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THE OBJECTIVE INTERNATIONAL RESPONSIBILITY OF STATES IN THE INTER-AMERICAN HUMAN RIGHTS SYSTEM

Gonzalo Sánchez de Tagle*

Abstract. *The international responsibility of States is based on two legal precepts: first, a State must be subject to international obligations; and second, a State must be responsible for noncompliance with such obligations. Specific and concrete damages are not required for the allocation of international responsibility to a State. Given these elements, the Inter-American Human Rights System, through the Inter-American Court, will not hear disputes involving a State's international responsibility without the existence of a specific and concrete human rights violation. While this seems appropriate, rulings by the Inter-American Court have subsequently opened the door to States' objective international responsibility; i.e., responsibility under the American Convention on Human Rights that require no showing of a specific violation. In the author's view, the international responsibility of States, similar to Public International Law, should be based on noncompliance without the need for a victim –especially in human rights cases. For this reason, the Inter-American Court is correct in holding States responsible for domestic laws that contravene its own human rights commitments under international treaties– regardless of whether or not these norms have been enforced.*

Key Words: *International Human Rights Law, Objective International Responsibility of the State, Internationally Wrongful Acts, Inter-American Court of Human Rights.*

Resumen. *La responsabilidad internacional del Estado, parte de dos premisas esenciales. Por un lado debe de existir una obligación a cargo del Estado y, por el otro, la conducta violatoria a dicha obligación debe ser atribuible a ese Estado. Siendo así, que la causación de daños específicos y concretos, no es un requisito indispensable para una eventual determinación de responsabilidad internacional del Estado. Sin embargo, el sistema interamericano de derechos humanos, a*

* BA. Law from Universidad Iberoamericana, MA. Constitutional and International Law form Georgetown University. He has a diploma on Public Law from Escuela Libre de Derecho and a Diploma in Local Government and Management from the CIDE. He is currently coordinating the Center for International Studies "Gilberto Bosques" of the Mexican Senate and is a professor of Constitutional Law at the "Universidad Iberoamericana". He has a weekly column at La Silla Rota newspaper and often contributes for the Reforma newspaper.

través de la jurisprudencia de la Corte Interamericana ha determinado que para estar en capacidad de resolver la responsabilidad internacional de un Estado, se debe demostrar la violación específica y concreta a un derecho humano en particular. Si bien es una premisa correcta, la jurisprudencia de la Corte Interamericana ha abierto la posibilidad para determinar la responsabilidad internacional objetiva del Estado, a través de la cual, se puede determinar responsabilidad por el hecho de haber emitido alguna norma contraria a la Convención Americana sobre Derechos Humanos, sin que esta haya sido efectivamente aplicada a un caso en particular. En ese sentido, la responsabilidad internacional de un estado, de manera destacada en materia de derechos humanos, se debe de determinar en principio, al igual que en materia de Derecho Internacional Público, por la transgresión a sus obligaciones y no, como elemento indispensable, por la existencia de una víctima. Es así, que si bien debe de existir una causa de pedir, el análisis que realice en su caso la Corte Interamericana, debe de partir de la premisa de que un Estado puede ser responsable por la emisión de una norma que contraviene sus compromisos internacionales en materia de derechos humanos, aún cuando está no haya sido aplicada a un caso en concreto.

Palabras clave: *Derecho internacional de los derechos humanos, responsabilidad internacional objetiva del Estado, actos internacionalmente ilícitos, Corte Interamericana de Derechos Humanos.*

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I. Introduction

This note analyzes the objective international responsibilities of States pursuant to the Inter-American Human Rights System. Under this legal frame-

work, a State can only be held accountable for an internationally wrongful act if such act (a) is attributable to the State under international law; and (b) constitutes a breach of the State's international obligation.[1] Under this framework, specific damages caused by a wrongful act need not to be shown in order to establish the State's culpability.

In a recent advisory opinion, the Inter-American Court of Human Rights held that "the promulgation of a law in manifest conflict with the obligations assumed by a state upon ratifying or adhering to the Convention is a violation of that treaty. Furthermore, if such a violation affects the protected rights and freedoms of individuals, it may give rise to international responsibility for the state in question"[2]. Notably, this opinion manifests a contradiction between the International Law Commission and the Inter-American Court of Human Rights regarding the need for specific damages or a human rights violation to trigger State culpability for an internationally wrongful act.

The principles of state responsibility govern when and how a state is held responsible for a breach of an international obligation. As such, they do not establish specific obligations, but rather determine when an obligation has been breached and the legal consequences of that violation. This note addresses the nature of such international responsibility, specifically whether or not international responsibility under the Inter-American Human Rights System requires a showing of specific damages or a human rights violation. It argues that even if a human rights violation is necessary to trigger international responsibility under the Inter-American Court's rules, a strong argument can be made to foster abstract control of a given law; i.e., objective international responsibility without the need for a specific human rights violation.

The first part of the note provides a general framework, including the differences already mentioned between Public International Law and International Human Rights Law. The second part there discusses the general obligations of States under: (a) the Vienna Convention on the Law of Treaties of 1969 (hereinafter referred to as the "Vienna Convention"); (b) International Human Rights Law; and (c) the American Convention on Human Rights (hereinafter referred to as the "American Convention"). Special attention is paid to Articles 1 and 2 (obligation to adapt domestic laws) and Article 63.1 (obligation to make reparation) of the Convention.

The third part of the note examines the objective international responsibility of States in the Inter-American System, based mainly on theories developed by former Inter-American Court of Human Rights Judge A.A. Cançado Trindade, who contributed several concurring opinions to the Court's rulings. The fourth and final part will examine several rulings made by the Inter-American Court regarding the objective responsibility of States under international law.

[1] *Draft Articles on Responsibility of States for International Wrongful Acts*, [2001] 2 Y.B Int´l L. Comm´n, U.N. Doc. A/56/10.

[2] International Responsability for the promulgation and enforcement of laws in violation of the Convention, Advisory opinion, 1994 Inter-Am.Cr.H.R.

Before discussing the Vienna Convention, it should be noted that of the 34 member nations of the Organization of American States, only 24 belong to the American Convention. Of these 24, only 21 recognize the Inter-American Court's jurisdiction. This is significant, as several opinions and rulings cited herein do *not* include: the United States; Canada; Antigua and Barbuda; Bahamas; Belize; Dominica; Grenada; Guyana; Jamaica; Saint Kitts and Nevis; Saint Lucia; St. Vicente; and Trinidad and Tobago.[3]

II. Public International Law and International Human Rights Law

Several notable differences exist regarding State responsibility under Public International Law and International Human Rights Law. The Inter-American Court of Human Rights has stated that "modern human rights treaties in general, and the American Convention in particular, are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the Contracting States. Their object and purpose is the protection of the basic rights of individual human beings […] The States […] assume various obligations, not in relation to other States, but towards all individuals within their jurisdiction."[4]

For this reason, the European Commission on Human Rights concluded that "obligations undertaken by the High Contracting Parties in the European Convention are essentially of an objective character, being designed rather

[3] The Commission exercises different powers depending on the member of the OAS towards which it is acting. In this regard, in relation to all State members of the OAS it has the authority to: develop an awareness of human rights; draft recommendations for State governments to adopt progressive measures that favor human rights; prepare studies or reports deemed appropriate; request reports from State governments; reply to member state inquiries regarding human rights; and practice *in loco* observations.

With regard to member States of the American Convention on Human Rights, the Commission has the authority to: fill individual requests or communications from States; appear before the Inter-American Court of Human Rights; request the Court to take interim measures; and consult the Court regarding the interpretation of the Convention or other treaties on the matter.

Finally, with regard to non-member States of the American Convention on Human Rights, the Commission specifically has the authority to: pay attention to the observance of human rights mentioned in Articles I, II, III, IV, XVIII, XXV and XXVI of the American Declaration of Rights and Duties of Man; consider communications submitted to it and any other available information; request information and make recommendations; check whether internal processes and resources of each State were duly applied and exhausted (with respect to the power to examine communications submitted to it). About these countries, the Commission bases its authority in accordance with the American Declaration of Rights and Duties of Man and of the Charter of the Organization of American States.

[4] The Effect of Reservations on the Entry Into Force of the American Convention on Human Rights (Arts. 74 and 75), Advisory Opinion OC-2/82, September 24, 1982, Inter-Am. Ct. H.R. (Ser. A) No. 2 (1982).

to protect the fundamental rights of individual human beings from infringements by any of the High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties themselves."[5]

In his concurring opinion in Blake v. Guatemala (regarding reparations and costs), former Inter-American Court Judge A.A. Cançado Trinidad stated:

> The tension between the precepts of Public International Law and those of the International Law of Human Rights is not difficult to explain: while the juridical concepts and categories of the former have been formed and crystallized, above all at the level of *inter-State* relations (under the dogma that only the States, and subsequently in international organizations, are subjects of that legal order), the juridical concepts and categories of the latter have been formed and crystallized at the level of *intra-State* relations, that is, in relations between the States and the human beings under their respective jurisdiction (the latter elevated to subjects of that legal order).[6]

The State's obligations under International Human Rights Law transcend the classical definition of State responsibility under International Law, since the primary objective of Human Rights law is to protect the rights of individuals. This distinction significantly alters the nature of States' obligations under these treaties. In this respect, "the objective of international human rights law is not to punish those individuals who are guilty of violations, but rather to protect victims and provide for reparation of damages."[7]

III. Objective International Responsibility of States

International Responsibility arises when a State has incurred in an internationally wrongful act; *i.e.*, "conduct consisting of an action or omission that is attributable to a State under International Law and constitutes a breach of the State's international obligation."[8] A State will generally only be liable for the official conduct of its agencies or officials.[9] As well, State conduct may include "positive acts, omissions, failure to meet a standard of due care, or diligent control or pure lack of vigilance that is lawful according to the national law of the State."[10] Regarding the elements required under Article Two of

[5] Austria vs Italy, App. No. 788/60, 4 Y.B. Eur. Conv. On H.R 116, 140 (1961).

[6] Blake, 1999 Inter-Am.Ct.H.R., (ser C.) No. 48., at 5 (Jan. 22, 1999).

[7] Fairén-Garbi and Solís-Corrales, 1989 Inter-Am.Ct.H.R., (ser. C) No. 6, at 136 (Mar. 15, 1989).

[8] *Draft Articles on Responsibility of States for International Wrongful Acts*, [2001] 2 Y.B Int'l L. Comm'n art. 2, U.N. Doc. A/56/10.

[9] *Id.*, at art. 4.

[10] Goran Lysén, State Responsibility and International Liability of States for Lawful Acts: A Discussion of Principles 59 (Lustus, 1979)

the Draft Articles on the Responsibility of States for International Wrongful Acts, Alain Pellet said:

> The most striking feature of this new approach compared to the traditional understanding of the notion of responsibility is the exclusion of damage as a condition for responsibility. In order for an internationally wrongful act to engage the responsibility of a State, it is necessary *and sufficient* that two elements (breach and attribution) are present. This is certainly not to say that, in this system, injury has no role to play; however, it fades into the background, at the level not to the triggering of the mechanisms of responsibility, some of which (the principal being, without doubt, the obligation of reparation) are dependent upon injury for their existence.[11]

In this regard, the objective international responsibility of States renders international responsibility to the State to the extent that there is no need for specific damage or violation to the rights of a third party. "The requirement that there should be a breach of obligation is therefore sufficient."[12]

1. *International Responsibility of States under the Vienna Convention on the Law of Treaties*

As legal entities, nations that sign international treaties agree to be bound by their terms. Article 2.1.d) of the Vienna Convention refers to a "contracting party" as a "State which has agreed to abide by a treaty, whether or not the treaty has entered into force". This is the basis for States' international obligations: legal responsibility pursuant to the terms of mutual agreement. International law rests on other legal principles and, as such, its duties and obligations extend beyond treaties, including customary law and norms of *jus cogens*.[13]

Article 18 of the Vienna Convention defines the State's main obligation as "refrain(ing) from acts which would defeat the object and purpose of the treaty." As obvious as this may appear, it forms the basis for the international responsibility of States, as it requires that each signatory nation act in accor-

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[11] Alain Pellet, The Law of International Responsibility Oxford Commentaries on International Law 9 (James Crawford, Alain Pellet & Simon Olleson eds., Oxford, 2010)

[12] *Id.*

[13] Vienna Convention on the Law of Treaties, art. 18, May, 23, 1969, 1155 U.N.T.S. 331.

This investigation will only refer to the international responsibility of the States resulting from conventional obligations.

2 Sections a. and b. of Article 18 of the Vienna Convention establish:

(a) It has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or

(b) It has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

dance with the terms of the treaty. More importantly, each party is obligated to make a good faith effort to actively support the main principles of the accord.

This general obligation is complemented by the *pacta sunt servanda* and *bona fide* principles of international law. Article 26 of the Vienna Convention establishes that "every treaty in force is binding upon the parties to it and must be performed by them in good faith". In this way, it establishes the obligatory nature of international agreements, particularly States' obligation to proactively act in ways that promote compliance. Article 27 of the Vienna Convention states that "a party may not invoke the provisions of its internal law as a justification for its failure to perform a treaty."[14] This norm codified the rule that domestic law is irrelevant to international law. Roberto Ago, former Special Rapporteur of the United Nations International Law Commission, said that "for the national legal order, the organization of the state —structures and functioning of which are determined wholly by legal norms pertaining to that order— has a legal character. On the other hand, the formation and regulation of the same organization are entirely alien to the legal provisions of the international order; for the latter system, the internal organization of the State is as a whole, merely a fact."[15]

Although the Vienna Convention imposes many legal obligations, the agreement to abide by the treaty's purpose (*pacta sunt servanda* and *bona fide)*; and its signatories' commitment not to justify noncompliance with domestic law, provide a clear idea of the nature of State responsibilities under international accords.

2. *Responsibility of States under International Human Rights Law.*

Although it is difficult to assess a general category of State responsibilities under International Human Rights Law —mainly because of the broad array of human rights— the way they are exercised, the social and cultural conditions needed to fulfill them and the position (mainly economic) of a given State towards negative and positive rights; in essence, three basic elements comprise the core of human rights obligations assumed by States: "the obligation to respect, to protect and to fulfill."[16] As such, the "failure to perform any of these three obligations constitutes a violation of such rights."[17]

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[14] Vienna Convention on the Law of Treaties, art. 46, May, 23, 1969, 1155 U.N.T.S. 331. This rule is supported by Article 46 of the Vienna Convention, referring to the provisions of internal law regarding competence to conclude treaties.

[15] Roberto Ago, *Third Report on State Responsibility: The Internationally Wrongful Act of the State, Source of International Responsibility,* [1971] 2 Y.B Int'l L. Comm'n par. 117,, UN Doc. A/56/10.

[16] Olivier de Schutter, International Human Rights Law 242 (Cambridge University Press, 2010)

[17] International Commission of Jurists (ICJ), Maastricht Guidelines on Violations of Eco-

The first obligation ("respect") requires that States "avoid interfering with the enjoyment of economic, social and cultural rights"[18] (including also civil and political rights). The second obligation ("protect") requires that States "prevent violations of such rights by third parties"[19]. And the third obligation ("fulfill") requires that States "take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights."[20]

In the Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies in 2005, the Office of the High Commissioner for Human Rights stated:

> All human rights —economic, civil, social, political and cultural— impose negative as well as positive obligations on States, as is captured in the distinction between the duties to respect, protect and fulfill. The duty to respect requires the duty-bearer to refrain from interfering with the enjoyment of any human right. The duty to protect requires the duty-bearer to take measures to prevent violations of any human right by third parties. The duty to fulfill requires the duty-bearer to adopt the appropriate legislative, administrative and other measures towards the full realization of human rights.[21]

3. *Responsibility of States under the American Convention*

Under Articles 1 and 2 of the American Convention, the obligations and duties of States to respect, protect and fulfill human rights are considered "primary" norms, or substantive rules of international law. Article 62.3, 63 and 68 address basic issues of responsibility and availability of remedies; these norms are considered "secondary".

A. *Obligations of States under Articles 1 and 2 of the American Convention*

Article 1.1 sets forth the obligation of States to respect and guarantee human rights as follows: "The State-Parties to this Convention undertake to *respect* the rights and freedoms recognized herein and to *ensure* that all persons

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nomic, Social and Cultural Rights, 26 January 1997, para. 6, *available a*t http://www.refworld.org/docid/48abd5730.html (last accessed 27 October 2014)

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] Office of the High Commissioner for Human Rights, Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies, 2005. par 47. Regarding social, economic and cultural rights, the quote continues: "Resource implications of the obligations to respect and protect are generally less significant than those of implementing the obligations to fulfill for which more proactive and resource-intensive measures may be required. Consequently, resource constraints may not affect a State's ability to respect and protect human rights as its ability to fulfill human rights".

subject to their jurisdictions enjoy the free and full exercise of those rights and freedoms, without discrimination […]."

On the other hand, Article 2 of the Convention states:

> Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the State-Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

In the Inter-American Human Rights System, Articles 1 and 2 of the Convention are the cornerstone of States' international duties and responsibilities. The Inter-American Court once declared that Article 1 "specifies the obligation assumed by the State-Parties in relation to each of the rights protected. Each claim alleging that one of those rights has been infringed necessarily implies that Article 1(1) of the Convention has also been violated."[22] In other words, for every right recognized under Article 3 to Article 27 of the Inter-American Convention, a corresponding obligation exists for each State to protect and guarantee this right.

The Inter-American Court has stated that Article 1 "is essential in determining whether a violation of the human rights recognized by the Convention can be imputed to the State-Party. In effect, that Article charges the State-Parties with the fundamental duty to respect and guarantee the rights recognized in the Convention."[23]

The first obligation assumed by States under Article 1 is to "respect the rights and freedoms", which implies certain limits in the "exercise of public authority based on the fact that human rights are inherent attributes of human dignity and are, therefore, superior to the power of the State."[24] The States' second obligation under Article 1 is to "guarantee" the free and full exercise of those rights and freedoms. This obligation implies the "duty of the State-Parties to organize the governmental apparatus […], so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence, the States must prevent, investigate and punish any violation of the rights recognized by the Convention."[25]

In Article 2 of the Convention, the Court requires that States "include the adoption of measures to suppress laws and practices of any kind that imply a violation of the guarantees established in the Convention, and also the adoption of laws and the implementation of practices leading to the effective observance of said guarantees."[26] This obligation covers several important points.

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[22] Velázquez-Rodríguez, 1988 Inter-Am.Ct.H.R., (ser. C) No. 4, at 162 (Jul. 29, 1988).

[23] *Id.* para. 164.

[24] *Id.* para. 165.

[25] *Id*. para. 166.

[26] Olmedo Bustos et al, 2001 Inter-Am.Ct.H.R., (ser. C) No. 73, at 85 (Feb. 5, 2001).

Firstly, it considers the States and Inter-American Human Rights system as the main entities responsible for formulating and ensuring the protection of human rights. In this view, the Commission and Court act to adjudicate disputes when States fail to comply with their obligations. Article 2 also defines the principle of *effet utile*, which requires each State to ensure legal and practical enforcement of the Convention's human rights norms. The Court has held that

> […] in international law, customary law establishes that the State that has ratified a human rights treaty must introduce the necessary modifications to its domestic law to ensure proper compliance of the obligations it has assumed […] This general obligation implies that the measures of domestic law must be effective; this means that the State must adopt all measures so that the provisions of the Convention are effectively fulfilled in its domestic legal system.[27]

In sum, Article 2 was enacted to ensure that States harmonize their national norms with the Convention. These articles, in effect, establish two benchmarks: (a) to ensure compliance with the Convention; and (b) to defend human rights. For this reason, "the efficacy of human rights treaties is measured, to a large extent, by their impact upon the domestic law of the State-Parties."[28]

Former Judge A.A. Cançado Trinidade has said that "the two general obligations enshrined in the American Convention —that of respecting and guaranteeing the protected rights (Article 1(1)) and that of harmonizing domestic law with the international norms of protection (Article 2)— appear to be ineluctably intertwined. Hence, the breach of Article 2 always brings the violation likewise of Article 1(1). The violation of Article 1(1) takes place whenever there is a breach of Article 2. And when Article 1(1) is violated, there is a strong presumption of non-compliance with Article 2."[29]

Given that a major element of "respect" and "assurance" of human rights lies in States' domestic laws and regulations, this is significant. For this reason, States' international responsibilities through the analysis of general, impersonal and abstract acts of the State, such as laws or regulations, that infringe a human right, violate key obligations set forth in Article 1 of the Convention.

B. *Obligations of States under Article 63.1 of the American Convention*

Under Articles 1 and 2 of the Convention, the State-Parties agree to a third obligation: make reparation for human rights violations for which they

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[27] *Id.* para. 87.

[28] *Id.* para. 9; Concurring Opinion of A.A Cançado Trinidade (Jan. 29, 1997)

[29] Caballero-Delgado and Santana, 1997, Inter-Am.Ct.H.R., (ser. C) No. 31, at Concurring opinion A.A, Cancado Trinidade (Jan. 29, 1997).

are culpable. "When an unlawful act imputable to the State occurs, said State becomes internationally responsible for a violation of international law. It is out of this responsibility, that a new juridical relationship for the State emerges, which is the obligation to make reparation."[30] The State's obligation to remedy human rights infringements is set forth in Article 63.1 of the American Convention as follows:

> If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be *ensured* the enjoyment of the right and freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be *remedied* and that *fair compensation* be paid to the injured party.

What do each of these elements mean? Reparation is any measure taken by the State to redress gross and systematic violations of human rights law or humanitarian law through the administration of some form of compensation or restitution to the victims. There are four major categories of reparation: *restitutio in integrum*, compensation, satisfaction and guarantees of non-repetition. To refer to the forms of reparation, is useful to defer to the definitions employed by the Draft Articles on Responsibility of the States for Internationally Wrongful Acts (2001),[31] developed by the International Law Commission of the United Nations (hereinafter referred to as the Draft).

Article 34 of the Draft states that full reparation of the injury caused by the wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination. In Article 35, the Draft sets forth that a State responsible for an internationally wrongful act is obligated to make restitution; that is, to re-establish the situation that existed before the wrongful act occurred, unless "it is not materially impossible" and "does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation".

It is a principle of international law —as set forth in Article 36 of the Draft— that any breach of a treaty engagement involves an obligation to make reparation for a wrongful act, insofar as such damage is not made good by restitution. This compensation must cover all financially-measurable damages.[32]

As a form of reparation, "satisfaction" is made by the State when reparation is not feasible either by restitution or compensation. Article 37 of the

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[30] Garrido and Baigorria, 1998, Inter-Am.Ct.H.R., (ser. C) No. 39, at 40 (Aug. 27, 1998).

[31] *Draft Articles on Responsibility of States for International Wrongful Acts*, [2001] 2 Y.B Int´l L. Comm'n, U.N. Doc. A/56/10.

[32] In addition to financial damage, the Inter American System has developed an array of jurisprudence that states that compensation shall cover both financial and non-financial damages.

Draft establishes that "satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality." The Inter-American Court has said that guarantees of non-repetition are "positive measures that the State must adopt to ensure non-recidivism of injurious acts."[33]

C. *Considerations Regarding State Responsibilities: Source and Types of Acts Committed by States*

It is noteworthy that under the American Convention, the internal laws of signatory nations are not subject to international law; they are considered a simple matter of fact. This said, the Inter-American Court has held that "the international responsibility of the State may be engaged by acts or omissions of any power organ of the State, whatsoever its rank, that violate the American convention".[34] In effect, this means that any entity, agency or official acting on behalf of a public authority may be liable for a human rights violation.

It has long been universally recognized that a "State is responsible for violations of international law committed by its agents."[35] Referring to State judicial power in its 1969-II Yearbook, the International Law Commission quoted the French-Italian Arbitration Panel (1955) which said that

> [...]the judgment or order of a court is something issuing from an organ of the State, just like a law promulgated by the Legislature or a decision taken by the executive authorities. The non-observance by a court of a rule of international law creates international responsibility on the part of the collectivity of which the court is an organ, even if the court has applied municipal law in conformity with international law.[36]

The Court also stated that "any violation of rights recognized by the Convention carried out by an act of public authority or by persons who use their position of authority is imputable to the State."[37] In this way, a State may be liable for human rights violations even if the agent who acted unlawfully did so pursuant to law. Which means that when agents act outside their scope of authority, or violate domestic norms, the State may still be responsible for their acts and omissions.[38]

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[33] Balucio, 2003, Inter-Am.Ct.H.R., (ser. C) No. 100, at 73 (Sep, 18, 2003).

[34] Olmedo Bustos et al, 2001 Inter-Am.Ct.H.R., (ser. C) No. 73, at 72 (Feb. 5, 2001).

[35] Roberto Ago, *supra* note 15, at 105 para. 10.

[36] *Id.* at 106, para. 19.

For a reference in the Inter-American System, *see* Tristán Donoso, 2009, Inter-Am.Ct.H.R., (ser. C) No. 193, at 85 (Sep. 1, 2010). Here the Inter-American Court decided that the Supreme Court of Justice of Panama had violated Article 8.1 of the American Convention, due to the lack of motivation in a resolution regarding the disclosure of a telephonic conversation.

[37] Velázquez-Rodríguez, 1988 Inter-Am.Ct.H.R., (ser. C) No. 4, at 172 (Jul. 29, 1988).

[38] *Id.* para. 170.

According to the classical approach to the international responsibility of States, each nation is solely responsible for the positive acts and omissions of its agents. The Inter-American Court's "due-diligence theory", however, holds that "an(y) illegal act which violates human rights and which is initially not directly imputable to the State, can lead to international responsibility, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention."[39]

IV. Objective International Responsibility of States in the Inter-American Human Rights System

Roberto Ago said that "one of the principles most deeply rooted in the doctrine of international law and most strongly upheld by State practice and judicial decisions is the principle that any conduct of a State which international law classifies as a wrongful act entails the responsibility of that State in international law."[40]

The underlying basis for objective international responsibility requires that each State's domestic norms be compatible with the American Convention –whether or not these norms have ever been enforced. This responsibility implies "that the very existence of a legal provision of domestic law can create a situation *per se* that directly affects rights protected under the American Convention, by the risk or the real threat that its applicability represents, without it being necessary to wait for the occurrence of damage".[41] In other words, analyzing the compatibility of a domestic norm with the American Convention is not purely hypothetical, since "the moment a violation of a protected right is found […], the examination is no longer an abstract question […], is in fact a concrete question."[42]

Former Inter-American Court Judge A. A. Cançado Trinidade states that "it is the existence of victims that provides the decisive criterion for distinguishing the examination simply *in abstracto* of a legal provision, from the determination of the incompatibility of such provision with the American Convention in the framework of a concrete case […]."[43] A concrete case is one in which victims of human rights violations have been shown to exist.

Based on this theory, a signatory nation's law could trigger liability for an international wrongful act without any need to show a connection between the law and a human rights infringement. Despite this, Judge Cançado Trinidade said that it was impossible to address the illegal norm *in abstracto*,

[39] *Id.* para. 172.

[40] *Second Report on Responsibility of the State*, *International Law Commission*, 205, par. 30, 1971

[41] Olmedo Bustos, 2001, Inter-Am.Ct.H.R., (ser. C) No. 73, at 3 (Feb. 5, 2001).

[42] El Amparo, 1996 Inter-Am.Ct.H.R., (ser. C), No. 28, at 7 (Jan 18, 1996).

[43] *Id.*

e.g., based on the legal provision itself. In his view, "the existence of victims renders juridically inconsequential the distinction between the law and its application, in the context of a concrete case."[44]

Thus, the existence itself of a law entitles the victims of violations of the rights protected by the American Convention to require its harmonization "with the provisions of the Convention, and the Court is obliged to pronounce on the question, without having to wait for the occurrence of an additional damage by the continued application of such law".[45]

The opposing argument is that laws must be first enforced to determine their compatibility with the American Convention. "If one attempts […] to deny the idea of State responsibility because it allegedly conflicts with the idea of sovereignty, one is forced to deny the existence of an international legal order."[46] Most international human rights treaties (including the American Convention) are enacted based on the assumption that internal laws must be harmonized with their provisions —not vice versa.

"The American Convention, seeks to have in the domestic law of the State Parties, the effect of improving it, in order to maximize the protection of the recognized rights, bringing about, to that end, whenever necessary, the revision or revocation of national laws which do not conform to its standards of protection."[47] In fact, it would be completely unrealistic to attempt to adapt the American Convention to the provisions or regulations of the internal laws of any particular State.

In Articles 1 and 2, the American Convention stipulates that States must (a) ensure compliance with their international human rights obligations; and (b) harmonize domestic law with the Convention. For this reason, all laws enacted by States are subject to review by the Inter-American Commission and Court. Thus, the question would not be based on why or what, but on when the Court must check on a norm that presumptively infringes the international obligations of the State.

It is notable that under the Inter-American Human Rights System, an actual human rights violation must occur for a party to seek redress. Pursuant to objective international responsibility, once a legitimate claim is filed, both the Commission and Court may review any State law relevant to the case.

In analyzing the State's international responsibility, there is no question whether or not the legislative power and its actions can be held liable for breaching the international obligations of the State. The issue here is whether or not the law must be first enforced to qualify for review by either the Inter-American Commission or Court.

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[44] *Id.*

[45] Genie-Lacayo, 1997, Inter-Am.Ct.H.R., (ser. C), No. 30, at 10 (Jan. 29, 1997).

The concept of continuing violations comprises violations of human rights which, e.g., cannot be divorced from the legislation from which they result (and which remains in force).

[46] *Second Report On Responsbility Of The State* , *International Law Commission*, 205. par. 30, 1971

[47] El Amparo, 1996 Inter-Am.Ct.H.R., (ser. C), No. 28, at 14 (Jan 18, 1996).

It is also worth noting that any legal provision that violates human rights as a self-executing or self-binding norm is not included in this analysis. The specific types of norms examined are those whose enactment violates per se Article 2 of the Convention, whether or not they were applied to a specific case.

In our opinion, the Inter-American Commission and Court of Human Rights may legally review internal norms that create a situation *per se* that directly affects rights protected under the American Convention for any of the following four reasons:

1) The internal norm breaches the State's obligation under Article 2 to adopt "legislation needed to give effect to the conventional norms of protection, filling in eventual lacunae or insufficiencies in the domestic law, or else the modification of national legal provisions so as to harmonize them with the conventional norms of protection."[48]

   Although the primary purpose of International Human Rights Law is to protect human rights, the Inter-American Court is the only legal entity with the jurisdiction to interpret and adjudicate the Convention's provisions. For their part, the States must harmonize their own laws to foster respect for and compliance with their obligations under the Convention. In cases of infringement, however, the only entity with legal competence to decide is the Court.
2) A State fails to comply with its human rights obligations under Article 1if it fails to harmonize its internal laws or openly contradicts the Convention.
3) When a law exists that openly and perpetually violates human rights *per se*, "the Court is obliged to pronounce on the question, without having to wait for the occurrence of an additional damage by the continued application of such law."[49] That means that there is no necessity to "wait for the subsequent application of the law, generating additional damage."[50]
4) Article 63.1 of the American Convention, in relation to the general obligations of the States under Articles 1 and 2, "accords perfectly on the duty to make reparation for damages resulting from violations of the protected human rights."[51] Article 63.1 provides for satisfaction as a measure of reparation, as well as for the duty to ensure enjoyment of the protected rights.

   The obligation of the States under Article 63.1 covers all measures, including legislative ones; the Court "should proceed to the determina-

[48] Caballero-Delgado and Santana, 1997, Inter-Am.Ct.H.R., (ser. C) No. 31, at 9 (Jan. 29, 1997).

[49] El Amparo, 1996 Inter-Am.Ct.H.R., (ser. C), No. 28, at 7 (Jan 18, 1996).

[50] *Id*., para. 22.

[51] Caballero-Delgado and Santana, 1997, Inter-Am.Ct.H.R., (ser. C) No. 31, at 11 (Jan. 29, 1997).

> tion of both the indemnizations (*sic*) as well as the other measures or preparation resulting from the duty to ensure and guarantee the enjoyment of the rights that were violated."[52]

In addition to these four reasons, International Public Law requires signatory nations to fulfill and promote the object of the treaty and refrain from invoking internal law to justify noncompliance. Provide by themselves additional elements to why the Inter-American Commission and Court of Human Rights may legally review national laws that directly affect *per se* rights protected by the American Convention, and eventually determine its incompatibility with the Convention.

Finally, it should be noted that the "the reparation itself for proven human rights violations in concrete cases may require changes in domestic laws and administrative practices. Enforcement of human rights treaties has not only been known to resolve individual cases, it has also brought about such changes, thus transcending the particular circumstances of concrete cases."[53]

V. Objective International Responsibility of States in Rulings by the Inter-American Court of Human Rights.

The Inter-American Court has reviewed several cases involving the compatibility of the domestic laws of signatory parties with Article 2 of the American Convention. The following section examines several notable rulings by the Court:

1) In Genie Lacayo v. Nicaragua (Merits, 1997), the Court limited its own ability to rule on the objective international responsibility of States. In his concurring opinion, former Inter-American Court Judge Trinidade stated that the court took to an extreme the legal theory that a hearing under the American Convention requires that a law be first enforced. Regarding decrees No. 591 and 600 (of 1980); the Court distinguished between provisions that had already been applied, as evident by a comparison of paragraphs 83, 91 and 92. In sum, the Court's ruling limited its own ability to enforce States' legal obligations.[54]
2) Suarez Rosero v. Ecuador (Merits, 1997) was the first case in which the Court endorsed the theory of objective international responsibility. In this ruling, the Court held that a provision of the Ecuadorean Criminal Code failed to comply with Article 2 of the Convention. The Court

[52] *Id.*, para. 13.

[53] Caballero-Delgado and Santana, 1997, Inter-Am.Ct.H.R., (ser. C) No. 31, at 11 (Jan. 29, 1997).

[54] Genie-Lacayo, 1997, Inter-Am.Ct.H.R., (ser. C), No. 30, concurring opinion of Judge A. A. Cançado Trinidade, at 10 (Jan. 29, 1997).

stressed that although "the rule has been applied to the specific case […], the law violates Article 2 of the Convention *per se*, whether or not it was enforced in the instant case."[55]

3) In Last Temptation of Christ (Olmedo Bustos et al.) v. Chile (Merits, 2001),[56] the Court ruled —under the theory of the objective international responsibility of States— that a provision of the Chilean Constitution used to permit censorship contravened Articles 2 and 13 of the Convention. The Court stated that "by maintaining cinematographic censorship in the Chilean legal system (Article 19(12) of the Constitution and decree law 679), the State is failing to comply with its obligation to adapt domestic law to the Convention in order to make effective the rights embodied in it, as established in Convention Articles 2 and 1(1)."[57]

   In paragraph 4, the Court ruled that "the State must amend its domestic law within a reasonable period, in order to eliminate prior censorship […]."[58]

4) In Barrios Altos v. Peru (Merits, 2001), the Court held that amnesty laws No. 26479 and No. 26492 were incompatible with the Convention and, as a result, lacked legal effect. Consequently, the Court found Peru liable for failing to comply with Articles 1(1) and 2 of the Convention.

   In this case, the Court held that "the adoption of self-amnesty laws that are incompatible with the Convention meant that Peru failed to comply with the obligation to adapt internal legislation embodied in Article 2 of the Convention."[59] It also declared that said laws lacked legal effect and thus could not be used to (a) obstruct continued investigation of the case; (b) identify and punish those responsible; and (c) be applied to other Peruvian cases involving alleged violations of the American Convention.[60]

5) In Gelman v. Uruguay (Merits, 2011), the Court held that Uruguay's Expiry Law was incompatible with the American Convention and Inter-American Convention on the Forced Disappearance of Persons, and thus lacked legal effect. Uruguay was ordered to ensure that the Expiry Law would not impede factual investigation, identification and punishment of culpable parties.

   In the Court's view, "the fact that the Expiry Law of the State has been approved in a democratic regime and yet ratified or supported by the public, on two occasions, namely, through the exercise of direct

55 Suárez-Rosero, 1997, Inter-Am.Ct.H.R., (ser. C) No 35, at. 97 (Nov 12, 1997).

56 Olmedo Bustos et al, 2001 Inter-Am.Ct.H.R., (ser. C) No. 73, at 85 (Feb. 5, 2001).

57 *Id.* para. 88.

58 *Id.* para. 4.

59 Barrios Altos, 2001, Inter-Am.Ct.H.R., (ser. C) No. 35, at 43 (Mar 14, 2001).

60 *Id.* at 44.

democracy, does not automatically or by itself grant legitimacy under International Law."[61]

6) In Castañeda v. Mexico (Merits, 2008) —involving political rights— the Court held that the "State shall complete the adaptation of its domestic law to the Convention, in order to adapt the secondary legislation and the norms that regulate the action for the protection of the rights of the citizen to the provisions of the constitutional reform of November 13, 2007, so that, using this remedy, the citizens are effectively guaranteed the possibility of contesting the constitutionality of the legal regulation of the right to be elected."[62]

   This ruling is notable because it involves a violation in the absence of laws or an adequate legal framework to protect valid rights. In this sense, Castañeda addressed States' objective international responsibility by omission.

7) In four distinct cases (Radilla-Pacheco v. México (2009), Fernández Ortega v. México (2010), Rosendo Cantú v. México (2010) and Cabrera García and Montiel-Flores v. México (2010)), the Court ruled that Article 57 of the Mexican Military Code violated the American Convention, and ordered the Mexican government to harmonize its legislation with International and Inter-American Human Rights standards.

   In all four cases, the Court held that Article 57 of the Military Criminal Code was "incompatible with the American Convention" and ordered the State to "adopt, within a reasonable period of time, appropriate legislative reforms in order to make this provision compatible with the international standards of the field and of the Convention."[63]

Notwithstanding comments made in Advisory Opinion OC-94/1994,[64] we believe that these cases define the Inter-American Court's approach to the objective international responsibility of States. As a result of these rulings, States may be held responsible for international wrongful acts by the enactment of legislation that violates *per se* Article 2 of the Convention.

It is worth noting that the Inter-American Court still requires a cause of action to hear cases. Once that threshold has been met, however, any law that alleged violates a human right —whether it has been enforced or not— must be carefully analyzed in order to avoid potential future human rights violations.

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61 Gelman, 2011, Inter-Am.Ct.H.R., (ser. C) No. 221, at 238 (Feb 24, 2011).

62 Castañeda-Gutman, 2008, Inter-Am.Ct.H.R., (ser. C) No 184, at 231 (Aug 6, 2008).

63 Radilla-Pacheco Inter-Am.Ct.H.R., (ser. C) No. 209, at 342 (Nov 23, 2009).

64 Advisory Opinion OC-14/94, 1994, Inter-Am.Ct.H.R., (ser. A), No. 14, at 1, (Dec.9, 1994). "The promulgation of a law in manifest conflict with the obligations assumed by a state upon ratifying or adhering to the Convention is a violation of that treaty. Furthermore, if such a violation affects the protected rights and freedoms of specific individuals, it gives rise to international responsibility for the state in question."

If no victim is required under International Public Law,[65] this same principle should also be applied to International Human Rights Law. Notwithstanding the Inter-American Court's apparent ruling on this issue, it should disregard the criteria set forth in Advisory Opinion OC-94/1994 and establish new standards by which international objective responsibility is recognized under the Inter-American Human Rights System.

VI. Conclusion

The International Human Rights Law holds signatory nations to a complex regulatory framework. On the one hand, it obligates parties to ensure human rights protection and, in case of infringement, make reparations. On the other hand, the States are left responsible for enforcing their own compliance with international obligations.

Under Articles 1 and 2 of the Inter-American Convention, signatory nations are legally bound to ensure by negative and positive means human rights protection within their territory. By virtue of this accord, each State agrees to respect its international obligations, adhere to the purpose of the treaty; subscribe to *pacta sunt servanda* and *bona fide* principles; and refrain from using domestic law to justify noncompliance.

In this light, when a State fails to harmonize its internal norms with the provisions of the American Convention, it may be responsible for human rights violations *per se*, as well as international obligations under the Convention.

The legal basis for the objective international responsibility of States was made to deter States from infringing on human rights. The only caveat is that it requires them to comply with international obligations. When properly implemented, this becomes a virtuous cycle by which States embed a systemic international approach to the protection of human rights through the creation of their own internal laws and regulations.

As we have seen, the Court's rulings represent a major step towards human rights protection on an international level. For "the efficacy of human rights treaties (and the level of human rights protection) is measured, to a large extent, by their impact upon the domestic law of the State Parties."[66] As stated above, there must be an actual human rights violation (cause of action) in order for the Inter-American Human Rights Court to hear a case involving a particular State's international responsibility. By doing so, the Court may determine that a specific law, notwithstanding if it was applied to the specific case or not, which infringes an international obligation renders international responsibility.

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[65] *Draft Articles on Responsibility of States for International Wrongful Acts*, [2001] 2 Y.B Int'l L. Comm'n, U.N. Doc. A/56/10.

[66] Olmedo Bustos et al, 2001 Inter-Am.Ct.H.R., (ser. C) No. 73, at 85 (Feb. 5, 2001).

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