



HUMAN RIGHTS CLINIC

THE UNIVERSITY *of* TEXAS SCHOOL *of* LAW

Amicus brief

In the matter of

Fleury v. Haiti

I. Interest of Amici

1. The Human Rights Clinic of the School of Law of the University of Texas at Austin brings together an interdisciplinary group of law and graduate students to participate in a number of human rights projects and cases under the supervision and direction of Professor Ariel E. Dulitzky. Students collaborate with human rights organizations worldwide to support human rights claims in domestic and international fora, to investigate and document human rights violations, to develop and participate in advocacy initiatives before the United Nations and regional and national human rights bodies, and to engage with global and local human rights campaigns. By taking on primary responsibility for their cases and projects, students develop both theoretical and practical skills. The range of cases and projects handled by the Human Rights Clinic illustrates the breadth of human rights practice, including fact-finding, report-writing, and other public advocacy. The Clinic has been working on issues related to the development of international human rights law.
2. In particular, the Clinic has focused on the functioning and strengthening of the Inter-American system. In that sense, the *Fleury v. Haiti* case offers a unique opportunity to the Inter-American Court of Human Rights (the Court) to develop the idea of States as collective guarantors of the Inter-American system, a point of great interest to our Clinic.
3. In this brief, the Clinic urges the Court to use its broad powers, granted by the American Convention on Human Rights (the American Convention or the Convention)¹, to issue a judgment that will allow Mr. Fleury the full enjoyment of his rights under international law. The Clinic believes that by doing so, the Court will reinforce its own effectiveness and legitimacy while staying true to the object

1. Organization of American States, American Convention on Human Rights, Art. 68(1), Nov. 22, 1969, O.A.T.S. No. 36, 1444 U.N.T.S. 123.

and purpose of the Inter-American system, which is the protection of human rights in the Inter-American system. The Clinic recommends that the Court utilize the principle of collective guarantee, a principle imbedded in the American Convention, to foster interstate cooperation. Through interstate cooperation, Mr. Fleury may enjoy full access to his rights.

II. Introduction

4. The Human Rights Clinic respectfully approaches the Honorable Court in the status of Amicus Curiae to reinforce, develop and expand the already well-established principle of collective guarantee that will enable post-catastrophe State Parties to fulfill their human rights obligations. This principle arises out of Haiti's potential future obligations stemming from the Case of Lysias Fleury.
5. The Inter-American Commission on Human Rights (the Commission) brings this case before the Inter-American Court against Haiti for violations of his rights recognized by the American Convention articles 5, 7, and 8. Mr. Fleury claims a violation of his right to personal liberty, his right to humane treatment, and his right to fair trial and judicial protection.
6. If the Court finds Haiti in violation of the American Convention, Mr. Fleury has a right to reparations pursuant to article 63(1) and customary international law.
7. Haiti is responsible for redressing the violations through reparations. Haiti has the primary duty to fulfill its obligation to Mr. Fleury through reparations, regardless of any intervening catastrophic event.
8. However, the Court should recognize that the earthquake of January 12, 2010 in Port-au-Prince may make Haiti's ability to fulfill its obligation to enforce the Court's order extremely difficult.

9. Thus, we urge the Court to reiterate the understanding that the Inter-American human rights system presupposes that all Organization of American States (“OAS”) Member States have a collective duty to ensure that each State executes its obligations arising from the American Convention and complies with the Court’s orders. In this particular instance, the collective duty translates into an additional obligation for Haiti to request assistance from the other OAS Member States in fulfilling its obligations as ordered by the Court and to the other States to provide such assistance.

III. The 2010 Earthquake and its effect on Haiti’s ability to meet its international obligations.

A. The 2010 Earthquake

10. On January 12, 2010, an earthquake measuring 7.0 on the Richter scale hit Haiti. The epicenter of the earthquake was approximately ten miles south of Port-au-Prince, the Haitian capital. The tragedy faced by the Haitian people was well documented in news media across the globe, and the Haitian president estimated that 300,000 people died as a result of the disaster.²
11. Relief efforts began immediately after the earthquake, with outpourings of sympathy and commitments of support from international organizations and world leaders. The Inter-American Development Bank estimated that the cost of rebuilding Haiti may be up to \$13.2 billion (measuring in U.S. dollars).³ As it is well known by the Court, Haiti faced severe developmental challenges as well as

2. See e.g. Times Topics: Haiti, N.Y. TIMES, <http://topics.nytimes.com/top/news/international/countriesandterritories/haiti/index.html> (last visited Apr. 23, 2010).

3. Id.

a fragile democracy prior to the earthquake.⁴ Due to the earthquake, the government infrastructure nearly collapsed, exacerbating the economic, social and political shortcomings of the country.⁵

12. The loss of lives, destruction of government buildings, and the general disruption caused by the 2010 earthquake have significantly limited the Haitian government's ability to function. Three months after the earthquake, schools were not fully opened⁶, 1.2 million people were displaced from their homes (with only forty percent having access to tarpaulins or tents),⁷ and social tensions were exacerbated.⁸ Additionally, an unprecedented outbreak of cholera nine months after the earthquake caused the death of more than 1000 people.⁹ Haitian urban planners' reconstruction proposal includes a complete reorganization of the city structure in order to change political power dynamics of the government.¹⁰

13. The OAS immediately recognized the catastrophe caused by the earthquake and planned to coordinate collection of funds for immediate aid, relief to victims (such as water, blankets, access to communication), and future reconstruction plans.¹¹ The Inter-American Development Bank (IDB) approved \$118 million (in U.S. dollars) in grants for Haiti.¹² Additionally, in September 2010, the IDB

4. See Observations of the Inter-American Commission on Human Rights Upon the Conclusion of its April 2007 Visit to Haiti, Inter-Am. Comm'n H.R., Special Report, OEA/SER.L/V/II.131, doc. 26 (2008).

5. A Plan For Haiti, THE ECONOMIST, Jan. 2010 (available at: http://www.economist.com/node/15330453?story_id=15330453).

6. Évelyne Trouillot, From Disaster, Emerging Life, N.Y. TIMES, Apr. 11, 2010 (available at <http://www.nytimes.com/2010/04/12/opinion/12trouillot.html>).

7. Deborah Sontag, Tent City at a Golf Club Dramatizes Haiti's Limbo, N.Y. TIMES, Mar. 21, 2010 (available at <http://www.nytimes.com/2010/03/22/world/americas/22haiti.html>).

8. Simon Romero, Quake Has Accentuated Chasm that Has Defined Haiti, N.Y. TIMES, Mar. 27, 2010 (available at <http://www.nytimes.com/2010/03/28/world/americas/28haitipoor.html>).

9. The death toll continues to increase rapidly since the outbreak began in October, 2010. Patrick Worsnip, Haiti Cholera Spreading Faster than Predicted: U.N., REUTERS, Nov. 23, 2010 (available at <http://www.reuters.com/article/idUSTRE6AM6Q820101123>).

10. Nicolai Ouroussoff, A Plan to Spur Growth Away From Haiti's Capital, N.Y. TIMES, Mar. 30, 2010 (available at <http://www.nytimes.com/2010/03/31/arts/design/31planning.html>).

11. Press Release, Organization of American States, The Inter-American System Responds to the Earthquake in Haiti (Jan. 15, 2010) (available at http://www.oas.org/OASpage/press_releases/press_release.asp?sCodigo=E-010/10).

12. News Release, Inter-American Development Bank, IDB Approves \$118 Million in Grants for Haiti (July 21, 2010) (<http://www.iadb.org/news-releases/2010-07/english/idb-approves-118-million-in-grants-for-haiti-7541.html>).

cancelled Haiti's outstanding debt of \$484 million, after receiving a \$204 million advance contribution from the United States.¹³ Furthermore, The OAS committed itself to supporting Haitian authorities in maintaining "political stability, democracy, good governance and the rule of law, and to strengthen institutions, and promote socioeconomic development."¹⁴

14. On February 2, 2010, the Commission issued a press release, expressing its solidarity with the people and Government of Haiti while stressing the "duty to respect human rights during the emergency in Haiti."¹⁵ The Commission committed itself to working with Haiti and the international community to overcome the current crisis.¹⁶

B. Because of this disaster, Haiti will likely have exceptional difficulty in fully complying with the Court's judgment.

15. If the Court finds that Haiti violated Mr. Fleury's rights under the American Convention, the Court, in light of prior jurisprudence, will likely find Haiti to be obligated to provide reparations. We urge the Court to recognize, however, that, as a result of the catastrophic 2010 earthquake and the ensuing emergency situation, Haiti will likely have exceptional difficulty complying with the Court's judgment. Participants of the Haiti Donor Conference agreed on "the extraordinary need for budget support to the Haitian government over this fiscal year and the next to help finance critical expenses such as the salaries of civil servants and police and the operation of schools and hospitals," due to the "fall in

13. News Release, Inter-American Development Bank, With U.S. Contribution IDB Cancels Haiti's Remaining Debt (Sept. 20, 2010) (available at <http://www.iadb.org/news-releases/2010-09/english/with-us-contribution-idb-cancels-haitis-remaining-debt--8091.html>).

14. Press Release, Organization of American States, OAS Reaffirms Support for People and Government of Haiti in Earthquake Aftermath (Feb. 17, 2010) (available at http://www.oas.org/OASpage/press_releases/press_release.asp?sCodigo=E-043/10).

15. Press Release, Inter-American Commission on Human Rights, IAHR Stresses Duty to Respect Human Rights During the Emergency in Haiti No. 11/10 (Feb. 2, 2010) (available at <http://www.cidh.oas.org/Comunicados/English/2010/11-10eng.htm>).

16. Id.

government revenues as a result of the earthquake.”¹⁷ Furthermore, the Commission expressed “its profound concern about the difficulties encountered by the Haitian government to meet the basic needs and guarantee the economic and social rights of the people of Haiti.”¹⁸ The Court should take into consideration the impact that the 2010 earthquake, and the subsequent emergency situation, will have on Haiti’s ability to fully comply, in good faith, with the Court’s judgment.

16. General principles of international law recognize that States’ international obligations, may be accommodated either temporarily or permanently, under exceptional circumstances. For example, derogation of these obligations during states of emergency in addition to the principle of force majeure, have long been recognized by the international community as legitimate instances when States may be relieved of their international legal obligations or those obligations could be redefined or accommodated.

17. The ability of States to derogate from certain international legal obligations is an example of the international community’s flexibility during states of emergency.¹⁹ Article 27 of the American Convention and the Court’s jurisprudence evince the consistent recognition of states of emergency under international law. The Court’s jurisprudence has been permissive of the temporary suspension of guarantees under the American Convention during states of emergency.²⁰ Emergency measures should always be considered exceptional, interpreted in the most restrictive manner and be consistent with the overall international human rights obligations. Additionally, international law recognizes the impact of

17. Haiti Donor Conference, available at <http://www.haiticonference.org/communique.html> (last visited 15 April 2011).

18. Press Release, Inter-American Court of Human Rights, IACHR Concludes its 138th Period of Sessions, No. 38/10 (Mar. 26, 2010).

19. See Organization of American States, American Convention on Human Rights, Art. 27 Nov. 22, 1969, O.A.T.S. No. 36, 1444 U.N.T.S. 123; International Covenant on Civil and Political Rights, GA Res. 2200A (XXI), Art. 4, U.N. Doc. A/RES/6316 (Dec. 16, 1966); European Convention on Human Rights, Art. 15, Nov. 4, 1950, CETS No. 5

20. See e.g. Case of Zambrano Velez et al v. Ecuador, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 166 (July 4, 2007). paras. 46-47; Case of Tibi, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 9 (Sept. 7, 2004). para. 26 (noting that during a state of emergency and “under the terms of Article 27(2) of the Convention, there is the possibility of suspending the right to fair trial set forth in Article 8”); Case of Durand and Ugarte, Judgment, Inter-Am. Ct. H.R. Ser. C) No. 68 (Aug. 16, 2000). para. 99.

catastrophic acts of nature on States' international obligations, under the principle of force majeure.²¹ Article 23(1) of the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts reflects a general principle of customary international law:

The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to force majeure that is the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.²²

18. The Court has already taken the 2010 earthquake into consideration. In an ordinance dated February 1, 2010, the Court, describing the earthquake as an exceptional force majeure seriously affecting the State's functioning, postponed future proceedings until the first period of 2011.²³ The ordinance of February 1, 2010 demonstrates the Court's willingness to accommodate Haiti procedurally,²⁴ while maintaining Haiti's obligations under the American Convention.

19. The principle of force majeure demonstrates that in exceptional circumstances, international law provides flexibility to States in fulfilling certain obligations. It also demonstrates that the international community may accommodate States' needs in these special circumstances. While the principle of force majeure may allow the international community to accommodate States by calling for the temporary suspension of international obligations, this is not the only way to accommodate States in emergency situations.

21. Black's Law Dictionary (8th ed.), defines force majeure as "an event or effect that can be neither anticipated nor controlled. The term includes both acts of nature (e.g., floods and hurricanes) and acts of people (e.g., riots, strikes, and wars)."

22. Responsibility of States for internationally wrongful acts, G.A. Res. 56/83, U.N. Doc. A/RES/56/83 (Jan. 28, 2002)

23. Ordonnance de la Cour interaméricaine des Droits de L'Homme du 1er février 2010 ("Face à la situation exceptionnelle de force majeure dans laquelle se trouve Haïti, cause par le tragique tremblement de terre survenu le mois passé, qui a affecté sérieusement le fonctionnement de l'État. . .").

24. The Court, noting the exceptional situation in Haiti, recognized that Haiti would not be able to respect the original deadline set for the submission of its responses ordered by the Court. See *id.* ("Déclarer, par les motifs et raisons signalées au paragraphe considérant précédent, qu'il est désormais impossible de respecter le délai ferme prévu par [l'article 30.2 du] Règlement pour que l'Etat présente sa réponse à la requête et aux observations à l'écrit des sollicitudes et arguments, dans l'affaire Fleury vs. Haïti.").

20. These accommodations should be constructed considering the nature of the pertinent international obligations in place, the object and purpose of the treaty in question and, particularly, the rights of individuals compromised. As such, temporary suspension of State obligations is not only inappropriate in the context of reparations ordered by the Court to redress human rights violations, but they would be contrary to the object and purpose of the American Convention. Thus, the Court should devise a principle that is effective and realistic in securing the rights of Mr. Fleury.
21. In regard to the Case of Lysias Fleury, the Clinic respectfully submits that the appropriate action that the Court should take, due to the situation in Haiti, is to invoke a duty of collective guarantee. This duty would require Haiti to seek assistance from other States to fulfill the Court's judgment. It would also call on other States to assist Haiti in fulfilling the Court's judgment.
22. While we urge the Court to continue to recognize the 2010 earthquake as force majeure, we maintain that it should not temporarily suspend Haiti's obligations to fulfill the Court's judgments. To the contrary, in exceptional circumstances, such as the 2010 earthquake, we advise the Court to explicitly reinforce, develop and expand the already well-established collective guarantee of OAS Member States to ensure that a State Party in violation of American Convention rights complies with the judgment of the Court. In this situation, a duty of collective guarantee is necessary for Haiti to fulfill the Court's judgments, as compliance plays an integral role in the Inter-American human rights system.²⁵

IV. Haiti's Primary Responsibility for American Convention Violations: The Case

25. See e.g. Case of the Saramaka People, Monitoring Compliance with Judgments, Order of the President of the Court, para. 5 (Inter-Am. Ct. H.R. Apr. 20, 2010) available at www.corteidh.or.cr/docs/supervisiones/saramaka_20_04_10_ing1.doc. (declaring that "[t]he obligation to comply with the rulings of the Court conforms to a basic principle of law regarding the international responsibility of the State. That is, States must comply with their international treaty obligations in good faith (pacta sunt servanda) . . .").

of Lysias Fleury

A. In General

23. Article 68(1) declares that “[t]he State Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties.”²⁶

The Court has previously declared, compliance with its judgments:

[S]hould be considered an integral part of the right of access to justice, understood [in its] broadest sense. The contrary would presume the very denial of this right. If the responsible State does not execute the measures of reparation ordered by the Court at the national level, this would deny the right of access to international justice.²⁷

24. With regard to the Case of Lysias Fleury, if the Court finds Haiti in violation of the petitioner’s rights under the American Convention, Haiti will bear primary responsibility for providing reparations to the victim.

25. Pursuant to article 63(1) of the American Convention and the Court’s jurisprudence, a Member State found in violation of an obligation under the Convention is responsible for redressing the violation.²⁷ Reparations are a crucial method of redressing human rights violations. The Court has consistently recognized that reparations for damages arising from a violation of the American Convention, require *restitutio in integrum*, or a restoration of the victim to his

26. American Convention of Human Rights, Art. 68(1).

27 Baena Ricardo et al. v. Panama, Competence, Judgment, Inter-Am. Ct. H.R., (Ser. C) No. 104, para. 130 (Nov. 28, 2003).

27. See e.g., Carpio Nicolle et al. v. Guatemala, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R., (Ser. C) No. 117, para. 86 (Nov. 22, 2004). (“As the Court has indicated, Article 63(1) of the American Convention contains a customary norm that constitutes one of the basic principles of contemporary international law on State responsibility.”); Velasquez-Rodriguez v. Honduras, Reparations and Costs, Judgment, Inter-Am. Ct. H.R., (Ser. C) No. 8, para. 25 (Jul. 21, 1989). (“It is a principle of international law, which jurisprudence has considered ‘even a general concept of law,’ that every violation of an international obligation which results in harm creates a duty to make adequate reparation.”). See also The International Law Commission’s Draft Articles on Responsibility of States for Internationally Wrongful Acts, Chapter I, Article 1 (“Every internationally wrongful act of a State entails the international responsibility of that State.”).

original position before the harm.²⁸

B. Primary Responsibility for American Convention Violations

26. While recognizing the catastrophic impact of the January 12, 2010 earthquake and the resulting impact on resources available to the Haitian people and government, international law requires that the Court demand reparations if it finds Haiti in violation of its Convention obligations. No intervening circumstance could relieve Haiti of its responsibility for violating Mr. Fleury's rights. The devastating impact of the 2010 earthquake, the resulting strain on financial resources available and other extremely hard limitations that face the Haitian government should not be taken into consideration when the Court determines the type of reparations and the amount of compensation required to redress the victim's harm.

27. It is a basic principle of international law that a State must make adequate reparation for the harm caused by the breach of its international obligations.²⁹ The Court has stated that "when a wrongful act occurs that is imputable to the State, the State incurs international responsibility for the violation of international law, with the resulting duty to make reparation, and the duty to put an end to the consequences of the violation."³⁰ Article 63 of the American Convention further requires that the Court rule that the injured party be ensured the enjoyment of his right or freedom when violated.³¹ In the current case, this means the Court must grant reparations if Haiti is found to be in violation of Mr. Fleury's rights. In other words, Mr. Fleury's right to reparations is absolute. Therefore, the Court must order Haiti to ensure that reparations are implemented and Mr. Fleury is compensated, despite the catastrophe wrought by the earthquake.

28. Baena-Ricardo et al. v. Panama, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 72, para. 202 (Feb. 2, 2001).

29. See Velasquez-Rodriguez, *supra*, at para. 25.

30. Castillo Paez v. Peru, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 43, para. 50 (Nov. 27, 1998).

31. American Convention of Human Rights, Art. 63.

28. The Commission notes in its application in the current case that, “[a]s a state party to the American Convention, Haiti has the obligation to carry out investigations, impose punishment, and if necessary, grant reparations.”³² Specifically, the Commission has requested that Haiti adopt measures reforming its security forces and judicial system in order to prevent the future violation of Convention rights.³³ Similar to its determination of compensatory damages, the Court must not take the 2010 earthquake into account when ordering Haiti to implement measures of cessation, satisfaction and guarantees for non-repetition. However, the Court should recognize the extreme difficulty Haiti will face in actually implementing its orders due to the 2010 earthquake and the aftermath.

V. Introduction to Collective Guarantee

32. IACHR Application to the Inter-American Court of Human Rights in the case of Lysias Fleury and his family against the Republic of Haiti , Case 12.459, para. 86 (Aug. 5, 2009).

33. The victim’s original brief also requested the Court to order the following measures:

- a) To urge the Haitian State to publicly acknowledge its international responsibility for the violation of the victim’s human rights in this case and issue a public apology in a national daily newspaper.
- b) To urge the Haitian State to adopt measures necessary to improve the situation of detention centers throughout the State.
- c) To urge the Haitian State to adopt measures necessary to improve HNP training regarding arrest and detention standards under domestic and international law, including those set out in Articles 5 and 7 of the American Convention, as well as other human rights violations and unnecessary use of force.
- d) To urge the Haitian State to adopt all necessary changes within its justice system required to implement its obligations under the Convention
- e) To urge the Haitian State to create and maintain a higher obligation towards the protection of human rights defenders, including adopting measures to safeguard the lives, freedom and personal safety of human rights defenders and their families, acknowledging that human rights defenders provide an essential service to society by safeguarding the rule of law.
- f) To urge the Haitian State to condemn actions intended to prevent or hinder, whether directly or indirectly, the work of human rights defenders.
- g) To urge the Haitian State to condemn the practice of impunity among State actors within Haiti, including the perpetrators of various human rights violations.

29. Because of the extreme difficulty that Haiti will face in fulfilling the Court's judgment, we urge the Court to reinforce, develop and expand the already well-established principle of collective guarantee in the Inter-American System. A duty of collective guarantee encourages Member States to ensure that each State complies with obligations arising from the American Convention. This duty requires States to take actions that contribute to maintaining the integrity of the Inter-American system. In this special situation, the duty translates into an obligation by Haiti to contribute to maintaining the system by requesting assistance from Member States. It also translates into an obligation by Member States to assist Haiti in fulfilling the Court's judgments.

A. The idea of Collective Guarantee is already present within the Inter-American System

30. The principle of collective guarantee is not new to this Court. The Inter-American System already relies on inter-state cooperation. Reinforcing, developing and expanding the already well-established duty of collective guarantee serves as an appropriate extension of inter-state cooperation. Furthermore, this duty contributes to maintaining the integrity of the Inter-American System.

31. As already mentioned, the idea of collective guarantee is already present within the Inter-American System. Inter-state cooperation is at the core of the principle of collective guarantee. Principles of inter-state cooperation within the Inter-

American System exist in the American Convention, the OAS Charter, and the Court's jurisprudence. Such cooperation is based on the idea that there is a duty among the Member States to protect human rights, regardless of the victim's nationhood. Since the duty to protect human rights extends beyond nationhood, protecting such rights requires continuous cooperation between States.

ii. The OAS Charter

32. The OAS Charter provides language in the preamble supporting the concept of collective guarantee as an implicit consequence of Inter-American solidarity:

“Confident that the true significance of American solidarity and good neighborliness can only mean the consolidation on this continent, within the framework of democratic institutions, of a system of individual liberty and social justice based on respect for the essential rights of man. . . .”

We urge the Court to build upon this principle of solidarity, which requires inter-state cooperation, by using the principle of collective guarantee to ensure OAS Members' compliance with Court judgments, so that the human rights of all within the Inter-American System will be better protected. Each OAS Member State will be better able to uphold and protect the human rights of the persons under its jurisdiction if they act in solidarity with one another, ensuring the fullest compliance with the Court's orders and the highest standard of human rights protection.

33. As recently as April 2009, the OAS has recommitted itself to a system of cooperation. At the Fifth Summit of the Americas, OAS Member States reiterated their commitment to the principle of cooperation: “We reaffirm the importance of promoting cooperation among our States in the basis of solidarity in the different spheres of inter-American relations in accordance with the principles and essential purposes of the Charter of the OAS, recognizing our social, political, and

economic diversity.”³⁴

34. There are strong precedents for Member States’ cooperation in addressing a variety of international problems. Member States recognize that practicality requires cooperation and “the importance of both bilateral and regional cooperation to achieve” their goals.³⁵ Alone, Member States cannot effectively deal with their national problems without international assistance.³⁶ In that sense, creating a functioning Inter-American human rights system is the expression of this solidarity and inter-State cooperation in the achievement and fulfillment of the goals of the OAS Charter.

ii. The American Convention

35. The Inter-Americans System’s commitment to collective guarantee is implied in the American Convention, which states:

[T]he essential rights of man are not derived from one's being a national of a certain state, but are based upon attributes of the human personality, and that they therefore justify international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American States.³⁷

36. The Convention reaffirms that human rights are not based on nationality. Instead,

34. Declaration of Commitment of Port of Spain preamble, Apr. 19, 2009.

35. DR-CA-US ECA art. 2, (Feb. 18, 2005), available at http://www.sice.oas.org/trade/cafta/caftadr_e/environment/envcoop_e.asp.

36. For instance, the OAS has created a Department of Sustainable Development to oversee environmental management and protection. Various Member States have formally committed to environmental cooperation, “to protect, improve and conserve the environment, including natural resources. The objective of the Agreement is to establish a framework for such cooperation among the Parties. *Id.* Additionally, the Parties recognize OAS Member States have also committed to cooperation in criminal matters and human trafficking. See Organization of American States, Inter-American Convention on Mutual Assistance in Criminal Matters art. 2, opened for signature May 23, 1992, O.A.S.T.S. No. A-55; Organization of American States, Inter-American Convention on Extradition preamble, entry into force Mar. 28, 1992, O.A.S.T.S. No. B-47; OAS Anti-Trafficking in Persons Section, available at <http://www.oas.org/juridico/MLA/en/index.html>.

37. American Convention of Human Rights, preamble.

because human rights are universal, these rights require cooperative international protection. In order to provide international protection, States may need to act collectively to protect human rights. The preamble of the American Convention adds the idea of solidarity and cooperation when reaffirming the intention of States Parties “to consolidate, in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man.”³⁸

37. The Convention creates a collective system to uphold, protect and promote the rights enshrined in it. Clearly, Article 35 of the Convention expresses the idea of a collective system by stipulating that “the Commission shall represent all the member countries of the Organization of American States.”³⁹ For former President and Judge of the Court, Cecilia Medina, the combination of the language found in the preamble and Convention article 35 provides evidence for the existence of a collective guarantee for all OAS Member States.⁴⁰

38. Other articles of the Convention reinforce the idea of a collective system where each OAS Member State has an interest in guaranteeing the proper functioning of the Inter-American human rights system. The clearest example is the requirement of Article 65 of the Convention, which requires the Court to report to the OAS General Assembly on any instances of noncompliance with its judgments. In that sense, the implementation of the Court’s order, according to the Convention, is a matter of collective interest to the OAS. Thus, the Convention, in Article 69, requires the Court to notify its judgments to all the OAS Member States so that they may be aware of the tribunal’s decisions and orders. These provisions are meant to secure the effective functioning of the system by creating a collective engagement with the activities of the Court.

38. Id.

39. Id. at Article 35

40. Id. at Article 35. “The Commission shall represent all the member countries of the Organization of American States.”

39. The Convention has clearly created a system based on a principle of collective guarantee, as evidenced by several of its provisions that impose duties on OAS Member States that are not even part of the Convention. For instance, Article 64.1 allows OAS Member States (not only States party to the Convention) to seize the advisory jurisdiction of the Court. Article 58 allows the Court to sit in the territory of any OAS Member State. These provisions express the idea that the Convention is a collective treaty for the protection of human rights that concern all OAS Member States.

40. Judge Cançado Trindade, another former President and Judge of the Court, has said:

[T]he notion of a collective guarantee, exercised in concert by all the States Parties, underlies the American Convention and all the other human rights treaties...[T]he Convention's States Parties also assume, in concert, the obligation of overseeing its enforcement in their capacity as its guarantors. By creating obligations for the states parties with respect to all individuals under their respective jurisdictions, the American Convention requires that this collective guarantee be exercised in order to fully attain its goals and purposes. The Inter-American Court firmly believes that permanent exercise of that collective guarantee will help strengthen the protection mechanisms of the American Convention on Human Rights as we enter the 21st century.⁴¹

41. More importantly, Judge Cançado Trindade emphasized that,

the collective guarantee exercised by the Convention's states parties should not merely be reactive, coming into play when one of the Court's judgments is not observed; it should also be proactive, in that all the states parties should previously have adopted positive measures of protection in compliance with the precepts of the American Convention⁴²

41. Presentation Of The Annual Report Speech By The President Of The Inter-American Court Of Human Rights Judge Antônio A. Cançado Trindade, Meeting of the Committee on Juridical and Political Affairs April 19, 2002, OEA/Ser.G, CP/CAJP-1932/02, 25 April 2002 Original: Spanish

42 Id.

42. A logical consequence of the Convention's provisions is that, in special circumstances (like an intervening catastrophic event), States may act collectively by helping to implement reparations and pay compensation to a victim.

iii. The Court

43. The Inter-American Court is the “ultimate interpreter of the American Convention.”⁴³ As such, the Court has clearly recognized the idea of the Convention as a treaty that creates a collective mechanism for the protection of human rights. In the case of *Ivcher-Bronstein v. Peru*, the Court has said that “[t]he American Convention and the other human rights treaties are inspired by a set of higher common values (centered around the protection of the human person), are endowed with specific supervisory mechanisms, are applied as a collective guarantee, embody essentially objective obligations, and have a special character that sets them apart from other treaties.”⁴⁴

44. As a translation of this collective guarantee principle, the Court has emphasized the importance of inter-state cooperation to the Inter-American System in several key cases, such as *La Cantuta v. Perú* and *Goiburú et al. v. Paraguay*. In *Goiburú*, agents of the Paraguayan State “illegally detained, maintained incommunicado, tortured and disappeared individuals whose political activities were opposed to General Stroessner’s regime or who were identified as his enemies.”⁴⁵ After the regime was toppled, several efforts to extradite General Stroessner and his cohorts were frustrated by ineffective

43 *Almonacid-Arellano et al. v. Chile*, Preliminary Objections, Merits, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 154, para. 125 (Sept. 26, 2006); *La Cantuta v. Perú*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 162, para. 173 (Nov. 29, 2006).

44. *Ivcher-Bronstein v. Peru*, Competence, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 54, para. 42 (Sept. 24, 1999).

45. *La Cantuta v. Perú*, Merits Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (Ser.C)No.162, para.173 (Nov. 29.2006)

extradition procedures and a general lack of international cooperation. The Court addressed this lack of justice by declaring, “State Parties to the Convention should collaborate with each other to eliminate the impunity of the violations committed.”⁴⁶ The Court emphasized Paraguay’s responsibility to “further extradition requests by all possible means”—even if extradition treaties didn’t exist—in order to uphold the rights guaranteed by the American Convention.⁴⁷ The Court explained:

[A]ccess to justice is a peremptory norm of international law” that “gives rise to obligations erga omnes for the States to adopt all necessary measures to ensure that such violations do not remain unpunished, either by exercising their jurisdiction to apply their domestic and international law...or by collaborating with other States that do so or attempt to do so.”⁴⁸

45. In *La Cantuta*, the Court restated several of the Court’s assertions in *Goiburú*, urging that “the States Parties to the Convention must collaborate with one another” to uphold “the collective guarantee mechanism set out in the American Convention.”⁴⁹ In its analysis of Perú’s attempts to extradite Alberto Fujimori to stand trial for his role in the extra-legal executions of a professor and nine students, the Court stated, “the need to eliminate impunity establishes an obligation for the international community to ensure inter-State cooperation.”⁵⁰ The Court deems such collaboration to be imperative in order to avoid a “flagrant disavowal of the essential principles on which the inter-American system is based.”⁵¹

46. While the Court in *Goiburú* acknowledged a duty to collaborate in the context of investigating and punishing human rights violations, the same rationale requires the Court to recognize that Member States have a reciprocal duty to

46. Id. para. 125

47. Id. para. 130.

48. Id. parr. 131.

49. See *La Cantuta*, supra note 66, at para. 160.

50. See *Goiburú*, supra note 67, at para. 131.

51. Id. at para. 132.

ensure reparations for victims. Whether through reparations or extraditions, justice requires full compliance with the Court's orders and inter-state cooperation is sometimes the only way to ensure full compliance. In *Goiburú* and *Cantuta* the State could not fully comply with the Court's orders without the assistance from a third State in the extradition process. This assistance was crucial to ensuring full compliance with the Court's decisions and, therefore with providing justice for the victim.

47. We contend that protecting the interests of victims of human rights abuses is the ultimate goal of the Convention, whether OAS Member States seek to eliminate the impunity of the perpetrators through extradition or whether they are attempting to ensure the proper enforcement of remedies as determined by the Court.

48. The situation faced by Haiti in Mr. Fleury's case is similar to the *Goiburú* and *Cantuta* precedents because Haiti may be unable to fully comply with the Court's orders without assistance from other Member States. It is crucial to provide Mr. Fleury with justice and crucial, therefore, that Haiti fully complies with the Court's decision, even if that means seeking assistance from other Member States. We urge the Court to expand this principle of collective guarantee and inter-State cooperation in Mr. Fleury's case, should Haiti remain so incapacitated by the earthquake that it will be unable to comply with potential Court-ordered reparations.

49. In the interest of giving meaning to the principles embodied in the American Convention, the Court should expand on these principles of collective guarantees and inter-state cooperation. It should articulate a need for Member States to collaborate in order to ensure that human rights victims are fully repaired. In extreme situations, Member States may need to assist another

State in fulfilling its obligations.

iv. The Inter-American Commission

50. The Inter-American Commission has also embraced the idea of collective guarantee in its work. In the *Nicaragua v. Costa Rica* decision, the IACHR emphasized the importance of employing a principle of collective guarantee to ensure the protection of States' legal interests in the protection of human rights regionally. In its assessment of human rights violations waged against Nicaraguan nationals working in Costa Rica, the Commission stated:

The American Convention enshrines a system that constitutes a genuine regional public order the preservation of which is in the interests of each and every state party. The intention of the signatory states is the preservation of the system for protection of human rights, and if a State violates its obligation to ensure the human rights of the individuals under its jurisdiction it also violates its undertaking to other states. Therefore, the Convention has provided a mechanism that enables states to present communications to the IACHR in order to protect the regional system of human rights and contribute to the fulfillment of the guarantees recognized in the Convention.⁵²

51. In this Report, the Commission recognized that the preservation of the system is in the interest of all States. While States undoubtedly must cooperate with one another to preserve the System, they may also need to act collectively to preserve this System.

52. The Commission, in developing the idea of collective guarantee to ensure the rights recognized in international human rights treaties, relied heavily on the General Comment 31 of the Human Rights Committee. In that sense, the principle of States' collective interest and responsibility in securing

52. *Nicaragua v. Costa Rica*, Case 01.06, Inter-Am. C.H.R., Report No. 11/07, OEA/Ser.L/V/II.130, doc. 22 rev. para. 197 (2007).

compliance with human rights norms is accepted by most of the human rights bodies. The Human Rights Committee in the aforementioned General Comment 31 stated:

Every State Party has a legal interest in the performance by every other State Party of its obligation. This follows from the fact that the ‘rules concerning the basic rights of the human person’ are erga omnes obligations and that [...] there is a [stipulated] obligation to promote universal respect for, and observance of, human right and fundamental freedoms.⁵³

53. General Comment 31 not only promotes the principle of inter-state cooperation but also supports the idea of collective guarantee. If every State party has an interest in the performance of other State parties, it follows that States may need to act collectively to support the performance of another State. General Comment 31 explicitly anticipates the necessity of this kind of cooperation when it states that “without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy...is not discharged...States parties should also assist each other to bring to justice persons suspected of having committed acts in violation of the Covenant.”⁵⁴ The importance of an effective remedy is emphasized by this requirement that States assist each other, but also by the encouragement that States Parties “provide for and implement provisional or interim measures to...endeavor to repair at the earliest possible opportunity any harm that may have been caused by such violations.”⁵⁵ General Comment 31 thus stands, in this context, for two propositions—that making reparations to victims is the highest priority and that States must take measures beyond their individual, normal obligations to see that reparations are made, whether those measures mean assisting another State Party or implementing provisional or interim measures to bring justice to the victim without delay.

53. See Nicaragua, *supra*, note 48, para. 201.

54 UN Human Rights Committee (HRC), General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13, available at <http://www.unhcr.org/refworld/docid/478b26ae2.html>.

55. *Id.*

54. The Commission perhaps best captures the underlying basis for this inter-State and collective obligation with the following statement: “The intention of the signatory States is the preservation of the system for protection of human rights, and if a State violates its obligation to ensure the human rights of the individuals under its jurisdiction it also violates its undertaking to other states.”⁵⁶ It follows that OAS Member States should make efforts to assist their fellow Members in the face of legitimate hardships. Under a principle of collective guarantee, each State will have an explicit interest in ensuring that each decisions of the Court is fully complied with as well as an obligation to, in certain circumstances, collaborate with a particular State that would have difficulty in fully complying with the Court’s decision.

B, The practice of other human rights bodies and international tribunals

55. The idea of a collective guarantee is not unique to the Inter-American system. We have already mentioned that the Human Rights Committee in its General Comment 31 has referred to this idea. The European Court of Human Rights has, on multiple occasions, made references to and concretely applied this principle. In one of its leading cases, *Ireland v. the United Kingdom* (1978), the European Court held the following:

Unlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a “collective enforcement”.⁵⁷

56. In *Soering v. United Kingdom* , the European Court declared that, when interpreting the European Convention, “regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental

56. See Nicaragua, supra, note 48, para. 197.

57. European Court of Human Rights, Ireland vs. United Kingdom case, judgment of 18 January 1978, Series A no. 25, p. 90, paragraph 239.

freedoms.... Thus, the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective.”⁵⁸

57. In addition to the European Court of Human Rights, the International Court of Justice (ICJ) has, on several occasions, propounded a positive obligation on all States to collectively ensure that all States respect certain essential elements of international law. In the *Barcelona Traction* case, the ICJ declared that *erga omnes* obligations (obligations of a State towards the international community as a whole)⁵⁹ are “by their very nature...the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection.”⁶⁰ Haiti violated its *erga omnes* obligations by violating international human rights law. This matter should inherently concern all of the States in the Inter-American System, whose purpose is to ensure the protection of an individual’s human rights.

58. The ICJ also announced, in its *South West Africa* case, that “[the ICJ] would be failing in the discharge of its judicial functions if it did not declare that there is an obligation, especially upon Members of the United Nations, to bring that situation [that has been determined to be illegal] to an end.”⁶¹ The ICJ links this positive obligation on UN Member States to act to bring an illegal situation to an end, with the positive obligation imposed on a state to *seek* assistance to end such a situation: “the injured entity is a people which must look to the international community for assistance.”⁶² This positive obligation imposed on all States by the ICJ to both take action and to seek help to bring an end to a violation of

58. European Court of Human Rights, *Soering Case*, decision of 26 January 1989, Series A no. 161, paragraph 87.

59. *Barcelona Traction, Light, and Power Company, Limited, (Belgium v. Spain)* 1970 I.C.J. 3, at 32 (February 5).

60. *Id.*

61. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276*, 1971 I.C.J. 17, at 54 (June 21).

62. *Id.* at 56, para. 127.

international law is the same principle of collective guarantee that already exists within the Inter-American System.

59. In *The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the ICJ noted that “it is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end. In addition, all the States parties to the Geneva Convention... are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention.”⁶³ The ICJ has, therefore, placed a positive obligation on *all* States to take action to remedy noncompliance with international law, just as we respectfully ask this Court to do.

C. Invoking a principle of Collective Guarantee in the Inter-American System satisfies the object and purpose of human rights treaties

60. All OAS member States’ obligations need to be interpreted in light of the object and purpose of the American Convention. Article 31 of the Vienna Convention on the Law of Treaties states, “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”⁶⁴

61. The Court consistently has used the Vienna Convention’s rules of interpretation. The tribunal has declared that the “object and purpose of the Convention is not the exchange of reciprocal rights between a limited number of States, but the

63. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 I.C.J. 13 (July 9).

64. Vienna Convention on the Law of Treaties, Art. 31 (March 21, 1986) available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_2_1986.pdf

protection of the human rights of all individual human beings within the Americas, irrespective of their nationality.”⁶⁵ The object and purpose of the Inter-American System is, therefore, to protect individuals’ human dignity while respecting essential human rights. The Court has added that the object and purpose of the Convention plays a central and crucial role in its interpretation of the treaty. Particularly, the Court has said that “When interpreting the Convention in accordance with its object and purpose, the Court must act in such a way that the integrity of the system established in Article 62(1) of the Convention is preserved.”⁶⁶

62. In a broader sense, invoking a principle of collective guarantee conforms to the object and purpose of human rights treaties. Former Court president, Cecilia Medina Quiroga, has asserted that human rights treaties not only establish rights for individuals and obligations for States, but also create a system to protect human dignity, the maintenance of which should be in the interest of all States participating in the system.⁶⁷ This maintenance imposes “the obligation to cooperate, [as cooperation] has a key role to play in ensuring universal support for the interests of humanity.”⁶⁸

63. The object and purpose of the Inter-American System can be fulfilled by employing a principle of collective guarantee in Mr. Fleury’s case. In Mr. Fleury’s case, Haiti may be required to seek help from the other OAS Member States in order to comply with the Court’s decision. By seeing that the Court’s decision is complied with, Haiti would ensure that Mr. Fleury’s human dignity is

65. The Effect of Reservations on the Entry Into Force of the American Convention on Human Rights, Advisory Opinion OC-2/82, Inter-Am. Ct. H.R. (Ser. A) No. 2, para. 27 (Sept. 24, 1982).

66. I/A Court H.R., Case of the Constitutional Court v. Peru. Competence. Judgment of September 24, 1999. Series C No. 55

67. Cecilia Medina Quiroga, Las Obligaciones de Los Estados Bajo La Convención Americana Sobre Derechos Humanos in LA CORTE INTERAMERICANA DE DERECHOS HUMANOS, UN CUARTO DE SIGLO: 1979-2004 214 (“Es evidente, por lo tanto, que la Comisión ejerce sus funciones de control en representación de todos los Estados miembros de la OEA, señal clara de la existencia de una garantía colectiva.”).

68. Nina HB Jorgensen, The Obligation of cooperation, in *The Law of International Responsibility*, 700. Ed. James Crawford, Alain Pellet and Simon Olleson.

respected, despite its inability to make Mr. Fleury's reparations itself.

64. If the Court were to not develop a principle of collective guarantee in Fleury's case, it could mean that reparations will not be made to him, despite the human rights violations he suffered. Without the principle of collective guarantee, the Court's decision could go unenforced because of Haiti's lack of resources and capacity.

65. This noncompliance would amount to a denial of Fleury's rights because, as the Court stated in *Baena-Ricardo et al. v. Panama*, "if the responsible State does not execute the measures of reparations ordered by the Court at the domestic level, it is denying the right to access to international justice."⁶⁹

66. Given the consequences of the earthquake, the likelihood that Haiti will not comply with its Article 63(1) obligation to provide effective remedies to Mr. Fleury, will have a negative impact on the Inter-American Human Rights System as a whole. Non-compliance with a Court's judgment not only leaves the victim's violations unaddressed, but also maintains the status quo, likely giving rise to future human rights violations. In this sense, it is worthy to recall that the commentators of Draft Articles on Responsibility of States for Internationally Wrongful Acts state that "it is...clear that the obligation to cooperate applies to States whether or not they are individually affected by the serious breach."⁷⁰ As members of the Inter-American System, OAS Member States have a stake in ensuring that Haiti complies with the Court's judgment, even if it means calling on other Member States to support Haiti, so as to protect the Inter-American Human Rights System.

67. In the case of *James et al.*, in which Trinidad and Tobago refused to comply with

69. *Baena-Ricardo et. al. v. Panama*, Competence, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 104, para. 83 (Feb. 2, 2001).

70. Draft Articles on Responsibility of States for Internationally Wrongful Acts, Article 41(3), (2001).

the Court's orders, the Court declared "that, should the State execute the alleged victims, it would create an irremediable situation incompatible with the object and purpose of the Convention, would amount to a disavowal of the authority of the Commission, and would adversely affect the very essence of the Inter-American system." Noncompliance, therefore, undermines the object and purpose of the Inter-American System and, as such, should be guarded against.⁷¹

68. In addition to amounting to a denial of rights, noncompliance with the Court's decisions defeats the *raison d'être* of the Inter-American System. This Court explains in *Baena-Ricardo* that:

It is necessary to establish and implement mechanisms or procedures for monitoring compliance with the judicial decisions, an activity that is inherent in the jurisdictional function. Monitoring compliance with judgments is one of the elements that comprises jurisdiction. To maintain otherwise, would mean affirming that the judgments delivered by the Court are merely declaratory and not effective. Compliance with the reparations ordered by the Court in its decisions is the materialization of justice for the specific case and, ultimately, of jurisdiction; to the contrary, the *raison d'être* for the functioning of the Court would be imperiled.⁷²

69. Compliance is the integral part of access to justice because it bridges the gap between announcing rights and securing rights. By ensuring that the Court's decisions are complied with, a principle of collective guarantee would fulfill the object and purpose of the Inter-American System. In order to ensure all of its decisions are complied with and, therefore, that the object and purpose of the Inter-American System is fulfilled, the Court needs to invoke a principle of collective guarantee.

70. A principle of collective guarantee would also promote a regional public order, to

71. *Matter of James et al. Regarding Trinidad and Tobago, Provisional Measures, Order of the Court* Inter-Am. Ct. H.R. (Ser. E.), para. 2 (May 25, 1999).

72. *Baena-Ricardo et. al. v. Panama, Compliance, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. XXX, para. 72* (Feb. 11, 2008).

further ensure that the object and purpose of the Inter-American System is fulfilled. As mentioned above, the Commission declared in *Nicaragua v. Costa Rica* that the American Convention “enshrines a system that constitutes a genuine regional public order the preservation of which is in the interests of each and every state party.”⁷³ A principle of collective guarantee would enable OAS Member States to better see themselves as guarantors of the Inter-American System and, by extension, guarantors of the human rights of all persons within the system. A regional public order would heighten the protection and defense of human rights, contributing to the object and purpose of the Court.

D. Collective Guarantee helps maintain the effectiveness and legitimacy of the Inter-American System.

71. The Inter-American System aims to protect human dignity. The maintenance of this system is in the interest of all States participating within the system.⁷⁴ When States collectively assist each other in complying with the court’s judgments, they help to maintain the system by enhancing its effectiveness and legitimacy.

iii. Effectiveness Requires a Principle of Collective Guarantee

72. Effective adjudication can be defined in terms of a court’s basic ability to compel or cajole compliance with its judgments. In the supranational context, effective adjudication depends on a supranational tribunal’s ability to secure such compliance by convincing domestic government institutions, directly and through

73. *Nicaragua v. Costa Rica*, supra, note 48, para. 197.

74. See Cecilia Medina Quiroga, *Las Obligaciones de Los Estados Bajo La Convención Americana Sobre Derechos Humanos in LA CORTE INTERAMERICANA DE DERECHOS HUMANOS, UN CUARTO DE SIGLO: 1979-2004* 214 (“Es evidente, por lo tanto, que la Comisión ejerce sus funciones de control en representación de todos los Estados miembros de la OEA, señal clara de la existencia de una garantía colectiva.”).

pressure from private litigants, to use their power on its behalf.⁷⁵

73. Maintaining an effective court, one that compels adherence to its judgments, is crucial to achieving the goal of protecting individuals human rights within the Inter-American System. The Court has explicitly committed itself to the goal of maintaining an effective system. As the Court stated in the Case of Baena-Ricardo et al. v. Panama, “It is necessary that there are effective mechanisms to execute the decisions or judgments [of this Court], so that the declared rights are protected effectively.⁷⁶ The execution of such decisions and judgments should be considered an integral part of the right to access to justice, understood in its broadest sense, as also encompassing full compliance with the respective decision. The contrary would imply the denial of this right.”⁷⁷ As demonstrated Baena-Ricardo, the Court demands that effective remedies be in place not only to execute domestic judgments, but also to execute the judgments of the Inter-American Court.

74. In fact, the Court has, on several occasions, strongly emphasized the importance of States Parties to the Convention to guarantee compliance with its provisions and its effects (*effet utile*). The tribunal has said that:

[t]his principle applies not only to the substantive provisions of human rights treaties (in other words, the clauses on the protected rights), but also to the procedural provisions, such as the one concerning recognition of the Tribunal’s contentious jurisdiction. That clause, essential to the efficacy of the mechanism of international protection, must be interpreted and applied in such a way that the guarantee that it establishes is truly practical and effective, given the special nature of human rights treaties (cf. *infra* 42 to 45) and their collective enforcement.⁷⁸

75. Laurence R. Helfer and Anne Marie-Slaughter, *Towards a Theory of Effective Supranational Adjudication*, 107 *Yale L.J.* 273, 276 (1997).

76. *Baena-Ricardo et al. v. Panama, Competence, Judgment*, Inter-Am. Ct. H.R. (Ser. C) No. 104, para. 130 (Feb. 2, 2001).

77. *Case of Goiburú et al v. Paraguay*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 153 at 32 (Sept. 22, 2006).

78. *Ivcher case*, see para. 37.

75. In this case, Haiti may lack the necessary resources and ability to fulfill its obligations under international law. However, this fact should not deter the Court from issuing a judgment that will effectively secure reparations for Mr. Fleury. This can be done though invoking the principle of collective guarantee. If the Court invokes collective guarantee, Haiti will have to make a reasonable effort to fulfill its obligations, which may require seeking the assistance of other OAS Member States. The OAS then should take steps to ensure that Haiti receives the necessary assistance to fulfill its obligations under international law to provide Mr. Fleury with reparations.

76. The Court has invoked this idea of collective responsibility as a means to achieving effective remedies in the past. In *Goiburú*, the Court acknowledged a duty to collaborate in the context of investigating and punishing human rights violations.⁷⁹ The same rationale requires the Court to recognize that Member States have a reciprocal duty to ensure reparations for victims. We urge the Court to utilize this principle of inter-State cooperation in *Fleury's* case, should Haiti remain so incapacitated by the earthquake that it will be unable to comply with potential Court-ordered reparations.

77. Effective remedies are crucial to the maintenance of a functioning human rights system. Cooperation between States “is often the only way of providing an effective remedy” for the gravest breaches of international law,⁸⁰ including and

79. See Laurence R. Helfer and Anne Marie-Slaughter, *Towards a Theory of Effective Supranational Adjudication*, 107 *Yale L.J.* 273, 276 (1997) (“Various formulations of the sources of judicial legitimacy include the following components, related to both structure and process: impartiality; principled decision making; reasoned decision making; continuity of court composition over time; consistency of judicial decisions over time; respect for the role of political institutions at the federal, state, and local levels; and provision of a meaningful opportunity for litigants to be heard. This list is not intended to be exhaustive; further, many of the factors overlap. Nevertheless, it offers a sense of the judicial attributes that undergird the “compliance pull” of judicial decisions) See Also, *Casey v. Planned Parenthood of Southeastern Pennsylvania*, 505 U.S. 833, 981 (“The Court's power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands.”)

80. See Draft articles, *supra*, note 79.

especially international human rights law. The Court should seek to issue judgments that will effectively provide remedies and protect human rights. If the Court orders Haiti to make reparations that the State is unable to make, then the Court will be providing ineffective remedies. Through the principle of collective guarantee, the Court can ensure that Mr. Fleury receives reparations and that the judgment is, therefore, effective.

ii.. A Duty of Collective Guarantee to Enhance the Legitimacy of the Court

78. Invoking a principle of collective guarantee helps to maintain the Inter-American System by enhancing the System's legitimacy. A court system is generally perceived as legitimate because it makes valid, reasoned and consistent decisions, and produces widespread compliance with those decisions.⁸¹ When the Court urges States to act collectively to protect human rights, it also urges States to maintain the system by enhancing the legitimacy of the Court and its decisions.

79. When States assist in fulfilling the Inter-American Court's decisions they demonstrate to the international community that the Court's decisions are valid. If States within the Inter-American system assist Haiti in complying with the Court's judgment they would not only demonstrate that they perceive the court's decision to be valid and reasoned but would also encourage others to perceive the Court's decision this way. Likewise, consistent judgments contribute to a court system's legitimacy.⁸² A duty of collective guarantee helps to promote consistent judgments. When States assist in fulfilling the Court's judgments they encourage the Court to make similar judgments in the future.

80. We urge the Court to consider that invoking a principle of collective guarantee will enhance compliance with the Court's judgments. When member States

81. *See id.*

82. *See id.*

ensure that each member fulfills its international obligations, the Court's judgments are more likely to be fulfilled. Widespread compliance with judgments also enhances the Court's legitimacy.⁸³ Widespread compliance affects perceptions about the system and the Court's judgments, ultimately affecting how States will react to the Court's judgments in the future.

81. Widespread compliance cannot be attained if States fail to fulfill the Court's judgments. Moreover, non-compliance undermines the legitimacy of the system. In discussing the failure of Peru to comply with one of the its judgments, the Court noted how non-compliance affects the system and its legitimacy,

The steps taken by Peru sets a serious precedent that directly affects the protection system established by the American Convention on Human Rights. Since this Court is entrusted with defense of the totality of the system, we respectfully request that, as the depositary of the Convention, you take measures that you consider appropriate in view of conduct on the Peruvian State.⁸⁴

82. Because the Court is entrusted with the defense of the System, we urge the Court to consider further defending the system by invoking a duty that would improve compliance, thereby enhancing the legitimacy of the system.

E. In this case, a duty of Collective Guarantee is especially prudent because many OAS States have already agreed to assist Haiti

83. The OAS and individual OAS Member States have already shown their willingness to assist Haiti, by pledging technical and financial assistance at the 2010 International Donor's Conference on Haiti.⁸⁵ On March 31, 2010, the

83. *See id.*

84. *See Baena, supra*, note 26 at para. 113.

85. *See* Press Release, Organization of American States, OAS Assistant Secretary General Addresses International Donors Conference on Haiti (March 31, 2010) (announcing that "the OAS will provide significant technical and financial assistance to the government of Haiti for the country's reconstruction efforts"), available at

international community met at the United Nations headquarters in New York to take part in the International Donors' Conference Towards a New Future for Haiti. The mission of the conference was to “mobilize international support and announce concrete financial commitments for Haiti’s recovery and reconstruction needs as the country begins to lay the foundation for its long-term development.”⁸⁶ The conference, comprised of over 150 countries and international organizations, resulted in a pledge of over \$5 billion (U.S. dollars) for the next 18 months to finance Haiti’s “path to long-term recovery.”⁸⁷ The international community has recognized the importance human rights will play in the rebuilding process. According to the Conference, the financial assistance:

[W]ill be delivered in a manner that strengthens the authority of the State, makes local governments more effective, builds the capacity of local and national institutions, mitigates vulnerability to future disasters, protects the environment, promotes human rights and gender equality, and creates an enabling environment for the private sector and civil society to thrive, all of which are critical for Haiti’s long term stability and prosperity.⁸⁸

84. Collective assistance provided by OAS Member States to ensure Haiti’s compliance with a judgment stemming from Fleury’s case will support the Conference’s goal of promoting human rights in post-earthquake Haiti. The Court is presented with an excellent opportunity to build upon the global sense of solidarity with Haiti in order to create a regional principle of collective guarantee to provide financial or technical assistance to post-catastrophe States to ensure their compliance with Court judgments.

http://www.oas.org/OASpage/press_releases/press_release.asp?sCodigo=E-103/10. In addition to the OAS, individual OAS Member States have pledged their support to Haiti, including: Argentina, Brazil, Canada, Dominican Republic, Mexico, the United States, Uruguay, and Venezuela.

86. Haiti Donors Conference, <http://www.haiticonference.org/faq.html> (last visited 15 April 2011).

87. Haiti Donors Conference, <http://www.haiticonference.org> (last visited 15 April 2011); see also Howard LaFranchi, UN Haiti Conference: more than 100 countries pledge \$15 billion, *The Christian Science Monitor*, March 31, 2010, available at <http://www.csmonitor.com/USA/Foreign-Policy/2010/0331/UN-Haiti-conference-more-than-100-countries-pledge-15-billion>.

88. Haiti Donors Conference, <http://www.haiticonference.org/communique.html> (emphasis added) (last visited 6 April 2010)

V. Conclusion and Request

85. The earthquake, striking at the heart of Haiti on January 12, 2010, left in its wake a country on the verge of complete collapse. While the international community focuses its efforts on the long and arduous process of rebuilding Haiti's governmental institutions, economy and basic social services, it is important not to lose sight of the role of human rights. Ensuring Haiti that fulfills its obligation, under the American Convention, to comply with the Court's forthcoming judgment will promote the object and purpose of the Inter-American Human Rights System: the consolidation of "a system of personal liberty and social justice based on respect for the essential rights of man." The Court has the "authority . . . to determine the scope of its own competence, and also of its orders and judgments."⁸⁹

86. We urge the Court to announce a duty of collective guarantee, whereby Haiti is required to seek the assistance of the OAS Member States so that the OAS may provide financial, technical, and/or any other type of assistance to Haiti in order to ensure that Haiti, as a State Party in violation of the American Convention—incapacitated due to force majeure—complies with the judgment of the Court.

87. We also respectfully submit a request for the Court to stipulate that the other OAS Member States are collective guarantors of the integrity and functioning of the Inter-American Human Rights System and its organs. In cases such as this, we urge the Court to announce that the collective guarantee translates into a legal duty to cooperate with Haiti and provide the assistance requested, in order to fulfill the judgment of the Court and reestablish the violated rights of Mr. Fleury.

89. See American Convention on Human Rights, Preamble