

SANA CRÍTICA: THE SYSTEM FOR WEIGHING EVIDENCE UTILIZED BY THE INTER-AMERICAN COURT OF HUMAN RIGHTS

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The Spanish version of the case law of the Inter-American Court of Human Rights often states that this tribunal's assessment of evidence is ruled by *sana crítica*, a notion which has received several translations in the English version of the Court's case law. This concept has a clear meaning in the Hispanic civil law tradition. *Sana crítica* is a system for evaluating the weight of evidence whereby a court or tribunal is not constrained by the evidentiary rules of *legal proof*, but must judge in accordance with the rules of logic and experience, and state the grounds for its evaluation. For a better understanding of *sana crítica* or sound judicial discretion, this paper will refer to the other systems used for the weighing of evidence in the Hispanic legal tradition, especially to the oft-loathed method of legal proof, which requires the judge to give a previously defined weight to specific items of evidence. Reference will be made also to the differences between the systems used for weighing evidence and other related concepts, such as the standards of proof. The above description of the concept of *sana crítica* will be illuminated with some comments on how the Inter-American Court applies this system.

INTRODUCTION

The Inter-American Court of Human Rights¹ usually states in the English translation of its case law, that its assessment of evidence is governed by

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¹ Hereinafter: "Inter-American Tribunal," "Inter-Am. Ct. H.R.," "Court," or "Tribunal." This study, following the practice of the Inter-American Court, will use the concepts "tribunal" and "court" as interchangeable.

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the rule or principle of “sound criticism,” “competent analysis,” “judgment based on admissible evidence,” “healthy criticism,” “reasonable credit,” “sound judgment,” “sound judicial discretion,” etc.² In contrast, the original Spanish version of the Court’s case law simply states that the Inter-American tribunal’s assessment of evidence follows the rule of *sana crítica*.³ The Court does not engage in providing any definition of this concept. At most, it remarks that *sana crítica* [sound judicial discretion⁴] allows it to reach an adequate decision.⁵

This study will give an account of the meaning of *sana crítica*, which is essentially the Hispanic expression referring to a system for evaluating the weight of evidence according to the rules of logic and experience.⁶

² The Constitutional Court v. Peru, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 71, ¶ 49 (Jan. 31, 2001); Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 88 (Aug. 31, 2001); Baena-Ricardo v. Panama, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 72, ¶ 70 (Feb. 2, 2001); Case of the 19 Merchants v. Colombia, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 109, ¶ 79 (July 5, 2004); Gómez-Palomino v. Peru, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 136, ¶ 50 (Nov. 22, 2005); Dacosta-Cadogan v. Barbados, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 204, ¶ 35 (Sept. 24, 2009); Xákmok Kásek Indigenous Community v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 214, ¶¶ 31-32 (Aug. 24, 2010). For two other translations see Almonacid-Arellano v. Chile, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 154, ¶ 69 (Sept. 26, 2006) (“rules of reasonable credit and weight analysis”), and Rochela Massacre v. Colombia, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 163, ¶ 55 (May 11, 2007) (“principles of reasoned judgment”). Case decisions of the Inter-American Court are available at: www.corteidh.or.cr (in the “jurisprudence” section of the English version) (last visited Apr. 17, 2012).

³ The different names given to this concept is probably due to the Court’s lack of a permanent office in charge of translating its case law, which may be, in turn, due to the Tribunal’s lack of funding.

⁴ This translation of the concept *sana crítica* illustrates best the content of this notion, so it will be used in this study together with the original Spanish expression. The expression *valorar en consciencia* [to evaluate according to one’s conscience] is a synonym of *sana crítica*. Joel González Castillo, *La Fundamentación de las Sentencias y la Sana Crítica*, 33 REVISTA CHILENA DE DERECHO 93, 95 n.3 (2006).

⁵ See e.g., *Mayagna (Sumo) Awas Tingni Cmty.*, Inter-Am. Ct. H.R. (ser. C) No. 79 at ¶ 88; *Baena-Ricardo*, Inter-Am. Ct. H.R. (ser. C) No. 72 at ¶ 70.

⁶ Some authors use the concept “evaluation” for referring to the action of weighing evidence. See, e.g., Dinah L. Shelton, *Judicial Review of State Actions by Inter-*

Sana crítica resembles the way in which common law judges weigh evidence.

The importance and relative novelty of sound judicial discretion in the Latin American context can best be properly understood if this concept is contrasted with the other Hispanic models for weighing evidence. The reason why this article refers to a *Hispanic* civil law model is because there are different procedural law systems within the civil law. Michele Taruffo considers that there are three main civil law models—French, German and Spanish—and some “mixed” systems.⁷ The concept “Hispanic” will not only be understood here as including the procedural model of Spain, but also those of the nations which are heirs of the Spanish juridical system—most of the countries under the jurisdiction of the Inter-American Court of Human Rights. This concept would also include mixed systems that rely on the Spanish model when dealing with the evaluation of the weight of evidence.

The main object of this paper is to explain the system for weighing evidence used by the Inter-American Court, and not to assess the way in which this tribunal applies it. Nevertheless, this study will make several commentaries about the Court’s use of *sana crítica*, so it is necessary to provide an overview of the Inter-American system of human rights.

This system was created within the context of the Organization of American States (“OAS”).⁸ Its main human rights instruments are the 1948 American Declaration of the Rights and Duties of Man, and the 1969 Amer-

national Courts, 12 FORDHAM INT’L L.J. 361, 392 (1989); B.G. Ramcharan, *Evidence*, in INTERNATIONAL LAW AND FACT FINDING IN THE FIELD OF HUMAN RIGHTS 64, 79 (B. G. Ramcharan, ed., 1982). This study will not dwell on whether these two concepts are synonyms. However, it will try to exclusively use the expression “weighing.” Taruffo refers to what this study calls the “rules of logic and experience” as the “commonsense rules of reason and to the average experience of the world.” Michele Taruffo, *Rethinking the Standards of Proof*, 51 AM. J. COMP. L. 659, 668 (2003). Despite the elegance and accuracy of the expression used by Taruffo, this paper will use the wording “rules of logic and experience,” since it accords with the expression used by the Inter-American Court, and also because it is a more literal translation of the traditional Hispanic wording.

⁷ See Taruffo, *supra* note 6 at 660-61. These systems share many concepts.

⁸ For a description of this system, see HÉCTOR FAÚNDEZ LEDESMA, THE INTER-AMERICAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS: INSTITUTIONAL AND PROCEDURAL ASPECTS (Charles Moyer trans., 2008), http://www.iidh.ed.cr/BibliotecaWeb/Varios/Documentos/BD_125911109/interamerican_protection_hr.pdf (last visited Apr. 17, 2012).

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ican Convention of Human Rights.⁹ The structure of the Inter-American system resembles to some extent the European system in its early years of existence, since there is a joint operation of a Commission and a Court of Human Rights.¹⁰ However, members of the OAS are under no obligation to sign the American Convention or to grant compulsory jurisdiction to the Court¹¹—contrary to what is required from members of the Council of Europe. Therefore, some American States are subject to the jurisdiction of both the Court and the Commission, while others are subject solely to the latter.

The Inter-American Court was established by the American Convention as the competent organ for the protection of this treaty's wide catalogue of human rights, but there is no direct access for individuals to this tribunal.¹² The Inter-American Court of Human Rights has issued around one hundred and forty final judgments dealing with an extensive range of matters.

I. PRELIMINARY ISSUES

Before engaging in the task of explaining the concept of *sana crítica* to a reader familiar with the common law system, it is necessary to stress that in a comparative study there is often no perfect correspondence between concepts belonging to different jurisdictions. This difficulty may at times give rise to some misunderstandings, which the reader should take

⁹ American Declaration of the Rights and Duties of Man (1948); American Convention of Human Rights [hereinafter "American Convention"], Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, *both reprinted in* INTER-AMERICAN COURT OF HUMAN RIGHTS, BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM (UPDATED TO FEBRUARY 2011) at 19, 29, respectively, http://www.corteidh.or.cr/docs/libros/eng_docs2011.pdf (last visited Apr. 17, 2011). There are also other OAS documents and treaties referring to human rights. *See* INTER-AMERICAN COURT OF HUMAN RIGHTS, BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM *supra* note 9, at 77ff.

¹⁰ The former is located in Washington D.C, and the latter in San José de Costa Rica.

¹¹ Therefore, eleven of its thirty-five member States—which include all the independent States of the Americas—are not parties to the American Convention. Among the member States to this treaty, "[t]wenty-one States Parties have accepted the compulsory jurisdiction of the Court. They are: Costa Rica, Peru, Venezuela, Honduras, Ecuador, Argentina, Uruguay, Colombia, Guatemala, Suriname, Panama, Chile, Nicaragua, Paraguay, Bolivia, El Salvador, Haiti, Brazil, Mexico, the Dominican Republic and Barbados." Rep. Inter-Am. Ct. H.R. 2009, 2.

¹² *See* American Convention, *supra* note 9 at Art. 44.

into consideration. For instance, as it will be explained later, in a system of *sana crítica*, the content of the expression “to weigh evidence” will be similar to that used by common law lawyers. On the contrary, it will not be so in a system of legal proof—legally appraised evidence—where it is mainly the law that weighs the evidence, not the tribunal of fact.

Likewise, many features of the methods for weighing evidence in the Hispanic civil law system may resemble some institutions of the common law system. For instance, legal proof seems to be a system in which the law overburdens the judge with rebuttable and irrebuttable presumptions of law concerning evidence. However, there are often nuances that make it impossible to draw straightforward analogies. This explains why the aim of this study is not to translate civil law concepts into those of the common law, but to allow the English speaking reader to understand what the Inter-American Court means when it refers to sound judicial discretion or to some other analogous term.

It is also important to note that this study is not advocating in favor of the Hispanic classification of the systems for weighing evidence. Similarly, this study does not intend to be a critique of these methods, even though it follows the trend of considering *sana crítica* to be the most adequate among the Hispanic systems for weighing evidence. Indeed, sound judicial discretion seems to be the method most widely supported by Hispanic scholarship. It is also the most similar to the common law system for weighing evidence. In fact, it has even been asserted that the treatise on judicial evidence extracted from the manuscripts of Jeremy Bentham¹³ is just a compilation of the rules of *sana crítica*.¹⁴

The concept of *sana crítica* appeared in the law for the first time in 1846, in the Spanish *Reglamento del Consejo Real* [Rules of Procedure of the Royal Council].¹⁵ This notion cannot be fully understood on its own, without describing the different methods for weighing evidence as usually classified in Hispanic and similar legal traditions.¹⁶ These systems would

¹³ M. DUMONT, A TREATISE ON JUDICIAL EVIDENCE, EXTRACTED FROM THE MANUSCRIPTS OF JEREMY BENTHAM ESQ. (1825).

¹⁴ NICETO ALCALÁ-ZAMORA Y CASTILLO, ESTUDIOS DE DERECHO PROBATORIO 87 (1965).

¹⁵ *Id.* at 80. The use of *sana crítica* is proposed in the Model Procedural Code for Iberian-American States. See *El Código Procesal Civil Modelo para Iberoamérica*, INSTITUTO IBEROAMERICANO DE DERECHO PROCESAL, available at http://www.iidp.org/index.cgi?wid_seccion=6&wid_item=13# (last visited Mar. 9, 2011).

¹⁶ Examples of this classification can be found in the work of the Italian scholar Lessona and of the Spanish scholar Alcalá Zamora. See CARLOS LESSONA, *TEORÍA GENERAL DE LA PRUEBA EN DERECHO CIVIL* 355 (1957); ALCALÁ-ZAMORA Y CAS-

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be: legal proof,¹⁷ free conviction,¹⁸ and rational persuasion. Some legal scholars consider these systems to be two: legal proof and free proof, subdividing the latter into two different systems, free conviction and rational persuasion,¹⁹ if subdividing them at all.²⁰ *Sana crítica* is the Spanish concept used to refer to the system of rational persuasion.²¹ This study will follow the understanding that there are three Hispanic systems for weighing evidence.²²

The systems for assessing the weight of evidence are relevant only once the means of evidence have been admitted into a particular proceed-

TILLO, *supra* note 14, at 32. The names given to these three methods vary between the writings of different scholars. In the context of the Inter-American Court these systems are referenced in Alberto Bovino, *Evidential Issues Before the Inter-American Court of Human Rights*, 2 SUR INT'L J. HUM. RTS. 56, 65-66 (2005).

¹⁷ In Spanish it is usually called either *prueba legal* [legal proof] or *prueba tasada* [appraised evidence]. Probably the concept "legally appraised evidence" better reflects the content of this system.

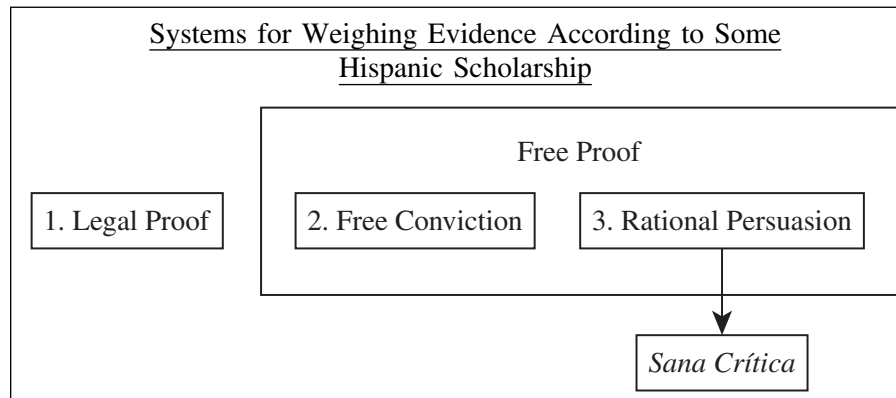
¹⁸ Some scholars have used the concept of "intimate conviction" (Bovino, *supra* note 16, at 65), but it may give rise to confusion with the French concept of *intime conviction*. Two different understandings of this French concept can be found in Christoph Engel, *Preponderance of the Evidence Versus Intime Conviction: A Behavioral Perspective on a Conflict Between American and Continental European Law*, 33 Vermont Law Review 435 (2009), and in Michele Taruffo, *supra* note 6, at 667. Engel considers it to be a standard of proof, while Taruffo seems to consider it to be a system for evaluating evidence, in a broad sense.

¹⁹ This is described by the following authors, even though they do not use the twofold classification themselves: Héctor Fix-Zamudio, *Orden y Valoración de las Pruebas en la Función Contenciosa de la Corte Interamericana de Derechos Humanos*, in I MEMORIA DEL SEMINARIO: EL SISTEMA INTERAMERICANO DE PROTECCIÓN DE LOS DERECHOS HUMANOS EN EL UMBRAL DEL SIGLO XXI 197, 202 (2003), available at <http://biblio.juridicas.unam.mx/libros/5/2454/12.pdf> (last visited Sept. 15, 2012); and ALCALÁ-ZAMORA Y CASTILLO, *supra* note 14, at 32. The latter classifies these methods as four, adding trial by ordeal to the previously referred methods. He considers the ordeal to be a historical method for evaluating evidence. *Id.* at 33-35. This assertion is arguable.

²⁰ For example, Alfredo Vélez Mariconde considers that free conviction and *sana crítica* are the same. ALFREDO VÉLEZ MARICONDE, 2 DERECHO PROCESAL PENAL, 198, quoted in María Auxiliadora Solano Monge, *La Prueba Pericial ante la Corte Interamericana de Derechos Humanos*, 5 ILSA J. INT'L & COMP. L. 651 n.6 (1999).

²¹ ALCALÁ-ZAMORA Y CASTILLO, *supra* note 14, at 49-50.

²² This account excludes mixed methods. *Cf. id.* at 32. It will also exclude other non-mainstream systems that some authors consider to be methods for evaluating evidence. See *supra* note 19.



ing. Thus, they do not refer to the admissibility requirements that evidence has to meet in order to be accepted, which are considered *before* the evidence is weighed.²³ Similarly, these systems refer to the weight of evidence, not to which party has to prove an issue, so they do not directly affect the burden of proof.²⁴ Finally, the systems for weighing evidence cannot be equated with the standards of proof required for proving a particular fact, since the latter refer to the degree of conviction which the judge is required to have *after* applying the rules for weighing evidence.

Unfortunately, it is easy to confuse the notions of the weight of evidence and of the standard of proof when one of these two concepts is not clearly established in a given legal system. According to Taruffo, this happens in Spanish civil cases, where *sana crítica* is, generally speaking, the system for weighing evidence, but at the same time “no specific standards of proof are prescribed.”²⁵ On the contrary, the contrast between the stan-

²³ Karl H. Kunert, *Some Observations on the Origin and Structure of Evidence Rules Under the Common Law System and the Civil Law System of “Free Proof” in the German Code of Criminal Procedure*, 16 BUFF. L. REV. 122, 155-56 (1966); and González Castillo, *supra* note 4, at 99.

²⁴ González Castillo, *supra* note 4, at 99.

²⁵ Taruffo, *supra* note 6, at 668-669. Bovino notes the difference between standards of proof and systems for assessing evidence, since he states that sound judicial discretion in domestic criminal procedures has to be applied together with a high evidentiary standard. See Bovino, *supra* note 16, at 69. The English version of some Inter-American Court case decisions refer explicitly to the concept of standards of proof (e.g. Velásquez-Rodríguez v. Honduras, Merits, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶¶ 126-128 (July 29, 1988), and Godínez-Cruz v. Honduras, Merits, Inter-Am. Ct. H.R. (ser. C) No. 5, ¶¶ 132-134 (Jan. 20, 1989)), but this expression seems to be an error of translation, so it will not be of great help for showing the difference between the concepts of sound judicial discretion and standards of proof.

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dards of proof and the systems for assessing evidence is illustrated by legal systems employing both concepts. For instance, juries may be asked to decide a case with a conviction beyond any reasonable doubt—a standard of proof—and at the same time could be acting according to the system of free conviction—a system for weighing evidence.²⁶

II. LEGAL PROOF AND FREE CONVICTION

A. *Legal Proof*

The practical importance of the method of legal proof is currently very slight. In this system there will be “rules determining in general and binding terms the probative force of specific items of evidence.”²⁷ In other words, “the evaluation by the fact-finder [is] governed by strict rules attributing certain quantities of weight to any given evidentiary item.”²⁸ This system could either prevent the judge from issuing a decision of which he or she was convinced, e.g. because of the application of a rule such as *testis unus testis nullus* [one witness [is] no witness],²⁹ or force him or her to issue a decision in a particular way when there was a *full proof*. The system of legally appraised evidence was widely applied before the modern theory of the separation of powers came into operation, and it was used in the Spanish, French, and German traditions of civil law.³⁰ The paradigmatic example of this system is found in the conclusive evidentiary value of confession, which is still in force in some domestic legal systems.³¹

It could be argued that a system of legal proof contains implicitly a standard of proof, because the referred system orders judges to issue a particular judgment whenever there is *full proof* (this concept will be explained later on in this paper). At least in theory, judges in a legal proof system would follow an almost mathematical method for deciding whether there was *full proof in a particular case*. This arithmetic procedure could be seen as a given standard of proof. Cf., Kunert, *supra* note 23, at 144-145, who refers to this arithmetic procedure.

²⁶ Likewise, the Chilean Criminal Procedure Code establishes that judges should use the system of sound judicial discretion, but also that they should reach their decisions applying the beyond reasonable doubt standard. CÓDIGO PROCESAL PENAL [CÓD. PROC. PEN.] as amended, arts. 297, 340, respectively (Chile).

²⁷ Taruffo, *supra* note 6, at 666.

²⁸ Kunert, *supra* note 23, at 123-24.

²⁹ An example of which will be given in the next paragraph when referring to *Las Siete Partidas*.

³⁰ This system is called *preuve légale* in the French tradition and *gesetzliche beweistheorie* in the German tradition. Kunert, *supra* note 23, at 123.

³¹ An example is given by Article 1713(1) of the Chilean Civil Code, which provides that confession generates *full proof*. CÓDIGO CIVIL [CC], as amended (Chile).

The system of legal proof finds its origins in the notion of the judge as a civil servant of the ruler.³² It “was politically and sociologically inspired by the desire to restrain the judge’s power, which was to be achieved by making him an executor of prescribed rules rather than the decisive factor in a legal proceeding.”³³ The paramount importance of legal proof in the Hispanic system goes back to at least the thirteenth century, with the *Siete Partidas* of King Alfonso X of Castile and Leon, a legal source that had a fundamental influence on the legislation of the American colonies of Spain.³⁴ The law XXXII of title XVI of the Third *Partida* of this legal corpus gives an exquisite example of legally appraised evidence, hence, this paper prefers to quote it *in extenso*:

Two witnesses of good reputation and who are in such a character that they can not be excluded for the reasons ordered by the laws of this our book, are sufficient to prove every case in court, except one involving the discharge of a debt of which a record had been made by a notary public. For where a debtor desires to prove that he has paid such a debt, and that he has been released by the party to whom he owed it, he must establish this by competent written evidence, or by five witnesses who state that they were present when the said payment or release was made, and that they were summoned or asked to be witnesses to the fact.

We also decree that a will, in which anyone was appointed an heir must be proved by seven witnesses requested to act

The exposition of motives of the Spanish Code of Civil Procedure of 2000 explicitly states that it purported to end with the legal conclusive weight given to confession. LEY DE ENJUICIAMIENTO CIVIL [L.E. Civ.], *Exposición de Motivos* No. XI (Spain). However, Article 316(1) did not rely completely on the judge’s sensibility, and explicitly provided that the tribunal shall consider as true the facts acknowledged by a party, as long as they are in prejudice to the acknowledging party and are not contradicted by other means of evidence. *Id.* art. 316(1). This provision of the L.E. Civ. is logical, and so much so, that even if this rule were not in force, a decision denying this weight to confession could probably be reversed on appeal. Nevertheless, by providing this rule by law, instead of leaving this decision to the judge’s sensibility, legislators reflect that their reasoning may be still influenced by a legal proof understanding of the evaluation of evidence.

³² Kunert, *supra* note 23, at 144.

³³ *Id.*

³⁴ The composition of the *Partidas* began in 1256 and was most likely finished in 1265. ALFONSO X, 1 LAS SIETE PARTIDAS: THE MEDIEVAL CHURCH xxxv-xxxvi (Robert I. Burns, S.J. ed, Samuel Parsons Scott trans., Univ. of Pa. Press 2001).

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as such. If the party who made the will was blind, it must be proved by eight witnesses. Any other will, containing bequests, in which a party was not made an heir will be sufficiently proved by five witnesses. But we decree that no agreement can be proved by one witness, no matter how good and honorable a man he may be, although a strong presumption will arise as to the act concerning which he testifies.³⁵ Where, however, an emperor or a king gives testimony concerning any matter, we decree that this will be sufficient to prove every case; for every man should consider that he who is appointed to maintain the country in justice and in right would not state anything but truth in his testimony, or desire, in an instance of this kind, to assist one person in order to embarrass another. We also decree that a judge shall not permit any of the parties to introduce in court more than a dozen witnesses in one suit, for we hold that this number is sufficient for him who summons them to prove his case.³⁶

Since the system of legal proof was widely used during the times of the inquisitorial procedure—which at times revealed the uttermost expression of judicial powers—it has been asserted that this system was used for limiting judicial despotism.³⁷ However, it is difficult to know whether the overall effect of legal proof was to control or to cause some judicial excesses of the inquisitorial system. This, because the establishment of confession as a legally conclusive evidence may have encouraged, in some inquisitorial procedures of the Middle Ages, torturing the accused as a means of obtaining confession.³⁸ This system of legal proof was modified and later liberalized.³⁹ Its importance declined after the French Revolution, when it was abolished for criminal law cases in France.⁴⁰ In Germany, this system was abolished for criminal cases in the mid-nineteenth century.⁴¹

³⁵ This is an example of the rule *testis unus testis nullus*.

³⁶ ALFONSO X, 3 LAS SIETE PARTIDAS: MEDIEVAL LAW, *Law XXXII*, 679 (Robert I. Burns, S.J. ed., Samuel Parsons Scott trans., Univ. of Pa. Press 2001).

³⁷ ALCALÁ-ZAMORA Y CASTILLO, *supra* note 14, at 37.

³⁸ Kunert, *supra* note 23, at 145.

³⁹ According to Kunert, it lasted until the French Revolution in France, and until the middle of the nineteenth century in Germany. *Id.* at 144.

⁴⁰ *Id.* at 146.

⁴¹ *Id.*

In a system of legal proof, the law will consider some evidence to be *full proof*: a concept used to refer to legally established conclusive evidence, e.g. the testimony of two trustworthy witnesses.⁴² If there was no single *full proof* in a case, the law purported to oblige the tribunal to judge in a way that could be considered “an almost entirely arithmetic procedure,”⁴³ adding the evidence which was legally considered to be *half, more than half, or less than half proof*,⁴⁴ in order to reach the amount of evidence required for deciding a case. However, the law’s “efforts could never banish judicial discretion entirely from the evaluating process.”⁴⁵ This was so because often these rules of legal proof would include in their terms some concepts open to interpretation by the judge, e.g., *trustworthy* confession or *suspect* witness.⁴⁶

At this point it is interesting to note that the Inter-American tribunal has at times used the concept *full evidence* or *full proof*. The Court has done so when stating that it will not consider a single item of evidence to be *full proof*, as in *Bulacio v. Argentina* and in *Gómez-Paquiyaui Brothers v. Peru*.⁴⁷ The Inter-American tribunal’s use of the concept of *full proof* is very infrequent, and is not necessarily linked with the system of legally appraised evidence. For instance, in *Cabrera-García & Montiel Flores v. Mexico* the Court used the concept of *prueba plena* [full evidence] as referring to a standard of proof: the Inter-American tribunal stated that domestic

⁴² This is only an example, since this rule may not exist in some systems.

⁴³ Kunert, *supra* note 23, at 145.

⁴⁴ *Id.* This author gives some examples of evidence with this weight. *See also* LESSONA, *supra* note 16, at 362 (referencing only the distinction between *full* and *half full proof*).

⁴⁵ Kunert, *supra* note 23, at 145.

⁴⁶ *Id.* at 145. For instance, the third rule for weighing witness statements under Article 384 of the Chilean Civil Procedure Code—the reform of which is currently under consideration—provides: “When the declarations of witnesses presented by one party are in contradiction to those of witnesses presented by the other, [the Courts] will consider to be truth what is declared by those who, even being fewer, seem to be saying the truth because they have a better knowledge of the facts, or because they have a better reputation, are more impartial and truthful, or because their declarations match better with the rest of the evidence in the case.” CÓDIGO DE PROCEDIMIENTO CIVIL [CPC], as amended (Chile) (author’s translation). This could even be considered a half-way point between the rigid system of legal proof and the more flexible system of rational persuasion.

⁴⁷ *Gómez-Paquiyaui Brothers v. Peru*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 110, ¶ 56 (July 8, 2004); *Bulacio v. Argentina*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 100, ¶ 62 (Sep. 18, 2003).

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courts required *full proof* before convicting an accused.⁴⁸ Something similar was done in the *Cantoral-Benavides v. Peru* case, where the Court stated that this State violated the presumption of innocence by condemning Luis Cantoral-Benavides without *full evidence*.⁴⁹ In the recent *Fernández-Ortega* case, the State of Mexico referred to the concept of *prueba plena*—it was translated as “sufficient proof”—despite being aware that the Court evaluates the weight evidence according to the rules of *sana crítica*. The State of Mexico used this concept in a broad sense, arguing that the declarations of the victim could not be considered as *prueba plena*, and that they should be taken into account together with other elements.⁵⁰ This latter use of the concept *prueba plena* seems to be identifiable with the notion of conclusive evidence.

According to Bovino, when the Court applies the presumption of veracity to uncontested evidence, it endows it with a higher weight than what it deserves.⁵¹ In addition, he seems to imply that, when doing so, the Court would be giving this kind of evidence the value of *full proof*. Granting this value, according to Bovino, would be a manifestation of the Court’s adoption of the system of legal proof in some cases.⁵² Accordingly, he considers this to mean that the Inter-American tribunal would apply the system of *sana crítica* only in those cases in which there has not been full evidence.⁵³ However, this paper has a different understanding.

⁴⁸ *Cabrera García & Montiel Flores v. Mexico*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 220, ¶ 138 (Nov. 26, 2010).

⁴⁹ *See Cantoral-Benavides v. Peru*, Merits, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 69, ¶ 121 (Aug. 18, 2000).

⁵⁰ *Fernández-Ortega v. Mexico*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 215, ¶ 96 (Aug. 30, 2010).

⁵¹ An example would be *Suárez-Rosero v. Ecuador*, Merits, Inter-Am. Ct. H.R. (ser. C) No. 35, ¶ 30 (Nov. 12, 1997). Bovino, *supra* note 16, at 67-68.

⁵² Bovino, *supra* note 16, at 67-68, 71.

⁵³ *Id.* Bovino states that the Court has a presumption of veracity of uncontroverted evidence, whereby it would give conclusive weight to unchallenged means of evidence. He considers that this would imply adjudicating in accordance with the rules of legal proof, because the Court would not be able to assess uncontroverted evidence together with the rest of the *body of evidence*. In other words, Bovino considers that by not contradicting evidence, the parties prevent the Court from applying sound judicial discretion.

However, this is not so, because the Court applies this presumption of veracity only when it considers facts to be proved according to the rules of logic and experience. The Inter-American tribunal is not obliged by any external rule to give this conclusive weight. Besides, the Court does not always state that uncontroverted evidence

It is possible for a court to use both a system of *sana crítica* and one of legally appraised evidence at the same time regarding different issues.⁵⁴ However, the Inter-American Court does not do so. The weight of a means of evidence can be given both by the law and by the judge's rationality.⁵⁵ As to the Inter-American Court, there is no external rule requiring the tribunal to assign a particular weight to certain means of evidence. Therefore, if the Inter-American Court considers certain items of evidence to be conclusive, it will do so only because the rules of logic and experience make this desirable, excluding the application of legal proof.

As it was previously mentioned, the method of legal proof could be understood by a common law lawyer as a system in which the law overburdens the judge with presumptions regarding evidence. However, presumptions are usually aimed at establishing the existence of an unknown substantive fact, from a proven or admitted primary substantive fact that usually entails the former, unless the presumption is established because of a public policy concern. Presumptions may, in practice, give certain weight to an item of evidence, which is why these two concepts are somewhat connected. Nevertheless, they are generally aimed at proving the facts of a case, not at establishing the value of evidence.

This contrasts with what happens in a system of legal proof whose rules are not concerned with the substantial facts of the case, but with procedural facts. Nevertheless, a system of legal proof can still be compared with a detailed and comprehensive system of irrebuttable presumptions whose primary facts are the presentation of certain evidence.⁵⁶ There are also other concepts that have similarities with certain aspects of a system of legal proof, as happens with *corroboration requirements*, but they lack the systemic or pervasive reach that characterizes a system of legal proof.

is enough for proving a particular fact (e.g. *De la Cruz-Flores v. Peru*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C). No. 115, ¶ 58 (Nov. 18, 2004)). The presumption of veracity could be interpreted as a procedural penalty established voluntarily by the Court in cases where the State refuses to provide evidence, but not as a manifestation of the system of legal proof.

⁵⁴ This happens in the Spanish Civil Procedure Code, where the law orders the judge to weigh evidence in a legally appraised fashion in some cases, and using sound judicial discretion in others. For an example of legal proof see art. 319 (1-2), and for an example of *sana crítica* see art. 348. L.E. Civ.

⁵⁵ This is referred to in the note of the translator in LESSONA, *supra* note 16, at 363.

⁵⁶ It has been said that irrebuttable presumptions "amount to no more than rules of substantive law expressed, somewhat clumsily, in the language pertaining to presumptions." ADRIAN KEANE, *THE MODERN LAW OF EVIDENCE* 636 (2000).

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Creating a system in which the legislator systematically prevents judges from weighing evidence in the way they deem most appropriate could give rise to issues concerning separation of powers. Undoubtedly, the system of legal proof was largely adopted during the monarchical era, when these concerns were not present for those who wielded power. Currently there are some remnants of legally appraised evidence in some jurisdictions. However, these vestiges are in force only in some limited areas of law or are applicable to specific kinds of evidence. Thus, they give rise to no important concern regarding separation of powers in a civil law environment. Notwithstanding this, Hispanic systems have gradually moved towards a general application of the system of sound judicial discretion.

The system of legal proof reveals several defects: its rules may be inflexible and could prevent the judge from issuing a reasonable judgment in some cases;⁵⁷ it stems out of an unrealistic desire for predicting the out-

⁵⁷ For example, in some private matters it would be difficult to fulfill the rule of *testis unus testis nullus* [one witness [is] no witness]. This is especially so because close relatives are often not allowed to perform as witnesses in civil matters. Nevertheless, in some exceptional circumstances it may have the effect of aiding the protection of human rights. For instance, the Inter-American Commission highlighted some of this system's benefits when tribunals are composed by a high number of unprepared judges. It did so in the context of the *special tribunals* created by the *Sandinista* Government Junta of National Reconstruction, for trying crimes "committed by members of the military, officials and civilian employees of the previous regime, and any other individual, who, protected because of his or her association with them, participated in the commission of crimes" The Commission asserted: "Pursuant to this system of free evidence in the proceedings against former members of the National Guard and the so-called Somocists detainees the members of the Special Tribunals were to evaluate the evidence and take it into consideration—as the law states—'by assessing it according to their conscience,' thereby posing another serious problem with respect to these trials. The members of the tribunals, some of whom has [sic] no legal training, found that the law did not say what evidence should be rejected, how the evidence should be presented or what criterion should be used to evaluate it. Upon reviewing case files at the Special Tribunals, the Commission found many proofs that did not refer to the facts, but instead were value judgments about the individuals or the facts under investigation." Furthermore, the Commission states that the "system of free evidence and the free evaluations of that evidence, are procedures more conducive to judicial error than the system of legal evidence. There is always room for some degree of judicial error in the administration of justice, which must be controlled and avoided by eliminating mechanisms which, by excess or defect, expose or induce judges to commit more errors." Inter-Am. Comm'n H.R., *Rep. on the Situation of Hum. Rts. in the Republic of Nicaragua*, OEA/Ser.L/V/II.53, Doc. 25 (June 30, 1981), Chapter IV, ¶¶ D 1 & D 14, available at <http://www.cidh.org/countryrep/Nica81eng/>

come of a case once the input of evidence is established; and it reflects a high mistrust in the capacity of the decision maker for coming to proper conclusions in the absence of clear and specific legal controls. These shortcomings explain why legal proof is no longer the general rule for evaluating the weight of evidence in civil law countries.

Another explanation for the lack of support of the legal proof system may be the termination of the political milieu in which these rules were created.⁵⁸ However, some remnants of legal proof are maintained: for instance, several domestic laws state that contracts agreed before a public notary have an important pre-established weight.⁵⁹ These remaining vestiges of legal proof tend to be fairly logical,⁶⁰ since they aim at enshrining what a reasonable judge would take into consideration when weighing evidence.⁶¹

B. *Free Conviction*

In contrast to the system of legal proof, the two remaining methods are not subject to legal constraints for evaluating the weight of specific means of evidence. This could be the reason why they have been at times classified as two forms of a unique system for weighing evidence: the method of “free evaluation.” Among them, the system of free conviction is the most ex-

TOC.htm (last visited Sept. 19, 2012). The Spanish version of this paragraph refers to concepts pertaining to the system of legally appraised evidence, some of which have been previously explained, e.g. *full evidence* and *half full evidence* (the relevant sentence states: *ni con qué criterio debían de ser valoradas como pruebas plenas, semiplenas, indiciarias o referenciales*).

⁵⁸ ALCALÁ-ZAMORA Y CASTILLO, *supra* note 14, at 37-38.

⁵⁹ For an example of a law giving conclusive weight to public documents see L.E. Civ., art. 319 (1-2).

⁶⁰ Historically there have been important exceptions to this reasonability, e.g. often the declaration of older people would be considered more valuable than that of younger, and even worse, declarations of women would be considered less valuable than those of men. EDUARDO BONNIER, *TRATADO TEÓRICO Y PRÁCTICO DE LAS PRUEBAS EN EL DERECHO CIVIL Y EN DERECHO PENAL* 352-353 (1902).

⁶¹ Examples of this system regarding confession can be seen in *supra* note 31. For an example in the matter of witnesses see Article 384 of the Chilean Civil Procedure Code, the reform of which is currently under consideration. The second of the rules enshrined in this Article provides that the statement of “two or more witnesses agreeing in the fact and its essential circumstances, who have not been declared unable to testify, legally examined and able to explain their sayings, will constitute full evidence [*prueba plena*] when their statement has not been rebutted by another contradicting piece of evidence.” CÓDIGO DE PROCEDIMIENTO CIVIL [C.P.C.], as amended, Art. 384 (Chile) (author’s translation).

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treme. Scholars define it as having two features. The first is that it could allow judges to decide according only to their opinion or knowledge, without necessarily making reference to the evidence rendered before them at trial. The second is that it does not require courts to explain their decisions or how they assessed the evidence.⁶² Only the former of these features seems to be essential, distinguishing clearly free conviction from the two other systems for evaluating the weight of evidence.⁶³

The previously described first feature is particularly radical, since it could even allow a court to issue a decision contrary to what would follow from the evidence presented in a case. Judges using free conviction could take into consideration facts of which they are aware, e.g. foreign law, even if no evidence is rendered on that particular issue.⁶⁴ Likewise, they could place higher importance on perceptions based on the demeanor of witnesses.⁶⁵ This does not mean that judges using the system of free conviction will adjudicate in an unreasonable fashion. Indeed, if the law or the parties give some judges the power to evaluate evidence according to free conviction, it is because these judges' prudence and honesty inspire confidence.⁶⁶ Therefore, even if judges using free conviction are not constrained by the ordinary rules of evidence, they will usually follow them.

As has been mentioned, some legal scholars do not distinguish between free conviction and rational persuasion. This explains why, for in-

⁶² See LESSONA, *supra* note 16, at 355, and González Castillo, *supra* note 4 at 96.

⁶³ It is possible to imagine a case in which a Court issues a decision without being constrained by the evidence presented in trial—for instance, by applying private technical knowledge of a particular area—and in which the Court explains how it reached its decision. This case still seems to be a kind of adjudication according to the system of free conviction. Likewise, it is also possible to imagine a situation in which judges adjudicating in accordance with legal proof do not explain the grounds for their decision. This would not transform this kind of adjudication into a decision according to free conviction.

⁶⁴ Foreign law and technical issues are questions of fact, so they should be proven in a case. In order to avoid having to present evidence on these matters, it could be useful for the parties to give an expert arbitrator the power of free conviction regarding these issues.

⁶⁵ For a study about the unreliability of demeanor see generally Olin Guy Wellborn III, *Demeanor*, 76 CORNELL L. REV. 1075 (1991) (discussing the role of demeanor in evidence).

⁶⁶ If the parties give this power to judges, they must trust them in a way comparable to when parties give judges the status of *ex aequo et bono*. Regarding this latter concept see Leon Trakman, *Ex Aequo et Bono: Demystifying an Ancient Concept*, 8 CHI. J. INT'L L. 621 (2008). In fact, a judge allowed to evaluate evidence freely is similar to a judge with a status of *ex aequo et bono* with regard to evidentiary law.

stance, Solano Monge asserts that the Inter-American Court decides according to free conviction *or* to *sana crítica*.⁶⁷ Her statement does not mean that she believes the Inter-American Court to be reaching its decision according to free conviction in the sense provided in this paper. Solano Monge understands that the Court is bound by the rules of rational persuasion. This can be perceived in her description of free conviction according to Vélez Mariconde, who considers that evidence must be appreciated following “the rules of logic, psychology and experience,”⁶⁸ something similar to what shall be said regarding the system of rational persuasion and *sana crítica*. Therefore, there is no substantial conflict between the assertions of this paper and opinions such as those of Solano Monge, only a semantic difference.

Civil law scholars usually assert that juries use the system of free conviction,⁶⁹ since jurors need not give reasons for their decisions, and can weigh evidence in the way they deem most appropriate. If juries are allowed to nullify, they may even have the possibility of finding against the proofs rendered in a trial.⁷⁰ This may also happen in practice when juries have no expressly recognized dispensing power, but nevertheless acquit against the evidence rendered in the trial.⁷¹ Indeed, even if nullification is

⁶⁷ Solano Monge, *supra* note 20, at 659.

⁶⁸ *Id.* at 652, note 6 (author’s translation).

⁶⁹ Alcalá-Zamora considers that this method is used by juries and by the—currently extinct—Spanish *tribunales de honor* [honor tribunals]. ALCALÁ-ZAMORA Y CASTILLO, *supra* note 14, at 44-46. Bovino has the same opinion regarding juries. Bovino, *supra* note 16, at 65. Some commentators used to opine that obliging Spanish juries to give reasons for acquittals would violate the ruling principle of free evaluation of evidence. See Stephen C. Thaman, *Europe’s New Jury Systems: The Cases of Spain and Russia*, 62 LAW & CONTEMP. PROBS. 233, 255 (1999). The Spanish jury’s use of *libre convicción* [free conviction] is acknowledged in the explanatory statement of the relevant law. Ley Orgánica del Tribunal del Jurado, II Los ciudadanos jurados (Ley Orgánica 5/1995, 1995) (Spain) available at <http://www.boe.es/buscar/doc.php?id=BOE-A-1995-12095> (last visited Sept. 15, 2012).

⁷⁰ E.g., Maryland’s Constitution explicitly accepts nullification in criminal cases. MD. CONST., Dec. of Rights. art. 23. It is affirmed that the English jury “possessed for at least three centuries the power to pardon the criminal *sub rosa* by acquitting him against the weight of evidence.” Mirjan Damaška, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 584 (1973).

⁷¹ Rubenstein considers that, despite the prohibition of *Sparf v. United States* (156 U.S. 51, 63 (1895)), U.S. juries are allowed to nullify. He states that “juries are free to acquit against the evidence but are instructed in the strongest terms that they cannot.” Arie M. Rubenstein, *Verdicts of Conscience: Nullification and the Mod-*

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expressly forbidden and jurors are instructed in this regard, a strict control of the jury's means of conviction is not feasible, since it is impossible to check in an individual case whether jury instructions had their desired effect.⁷²

The tremendous leeway given to judges in this system makes their judgments hardly accountable, allowing them to act in an arbitrary fashion. This is why it would not be possible or fair to grant this power to professional judges. Thus, the importance of this system is mainly theoretical. In the case of juries—if they were to be considered as judging according to the rules of free conviction—the danger of arbitrariness is tackled by several institutions, such as jury instructions, the requirement of a large number of jurors in a case, and the need for unanimity or high majority of votes required for convicting an accused.

III. *SANA CRÍTICA*, THE HISPANIC EXPRESSION FOR RATIONAL PERSUASION

A. *General Issues Regarding Sana Crítica*

The aforementioned systems of legal proof and free conviction stand in contrast to rational persuasion, also called rational assessment of evidence.⁷³ This system seems to be a compromise solution between rigidity and mistrust in judges, represented by the system of legal proof, and over-flexibility and irresponsibility, represented by the system of free conviction. Judges evaluating evidence according to the system of rational persuasion will have no particular directives about how to weigh each means of evidence,

ern Jury Trial, 106 COLUM. L. REV. 959, 985 (2006). The British Lord Justice Auld considered that “[t]here are many, in particular the Bar, who fervently support what they regard as the right of the jury to ignore their duty to return a verdict according to the evidence and to acquit where they disapprove of the law or of the prosecution in seeking to enforce it.” LORD JUSTICE AULD, REVIEW OF THE CRIMINAL COURTS OF ENGLAND AND WALES REPORT 173 (The Stationery Office, London 2001) *available at* <http://www.criminal-courts-review.org.uk/chpt5.pdf> (last visited Sept. 15, 2012). This dispensing power has been used in the United Kingdom in “*Clive Ponting*, and *Randle and Pottle* cases and, more recently, a number of acquittals in cases of alleged criminal damage by anti-war and environmental campaigners cases. . . .” *Id.* at 174-176. While saying this, Lord Justice Auld regrets the lack of procedural means to prevent the ability to issue a perverse verdict of acquittal. *Id.*

⁷² Engel, *supra* note 18, at 464.

⁷³ This latter denomination (*apreciación razonada de la prueba* [reasoned assessment of the evidence]) is given in ALCALÁ-ZAMORA Y CASTILLO, *supra* note 14, at 32.

but they have an obligation to do it according to the principles of reason. This system may or may not coexist with flexible rules for admitting evidence.⁷⁴ A Court may be free to both weigh and admit evidence, as happens with the Inter-American tribunal, but this is not always the case. In fact, the common law system for weighing evidence, which in general terms is similar to that of rational persuasion, often has strict rules of evidence admissibility.

Scholars usually define *sana crítica* as a system in which the judge has a duty to evaluate the weight of evidence according to both the rules of logic and experience.⁷⁵ This requirement seems to be aimed merely at requiring sensibility in the judges' appreciation of a case's evidence. This is nothing new from a common law point of view, since it simply involves the freedom of judges to weigh evidence according to reason.⁷⁶ However, it makes an important difference in systems where legal proof used to be the norm. *Sana crítica*'s requirement to follow the rules of logic and experience could be similar to what is asked of judges when taking judicial notice, but with the difference that the latter is used when considering the facts of a case, while the former is applied when weighing evidence. For instance, in the matter of judicial notice a judge will know that a period of two weeks is not enough time for human gestation,⁷⁷ and in the matter of weighing evidence a judge will understand that a confession may not be reliable if there is a real threat of undue pressure exercised on the accused.

⁷⁴ Bovino makes the concept of sound judicial discretion seem broader than what it is, extending its flexibility to the rules for admitting evidence. Bovino, *supra* note 16, at 66.

⁷⁵ These two demands—to follow the rules of logic and experience—are the basic requirements of sound judicial discretion. González Castillo, *supra* note 4, at 95-98. However, domestic legal systems might establish others, e.g., González identifies a third requirement according to a domestic legal system. *Id.* at 100. In the context of the Inter-American Court see Fix-Zamudio, *supra* note 19, at 214. The German system of *freie Beweiswürdigung* [free evaluation of evidence] would allow, at least in criminal cases, appeals “based on the alleged violation of rules of logic or experience or of the laws of nature, and, in critical cases, even on the allegation that a particular inference, though logically possible, violated the laws of probability.” Kunert, *supra* note 23, at 124.

⁷⁶ In fact, the way in which a British scholar describes the process of weighing evidence in the common law system is strikingly similar to the previously referred requirement of *sana crítica*. He states that “[t]he assessment of the weight of evidence in the common law system is essentially a matter of common sense and experience. . . .” KEANE, *supra* note 56, at 28.

⁷⁷ *Id.* at 656.

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The mandate to follow the rules of logic and those commonly drawn from experience is indirectly endorsed by the Inter-American Court, which in several cases, after mentioning the concept of sound judicial discretion, asserts that it is “following the rules of logic and based on experience.”⁷⁸ Indeed, it can safely be said that whenever the Court asserts that it is evaluating evidence according to the rules of logic and experience, it is referring to the use of *sana crítica*, even though it may not be utilizing this concept explicitly.⁷⁹

Evidence has no legally pre-established weight in a system of sound judicial discretion. However, this is not the same as to affirm that all means of evidence will have the same value, as has been suggested⁸⁰, because they will have greater or lesser weight according to the rules of logic and experience. For instance, there will be no rule stating that a confession will entail a ruling contrary to the person acknowledging his or her guilt—as was often the case in legal proof systems—but rules of logic and those drawn from experience will still suggest that a confession usually carries more weight than the statement of a witness related to a party to the trial. Therefore, if judges wish to give more weight to the latter, they should explain why the rules of logic and experience advise doing so. For instance, they may justify their decision by saying that the person who confessed was probably subject to cruel, inhuman or degrading treatment.

Judgments of lower courts failing to follow the rules of logic and experience could be reversed, and the best way for assessing this flaw is by analyzing the grounds set forth in the very judgment. This could be the reason why Hispanic legal scholars usually consider that a system of rational persuasion requires, rather than merely recommends, judges to ex-

⁷⁸ *E.g.*, *Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua*, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 89 (Aug. 31, 2001); and *Baena-Ricardo v. Panama*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 72, ¶ 71 (Feb. 2, 2001). This reassurance is important, since in many cases “a term which is used by international tribunals for a concept is identical to a term for a municipal law concept, without the contents being identical.” MOJTABA KAZAZI, *BURDEN OF PROOF AND RELATED ISSUES: A STUDY ON EVIDENCE BEFORE INTERNATIONAL TRIBUNALS* 22 (1996).

⁷⁹ *E.g.*, *Olmedo-Bustos v. Chile (The Last Temptation of Christ)*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 73, ¶ 50 (Feb. 5, 2001). On the contrary, the Court is not being accurate when it refers to “the rules of ‘competent analysis’ and experience,” since “competent analysis” is one way in which the Court refers to *sana crítica*. Therefore, one concept would include the other. *Hilaire v. Trinidad and Tobago*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 94, ¶ 82 (June 21, 2002).

⁸⁰ *Cf.*, Bovino, *supra* note 16, at 71, 76.

plain the grounds on which they weighed evidence.⁸¹ It has even been said that, in the context of rational persuasion, the judges' duty to explain their evaluation of evidence is the only safeguard against rulings contrary to the merits of a case.⁸² The Inter-American Court has stated that the "duty to state grounds is a guarantee linked to the proper administration of justice, protecting the right of citizens to be tried for the reasons provided by Law, and giving credibility to the legal decisions adopted in the framework of a democratic society."⁸³ This duty to provide explanations also binds international judges who use the system of *sana crítica*, even if—or particularly because—they have no hierarchical superior, because they still have a duty towards the parties of a case, and society at large, to justify how they reached their decisions.

Notwithstanding the foregoing, when all the evidence points in the same direction it is reasonable to consider that there is no need to explain how each item of evidence affects the decision-making process. In this case judges would only need to enumerate the evidence, unless there is *prima facie* insufficient evidence for asserting a particular fact. The Inter-American Court tends to be especially methodic when describing the evidence presented before it. Likewise, it is very clear when stating which items of evidence are taken into consideration when proving a particular fact. However, there might be isolated exceptions to this practice, as occurred in the *Las Palmeras v. Colombia* case, where the Inter-American Court did not list the witnesses and expert witnesses who appeared at the public hearings of the case.⁸⁴

⁸¹ LESSONA, *supra* note 16, at 363-364; ALCALÁ-ZAMORA Y CASTILLO, *supra* note 14, at 51 (stating also that the system of free conviction would require the judge only to enumerate the means of evidence rendered before him or her, whereas *sana crítica* would demand a thorough analysis of the evidence), and González Castillo, *supra* note 4, at 102-104. The Inter-American tribunal has defined grounds as "the exteriorization of the reasoned justification that allows a conclusion to be reached." Chaparro-Álvarez and Lapo-Íñiguez v. Ecuador, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 170, ¶ 107 (Nov. 21, 2007).

⁸² LESSONA, *supra* note 16, at 364.

⁸³ Apitz-Barbera ("First Court of Admin. Disputes") v. Venezuela, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 182, ¶ 77 (Aug. 5, 2008).

⁸⁴ *Las Palmeras v. Colombia*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 90, ¶¶ 25-26 (Dec. 6, 2001).

214 BUFFALO HUMAN RIGHTS LAW REVIEW Vol. 18*B. Particular Commentaries on the Court's Use of Sana Crítica*

As was mentioned earlier, *sana crítica* is the Hispanic concept used for referring to the system of rational persuasion. Hence, it seems that judges of the Inter-American tribunal, who predominantly come from the Hispanic civil law tradition, used the concept of *sana crítica* as a means to express their lack of legal constraints for evaluating the weight of specific items of evidence,⁸⁵ the freedom that international tribunals have for weighing evidence. This is why the Court has asserted that “international courts have the power to appraise and assess the evidence according to the rules of [*sana crítica*].”⁸⁶ Similarly, but without referring to the Hispanic concept of sound judicial discretion, the European Court of Human Rights also asserts that in its proceedings there are no “pre-determined formulae for its assessment” of evidence, and that it “adopts the conclusions that are, in its view, supported by the free evaluation of all evidence.”⁸⁷

The Inter-American Court usually claims to analyze the evidence only once it is brought together “into a single body, considered a whole,”⁸⁸ a statement that conveys the idea of a tribunal affirming its freedom from rules determining the weight of particular evidentiary items. The single body of evidence referred to by the Court may include proofs rendered in

⁸⁵ The Inter-American Court has asserted its flexibility for evaluating evidence since its very first decision on the merits (see *Velásquez-Rodríguez v. Honduras*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 127 (July 29, 1988)), and continues asserting it (e.g. *Hilaire, Constantine and Benjamin v. Trinidad and Tobago*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 94, ¶ 65 (June 21, 2002); *Cantos v. Argentina*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 97, ¶ 27 (Nov. 28, 2002)).

⁸⁶ In the original the Court speaks about the rules of “competent analysis,” which is another way of translating the concept *sana crítica*. *Miguel Castro-Castro Prison v. Peru*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 160, ¶ 184 (Nov. 25, 2006). Regarding the margin of discretion that international tribunals have for the assessment of evidence see CHITTHARANJAN F. AMERASINGHE, *EVIDENCE IN INTERNATIONAL LITIGATION* 187-210 (2005). Regarding the International Court of Justice’s freedom for weighing evidence see Shelton, *supra* note 6, at 387.

⁸⁷ *Nachova and others v. Bulgaria* (App. nos. 43577/98 & 43579/98) Eur. Ct. H.R. ¶ 147 (July 6, 2005).

⁸⁸ *Acosta-Calderón v. Ecuador*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 129, ¶ 49 (June 24, 2005). Other examples are in *Serrano-Cruz Sisters v. El Salvador*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 120, ¶ 46 (March 1, 2005), and *Gómez-Paquiyaui Brothers v. Peru*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 110, ¶ 66 (July 8, 2004).

different stages of the trial, for example, in the phase of preliminary objections.⁸⁹ Similarly, when different cases have been merged or accumulated, this body of evidence will include the means of proof of all the cases that have been merged, as in the case of *Hilaire, Constantine and Benjamin v. Trinidad and Tobago*.⁹⁰ Furthermore, the Court has even incorporated evidence rendered in a different case affecting the same State and dealing with a similar issue, as happened in *Durand & Ugarte v. Peru*.⁹¹ Only once the evidence has been gathered as a single body will the Court give different weight to each piece of evidence in accordance with the rules of sound judicial discretion, without the constraints of any legal proof.

In every contentious case before the Court there will be—at least in theory—two rival positions, which will present opposing evidence in relation to particular matters. Thus, the Inter-American tribunal will often have the duty under the rule of *sana crítica* to state why it preferred some evidence over the other. In this case it is not enough just to make a list of the means of evidence rendered before the Court.⁹² If a tribunal does so, without addressing why it dismissed evidence pointing in a particular direction, it would not be justifying its decision. If a court only lists the “proven facts” of a case, making no particular reference to the means of evidence used for

⁸⁹ *E.g.*, *Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua*, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 98 (Aug. 31, 2001), and *Herrera-Ulloa v. Costa Rica*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. Series A No. 107, ¶ 91 (July 2, 2004). The Court will also use evidence rendered at the merits stage for deciding an issue at the reparations stage. *E.g.*, *Bámaca-Velásquez v. Guatemala*, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 91, ¶ 22 (Feb. 22, 2002). Originally this custom was more noticeable, because the Court would issue a separate decision for each stage of a particular case, whereas currently it usually renders a unique decision regarding preliminary objections, merits, reparations and costs.

⁹⁰ *Hilaire*, Inter-Am. Ct. H.R. (ser. C) No. 94, ¶ 78.

⁹¹ However, this situation was an incorporation of evidence *motu proprio* by the Court. *Durand & Ugarte v. Peru*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 68, ¶¶ 35, 38 (Aug. 16, 2000). Another example is *Sawhoyamaxa Indigenous Cmty v. Paraguay*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 49 (Mar. 29, 2006). For a description of the requisites for incorporating evidence from a different proceeding without violating the principle of due process see ÁLVARO PAÚL DÍAZ, *LA PRUEBA ANTICIPADA EN EL PROCESO CIVIL* 45-49 (2006).

⁹² ALCALÁ-ZAMORA Y CASTILLO, *supra* note 14, at 51. The Court’s decisions on the merits usually have a chapter called “Evidence Assessment,” but it deals mainly with the admissibility of evidence, not with its evaluation according to the rules of logic and experience.

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asserting them, it would be issuing a “black box” decision. It would be a ruling in which the observer only knows the inputs and outputs—i.e., the evidence presented by both parties and the final decision—but not the process whereby the conclusion was reached.⁹³ An example of this in the Inter-American system is given by the *Street Children* case,⁹⁴ where the Court did not explain which evidence was used for proving most of the facts.⁹⁵ Fortunately, this case was just an exception, since the Court usually gives an account of the means of proof supporting each of its findings.

An example of a proper justification of the Inter-American tribunal’s evaluation of evidence is the assessment of a witness’s testimony in the reparations’ stage of *Aloeboetoe v. Suriname*. In this case the Court stated the reasons why it gave no value to this declaration, which countered other evidence on the same issue.⁹⁶ A display of the motives for dismissing a witness’s testimony should allow the observer to judge the Court’s reasoning according to the rules of logic and the teachings of experience. By way of contrast, an example of the Court’s failure to give a proper justification of its reasons for preferring some evidence over the other can be found in *Serrano-Cruz Sisters v. El Salvador*,⁹⁷ where the applicants alleged the abduction of two little girls by military forces while they were alone in the midst of the wilderness. In this case there was conflicting evidence regarding the very existence of the girls.⁹⁸ However, instead of explicitly analyz-

⁹³ The system of free conviction is the only one allowing a “black box” reasoning. See *id.*; Taruffo, *supra* note 6, at 667. Cf. González Castillo, *supra* note 4, at 104-105.

⁹⁴ Villagrán-Morales v. Guatemala (*Street Children*), Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 63, ¶¶ 76 ff (Nov. 19, 1999).

⁹⁵ However, in this case it is possible to imply which evidence was used for proving many of the facts.

⁹⁶ *Aloeboetoe v. Suriname*, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 15, ¶ 58 (Sept. 10, 1993). In this case the Court considered that “the manner in which that witness testified, his attitude during the hearing and the personality he revealed led the Court to develop an opinion of the witness that persuaded it to reject his testimony.” The Court’s rejection of this witness’s testimony was not a declaration of inadmissibility—which can also occur in a system of legal proof—but a judicial assessment of this declaration’s evidentiary weight.

⁹⁷ *Serrano-Cruz Sisters v. El Salvador*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 120 (Mar. 1, 2005).

⁹⁸ *Id.* For statements of witnesses related to the girls’ family, against the existence of the girls, see *id.* at ¶ 35 (4-7); ¶ 366. For evidence supporting the existence of the girls—besides the declarations of some next of kin entitled to compensation— see ¶ 36(7); ¶¶ 48(77), 102. Among this evidence, probably the most important were the girls’ baptismal records, even though their authenticity was not crystal clear.

ing the competing evidence according to the rules of sound judicial discretion, the Court dismissed the whole issue by saying that the Salvadoran Ombudsman Office had specifically mentioned to the girls' case, understanding that this would prove their existence.⁹⁹ The Court did so without even discussing the Ombudsman's rigorousness and independence or how this body had reached its conclusions. The result reached by the Court may be reasonable, but the issue at hand is the process whereby this result was achieved.

In this regard, when reports of public or private bodies have a decisive influence in the Court's determination of some facts, as in the recent *Fernández-Ortega v. Mexico* case,¹⁰⁰ it would be advisable for the Court to issue a separate analysis of their independence and decision-making process.¹⁰¹ The evidentiary value given to a report will be totally dependent on the reliability of the body which renders it.

⁹⁹ Serrano-Cruz Sisters, Inter-Am. Ct. H.R. (ser. C) No. 120, ¶ 102.

¹⁰⁰ In the *Fernández-Ortega* case the Court placed a very significant weight on a report of the *Secretaría de la Mujer del estado de Guerrero* (Woman's Secretariat of the state of Guerrero) (*Fernández-Ortega v. Mexico*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 215, ¶ 79 (Aug. 30, 2010)). The relevance of this report for the Court's decision is stressed in *Cabrera-García & Montiel-Flores v. Mexico*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 220, ¶ 85 (Nov. 26, 2010).

¹⁰¹ This study's consideration about the need of analyzing the body issuing a report is similar to Faúndez's assertion that the Commission should, when evaluating evidence, "objectively take into account the independence and impartiality of its source." FAÚNDEZ LEDESMA, *supra* note 8, at 405406. Another issue concerning reports is that they are usually available not only in the case's file, but elsewhere (e.g. the internet). However, when the Court cites them in its judgments, it tends to pinpoint only the volume and page number of the case's file where this document is included, not the page number of the actual document. This hinders the assessment that academics and human rights advocates could make of the Court's rulings, since it would be easier for them to have access to the reports directly than to the file of a case. Thus, the Court should also refer to the page number of the quoted document. Examples of the Court's practice can be seen in *González ("Cotton Field") v. Mexico*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205, ¶¶ 116-20, (Nov. 16, 2009); *Fernández-Ortega*, Inter-Am. Ct. H.R. (ser. C) No. 215 at ¶ 79. However, this is not always the case, as it may be noted in *Miguel Castro-Castro Prison v. Peru*, where the Court does refer to the relevant sections of the original document. Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 160, ¶¶ 30 ff (Nov. 25, 2006). Another matter that does not facilitate the assessment of the Inter-American Court's ruling

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The merits of these reports may benefit either the alleged victim or the State. An example of the latter situation is given by the matter of provisional measures claimed in *Four Ngöbe Indigenous Communities and Their Members regarding the Republic of Panama*.¹⁰² The Court's decision on this matter was criticized because of the importance given to a report issued by the *Defensoría del Pueblo* [Office for Civil Rights],¹⁰³ which was favorable to the interests of the State.¹⁰⁴ This decision regards provisional measures as opposed to a decision on the merits. However, it is nevertheless useful for exemplifying cases in which reports are favorable to the State.

The foregoing commentary about giving weight to reports without explicitly analyzing their objectivity does not intend to offer an evaluative judgment of the merits or suitability of the said reports. Indeed, at times they may be particularly useful for proving generalized violations of human rights. These comments are designed merely to stress that the use of reports whose aptness has not been explicitly assessed may result in a mistaken account of the facts. The need for analysis of these reports is especially relevant when they refer to the general human rights situation of a given country, since they may be used in several future cases involving similar situations. The lack of a proper analysis of reports used by the Court was probably what motivated a complaint of the ad-hoc judge in the *Mack Chang v. Guatemala* case.¹⁰⁵

The Court has exceptionally described some features of the body issuing a report, or of the report itself. In the *Miguel Castro-Castro Prison v. Peru* case, prior to utilizing the final account of the Peruvian Commission for Truth and Reconciliation, the Court described some of this body's fea-

is that this tribunal has not uploaded to its website the relevant writs and documents of cases decided after 2008.

¹⁰² *Four Ngöbe Indigenous Cmtys.*, Order of the Inter-Am. Ct. H.R. (May 28, 2010), available at http://www.corteidh.or.cr/docs/medidas/ngobe_se_01_ing.pdf (last visited Sept. 19, 2012).

¹⁰³ *Id.*, e.g., at 8 ¶ 7, 9 ¶ 11 & 10 ¶ 15.

¹⁰⁴ At times these State agencies will have an opinion absolutely against the interests of the State, as it happened in *Ticona-Estrada v. Bolivia* case, where the national *Ombudsman* filed the case against the State. Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 191, ¶ 1 (Nov. 27, 2008).

¹⁰⁵ Judge Martínez states that certain reports "do not represent by themselves [the] facts stated therein." *Mack Chang v. Guatemala*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 101, ¶ II (Nov. 25, 2003) (Martínez-Gálvez, dissenting). The Court did not base its findings exclusively on the reports alluded by the said opinion; there was also an acknowledgement of responsibility by the State. *See id.*, at ¶ 113. However, this criticism may have been avoided by analyzing the probative value of the said reports.

tures: how was it created, which were its ends, and how were its members appointed.¹⁰⁶ Similarly, in the recent *Vera-Vera v. Ecuador* case the Court analyzed the weight of a report of the Inter-American Commission, which was based on an *in loco* visit to Ecuador, but which did not provide further data, surveys, or evidence about the situation under analysis. In this case, the Court considered that this report was not enough for proving a particular situation.¹⁰⁷ This deliberation of the Court is appropriate, since it takes into account the way in which the report was produced, before determining whether it is reliable evidence.¹⁰⁸

An issue related with the foregoing is the determination of who has the burden of claiming the lack of accuracy of the reports presented before the Court. This matter has no simple answer. In cases where the Court itself incorporates a report *motu proprio*, it is easier to state that the Inter-American tribunal has a duty to assess the objectivity and decision-making process of the body issuing this report. In the remaining cases, it is reasonable to expect the interested party to complain about the unsuitability of this evidence. However, the traditionally active role of the Inter-American tribunal when obtaining and evaluating evidence gives strong grounds for requiring the Court to analyze the objectivity of these reports, irrespective of whether the parties present any objections to this evidence. This is especially so when these reports may have an impact on future cases.

Finally, since the Inter-American Court can weigh evidence freely, as long as it follows the rules of sound judicial discretion, it may take into consideration not only direct but also other admissible means of evidence. In this regard, since its very first judgment on the merits, in the *Velásquez-Rodríguez v. Honduras* case, the Inter-American Court has stated its power to base its decisions on circumstantial evidence, indicia, and presumptions.¹⁰⁹ The European Court has made a similar assertion.¹¹⁰ When a Court

¹⁰⁶ *Miguel Castro-Castro Prison v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 160, ¶ 197(3-5).

¹⁰⁷ *Vera-Vera v. Ecuador*, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 224, ¶¶ 80-81 (May 19, 2011).

¹⁰⁸ The suitability of the Commission's reports as evidence before the Court will not be dealt with in this paper.

¹⁰⁹ *Velásquez-Rodríguez v. Honduras*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 130 (July 29, 1988). The Inter-American tribunal continues asserting its possibility to do so, e.g., *Villagrán-Morales v. Guatemala (Street Children)*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 63, ¶ 69 (Nov. 19, 1999).

¹¹⁰ In *Jalloh v. Germany* the European Court states that it can use not only direct evidence, but also evidence which comes about from "coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of

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bases its judgment on indirect evidence, meeting an appropriate standard of proof, its decisions will be as binding as if they were based on direct means of evidence. Thus, the Inter-American tribunal's approach in the *Gangaram-Panday v. Suriname* case, where it granted the applicant only a "nominal amount" of compensation and dismissed the request for an award of costs, simply because it reached its conclusion by inference, seems inadequate.¹¹¹ Indeed, there is no reason for the Inter-American tribunal to grant different kinds or amounts of compensation according to the way in which it reaches a decision. Fortunately this approach was not maintained in later jurisprudence of the Court.

CONCLUSION

The concept of *sana crítica* [sound judicial discretion] has a clear meaning in Hispanic civil law. It refers to one of the different ways in which courts can weigh the evidence rendered in a case. This system allows judges to assess evidence without being constrained by norms of *legal proof*. At the same time, it requires adjudicators to judge in accordance with the rules of reason and experience, and to state the grounds for their evaluation of the weight of evidence. Sound judicial discretion represents a midway point between rigidity and mistrust in judges, reflected in the system of legal proof, and over-flexibility and irresponsibility, reflected in the system of free conviction.

Usually the Inter-American tribunal states that its assessment of evidence follows the system of *sana crítica*. However, the varying translations of this concept have probably not suggested the reader of the English version of the Court's case law to enquire into the content of *sana crítica*. Giving diverse names to this notion may be the result of the Court's lack of a permanent office in charge of translating documents, which may be, in turn, due to this tribunal's lack of funding. Nevertheless, the Court should aim at being consistent when translating the concept of *sana crítica* into English, in order to make the reader of this version of the Inter-American tribunal's case law accustomed with a single notion.

The Inter-American Court understands the concept of *sana crítica* and has generally made an appropriate use of it. Particularly praiseworthy is this tribunal's account of the means of evidence supporting each one of its findings. However, as to the Court's duty to explain how it weighed the evidence rendered before it, there are cases of both good and defective ex-

fact." 2006-IX Eur. Ct. H.R., ¶ 67, <http://hudoc.echr.coe.int/sites/eng/> (search for "Jalloh v. Germany") (last visited Sept. 21, 2012).

¹¹¹ *Gangaram-Panday v. Suriname*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 16, ¶¶ 70-71 (Jan. 21, 1994).

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planations. Examples of the latter are cases where the Court places important evidentiary weight on reports of governmental or non-governmental organizations, without commenting on their independence or on the rigor-ousness of their decision-making process. Thus, even though there is a gen-erally positive application of *sana crítica* by the Court, there is still some scope for improvement.

