Diversity in search of a state

Legitimate democratic governance in the making

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This pyramidal universe is that of order and hierarchy, a vertical and linear order culminating, as the etymology informs us, in a transcendental and sacred (hieros-arkè) power – wielded yesterday by a divine right ruler, later by a ruler endorsed by universal suffrage, today by politico-financial directories. In Great Leviathan's shadow, quietly confident in a convergence of the rational with the material, order reigns in the country.

Our world?

So it is down to us to invent a world in which [...] political sovereignties would be relative and, citizenships shared, rationalities would be many and values plural... a networked world.

Our world?

F. Ost and M. Van de Kerchove[1]

Understanding, identifying, seeing, bringing out what actually underpins power adhesion have been the IRG's constant pursuit over the past six years through its "Legitimacy and Entrenchment of Power" program. It has placed us in a position to scrutinize the sources of power legitimacy, whether exercised at the level of the village or of a supra-national organisation, via those exercised at state level, and this in diverse socio-cultural and historical contexts. Concluding, at the term of our analyses and meetings, to the divorce between the populations, the institutions and the elites, we wrote in the latest issue of this periodical that this growing gap raised in increasingly violent terms the ongoing question of a crisis of politics and democracy. Indignations, revolutions, and demonstrations: all over the world, action has, in recent months, spoken loudly; indeed demanding dignity and social justice... From Tunis to Washington via Madrid, the call for a democratic governance "from, by and for" all its actors compellingly urges the reconnection of societies with their state.

1. *De la pyramide au réseau ? Pour une théorie dialectique du droit* [From Pyramid to Network ? for a dialectical theory of law], Bruxelles, Presses des Facultés universitaires Saint-Louis, 2002, 587 pages, p. 4-5.

One of the deep causes of this uncoupling has to do with the fact that the symbolic value of the image of the state and public institutions has been lost. The legitimacy of power is culturally, socially and psychologically anchored. It reflects the ever-shifting perception a group has of authority and of itself.[2] What founds power adhesion (its legitimacy) and the formal expression thereof (its legality) evolves. Whenever the regulation and legitimacy constructed by the state are at odds with social pluralism, the state no longer answers the expectations from civil society, the private sector or the institutions, be they symbolic (in terms of conceptions of social justice, power, etc) or material (security, basic services, etc.). Hence the state is less and less acknowledged as the legitimate political authority by those entities, who turn to other regulations and thereby legitimate other powers besides the state, be they traditional, religious, armed organisations ... etc.

This analysis stems from the prism of legitimacy understood in its most pragmatic meaning: is legitimate what is accepted as such by the actors. Accordingly, this positions us beyond its formal definition whereby is legitimate what is conform to the law. As it happens, in order to last, legal power needs to be socially anchored and upheld in the populations' representations and practices. An institution can only endure when it is connected to the societies it is supposed to embody and rule so that the general interest and the actors' material and symbolic needs meet. Uprooted, the institution withers and becomes detached from its people. Deep-rooted, it grows like a rootstock on multiple bases that reinforce its foundations. This anchoring partakes – and is part – of the social sentiment, the shared mindscape which underpins the "social contract", the "founding myth", the "sacred history" (use as dictated by context), that is a "binder" that substantially founds the involvement of the actors in the collective endeavour.

Thus the notion of legitimacy helps take into account the diversity of regulatory (e.g. religion or tradition-inspired) systems operating in effect alongside the law, the rule of law in a given society, as well as the complexity of power legitimation processes resulting from this plurality. Each of these systems induces values, authorities and norms that bear on the idea and practices of power. The notion of normative pluralism addresses the situation, extant in any society, wherein several normative systems (co)exist and legitimacy sources interact. The legitimation of power is constructed by

2. Séverine Bellina, "La légitimité dans tous ses états: réalités, pluralisme et enracinement des pouvoirs [Legitimacy every which way: realities, pluralism and rootedness of powers]", in *Chroniques de la gouvernance*, ECLM, 2008-2009, p. 62.

exercising it and thus in the relations set up between these sources of legitimacy. The regulation enshrined in state instituted power is duty-bound to embody this pluralism as well as its attendant cross-fertilisation. This unavoidably brings into question the principles and tools of the modern state. Indeed, founded in the myth of a unity into which diversity must blend, the modern state makes the law and more specifically the rule of law the main – nay the sole – regulation and norm of social regulation. Now the state, in the age of governance, is rooted in the paradigm of pluralism. It abides by the rule of laws. It is governed not only by the rule of law, but also by the rule of laws.

What regulations do actors recognize as legitimate in a given society? How do they interact? What impact do they have on the instituted power? What are the implications of normative pluralism at the level of state-run institutional engineering and regulation? What are the tools and drivers of this paradigm shift? While still pursuing and broadening its intercultural and cross-disciplinary work of analyses and proposals around legitimacy, and with a view to address these questions, the IRG has sought to reinforce its analyses of the tools and means of legitimate democratic governance founded in a pluralist paradigm. The latter's eventual success lies with the creation of new tools and processes matching the exercise of political power's growing complexities. With the paradigmatic and epistemological reversal that is normative pluralism, it is possible to reclaim practices and to go beyond the dogmatic conceptual frameworks unable to take these evolutions into account. Therein lies the challenge facing political powers today, which they must take up by reinventing the art of democracy and by making pluralism the corner stone of legitimate democratic governance.

When legitimacy questions the modern conception of the state: normative pluralism

Though it is nowadays broadly admitted that the legitimacy of power relies on a range of sources, the point was hard-won. What with the state no longer alone to front public action, its role and the regulation it produces must be redefined accordingly. Having broken with the hierarchical and pyramidal vision of public action, the governance prism proposes to envisage it operating in networks, between the law and the other regulations daily called upon by diverse actors. A whole range of regulation systems operate alongside those of the state known as the Law. Furthermore, legal systems other than the state's (e.g. traditional, religious, by-laws) intervene in societies' actual social regulation (giving us legal pluralism). This trend, inherent to processes of co-production of public policies at work in participation and consultation practices is developing in all the regions of the world, from local to global level.

What is at stake today, from the angle of legitimate democratic governance, rests with understanding these sources, their diversity, their evolutions, and above all their interactions. With this in mind, the IRG trawls through the different regions of the globe better to understand the diverse regulations actually operating in a given society along with the precise way in which they dovetail. The International Meeting Process for Debate and Proposals on Governance[3] (see box below) coordinated by the IRG with the support of the Foundation Charles Léopold Mayer, the French Ministry for Foreign and European Affairs in partnership with Columbia University, the Agence universitaire de la francophonie (AUF), the Alliance to Refound Governance in Africa, as well as all the local partners in each region has no other purpose. Our approach aims to capture the broadest possible range of sources of legitimacy – swiftly prompting one constatation: there are as many sources of legitimacy as there are actors, situations, interactions... We are inescapably lead to identify sources ranging from the most obvious (to do with e.g. tradition, religion, the economy, formal legality – be it international cooperation, human rights, elections, constitutions), to the most questionable (associated with violence, sectarianism, etc.) but still invoked by the actors, as they are more efficient than the state in fulfilling their needs. The latter are the markers of the legitimation – or not – of state power. The extent to which they are included or excluded alongside other sources of legitimacy is an indicator of a state's fragility, nay of its replacement. It then becomes clear that it is not so much the inventory of legitimacy sources that counts than the understanding of the dynamics at work, the principles of evolution and connectedness. Each of these types of legitimacy has its own authorities, its norms and its values. As such, each of these sources has a limited life span. It constantly evolves in relation to its mobilisation by actors and thereafter according to the interactions this entails with the others. Each of these components, (underlying values, norms authorities) interacts with the components of other normative systems. The resulting equations and dosage are therefore manifold and changing. Thus liberation movements in Southern Africa seek to reinforce their legitimacy as political party through religion. In South Africa for instance, the reference to the liberation struggle alone is no longer enough for the African National Congress, and its leaders derive fresh charismatic vigour from religious references. Some experts attending the Polokwane regional meeting went so far as to call for the "desacralisation" of the party. Thus the legitimation of power relies on an ever unstable equilibrium as Elizabeth Dau shows below.

3. See the Mapping of the International Meeting Process, partners and products on the IRG site: <http://www.institut-gouvernance.org/spip.php?article24&axe=1>.

The sources of legitimacy in interaction: The International Meeting Process for Debate and Proposals on Governance

At each stage of the International Meeting Process for Debate and Proposals on Governance, the IRG and its partners bring out the actors, the values and the norms that found the populations' adhesion for power thus conferring it its legitimacy.[1] There have been meetings in Bamako for Western Africa(2007), Polokwane for Southern Africa (2008), Lima for Andean America (2009), Arusha for Eastern Africa (2009), Yaoundé for Central Africa (2010) and finally Saarbrücken for Europe (2011). In 2012, the meetings continue in Tunisia for Northern Africa and thereafter head for other destinations in Europe, Northern America, Latin America and Asia.

Each meeting along this Process is conceived of as a four-way exchange forum: intercultural, inter-actor, inter-disciplinary and inter-tier. We deeply believe that, for all that it is exercised in a specific region, critical thinking must ensure a cross-fertilisation of worldviews and representations as well as the active participation of all the stakeholders. Problems must be envisaged in a broad perspective taking in e.g. the social, economic, political and cultural, anthropological, legal spheres whilst at the same time keeping in mind their territorial dimensions from the local to the global. For the IRG, this approach represents a methodological imperative inherent to the very notion of public governance.

Each stage of this process helps refine our questioning along with our approach towards a better grasp of legitimacy; as a result of which the typology of sources of power legitimacy established jointly with Bordeaux's Africa and the World Laboratory (LAM) and the Norwegian Institute for International Affairs (NUPI)[2] has been completed and refined. Alongside international legitimacy, often founded on international legality (human rights) or that of the modern state (constitutions, right of the state, etc.), it is often the sources of legitimacy linked to shared beliefs (tradition, religion and historical events, such as the National Conferences or the liberation struggles) that impose themselves. Behind, and often in competition with the state or in its stead, regulations unfold designed to meet the actors' symbolic and/or material needs. Most of the time they are related to basic services delivery, security, justice, health and education, etc.

Thus each meeting makes it possible for each region concerned to better recognise and understand the main regulations called upon by the actors and the way these regulations interact: those are as many underlying norms, authorities and values which in everyday life, mingle, disregard or compete with each other. It is through the analysis of these interactions as they are daily lived in a given context and time that the Process seeks to identify the situations that weaken public action and divide societies or, on the contrary, generate hybridizations and contribute to the legitimacy of governance. We discover constantly mutating situations. In spite of this changeable aspect, major trends are coming to the fore. Across continents, the scattering of the power's means of social anchoring outside the state undermine

political power and divide societies. As participants in the Lima[3] meeting diagnosed, the state then finds itself "external" to the interactions operating in the society and seems unable to take them into account in public regulation. In Mali, in Western Africa,[4] it is via social mediation and the traditional authorities that people prefer, in more than 99% of cases, to resolve their land conflicts. They have, in this way, turned to a symbolic legitimacy founded in shared values that exist in parallel to the legality of the state system. In Eastern Africa and in Latin America the armed actors' ability to ensure security locally (for instance the FARC, the Revolutionary Armed Forces of Colombia) earns them the populations' recognition. This "practical legitimacy"[5] – output legitimacy – refers to these actors' ability to meet a population's need, in this instance the need for security, and this even if some East African debate participants deplored the admission by stealth, in the slipstream of State deficit, of this source related to violence.

This out-and-out vacancy of the state also helps some actors to find an extra anchoring and a fresh legitimacy angle. Such are the Central African Evangelical churches (Revival churches). Beyond a symbolic legitimacy founded in values of integrity, good morality, their leaders' sense of responsibility, justice or peace, these churches re-found their legitimacy by taking on a more and more public, indeed political, role and by stepping in for the state. Through the creation of solidarity networks at local level, and by organising congregational giving and fund raising that ensure the delivery of basic public services (health, education) and bolster the economy (farming, micro-credit), these "people's" churches reinforce their social anchoring thanks to their proven efficiency to meet the populations' essential needs.

The Northern African context, the next stage in our Process, will no doubt offer extra opportunities to question the multiple registers propping the legitimacy of religion as a political authority in ongoing political developments. Strong in its presence in the collective

psyche, it reinforces its legitimacy in the eye of the populations at a time when the state has not only abandoned but also ill-treated these populations for decades and when security is a foremost concern. Fundamentally, it still is for many the "need for a state",[6] for regulation, for public action in the sense of social justice,[7] and for the delivery of basic services that leads the populations to entrust these missions to actors other than the state authority. Through this Process and its diverse activities around legitimacy, the IRG hopes to put forth with its partners proposals that would advance legitimate democratic governance processes.

Élisabeth Dau, IRG

It is also at the level of the actor, whether a person or a group, that the integration and imbrications between diverse normative systems occur. Indeed individual actors are "the bearers of rights and obligations in one or more regulatory systems".[4] In a given situation, it is actually rare that only one of their statuses be called upon, and what is more, according to their material and symbolic standing and interaction with the system, a dosage intervenes. To which must be added the unpredictable nature of choices made at a personal level, which relates among other things to what Richard Rechtman[5] calls the capacity for "resistance", a criterion for action as valid as material interest. Thus comes into light an extra element in understanding the challenges pertaining to the legitimacy of power and the imbrications of its sources. Instituted power must also take into account parallel regulations related to the fragmentation of legitimacy and evolving around the psychologisation of the political and the emergence of an action principle coloured by psychic categories (suffering, well-being etc.). The state has to compete with these sources of legitimacy that have arisen from failings observed on its traditional intervention "patch" (security, justice etc.). State legitimacy is thus internally belaboured by the twin occurrence of "fragmentary legitimacies" asserting themselves and the splintering of the crosscutting civic legitimacy. The field of its legitimacy thus evolves under pressure from the imbrications and mutations of legitimacy sources and also from the emergence of new ones, whether at infra-state level as we have just seen or at supra-state level.

International events have recently imposed finance into the category of international sources of power legitimacy. As the participants of the seminar co-organised by the IRG in Saarbrücken[6] in May 2011 noted, globalisation has, since World War II, been built around the economy. It developed along liberal lines around values such as economic growth and individualism. Over the last decade, it yielded to finance with a corollary weakening of politics, the states and ideologies. This source exhibits a universal dimension since all the states depend today on the credit rating agencies and other actors in this sector. The emergence of this source also bears witness to

4. See «La légitimité dans tous ses états: réalités, pluralisme et enracinement des pouvoirs [Legitimacy every which way: realities, pluralism and rootedness of powers]», in *Chroniques de la gouvernance 2008-2009,* ECLM, p. 60-61.

5. See in this issue the interview with Richard Rechtman, p. 291.

6. Workshop "The comeback of the Nation-State, populism and political disenchantment: the issues of EU legitimacy and traditional democratic models in Europe" 13th edition of the Franco-German dialogue Thinking tomorrow's Europe, organized by ASKO EUROPA-STIFTUNG and the European Academy of Otzenhausen, Saarbrücken 5, 6 May see proceedings < http://www.institut-gouvernance.org/IMG/pdf/3TWSarebruckmai2011ENG.pdf>.

the growing gap between the elites and the people and exposes the fragility of states become powerless.

Coincidentally, in the framework of the study on the legitimacy of power quoted above, we drew attention, to another significant trait in respect of the relations between sources: the fact that international legitimacy, notably that concerned with international and political development-aid relations, had prevailed in the assessment of state legitimacy, on the basis of the "modern" state's legal-rational and liberal principles. The principle of elections as promoted and forwarded by the international community as prime and often final tool of democracy is one of its most glaring illustrations. It is impossible to reduce democratisation, let alone democracy to the vote. It is impossible to reduce legitimate democratic governance to one predetermined democratic model. Whereas the vote can be a mean of power legitimation, it can also be a factor in a country's instability and fragilisation. In order to be a driver of power legitimacy, the elections themselves must be legitimated so as to fit in with the shared beliefs and collective representations which, from tradition or religion to human rights, inform the community's sense of itself. They must embody processes for the nomination of leaders that correlate with both the socio-cultural and historical practices of the societies concerned and the actual structures (which are not restricted to authorities emerging from the ballot box) that underpin these states' political life. In short they must fit in constructively with other sources of legitimacy at work in the country, the region, the city, the village. How could elections be better integrated in the power legitimation and institutionalisation processes in Africa? That is the question the IRG, alongside Science-Po Bordeaux's LAM, aims to answer in a study of electoral processes in Africa (see box below)

Electoral processes in Africa: drivers of instability or legitimacy? Which development policies?

Science-Po Bordeaux's Africa in the World Laboratory (LAM) and the Institute for Research and Debate on Governance are conducting, along with a cross-disciplinary and multi-actor international network, a study aimed at understanding better the extent to which electoral processes are suited to the context in which they take place. The object is to establish whether they found and reinforce the legitimacy of the elected authorities (especially post crisis) or, on the contrary, represent sources of instability and fragilisation of state and society. Commissioned by the Democratic Governance mission under the general directorate for globalisation at the French Ministry of Foreign and European Affairs, the study must lead to

concrete proposals towards redefining French cooperation-aid policies of support to electoral processes and more specifically the role of foreign actors.

The electoral system currently used in many states consists in appointing, depending on the electoral model chosen, one leader or a group of leaders with full latitude thereafter to enjoy a monopoly on the exercise of power in the name of majority rule. This is one of the reasons why presidential elections elicit the most serious crises, unlike local and legislative elections which are not associated in the same way to the capture of power. Now, traditionally, in many African countries, the exercise of power is more readily associated with consensus than with a prevailing majority. It must not just be the victory of one camp over the other but also the expression of "togetherness". The exercise of power supposes that the minority be associated to its benefits, thus sweeping aside its opposition status. Many political crises in Africa arise from allocating the monopoly of power to the person or group who have won the political argument, discarding a global arrangement between rivals (Niger, Burundi, Nigeria, Mali, Guinea-Conakry…). In most African electoral crises, a solution has been found through implementing a "Political formula" (or settlement) awarding the running of state affairs to a group and allocating part of the power to the opposition (Kenya, South Africa, Niger, Mali). This shows in particular that the political significance and structural conditions of the voting event (elections in the narrowest sense) must be prepared up and down-stream. Only at that price do elections become manageable and liable to represent a moment both of tension and collective adhesion. To sum up, the "political settlement" incorporates the legal electoral norm, which can never be more than a personnel selection technique and can in no way be substituted to the political form of regulation making up the basis for legitimate democratic governance.

It is in the light of both the socio-cultural and historical practices of the societies concerned that the legitimation and institutionalisation of the state via elections needs to be called into question. The anchoring in existing practices has a powerful operational object. It is about letting go of the too normative an approach to elections which has long been championed by the donors and which consisted in setting up as a template the good election toolkit complete with its attendant political system. On the contrary it is important to rethink elections against the background of the countries in which they take place. They must be put in the service of a democratic governance that will take into consideration the legal norms but also what they do not cater for, that is other processes of political regulation and appointment, in short the other sources of power legitimacy. The outcomes of the study will be available in the spring of 2012.

Laure Espieu, project Coordinator for the LAM and the IRG and Séverine Bellina, IRG

When legitimacy refounds legality on a plural basis: the rule of laws

Competitions, complementarities, cross-fertilisation, hybridisation, embeddedness... Which of these interactions strengthen the social anchoring of power? Which are the means likely to allow what our East African colleagues called a "legitimazing legitimacy dynamics"? How are the evolutions affecting legitimacy sources and their interactions with others to be taken into account? Answering these questions sets off the operational critical thinking leading to the re-foundation of the state and democratic governance. With this in mind, the IRG has actively developed over the past two years a range of institutional partnerships, analyses and activities (see box below). Democracy and rule of law revisited through a dialogue between legal cultures:

The implications for research and education

The Francophonie, an institutional organisation that manages the political relations and cooperation between members of the International Organisation of the Francophonie (OIF) has opened the debate on what relations should be established between the complementary and competing juridicities that belabour societies. The submission of the state to the law and to its procedures in a democratic context supposes civil societies' assent to the nature and the legitimate functions of the law. Ten years after the Bamako declaration,[8] observers in the field note that the democratic management of an ever more asserted plural identity, whether in the North or in the South demands an overhaul of the regulatory models and of the politico-juridical culture within the State itself in order for it to enlist (anew) the support of its actors of social cohesion.

In the framework of its associative mandate assisting higher education institutions, the Francophonie's University agency (AUF)[9] focuses on scientific knowledge to be produced (through research), passed on (through teaching), or acquired (through study) within a project approach. The problems posed by the dialogue between legal cultures form part of one of the primary themes of the AUF 2010-2013 four year programme: This is the opportunity to find out whether it is actually feasible to interweave the strands of juridical diversity towards a fresh conception of democracy, the rule of law and fundamental rights. Given the observable processes taking legal plurality on board, the state, today faced with accelerated globalisation – notably in its economic variant – a proliferation of actors, and territorial restructuring, finds itself challenged precisely in what were still yesterday its main attributes: control of a territory, normative monopoly, ultimate sovereignty, legitimate use of force and ability to define a founding myth. Even though there is no question of dispensing with the state, or to turn it into an actor among many, a whole range of protagonists stand to compete with it internally (ethno-cultural groups, religious minorities, local authorities, associations, enterprises, economic or professional

bodies, etc,) as well as externally (international organisations, non-governmental organisations, right of humanitarian intervention, etc.)

Since 2010, the AUF and the Institute for Research and Debate on Governance (IRG) have grown a partnership addressing issues of diversity in legal cultures and the rule of law. Driven by shared ambitions of disciplinary, cultural and socio-professional open-mindedness, the AUF and the IRG are convinced of the import of legal cultural diversity when thinking up the law in the age of governance. Such innovative approaches are the harbingers of significant epistemological mutations which must be explained and nurtured. Research and training represent thus a major stake, including in terms of competences for governance actors. It is precisely with this in mind that the AUF and the IRG have decided to join forces and make the best of their complementarity to put together governance training curriculums as well as to publish materials intended for young researchers.

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To take into account the diversity of sources of state legitimacy it is necessary to quit using the usual mono-centric prism, according to which other normative orders' legitimacy exists only in regard of their fitting in with the law of the state, and acknowledge the poly-centricity of public action and of power. All too often, although the diverse normative or legal systems are recognised, they are built into the state's positive law (e.g. by legislation or codification...) never mind that it distorts, re-codifies or cuts them from their socio-cultural meaning to make them compatible with state law. The place of state's law may well have been relativised: it still remains the reference, thereby introducing a hierarchisation. Instead of favouring constructive frictions, this can lead to unproductive face-downs. We have then a case of hegemonic pluralism or of subordination as identified and explicated by anthropologists and legal-pluralist scholars.[7] These authors point out that, this being the case, the state, while pretending to draw on the law from other normative or legal systems it recognises, dictates "the other's law". It writes it under pretence of codifying it in the name of juridical security. It entrusts its interpretation to state judges and constrains its production model and its contents. It turns it down in favour of state law whenever the norms

7. After monism (interaction-free), hegemonic pluralism represents the second rung on the ladder of normative imbrications, below coordination or dialogical pluralism, as set forth in G. Otis, A. Cissé, P. De Deckker and W. Mastor's analytical grid in their overview of the dialogue between legal cultures and governance. See *Cultures juridiques et gouvernance dans l'espace francophone. Présentation générale d'une problématique*, publication du programme thématique "Aspects de l'État de droit et démocratie" [Legal cultures and governance in the francophone space. Overview of the problems in "Features of the rule of law and democracy"], Agence universitaire de la francophonie, Éditions des archives contemporaines, 2010, 112 pages.

conflict. It complements it when it is lacking or silent and devalues it by privileging state law options.[8] Truth to say, this hypothesis acknowledges pluralism, a prerequisite, which opens the way to interactions and therefore respective evolutions. But in so far as the diversity of regulations is only recognised through the prism of modern rule of law, the gap with the populations continues to grow. The shared imaginary is not nurtured, leaving a vortex of tensions, authoritarian regimes and popular revolts. From this angle, the state no longer is the embodiment of societies. Such an issue, when it comes to taking into account normative pluralism, resurfaces at international level, for instance regarding the protection of human rights. Regional human rights courts or the international penal courts show on a daily basis the frictions between international law and social praxis. In order to understand better these dynamics (e.g. whether pluralism is taken into account and if so how?) the IRG and the CERDHAP have completed a study called *Normative Pluralism and the Elaboration of International Law: the case of the Inter-American Court of Human Rights (IACHR) and of the International Criminal Tribunal for Rwanda*. The study proposed to identify, should they arise, international law innovations resulting from interactions between international norm and local practices in diverse contexts. The case of the ICTR has much to teach us about a dubious enlistment of pluralism in hock to subordination or the hegemonic conception of pluralism (see box below). The case of the IACHR exposed later (see following box by Melissa Lopez) brings out for its part the concrete processes of operationalisation of a more advanced pluralism, of a plural approach to human rights.

Sitting on the grass with sages ... standing before judges: in Rwanda, the gacacas between instrumentalization and hybridization

From upholding social harmony…

The Gacaca – traditional village tribunal in Rwanda – was not always the court we know today, i.e. the jurisdiction competent to judge some of the crimes committed during the 1994 genocide. Indeed, its origins are much older. "Originally, the Gacaca was a popular court. It consisted in village assemblies during which wise men settled differences, sitting on the lawn or grass"[10]. Usually delivered by the elders of the family, this form of popular justice was subjected to no fixed venue or sessions. All social disruptions came under this form of justice, the object of which was almost "exclusively to restore social harmony"[11]. The finality was not to punish the troublemaker but rather to resocialize him. With this in mind, the "elders" or

8. *Ibid.*, p. 20-22.

the "sage", called Inyangamugayo, sought to reconcile the parties through their decisions. This, however, did not preclude potentially very severe sanctions, given the socio-cultural context, as for example the perpetrators' exclusion from the family, which is tantamount to civil death – an alternative to physical death. During the colonial period, as in much of Africa, a Western style juridical system was introduced in Rwanda; but the Gacaca remained a customary practice. During that period all the way up to the moment of independence, the Gacaca continued to play an important social mediation role.

… to national reconciliation

In the aftermath of the genocide, the Rwandan judicial and prison systems were in no fit state to deal with the crimes that had been committed. As a result, the government undertook a consultation on the ways and means to be adopted in order to judge the genocidal crimes, but also to induce a national reconciliation. Thus, the discussions organised from 1998 to March 1999 at Urugwiro[12], under the patronage of the President of the Rwandan Republic led the government to explore the "Gacaca solution". Its purpose was to enable the implementation of a justice which, being both local and traditional, would be recognised and accepted by the population. This Gacaca solution is the translation of Rwandan desire (supported to some extent by the international community) to practice post-crisis justice differently: pass form an exclusively punitive justice to a reparative justice involving the entire Rwandan society. After numerous consultations with experts and the population, organised and coordinated by the ministry of Justice, the 25 January 2001 organic law created the Gacaca jurisdictions.

Although the post-genocide Gacaca model differs from the original, it keeps, in principle, certain characteristics that incarnate Rwandan tradition and culture. Thus, the reinvented Gacaca courts have maintained a reparative conception of justice involving the offender, the offended, their families, group or community because the damage goes beyond the individual sphere. Indeed, the response that would be given by a classic judicial system (which would be imprisonment) cannot in this situation bring a satisfactory solution. The author Christian Nadeau argues in favour of such a justice capable of meeting the expectations of Rwandans: "According to John Braithwaite, reparative justice is both a response to the harm caused by the offense and a collective investigation into what the offense reveals about the offender but also the community to which they belong[13]." To repeat the words of Kofi Afande, "all things considered, the traditional African concept of sanction enjoys greater popular legitimacy, while the colonial strain raises suspicion.[14]" Therefore, the Gacaca justice, rooted in the reality and tradition of the country, appears for the Rwandan people as the best instrument for reconciliation.

The Gacaca reinvented: a model of hybridization?

The difficulty in creating post-genocide Gacacas lied mainly with the conciliation between Western and African traditional visions of justice. The first, stemming from postcolonial state law and based on written laws, is centered on the individual and on the sentence. The second, incarnated by the collective responsibility focuses

on reconciliation, even if traditional African justice also takes into consideration the punitive aspect of justice which is involved in the process of reconciliation. In fact, other then the name, the traditional Gacaca and the reinvented Gacaca do not share much. Indeed, where a more creative response had been expected from the introduction of Gacacas, the sanctions and judgements delivered have not been that different from what classical, Western style justice would have delivered. The prison sentence is warranted by the gravity of the acts perpetrated, but also because community exclusion is not necessarily appropriate either in a case of genocide or in existing African society. Hence the introduction of a traditional mechanism in line with a specific Rwandan custom did not help find a response to the need for post-genocide reconciliation. This is probably due to the fact that this mixing of justice models was expected to yield a hybridization of the values in which each system was founded as well as of their aims (social harmony versus reconciliation). When it reality it gave birth to new regulation system; which does not satisfy the Rwandan population's sense of justice and re-established social peace. It thus appears that the reinvented Gacacas combine the limitations of the two justices instead of hybridizing them. This is to say that the reinvented Gacacas failed in their mission of reconciliation.

Western and traditional visions of justice. The former, conveyed by post-colonial state law, based on written laws, focuses on the individual and on retribution, the latter embodied in collective responsibility emphasises reconciliation, even though traditional African justice does not exclude the penal aspect of justice which is part and parcel of a reconciliation process. In the event, the traditional gacaca and the made-over gacaca no longer had much in common bar their name. Where a more creative response had been expected from the introduction of Gacacas, the sanction has not been that different from what classical justice may have meted out. A prison sentence was warranted by the gravity of the acts perpetrated, certainly, but also because community exclusion is not necessarily appropriate either in a case of genocide or in existing Rwandan society. So that the introduction of a traditional mechanism in line with Rwandan custom did not help find a response to the need for post-genocide reconciliation. This is probably due to the fact that the blend of forms had been expected to yield a hybridisation of the values in which each system was founded as well as of their aims: (social harmony versus reconciliation), instead of giving birth to a new regulatory system satisfying the Rwandan populations' sense of both justice rendered and restored social peace. It turns out that the made-over Gacaca compounded the limitations of both types of justice instead of hybridising them. Needless to say these made-over gacacas failed in their conciliation mission.

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To better legitimate instituted state power, let us then "stride" from the modernity paradigm … to the plural approach. The regulation harboured by the state is no

longer destined to integrate diversity in unity (the rule of law) but instead to promote constructive dynamics propitious to unity in diversity (the rule of lawS). Thence governance can be defined as the representation of a public action poly-centred and negotiated rather than self-centred and hierarchical, thereby setting the interaction of diverse regulations, inter-normativity, at the heart of democratic governance.[9] Inter-normativity addresses a situation of dialogical pluralism or of coordination according to the typology established by G. Otis *et al.*. It is also described as union by hybridisation by Mireille Delmas Marty.[10] It rests on the reciprocity between the regulatory systems involved. It leads to new interactions between the diverse regulations liable to engage the plurality of governance actors. From then on, stepping into a plural approach, means thinking the institutional reforms, norms and regulation churned out by the state or by infra and supra-state tiers as the result of cross-fertilization or hybridization. The law of the state – as well as that of local authorities, federate state or inter-state organisations – is henceforth thought of as hybrid, mutable and plural laws.

These processes and forums of inter-normativity will have to be the object of our exploration... for though there exist many texts analysing pluralism, very few tools have been developed towards its more systematic operationalisation in a plural perspective. The IRG and its partners have decided to mine this seam. With this in mind, the IRG has opted to explore more particularly existing practices in the fields of constitutions and human rights which showcase inventive practices all over the world. We propose to develop our understanding of the methodologies underpinning a plural approach as well as an exchange of experiences. We hope to establish in due course shared diagnoses and cross-disciplinary analyses on the basis of work conducted in network with all of the categories of actors concerned. This represents a prerequisite starting point in order to develop tools suited to a legitimate and effective democratic governance. The inter-cultural approach at the heart of the Inter-American system for the protection of human rights constitutes, for instance, a prototype likely to cater for a truly "plural method" (see box below). As for constitutions, they need grow out of drafting synergies rooted in a plural approach in order to embody truly a society's shared world view and its collective project. Recent international news shows how fundamental this is, over and above participative processes. It seems to us that the

9. G. Otis "Cultures juridiques et gouvernance dans l'espace francophone. Présentation générale d'une problématique", op. cit., p. 29.

10. Ibid., p25.

pathways between these two axes are important and at the heart of a momentous paradigm shift in the field of democratic governance.

The dynamics developed within the Inter-American system of human rights, essentially around the question of violation of the rights of so-called "indigenous" communities opens an innovative avenue in that it belongs with cross-fertilisation rather than hang in with the (extreme) pendulum swing between universalism and culturalism (see box below). It allows for a juridical re-definition of key-notions in the international corpus for the protection of human rights and thus achieves an actual paradigm shift. This approach relies on a pluri-cultural stance; it requires, to start with, an intercultural reading of human rights, which supposes in turn a grasp of the meaning of damage according to the cultural values of a given indigenous community. This entails the adjustment of court decisions so that the reparations of damage meet both the principle of respect of human rights as set forth in the American Convention of Human Rights (ACHR) and the sense of justice arising from the indigenous peoples' cultural realities. If this appears to be a "top-down" dynamics and to amount to little more than the interpretation of local contexts by the ACHR, the specific nature of the exercise no less brings about a sort of circularity between human rights and the diversity in world views. This brings about a constructive interaction and thus mutual evolutions between them. This approach opens on a proper interpretation/reframing of human rights on the basis of the way indigenous peoples understand the world. Ghislain Otis and Aurélie Laurent mention in their article[11] another instance of "cross-fertilisation" taking shape in the framework of a trans-judiciary dialogue between the diverse international jurisdictions. Judges, through cross-referencing jurisprudences make it possible for the national, constitutional jurisdictions to take into account sources other than their own legal system.

Dovetailing international instruments, notably international human rights conventions with local or even national contexts has led magistrates to take into account a diversity of conceptions of what makes the law and justice. This approach brings with it the acceptation of other social practices and their recognition when time comes to define what constitutes a violation of rights and its reparation. It in turn reinforces the legitimacy of this international normativity and the effectiveness of the rulings passed by the ACHR, since they belong with a conception and a purpose of justice accepted and recognised by the actors concerned. And what if, as Koffi Afande[12]

11. See in this issue p. 265.
12. See in this issue p. 277.

explains in his article, pluralism were today driving the formulation of a shared universalism in which the state would hold on to all its legitimacy in its capacity as the supreme political authority?

Cosmovision and human rights
Jurisprudence founded in a pluricultural approach.

The Inter-American court of Human Rights.

From the management of multicultural realities…

An autonomous judicial institution of the Organization of American States (OAS) charged with the task of executing and interpreting the American Convention on Human Rights (ACHR) provisions, the Inter-American Court of Human Rights (IACHR)[15] has proved to be a forum for the discussion and the management of the diverse cultural and normative realities existing on the South American continent. It reached a turning point in 2001 when the Mayagna Awas Tingni[16] case confronted the IACHR with the challenge of interpreting the ACHR so as to take into account indigenous peoples' diverse worldviews. Referring to the principle established by the European Court of Human Rights (ECHR) whereby International Human Rights norms are "living instruments"[17] whose interpretation must be weighed according to the evolution of living conditions[18], the IACHR considers that these norms must be adapted and interpreted according to the context in which they apply[19]. For the IACHR this means that ACHR implementation must take into account the Indigenous populations' right to cultural identity[20]. The implementation of this principle has opened the inter-American jurisdictional system to the indigenous peoples' diverse cosmovisions. Such adjustments of international instruments implies accepting that other social practices exist and that, as a result, the Inter-American system of Human Rights has a duty to engage with these realities and to take them into account when defining what consists a violation of indigenous peoples' rights.

...to the elaboration of a plural international law in the field of Human Rights.

The IACHR rulings regarding indigenous communities have in the process improved intercultural understanding of Human Rights, allowed for a better understanding of the notion of damage according to the cultural values of a given indigenous community. This led the IACHR to attune its rulings concerning Human Rights violations to the cultural realities of indigenous people. Such an approach fosters actual hybridization of the normative systems (ACHR and local norms) drawn upon by the actors involved. It reinforces the rulings passed by the IACHR since they correspond to a conception and a purpose of justice accepted and recognised by all concerned.

The recognition of the collective ownership of ancestral land

In the Mayagna Awas Tingni Community case, the IACHR adopted a cross-cultural approach and handed down a founding ruling whereby it fully assumed the challenges and implications associated with taking into account multiculturalism when implementing the ACHR. This decision was also the first international court ruling to enshrine indigenous peoples' collective rights to the land and to natural resources. In this instance, on the basis of statements from members of the community involved and of expert appraisement, the IACHR concluded that, for the indigenous people, land property is considered as collective ownership for it is not concentrated in the hands of just one person but in those of the group and its community. Likewise, in the Court's eyes, the nature of the relation indigenous peoples have to the land must be recognised and understood as the essential basis of their culture, spiritual life, economical survival, their preservation and the transmission of their culture to generations to come[21].

In 2007, in the case of the Saramaka people v. Suriname[22], the IACHR backed this trend when it asserted that the State cannot authorise the development of economic projects in indigenous peoples' territories if those projects put the survival of the indigenous people concerned at risk. The Court stated that in order to assess such a risk, the state must consult the indigenous people before implementing its projects. IACHR case law contributes thereby in the development of an autochthon customary forum for the management and protection of indigenous peoples' ancestral land[23].

The influence of native American peoples' worldview in the conception of immaterial damage

In 2004 the IACHR set forth a conception of immaterial damage on the basis of a cultural and collective perspective in the case of "the Plan de Sánchez massacre v. Guatemala". In the case of massacres of indigenous people, the court found that the fact that the community could not bury the massacred people according to their rites and tradition was a immaterial damage. The Court took into account, when assessing he damages done, the fact that in the Maya Achi people's tradition, rites and custom are central to community life. The community's spirituality is expressed in the close relationship existing between the living and the dead. It is translated, through the practice of burial rituals, into a kind of ongoing contact of solidarity with the ancestors[24].

Likewise in 2007, in the case of the Escué Zapata v. Colombia case[25] and in tis estimation of the immaterial damage, the Court, on the strength of community members' evidence, took into consideration the importance of the relationship existing between the living, the dead and the land within Nasa culture. In this culture, when a child comes into the world it is as if he/she sprouted from the earth, remaining bound to it by the umbilical cord. When the person dies, they must be "sown" in the earth. The IACHR considered that the protracted wait for the return of American Indian Zapata's mortal remains, after he was arbitrarily killed by the Columbian army, had negative spiritual and moral aftereffects for his family and culture, and that it impacted beyond on the territory's harmony[26].

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When it comes to constitutions, the issues are the same and echo the more global requirements of reform or re-foundation of public institutions towards the embodiment of constructive interactions between the diverse sources of legitimacy. The object is to help in devising a hybrid regulation system accepted by all. From that angle constitutions became a priority in IRG work as early as 2008, on the occasion of the second meeting in the International Meeting Process for Debate and Proposals on Governance in Southern Africa. It became clear in the debates that constitutions cannot be considered only as legal and technical tools. Such legality does not suffice to found their legitimacy. On the contrary, when the constitution loses its symbolic dimension, whether because it does not amount to much more than an imported, transferred or duplicated technical gizmo, or conversely because it is quintessentially the embodiment of a political project, it is frequently instrumentalized and sidetracked. As a result, rather than being the cement between the state and its societies, it becomes an extra source of tension and crises. Constitutions are a reflection of the social contract between a society's diverse components and that is what the constitution-tool is called to embody. This plea to reconnect the symbolic, and therefore political, dimension of this institution has grown louder and louder with each stage of the Process. Recent international news does not want for convincing examples. Events in Bolivia, Ecuador, Iceland, Tunisia and Egypt, etc. and the subsequent constitution processes may be specific but they share a common denominator: the redefinition of the country's social contract.

For the IRG developing a plural approach to the constitutions represents a high and urgent stake. Fully aware of the specific modalities required by such an approach when applied to constitutions, we still think it relevant to make the link with the processes developed in the field of international justice and human rights to help identify or assemble the required tools. Accordingly, in 2011, we launched with our partners the International Group on Constitutions (GIC) initiative with a view to develop some critical thinking in the framework of an international multi-actor network (see box below)

The international Group on Constitutions and Constitutionalism
A plural approach to constitutions

Launched in 2011 with the support of the French Ministry of Foreign and European Affairs[27], the GIC aims to develop an international and multi-actor scrutiny of constitution processes, constitutions and constitutionalism. It will be looking for the national formulation, local implementation and updating criteria liable to promote legitimate constitutions that embody a given society's collective vision.More broadly, the object is to co-develop critical thinking on the plural approach applied to constitutions. this analysis and the prospects of paradigm change it opens may in the process return the word "constitution" to the full meaning implied in its Latin etymology : cum (with, together) and statuire (to establish).

The plan is to identify and network some key actors in each region; spot the problem areas specific to a region or shared by several regions (instigating fresh research); pool the experiences; draw together pluri-disciplinary and cross-disciplinary analyses on constitutionalism practices in diverse zones (Africa, Latin America, Arab countries, Europe); devise concrete proposals liable to reinforce the constitutions' legitimacy as vectors of a given society's collective project from the local to the supra-state level, and contribute to the international debate.

At this stage three relevant lines of enquiry have emerged from the debates: the constitution-devising processes, the nature of their content, the modalities, tools and processes for their implementation.

These three strands will be addressed by the GIC. They will structure each shared diagnosis as established in the framework of regional studies, exchanges between the members of the regional and international networks and multi-actors and pluridisciplinary meetings. GCI work is scheduled until the end of 2013 and will be concluded in 2014 by a publication on "The Plural Approach to Constitutions: an exchange of views towards legitimate governance."

Séverine Bellina, IRG

Taking stock of constitution elaboration processes, the nature and the contents of their texts as well as their implementation in diverse regions of the world is prerequisite to the identification of potential plural dynamics or axes through which such an approach would opportunely enhance legitimate constitutions.

A powerful and oft-quoted example of a home-grown constitution process, born of participative processes, South Africa hosted debates showing that, in order to remain the embodiment of a collective project, the constitutions path was flagged with prerequisites and pitfalls. This is echoed by our Latin American partners. Constitution

processes on their continent arise from inclusive processes that lead to the recognition and a degree of management of social pluralism, notably concerning the recognition of indigenous communities and their rights within the state. For Rodrigo Uprimny,[13] this paved the way to a new state model. Indeed whilst the multiculturalism enshrined in the constitutions is at the heart of Latin American states' legitimacy, these constitutions no less convey today a societal project around the affirmation of their multicultural nature. And yet, is this enough to include the drafting of constitutions in a plural approach? This is a moot point. Since 2008, it is incidentally the very principle of interactions between diversity's building blocks that is being constitutionally established through the acknowledgment of dialogue processes. Avenues are thus open for the re-founding of the social contract and the affirmation of new founding principles such as well-being or even water and land set as objects of rights. Emanating from an intercultural dialogue between the diverse regulations the state-indigenous communities balance opens a virtuous circle for redefining the social contract through "transformative" constitutions. In this matter too, the GIC's work will enable us to understand whether a plural approach was indeed called upon. The idea of a "constitution in the making" is also alive in Africa essentially with a view to embody the social contract through connecting "tradition" with "modernity". In his article Mamoudou Gazibo[14] mentions the "programmatic" dimension of Niger's latest constitution also born of a participative process. Like in Latin America, this finds an expression in the affirmation of new principles harnessing, says our author, traditional and modern legal orders and affirming inter-generational solidarity. Then again, is this enough to propel the constitution in a truly plural dynamics or are we still dealing in subordinated pluralism? And the stakes of a plural approach are just as high at the level of the constitutions' implementation. Here, in the footsteps of the IACHR devising jurisprudence, a virtuous circle can be imagined that would make of the interaction between constitutional principles of recognition of pluralism and praxis a vector for redefining the constitution's founding principles.

Whilst our two fields of research, human rights and constitutions, provide the basis from which we hope to develop IRG thinking and proposals in terms of plural approach, the latter is present throughout the themes on the Institute's watch. Indeed the co-production of public good is the means to devise negotiated regulations, which are supposed to result from the constructive interaction between the diverse

13. See in this issue article by Rodrigo Uprimny, p. 245.
14. See in this issue article by Mamoudou Gazibo, p. 257.

actors, to wit from the regulations, norms and values they embrace. As a result the very nature of public action and public policies will have been modified, with a move – were a plural approach bringing about a paradigm shift to be adopted – towards legitimate democratic governance and paving the way to the re-founding of the state. The months ahead are rich in projects opening to the IRG a field of investigation, as full of surprises as it is enthralling, at the heart of our societies' challenges and of their creativity.

(Footnotes)

1. For more details on the Meeting Process's methodology, see the IRG site: <http://www.institut-gouvernance.org/spip.php?article344&lang=en> and also Séverine Bellina's article "La légitimité dans tous ses états: réalités, pluralisme et enracinement des pouvoirs [Legitimacy every which way: realities, pluralism and rootedness of powers]", in *Chroniques de la gouvernance*, ECLM, 2008-2009, p. 62.

2. On the occasion of a study on the legitimacy of the state in fragile situations commissioned by France and Norway and financially supported by the United Kingdom in the framework of research work by the INCAF group of the OECD's Development Assistance Committee. Four major types of legitimacy emerged: input legitimacy or legitimacy by process (where processes of association of the actors to the devising of public policy are found), output legitimacy or legitimacy by results (which supposedly meet the populations' needs), international legitimacy and symbolic legitimacy.

3. Meeting of Lima-Pachacamac (Peru), 15-17 février 2009, proceedings, *La Legitimidad del poder en los países andino-amazónicos, Bolivia, Colombia, Ecuador et Perú. Recorrido internacional de debate et propuestas sobre la gobernanza.*

4. Bamako Meeting 24-26 January 2007, proceedings *Between Tradition and Modernity: African Governance for Tomorrow* p. 98.

5. *La Legitimidad del poder en los países andino-amazónicos, Bolivia, Colombia, Ecuador et Perú. Recorrido internacional de debate y propuestas sobre la gobernanza*, op. cit.

6. The "need for a state" was unanimously hailed by the attendants to the Meeting at Yaoundé (Cameroun) for Central Africa e, 22-24 November 2010.

7. The notion of social justice was strongly felt to be the vector legitimating processes of interaction between diverse sources of legitimacy of power in Arusha for Eastern

Africa and in Lima for Andean America in 2009 as well as in Saarbrucken in Europe in 2011 – and we are hearing it from North Africa.

8. Adopted by the international symposium on democratic practices, the rights and liberties in the French-speaking space (November 2000, Bamako, Mali is Francophonie's normative reference text on these questions. It equips the Francophonie with the means to act in the event of a breach of democratic legality or serious violation of human rights in any of its member countries. <http://www.francophonie.org/>.

9. <http://www.auf.org/anglais/auf-brief/>.

10. Pierre Célestin Bakunda, Rwanda, l'enfer des règles implicites [Rwanda, a Hell of Unspoken Rules], Brussels, 24 June 2007, *Présentation of the book "Rwanda, l''enfer des règles implicites"*, L'Harmattan, 2006, Paris.

11. Françoise Digneffe, Jacques Fierens, "Justice et gacaca: l'expérience rwandaise et le génocide" [Justice and Gacaca: the rwandan experience post-Genocide], 2003, p. 15.

12. "These meetings brought together the country's highest authorities, political party leaders and a range of Rwandan institutions. These meetings were intended to address Rwanda's thorny problems: unity and reconciliation, democracy, justice, economy, social affairs, security" from the Parliamentary Commission on MDR Problems Report. <http://www.grandslacs.net/doc/2856.pdf>.

13. Christian Nadeau, "Quelle justice après la guerre ? Éléments pour une théorie de la justice transitionnelle", www.laviedesidees.fr, 23 March 2009.

14. Koffi Afande, "La légitimité et l'efficacité des sanctions pénales dans les pays de l'Afrique subsaharienne – un cas de pluralisme juridicosocioculturel", contribution to the "Sanctionner: est-ce bien la peine et dans quelle mesure ?" congress, Université de Lausanne, 29/30 June 2006, RICPT, n° 3, 2007, p. 277-294.

15. The IACHR was created in 1979 and has its seat in San José, Costa Rica.

16. *Corte I .D.H, Caso de la Comunidad Mayagna (sumo) Awas Tingni, la communauté Yakye Axa v. Nicaragua. Fondo, Reparaciones y Costas. Sentencia de 31 de agosto de 2001. Serie C No. 79.* In this particular case, the state of Nicaragua had granted a foreign company a concession for timber extraction on the ancestral land of the Mayagna (Sumo) Awas

Tingni community. The IACHR averred that this concession amounted to a violation by Nicaragua of the community's right to property.

17. This principle was established in the cases *Johnston et alia v Ireland* (No 9697/82) judgment of 18 December 1986, ECHR and, *Pretty v. United kingdom (No 2346/02)* judgment 29 April 2002, ECHR.

18. *Opinión consultiva OC-16/99 de 1 de octubre de 1999. Serie A No. 16. párr 114. El Derecho a la Información sobre la Asistencia Consular en el Marco de las Garantías del Debido Proceso Legal.*"

19. With this robust interpretation of the principle established by the ECHR, the IACHR paved the case law way where the ECHR did not. Indeed, the latter is much more muted when it comes to cultural interpretation since it has left the specific resolution of these socio-ultural conundrums to the states and their national jurisdictions.

20. This principle was established in the *Caso Comunidad Indigena Yakye Axa, v. Paraguay. Fondo, Reparaciones y Costas. Sentencia 17 de junio de 2005. Serie C No. 125.*

21. *Ibidm* para. 149.

22. *Corte I.D.H Caso del Pueblo Saramaka Vs Suriname. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 28 de Noviembre de 2007. Serie C No. 172 Voir aussi. RIVERA Francisco, RINALDI Karine "Pueblo Pueblo Saramaka Vs Suriname: el derecho a la supervivencia de los pueblos indigenas y tribales com.*

23. Ghislain Otis, "*Coutume autochtone et gouvernance environnementale: l'exemple du système interaméricain de protection des droits de l'homme* [Autochthon Custom and Environmental Goverance: the example of the Inter-american system of human Rights Protection]».

24. In this instance the Guatemalan military massacred 268 people from the Maya Achi people. The survivors were forced to burry the incinerated bodies of the victims on the site of the crime. *Caso masacre Plan Sánchez vs. Guatemala. Fondo. Sentencia del 29 de abril de 2004. Serie C No 105. Citado en: Parra Op. Cit. p. 1.*

25. Corte I.D.H. caso Escué Zapata Vs. Colombia. Fondo, Reparaciones y Costas. Sentencia de 4 de Julio de 2007. erie C No. 165.

26. *Ibidem. Paragraphe 153. Pág. 41.*