural revolution” would need to stop putting all this responsibility on the Court. The main question is framed as “how should the decentred socio-symbolic order of institutionalized practices/beliefs be structured, if the subject is to retain his or her ‘sanity’, his or her ‘normal’ functioning?” Such question can be answered by looking at the delusions that are needed to maintain the social network functioning, or as Žižek would put it “so that individuals can remain sane”.⁴⁷³ The limits of the human rights project have been explained from the movement itself. David Kennedy concretely explains the advantages on the recognition of human rights limits. He claims that one of the major flaws of the human rights movement has been to promise much more than what it can deliver. As such, human rights are sold to the world, especially to people suffering systematic violations of human rights as the answer to their problems.⁴⁷⁴ Human rights are supposed to solve these problems. The appeal of such tool for people actually suffering human rights violation is evident. Nonetheless, as Kennedy claims, this promise is a false promise. Human rights will not solve all the problems faced by different communities. Human rights advocates should do more pragmatic analysis in the possible costs and benefits of its actions in order to achieve better results.⁴⁷⁵

⁴⁷⁰ Ibid 249-250.

⁴⁷¹ Ibid 250.

⁴⁷² Ibid LXXII.

⁴⁷³ Ibid LXXII.

⁴⁷⁴ David Kennedy, ‘Reassessing international humanitarianism: the Dark Sides’ in Anne Orford *International Law and its Others* (Cambridge University Press, Cambridge 2006) 133-135.

⁴⁷⁵ Kennedy (n 6) 101-103.

4.2 The second axis: the Court's "vulnerable group perspective" and Ideology.

It is this chapter's task to explore the different ideological constructions and assumptions present in the Court's understanding of "vulnerable groups". The author will deal with criticism towards the ideology present in the IACtHR's practice. Žižek has put forward many concepts that are relevant for this criticism. Thus the aim of this section is to criticize the Court's jurisprudence on equality through the use of six ideas developed by Žižek. The elements that will be analyzed are: the Court's historical focus; the place and the target of the Court; the hidden impossibility of equality and "vulnerable groups"; equality's emptiness and the need to make a choice; the trap of the "beautiful soul"; the Court's ideology as "serious" or as a tool for "domination".

4.2.1 History and "vulnerable groups".

The first and most obvious ideological construction present in the Court's jurisprudence is making history responsible for current equality problems. Žižek's analysis of ideology is not connected with criticising how ideology transforms a specific idea into a universal truth, without taking into account the historical, socio-symbolical determinations that influenced it. He argues that such posture only hides the social antagonism "repressed" by a specific ideological fantasy, that keeps reappearing in different historical and social contexts.⁴⁷⁶ The example given to explain this concept are concentration camps. It is argued that this phenomenon is the most accurate example of the "perverse obverse of twentieth-century civilization". All attempts to identify it with a specific image or social order (Holocaust, Fascism, Stalinism) only serve to "elude the fact that we are dealing here with the 'real' of our civilization which returns as the same traumatic kernel in all social systems".⁴⁷⁷

This idea can be partially applied to the Court and its position towards "vulnerable groups". When the Court deals with indigenous or tribal people, internally displaced people or persons with disabilities, the Court always refers to a general context of discrimination. Discrimination is always connected, as the acts described by Žižek, to specific historical and other circumstances. For example, discrimination of indigenous people is the result of the historical exploitation of this group from the Colonial times;⁴⁷⁸ or discrimination against internally displaced persons in Colombia is the fault

⁴⁷⁶ Žižek (n 224) 50.

⁴⁷⁷ Ibid.

⁴⁷⁸ Concurring Opinion of Judge Cançado Trindade, *Sawhoyamaya Indigenous Community case* (Merits, reparations and Costs) Inter-American Court of Human Rights Series C No 146 (29 March 2006) paras 8 and 59.

of the internal conflict.⁴⁷⁹ These phenomena are never understood completely as necessary phenomena in our societies. This explanation ignores that the will of other people also intervene in these discriminatory attitudes. It is of course illogical not to take into account the effects of the internal Colombian conflict on internal displacement, however this fact does not explain the discriminatory attitudes of the general population against this group. Clearly, the conflict made people leave their places and become internally displaced. As such, this situation should be taken into account to solve the problem; yet this fact itself does not explain why a particular person would discriminate against the internally displaced.

Žižek explains that the most dangerous type of ideology is not the creation of false universals. It is rather the “over-rapid historicization” of social problems and phenomena.⁴⁸⁰ There are critiques claiming that psychoanalysis takes a particular social structure, such as the “patriarchal society” and treats it as a given; rather than as a contingent historically produced figure. The response of psychoanalysis is that this effort to put responsibility mainly on historical and societal conditions is also highly ideological and with a major flaw. This idea permits us to avoid “the real kernel” that is announced through different social phenomena and keeps appearing in social settings; equally this idea allows us to avoid personal responsibility.⁴⁸¹

This can be applied to the concept of equality used by the Court. The Court’s main focus with equality is the existence of “vulnerable” groups. It can be claimed that the Court believes that the existence of these groups is caused by inequality, by discrimination, and by unequal application of the law. As such, these groups are directly associated to historical phenomena and it is possible to avoid the “real” showed by these groups. This “real” is that there has always been disadvantaged and discriminated groups in America, they are a necessary part of our societies; social functioning would be challenged without their existence. Then, this attitude allows us to put the blame somewhere else, to still believe that people are discriminated because the law is not being applied; and not because discrimination is a necessary feature in our society.

The problem with making history responsible for everything is perfectly explained in *For they know not what they do*. Žižek claims that when we are “caught in the flow of events, we act ‘automatically’, as if under the impression that it is not possible to do otherwise, that there is really no choice; whereas the retrospective view displays how the events could have taken a radically different turn”. This truth is: “how what we perceived as necessity was actually a free decision of turn”. Unfortunately, here it is also mentioned the impossibility to be conscious about such “freedom in the present”. He claims that we discover such circumstances in the future.⁴⁸² It

⁴⁷⁹ *Mapiripán massacre case* (n 256) paras 175-178

⁴⁸⁰ Žižek (n 224) 50.

⁴⁸¹ *Ibid.*

⁴⁸² Žižek (n 11) 222.

is unclear whether this would mean that we cannot be aware of discriminatory or racist attitudes in the present, but always when we reconstruct them. For example, in a recent talk given in Lund, Robert Fisk described how he “this liberal person” changed in five minutes into a racist. He talked about his experience during the attacks against the World Trade Centre in September 11 of 2001. Mr. Fisk was on a plane on his way to the United States when the planes crashed the twin towers. He received the news and talked to the pilots about it. He along with crew from the airplane then went on to identify “suspicious” people that might be present in the airplane and “might be planning similar actions. All of them of course identified men with clear Middle Eastern or Muslim features. After having done this, he realized how he had “unconsciously” become racist in a matter of minutes.⁴⁸³ This is a perfect example of how we always realize the work of ideology afterwards. Mr. Fisk rather than accepting that he had become a racist, could have taken the attitude of justifying his actions in this “shock of the moment”. He could have claimed that his life was in danger, and that as such he could not think “properly”. Yet, this would completely ignore its own responsibility on the choice of being a racist or not. This is precisely the responsibility that we should not avoid when using this “vulnerable group” perspective.

Additionally, discrimination against these groups is not hold as “individual” decisions. They do not concern a particular case, or a one-time occurrence. On the contrary, the Court usually connects them to a general context of discrimination endured by these groups.⁴⁸⁴ This position is defended as the “right” attitude towards discrimination in the Continent. González and Parra argue that the label of “discrimination” should only be used in relation to problems connected with unequal social conditions of particular groups of people. When there is unequal treatment of people not in “vulnerable situation” the appropriate term is arbitrary and not discriminatory treatment.⁴⁸⁵ This perspective then supports the following idea: any discriminatory act has already been committed in the past. There are no discriminatory actions that occur in the present. Discrimination to these groups is the result of specific historical machinery that has put indigenous people, people with disabilities and others in a “disadvantaged” situation. Therefore, a particular “discriminatory” act is caused by this “figure”, by this existing machinery promoting discrimination.

There is of course a lot of “truth” in such claim, and indeed a great merit in taking historical conditions into account when solving a case. What such perspective misses nevertheless is the subject’s “present” responsibility for a specific act. It seems that these violations “already happened” before the case, and a case is a mere consequence of such “primordial” discrimination.

⁴⁸³ Robert Fisk, (Conference in Lund University for UPF Utrikespolitiska Föreningen in Lund, Sweden April 2010) <<http://www.upflund.se/upf-tv/>> (Part 1 min 8) accessed 14 June 2010.

⁴⁸⁴ Examples: *Mapiripán massacre case* (n 256) para 177; ‘*Street children*’ case (n 298) para 79; and *Cotton field case* (n 313) para 2.

⁴⁸⁵ González and Parra (n 14) 135.

On this sense, it is not that an act is a consequence of a specific “present” action of the State or an individual. It is as if such action had already been determined before; which consequently means that the situation could have not been any other way. This particular subject at this particular time making a particular discriminatory act could not have acted in any other way; the “discriminatory” machinery of “prejudices, attitudes and historical discrimination” had already determined the subject’s conduct.

The convenience of such attitude is obvious for States. Human rights violations are never their responsibility; they are always the responsibility of somebody else. It allows States to “genuinely” pursue their non-discrimination, egalitarian agendas of every democratic government; while maintaining discriminatory practices. It can even be possible to take the risk and argue that such understanding has facilitated States to accept their International responsibility for those actions. This is so because they are not actually accepting “their” responsibility, but always the responsibility of someone else. Such attitude is perhaps most evident in the *Plan de Sánchez Massacre* case. There, Guatemala accepted its responsibility for all the facts of the case, including the violations on the right to equality. In consequence, the Court did not make any analysis of the merits and just declared that several rights had been violated. The gravity of the facts could not have been greater. The case concerned graphic examples of extreme violence committed against *Mayan* people.⁴⁸⁶ The easiness with which the case was solved was nevertheless remarkable. The fact that there seemed to be no controversy between the parties is even stranger. Why would the Commission bring a case before the Court if Guatemala was “so willing” to accept its responsibility? This case illustrates precisely the kind of problem caused by such ideology. States and societies are not forced to deal with their present antagonisms. They are always capable of finding the fault on another place. The current Guatemalan State could separate itself from the State in power during the internal conflict. Yet, one does not even need to quote anybody to affirm that discrimination against indigenous people in Guatemala persists. Perhaps it is time for discrimination to change its perspective: Do not look at your past, look at your present! Look at your door!

This purpose is not obvious at first sight, and yet the concept serves as the basis of the “vulnerable group perspective”. There seems to be nothing wrong in a theory advocating taking into account structural discrimination faced by specific groups of people. The same can be said in relation to a theory taking into account every person’s sense of “vulnerability” or disadvantage. The problem is that, at least when the Inter-American Court puts this theory into practice, the disadvantaged situation becomes the whole thing being examined. When this theory is applied, the sphere of the subject’s responsibility is practically erased. The IACtHR’s decision is already made when it finds that a specific group has been “historically” or

⁴⁸⁶ *Plan de Sánchez Massacre case* (n 55) paras 42 (15)-42 (21) and 46-47.

“systematically” discriminated. The actual discriminatory facts thus become almost irrelevant for its analysis.

The first thing that could be said is of course that such application of the theory is not an inherent part of the theory itself: that the “vulnerable group perspective” is only a perspective and not a tool to erase “present-time” responsibility. This means claiming that this situation is merely a mistake in particular cases. Yet one should be careful with such justification. Does this not remind other ideological construction? Žižek claims that another sign to describe a theory as ideological is when this theory or idea asserts that the deviations found in reality are merely that, exceptions to the norm?⁴⁸⁷ These “deviations” should, on the contrary, be analyzed to see whether they are actually necessary parts of the theory itself. Unfortunately, as the ideological fantasy of an “organic society”, the erasing of the subject’s responsibility cannot be deemed as an “exception” to this theory. If the fantasy is that society can be a functional equal organ, what better way to maintain it, that negating present responsibility for discrimination? Erasing present responsibility does not allow to analyze how much present-day practices might require inequality. One could then well remember Žižek’s words in connection to democracy: the problem of democracy is not democracy itself but its collateral damage.⁴⁸⁸ Here, the problem is not the “vulnerable group perspective” but its collateral damage.

Accordingly, such obviation is a necessary aspect of the theory itself. The basic point of this ideology is to claim that discrimination is a historically and contextually produced situation; discrimination is a “complex” situation involving many factors outside of the subjects’ will. As such, to prevent discrimination it is necessary to address the multitude of historical, economical and contextual factors involved. The attention to present-day conditions is then unimportant. This is to say: discrimination will never be solved by addressing the responsibility of a person, a subject or a society. It is necessary to address an “external” circumstance. It becomes clear that erasing this “personal-present” responsibility of the subject is an essential element of the theory. This is where one finds the other subjects interest in the theory.

This perspective allows everyone to live in the fantasy-scenario of the impossible *kernel*: an organically functioning society. It also allows the system to continue its “normal” functioning. Discrimination is seen as something external to present situations; as external to the “normal” functioning of the symbolic network. As such, the present system is not to be blamed for discrimination, but rather some other phenomena. With such idea, human rights defenders can still believe in the “human rights project”: they can claim that discrimination and the existence of vulnerable groups can be solved through the respect and enjoyment of human rights. Society can claim that it can function as an organic being. The only obstacles are some historical, complicated problems. Therefore society’s interest is

⁴⁸⁷ Žižek (n 224) 49.

⁴⁸⁸ Žižek (n 11) LXXX.

similar to that of the State: the focus in “vulnerable groups” allows it to escape its responsibility for the present state of affairs. Discrimination is seen as something beyond society’s control and understanding. This permits every subject to keep playing its specific social role without taking into account its possible, and necessary, effects in the existing unequal social conditions.

Therefore as the avoidance of concentration camps,⁴⁸⁹ one keeps avoiding the fact that inequality is something present in all American societies; regardless their historical, economical, and political context. What one loses with this ideological fantasy, at least in the sphere of reality, is that we do not analyze everybody’s role in maintaining this system. Indeed, the mere idea of claiming that the Court is a tool that helps to maintain discrimination in the American continent strikes as a bit too radical to be taken seriously. In face of inequality’s continued reappearance perhaps is time to analyze different causes for this situation.

4.2.2 From where and for whom is the Court creating the “vulnerable group” perspective?

The analysis will focus in two things. First, the place the Court is putting itself when it creates the “vulnerable group perspective”; and second, the target of this theory. The target should be understood as the subject for whom the Court creates this perspective. This will be explained through the figures of symbolic and imaginary identifications. Imaginary identification is “identification with the image in which we appear likeable to ourselves, with the image representing ‘what we would like to be’”. Symbolic identification is “identification with the very place *from where* we are being observed, *from where* we look at ourselves so that we appear to ourselves likeable, worthy[...]”.⁴⁹⁰ This seems like a simple term, but there are two things to look after. The first is that both identifications usually relate to a “hidden” trait which is not necessarily the most obvious characteristic.⁴⁹¹ The second is that imaginary identification “is always identification *on behalf of a certain gaze in the Other*”. Then on this case, the question we need to ask is “*for whom* is the subject enacting this role? And not just from where is the subject creating this image?”⁴⁹²

Applying this theory, one needs to ask what is the image the Court is creating to appear likeable to itself? And for whom is the Court creating this image? It is easy to answer the first question. The Court wants to be looked as an Institution that protects groups in “vulnerable situations”. As Judge García Ramírez explained in its Concurring Opinion in *Ximénes López*, these groups are the ones who need the most attention and the most

⁴⁸⁹ Žižek (n 224) 50.

⁴⁹⁰ Ibid 105.

⁴⁹¹ Ibid.

⁴⁹² Ibid 106.

protection from States.⁴⁹³ Thus the Court rightfully wants to appear as a protector of these groups.

The second element is more complicated. It could be said that the Court has created this perspective for all people involved in the system: States, victims and human rights defenders. It is hard to sustain that the IACtHR is creating this image for the victims or “vulnerable groups” themselves. Yet it is possible that such groups themselves would not see their situation as one of “extreme vulnerability” and helplessness. For example the Court has not portrayed women as a “vulnerable group” in the same sense that it has done with other groups; even when women are discriminated in the Continent. Perhaps, a factor influencing this issue is that there are women in the Court.⁴⁹⁴ It can be argued that women see something negative to being portrayed as “vulnerable”. This of course does not mean that the Court does not recognise discrimination faced by women, but rather that it does not frame its actions under this sense of “vulnerability”. The word “vulnerability” unfortunately carries an ideological weight by itself that cannot be erased by the Court.

It can also be claimed that the Court is creating this idealistic figure for us, for human rights defenders. And it is creating this image in order, as the communist construction of the idealized working class, to legitimize its actions. Žižek explains that communist countries considered the “working class” as ideals, as persons without any flaw. They did this precisely to sustain its ideology or apparent support to this group. Obviously, if the “working class” were presented with its necessary flaws as other human beings, it would have been hard for communist regimes to justify all its actions.⁴⁹⁵ It is clear that this idealization and mystification of these groups do not completely coincide with other analysis. Yes, victims of human rights violation of course have virtues, yet they should not be portrayed as “ideal” human beings. We suddenly put these groups in other level; paradoxically they are put as truly “different” from us. What this false identification produces is the lack of awareness on the simple fact that these groups possess the same virtues and the same flaws as everyone: they are not an ideal “enacted for [our] gaze”.⁴⁹⁶ The consideration of these groups of people as “truly different” could be an unfortunate and unwanted result from this idealization. Human rights defenders should be aware of this danger.

⁴⁹³ Concurring Opinion Judge García Ramírez in *Ximenes Lopes case* (n 294) para 17.

⁴⁹⁴ In *Miguel Castro Castro Prison case* there was one female Justice present; in *Cotton Field*, there were three female Justices. The influence of the presence of female Justices in the Court’s jurisprudence has been pointed out by Quintana (n 309) 307.

⁴⁹⁵ Žižek (n 224) 102.

⁴⁹⁶ *Ibid.*

4.2.3 The hidden impossibility of equality and “vulnerable groups”.

This subsection covers one of Žižek’s most important ideas. The purpose is to show what is the element breaking the ideological fantasy of the Court. Žižek claims that every ideological universal “is ‘false’ in so far as it necessarily includes a specific case which breaks its unity, lays open its falsity”. He gives the example of freedom from a Marxist perspective. It explains how this concept includes different freedoms (speech, press) but also “by means of a structural necessity, a specific freedom (that of the worker to sell freely his own labour on the market) which subverts this universal notion”. He claims that through this freedom, the individual is actually losing his freedom to “enslavement to capital”.⁴⁹⁷ Thus this section will explain what is this element in the case of the Court’s ideology.

An analysis of an ideological universal should also look for this particular element breaking its unity. Equality for the Inter-American Court is reflected in its “vulnerable group perspective”. This understanding implies that equality is a valuable tool in connection to groups who have historically suffered discrimination. This thesis claims that the hidden impossibility under this research’s object of study is the existence of a functioning organic society.⁴⁹⁸ The desire that creates this fantasy is achieving this society. Žižek tells us that “society is always traversed by an antagonistic split which cannot be integrated into symbolic order. And the stake of social-ideological fantasy is to construct a vision of society which *does* exist, a society which is not split by an antagonistic division, a society in which the relation between its parts is organic, complementary”.⁴⁹⁹ This is how the phrase “*fantasy is a means for an ideology to take its own failure into account in advance*” must be read. The ideological fantasy already knows its impossibility. Therefore, it already contains an element to blame for this lack of “perfect” functioning. This way, when the fantasy is not fulfilled, when there continues to be discrepancy between reality and the dominant ideology, there is already an element to blame. Žižek gives the example of “the Jew” as the element showing the impossibility of fascism.⁵⁰⁰ His claim is that fascism already knew of the impossibility to form a homogenous society, that is why it needed the figure of “the Jew”. This way it would always have “something” to blame for the non-fulfilment of the ideology. In the case of the Court this element is the existence of “vulnerable groups”.

Obviously, the ideological fantasy supported by the Court is different to that of fascism. The Court and equality do not aim at creating a “homogenous society”. The Court aims to the existence of a society effectively enjoying their human rights. Equality aims at a society in which equals are treated

⁴⁹⁷ Žižek (n 224) 21.

⁴⁹⁸ See section 3.1.2.

⁴⁹⁹ Žižek (n 224) 126.

⁵⁰⁰ Ibid 126-128.

equally and unequals, unequally. The Court's understanding of equality aims at: first, treating equals equally and unequal's unequally unless there are reasonable and objective justification for doing otherwise; and providing "special measures" of protection to vulnerable groups. Then what are the elements included in this ideology that represents its own impossibility?⁵⁰¹ Equality can explain this dynamic in the case of the Inter-American Court. It can be said that the Court is aware that it is impossible that all members of society effectively enjoy their human rights. As such, there exist a number of standards to "balance" conflicting rights and to determine when a particular prejudicial situation is actually a human rights violation and when is not. On this sense, this "effective" enjoyment of human rights is unquestionably put into brackets. This is the point at which truly the "universality", "indivisibility", and "interrelatedness" of human rights show their faces: one seeks the protection of these elements of course as long as they are qualified. Indeed human rights greatest activists and doubtfuls share this idea: human rights are not absolute. This is the paradox and the fantasy at work in the ideology sustained by the Court. This ideology aims at the equal enjoyment of human rights; yet the ideology knows very well that this aim is impossible. At such it is necessary to come with a fantasy construction to hide this well known impossibility. In our case, this construction is the Court's formula of equality.

This is precisely one of Žižek's criticisms towards human rights. He claims that the "cheating" of human rights discourse is that they tell us that we should take its statements in connection with many other written and unwritten rules. As such, the reading of a human rights text should not be taken literally.⁵⁰² Article 1 of the ACHR establishes that everyone has the right to enjoy the rights protected in the Convention without discrimination. Still this does not tell the complete story. This does not tell us that everyone has this right unless there are reasonable and objective justifications not to have it, or as long as one is part of a "vulnerable group". He suggests that perhaps the most effective "anti-ideological subversion of the official discourse of human rights consists in reading it in an excessively "literal" way, disregarding the set of underlying unwritten rules".⁵⁰³ Article 1 does not then tell us that it can be applied when the Court considers that a person is member of a group worthy of protection. On this sense when the person does not belong to these groups as in *De la Cruz Flores, Suárez Rosero, Acosta Calderón, Castañeda Gutman, Apitz*, and other cases, the protection given by "equality" is truly unequal.⁵⁰⁴ It is unequal in the sense that not all persons' right to equality is being protected by the Court. The Court has a focus in the protection of "vulnerable groups". Persons not belonging to these groups could make the case that their right to equality is being violated by this attitude. This could be truth even if one talks of equality as a tool to correct structural disadvantages. It would seems that the victims in at least

⁵⁰¹ Ibid 127.

⁵⁰² Žižek (n 11) LXII.

⁵⁰³ Ibid.

⁵⁰⁴ See section 2.2.

De la Cruz Flores, Suárez Rosero, and Acosta Calderón could not be considered to be in a “privileged” situation.

The same can be developed in connection with the Court’s understanding of equality. The main idea is that there exist “vulnerable groups” in the American continent who deserve the Court’s protection. The reason for this “vulnerability” is discrimination and lack of respect for their right to equality. The logical solution is to declare a violation of this right and to raise “awareness” on particular discrimination attitudes. The “goodness” of such enterprise should be self-evident. Yet, this element shows the impossibility of equality and has two major problems. Regarding the impossibility, this sense of “vulnerability” will always be the reason to blame for the existence of inequality. Inequality will never be seen as “part of our societies”. Rather we will see these “vulnerable groups” like “Jews”, this external element that does not allow equality to function perfectly. If it not were for these groups, we would have equality. This is truly paradoxical. The “heart” of equality of the Court is the protection of these groups. Yet, these groups will always be the excuse for the lack of equality.

The first problem is that this understanding accepts the possibility of discrimination. When the Court deals with the need to change “discriminatory attitudes”, “prejudices” or “stereotypes”, it claims that such ideas are not based in reality. The Court states that these groups are not really like this; they do not have the characteristics that are being put into them. Consequently they should not receive the discriminatory treatment they receive.⁵⁰⁵ This claim resembles Žižek’s classic explanation of anti-Semitism. He claims that to break away from anti-Semitism one should not try to see “Jews” as “they really are”, since this already implies that we are under an ideological trap. Rather one should realize that whatever “real characteristics” a specific group possesses, the intolerance and ideological biases are driven by artificial fantasy-like constructions.⁵⁰⁶ Therefore, the first problem of this idea is that it indirectly (and unwillingly) accepts the possibility of such treatment, if it were justified on real criteria. As such, this proposition remains entirely ideological.

The second flaw is once again the denial of an “impossible kernel”: the denial that our society cannot be equal. It has been pointed out before that regardless of laws and standards racism and discrimination persists.⁵⁰⁷ The missing part is why they persist? An application of Žižek ideas could very well tell us that “vulnerable groups” exist because there is a need for their existence. The thing hidden in the ideological fantasy of equality is that the antagonistic character in our society impedes the existence of an equal society. This means that society “is not prevented from achieving its full identity because of [lack of respect for equality]: it is prevented by its own antagonistic nature, by its own immanent blockage, and it ‘projects’ this

⁵⁰⁵ *Cotton field case* (n 313) paras 231, 208, 293, 366-369; *OC-4* (n 86) paras 64-67.

⁵⁰⁶ Žižek (n 224) 47.

⁵⁰⁷ Arnardóttir (n 5) 19.

internal negativity into the figure of [discrimination]”.⁵⁰⁸ This once again is a difficult proposition to accept, yet it remains being a possibility.

The existence of this “immanent blockage” is perhaps clearer if one considers that the Court is generally more reluctant to find discriminatory practices in cases unrelated to “vulnerable groups”. Many times the Court solves equality claims from these groups without considering the claims’ merits. González and Parra will claim that this results from the Court’s misunderstanding of both equality clauses present in the Convention.⁵⁰⁹ This may very well be true. Yet, there could also be a motive in connection with the Court’s ideology. The claim here is that the Court’s ideology (in connection to equality) could be hiding the need for “vulnerable groups”. Therefore, cases not involving “vulnerable groups” do not need the same attention from the Court. This argument means that the Court would consider to highlight problems of inequality only in relation to cases involving a “vulnerable group”. If there is not “vulnerable group” involved the Court would not need to hide the need for this group. The ideological fantasy is not needed since there is nothing to hide. Thus cases still related to equality but not involving a “vulnerable group” would receive a different treatment. This treatment would translate in the lack of need to address the merits of any claim in connection to equality. This is precisely what happened in *Acosta Calderón* and *Castañeda*. Both cases do not involve any “vulnerable group”. Yet, in both cases the victims claim a violation of the right to equality. The Court did not even see the need to make an analysis under the right to equality.⁵¹⁰ Thus it is possible to see that this not obvious consequence might be affecting the Court’s reasoning and actions.

4.2.4 Equality’s emptiness and the need to make a choice.

There is a particular feature of the principle of equality that has been the source of a lot of controversy: the emptiness of this term.⁵¹¹ This subsection explores this “emptiness” as an appealing factor rather than a negative trait. Žižek tells that empty concepts are appealing precisely because they are objects “which [are] just [...] embodiment of the lack in the Other, in the symbolic order”. This means, that they are there just to fill in the gap, and the lack in our social structures. The “sublime” aspect given to this impossibility is that concepts they are nothing “but an embodiment of a certain void, lack, and radical negativity. [They] *cannot be negated because [they are] already in [themselves], in [their] positivity, nothing but [...] embodiment[s] of a pure negativity, emptiness*”.⁵¹² Furthermore, this

⁵⁰⁸ Žižek (n 224) 127.

⁵⁰⁹ González and Parra (n 14) 156 and 163.

⁵¹⁰ *Acosta Calderón case* (n 158) para 128 (a); *Castañeda Gutman case* (n 101) para 212.

⁵¹¹ Professor Peter Westen gives the broadest explanation to this issue in his book *Speaking of Equality. An Analysis of the Rhetorical Force of ‘Equality’ in Moral and Legal Discourse* (Princeton University Press, New Jersey 1990).

⁵¹² Žižek (n 424) 170.

emptiness will be connected with the subject's necessity to take personal responsibility and make a choice.

This of course strictly relates to the appeal of formalism and of the empty nature of equality. Professor Koskenniemi explains that it is precisely the emptiness of formalism what is important for legal science. Only in this sense, can the content put into the "Law" be challenged. Only by understanding that the "Law" itself does not have an inherent meaning, it is possible to question a number of actions that are done in its name.⁵¹³ The same can be said for the rhetorical appeal of equality identified by Professor Westen. Equality is a tool than can be used in different ways, as by itself it does not explain who is an equal and who is an unequal. Westen, unlike Koskenniemi treats this characteristic as a negative aspect of the concept.⁵¹⁴ As Burtont has clearly asserted there is no reason to differentiate "substantive norms" from equality norms, and as such both normative frameworks should be granted similar conclusions.⁵¹⁵ This is complemented by Žižek's defense of Kant's categorical imperative. He explains how this figure was criticized precisely for its emptiness as it could justify any type of action. Yet, Žižek rightly affirms that emptiness is not the problem. On the contrary, "the formal emptiness of the categorical imperative confronts us with the abyss of our freedom – this emptiness means that the free subject is fully responsible not only for doing his duty, but also for establishing what this duty is".⁵¹⁶

On this sense, the value of "empty" concepts cannot be neglected, especially for individuals. One of the key forces of such concepts is that they cannot be negated. Their emptiness rather than opening them for criticism works as a shield against all sort of analysis. A defender of equality can always claim that the problem is not the concept as such but the reading given to it. This is indeed a common argument in connection with "problematic" and uncertain terms: the term itself is not wrong, its meaning has been misinterpreted, deviated or manipulated. This is perfectly applicable to the Court's interpretation of equality. Nobody believes that equality as such is "wrong". The problem is always focused on the particular interpretation given to the term. This is the "sublime" appearance of this ideology: that for some reason equality itself appears as an "untouchable" thing. This is also the appeal of Professor Westen's theory on equality. He does not hesitate to question one of the basic concepts of human rights and legal reasoning.

This emptiness thus has "positive" and "negative" aspects.⁵¹⁷ The positive is that at the end the concept itself cannot be blamed for its meaning. The

⁵¹³ Martti Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870-1960* (Cambridge University press, Cambridge 2001) 503.

⁵¹⁴ Peter Westen, 'The Empty Idea of Equality' (1982) 95 *Harvard Law Review* 3, 542 and 547.

⁵¹⁵ Steven J Burtont 'Comment on Empty Ideas: Logical Positivist Analyses of Equality and Rules', (May 1982) 91 *Yale Law Journal* 6, 1148.

⁵¹⁶ Žižek (n 11) XXIV.

⁵¹⁷ Here positive and negative should be read as desirable and undesirable characteristics.

problem is of course, the second part of the position: the idea that there has been some deviation from the “right” meaning. This implies the existence of a “naturally right” meaning, rather than a contingent meaning. Of course if we were to accept that the meaning we give to the word “equality” is completely contingent, it would be extremely difficult to defend it in a believable matter. Yet, this is not necessarily true. The acceptance of the contingent nature of equality does not entail the lack of belief in this term’s truth. By accepting that the meaning of a specific term is not “natural” one is not falling on cultural relativism, on the contrary one is accepting his/her responsibility as subjects in the construction of the terms. A “truly ethical” defence of equality requires the acknowledgement of its emptiness and contingency. Only then one takes responsibility for whatever it is we are trying to achieve through equality, without recurring to external higher sources such as: Law, God, Morals, etc. Therefore, the negative and positive sides do not relate to the emptiness as such, but to the attitude towards it. It depends on whether one treats the emptiness as something “sublime” or as something contingent. This mainly implies taking responsibility for the content of the empty term.

Therefore, this idea points out to the necessity to make a certain choice. The mechanism of making this choice will be explained through what Žižek calls “foreclosure” and “*sinthome*”. The classical meaning given to the first term is the blocking of a certain signifier from the Symbolic order that would then return in the Real. However, the last meaning given to it is that every symbolic or social structure “is structured around a certain void, it implies the foreclosure of a certain key-signifier”.⁵¹⁸ As such, the “normal” process of identifying the symptom (problem) of a certain ideology would be to find that signifier (that element giving meaning to a specific aspect of things) that is being blocked. It would be to find the fantasy construction that allows us to block this signifier.⁵¹⁹ Yet the problem is not that simple. As Žižek explains, there are cases in which the fantasy construction is very clear for the subject, but still the subject remains having his or her symptom.⁵²⁰ Žižek’s explanation for this phenomenon is that this signifier produces enjoyment in the subject, and as such it is not possible to renounce.⁵²¹ This relates to the idea that when criticising a certain ideology is not only important to find which element is being “repressed” but perhaps more importantly why is this being repressed. Certainly, the suggestion that the Court might be providing support for the current inequalities is already radical enough. If one claims that this causes enjoyment, that is to say the Court has a purpose behind this, is truly a more radical and complicated statement.

Žižek develops the concept of “*sinthome*” to explain this situation. The existence of a certain *sinthome* is a necessary feature to make a particular system work. He explains that “symptom, conceived as *sinthome*, is literally

⁵¹⁸ Žižek (n 424) 72

⁵¹⁹ Ibid 74

⁵²⁰ Ibid

⁵²¹ Ibid 75

our only substance, the only positive support of our being, the only point that gives consistency to the subject [and] the way we – the subjects – ‘avoid madness’, the way we ‘choose something (the symptom-formation) instead of nothing (radical psychotic autism, the destruction of the symbolic universe)’ through the binding of our enjoyment to a certain signifying symbolic formation which assures a minimum of consistency to our being-in-the-world”.⁵²² As such, the whole critical process that is being put forward does not aim at erasing the *sinthome*. Rather it aims to make society realize that this concept, this idea, this particular enjoyment encapsulated in a certain conduct, is what “gives consistency” to a particular system or reality.⁵²³

The presence of this process in the Court’s work is perfectly exemplified by Judge Cançado’s Trindado concurring opinion in *OC-18* where he shows that the alternative to believe in the utopia of human rights is “desperation”.⁵²⁴ This is also visible from the most persuasive critique to Professor Westen’s ideas given by Steven J. Burtont. Burtont is willing to accept that indeed Westen ideas in connection to equality and substantive rights are coherent and valid.⁵²⁵ Yet he puts matters very clearly. He explains that what is at stake from those ideas is a challenge to the “integrity of legal reasoning itself” and not only to equality as a moral and legal discourse.⁵²⁶ He adds that if Professor Westen’s analysis is sound there are two possible conclusions: either rules (substantive rule analysis) and equality should be “banished from moral and legal discourse as explanatory norms” or “that something is seriously wrong with the kind of analysis that yields this result”.⁵²⁷ After making such an open and honest explanation, the author claims that he prefers the last option.

There are two possible readings to this last statement. The first is that Burtont is well aware on the necessity of the *sinthome* and as such, even when he is clearly conscious that legal reasoning is a mere “fantasy”, he chooses this option rather than “despair”. This can be supported by Burtont’s claim that such denunciation is a luxury destined only for philosophers but not for lawyers. As life continues, disputes need to be settled, lawyers cannot afford just to stop their activities.⁵²⁸ This would logically be an entirely utilitarian choice: claiming I know it is wrong, yet I do not have something else. The need to make this choice is no stranger in the legal research arena. Professor Koskeniemi claims that there is an irreducible political character in law pointing out “to the inevitable moment of choice in legal practice in favour of one contested meaning against

⁵²² Ibid.

⁵²³ Ibid.

⁵²⁴ Concurring Opinion of Judge Cançado Trindade in *OC-18* (n 28) para 42.

⁵²⁵ Burtont (n 515), 1148. This is clear by his statements claiming that “the problem identified by Professor Westen and others, identifying normative grounds for purposes of determining whether cases are alike or unlike is no small problem”. He explains that if rules are given the same kind of analysis, they too stand empty and collapse into equality.

⁵²⁶ Ibid 1144.

⁵²⁷ Ibid 1148.

⁵²⁸ Ibid 1152.

another”.⁵²⁹ On this sense, it could well be possible that Burtont was simply facing this moment of choice.

The second reading, and perhaps the true one, is that Burtont is clearly trapped under Law’s ideological machinery. He is well aware that law, as equality and substantive rules analysis provide serious problems that can endanger legal reasoning as a whole, yet he still believes that Law contains a “truth”. On this sense, he has not “gone trough the fantasy” and realized that law is only “necessary” rather than the carrier of some hidden truth. Furthermore, Burtont does not frame his choice as that between two contested meanings of the law; rather as that between law and no law.

This situation is made clear by Burtont’s following statements. After asserting the need to make a choice, he qualifies the type of criticism done by Westen in the following terms: “one might not quarrel with an analysis of equality along [these] lines [...] if it were used to show the incompleteness of the equality principle itself, and the consequent ways in which arguments from equality often are question-begging or misleading. What seems indefensible is the conclusion that the idea of equality should be banished from legal and moral discourse because it fails to satisfy a conceptual standard that virtually no legal or moral principle can satisfy.”⁵³⁰ Thus Burtont’s welcomes Professor Westen’s intellectual insights. What he does not welcome is that such insights question the legal system as a whole; that such insights, at least in his mind, put legal reasoning at risk. The resemblance between this position and Žižek’s criticism to “real communism’s” fear from the word is remarkable. Žižek argues that under communist regimes there was a hysterical fear of the word. The system was so afraid of words that it somewhat believed that even the lowest circulation school newspaper could put the entire system at risk. As such, it had constant operatives to repress the slightest sign of dissent.⁵³¹ Burtont’s argumentation falls into the same trap. He believes that somehow Professor’s Westen ideas can put under risk the entire legal system by questioning equality. He believes this, even when Westen himself at no point supports the fall of the legal system. Westen is in fact a clear defendant on the value of substantive rights analysis and the use of other legal standards; he just does not find that equality is a useful standard for legal reasoning. This second understanding is closely related with the paradigm of ideological law and democracy: you are free to choose, to question, to put forward new ideas, as long as they are the right ideas! As long as you obey! And as long as you do not question the system as such!⁵³²

⁵²⁹ Martti Koskenniemi, ‘What should Lawyers learn from Marx?’ in Susan Marks (ed) *International law on the Left. Sub-Re-examining Marxist Legacies* (Cambridge University press, Cambridge 2008) 45.

⁵³⁰ Burtont (n 515) 1152.

⁵³¹ Žižek (427) 18.

⁵³² Žižek (424) 80.

4.2.5 Falling under the “Beautiful soul” trap.

This section explores the applicability of what Žižek identifies as the “beautiful soul” trap to the Court’s jurisprudence. The Court’s particular focus in “vulnerability” could involve this ideological trap. Human rights Courts, defenders and academics can easily fall in the trap of the “beautiful soul”. Perhaps even more radically, victims of human rights violations can fall in it as well. The “beautiful soul” is explained as this forever victim, who sees itself always suffering and sacrificing itself, without doing anything about it. The “falsity” of this figure “is not its inactivity”, but the way the figure organizes everything so that it can “play [...] the role of the fragile, innocent and passive victim”.⁵³³ The ultimate danger hidden under this trap is the lack of acknowledgement of the subjects “formal responsibility for the given state of things”.⁵³⁴

It is extremely important that the Court and people involved in its processes are aware of this figure when dealing with equality. This is particularly true with the existence of a strong focus on “vulnerable groups” in the American jurisprudence. It might be far-fetched to claim that such groups are locating themselves in these vulnerable positions. However, the lesson one can learn from the “beautiful soul” is that one should always take a step back and think about our own responsibility on something. One should look at her own actions and analyze how is she contributing to the maintenance of the current affair of things. This seems to be a useful exercise for everyone involved in the human rights project, including the “vulnerable group”. This of course does not pretend to deny the responsibility of “history” or “society” in the present state of affairs. It simply pretends to portrait the role human rights institutions, defenders, and victims could be playing in creating and maintaining an unequal society.

These propositions cannot but remind me of a common attitude towards indigenous people in Mexico. Indigenous people come to work in the harvest of tobacco every year in the Mexican State of Nayarit. They often come in entire families. All of them live and work in the fields. These workers, usually, receive their payment at the end of the week. After receiving this money many of them go to the towns’ pubs and spend their weekly payment. It can be argued that this practice is a deliberate practice from non-indigenous people to maintain this system, permissive of indigenous exploitation. By bringing external factors such as alcohol and prostitution to their lives, we never allow them to free themselves and they are forced to live in this circle of exploitation. This image necessarily implies the total idealization of indigenous people. Moreover, it somehow puts indigenous people as completely foreign to everyone else; so foreign that somehow they are supposed to be exempted from common “desires” such as alcohol and sex. Indeed such characterisation could result to be more racist than the actual exploitation of indigenous people.

⁵³³ Ibid 215.

⁵³⁴ Ibid 216.

It is undeniable that such practices have been used to maintain the current social status. Nevertheless, human rights defenders, and more importantly indigenous people, should be careful not to fall into this “beautiful soul” trap. They should always be aware on their personal responsibility in this social network as well. The subject is there not as a passive person, but also as a “player” in the social network. Thus, the cynical attitude of blaming the external situations for not doing anything should not be accepted; or at least it should be exposed in its entire falsity. This has been eloquently explained by claiming that “such externalization of the cause into ‘social conditions’ is no less false, in so far as it enables the subject to avoid confronting the real of his or her desire”. This attitude allows the subject to “disengaged” itself from “what is happening to him; [...] far from stirring up the unacknowledged kernel of his desire, the traumatic event disturbs his balance from outside”.⁵³⁵ What this position does then is to provide an individual with a clear “enemy”, a clear antagonistic figure which, paradoxically, gives consistency to the position of this individual.⁵³⁶

There is another reason to keep up with this ideological fiction: if the individual loses the reference to this negative, “impossible point of reference” the identity of society dissolves.⁵³⁷ The American continent is the perfect example for this situation in connection to equality. It is not secret that this continent, and more specifically Latin America is the most unequal region on the world.⁵³⁸ As such, there is a strong link between inequality and the region. Perhaps on this sense, it is no surprising that the Inter-American Court has given such a fundamental importance to the rights of equality and non-discrimination. The picture of America is that of a very nice continent, with very nice people, many natural resources, great weather, but with such a great problem of equality. If only there were equality in the region, we would have such perfect societies.⁵³⁹ On this sense, if we remove inequality as the external factor bringing corruption to our system, we would be in the same position of fascism without “the Jew”: our identity would dissolve.⁵⁴⁰ Our societies would need to face the impossibility of functioning as organically wholes. There would not be an external factor (inequality) to blame for the failures of our realities. On such extreme situations, of lack of support on an external something, the subjects would not have anywhere else to look but to ourselves. The “blame” would then have to be put not into “inequality” but into us.

⁵³⁵ Žižek (n 427) 6.

⁵³⁶ Žižek (n 11) 70-71.

⁵³⁷ Žižek (n 424) 176.

⁵³⁸ Dulitzky (n 341) 15.

⁵³⁹ Before such priority was occupied by democracy itself. However, there seems to be a consensus that the Continent is pretty democratic now.

⁵⁴⁰ Žižek (424) 176.

4.2.6 Ideology as a “serious” thing or as a tool to maintain domination.

As it has been claimed, the proper focus when criticising ideology is not the sense of a possible “illusion”. Rather ideological space is characterized as “the moment this content – ‘true or ‘false’ (if true, so much the better for the ideological effect) – is functional with regards to some relation of social domination (‘power’, ‘exploitation’) in an inherently non-transparent way: *the very logic of legitimizing the relations of domination must remain concealed if it is to be effective*”.⁵⁴¹ This is perhaps the most controversial criticism one could make to the Court. Is the Court really supporting a particular relation of social domination? From the previous chapter, one knows that the Court pretends to correct discrimination and privilege “vulnerable” groups of the American continent. Such conduct cannot be deemed to contribute to social domination. Yet it is possible to qualify this general image.

First, the Court has a constant practice of not declaring violations of the right to equality in many cases involving “vulnerable” groups. It is necessary only to see that the greatest number of cases having a “vulnerable group perspective” do not contain a violation of the right to equality. There are many cases in which the Court uses equality only as a background or framework for other human rights violations. This is particularly true in cases involving human rights violations of the most vulnerable groups (*Sawhoyamaxa, Yakye Axa, Saramaka*). In none of these cases did the Court declare a violation of the right to equality. The Tribunal might have found that specific actions were discriminatory, or that actions were committed under a discriminatory pattern; however such statements are never materialized into a concrete legal finding. As such the consequences for these determinations are unclear, at least from the legal field. It is important that the Court highlights that *Mapiripán, Strett Children, Cotton field* and other cases were committed in a context of discrimination against a specific group of the population.⁵⁴² Nevertheless, the fact that the Court did not hold that such conducts were discriminatory and a violation of the American Convention cannot be taken as meaningless. This is especially true if we consider that these are statements done by a Court; on this sense law is supposed to be the language of this Institution. Highlighting the context of discrimination by these groups can be done by other Organizations. A Court of law is the only Institution that can actually establish a formal violation of this right.

As Dulitzky has rightly pointed out, without a specific finding on discrimination, the State’s obligation to investigate human rights violations does not have to involve the discriminatory factor.⁵⁴³ This means that the

⁵⁴¹ Žižek (427) 8.

⁵⁴² *Mapiripán massacre case* (n 256) para 177; “*Street children*” case (n 298) para 79; and *Cotton field case* (n 313) para 2 as examples.

⁵⁴³ Dulitzky (n 341) 14.

State does not necessarily needs to investigate and qualify the violations committed in a particular case as discriminatory. States can simply qualify such facts as violations of other rights. Let us take as examples the cases of *Yakye Axa* and *Sawhoyamaxa*. Both concern the lack of recognition of land rights of indigenous communities; both were analyzed under the claim of the existence of a discriminatory context of indigenous communities; and in both cases the Court found violations of the right to property, but not of the right to equality.⁵⁴⁴ The result is that Paraguay simply has to recognise and guarantee the property rights of both indigenous communities and everything will be all right. The State does not have to analyze if such denial was caused by discriminatory conducts in the State towards indigenous people. It can simply limit itself to treat the case as another property claim. This is the problem when the Court does not declare that the right to equality has been violated.

At first sight, there should not be any problem with such result. After all, both indigenous communities would obtain their land, which is what they wanted. Yet such reading is too simple and leaves completely intact the alleged discriminatory context, which caused the human rights violations in the first place. What could be an opportunity to challenge current unequal social conditions is let pass by the Court. The paradox here is that cases highlighting discriminatory attitudes against indigenous people can contribute to the maintenance of these attitudes. This is the danger hidden under such reading. Returning to the examples given in the previous paragraphs, in *Yakye Axa* and *Sawhoyamaxa* one believes that the Court has done the right thing and has protected both indigenous communities. After all, the Court recognised their right to property of these indigenous communities. Therefore, the general situation of inequality of these groups could stop; after all they already obtained a Judgment recognising their rights. The discussion would then change to fulfil the Court's judgment. Once again this is not inherently problematic since it is what the victims wanted. Yet, one of its effects can be the lack of discussion of the general problematic related with equality faced by indigenous groups. It is of course clear that this problem is more difficult to find. As such it would be easy to see this discussion not as a priority. One should be careful with this reading since it could mean that there is effective ideological machinery stopping us from seeing matters from different perspectives. Even when the Court receives criticism for inconsistencies in its jurisprudence, this of course is never close to affirming that the Court might be supporting a specific social domination system. As Žižek has pointed out time and time again, this practice of "legitimizing the relations of domination must remain concealed if it is to be effective".⁵⁴⁵

Yet it might also be that the Court actually takes its ideology seriously. The author has given different claims questioning the IACtHR's logic with equality. It is the position of this author that those claims are correct.

⁵⁴⁴ *Yakye Axa community case* (n 211) paras 2 and 51; *Sawhoyamaxa community case* (n 214) paras 59-60.

⁵⁴⁵ Žižek (n 427) 8.

Nevertheless it is necessary to make some qualifications. First, it has been explained ideology and the law are very appealing concepts.⁵⁴⁶ Furthermore, when an “ideology ‘takes itself literally’ [it can cease] to function as an ‘objectively cynical’ [...] legitimization of the existing power relations”.⁵⁴⁷ When ideology is actually working as an illusion we can face non-ideological content. This is so, since such “ideology” would not reflect any actual relations of power.⁵⁴⁸ Therefore, it could be argued as well that the development of the “vulnerable group perspective” is a concept that is actually taking human rights ideology seriously. This would mean that whatever ideology might be working under this concept, this ideology would not seek to maintain unequal relations of power. One must recognize that the Inter-American Court is at least breaking with the traditional notion of formal equality before the law, which is already a great accomplishment under the legal paradigm. However, one should not be that optimistic. Perhaps the theory itself is not “wrong”. Yet, its application at the end has resulted in finding very few violations of the right to equality, even in connection with these “vulnerable” groups. As such, it is more likely that the Court’s theories are actually ideological in the sense that has been previously explained.

4.3 The third axis: this legal research.

The final construction that will be analyzed is this paper’s own ideology. This analysis will only cover the previous chapter connected with the actual analysis of the Court’s jurisprudence. It will not cover the claims made under this chapter. This is perhaps one of the most interesting parts of the research. It was not part of the initial project, and it was developed after the analysis and most work related with the previous chapter was done. It provides an excellent example on the third and most elusive part of an ideology: the spontaneous ideology.

Some of its content might seem repetitive, as it would use many of the ideas already explained. Nonetheless, the focus is different. Moreover, it allows the reader to understand how an ideology works in one’s own work. The following analysis will be related with practice itself, and as such it might be easier to assimilate. Another final advantage of this analysis is that the author is in a position to know the ideas and purposes that surrounded the present research. As such, there is less speculation as to what the authors of other papers and decisions could have meant. This analysis will be done through the use of ideas previously explained and other concepts that have not been developed. The “old” ideas will be: the need to believe in the law; the need to make a choice; and the “quilting process”. The “new” ideas that will be analyzed relate to cultural relativism and the appearance of truth in unexpected events.

⁵⁴⁶ See sections 3.1.1 and 3.2.1.

⁵⁴⁷ Žižek (n 11) 187.

⁵⁴⁸ Ibid 187-188.

4.3.1 The need to believe in the truth: this ideology at practice.

This research constitutes a very good example on the ideological need to believe in the “truth” of the Law. As many other studies in connection with equality and non-discrimination, the first chapter’s focus is to find a logic in the Court’s decisions. The process of the research can be described in the following manner. It seems that there is something complex or irregular about the application of the Court’s legal standards of equality and non-discrimination, thus this is worthy of research. The research starts and the first impression is: there does not seem to be any pattern and consistency supporting the Court’s findings, thus the Court’s decisions do not follow Law’s rule of predictability. This finding lingers in one’s mind for a while, but then two additional ideas/doubts enter: perhaps one is not understanding the Court’s jurisprudence; and, more importantly, the Court still seems to be doing a “good” job so one should look for a more constructive approach in this analysis. This last point completely relates with the idea that criticism is accepted within a system as long as it does not question the system as such. One is always free to question, as long as one understands very clearly the correlated obligation of obeying.⁵⁴⁹ Additionally, this point falls within Pascal’s explanation on the reasons to make such intellectual procedures. He argues that for some reason, human beings cannot just believe that they are doing something just because it is necessary, but they need to believe that “truth can be found and resides in laws and customs”.⁵⁵⁰

Žižek thus claims that the illusion driving people to believe that truth can be found in law is described by a mechanism called “transference”.⁵⁵¹ Transference is defined as “this supposition of a Truth, of a Meaning behind the stupid, traumatic, inconsistent fact of the Law”. This mechanism names “the vicious circle of belief”. The cycle can best be described as: you believe in something because you have already chosen to believe in it, not because you have actually made an “objective” analysis and found reasons to believe.⁵⁵² This is equivalent to say that one can understand the Court’s arguments because one already decided that it is worth to believe in the Court.

Consequently, this research has strong ideological components. The first part is charged with this need of finding truth in the law. It perfectly shows ideology at work. This also supports the proposal that ideology is at work when “the facts which at first sight contradict it start to function as arguments in its favour”.⁵⁵³ The ideology at work here is once again that of the truth of the Law, human rights, and equality. Even after confronting the lack of sense and predictability in the Court’s jurisprudence, there is still a

⁵⁴⁹ Žižek (n 424) 80.

⁵⁵⁰ Žižek (n 424) 38 citin Blaise pascal, *Pensées* 152.

⁵⁵¹ Žižek (n 424) 38.

⁵⁵² Ibid.

⁵⁵³ Ibid 49.

need to find another meaning, another set of arguments under the Court's jurisprudence. Then, the same judgments that at the beginning were the perfect examples of the Court's inconsistency suddenly became perfect examples of the Court's logic. When the author first read *Castañeda* and *Yatama*, the reaction was that the Court was being contradictory. At the end, these cases were put in the first chapter as perfectly explaining the difference in the Court's approach to equality in a case involving and not involving a "vulnerable group".

4.3.2 The moment of choice continued.

The previous section developed the theory on the moment of choice present in legal process. Equally, the appeal of law through its normative emptiness and formalism has been put as an argument to explain Law's power. These ideas will be developed a bit further. The first "new" aspect is that Žižek later described this appeal as obscene. According to him, this "Kantian moral imperative" conceals a hidden compulsion to "Enjoy":

"The moral Law is obscene in so far as it is its form itself which functions as a motivating force driving us to obey its command – that is, in so far as we obey moral Law because it is law and not because of a set of positive reasons: the obscenity of moral Law is the obverse of its formal character".⁵⁵⁴

This idea is a bit difficult to grasp. It fails to give a specific definition of this hidden enjoyment. Further in the text, the author adds that "the real aim of ideology is the attitude demanded by it, the consistency of the ideological form [...] the positive reasons given by ideology to justify this request [...] are there only to conceal [...] the surplus-enjoyment proper to the ideological form as such".⁵⁵⁵ This still does not answer exactly what is this "surplus-enjoyment" caused by the form of ideology. However, this helps to understand that the positive reasons given by any ideology are there to hide this fact, that ideology is concealing a hidden enjoyment.

Finally, Žižek explains the "real" stakes of ideology: its form. What is at stake is "that we follow even the most dubious opinions once our mind has been made up regarding them; but this ideological attitude can be achieved only as a 'state that is essentially by-product': the ideological subjects, [...] must conceal from themselves the fact that 'it was possibly chance alone that first determined them in their choice'; they must believe that their decision is well founded, that it will lead to their Goal."⁵⁵⁶ If one perceives that the goal of our ideology is the mere consistency of ideology itself, the ideological structure is defeated. This is so, because such fact "would reveal the enjoyment which is at work in ideology, in the ideological renunciation itself. [...] It would reveal that ideology serves only its own purpose, that it does not serve anything, which is precisely the Lacanian definition of

⁵⁵⁴ Ibid 81.

⁵⁵⁵ Ibid 84.

⁵⁵⁶ Ibid.

jouissance".⁵⁵⁷ It is thus extremely interesting to explore if indeed the Court's construction as accepted and read during this research falls into this.

Žižek adds that by blindly following a certain ideology based on a purely formal imperative, we renounce enjoyment, we "sacrifice "ourselves without any meaning. As such, the enjoyment produced by ideology can finally be grasped: this martyr-like attitude of a "pure" sacrifice. The idea that we can execute an act without any "hidden meaning", without any "hidden agenda", without any "ideological, personal, subjective, selfish" considerations. Is this not what is considered the ultimate "moral" act in our societies? The idea that we act without thinking about ourselves, without seeking any gain from our actions. Žižek claims as evident that "the value of the sacrifice lies in its very meaninglessness; true sacrifice is for its own end; you must find positive fulfilment in the sacrifice itself, not in its instrumental value: it is this renunciation, this giving up of enjoyment itself, which produces a certain surplus-enjoyment".⁵⁵⁸ Certainly, this conclusion is not as "evident" as it might seem, but actually it has been suggested before. Kennedy argues that one of the possible failures of the human rights movement is that it can portray that working for human rights is an end itself, forgetting the actual consequences of this work.⁵⁵⁹

At first hand, it is very difficult to claim that the Court's judgments do not serve any other purpose than the Court's decision-making itself. Indeed, they create specific consequences for certain individuals that must be fulfilled by States. They have served to provide indigenous people with land or to allow indigenous groups to participate in elections. Only if one looks at a broader picture with an exaggerated paranoid perspective is possible to find something else. Only then is possible to assert that the ideological structure making us believe in the Court's truth, in the truth of the Law, is there only to support that constructed truth. That such ideology does not support anything else but the continuous functioning of this idea. This is explained by understanding that one of the purposes of a coherent legal system is the support of the legal system as such. If one confronts inconsistencies, if one confronts the "stupidity of the Law", the system loses support. Therefore an important element of a legal system is to seem internally coherent; to seem as a reliable, consistent system.

On this issue, there is another warning related with the difficulty to make conclusions in relation to ideology on the basis of empirical facts. "'Communism' means (in the perspective of the Communist, of course) progress in democracy and freedom, even if – on the factual, descriptive level – the political regime legitimized as 'Communist' produces extremely repressive and tyrannical phenomena".⁵⁶⁰ This system determines "democracy and freedom" in all circumstances, and that is why this connection cannot be refuted empirically, through reference to a factual

⁵⁵⁷ Ibid 84.

⁵⁵⁸ Ibid 82.

⁵⁵⁹ Kennedy (n 6) 115.

⁵⁶⁰ Žižek (n 424) 121

state of things.⁵⁶¹ On the same sense, the Court can always point out to its empirical results. It can say look I still found a violation of human rights and the victims got their reparations. Continuing with the examples of *Sawhoyamaxa* and *Yakye Axa*, it can claim well there was no violation of the right of equality but they have obtained their land. The analysis “of ideology must then direct its attention to the points at which names which *prima facie* signify positive descriptive features already function as ‘rigid designators’”.⁵⁶² This is the difficulty of trying to denounce an ideological construction through the use of empirical material. The created fantasy is well prepared to face such criticism.

This is also the problem of Pascal’s “even if we are wrong in our wager, even if there is no God, my belief in God and my acting upon it will have many beneficial effects in my terrestrial life – I will lead a dignified, calm, moral, satisfying life, free of perturbations and doubts”. The problem here is that one can only achieve this through believing in God. Then, there is a “hidden” and “cynical” logic: “although the real stake of religion is the terrestrial profit achieved by the religious attitude, this gain is a ‘state that is essentially a by-product’ – it can be produced only as a non-intended result of our belief in a religious beyond”.⁵⁶³ The resemblance with the belief in human rights law and law in general is remarkable. (It is thus unsurprising that Žižek quotes Pascal precisely to point out to the absurd of the law). Even if one is sceptical about the universality of human rights, about the values purported by different declarations, about the Organization or the Countries that enforce them, one still believes that we are better off with them. Even if the subject does not believe in them, if she acts as if she did, she would probably live this “dignified, calm, moral, satisfying life”.⁵⁶⁴ The hidden ideological process behind is its totalitarian effect. The idea that such existence is only possible as a non-intended result of our belief in human rights. This of course implies the correlated proposition that outside this belief, even false belief, there is nothing: only despair. Therefore, even if one does not believe in the logic of the Court in connection to equality, or if one does not find sufficient reasons to sustain it, one still thinks that by acting as if one believes we would obtain better results. Consequently, one should be careful to justify human rights ideology using these arguments. Perhaps it would be possible to create other discourses that can provide valid formulas to achieve better results than human rights discourse. Desperation and despair should not be the alternatives to human rights.

4.3.3 The quilting process: Che Voui, what do you really want?

The quilting process of the Court has been previously explained. The focus here is this research’s quilting process. The quilting procedure is best

⁵⁶¹ Ibid 109.

⁵⁶² Ibid.

⁵⁶³ Ibid 83.

⁵⁶⁴ Ibid.

described as that of empty terms ready to receive meaning such as “equality”, “freedom”, “justice”, etc., which then are complemented by a master signifier that provides them with meaning. Žižek gives the example of communism. The communist meaning of such concepts would be: “‘freedom’ is effective only through surmounting the bourgeois formal freedom, which is merely a form of slavery; the ‘state’ is the means by which the ruling class guarantees the conditions of its rule; market exchange cannot be “just and equitable” because the very form of equivalent exchange between labour and capital implies exploitation” and so on.⁵⁶⁵

Equality as protected by the American Convention is a normative term that does not tell much to its meaning. It needs to be filled with meaning. The meaning given by the Court is: people should be treated equally unless there are reasonable and objective justification for doing otherwise; and more concretely there is a need to provide “specific” measures of protection for “vulnerable groups”. The right to equality has practically assumed the form of providing “specific” rights to vulnerable groups according to their particular situation. Therefore the dominant factor quilting or giving meaning to the Court’s ideology is this “vulnerable group perspective”.

It would be premature to frame this “quilting process” as perfect. It is explained that after every “quilting” process there is still a gap. This gap can be understood as “*Che vuoi?*” – “You’re telling me that, but what do you want with it, what are you aiming at?”⁵⁶⁶ This aims to answer why is it that one has to follow a certain mandate and certain symbolic constructions? This question does not imply that the subject has suddenly become a critical mind and is questioning his or her situation. What can be learned from this process is the contrary, that the subject has still not stopped presuming truth, or supposing a meaning or a reason behind a particular symbolic structure. Thus as Žižek would put it, the subject does not accept “his being as *non-justified by the big Other*” (that is his being as non-justified by the socio-symbolic network).⁵⁶⁷ To put it in terms of the research, this is the position when one realized that different concepts work in a certain way in the Court’s jurisprudence. One has grasped that there is no logic in this proceeding and one has “accepted” things as they are. Yet, the doubt lingers: I know things are this way, yet this cannot possible be the answer, there must be something else that I do not know. Once again, one falls in the ideological trap of supposing transcendental external meanings.⁵⁶⁸

It is at this moment, when lacking an answer for this question that the ideological fantasy sets it. Fantasy “is an *answer* to this ‘*Che vuoi?*’ It is an attempt to fill out the gap of the question with an answer”.⁵⁶⁹ The answer to this question tries to identify what is the desire of the Other? What does the other wants from me? At such, it is not that the subject does not know his or

⁵⁶⁵ Ibid 102.

⁵⁶⁶ Ibid 110.

⁵⁶⁷ Ibid 126.

⁵⁶⁸ Ibid 110-113.

⁵⁶⁹ Ibid 114.

her desire, but does not know the desire of the other. Then the subject needs to make fantasies as to what is the other's desire. This concept can also be identified in this research's own ideological process.

Is it not the basic premise of such a research: what does the Court really want? Yes, the Court is saying this, but truly what does it aim at? What is it trying to achieve by its actions? The research then becomes an automatic hysterical reaction to the ignorance of the Other's desire. This reaction is exemplified by the development of theories, reasons, hidden meanings and standards. With such conceptualizations one can finally answer yes this is "it", this is what the Court wants! Or can't we? This perfectly exemplifies the existence of a "*Che vuoi*" at work in this research; and as such the ideological character of such process. The function of the ideological fantasy is to answer this question. But first of all, is to make us believe that there is an answer for this question. This fantasy allows people to believe that the Court truly has an aim, and that we can learn what the Court wants. This of course is extremely important to determine the type of behaviour that is expected from us. Now what is it that fantasy is hiding?

"Fantasy conceals the fact that the other, the symbolic order, is structured around some traumatic impossibility, around something which cannot be symbolized – i.e. the real of *jouissance*: through fantasy, *jouissance* is domesticated, 'gentrified' – so what happens with desire after we 'traverse' fantasy? Lacan's answer, in the last pages of his *Seminar XI*, is *drive*, ultimately the death drive: 'beyond fantasy' there is no yearning or some kindred sublime phenomenon, 'beyond fantasy' we find only drive, its pulsation around the *sinthome*. 'Going-through-the-fantasy' is therefore strictly correlative to identification with a *sinthome*".⁵⁷⁰

The last part of this quote probably seems a bit confusing with the use of the terms *sinthome*, drive, desire, and death-drive in the same sentence. However, it is not as complicated. One only needs to think that "death-drive" stands for facing the impossible antagonism hidden by the ideological fantasy. On this sense, going through the fantasy and facing this "real" is simply to be willing to accept the impossibility of the Court as such. To face the impossibility of society is to face that there is nothing behind what was hidden by the fantasy than the hiding itself. Applying Žižek's theories, one can conclude that the standards found to give shape to the Court's judgments are fantasy constructions that hide nothing.

4.3.4 "Mistakes" as messages of truth: truth appears in traumatic encounters.

The focus here is to explain Žižek's argument that truth actually does appear but it does in traumatic encounters.⁵⁷¹ A traumatic encounter can be understood as an event where the individual faces a certain feeling of shock. This section also contains a brief analysis on relativism. Žižek explains that "the most radical illusion consists not in accepting as Truth, as the 'Thing-

⁵⁷⁰ Ibid 123.

⁵⁷¹ Ibid 190.

in-itself⁵⁷², what is effectively a mere deceptive illusion, but rather in a refusal to recognize the presence of the Truth – in pretending that we are still dealing with a fictitious appearance, when Truth is already here”.⁵⁷² This showing up of the truth in traumatic effects and its posterior denial is exemplified by the attacks of September 11th, 2001 to the World Trade Centre. Žižek claims that “their key message is not some deeper ideological point, it is contained in their very first traumatic effect: terrorism works; we can do it”.⁵⁷³ Therefore, truth should not be conceived as a completely relative matter. According to Žižek, Lacan’s final lesson is that “*truth is bound to emerge* in some contingent detail”.⁵⁷⁴

The problem with relativity is that it hides its own absolute pretensions. When one openly claims to be aware of its own limitations and accepts that one can be proven wrong at any point, this is possible only from a truly pretentious position. The problem is that the subject making these claims assumes “a neutral, exempted standpoint from which it can pass a judgment on the limitation of its content”.⁵⁷⁵ This analysis is relevant because the initial position of this research was extremely “relativist” in this sense. This means that the author’s initial position was that whatever analysis he made would be completely absent of any truth and would be “wrong” from certain points of view. Of course one should be open to criticism and it is quite possible that one’s ideas are proven wrong. The thing the author is trying to avoid is to assume an indifferent position towards a discussion on the accuracy of the research. After all if indeed all ideas are completely “subjective” and open to entirely different interpretations, what is the point of discussion? This is the position the author is hoping to avoid in this paper. This is also an important position to take into account to discuss cultural relativism and human rights law. According to Žižek, “the fundamental gesture of post-structuralism is to deconstruct every substantial identity, to denounce behind its solid consistency an interplay of symbolic over-determination – briefly, to dissolve the substantial identity into a network of non-substantial, differential relations”.⁵⁷⁶ He argues that this is a false position. In order to put this into evidence, he introduces the concept of “symptom”. He explains, that this notion is the “real kernel around which this signifying interplay is structured”.⁵⁷⁷ This means that the symptom represents the wishes and desires that are present in all substantiality. As such, it is not possible to make everything “relative” and fall in the post-structuralist trap of claiming that there is nothing “objective” about nothing.

This is indeed one of the main ideological fantasies present in the previous chapter. After reading the Court’s jurisprudence and especially cases such as *Castañeda Gutman* (in comparison to *Yatama*), or *Apitz*, the initial feeling of the reader is to think that their analysis is deeply flawed. The contrast

⁵⁷² Ibid 191.

⁵⁷³ Žižek (n 11) XIV.

⁵⁷⁴ Ibid 196.

⁵⁷⁵ Ibid 217.

⁵⁷⁶ Žižek (n 424) 72.

⁵⁷⁷ Ibid.

between *Castañeda Gutman* and *Yatama* seems to be the most shocking. After taking into account that there are no concurring or dissenting Opinions next to the former case, this sense of puzzlement increases. A reader thus experiments a similar feeling to the one explained by the concept “I know very well, nevertheless...”⁵⁷⁸ This concept explains that a person wishes to believe something he or she nevertheless knows is not correct. This concept explains what Žižek calls the “normal disavowal of castration” or the pass from the imaginary to the symbolic.

This means that at this point, the subject recognizes that its symbolic or social structure is a mere fantasy, yet he chooses to believe it. He takes this fantasy as its social structure. Thus Žižek explains the focus is not longer what is hidden behind the mask, but “the ‘efficacy of the mask as such’”.⁵⁷⁹ Undoubtedly, the Court’s jurisprudence seems inconsistent at the points mentioned before, yet one refuses to accept such fact. The reasons could be many: one believes that the role played by the Court is generally good for the continent; one believes that one should believe in Law; one believes that perhaps there is something one is not understanding. Then one keeps looking for explanations to “understand” the Court. This is precisely the time when the full ideological fantasy enters into motion: one finally finds the theory that explains the Court’s reasoning. In the specific case, this would be Arnardottir’s explanation regarding the ECHR jurisprudence on equality. After reading this theory, one feels accomplished, understanding is finally found: the authority of the Law and the Court remains untarnished. What is at work in such logic? Žižek’s answer would be that this logic “introduces a dialectical relation between Truth and appearance”, explaining that Truth is not something “*eluding* us again and again; it appears, on the contrary, in the form of traumatic *encounters* – that is, we chance upon it where we presumed the presence of ‘mere appearance’: the ‘shock of the truth’ consists in its sudden emergence in the midst of the realm of reassuring phenomena”.⁵⁸⁰

Therefore, *Castañeda Gutman*, rather than being the perfect example of the “vulnerable rights perspective”, could be the perfect example of the Court’s inconsistencies. Claims related to lack of understanding can be based in the theory of making everything relative, including the truth. One believes that truth is such an elusive matter, that even when we experience it, we refuse to believe it. The hidden truth in here is the “non-sensical” character of the Law that has been previously explained. At such, this denial of the truth cannot be justified by claiming that we wish to make a “deep” research and as such find the hidden logic of things, whatever this may be. The truth is that one is only interested in finding one truth: the truth that, while remaining critical, would still maintain the sustainability of the human rights system. It is of course then no surprising that when the author does not find this truth, he proceeds as if the findings were just appearances. The final paradox of such understanding is that behind this appearance there is

⁵⁷⁸ Žižek (n 11) 245-246.

⁵⁷⁹ Ibid 245-246.

⁵⁸⁰ Žižek (n 424) 190.

nothing, the hidden thing behind appearance is “precisely the fact that there is nothing to hide. What is concealed is that the very act of concealing conceals nothing”.⁵⁸¹ This does not mean that this hiding process is irrelevant. Of course there is “something” to hide. However this “something” does not have a positive content, it is not the idea, the hidden truth or meaning one is looking for. This “something” is the lack of a meaning, is facing the idea that the hidden truth one is looking for simply does not exist.

This is a clear logical consequence of the search for the truth. By concealing the truth, the subject presumes there is something to hide. As such, the best way to believe in truth is pretending one does not know it; that one cannot grasp it. This way one never needs to face it. Therefore process such as the one made under the first chapter of this research can be deceiving. The search for truth on the first chapter arised from this need to believe and to find the “truth” in the Court’s jurisprudence. Why would the author make make such a search? Because the other possible answer was simply that the Court did not have a systematic scheme to deal with discrimination of equality. Such conclusion did not seem acceptable. Therefore, when making second readings individuals should always be aware of the warning: “what, however, if the meaning which arises in the second reading is ultimately a defence formation against the shock of the first?”⁵⁸² The more complicated explanation given for this phenomenon is that the foreclosed, or repressed part of our reality appears in our symbolic network. Nonetheless, when this “Real” appears we still see it as a “spectral illusion for which there is no room in our (symbolically constructed) reality”.⁵⁸³

4.4 Concluding in Democracy.

The criticism towards ideology portrayed in the previous sections basically relates to the impossibility of having an organically functioning society. This model of society is represented, now, by democracy. Therefore it is appropriate to finish this chapter by looking at some of Žižek’s critiques and “alternatives” to this system. Instead of providing a recount of the findings in the previous sections we can have a look to some of the implications of these statements. A complete evaluation of democracy in the work of the Court unfortunately escapes the scope of this research.⁵⁸⁴

One of this paper’s arguments is that the Court and its ideology regarding equality support the current political system that caused inequality in the first place. This idea is developed in section 3.2.1 (History and “vulnerable groups”). There, the author attempted to show how it could be argued that one of the purposes of the Court’s jurisprudence is to maintain current

⁵⁸¹ Ibid 193.

⁵⁸² Žižek (n 11) XIV-XV.

⁵⁸³ Ibid XVI.

⁵⁸⁴ An ideological study of these implications will be extremely relevant. It is only necessary to mention that the Court has expressly claimed the importance of this system for the Member States.

inequalities. Furthermore, it was argued that there could be a need in our social system for the existence of “vulnerable groups”; that our systems could not survive without them. It was then explained that one of the purposes of the ideology connect with the Court’s “vulnerable group perspective” is precisely to hide the need for these groups. Taking into account that Democracy has a prominent role under this system, it is relevant to make a brief analysis in connection to this topic. Žižek has always maintained a critical position towards democracy. Recently he qualified its earlier indirect support for democracy. He explained that one of the major flaws of “*The Sublime object of Ideology*” is this support.⁵⁸⁵ He adds that one of the philosophical weaknesses of that same book was the oscillation between Marxism and democracy.⁵⁸⁶ The author’s position with Marxism should not direct us to the image of totalitarian communist regimes. As Žižek has recently described, he is a “Marxist” in so far as this implies maintaining a critical distance, and a critical doubt towards liberal capitalism.⁵⁸⁷

The basic characteristic of democracy, as explained by Žižek, is that the place of Power is necessarily an empty place.⁵⁸⁸ As such, this system is put forward as the answer for political conflict. Political conflict resumed as “the tension between the structured social body in which each part has its place, and ‘the part with no-part’ which unsettles this order on account of the empty principle of universality”.⁵⁸⁹ On this sense, it is claimed that the element or group occupying this place in a democratic system always does so in a temporary manner.⁵⁹⁰ However, Žižek rejects this idea with perhaps one of the most critical evaluations of democracy. He explains that the

“problem with democracy is that the moment it is established as a positive formal system regulating the way a multitude of political subjects compete for power, it has to exclude some options as “non-democratic”, and *this exclusion this founding decision about who is included in and who is excluded from the field of democratic options, is not democratic* [...] this inclusion/exclusion is overdetermined by the fundamental social antagonism (“class struggle”), which, for that very reason, can never be adequately translated into the form of democratic competition.”⁵⁹¹

He further adds that democracy’s main problem is its reliance on private property. “In short, the problem with democracy is not that it is a democracy, but [...] its ‘collateral damage’: the fact that it is a form of State Power that involves certain relationships of production”.⁵⁹² Thus, it is not

⁵⁸⁵ Žižek (n 11) LXXVII.

⁵⁸⁶ Ibid XVIII.

⁵⁸⁷ Slavoj Žižek, “Presentation of book Violence” (Conference given at Google headquarters, 2010) <http://www.youtube.com/watch?v=_x0eyNkNpL0> accessed 16 June 2010.

⁵⁸⁸ Žižek (n 424) 147.

⁵⁸⁹ Žižek (n 11) LXXVII.

⁵⁹⁰ Ibid LXXIX.

⁵⁹¹ Ibid LXXX.

⁵⁹² Ibid.

the “innocent” project that leaves the place of Power empty, or that occupies it for a short period of time. It is a political ideology that necessarily implies specific relations of production. After seeing the current state of world affairs, and the specific situation in the American continent it is very hard to disagree with this proposition.

Then what is it that Žižek is offering as a substitute for democracy? He explains that for Lacan,

the ultimate authentic experience (‘traversing the fantasy’) is that of fully confronting the fundamental impasse of the symbolic order; this tragic encounter with the impossible Real is the limit-experience of a human being: we can only endure it, we cannot force a passage through it.⁵⁹³

The consequences of his are that while “Lacan enables us to gain an insight into the falsity of the existing State, this insight is already ‘it’: there is no way of passing through it; every attempt to impose a new order is denounced as illusory.”⁵⁹⁴ This understanding is further confirmed by Žižek in person. Giving a presentation for his latest book, *Violence*, he explains that his criticism to Francis Fukuyama’s project on democracy from the left is precisely “it”. He does not offer anything else but this criticism. He does not offer another political system in substitution of this.⁵⁹⁵ Once again the point of departure is that ideology is not “a dreamlike construction hindering us from seeing the real state of things, reality as such”. Thus it is not possible to break this “ideological dream by ‘opening our eyes and trying to see reality as it is’, by throwing away the ideological spectacles: as the subjects of such a post-ideological, objective, sober look, free of so-called ideological prejudices, as the subjects of a look which views the facts as they are”. On the contrary, “[t]he only way to break the power of our ideological dream is to confront the Real of our desire which announces itself in this dream”.⁵⁹⁶

Yet, Žižek adds one more thing: “we should not forget that *this instantaneous reversal is not the end, but the beginning*: the shift which opens up the space for the “post-eventual” work; to put it in Hegelese, it is the “positing of the presupposition” which opens the actual work of positing”.⁵⁹⁷ Žižek theories do not entail that after facing our antagonism, this is it. After such an encounter, there would be a new process of giving meaning to things, of finding “new antagonisms”. It is quite possible that one would then find himself denouncing a particular system and creating another one. But perhaps this is the only way to truly accomplish the alleged mission of democracy: to keep the space of power effectively empty.

⁵⁹³ Ibid LXXXI.

⁵⁹⁴ Ibid.

⁵⁹⁵ Žižek (n 587) A cross reference to Fukuyama’s work is not provided since Žižek did not mention his source during this conference.

⁵⁹⁶ Žižek (n 427) 325.

⁵⁹⁷ Žižek (n 11) LXXXVI.

Unfortunately the author of this thesis is not better positioned on this sense. It is not possible to provide an alternative to the Court's reasoning at this point, than what has already been criticized and observed by other authors; or what has already been said in this and the previous chapter. Consequently, the summarized "lesson" here is the need to maintain this critical approach towards the work of human rights. The author will then not put forward an idea as to what should be the Court's conduct. The doubts and possible criticism that could be affecting the Court's work, provided in this paper, are already it. They constitute the role of this research. This lesson is coherent with the approach taken from the beginning of the research. This never aimed to be a research that would give all the answers. It merely attempted to show a critical analysis of the Court's jurisprudence hoping some ideas that could help the Court's work were found out. The author cannot but remain hopeful of this purpose.

5 Conclusion.

After all these considerations, it seems that the picture given by the thesis is truly grim. Is it truly a “better” answer to explain to indigenous people working in tobacco fields that actually the Court and legal actions that could help them achieve justice could be tools to maintain their unequal situation? How is it possible for these groups and human rights activists to continue with their work agendas? Unfortunately, this research does not provide precise answers to these issues. It merely points out at different mechanisms that can be found in the practice of human rights. Yet, the positive role achieved by human rights and the Inter-American Court must be kept in mind. This issue has been largely overlooked in this research except for very specific sections. This role however is not negated, but merely questioned. As it has been argued there is no question that human rights and its movement have done “a great deal of good”.⁵⁹⁸ Yet this should not stop us from searching and inquiring about possible problems. This is more relevant when this same movement cannot provide a straightforward answer to the questions post in this research. Or when the answers provided in practice might hide certain ideological structures as was developed in the second chapter.

Still, even within these grim theories, there are some “positive” or more constructive developments. Žižek provides a positive and strangely concrete mission for the left:

“This then, is the point where the Left must not ‘give way’: it must preserve the traces of all historical traumas, dreams and catastrophes which the ruling ideology of the ‘End of History’ would prefer to obliterate – it must become itself their living monument, so that as long as the Left is here, these traumas will remain marked. Such an attitude, far from confining the Left within a nostalgic infatuation with the past, is the only possibility for attaining a distance on the present, a distance which will enable us to discern signs of the New”.⁵⁹⁹

In order to accomplish this, Žižek remind us of three things. First, now that the external adversary of liberal democracy disintegrated (the “Communist ‘Evil Empire’”), its own “weaknesses can no longer be exculpated by means of a comparison with ‘Them’”. Second, the left must be aware of its past and not forget its role in gaining “most of the rights and freedoms today appropriated by liberal democracy”.⁶⁰⁰ And finally, the left must assume the

⁵⁹⁸ Kennedy (n 6) 101.

⁵⁹⁹ Žižek (n 11) 272. For an imprescindible account of this role see pages 270-272 in the same book.

⁶⁰⁰ Ibid 271. Žižek gives the examples of the right to vote, and the critical perception of mass media of Stalinism. In the American continent, one could add the end of the multiple dictatorships affecting the continent.

ethical stance of “drive” rather than the “hysterical, “obsessional” and “pervert” ethical imperatives it has adopted so far. This stance is described as the compulsion to “mark repeatedly the memory of a lost cause”; on the marking of the impossible character of such trauma and the complete powerlessness to incorporate such trauma in the symbolic-societal network.⁶⁰¹ This can be read as the necessity to precisely point out to past situations which showed the impossibility of the current system; situations that were not possible to explain through the use of the tools available to us; those situations which were shown as mere exceptions but on the contrary can only be interpreted as already contained in ideological fantasies. Therefore what one must do in connection to the Court’s use of equality is to highlight its contradictions. One should not spare the Court from criticism because one thinks that the overall role of the Court is actually positive.

This research has showed that it is possible to find a pattern in the Court’s jurisprudence on equality and non-discrimination. Of course such process is qualified by the ideas exposed in the second chapter. Under this understanding, being or not being in a situation of “vulnerability” has great implications for the Court. This initially seems to be completely favourable to solve the human rights problems of the young couple portrayed in the introduction. However, this young couple must be aware of the reach of human rights. They should not believe that the Court or human rights advocates would completely solve their problems. The chapter on ideology has pointed out to different issues and problems present in the reasoning of this Court. Moreover, the need of a coherent practice in the application of the law has been disputed. Therefore it can be said that the research question has been properly answered. It has been shown that it is possible to find a pattern in the Court’s jurisprudence, of course if one is already decided to find it. Then, the different ideological aspects of this process have been developed.

Finding this reasoning was precisely the purpose of the first chapter. There the author analyzed the Court’s jurisprudence on equality and non-discrimination. Cases analyzing violations of articles 1 and 24 as well as cases not dealing directly with these articles but touching upon issues considered relevant for equality and non-discrimination were covered. The aim was to find how to predict the Court’s findings in connection to equality and non-discrimination. The chapter’s main finding was that what the author called “vulnerable group perspective” was the key to predict the Court’s findings. It was explained that the Court had a constant practice of identifying human rights victims as parts of “vulnerable groups”. In connection with this chapter’s purpose, it was argued that if the Court identifies a victim as member of a “vulnerable group” it would very likely find a violation of the right to equality. However, to make a legal finding in connection with equality this identification was not the only requisite, it was also necessary that the victim requested the violation of this article. If the Court identified the victim as member of a “vulnerable group” but there was

⁶⁰¹ Ibid 272.

not a formal request to find a violation of the right to equality, the IACtHR would still expand the content of other human rights (Section 2.3.6). The author claimed that this expansion was directly linked to equality since the Court derived its “vulnerable group perspective” from this right. On the contrary, it was also put forward that if the Court considered the victims to be in a “privileged” situation it would not find a violation of this right. (Sections 2.3.6 and 2.4.2.2). Finally some cases not following this line of reasoning were found, yet it was still argued that the majority of cases followed the previously exposed pattern (Section 2.4.2.1). It is important to remind that chapter 1 and 2 are two independent analyses. Chapter one was made without taking into consideration its ideological consequences exposed in chapter two.

Chapter two discussed ideological elements that could be found in the IACtHR’s jurisprudence. The chapter divided this analysis in three parts. It first studied ideological consequences found in the jurisprudence that could be said to belong to the field of Law in general (section 3.1). Here the main argument was to explain how Law’s authority is created and believed by individuals (section 3.1.1). Then, it studied the ideological consequences found in the theory or pattern constructed to explain the Court’s jurisprudence on equality and non-discrimination (section 3.2). The author discussed different ideas under this section. Perhaps the most important lesson from this section is the need to be aware of different consequences that human rights work might have and to assume responsibility for them. The first element here was the need for the Court, for human rights activists, and for victims themselves of being aware of the role they were playing under the Court’s jurisprudence on equality (Section 3.2.2). It was argued that perhaps human rights victims could avoid taking responsibility from their actions, rather assuming the position of “vulnerable” people. On this sense, it was also claimed that the Court and human rights activists could be “using” human rights victims to justify its actions and to legitimize the system, rather than to actually achieve a change in those peoples’ lives. There was another important claim in this chapter: that inequality is a necessary feature of our societies and the Court’s “vulnerable group perspective” might be helping to maintain this inequality (section 3.2.3). This was a bold argument. It is very difficult to determine this situation with certainty. Therefore the purpose is not to completely prove this argument’s trueness. The author is satisfied to consider that this is a possibility. The purpose is simply to generate a reflexion exercise to evaluate if this is right or not. Finally the third part analyzed the ideological consequences of the research made under chapter one (Section 3.3). The main purpose was to discuss why legal research needs to look for patterns and coherence in the law. This section directly analyzed why the author wanted to find a pattern in the Court’s findings? It explained some ideological motives that could have pushed the author to find this.

Still, after seeing the contents of this research it would seem the question faced by the persons’ portrayed in the introduction remain. What they should do? The answer will not be found in the following lines. It is not the

purpose here to show the new road for the Court or different victims of human rights violation. Each actor needs to evaluate the role it has played so far to sort out the role it wants to play in the future. Nonetheless, the author does not claim that this couple or human rights activists should abandoned their quests. They simply should be aware of the different risks and ideas present in the discourse of human rights and equality. The awareness of these issues will allow them to make a more transparent and realistic use of the tools offered by human rights. Furthermore, questioning basic ideas of the system itself can have positive effects in the implementation of human rights mechanisms. People who believe in the human rights project will react negatively to many ideas put forward in this research. And they should do so. What would be necessary then is to provide explanations for the arguments put forward here. Of course the most positive outcome would be that these ideas are taken into account to create a reflexive exercise in different actors. But perhaps this expectation is a bit too naive.

Finally, the author hopes to at least have contributed towards the goal explained by Žižek. It is expected that by pointing out to different contradictions present in the Court's jurisprudence, new understandings can be developed. Perhaps the usefulness of this paper is still not clear for the young family pictured at the introduction. Yet the questions put forward here also address these individuals. They address the need to analyze one's own actions and to take responsibility for them. The group portrayed in the first paragraphs of the research should not be exempted from this exercise. Moreover, this same attitude can help different actors involved in human rights discourse to be aware of situations present in its rhetoric that are not sufficiently analyzed. The aim here is to refuse to fall in the cynical attitude that our reality is what it is and nothing can be done about it. The alternative is not however to blindly adopt human rights rhetoric as the answer and go into the world to help realize this mission. This attitude can at the end have severe consequences in human rights activists and in the "cause" itself. Thus, the purpose here is to put forward a platform to develop new understandings and new ideas related with human rights practice. The purpose is to chip in into the achievement of the alleged goals of this rhetoric.

Bibliography

Books.

Oddny Mjöll Arnardóttir, *Equality and Non-discrimination under the European Convention of Human Rights* (Kluwer Law International, the Netherlands 2003).

Oddny Mjöll Arnardóttir, 'A Future of Multidimensional Disadvantage Equality?' in Oddny Mjöll Arnardóttir and Gerard Quinn (eds), *The UN Convention on the Rights of Persons with Disabilities. European and Scandinavian Perspectives* (Martinus Nijhoff Publishers and VSP, Leiden 2009).

Oddny Mjöll Arnardóttir, 'Multidimensional equality from within. Themes from the European Convention on Human Rights' in Dagmar Schiek and Victoria Chege (eds), *European Union Non-Discrimination Law. Comparative Perspectives on Multidimensional Equality Law* (Cavendish Publishing, Abingdon Oxon 2009).

Ariel E. Dulitzky, 'A Region in Denial: Racial Discrimination and Racism in Latin America' in Dzidzienyo, Anani and Suzanne Oboler (eds) *Neither Enemies Nor Friends: Latinos, Blacks Afro-Latinos* (Palgrave Macmillan, New York 2005).

<<http://www.britannica.com/EBchecked/topic/1446643/Slavoj-Žižek>>
Encyclopedia Britannica, accessed 12 September 2010.

<<http://www.britannica.com/EBchecked/topic/327112/Jacques-Lacan>>
Encyclopedia Britannica, accessed 12 September 2010.

Florian F. Hoffmann, 'Human rights, the self and the other: reflections on a pragmatic theory of human rights' in Anne Orford (ed) *International Law and its Others* (Cambridge University Press, Cambridge 2006).

David Kennedy, 'Reassessing international humanitarianism: the dark sides' in Anne Orford *International Law and its Others* (Cambridge University Press, Cambridge 2006).

Martti Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870-1960* (Cambridge University press, Cambridge 2001).

Martti Koskenniemi, 'What should Lawyers learn from Marx?' in Susan marks (ed) *International law on the Left. Sub-Re-examining Marxist Legacies* (Cambridge University press, Cambridge 2008).

Ian Parker, *Slavoj Žižek: a critical Introduction* (Pluto Press, London 2004).

G. Quinn, 'Disability and Human Rights: A New Field in the United Nations' in Catarina Krause and Martin Sheinin (eds), *International Protection of Human Rights: A Textbook* (Åbo Akademi University Institute for Human Rights, Finland 2009).

Liliana Tojo and M. Claudia Martínez, *Sumarios de Jurisprudencia/Igualdad y No Discriminación* (Center for Justice and International Law-CEJIL, Costa Rica 2009).

Peter Westen, *Speaking of Equality. An Analysis of the Rhetorical Force of 'Equality' in Moral and Legal Discourse* (Princeton University Press, New Jersey 1990).

Slavoj Žižek, 'The Spectre of Ideology' in Slavoj Žižek (ed) *Mapping Ideology* (Verso, London 1994).

Slavoj Žižek, *The Sublime Object of Ideology* (9th edn Verso, London 2002).

Slavoj Žižek, *For They Know Not What They Do, Enjoyment as a Political Factor* (2nd edn Verso, London 2008).

Articles.

Anne Bayefsky, 'The Principle of Equality and Non-discrimination in International Law' (1990) 11 *Human Rights Law Review* 1-34.

Beth Lyon, 'The Inter-American Court of Human Rights Defines Unauthorized Migrant Workers Rights for the Hemisphere: a comment on Advisory Opinion 18' (2004) 28 *New York University Review of Law and Social Change* 547.

Steven J Burtont 'Comment on Empty Ideas: Logical Positivist Analyses of Equality and Rules', (May 1982) 91 *Yale Law Journal* 6, 1136.

Ariel Dulitzky, 'El Principio de Igualdad y No Discriminación. Claroscuros de la Jurisprudencia Interamericana' [2007] *Anuario de Derechos Humanos de la Universidad de Chile* 15.

Marianne González Le Saux and Óscar Parra Vera, 'Concepciones y cláusulas de igualdad en la jurisprudencia de la Corte Interamericana. A propósito del Caso Apitz' (2008) 47 *Inter-American Institute for Human Rights Journal* 127.

R. Kayess and P. French, 'Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities' (2008) 8 *Human Rights Law Review* 1.

David Kennedy, 'The International Human Rights Movement: Part of the Problem?' (2002) 15 *Harvard Human Rights Journal* 101.

Patricia Palacios Zuloaga. "The Contribution made by Advisory Opinion 4 and Advosory Opinion 18 by the Inter-American Court of Human Rights to the Concept of Discrimination within the Inter-American System for the Protection of Human Rights". Paper prepared for the Advanced Course on the International Protection of Human Rights, Institute for Human Rights Åbo Akademi University, Finland 2004. Available at <<http://www.cdh.uchile.cl/publicaciones/articulos/>> accessed on 22 May 2010.

Karla I. Quintana Osuna, 'Recognition of Women's Rights before the Inter-American Court of Human Rights' (2008) 21 *Harvard Human Rights Journal* 301.

Peter Westen, 'The Empty Idea of Equality' (1982) 95 *Harvard Law Review* 3, 542.

Conferences.

Robert Fisk, (Conference in Lund University for UPF Utrikespolitiska Föreningen in Lund, Sweden April 2010) <<http://www.upflund.se/upf-tv/>> accessed 14 June 2010.

Slavoj Žižek, "Presentation of book Violence" (Conference given at Google headquarters, 20010) <http://www.youtube.com/watch?v=_x0eyNkNpL0> accessed 16 June 2010.

Table of Cases

Advisory Opinions.

1. Exceptions to the Exhaustion of Domestic Remedies (Arts. 46 (1). 46 (2)(a) and 46 (2)(b) American Convention on Human Rights, Advisory Opinion OC-11, Inter-American Court of Human Rights Series A No 11 (10 August 1990)
2. Juridical Condition and Human Rights of the Child, Advisory Opinion OC-17, Inter-American Court of Human Rights Series A No 17 (28 August 2002).
3. Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18, Inter-American Court of Human Rights Series A No 18 (17 September 2003)
4. Proposed Amendments to Naturalization Regulation in Costa Rica on the, Advisory Opinion OC-4, Inter-American Court of Human Rights Series A No 4 (19 January 1984).
5. The Right to Information to Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16, Inter-American Court of Human Rights Series A No 16 (1 October 1999).

Contentious cases.

1. Acosta Calderón case (Merits, reparations and costs), Inter-American Court of Human Rights Series C No 129 (24 June 2005).
2. Aloeboetoe case (Merits) Inter-American Court of Human Rights Series C No 11 (4 December 1991).
3. Aloeboetoe case (Reparations and costs) Inter-American Court of Human Rights Series C No 15 (10 September 1993).
4. Apitz Barbera et al (“First Court of Administrative Disputes) case (Merits, reparations and costs) Inter-American Court of Human Rights Series C No 182 (5 August 2008).
5. Castañeda Gutman case (Merits, reparations and costs) Inter-American Court of Human Rights Series C No 184 (6 August 2008).
6. De la Cruz Flores case (Merits, reparations and costs) Inter-American Court of Human Rights series C No 115 (18 November 2004).

7. De la Cruz Flores case (Application of the Inter-American Commission) Inter-American Court of Human Rights series C No 115 (18 November 2004).
8. Genie Lacayo case (Merits, reparations and costs) Inter-American Court of Human Rights Series C No 30 (29 January 1997).
9. Girls Yean and Bosico case (Merits, reparations and costs) Inter-American Court of Human Rights Series C No 130 (8 September 2005).
10. González et al (Cotton Field) case (Merits, reparations and costs) Inter-American Court of Human Rights Series C No 205 (16 November 2009).
11. López Álvarez case (Merits, reparations and Costs) Inter-American Court of Human Rights Series C No 141 (1 February 2006).
12. Mayagna (Sumo) Awas Tingni case (Merits, reparations and costs) Inter-American Court of Human Rights Series C No 79 (31 August 2001).
13. Mapiripán massacre case (Merits, reparations and costs) Inter-American Court of Human Rights Series C No 134 (25 September 2005).
14. Miguel Castro Castro Prison case (Merits, reparations and costs) Inter-American Court of Human Rights Series C No 160 (25 November 25 2006).
15. Moiwana Community case (Merits, reparations and costs) Inter-American Court of Human Rights Series C No 124 (15 June 2005).
16. Plan de Sánchez Massacre case (Merits) Inter-American Court of Human Rights Series C No 105 (29 April 2004).
17. Plan de Sánchez Massacre case (Applica of the Inter-American Commission of Human Rights).
18. Sawhoyamaxa Indigenous Community case (Merits, reparations and Costs) Inter-American Court of Human Rights Series C No 146 (29 March 2006).
19. Saramaka people case (Merits, reparations and costs) Inter-American Court of Human Rights Series C No 172 (28 November 2007).
20. Suárez Rosero case (Merits) Inter-American Court of Human Rights Series C No 35 (12 November 1997).
21. “Street Children” case (Merits) Inter-American Court of Human Rights Series C No 64 (10 November 1999).
22. Velasquez Rodríguez case, (Merits) Inter-American Court of Human Rights Series C No 1 (1989).

23. Ximenes Lopes case (Merits, reparations and costs) Inter-American Court of Human Rights Series C No 146 (44 July 2006).

24. Yatama case (Merits, reparations and costs) Inter-American Court of Human Rights Series C No 127 (23 June 2005).

25. Yakye Axa Indigenous Community case (Merits, reparations and costs) Inter-American Court of Human Rights Series C No 142 (17 June 2005).