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Glenda Mezarobba

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Cooperation Between the Universal and Inter-American Human Rights
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IN MEMORIAM

Kevin Boyle – Strong Link in the Chain

By Borislav Petranov



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PRESENTATION



We are very pleased to present the 13th issue of *Sur Journal*, which addresses the subject of regional human rights protection mechanisms. The purpose of this issue is to examine the development of these regional systems, their drawbacks and potentials, and to discuss the possibility of cooperation and integration between them and the international human rights system. The journal's first article, titled **Urgent Measures in the Inter-American Human Rights System**, by Felipe González, reviews the treatment given urgent measures by the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights (precautionary measures, in the case of the Commission, and provisional measures, in the case of the Court).

Juan Carlos Gutiérrez and Silvano Cantú, in **The Restriction of Military Jurisdiction in International Human Rights Protection Systems**, examine cases from the Universal, Inter-American, African and European human rights protection systems in order to place the matter of military jurisdiction in a comparative perspective, particularly when this jurisdiction applies to civilians, whether they are passive or active subjects.

Addressing the African system specifically, Debra Long and Lukas Muntingh, in their article titled **The Special Rapporteur on Prisons and Conditions of**

Detention in Africa and the Committee for the Prevention of Torture in Africa: The Potential for Synergy or Inertia?, analyze the mandates of these two special mechanisms and consider the potential for conflict generated by two mandates being held by a single member.

This edition of the journal also contains an article by Lucyline Nkatha Murungi and Jacqui Gallinetti on the role of the courts of Africa's Regional Economic Communities regarding the protection of human rights on the continent, in **The Role of Sub-Regional Courts in the African Human Rights System**.

Magnus Killander, in **Interpreting Regional Human Rights Treaties**, illustrates how regional human rights courts have, for the purposes of interpreting international treaties on the subject, followed the rules established by the Vienna Convention on the Law of Treaties.

Antonio M. Cisneros de Alencar, in **Cooperation Between the Universal and Inter-American Human Rights Systems in the Framework of the Universal Periodic Review Mechanism**, makes the claim that despite new opportunities for cooperation between the global and regional human rights systems, a great deal more can still be done to make the Inter-American system benefit from the UN Human Rights Council's Universal Periodic Review Mechanism.

We hope that this issue of Sur Journal will draw the attention of human rights activists, civil society organizations and academics to the possibility of a greater cooperation and integration between the regional and the international human rights systems.

We have also included in this issue the article **Strong Link in the Chain**, by Borislav Petranov, a homage to Professor Kevin Boyle, an exceptional academic and human rights defender, and a tireless partner of Sur Journal and the other initiatives of Conectas Human Rights. His life will remain a major source of inspiration for us. This issue includes another two articles, both dealing with the topic of transitional justice in post-dictatorship Latin America. The article by Glenda Mezarobba, titled **Between Reparations, Half Truths and Impunity: The Difficult Break with the Legacy of the Dictatorship in Brazil**, reconstructs and analyzes the process developed by the Brazilian State for making amends with victims of the dictatorship and with society. It also looks at what has already been done and what still needs to be done in terms of truth and justice and in relation to reforming the country's institutions.

The article by Gerardo Alberto Arce Arce, meanwhile, discusses the process of establishing a Truth and Reconciliation Commission in Peru, and the judicialization of the human rights violations that occurred dur-

ing the country's armed conflict in light of the relations between the Peruvian armed forces and the political and civil spheres of its society, in **Armed Forces, Truth Commission and Transitional Justice in Peru**.

This is the second issue released with the collaboration of the Carlos Chagas Foundation (FCC), which started supporting Sur Journal in 2010. We would like to thank the FCC once again for its support, which has guaranteed the continued production of the print version of this journal. Similarly, we are grateful to the MacArthur Foundation and to the East East: Partnership Beyond Borders Program (Open Society Foundations) for their support for this issue.

We would also like to thank the Centre for Human Rights, of the University of Pretoria (South Africa), and the Center for Legal and Social Studies (CELS, Argentina) for their involvement in the call for papers and the selection for this 13th issue.

Exceptionally, the present issue, dated December of 2010, was printed in the first semester of 2011.

Finally, we would like to remind everyone that the next issue of Sur Journal will address the UN Convention on the Rights of Persons with Disabilities and the importance of tackling this issue within the realm of human rights.

The editors.



GLEND A MEZAROBBA

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ABSTRACT

This article reconstructs and analyzes the process of making amends developed by the Brazilian State with victims of the dictatorship and with society. It begins by recounting the nature and the form of the repression used by the military regime (1964-1985), makes a brief characterization of the dictatorship itself and of the process of redemocratization, and then looks at the mechanisms of transitional justice adopted by Brazil. Since the emphasis in Brazil was placed on reparations, this article addresses the compensation paid by the two administrative commissions created for this purpose. It also analyzes what has been done and what still needs to be done in relation to the duties of truth and justice and with respect to the reform of institutions.

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KEYWORDS

Amnesty – Brazil – Human rights – Military dictatorship – Transitional justice



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BETWEEN REPARATIONS, HALF TRUTHS AND IMPUNITY: THE DIFFICULT BREAK WITH THE LEGACY OF THE DICTATORSHIP IN BRAZIL*

Glenda Mezarobba

Like many other countries in the region, Brazil was also governed in the second half of last century by military forces that usurped power and operated within an ideological structure based on the doctrine of “National Security”, and against the international backdrop of the Cold War. The Brazilian dictatorship was structured to eliminate domestic subversion from the left and to reestablish “order” in the country, and it was organized to spread fear and demobilize society, with anyone opposing its ideas being classifying as enemies of the state. With the declared goal of ridding the country of corruption and of the communist threat, the dictatorship in Brazil consisted of at least three distinct stages and it made use, among other legal mechanisms, of so-called Institutional Acts (AIs) to exercise power. It also employed a variety of methods to punish and persecute people it considered its opponents, and used emergency measures to limit or suppress the right to defense of those accused of crimes against national security. Among the most frequently adopted penalties were exile, suspension of political rights, loss of political mandate or removal from public office, dismissal or loss of union mandate, expulsion from public or private schools and imprisonment. Just as arbitrary detention was commonplace, so was the use of torture, kidnapping, rape and murder. And although it may

* This article includes excerpts from *Um acerto de contas com o futuro: a anistia e suas conseqüências – um estudo do caso brasileiro* (A settling of accounts with the future: the amnesty and its consequences – a Brazilian case study) and *O preço do esquecimento: as reparações pagas às vítimas do regime militar (uma comparação entre Brasil, Argentina e Chile)* (The price of forgetting: the reparations paid to the victims of the military regime – a comparison between Brazil, Argentina and Chile), respectively a master’s dissertation (2003) and a doctoral thesis (2008) defended by the author in the Department of Political Science at the University of São Paulo (MEZAROBBA, 2006, 2008).

not be formally considered a punishment, the practice of including the names of regime opponents in the files of the security agencies effectively served as one. (DALLARI, 197?). There was also the death penalty, established by AI-14, although it was never officially used. To eliminate its opponents, the government instead carried out summary executions or killed its victims during torture sessions, always behind closed doors (FAUSTO, p. 481).

1 The stages of the dictatorship

The first stage of the Brazilian dictatorship can be placed between the coup d'état, when in April 1964 the self-named Supreme Revolutionary Command issued AI-1 establishing a state of emergency in the country, and the consolidation of the regime imposed by the military. Signed by the commanders-in-chief of the three armed services, this Act formally maintained, after several modifications, the Constitution of 1946, but significantly expanded the powers of the Executive. Unlike other Latin American countries, the National Congress continued to function, albeit in a restricted manner – the Congress had, for example, a very short time schedule of just one month to vote on bills submitted by the President of the Republic. AI-1 suspended for six months the constitutional guarantees of job stability and lifetime tenure for holders of public office, thereby allowing, “upon summary investigation”, the dismissal of civil servants and military personnel. It is estimated that initially some 10,000 civil servants were sacked and 5,000 investigations were opened involving more than 40,000 people. Article 10 of this Act also authorized the suspension of political rights and the removal of elected officials. In this first punitive cycle, whose initial list contained over a hundred names, including those of former president João Goulart and prominent politicians such as Leonel Brizola, Miguel Arraes and Celso Furtado, 2,985 Brazilian citizens were removed from public office. Furthermore, shortly after the coup, ships were converted into prisons, 20 generals and 102 officers were quickly transferred to the reserve corps, the Workers General Command (CGT) – the main trade union federation – was closed, all the other umbrella union groups and hundreds of individual unions were placed under intervention, and the *Ligas Camponesas* – a league of rural organizations fighting for land reform – was abolished. The activities of the National Union of Students (UNE) and the Brazilian Union of Secondary School Students (UBES) also ground to a halt. In the first few months of military rule, an estimated 50,000 people were detained. Following AI-2, presidential elections were made indirect, political parties were abolished and a further 305 people were “punished”. In the third wave of repression, 1,583 citizens lost their political rights (ARNS, 1985, p. 61-68; MARTINS, 1978, p. 119-122, 127; GRECO, 2003, p. 266; BRASIL, 2007a, p. 30. UNIÃO ESTADUAL DOS ESTUDANTES, 1979, p. 3). AI-3, in February 1966, extended the powers of the Legislative Assemblies, which, in addition to appointing state governors, also began to name the mayors of state capitals and of other cities classified as crucial to “national security” (GREEN, 2009, p. 97).

The second stage of the dictatorship began in December 1968, with the enactment of AI-5, which granted the President of the Republic powers to temporarily close the National Congress, intervene in the states and suspend individual rights and the guarantee of *habeas corpus*. In this so-called “coup within a coup”, former president Juscelino Kubitschek and former governor Carlos Lacerda were arrested and political rights were suspended not only of members of the opposition MDB party, but also of Arena, a party that supported the military government. This is the period when repression reached its peak, with strict censorship of the press and punitive measures in universities. While they governed the country, and in contrast to dictatorships such as Chile’s, for example, the generals in Brazil alternated the office of president, establishing a type of power rotation, in processes of succession in which only their peers participated. The presidency of General Ernesto Geisel, who took office in 1974, marked the start of the third stage of the dictatorship, which was characterized by the slow process of political liberalization that would continue until the end of the regime. In 1978, the political banishments started to be revoked and the Ministry of Foreign Relations began to make it easier for Brazilians living in exile to secure passports and travel papers (SOARES; D’ARAUJO; CASTRO, 1995, p. 308). Censorship was relaxed and the intelligence and security agencies had their powers curtailed. After 10 years, AI-5 was repealed.

Marked by the inexistence of the Rule of Law and, therefore, by the constant disregard for fundamental legal principles and the broad repressive powers at the disposal of the security forces, the conditions imposed by the doctrine of “National Security” relied on the administration of military justice to remain in place. As “legal grounding” for its abuses, the regime depended on the Military Criminal Code, the Code of Military Criminal Procedure and the Military Judiciary Organization Law. Decreed in 1969, these laws “regulated” the security forces, making them the proper authorities to order and enforce the imprisonment of any person, and they also changed the definition of crimes against national security and gave the military justice system jurisdiction to prosecute all such crimes, including, for example, bank robbery (BRASIL, 1982, v. 2, p. 524; D’ARAUJO; SOARES; CASTRO, 1994, p. 19). Another authoritarian edict enacted in the same year was the National Security Law (LSN), which was the practical application of the principles of the doctrine of the same name (INSTITUTO INTERAMERICANO DE DIREITOS HUMANOS, 1991, p. 44). To control and/or repress society, the government made use of the apparatus formed by the National Information Service (SNI), the Intelligence Agencies of the Army (CIEX), the Navy (CENIMAR) and the Air Force (CISA), and the Office of Information and the Center for the Operation of Internal Defense (DOI-CODI). São Paulo had an additional intelligence and security agency, known as Operation Bandeirantes (OBAN). To stand up to this military oppression, given the increasing degeneracy of the dictatorship, some leftist organizations opted for armed resistance (BRASIL, 2007a, p. 24).

Over the duration of the regime, it has been calculated that 10,000 Brazilian citizens left the country to live in exile – at least 130 were banished.

Until 1979, data from the research project *Brasil: nunca mais* (Brazil: never again) reveal that 7,367 people were tried and 10,034 people were interrogated, 6,592 military personnel were “punished” and at least 245 students were expelled from their universities (ARNS, 1985, p. 61-68; MARTINS, 1978, p. 119-122, 127; GRECO, 2003, p. 266; BRASIL, 2007a, p. 30). The string of Institutional Acts and the well-documented persecutions led the São Paulo State Union of Students to estimate, in the late 1970s, that more than half a million people were arrested, banished, exiled, removed from public office, forced into retirement, prosecuted or indicted by the regime (UNIÃO ESTADUAL DOS ESTUDANTES, 1979, p. 3). In the book *Liberdade para os brasileiros: anistia ontem e hoje* (Freedom for Brazilians: amnesty yesterday and today), published in 1978, Roberto Ribeiro Martins goes a step further. He calculated the number of Brazilians who would be in direct need of amnesty at more than a million. “Which means, for every hundred Brazilians, at least one needs amnesty,” he wrote, at the time (MARTINS, 1978, p. 152).

2 The struggle for amnesty

Unlike what was observed in other countries in the region, amnesty in Brazil for the victims of political persecution was not only highly desired, but also constantly demanded, right from the start of the dictatorship. In fact, a veritable struggle for amnesty began to be waged 15 years before the enactment of the law by a few exponents of the political and intellectual class, gaining momentum in society until it eventually involved a significant portion of Brazilians. By the late 1970s, on streets and soccer fields, for example, posters and banners could be seen in support of amnesty. Window stickers were displayed on cars, pamphlets were distributed on street corners and rallies were held to raise public awareness on the subject. The struggle for amnesty was by now taking place within a context of democratization, of returning to the Rule of Law and of recognition and defense of human rights, and it enlisted the support of international groups and celebrities. This foreign pressure exerted on the government did not, however, produce the anticipated results, although it did achieve significant success internationally exposing the horrors of the regime.

It was in a context of political liberalization, therefore, when responsibility for the death under torture of the journalist Vladimir Herzog was weighing on the Brazilian State, and when the military regime was more receptive to the idea of multi-party politics, that the government effectively began to consider amnesty. In June 1979, a bill for this purpose was submitted to the Congress by the then President of the Republic, General João Baptista Figueiredo. During its passage through the legislature, there was practically no exchange of ideas with society, nor with the potential beneficiaries of the law, although the Brazilian Amnesty Committees had mobilized to put a stop to torture and shed light on the cases of disappearances, and also to prevent the law from benefitting the “tormenters” of the regime’s victims.

Approved in August 1979, Law No. 6,683, or the Amnesty Law¹, fell far short of the intentions of the movement that had been calling for it, and it did not redress even the basic grievances of the victims of political persecution. Excluded from the scope of the law were certain manifestations of opposition to the regime, classified as terrorism or acts specified in emergency legislation, such as violent crime, and including only those individuals who had not previously been convicted by the dictatorship, which would last almost another six years. That is to say,

although of great significance in the country's democratization process, law 6,683 was drafted basically under the government's own terms, proving to be more effective for the members of the apparatus of repression than for the victims of political persecution, and incapable of putting a stop to the escalation in atrocities that began with the coup in 1964. In other words, the Amnesty Law was restricted by the limits established by the military regime and the circumstances of its time. [...]. Therefore, in those early days, in 1979, it can be said that the amnesty represented an attempt to reestablish relations between the military and the opponents of the regime who had been removed from office, banished, imprisoned or exiled. The law contained the idea of pacification, harmonization of differences and, by permitting an impasse to be broken, it ultimately acquired a sense of pragmatic conciliation, capable of contributing to the transition to democratic rule.

(MEZAROBBA, 2006, p. 146-147).

3 The start of the process of making amends

Despite the intentions of the military to shut the door on the human rights violations committed during its rule, the Brazilian State nevertheless embarked in a quite unique process of making amends with the victims of the dictatorship and with society. Since the Amnesty Law was incapable of redressing the main grievances of the victims of political persecution and the families of the victims who were killed by the regime (article 6 of the law, for example, only permitted the spouse, a relative or the Public Prosecutor's Office to request a missing persons report for someone who, involved in politics, had disappeared from their home and not given news for over a year, starting from the date the law came into effect), the matter naturally remained unsettled throughout this period of "détente".

In Brazil, as is well known, the transition to democracy took several years and was negotiated from the outset and defined in a type of "agreement" between the elites, which

[...] may be summed up as a compromise whereby the military would gradually withdraw from politics, retreating to the point of its political role at the start of the Republic: that of the guarantors of last resort of public order, i.e., of the stability of the republic's political institutions. The civilian elites, meanwhile, accepted the premise of the military assessment's of the post-1964 period: that it was an exceptional period in which the military intervened in politics to "save" the republic's institutions, a period in which "excessive" acts were committed on both sides (that is, by the military and

the leftist militants). To shut the door on this period, there was to be a “reciprocal pardon”, without any investigation into the violations, or even a humanitarian effort to provide the victims and their families with documentation so they could learn the truth about the events or recover the bodies of the people who died or disappeared. This limitation had the clear objective to prevent information from being gathered on the perpetrators of the violations [...].

(IBCCRIM; SABADELL; ESPINOZA MAVILLA, 2003, p. 108-109).

Furthermore, the military left power without direct elections being held for president, which did not contribute to the debate on how to handle the legacy of mass human rights violations accumulated over the 21-year duration of the dictatorship. To complicate matters further, Tancredo Neves, the civilian who had been chosen indirectly by the Electoral College to succeed General Figueiredo as President of the Republic, died before taking the oath of office. As a result, his vice-president, Senator José Sarney, from Arena, a party that supported the military dictatorship, took power in 1985.

According to Sarney, the issue of the victims of the dictatorship concerned Tancredo Neves: “[...] but, there was absolutely no way (he) could commit himself to a more radical approach to the issue. He was very fearful of a setback.” The former president, who was in power from 1985 to 1990, explained that in spite of being “a man of good judgment, of conciliation”, Tancredo Neves understood the “delicate nature of the situation and of his responsibilities” and was aware of the resistance from the regime’s hardliners:

He understood that he should oversee the transition together with the military, not against them. Had he made a more emphatic “commitment” to the issue of the regime’s victims, he could have jeopardized the whole process. To illustrate this sentiment, it’s important not to forget that he was apprehensive about even convening the Constitutional Assembly and legalizing clandestine political parties. This wasn’t among his plans. But since I wasn’t caught up in all the complex negotiations or in the compromises that Tancredo had to make to the military, when I took over the Presidency, I could legalize the PC do B [Brazilian Communist Party] and convene the Constitutional Assembly. I could conclude the amnesty, freeing the last of the political prisoners, a measure that benefitted, for example, those punished at Petrobras. Obviously there was resistance from the military.²

Sarney explained that no progress was made on the matter involving the whereabouts of the bodies of victims killed by the dictatorship during his administration, because this “was not an issue on the political agenda”. “Nevertheless, it would have been imprudent at that time. The Amnesty Law, as it was negotiated and approved, was the best possible option given the context. Without it, we could have gone in other more divisive directions.”³ It is clear, therefore, that the Brazilian transition was handled so as to avoid what are now known as transitional justice mechanisms from being adopted at the start of the civilian government.

4 Acknowledgement of the responsibility of the State

Numerous efforts were made to expand the Amnesty Law, even before the end of the military regime, although the first breakthroughs in the process of making amends only really came when the military began to lose power and, simultaneously, as democracy matured and as human rights were incorporated into the national agenda. This was how, in December 1995, President Fernando Henrique Cardoso, himself a former political exile, sanctioned Law No. 9,140, or the Law of the Disappeared⁴, acknowledging as dead 136 missing political dissidents, whose names are listed in Appendix I of the law. Cases of disappearances in Brazil date back to 1964, but this tactic would only become emblematic of the regime of terror five years later when, in September 1969, following the imprisonment of Virgílio Gomes da Silva, a militant from the National Liberation Action (ALN) guerilla group, who disappeared after being taken, handcuffed and hooded, to the headquarters of Operation Bandeirantes (OBAN) in São Paulo (MIRANDA; TIBÚRCIO, 1999, p. 38-39). The approval of Law No. 9,140 marked the first time in Brazil, outside of a court ruling, that the State accepted objective responsibility for the illicit acts of its security forces. Although the Law of the Disappeared states that the application of its provisions and all its effects shall be guided by the principle of national reconciliation and pacification expressed in the Amnesty Law, with this piece of legislation, as Nilmário Miranda and Carlos Tibúrcio observe, the Brazilian State took broad responsibility for the human rights violations committed during the military regime, namely kidnapping, imprisonment, torture, forced disappearance and murder, including violations against foreigners residing in the country (on the list are the names of four missing political dissidents who are not Brazilian). As a result, their families acquired the right to request the death certificates of the disappeared and receive compensation. After the law came into force, a commission was created to examine allegations of other deaths that were politically motivated and involving unnatural causes “while in police custody or in similar facilities”.

Although they acknowledged the importance of the government introducing legislation to address the issue of political deaths and disappearances, the families of the victims killed by the military regime could not fully endorse the new law, among other reasons because it did not compel the State to identify and hold responsible those who were directly involved in the torture, deaths and disappearances, and because it placed the burden of proof on the relatives of the victims. The families also took issue with the government’s argument that, given the limits imposed by the Amnesty Law, it was impossible to examine the circumstances of the deaths. They also criticized the requirement that requests for acknowledgement of State responsibility could only come from the families themselves, thereby treating the issue as a family matter instead of a right of society. Throughout the dictatorship and afterwards, during redemocratization, families of the dead and disappeared continued to fight for justice, and their demands were underpinned by their desire to know the truth (the revelation of the circumstances surrounding the crimes), to

determine the culpability of those involved and to locate and identify the remains of the victims. Payment of reparations never figured highly among their demands. Nevertheless, after 11 years of activities, the Special Commission on Political Deaths and Disappearances (CEMDP) had disbursed nearly 40 million *reais* to the families of more than 300 victims killed by the military regime – 475 cases were reviewed by the commission; the average value of each compensation payment was 120,000 *reais* (almost 120,000 dollars at the exchange rate when the law was passed).

In addition to compensation payments, and for the purpose of creating a database of DNA profiles to identify with scientific certainty the bones of victims separated for examination and those that would later be located, the CEMDP in September 2006 started collecting blood samples from the families of more than 100 people killed during the regime. More than 140 political dissidents who disappeared during the Brazilian dictatorship are still missing. The commission continues to work on cataloguing information on the possible locations of secret graves in large cities and on the likely burial sites of militants in rural areas, particularly in the region known as Araguaia.

5 Payment of reparations to victims of political persecution

Unlike the families of the victims killed by the military regime, the victims of political persecution have busily pursued financial compensation. Although the Amnesty Law established, in article 2, that “civil servants and military personnel who were dismissed, placed on leave, forced into retirement, transferred to the reserve corps or stripped of their rank” could request reinstatement to their former positions, this was not actually what happened once the law came into effect. After requesting amnesty, these victims of persecution had to apply for return to active service and submit to a medical examination (which needed to match the last examination prior to their punishment). In order for them to be reinstated to their positions, not only did there need to be a vacancy, but there also needed to be a “public interest” in reappointing them. Probably envisaging the difficulties that would no doubt be encountered, there were concerns even before the law was approved about the usurped rights of these victims, especially in the proposals submitted to the National Congress, particularly those dealing with cases involving civil servants and military personnel who had lost their jobs. While it was still pending in the legislature, the government’s amnesty bill received countless amendment proposals granting some kind of compensation to the victims of political persecution. None of them prevailed. When it was sanctioned in 1979, the Amnesty Law barred any possibility of reparation. In article 11, perhaps the most clearly worded of all the articles in Law No. 6,683, the veto was explicit: “This Law, beyond the rights expressed herein, does not generate any others, including those relating to remuneration, payments, salaries, income, restitution, dues, compensation, advances or reimbursements.”

After years of dealing with decrees and circulars that, in quite a disorganized way, regulated their remuneration, it was only when Law No. 8,213 came into force, in July 1991, that amnesty recipients secured the right to a special pension. At the

time, there was no shortage of cases waiting in the courts to grant the amnesty that had been denied by the government. The situation would get worse before the third phase of the process of making amends between the State and the victims of the military regime began to be defined. It was only in 1996, one year after the enactment of the Law of the Disappeared, that the victims of political persecution, from various different organizations across all regions of Brazil, decided to unite and speak with one voice. After five years of organized efforts, in 2001 they successfully convinced the government of Fernando Henrique Cardoso to send to the National Congress a bill to compensate the losses of those who had been prevented from performing their work activities as a result of the political persecution suffered during the authoritarian regime. Once Law No. 10,559⁵ came into force and the Amnesty Commission was installed in the Ministry of Justice, the process of making amends could once again be expanded, since the State could now provide financial redress to victims of political persecution that Law No. 6,683 had been unable to retribute – paying compensation for the harm caused to thousands of people through the use of discretionary power, although this was not necessarily related to the suffering experienced by the victim.

Organized into five chapters, the law (which was considered highly satisfactory by the victims of political persecution) guarantees the following amnesty rights: the declaration of the status of political amnesty recipient; financial reparations; assurance, for all official purposes, that the period of time in which they were forced to stop their professional activities due to punishment or threat of punishment will count as valid; the conclusion of courses interrupted due to punishment or the validation of diplomas obtained by those who completed courses at teaching institutes outside the country; and the right to reinstatement for punished civil servants and public employees. In the sole paragraph of article 1, the law guarantees those who were removed from their jobs by administrative cases, based on emergency legislation, without the right to contest the case or defend themselves, and prevented from knowing the motives and grounds for the decision, reinstatement to their positions (due to the age of the claimants, this reinstatement has occurred, in practice, in retirement). The law also lists in detail all the punishments that entitle victims to the status of recipients of political amnesty, and it states that financial reparations, provided for in chapter III, may be paid in two different ways: in a single installment, consisting of the payment of 30 times the minimum monthly wage per year of punishment for those who cannot prove an employment relationship, and whose value may not, under any circumstances, exceed 100,000 *reais*; or in permanent and continuous monthly installments, guaranteed to those who can prove an employment relationship. According to the law, each victim of political persecution has the right to receive the outstanding amounts up until five years before the date of their request claiming amnesty.

Since it was installed in Brasília, the Amnesty Commission, established to review claims for political amnesty and compensation filed by people who were prevented from working for exclusively political reasons, has received more than 80,000 claims. Data from January 2011 reveal that the commission has already judged 66,400 cases. Of this total, 35,000 were granted and the rest were denied.

Among the claims that were accepted, more than half were granted without any form of financial reparations (BRASIL, 2009a). An assessment of the process made in the first half of 2010 indicated that the government has disbursed 2.4 billion *reais* in reparations to these victims – in some cases, reparations for a single victim of political persecution exceed the figure of a million *reais* (LUIZ, 2011). In all the approved cases, the recognition of the status of political amnesty recipient is made official in the same way that it occurred during the dictatorship, i.e., by publishing the name of each recipient in the Federal Gazette.

6 The indifference of society and the shift in political meaning

While the struggle for amnesty involved a large part of society, the same cannot be said about the claims surrounding the obligations of the democratic State or the rights of the victims of the military regime, issues that did not mobilize – or, it would seem, even interest – the majority of Brazilians. Recalling that the main goal of the amnesty in 1979 was to forget the “excesses” committed during the military regime, this was indeed the very outcome that befell those who were directly involved in the matter, albeit for different reasons:

Permanently frightened by the possibility of reconstituting the past, the military is still the most intent on not remembering the abuses that occurred after 1964, demonstrating that even now they have not been able to forget. Similarly, the enduring need to remember – prompted by grievances never redressed, truths left unknown and a desire for this kind of suffering never to be repeated – has denied the victims of the regime and their families the possibility of ever forgetting. Remaining disconnected from the debate, impassive, is society. In fact, it seems to be alone in having managed to embrace forgetfulness.

(MEZAROBBA, 2006, p. 150-151).

Therefore, since the initial spirit of conciliation expressed in the Amnesty Law and reiterated in the two subsequent laws was maintained, new political meanings were conferred upon the process of making amends. This is evident when looking at the three main stages of this process, guided basically by federal legislation (the Amnesty Law of 1979, the Law of the Disappeared of 1995 and Law No. 10,559 of 2002): “From its initial spirit of pragmatic conciliation, we can observe that the amnesty saw its meaning evolve into an acknowledgement of the responsibility of the State for serious human rights violations and then into financial reparations for the losses suffered by victims of political persecution” (MEZAROBBA, 2006, p. 150). From the information covered so far, therefore, it is clear from the approach taken by the Brazilian State that the main investment in justice has been made in the administrative arena, through the creation of the two commissions, and geared primarily towards financial compensation. Moreover, the initiatives originated in the Executive branch and were developed with the support of the Legislature. Concerning the duty to identify, prosecute and punish the perpetrators of human rights violations, very little has been done thus far, which explains the almost complete absence of the Judiciary in the national process of making amends.

7 The lack of punishment

The first recorded case of the Amnesty Law being applied to prevent the punishment of crimes committed by the dictatorship occurred in April 1980, when the Superior Military Court (STM) heard a case calling for the punishment of three torturers who had blinded a political prisoner, four years previously. The case was dismissed as groundless, despite the fact that the violence perpetrated against the prisoner had been established in the proceedings and recognized by the military prosecutor and by the court itself. Even though no one has yet been convicted for crimes committed by the regime, the Brazilian State has been held legally responsible on numerous occasions for the imprisonment, torture, death or disappearance of the victims of political persecution. The first time was in 1978, in the case involving the illegal imprisonment of journalist Vladimir Herzog. Since it did not ensure his physical and moral integrity, the federal government was required to compensate his widow and children for material and moral damages resulting from his death. Other similar court rulings would follow, all of them recognizing the civil liability of the State. Never the criminal liability of its agents. In fact, the Brazilian courts have heard very few cases involving criminal liability. As far as is known, court cases testing the limits of the amnesty law in this respect were extremely rare, demonstrating not only the lack of confidence of the victims and their families in the legal system, but also how the climate of forgetfulness and impunity fostered by the military managed to restrain those affected by the violence of the regime. There is no doubt that certain peculiarities of the Brazilian legal system have contributed to this situation. For example, torture and murder in Brazil are treated as “crimes of public initiative”, meaning that only Public Prosecutor’s Office can file criminal cases for these crimes.

In June 2008, an attempt to punish crimes of the dictatorship began to be developed by the Public Prosecutor’s Office, after a federal prosecutor from the city of Uruguaiana, in southern Brazil, filed a request for the Federal Police to open an inquiry to investigate the kidnapping and disappearance, in 1980, of a left wing Italian-Argentine militant and an Argentine priest, in the border region of Brazil and Argentina, and the alleged involvement of both civilian and military agents of the dictatorship. The crimes were purportedly committed as part of Operation Condor and for years have been under investigation by the Italian justice department, which has already indicted a number of members of the Brazilian repressive apparatus and is calling for the suspects to be prosecuted. The case is still pending. Not long afterwards, in October of the same year, the retired colonel Carlos Alberto Brilhante Ustra was found responsible for kidnapping and torture during the military regime, in a case brought by five members of the Telles family. This was the first official recognition, by the Brazilian State, that a high-ranking military official had effectively participated in acts of torture against civilians. Tried in a civil court, this declaratory judgment case sought recognition of the occurrence of torture

and, therefore, of the existence of moral damages and damages for violation of physical integrity, but it does not imply any punishment or monetary compensation. The ruling was given by a trial court, and may be appealed.

Practically unquestioned throughout all these years in trial courts, the Amnesty Law finally began to be challenged towards the end of the 2000s not in one, but in two (high) courts: Brazil's Federal Supreme Court and the Inter-American Court of Human Rights. On the national level, it all started in the second half of 2008, when the Brazilian Bar Association filed a motion with the Federal Supreme Court, questioning the validity of amnesty for agents of the State who had committed human rights violations during the dictatorship. In the motion, the association asked the Supreme Court for a clearer interpretation of article 1 of the law, and claimed that the amnesty granted to the perpetrators of "political and connected crimes" does not extend to public agents accused of common crimes such as rape, forced disappearance and murder. Drawing on supposedly historic arguments, the reporting justice Eros Grau claimed that the Judicial branch was not in a position to review the political agreement that had resulted in the amnesty. Six justices voted in the same way and the other two opposed the interpretation. The decision was harshly criticized by human rights organizations both inside and outside Brazil.

In March 2009, the Inter-American Commission on Human Rights (IACHR), of the Organization of American States, referred the Araguaia Guerilla case against Brazil to the Inter-American Court of Human Rights. Ever since the dictatorship, relatives of the victims had been applying for access to the records of repression against this guerilla movement. In 1982, several families filed a liability case in court against the Brazilian State, to clarify the circumstances surrounding the deaths of these opponents of the regime and the whereabouts of their remains. After exhausting all available domestic remedies, the families decided in 2001 to appeal to the IACHR. In its referral, the commission asked the court to determine the international responsibility of the Brazilian State for its failure to meet a number of obligations, namely the right to personal integrity and the right to life. The commission also noted the possibility of the court determining the Amnesty Law incompatible with the American Convention on Human Rights, as a result of the serious human rights violations. On December 14, 2010, the court published its ruling on the case, declaring the country responsible for the forced disappearance of 62 people between 1972 and 1974, in the region known as Araguaia. Based on international law and on its own case law, the court concluded that the provisions of the Amnesty Law that prevented the investigation and punishment of serious human rights violations are incompatible with the American Convention and have no legal grounding. It ruled that the law must not continue to be used as an obstacle blocking either the investigation of the facts or the identification and punishment of those responsible. While it recognized and applauded of the efforts at reparation made by Brazil, the court determined, among other things, that the State not only reveal the truth about the crimes, but also criminally investigate the facts of the case.⁶

8 The right to reveal the truth

In addition to not fulfilling its duty to provide justice, the incompleteness of the process of making amends to victims of the military dictatorship by the Brazilian State also involves the duty to reveal the truth, which has only recently been addressed more substantively, although still not in full. As we know, a truth commission was never installed in Brazil to look into the human rights violations committed during the regime. For more than two decades, the main effort in this respect was limited to the development of a single unofficial project: *Brasil: nunca mais* (Brazil: never again), executed by a group of human rights defenders under the leadership of the then Cardinal Archbishop of São Paulo, Dom Paulo Evaristo Arns, and the Reverend Jaime Wright, and under the sponsorship of the World Council of Churches. The project began to be developed shortly after the approval of Law No. 6,683, in 1979, when lawyers representing political prisoners and those in exile were given access to STM files, in order to prepare amnesty claims for their clients. To guarantee a lasting record of the terror practiced by the State, these human rights defenders began to photocopy as many military court cases as they could. Three years later, practically all the files had been copied. More than a million pages had been catalogued, representing nearly all the political cases (707 in full and dozens of others in part) that passed through the military justice system between April 1964 and March 1979 (ARNS, 1985, p. 22). Released in July 1985 by the Archdiocese of São Paulo, the book *Brasil: nunca mais*, which was soon to be published in its 20th edition and become one of the best-selling books in the history of the country, reports on the repressive system, the subversion of the law and the different forms of torture that political prisoners were subjected to during the dictatorship.

The first official initiative to expose the atrocities committed during the period only began to take shape in 2007, during the second term of President Luiz Inácio Lula da Silva, himself a recipient of political amnesty, with the launch of the book *Direito à memória e à verdade* (Right to memory and to truth). The result of 11 years of work by the Special Commission on Political Deaths and Disappearances, it is the first official report by the Brazilian State to accuse members of the security forces for crimes such as torture, rape, dismemberment, decapitation, concealing bodies and murder of opponents to the regime who were already imprisoned and, therefore, unable to react. The book, which has approximately 500 pages and documents the activities of the commission, had been widely anticipated since at least 2004 and was only completed after Paulo Vannuchi was appointed Special Secretary for Human Rights. A journalist, former political prisoner and one of the authors of *Brasil: nunca mais*, Vannuchi completed the book with the help of two other writers. “We now have an official publication with the stamp of the federal government, which incorporates the version of the victims,” said the secretary when the book was launched (DANTAS, 2004, p.10; BRASIL, 2007a, p. 17, 2007b; MERLINO, 2007).

Intended as a report and critical even of the Lula da Silva government, the book explains how the work of the commission refuted the official versions

claiming that the victims had been killed while trying to escape, in exchanges of fire, or that they had committed suicide. The investigations managed to prove that the absolute majority of opponents had been arrested, tortured and killed. Highly critical of the amnesty, the book also refers to “State terror”, claiming that the victims “died fighting as political opponents of a regime that was born violating the constitutional democracy” and explains the need for the military, particularly those who participated directly in the operations, to reveal the truth that has been hidden for years. “Their formal testimony to the high command would no doubt unravel mysteries and contradictions, permitting the remains of the bodies to be effectively located.” (BRASIL, 2007a, p. 27, 30). The project *Direito à memória e à verdade* was accompanied by a photographic exhibition called “The dictatorship in Brazil 1964-1985”. Over the past few years, memorials entitled “Indispensable People” have been inaugurated – panels and sculptures that restore some of the history of the political dead and disappeared.

In relation to the archives of the dictatorship, which began to be opened after the first democratically elected president took office, in the early 1990s, some gradual but important progress has been made. In May 2009, acknowledging its obligation to reveal the truth to Brazilian society, the federal government launched the online project Revealed Memories, otherwise known as the Reference Center for the Political Struggles in Brazil (1964-1985), to make information available on the recent political history of the country. The records are stored online in a national network under the supervision of the National Archives, an institution that reports to the Office of the Chief of Staff of the Presidency of the Republic. For some years now, these archives have included documentation produced by the National Intelligence Service (SNI), the National Security Council (CSN) and the General Commission of Investigations (CGI), which used to be controlled by the Brazilian Intelligence Agency (ABIN). Thousands of secret documents drawn up between 1964 and 1975 by the Ministry of Foreign Relations and by the Federal Police are also now preserved in the National Archives. However, the existence and whereabouts of the files documenting the activities of the main protagonists of the regime’s violence – the Armed Forces – remain unknown.

9 The reform of the institutions

If there is still much to be done to fulfill the duty of providing truth and justice, then also still pending is the duty of the Brazilian State to reform key institutions, to make them democratic and accountable. While there can be no doubt as to the important progress that has been made since redemocratization, particularly in the social and economic areas, there are still problems, for example, concerning respect for civil rights, which can be illustrated by the not only high, but in some cases also rising, rates of violence. Tragic evidence of this is that torture continues to be used against prisoners in police stations and prisons across the country. Although it was employed long before the military regime, throughout Brazilian

history, the dictatorship relished in its refinement of torture, and the practice persists to this day, even after Law No. 9,455 codified the crime of torture in 1997 – only going to confirm that the transition to democracy has not, in itself, been sufficient to shut the door definitively on the country's repressive past. In addition to the impunity and the threat it represents in relation to future abuses, Brazil is also a clear example of a country that has been unable to shake off the legacy of authoritarianism built over the course of the regime. Although Law No. 9.299 was sanctioned in 1996, transferring from military to civil courts the jurisdiction to judge military police accused of “felonies against life”, legislation such as the National Security Law still persists. This law is extremely authoritarian and is incompatible with the Brazilian Constitution of 1988, but it remains in force in direct conflict with democratic ideals.

And even though the creation of the Ministry of Defense, in 1999, imposed some form of civilian control over the Armed Forces, no significant reform has been made of the national security system, which was also not purged after the dictatorship. As a result, it is not rare to read in the press about cases, usually based on charges made by human rights groups, of notorious torturers from the regime who continue to work in police stations or government offices, or who even plan to run for elected office. Until now, and unlike what has happened in Argentina and Chile, for example, no official apology has been made by the Brazilian military. Although the practice of torture during the regime has been progressively admitted by military officials, albeit inaccurately as isolated acts by a few rogue officers and not as a policy of the State, the more than 25 years of democracy in Brazil has still not been long enough for the Armed Forces to publicly express regret for the crimes committed after 1964. In general, the military have pulled together, expressing no regret, and very often putting up barriers to hold back the process of making amends. The most recent example of the difficulty this group has in dealing with the crimes of the past occurred in the second half of 2009, during a debate on the possibility of creating a truth commission. The teaching of human rights in military academies also continues to be a delicate issue.

Nevertheless, more generally speaking, it is possible to note that not only have important initiatives been developed since the return to democracy, but the issue of human rights appears to be gradually turning into a policy of the State, regardless of the differing ideological positions of the leaders presiding over the country. The process of bringing Brazil into the folds of the international human rights protection system began during the government of José Sarney, who signed, in September 1985, the Convention Against Torture and Other Cruel and Degrading Treatment. His successor, Fernando Collor de Mello, became the first Brazilian president to emphasize the role of the international community in monitoring human rights, in a speech given at the annual opening of the United Nations General Assembly, in 1990, and he was also the first to officially receive to the country a delegation of Amnesty International (ALMEIDA, 2002, p. 16). Unlike Sarney, whose term was marked by the unconditional defense of the sovereignty of the Brazilian State, Collor refused to use this to cover up

human rights violations (ALMEIDA, 2002, p. 62). Accordingly, after circular letter no. 9,867, of November 8, 1990, the Ministry of Foreign Relations began to advise its staff about the government's new position to no longer deny the facts, but instead, whenever necessary, to acknowledge human rights violations and demonstrate that the government was committed to investigating them (ALMEIDA, 2002, p. 87, 122).

In response to a recommendation of the Declaration and Programme of Action of the United Nations World Conference on Human Rights (whose writing committee was chaired by Brazil), held in Vienna, the country instituted its first National Human Rights Program (PNDH) in 1996, with an emphasis on assuring civil and political rights. Foremost among the numerous goals, put into practice upon its implementation, are the creation of the National Witness Protection System and the demolition of the Carandiru prison, in São Paulo, which rose to infamy in the first half of the 1990s after a massacre that culminated in the death of more than 100 inmates and turned the prison into a symbol of disrespect for human rights. Shortly afterwards, the National Bureau of Human Rights was created within the purview of the Ministry of Justice. The first PNDH was reviewed and updated in 2002, in response to demands from social movements that called for its expansion. The PNDH II incorporated economic, social and cultural rights (BRASIL, 2008, 2009).

Early in the first term of the Lula da Silva administration, in 2003, the name of this bureau was changed to the Special Bureau of Human Rights and, together with the Special Bureau of Policies for the Promotion of Racial Equality and the Special Bureau of Policies for Women, acquired ministerial status. Five years later, after the 11th National Human Rights Conference, Brazil embarked on a process to review and update the two previous PNDHs, with 137 meetings held in advance of the state-level stage, involving nearly 14,000 participants, namely representatives of organized civil society and the public authorities. Structured around six central principles (one of them dedicated to the right to memory and to truth; another to human rights education and culture), subdivided into 25 guidelines and more than 80 strategic goals, the PNDH III is based on the 700 resolutions of the 11th Conference and on countless other proposals from Thematic National Conferences and from federal government plans and programs, in addition to international treaties ratified by Brazil and recommendations made by the UN Treaty Monitoring Committees and their special rapporteurs (BRASIL, 2009b). It was launched by the President of the Republic on December 10, 2009, in the midst of much controversy. Towards the end of 2010, Brazil ratified the International Convention for the Protection of All Persons from Forced Disappearance. And early in 2011, the National Congress began to debate bill no. 7,376/2010⁷, sent by the Executive branch, which should finally institute a National Truth Commission to examine and shed light on the serious human rights violations committed during the military dictatorship.

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NOTES

1. The full text of Law No. 6,683 is available (in Portuguese) at: <http://www.planalto.gov.br/ccivil_03/Leis/L6683.htm>.

2. Interview given by the former president of Brazil José Sarney to Glenda Mezarobba on August 23, 2007.

3. Interview given by the former president of Brazil José Sarney to Glenda Mezarobba on August 23, 2007.

4. The full text of Law No. 9,140 is available (in Portuguese) at: <<http://www.planalto.gov.br/>

ccivil_03/Leis/L9140.htm>.

5. The full text of Law No. 10,559 is available (in Portuguese) at: <http://www.planalto.gov.br/ccivil_03/Leis/2002/L10559.htm>.

6. The official text of the ruling is available (in Portuguese) at: <http://www.corteidh.or.cr/docs/casos/articulos/seriec_219_esp.pdf>.

7. The full text of Bill No. 7,376/2010 can be found (in Portuguese) at: <http://www.camara.gov.br/internet/sileg/Prop_Detalhe.asp?id=478193>.

RESUMO

Este artigo reconstitui e analisa o processo de acerto de contas desenvolvido pelo Estado brasileiro junto às vítimas da ditadura e a sociedade. Começa recordando a natureza e a forma de repressão utilizada pelo regime militar (1964-1985), faz uma breve caracterização da ditadura propriamente dita e do processo de redemocratização e trata dos mecanismos de justiça de transição adotados pelo Brasil. Como a ênfase, no país, foi dada ao esforço reparatório, trata das indenizações pagas pelas duas comissões administrativas criadas com essa finalidade. Também analisa o que foi feito e o que ainda falta fazer em relação aos deveres de verdade e justiça e no que diz respeito à reforma das instituições.

PALAVRAS-CHAVE

Anistia – Brasil - Direitos humanos - Ditadura militar - Justiça de transição

RESUMEN

Este artículo reconstruye y analiza el proceso de ajuste de cuentas llevado a cabo por el Estado brasileño frente a víctimas de la dictadura y frente a la sociedad en su conjunto. Comienza recordando la naturaleza y la forma de represión utilizada por el régimen militar (1964-1985), caracteriza brevemente la dictadura propiamente dicha, así como el proceso de redemocratización, y aborda los mecanismos de justicia transicional adoptados por Brasil. Ya que el énfasis, en el país, ha sido puesto en el esfuerzo de reparación, el artículo trata de las indemnizaciones abonadas por las dos comisiones administrativas creadas con tal finalidad: la Comisión Especial sobre Muertos y Desaparecidos Políticos y la Comisión de Amnistía. También analiza lo que ha sido hecho y lo que todavía falta hacer con relación a los deberes de verdad y justicia, y con respecto a la reforma de las instituciones.

PALABRAS CLAVE

Amnistía – Brasil – Derechos humanos – Dictadura militar – Justicia transicional



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ABSTRACT

Peru has experienced, in the past few years, a process that has largely determined the dynamics of the relationship between the Armed Forces and the political and civil societies, through the creation of a Truth and Reconciliation Commission, and the judicialization of the violations of human rights committed during the internal armed conflict between the terrorist group *Sendero Luminoso* and the security forces of the State (1980-2000). This process incurred a stern reaction from the Armed Forces, expressed through a number of discourses and strategies that attempted to limit its reach, by means of continuous requests, to the political authorities, for political and legal support for the fulfillment of their duties.

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KEYWORDS

Peru – Armed Forces – Democracy – Human rights – Truth Commission – Transitional justice



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ARMED FORCES, TRUTH COMMISSION AND TRANSITIONAL JUSTICE IN PERU

Gerardo Alberto Arce Arce

1 Introduction

An affirmation that resists but little discussion is that civilian control over the Armed Forces understood, broadly, as “the ability of a democratically elected civilian government to carry out a political policy without interference by the military, to define the goals and general organization of national defense, to formulate and carry out a defense policy, and to supervise the application of military policies” (AGÜERO, 1995, p. 47), is one of the main requirements for the consolidation of democracy. In Latin America, after the end of military governments and transitions to democracy in the decade of 1980, these processes have had dissimilar results: in some countries, progress has been made regarding the institutionalization of ministries of Defense and the reduction of the institutional prerogatives of the Armed Forces; in others this progress has been slower and more sinuous, with the occurrence, in many cases, of resistance from the military corporation to this process; and, in some cases, rejection to the processes of transitional justice in societies that were leaving behind internal armed conflicts or episodes of political violence and State-sponsored repression.

A good example of this last case is that of Peru, which in the past few years lived a process that has largely determined the dynamics of the relationship between the Armed Forces, and the political and civil societies: the process of transitional justice after the end of the regime of Alberto Fujimori (1990-2000) and the creation of a Truth and Reconciliation Commission, in charge of investigating and clarifying the responsibilities for the violations of human rights committed during the internal armed conflict between *Sendero Luminoso* and the security forces of the State.

In this context, the objective of the following pages is to analyze the discourses and strategies developed from within the military corporation in response to these events, which will help us understand, in turn, the scope and limits of the security sector reform in the period after the transition to democracy, as well as the

Notes to this text start on page 49.

consequences that the process of political violence lived in Peru between 1980 and 2000 –and which has certainly not concluded in some regions of the country– has on the relationship between the Armed Forces, and the civil and political societies.

2 The transition to democracy in Peru

Given Alberto Fujimori's resignation from the presidency in November 2000, a transitional government was installed in Peru (November 2000 – July 2001) headed by Valentín Paniagua, which had as its main objective the organization of fair and transparent elections, to guarantee due process in the trials that had been opened for cases of corruption against political operators of the Fujimori regime, and to deliver the power to a new democratically elected government. In this context, after the public exposure of the network of corruption sponsored by Montesinos within the Armed Forces, and with these institutions increasingly discredited before the public opinion, it was not too difficult for the transitional government of Paniagua to dismiss all the military leaders¹, and to generate the adequate conditions for the Judiciary to indict them for the acts of corruption committed, with all the guarantees of due process. An unexpected circumstance that would accelerate this process was the public exposure, in April 2001, of a "Subjugation Act" signed in 1999 by, virtually, all high commanders of the Armed Forces, in which they supported the so-called self-coup of 1992, the counter-subversive policy applied by the Armed Forces during the internal armed conflict, and the amnesty laws:

The participation of the Armed Forces (...) in the decision adopted by the government of the president of the Republic on April 5th, 1992 was a conscious and serenely meditated act, and the support and endorsement given to that decision was the expression of the unanimous institutional will of the members that comprise the Armed Forces, PNP and other stratum of the National Intelligence System.

(...)

To stress that our nation has dictated laws of General Amnesty that are fully valid, in which it is clearly defined that no responsibility whatsoever, either institutional or individual, can be attributed, to the military, police and the intelligence community personnel that participated in the struggle against terrorism.

To declare that the Armed Forces (...) assume the institutional commitment, without limitations in time, to defend, protect and support its members in the event that, notwithstanding the full validity of the amnesty laws, it were intended to hold them responsible, prosecute them or perform any kind of reprisal due to their intervention in the fight against terrorism.

Adhesion Ceremony by Generals and Admirals, 13 March 1999 (PERU, 2004, pp. 3503-3505).

Even though it may be argued that the signature of this act was a compulsory action to which the military command was obliged to by Montesinos (despite which some generals were able to find good excuses to be absent on that day), it is also true that

the contents of the act roughly reflect the mood of the military leaders in the final days of Fujimori's mandate: the fear that, if Fujimori did not beat the opposition in the 2000 elections and was not reelected, the generals who supported the *coup* in 1992, as well as all other military personnel who committed human rights violations during their fight against subversion, would be persecuted or penally sanctioned.

Given the publication of this statement, the transitional government forced into retirement 50 major generals and brigadiers of the Army, 20 vice-admirals and rear-admirals of the Navy, and 14 generals of the Air Force who had signed the document (ROSPIGLIOSI; BASOMBRIIO, 2006, p. 46). Also, the Commanding Generals of the three armed institutions and the General Director of the PNP tendered their resignation, and issued a statement in which they apologized to the Peruvian people for the institutional participation of the Armed Forces in the *coup* of 1992, outlined a self-criticism for their participation in the Fujimori government and backed the creation of a Truth Commission, indicating:

A commitment to perform tasks within the framework of the respect for human rights, the strengthening of moral values and, consequently, to firmly and permanently fight any indication of corruption or misconduct in the institutional life that may compromise such values and principles. For this reason, it supports the initiatives directed towards the creation and installation of a Truth Commission that will allow for national union and reconciliation, based on justice and on an equitable and objective appreciation of the facts and circumstances in which the effort for national pacification was carried out.

Statement signed by the three Commanding Generals and the General Director of the PNP on 17 April 2001 (ROSPIGLIOSI; BASOMBRIIO, 2006, p. 48).

This 180-degree turn, in less than two years, is due not only to the change in the conduction of the Armed Forces (we are referring to the change in command), but mainly to their political weakness after the fall of Montesinos' network and the surfacing of the corruption cases. But this can also shed light on the superficial conviction of the new military leadership on the convenience of creating a Truth Commission.

3 The Truth and Reconciliation Commission

In June 2001, a few weeks before the conclusion of his brief eight months of government, former president Valentín Paniagua instituted a Truth Commission whose mandate was to “clarify the process, the facts and the responsibilities of the terrorist violence and the violation of human rights produced since May 1980 and until November 2000, attributable both to the terrorist organizations and to State...” (PERU, 2001). Likewise, among the objectives of the commission were the elaboration of proposals for reparation and restoration of the victims' and their family members' dignity, and to “recommend institutional, legal, educational and other reforms, as a guarantee of prevention, in order for them to be processed and implemented through legislative, political or administrative initiatives” (PERU, 2001).

According to one of its commissioners, the decision to create a Truth Commission was “the product of an agreement between a very articulate, but not very numerous, sector of civil society, where human rights defenders and radical democrats coincided with the political wing of this government that sympathized with those same causes” (AMES, 2005, p. 32). On our behalf, we would like to emphasize the revealing nature of the precarious correlation of political forces that sustained the commission, in the sense that it was created by a supreme decree, a norm inferior in hierarchy to a law, which would have had to be approved by Congress, which in 2001 still had a numerous pro-Fujimori group of congressmen that would have presumably opposed the creation of this organism. Due to some criticism received, particularly focused on the political past of some of its members (commissioners Bernales, Degregori and Tapia had been militants or leaders of parties that comprised the extinct coalition *Izquierda Unida* [*United Left*]), the government of Alejandro Toledo (2001-2006) expanded the number of members of the commission from 7 to 12 –among them, a retired military officer, Lt. General (r) FAP Luis Arias Graziani– and changed its name to that of Truth and Reconciliation Commission (CVR, for its acronym in Spanish).

In spite of being profoundly discredited before the public opinion due to the cases of corruption in which most of the military leadership was involved during Fujimori’s regime, the military corporation was not passive or inactive regarding the work of the CVR. However, during the two years of activity of the commission, the corporation attempted to show the commissioners the vision that the militaries themselves had on the internal armed conflict. To this end, in August 2001, the Army Command formed a commission to liaise with the CVR, which worked as a dependent office of the military Chief of Staff. As of January 2002, it was decided that the Direction of Civilians Affairs of the Army would assume the tasks of that office. In parallel, an instruction from the Ministry of Defense ordered the creation of the Support Committees to the CVR in each armed institution and in the Joint Command (CVR, 2002).

Thus, during 2002 and 2003, the commission developed a series of interviews with the high commands of the Armed Forces linked to the anti-subversive fight between 1980 and 2000. Among others, they interviewed generals (r) José Valdivia Dueñas, Luis Pérez Documet and Clemente Noel Moral, who had been responsible for the political-military commands in the areas declared in state of emergency during that period. In those encounters, the commission requested the interviewees for their version regarding the strategy and anti-subversive actions that they were in charge of implementing, as well as the specific cases of human rights violations that were investigated by the CVR (CVR, 2003a). It must be indicated that the interviews requested by the commission were free and voluntary, and the level of response to the call for interviews was high.

Likewise, the commission established channels for dialogue and working meetings with the leadership of the military institutions of that period (2001-2003), who communicated to the commissioners the “institutional view” within the armed institutions regarding the work of the CVR. Thus, in a meeting held at the facilities of the General Army Headquarters in February 2002 –which was

attended by the General Commander of the Army, General Víctor Bustamante Reátegui, along with the chief staff of that institution, and commissioners Ames, Bernales and Tapia—, General Bustamante told the commissioners that he had “three concerns gathered within his institution”:

- a) *The CVR wants to find military personnel responsible for violations of human rights in order to send them to prison.*
- b) *The truth commissions were created at the end of the internal conflicts, but Sendero Luminoso continues to operate in Peru in spite of its reduced presence.*
- c) *There is a risk that the negative views of the Army, caused by the actions of the military leadership of the 90's, may influence the conclusions of the CVR. (sic)²*

When analyzing the concerns expressed by the General Commander of the Army, as its spokesperson, it becomes clear that a feeling of fear exists that the work of the CVR would lead to the imprisonment of the officers involved in the fight against subversion, a fear perhaps heightened by the sad spectacle shown by the military leadership of Fujimori's regime, that, at the time, was imprisoned for crimes of corruption. This meant that if the generals who exercised—whether in alliance or under control of Montesinos—a complete control of the Armed Forces and that, at the time, appeared to be infinitely powerful and immune to the legal system, were now in prison serving long sentences, there would be no impediment for generals, who no longer enjoyed that sort of political power, as well as the lower-ranking officers, not to end up in prison; and not for crimes of corruption, but for much more serious crimes such as human rights violations, which in spite of having been perpetrated long before, could be deemed not subject to prescription (crimes whose responsibility is not extinguished by the passage of time).

The Truth and Reconciliation Commission made its Final Report public in August 2003. In it, they concluded that “the immediate and fundamental cause for the triggering of the internal armed conflict was the decision by the Communist Party of Peru – *Sendero Luminoso* (PCP-SL) to initiate the ‘armed struggle’ against the Peruvian State...” (CVR, 2003b, Vol. VIII, p. 317). Likewise, it is indicated that *Sendero Luminoso* was the main perpetrator of crimes and violations of human rights, being responsible for 54% of the fatalities reported to the commission. The CVR also concluded that the Armed Forces applied a strategy that, in a first stage, comprised indiscriminate repression against population suspected of belonging to the PCP-SL; and that, in a second stage, that strategy would have become more selective, although it continued allowing numerous violations of human rights (CVR, 2003b, Vol. VIII, p. 323).

It also indicates that, in certain places and moments of the internal armed conflict, the behavior of the members of the Armed Forces involved not only some individual excesses by officers or troop personnel, but also generalized and/or systematic practices of violations of human rights (murder, extrajudicial executions, sexual violence, torture and cruel, inhumane, or degrading treatment) which constituted crimes against humanity, as well as transgressions to the norms

of the International Humanitarian Law (CVR, 2003, Vol. VIII, pp. 323-325). However, the commission also recognized the important and legitimate role played by the Armed Forces in the fight against subversive groups: “The CVR acknowledges the sacrifice and hard work that the members of the Armed Forces performed during the years of violence, and renders its most sincere tribute to the more than a thousand valiant military agents who lost their lives or became incapacitated in the fulfillment of their duties” (CVR, 2003, Vol. VIII, p. 323).

Finally, it must be indicated that the Final Report also presented a set of recommendations for institutional reforms, meant to guarantee the prevention of these acts in the future. In the case of the Armed Forces and the National Police, the recommendations were aimed towards “strengthening the democratic institutions, based on the leadership of the political power, for the defense of the nation and the preservation of internal order” (CVR, 2003b, Vol. IX, pp. 120-125).

It must be pointed out that the only commissioner who signed the Final Report “with reservations” was Lt. General FAP (r) Luis Arias Graziani –who was one of the commissioners appointed by president Toledo– who, in a letter addressed to the president of the CVR, Salomón Lerner, indicated, after acknowledging that the commission fulfilled its mandate with “seriousness and thoroughness”, that:

4. (...) one cannot judge with the same level of responsibility, both the infamous terrorist hordes (Sendero Luminoso and MRTA) and the troops of the Armed Forces. The latter participated in a counter subversive action in compliance with their Constitutional mission, by mandate of the Government in power for two decades. It is important to highlight that those Governments had been elected by popular vote, which suggests that they democratically analyzed the convenience of ordering the participation of the Armed Forces, as well as declaring the States of Emergency and establishing the political-military chains of command.

(Letter from Lt. General FAP *Luis Arias Graziani – CVR, 2003b, Vol. VIII)

It should be noted that, at no point in the report of the commission are the Armed and police Forces placed in the same level of responsibility as the subversive groups. Aside from the human rights violations perpetrated, it is indicated, at all times, that the former acted in the name of the law and in defense of the democratic regime, while the latter rose authoritatively against said regime. In the letter mentioned above, Arias Graziani also requests that the Final Report not mention the names of all the military personnel responsible for human rights violations, asking instead for them to be confidentially delivered to the executive branch, so that it, in turn, send them to the Public Prosecutor’s Office for the corresponding investigation. Lastly, Arias Graziani³ demands a clear distinction be made between the individual responsibilities of the military officers who were responsible for the perpetration of human rights violations and the “intended suggestion of institutional responsibility”. This distinction would be common in the pronouncements of retired –as well as active– military officers in reaction to the final report of the CVR, and one which would avoid the acknowledgement of the institutional responsibility of the Armed Forces

in the systematic practices of human rights violations, just as was done, in their time, by the high military commanders in Chile and Argentina, in connection with the crimes perpetrated during the repression in the context of the military dictatorships of the Southern Cone.

4 The reactions to the Final Report of the CVR

The months and years in which the work of the CVR developed, as well as the period after the publication of their Final Report, was a period of constant loss of legitimacy of the same government that had provided it with support for the fulfillment of its mandate –the government of Alejandro Toledo–; a support that materialized not only with the increase of the number of members of the commission, the granting of part of the necessary budget to achieve its goals –complemented with resources coming from international cooperation– as well as an extension in the duration of its mandate, but also in the public endorsement of its conclusions and proposals for institutional reform.

Also, some sectors of the political opposition, amongst which stood out the American Revolutionary Popular Alliance (APRA, for its acronym in Spanish) –the second largest majority in Congress between 2001-2006–, and the weakened but still present support for the Fujimori regime, seized the opportunity of the publicity of the Final Report to aim their efforts against the government, for their alleged collusion or alliance with the progressive sectors (known, by then, as *caviars*). But perhaps the loudest reactions came from the sectors of the economic and social right wing, and from the Armed Forces through their formal and informal spokespersons.

In this sense, as soon as the Final Report was made public, the strongest reactions arose from several sectors, in many cases criticizing the number of fatal victims estimated by the commission (69.280 people), or the assignment of responsibilities to military personnel involved in cases of human rights violations. Thus, a group of 42 former Commanding Generals of the Army, Navy and Air Force of Peru issued a statement aggressively criticizing the Final Report of the CVR and denouncing a bias in its conclusions:

4. For all that has been said, it is not acceptable for the CVR to affirm in its report (conclusion N° 54) that the Armed Forces applied a strategy of indiscriminate repression that allowed for numerous human rights violations. It is inconsistent to attempt to discredit, through an inaccurate and biased criterion as the one presented by the CVR, the dignity and honor of the Armed Forces, demonstrated throughout the history of Peru, which cannot be compromised due to certain individual actions that deserve to be punished and which in no way must be generalized. It is false that the Armed Forces acted recurring to systematic practices in violation of human rights. We reiterate that the Armed Forces acted under the rule of the Constitution, the laws and their own regulations, with dedication and total sacrifice that should, instead of being subject of derision, receive acknowledgement from the Nation.

(DIARIO CORREO, 2003b, p. 15).

On their part, the Association of Officers, Generals and Admirals (ADOGEN, for its acronym in Spanish), the most representative union of retired military personnel, published a statement in which they categorically rejected the assertions of the Final Report of the CVR, particularly those concerning the actions of the Armed Forces during the internal armed conflict:

Facing the biased treatment with which the Final Report of the CVR refers to the performance of the Armed Forces and PNP during the period of the barbaric terrorism (...) the Association of Officers, Generals and Admirals, interpreting the feelings of the officials with the highest institutional hierarchy, in accordance with those of the branches, organisms, dependencies and unions that sustain and defend the constitutional order and the national interest, address the public opinion in order to point out the following:

(...)

If there were excesses by some of its members, these responded to a stratagem applied by Sendero Luminoso in order to provoke violent reactions against the civilian population that must not be attributed either to the entire Armed Forces, or to superior orders. The accusation against the defenders of the State in this special circumstance, contemplated by the law, would be the culmination of this ruse, which seeks to demoralize the Armed Forces and the PNP, and to alienate them from society in order to weaken the defensive capacity of the country.

(...)

ADOGEN, aware of its professional duty, firmly rejects the assertions of the Final Report which attribute a general and systematic character to the reprehensible actions of some personnel of the Armed Forces, considering that they exalt the individual and the negative in detriment of the professional and collective efficiency of the Armed Forces and the PNP, and thus constitute an inconsequential act towards the fundamental institutions of the nation, which are owed acknowledgement and gratitude.

(DIARIO EL COMERCIO, 2003a).

Finally, the text indicates that the referred group expected the government to take into account the concerns of the Armed Forces when assuming a position towards the report of the CVR. As can be seen, these statements do not seek to express an institutional or corporate *mea culpa*, nor do they show the slightest hint of a self-critical vision regarding the role of the Armed Forces during the internal armed conflict and the recent political process—for example, the cases of corruption and the institutional cooptation during the Fujimori regime—. On the contrary, the CVR is characterized as biased or as being a political instrument of leftist movements. Furthermore, they conceptualize the role of the Armed Forces—defined by the members of ADOGEN as *fundamental institutions of the nation*—within the State and society, which still shows worrisome remnants of the doctrine of National Security practiced by the military dictatorships that governed the region between the decades of 1960 and 1980.

This type of reactions regarding the appreciation of the Final Report of the CVR on the role of the Armed Forces during the internal armed conflict, came not only from retired personnel of the Armed Forces, but also from the business

sector. Thus, in a statement issued by the National Confederation of Private Business Institutions (Confiep, for its acronym in Spanish) the following excerpt is included:

CONFIEP considers that it is not acceptable that any ideological bias, political opportunism or any other purpose or interest, may drive us to a fragmented version of the historical truth, an official history or a fabricated myth, that future generations may accept as history when, in reality, it is neither history nor truth.

(...)

Second: We do not agree to characterize the actions of the Armed and Police Forces as a systematic and generalized policy of perpetration of attacks on human rights, and as crimes against humanity. It must be clearly established that the role of the Armed and Police Forces is that of the defense of the State in compliance with the instructions of the Governments which, in every governmental period, have the responsibility to preserve the integrity of the Nation. In this endeavor, thousands of military and police personnel gave their lives or became disabled due to protecting the State and its citizens. The individual actions of a member of said forces, violating legal norms, both institutional and criminal, are the sole responsibility of their authors and must be sanctioned in accordance with the law.

(...)

Fifth: We do not agree with the treatment of the issue of the victims of terrorism because it does not describe, in all its magnitude, the facts that all of us as Peruvians have lived; not only the sacrifice of the poorest and most unprotected peasants of our homeland, but also the suffering of thousands of family members of military, police and militia that defended the Nation, the sacrifice of businessmen, government officials and workers who were murdered and the numerous material losses that affected the State, when attacking the sources of wealth-production and taxes and the infrastructure of the Nation itself.

We also do not agree with comparing the murders perpetrated by the terrorists to the deaths caused by the forces of order in combat and defense of the homeland.

(DIARIO EL COMERCIO, 2003b).

We have reproduced an extensive part of the statement by the Confiep because we believe it is a good portrait of the political culture that rules the social and economic elites of our country, as well as the conservative political sectors. This position considers that the conclusions of the CVR were not the result of scientific research and historical reconstruction, but rather a mere product of the alleged ideological bias of its members. Likewise, this position denies the systematic character –in certain places and moments during the internal armed conflict– of the human rights violations committed by members of the Armed Forces. This entire set of statements was based, primarily, on a partial interpretation of the chapter on conclusions in the Final Report, ignoring the analysis on the causes and consequences of the process of political violence, as well as the cases investigated and the depth of the studies performed. Likewise, the Integral Program of Reparations and the proposals for institutional reform were not considered by these pronouncements.

Finally, it must be said that the Ministry of Defense did not issue any public pronouncements regarding the Final Report of the CVR, given that the government's

official position would be issued by president Alejandro Toledo. However, two weeks after the presentation of the Report, minister Aurelio Loret de Mola, during a ceremony to award compensations to the widows of militia members, seized the opportunity, given the presence of the media, and “paid tribute to the members of the three branches of the Armed Forces who were killed, wounded, incapacitated or left with psychological or psychiatric problems”, as a consequence of their participation in the armed conflict (GUILLEROT, 2003a, p. 6). Furthermore, during the month after the publication of the Final Report, the Ministry of Defense would post a publicity video in certain television channels, which showed members of the Armed Forces who were wounded and disabled as a consequence of the actions of *Sendero Luminoso*, and expressed a heartfelt gratitude towards them. However, this video suffered from a biased perspective, given that it didn’t show the victims caused by the actions of the Armed Forces (VICH, 2003). The official position of the Executive Branch was communicated by president Alejandro Toledo, through a message to the nation that was made public on 23 November 2003, almost three months after the publication of the Report. In that message, Toledo apologized, on behalf of the State, to the victims of violence. Likewise, he acknowledged that: “In a conflict of this nature, some members of the Armed Forces incurred in painful excesses. It shall be the task of the Public Prosecutor’s Office and the Judiciary to dictate justice on these matters, without fostering impunity or abuse. We respect the independence of the branches of government” (GUILLEROT, 2003b, p. 14).

Also, Toledo announced the creation of a State policy for reconciliation, and a Plan for Peace and Development, consisting of a set of investments for 2800 million soles (PEN) in order to promote development in the areas affected by the political violence.

5 The trials for violations of Human Rights

One of the legacies of the work of the CVR was the opening of the possibility for judicial investigations and criminal procedures against those military officials responsible for serious human right violations and crimes against humanity, and thus, to grant justice and reparation to the victims. At the conclusion of its mandate, the Commission delivered to the Public Prosecutor’s Office the set of evidence obtained on 47 cases, which had been the subject of investigation during their work. This evidence was used by the Public Prosecutor’s Office to initiate the investigation on those cases.

However, after seven years of the initiation of that process, the result is very limited. As pointed out by the Ombudsman Office,

even though the efforts of the Public Prosecutor’s Office and the Judiciary are commendable, particularly regarding the creation of some specialized instances for the investigation and judgment of these cases, it is also necessary to indicate that there have been difficulties in the development of the investigations, and setbacks with regard to jurisprudential criteria established by the Constitutional Tribunal, the Supreme Court of Justice and the National Criminal Court.

(DEFENSORÍA DEL PUEBLO, 2008, p. 104).

It must be said that these setbacks went hand-in-hand with the evolution of the political process and the recovery, by the Armed Forces, of part of the political power that they enjoyed in the past.

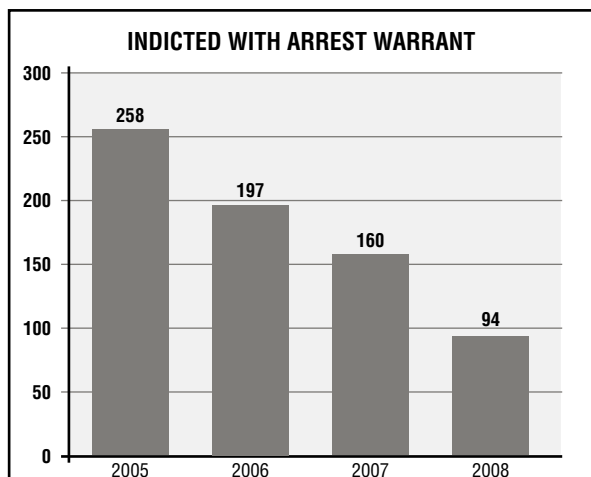
In the last years, the Ombudsman Office has been performing a follow-up of the status of these judicial proceedings, in which most of the accused are military personnel. In this universe of 194 cases (47 of which were presented by the CVR, 12 were investigated by the Ombudsman Office itself, and 159 by the Inter-American Commission on Human Rights), 112 (57.7%) continued in the stage of preliminary investigation towards the end of 2008, even though the majority of them were initiated between the end of 2001 and the beginning of 2004. This was the situation of cases such as “*Violations of human rights in the Military Base of Capaya*” and “*Massacre of peasants in Putis*”, among others, which were being investigated since December 2001 (DEFENSORÍA DEL PUEBLO, 2008, p. 125).

Likewise, 57.4% of the cases in the stages of instruction and oral proceedings, or pending the latter (27 cases), have been in process since mid-2004 (16 cases) or early 2005 (13 cases), such as in the cases of “*Violations of human rights in the Barracks of Los Cabitos N° 51*” and “*Extrajudicial execution of Juan Mauricio Barrientos Gutierrez*,” whose terms for judicial investigation had been extended up to six times (DEFENSORÍA DEL PUEBLO, 2008, p. 127-128). According to the reports from the Ombudsman Office, among the factors that contribute to this stagnation are the difficulties to individualize those responsible due to lack of collaboration by the Ministry of Defense, and their reluctance to provide information on the identity of the military officers involved in these cases.

Regarding the number and situation of the militaries being prosecuted, it is known that the 30 criminal procedures related to the cases presented by the CVR and the Ombudsman Office involve 339 defendants, out of which 264 belong to the Army, 47 to the Peruvian National Police, 17 to the Navy, and 11 are civilians (DEFENSORÍA DEL PUEBLO, 2008, p. 139)⁴. It is worth indicating that 61.4% of these defendants (208) are encompassed in 5 cases: “*Colina Group*” (58 defendants), “*Arbitrary execution of civilians in Cayara*” (51), “*Arbitrary executions in Pucará*” (41), “*Arbitrary executions in Accomarca*” (31) and “*Massacre of 34 peasants in Lucmahuayco*” (27) (DEFENSORÍA DEL PUEBLO, 2008, p. 142). On the situation of these defendants, it is worth noting that:

In the cases of defendants prosecuted for human right violations, the tendency of the judges to impose arrest warrants has varied significantly throughout the last years. Thus, of the total number of defendants being prosecuted in the cases presented by the CVR and the Ombudsman Office, in the year 2005, 258 defendants had arrest warrants issued against them (67%). In the year 2006, this number was reduced to 197 (53%), and currently there are only 94 defendants with arrest warrants issued against them (27.7%). The remaining 72,3% (245 defendants) have been served with orders to appear before the law, with restrictions.

(DEFENSORÍA DEL PUEBLO, 2008, p. 145).



Source: Files from the criminal and anti-corruption supra-provincial courts; criminal and mixed courts; and National Criminal Court. Source: Defensoría del Pueblo (2008)

Further, the Ombudsman Office reports that, until November 2008, out of the 94 defendants with pending arrest warrants, only 43 were effectively complying with this measure, while 51 were considered fugitives or in contempt of court. According to the Ombudsman Office, the low rate of execution of arrest warrants is a factor that slows down the process of judicialization of human rights violations. This, in turn, is due to a lack of will on the part of the authorities of the Ministry of Defense to collaborate in the fulfillment of these mandates

(DEFENSORÍA DEL PUEBLO, 2008, p. 146-148). In any case, it could be argued that this gradual decrease in the number of military personnel with arrest warrants (orders for their detention) could be correlated to the equally gradual recovery of political power by the Armed Forces, as we will see in the remaining sections.

However, the judicialization of human rights violations committed by military officers is not precisely one of the priorities in public opinion, perhaps due to the generalized perception that the main perpetrators of these crimes during the internal armed conflict were not the Armed Forces, but rather the subversive groups:

WHO DO YOU BELIEVE TO BE RESPONSIBLE FOR THE GREATER NUMBER OF VICTIMS OF THAT PERIOD: THE ARMED FORCES OR THE SUBVERSIVE GROUPS?

Answers	Locations			
	Lima-Callao	Other cities	Huánuco-Junín	Ayacucho
Armed Forces	8,2	13,2	12,5	15,3
Subversive groups	46,2	42,4	46,2	25,5
Both, equally	40,0	42,3	38,3	50,5
No response	5,6	2,1	3,0	8,7
Total	100	100	100	100

Source: Sulmont 2007

Although in this survey on issues of transitional justice, carried out by the Idehpucp (for its acronym in Spanish; stands for the Institute for Democracy and Human Rights of the *Pontificia Universidad Católica del Perú*) towards the end of 2006, a high percentage of those interviewed responded that both, the Armed Forces and the subversive groups, caused the greater number of victims during the conflict (even though, when both groups are individualized, it becomes evident that greater responsibility is attributed to the subversive groups in comparison with the Armed Forces), when asked about the measures to be adopted in the future, the majority

of those interviewed answered that the granting of economic reparations and the investment in the development of the poorest areas of the country had priority over the investigation and punishment of those responsible for human rights violations.

THINKING ABOUT THE FACTS THAT OCCURRED AND IN THE FUTURE OF THE COUNTRY, OF ALL THE THINGS MENTIONED, WHICH DO YOU BELIEVE IS THE MOST IMPORTANT?

Measures	Locations			
	Lima-Callao	Other cities	Huánuco- Junín	Ayacucho
To provide support and reparation to the victims of violence	20,7	22,4	31,1	32,3
To invest in the development of the poorest areas of the country	32,5	32,2	28,7	23,8
To investigate and punish those responsible for human rights violations	24,9	16,6	13,5	23,3
To reform our education in order to promote peace	13,5	13,3	14,7	9,3
To guarantee that, in the future, the Armed Forces will respect human rights	5,8	14,7	10,3	4,4
No response	2,5	0,9	1,8	6,9
Total	100	100	100	100

Source: Sulmont 2007

Lastly, we must indicate that, as mentioned by the Ombudsman Office, one of the factors that has some incidence in the slow development of the proceedings for human rights violations (in many cases they go for more than 7 years without obtaining a judgment) was the lack of collaboration, on the part of the Ministry of Defense, with the institutions in charge of administrating justice, and their reluctance to provide information on the identity of military officers involved in these cases. Without going into greater details, we must note that the excuses given by officers at the Ministry of Defense aim at the inexistence of said information –in many cases it is alleged that the information was either destroyed or that it never existed (it is said, for example, that the record kept of the officers assigned to a particular military base did not include their names, but only their *aliases*, due to security reasons). However, other alternatives to access or reconstruct said information were not attempted (such as the systematic review of the service files of all the officers in order to find out which ones were assigned to certain bases, and at what time).

6 The pronouncements on the human rights trials: requests for legal and political backing

As we have seen through the statements of the associations of retired military personnel, the years after the democratic transition were a special period in which the relationship between the Armed Forces, and civil and political society were marked by the processes of judicialization of the cases of human rights violations being investigated by the CVR, in which military personnel were involved as the main perpetrators of crimes. The rise in civil-military animosity can be appreciated, for example, in the statement that, in March 2005, a group of 17 former Commanding Generals of the Army –ranging from the ones that led the institution during the ‘70s, such as generals Francisco Morales Bermúdez (former president of the Republic) and Edgardo Mercado Jarrín, to the ones that did so in this century, such as generals Carlos Tafur, Jose Cacho Vargas and Víctor Bustamante– produced “in interpretation of the feelings of the officers, technicians, non-commissioned officers, troops and draftees, civilian employees and military family”, in which they indicate that:

5. The excesses of several judges and district attorneys who lead the cases against the military personnel being denounced, are fostering feelings and reactions that may have very serious consequences for the future development of the Army personnel, because these would directly affect our national security, possibly generating, among others, the following effects:

a) Avoiding taking decisions and actions to resolutely combat those who threaten national security and internal peace, given the fear of legal reprisals to which the officers, technicians, non-commanding officers, troops and draftees are exposed to, due to the lack of legal and political backing for their actions in combat operations and/or reestablishment of the public order.

(...)

7. As in the past, there are some people and organizations who, consciously or not, collaborate with the psycho-social actions of the terrorists or unfoundedly attack the Army, confusing public opinion in their paltry ambition to obtain privileges or earning notoriety, without understanding that their actions debilitate and divide Peruvian society, by developing a harmful and anti-patriotic behavior, pretending to own the truth in detriment of national unity.

8. Thus, we intend that the human rights of all Peruvians are respected, which is why we do not seek conflict or confrontation, neither do we seek to generate any controversies: however, we do urge the Peruvian people to remain vigilant to the actions of ideologies and entities that seek to confront the State and society against their Army. This is the new strategy of terrorism that we all should know in order to combat it, decidedly and frontally.

(DIARIO EL COMERCIO, 2005, emphasis added by the author).

Several elements stand out in this statement, among them the critique of the work of the Judiciary and the Public Prosecutor's Office, and the attack on the human rights organizations—and their whimsical linkage with the “strategies of terrorism”—; but the greatest concern is the open threat or blackmail expressed with regard to the Armed Forces not complying with their constitutional functions and missions—meaning the duties assigned to them by political authorities, among which are included the control of internal order under certain circumstances, which would constitute an act of rebellion— unless the military was granted the necessary “*legal and political backing*” understood as immunity against charges of human rights violations committed, both in the past, during the internal armed conflict, as well as during the “*operations of combat and/or reestablishment of the public order*” performed during that time and throughout the decade. In sum, it is a claim that seeks to exchange impunity for obedience, in a context of growing social unrest in which, in some cases—such as the protests developed in the regions of Arequipa and Puno during the years of 2002 and 2003—, the Armed Forces were used to quell the protests that threatened to put the stability of the regime at risk.

7 Responses from the State to the demands for political and legal backing

The electoral process of 2006 brought, as a consequence, a radical change in the political scenario. Indeed, as a product of the elections emerged a new correlation of forces—visible both in the Parliament, as well as in the Executive Branch— very different from the one that had made possible the creation of the CVR during the transitional government, and the development of its mandate during the government of Alejandro Toledo. In this new scenario, the pro-Fujimori sectors, who had been a small minority in Congress during the period between 2001-2006, regained strength and became a gravitational force, allowing the APRA party to conform majorities—together with the *Unidad Nacional* [*National Unity*] party—in order to carry out certain initiatives.

Indeed, after Alan García (APRA, 2006-2011) won the election and took the first decisions of his new government, his alliance with the same sectors that had opposed him in the past—the social, economic and political right wing— became increasingly more apparent. For this reason, García's decision to appoint Allan Wagner as his Defense Minister surprised many, because it was expected that, in an area as sensitive as Defense, and given his new closeness to the most conservative sectors of the business community, the church and the Armed Forces (the last two corporations represented by his closeness to Opus Dei Cardinal Juan Luis Cipriani, and vice-admiral and new vice president Luis Giampietri, respectively), he would name a more conservative politician for this post. It must be noted that this forecast would materialize later in time, with the successive appointments, in the area of Defense, of Antero Flórez Aráoz and Rafael Rey.

Wagner, former foreign minister for García during his first government, a career diplomat with more centrist political preferences, would make an effort to contradict the predictions by political analysts in relation to the possible right-wing

conversion of the regime, in that he would name, for the high directing posts of the Ministry of Defense, a prominent team of professionals whose careers did not reflect this alleged move towards the right. However, Wagner's term did mean a "political and legal backing" to the military corporation. This materialized through the decision of the ministry to offer free legal assistance –that is, paid for by the State– to the military personnel being prosecuted for human rights violations. Indeed, the same State that refused to grant individual economic reparations to the victims of political violence was, in contrast, committing to pay for the expenses of the legal defense of the perpetrators of those human rights violations. In order to understand the reasoning that prompted Wagner to make this decision, we will quote his very words before the National Defense Commission of Congress, during a presentation before the commission in which he outlined the basic blueprint for his tenure as minister:

This leads us to other aspects that I have had the chance to mention in public, such as the case of the support of the legal defense of the members of the Armed Forces that are being investigated or prosecuted. The law is for everyone, we are all equal before the law and we all have the same rights and obligations; and one of the rights that the law gives us and the Constitution enshrines, is the right to a defense, and thus there is a necessity for the State and society, not only the State, to come in support of the right to a defense of those who are, at this time, being prosecuted or investigated.

(...)

Indeed, justice has to be based on due process, in the exercise of a legitimate defense, the defense to which every member is entitled to, but at the same time, to have the responsibilities individualized and avoid putting everything in the same bag, which is affecting, undoubtedly, the morale, as well as the people and their families.

Therefore, there is a necessity to attend to this situation, and just as the State is decided to provide economic support in order for this legal defense to be carried out, we also consider that society itself, which was defended by our Armed and Police Forces, should mobilize and support the defense of these members of our institutions.

(PERU, 2006a).

The free legal defense for alleged perpetrators of human rights violations committed during the internal armed conflict would materialize through a norm (PERU, 2006b) that establishes that the "police or military personnel, either retired or in service, who are criminally denounced or indicted before the civil jurisdiction due to alleged crimes against human rights, for acts performed in the exercise of their duties, in the anti-subversive struggle in the country" (PERU, 2006b, art. 1), would receive a legal defense paid for with resources from the budgets of the ministries of Defense and Interior. Years later, during the term of Rafael Rey, it would come to be known that a large number of indicted military personnel that invoked this norm in order to receive this benefit, requested that the ministry of Defense hire the legal services of the firm of César Nakasaki (and Rolando Souza, a congressman linked to Fujimori) who was also the lawyer of Alberto Fujimori in the case of the killings of *La Cantuta*

and *Barrios Altos*, as well as of other military leaders indicted for corruption during the Fujimori regime (DIARIO EL COMERCIO, 2009, DIARIO LA REPÚBLICA, 2009).

This positive predisposition towards the indicted military personnel, by minister Wagner, would be deepened after his replacement, as minister of Defense, by Antero Flórez Aráoz, towards the end of 2007. The animosity of Flórez Aráoz against the sectors that defend the cause of human rights, as well as his defense of the military personnel being tried for these crimes, would become evident with his stern opposition to the creation of a Museum of Memory to remember the victims of the process of political violence lived by Peru in the previous decades. After an offer from the German government of a two-million dollar donation for the construction and implementation of this Museum, towards the end of 2008 (an offer that was initially rejected by the García administration), Flórez Aráoz became the main spokesperson in opposition to this initiative within the cabinet of ministers, clearly and publicly expressing the official position that the construction of a memorial to remember the crimes committed by agents of the State –among other actors– in the context of the armed conflict, was not exactly a priority for the government, which should rather be working towards the fight against poverty.⁵

Flórez Aráoz would be greatly surprised when, a few days later, and after a heated debate in the media in which he exchanged severe epithets with writer Mario Vargas Llosa (LLOSA, 2009), the government created a High Level Commission for the management and implementation of the Museum of Memory,⁶ presided precisely by Vargas Llosa and composed by Monseñor Luis Bambarén, Frederick Cooper, Fernando de Szyszlo, Juan Ossio, Enrique Bernales and Salomón Lerner (the last two, former members of the CVR). However, it must be noted that in the mandate granted to said High Level Commission there is no mention related to the human rights violations perpetrated by State agents during the internal armed conflict, but rather only to the ones perpetrated by subversive groups. Indeed, the mandate of that commission consists of:

Ensuring that the Museum of Memory represents with objectivity and amplitude of spirit the tragedy lived by Peru during the subversive actions of Sendero Luminoso and the Revolutionary Movement Túpac Amaru during the last decades of the 20th century, with the purpose of showing to the Peruvians the tragic consequences that result from ideological extremism, the transgression of the law and the violation of human rights, in order for our country not to relive such regrettable experiences.

(PERU, 2009, art. 2).

If we compare this restricted mandate with the ample mandate given to the CVR –which had the mission to investigate human rights violations perpetrated both by subversive groups, as well as by State agents–, this would give the impression that, during the internal armed conflict, the Armed Forces had no participation in the perpetration of human rights violations. However, it would be difficult to expect something different from a government like that of Alan García, given his responsibility in the government during part of the period of political violence, and his current alliances. Indeed, the extreme sensitivity generated by this initiative

among different public sectors (among them, the Armed Forces, themselves), motivated the commission presided by Vargas Llosa to work in great detail to ensure its viability. In this context it can be understood that Vargas Llosa had to request a meeting with the Commanding General of the Army, General Otto Guibovich, in order to “exchange ideas regarding the contents and scope” of the Museum –now known as Venue for Memory– and explain to him that it would have no ideological bias nor any hostility towards the Armed Forces (DIARIO PERÚ, 2010).

In July 2009, three months after the incident with Vargas Llosa, Flórez Aráoz would be replaced, in the direction of the Ministry of Defense, by Rafael Rey. This character, as a member of the Opus Dei and a representative of a social and political ultra-conservative tendency, probably represents, better than his predecessors, the correlation of forces in current Peru, as well as the political alliances held by the García government. It is no exaggeration to affirm that Rafael Rey would turn the militant defense of military personnel indicted for human rights violations into the *leit motiv* and the *raison d’être* of his tenure at Defense. This was reflected in the approval of several initiatives (both, materially, as well as symbolically) in favor of the military personnel indicted for human rights violations. The main one would be the promulgation, in September 2010, of Legislative Decree No. 1097, on the “application of procedural norms for crimes that imply human rights violations”. Said decree established the application of the New Procedural Criminal Code to the military personnel being prosecuted of these crimes, with the purpose of making trials more agile and reducing their duration. But it also gave ample powers to judges in order to change arrest warrants into orders of appearance in court for the accused military personnel, surrendering the “care and vigilance” of the accused to the armed institutions to which they belong. Likewise, this norm established the “dismissal due to excesses in the terms of instruction or of the preparatory investigation” (article 6). The term after which the judges could approve said dismissal, in accordance with the New Procedural Criminal Code, is that of 36 months, deadline that had already been greatly overcome in most of the judicial procedures against military personnel who perpetrated violations of human rights during the internal armed conflict –most of these procedures were initiated between 2003 and 2005.

Likewise, in said norm, a series of benefits for indicted military personnel were approved, such as the possibility of annulling arrest warrants, for cases of indicted fugitives of justice, in exchange for a bail bond that could be paid for by the Armed Forces themselves, using public resources (in a similar manner to the payment of the legal defense approved during Wagner’s mandate):

In relation to those being prosecuted, who are declared absent or in contempt of court, and who express their will to comply with the law, the judge may change the arrest warrant in order to resolve the condition of absentee or contemptuous, imposing an economic bond, if the income of the accused allows for it, which may be substituted by a personal bond, both suitable and sufficient, from the accused himself or from a family member, or a third-party guarantor, be it either a natural or juridical person, or the military or police institution to which they belong.

(PERU, 2010, art. 4).

Finally, another of the provisions of this norm, which could imply serious consequences for the process of judicialization of human rights violations, is the final provision that establishes that the application of the “Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity”, signed by the Peruvian state in 2003, would only be legally binding from that date on. This would mean that the crimes committed before 2003 could not be considered “crimes against humanity”, nor judged as such, but only as common crimes, subjected to the statutory limitations established for them (terms that, in most cases, had already been overcome). It must be noted that, after a few days of the approval of this norm, there were already 21 military men who had requested the archiving of their cases under the protection of the provisions on dismissal, among them, those responsible in the cases of *Barrios Altos*, Pedro Yauri, and the *Santa*, Santiago Martín Rivas, Carlos Pinchilingue, Nelson Carbajal, Jesús Sosa, among others (members of the Colina Group) (DIARIO LA REPÚBLICA, 2010a; DIARIO EL COMERCIO, 2010).

However, Legislative Decree No. 1097, which for many did not constitute anything other than a covert amnesty, generated stern criticism from multiple sectors, both at the national and international levels. In Peru, criticism did not come only from human rights organisms, grouped under the National Coordinator for Human Rights, but also from State institutions, such as the Public Prosecutor’s Office, whose authorities issued a public statement against the decree and even issued an internal order aimed at avoiding the application of the decree by the system for the administration of justice (DIARIO LA REPÚBLICA, 2010b). To the statements against LD 1097 by several institutions and civil society collectives in Peru (Bar Association of Lima, Episcopal Conference, etc.), must be added the declarations by several foreign institutions, both from NGOs like WOLA or Human Rights Watch, as well as from international organizations such as the Inter-American Commission on Human Rights, and even, from the United Nations Special Rapporteur on Human Rights.

In the political sphere, criticism for LD 1097 came not only from the government opposition—the Nationalist Party presented, before the Constitutional Tribunal, a lawsuit of unconstitutionality against this decree— but also from the very members of APRA in Parliament (RPP, 2010; DIARIO LA REPÚBLICA, 2010). As days went by, the rejection for LD 1097 became increasingly generalized. One of the factors that contributed to the generalization of this rejection—both in public opinion, as well as within the political society— was the revealing of the participation of César Nakasaki, former lawyer for Alberto Fujimori, in the elaboration of this norm (IDL-REPORTEROS, 2010).

All of this produced ample rejection within public opinion. A symptom of this rejection was the resignation of Mario Vargas Llosa from the commission in charge of implementing the Venue for Memory. In his letter of resignation, Vargas Llosa indicated that the reason for this was grounded on his rejection of LD 1097, which he described as a “barely disguised amnesty to benefit a good number of people linked to the dictatorship and, either accused or being prosecuted, for crimes against human rights” (a few weeks after this event, the

writer would receive the Nobel Prize in Literature).⁷ The same day in which his resignation was made public –13 September 2010–, the Executive Branch presented Congress with a bill through which the derogation of LD 1097 was requested. The following day, the plenary of Congress approved the derogation of this norm (which, thus, was in force for only 13 days) by 90 votes in favor and only one against. The single vote against came from vice president and former Admiral (r) Luis Giampietri. It stands out that, in this opportunity, not even Fujimori’s supporters, who had initially defended the decree, had voted against its derogation. It is possible that this decision may have been influenced by pre-electoral calculations, given that these incidents happened only 7 months before the general elections of 2011, in a context in which the great majority of public opinion was against this measure.

8 Conclusions

Throughout these pages we have wanted to present the main strategies, both discursive and political, used by the Armed Forces and the sectors that presented themselves as their spokespersons, with regard to the processes of transitional justice and clarification of responsibilities that had to be faced in the period immediately after the transition to democracy. Among the main strategies used by the military corporation stand out the statements by the former Commanding Generals and the association of retired military, in which they would constantly request “political and legal backing”, to defend them from the accusations for human rights violations perpetrated during the internal armed conflict, and with the threat that the Armed Forces would not fulfill their constitutional missions if this support failed to materialize, in a context in which social conflicts were increasing –and military participation in them– and participation of the Armed Forces in the counter-insurgent strategy against the remnants of the *Sendero Luminoso* in the valley of the rivers Apurimac and Ene (VRAE), was being intensified.

Political society responded to this request for support through several measures: the approval of legal defense services paid for by the State for indicted military personnel, the opposition of the Ministry of Defense to the creation of the Museum of Memory, and the issuance of Legislative Decree 1097 on procedural and penitentiary norms. These initiatives, which sought to benefit, either materially or symbolically, the military personnel being prosecuted, entailed serious obstacles for the transitional justice process, and for the access to truth, justice and reparation claimed by the victims of the political violence that took place in Peru in the last decades.

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NOTES

1. A few days after assuming his post, the new Minister of Defense, Gral. (r) Walter Ledesma, retired all members of the class of 1966 to which Vladimiro Montesinos belonged (12 division generals who comprised the highest command of the army) (ROSPIGLIOSI; BASOMBRÍO, 2006).
2. *Meeting at the Army General Headquarters. Draft of Act. 16 February 2002.* Document that is part of the documentary resources that the CVR delivered to the Ombudsman Office, after concluding its mandate, and which is currently located in the archives of the Center for Information for the Collective Memory and Human Rights. The code of the document is SCO-310-01-012.
3. It must be noted that Arias Graziani also served as the presidential advisor in matters of security and defense throughout the entire presidential term of Alejandro Toledo.
4. Aside from these 339 being processed for cases presented by the CVR and the Ombudsman, there are 28 other military personnel indicted (out of which 22 belong to the Army) for cases presented by the Inter-American Commission on Human Rights.
5. "Flórez Aráoz: *Crear Museo de la Memoria no es prioridad para el Perú* [Flórez Aráoz: *Creating Museum for Memory is not a priority for Peru*]" In Radio Programas del Peru, February 26 of 2009. Available at: <http://www.rpp.com.pe/2009-02-26-flores-araoz--crear-museo-de-la-memoria-no-es-prioridad-para-el-peru-noticia_166846.html>. Last accessed on: Nov. 2010.
6. Through Resolución Suprema No. 059-2009-PCM, of April 1st, 2009.
7. The text of the letter can be read at: <<http://www.scribd.com/doc/37361078/Carta-de-renuncia-de-Mario-Vargas-Llosa>>.

RESUMO

Nos últimos anos, o Peru tem atravessado um processo em grande medida decisivo para as relações entre as forças armadas e as esferas política e civil da sociedade marcadas, particularmente, pelo estabelecimento de uma Comissão da Verdade e Reconciliação e pela judicialização das violações de direitos humanos ocorridas durante o conflito armado interno, protagonizado pelo grupo terrorista Sendero Luminoso e pelas forças de segurança do Estado (1980-2000). Esse processo provocou críticas ferozes por parte das forças armadas, por meio de uma série de discursos e estratégias que buscavam limitar seu escopo, o que se deu pela demanda constante por respaldo político e jurídico de autoridades políticas para que a Comissão pudesse exercer suas funções.

PALAVRAS-CHAVE

Peru - Forças Armadas - Democracia – Direitos humanos – Comissão da Verdade – Justiça transicional

RESUMEN

El Perú ha vivido en los últimos años un proceso que en gran medida determinó la dinámica de las relaciones entre las Fuerzas Armadas y la sociedad política y civil: la instalación de una Comisión de la Verdad y Reconciliación, y la judicialización de las violaciones de derechos humanos cometidas durante el conflicto armado interno, protagonizado por el grupo terrorista Sendero Luminoso y las fuerzas de seguridad del estado (1980-2000). Este proceso generó airadas reacciones desde las Fuerzas Armadas, a través de un conjunto de discursos y estrategias que intentaban limitar sus alcances, por medio de continuos pedidos a las autoridades políticas de medidas de respaldo político y legal para cumplir con sus funciones.

PALABRAS CLAVE

Perú – Fuerzas Armadas – Democracia – Derechos humanos – Comisión de la Verdad – Justicia transicional



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ABSTRACT

This work reviews the way in which the Inter-American System of Human Rights addresses, through its bodies –the Inter-American Commission and Court on Human Rights– urgent measures (precautionary at the Commission and provisional at the Court), and the recent reforms they have been object of. To this end, issues such as the general aspects of these measures, the grounds for their concession, the rights susceptible of being protected and urgent measures of a collective nature, among others, will be analyzed.

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URGENT MEASURES IN THE INTER-AMERICAN HUMAN RIGHTS SYSTEM

Felipe González

1 Introduction

The Inter-American Commission (hereinafter referred to as the “Commission”, the “Inter-American Commission”, or the “IACHR”) and Court (hereinafter referred to as the “Court” or the “Inter-American Court”) of Human Rights, as international bodies for the general protection of such rights,¹ possess a system of urgent measures, known as precautionary and provisional measures, respectively. The former derive from the broad powers of the Commission, which extend beyond the sphere of its case system; the latter expressly derive from the American Convention on Human Rights (hereinafter referred to as the “American Convention”).

Even though urgent measures in the Inter-American System are usually related to cases pending before the Commission or Court, this is not necessarily always the case, given that they are not, *stricto sensu*, part of the contentious jurisdiction of the organs in charge of protecting rights within that system. As we will see, this is particularly characteristic with the precautionary measures of the Inter-American Commission on Human Rights. Hence, it is convenient to process urgent measures separately from the case system.

Successively, we will analyze some general aspects of the precautionary measures, the grounds for their concession, provisional measures in general, the rights that may be protected through urgent measures in the Inter-American System, measures of a collective nature, as well as issues relating to the implementation and follow-up of such measures. Finally, we will try to provide an answer to the question of whether urgent measures in this regional system could represent a sort of international *Amparo* action (protection of constitutional guarantees and rights).

Notes to this text start on page 70.

2 General aspects of precautionary measures

Although the American Convention does not expressly refer to precautionary measures, they are adopted by the Commission by virtue of the broad powers for the protection of human rights conferred to it by this instrument. Since the beginning of the period of transitions towards democracy, the IACHR has continuously expanded the use of precautionary measures, and has increasingly requested the Court to order provisional measures for the same purpose (PASQUALUCCI, 2005).

In fact, whether referred to as precautionary measures or otherwise, the Commission had historically implemented the practice of urgently requiring States to adopt measures regarding certain violations. This had occurred particularly in cases of detained persons who could presumably be disappeared.

Hence, even though precautionary measures were only expressly institutionalized in 1980 through their incorporation to the Rules of Procedure of the Commission, the fact is this body had been exercising such function since long before, both in relation to and in the absence of cases pending before it. This institutionalization of precautionary measures originated from the creation of the Inter-American Court, which had, among its powers, the granting of provisional measures. Given that it is the Commission that must request these measures to the Court, formalizing precautionary measures was necessary, as a previous step to the request of the provisional ones.

The use of this mechanism considerably expanded, together with democratization processes, from the nineties onwards, and although it has continued to be generally focused on circumstances of life risk, it has also been extended to the violation of other rights in certain cases.

Only two States have questioned the IACHR's power to order precautionary measures.² However, it is evident that from the broad powers set forth in article 41 of the American Convention derives that of issuing this kind of measures. Henceforth, as already mentioned, several United Nations semi-judicial bodies –analogous, for the same reason, to the Inter-American Commission on Human Rights– adopt precautionary measures based on an interpretation of the treaties that created them, despite the fact that they are not explicitly contemplated in them. These bodies are the Human Rights Committee, the Committee against Torture and the Committee on the Elimination of Racial Discrimination (MÉNDEZ; DULITZKY, 2005, p.68 ss). The same happens regarding the African Commission on Human and Peoples' Rights and also occurred with the extinct European Commission of Human Rights.

However, a more recent treaty, the Inter American Convention on Forced Disappearance of Persons (ORGANIZACIÓN DE ESTADOS AMERICANOS, 1994),³ does make reference to precautionary measures, establishing that, for the purposes of that instrument,

the processing of petitions or communications presented to the Inter-American Commission on Human Rights alleging the forced disappearance of persons shall be subject to the procedures established in the American Convention on Human Rights

and to the Statute and Regulations of the Inter-American Commission on Human Rights and to the Statute and Rules of Procedure of the Inter-American Court of Human Rights, including the provisions on precautionary measures.

(ORGANIZACIÓN DE ESTADOS AMERICANOS, 1994, art. XIII, emphasis added by the author).

On the other hand, the Inter-American Court has ratified, in several occasions over the last years, the competence of the Commission to issue precautionary measures. For example, in the case of the *Mendoza Prisons* regarding Argentina, the President of the Court, acting on its behalf, stated:

[...] I consider appropriate to point out that, pursuant to the obligations acquired by virtue of the American Convention on Human Rights, States must implement and comply with the resolutions issued by its supervisory bodies: the Inter-American Commission and Court of Human Rights. Therefore, I am convinced that the State will abide by the precautionary measures requested by the Commission pending the Court's decision on this petition for provisional measures [...].

(CORTE INTERAMERICANA DE DERECHOS HUMANOS, 2004a, unofficial translation, emphasis added by the author).

Similarly, in the case of the *Forensic Anthropology Foundation* regarding Guatemala, the President of the Inter-American Court stated that:

[t]he information presented by the Commission [...] demonstrates, prima facie, that the precautionary measures have not produced the required effects and that members of the Foundation and relatives of its Executive Director [...] are facing a situation of extreme gravity and urgency, given that their lives and personal integrity continue to be threatened and at serious risk. Therefore, this Presidency considers necessary to protect those persons, by means of urgent measures, in light of the provisions of the American Convention.

(CORTE INTERAMERICANA DE DERECHOS HUMANOS, 2006, unofficial translation, emphasis added by the author).

In turn, the General Assembly of the Organization of American States (hereinafter referred to as the “OAS”) also made reference to this issue in 2006, encouraging Member States to “[f]ollow up on the recommendations of the IACHR, including, *inter alia*, precautionary measures.” (ORGANIZACIÓN DE ESTADOS AMERICANOS, 2006).

In addition, some States have adopted internal measures to recognize the Commission’s precautionary measures and make them operational. Thus, since 2003 the Colombian Constitutional Court has issued a series of judicial decisions imposing sanctions on public officials for not complying with precautionary or provisional measures.⁴ The “*Habeas Corpus and Amparo Law*” of Peru goes in the same direction, which recognizes the right of its inhabitants to turn to the Commission seeking guarantees when constitutional rights are being threatened (PERU, 1982).

The processing of precautionary measures does not imply significant formalities. Similar to the processing of complaints regarding the case system, any person or group of persons can file a request for precautionary measures before the Commission.

Unless the petition is received while it is in session –which occurs only in several periods throughout a year– the Commission decides on the requests *on-line*, based on the background information provided by the Executive Secretariat. It can either immediately respond to the petition or request further information from the petitioner and/or the State concerned. As time passed by, given the growing receptivity that the Commission has found in most of the States regarding precautionary measures, it has increasingly requested them for information as a prior step to deciding on a measure. This is set forth as a general rule in the recent modifications introduced to the Rules of Procedure of the IACHR, establishing that “[p]rior to the adoption of precautionary measures, the Commission shall request relevant information to the State concerned, unless the urgency of the situation warrants the immediate granting of the measures.” (COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS, 2009, art. 25.5).⁵

In addition, there are also three procedural aspects taken into account by the Commission. The first one refers to “whether the situation of risk has been brought to the attention of the pertinent authorities or the reasons why it might not have been possible to do so.” (COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS, 2009, art. 25.4). Applying the principle of subsidiarity, what is intended with this rule is that States resolve urgent situations internally. However, as established in the text, this is not a rule of an absolute nature; allowing petitioners to turn directly to the Inter-American body if the circumstances so demand it. Anyway, given the urgency of the situations involved in these measures, the Rules of Procedure of the Commission are more flexible in this aspect as compared to the regulation of the case system, which, pursuant to the American Convention, demands exhaustion of domestic remedies as a general rule.

The second aspect refers to “the individual identification of the potential beneficiaries of the precautionary measures or the identification of the group to which they belong.” (COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS, 2009, art. 25.4.b). Again, this is not an absolute rule but a factor to be considered by the Commission, given that such identification could, in certain situations, be only an approximation. In relation to the identification of the group to which someone belongs, this has to do with improving efficiency of precautionary measures of a collective nature, which shall be addressed later on.

The third aspect establishes that the Commission shall take into account “the express consent of the potential beneficiaries whenever the request is filed before the Commission by a third party unless the absence of consent is duly justified” (COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS, 2009, art. 25.4.c). This could surely occur in situations of forced disappearance, but also in other situations in which the person affected does not have access to the Commission; typically, when the person is deprived of their liberty, but also in other hypotheses.

Other procedural aspects, referring to the follow-up of precautionary measures granted by the Commission, will be analyzed later on, in reference to that specific issue.

3 Grounds for the concession of precautionary measures

Although the practice of the Commission regarding precautionary measures identified several grounds for their concession, these have only recently been expressly regulated with the reforms introduced to its Rules of Procedure, which entered into force on 31 December 2009. Thus, three hypotheses for the granting of these measures can be distinguished: one of a general nature referring to the prevention of irreparable harm to persons in the context of cases pending before the IACHR; one concerning the safeguarding of the subject matter of the proceedings before the Commission; and a third one relative to avoiding irreparable harm outside the scope of the case system. For all these hypotheses, a recent modification to the Rules of Procedure states that the context shall also be taken into consideration.

The first of these hypotheses –referring to the prevention of irreparable harm to persons in the context of cases pending before the IACHR– is the most common, and is in close connection with the regulations set forth by the American Convention on Human Rights for provisional measures of the Inter-American Court. Besides attempting to avoid irreparable harm to persons, it requires the existence of a serious and urgent situation (COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS, 2009, art. 25.1). This is one of the forms of urgent measures typically adopted by international human rights bodies.

The second hypothesis –only recently expressly incorporated in the Rules of Procedure of the Commission and which stems from prior practice⁶ refers to the protection of the “subject matter of the proceedings in connection with a pending petition or case.” As can be seen, in this circumstance, it is no longer about avoiding irreparable harm to persons, but about safeguarding the matter itself subject to a decision in a pending case before the Commission. It is in this way that what is trying to be avoided is that the final decision on the case by the IACHR is rendered futile and irrelevant. As with the first, this hypothesis is usually within the scope of the urgent measures adopted by international human rights bodies. Further, as noted by Antonio Cançado Trindade, when analyzing the evolution of urgent measures (to which the author generically refers to as provisional measures) in general Public International Law, they “[always face] the probability or imminence of an ‘irreparable damage’, and the concern or necessity to secure the ‘future realization of a given juridical situation’.” (CANÇADO TRINDADE, 2003).

The third hypothesis consists of the issuing of precautionary measures outside the scope of the case system, that is to say, in the absence of a case pending at the Commission. It will be analyzed in greater detail due to the fact that the Inter-American Commission on Human Rights is the only semi-judicial body of the International System for the Protection of such rights that issues urgent measures in the absence of a petition. Thus, the United Nations Human Rights Committee, the Committee against Torture, the African Commission on Human and Peoples’ Rights, to mention a few, only adopt such measures in the context of cases pending before them. The same happened with the extinct European Commission of Human Rights.

Until recently, the adoption of precautionary measures pursuant to this third hypothesis only derived from a practice of the IACHR –based on the broad

powers conferred to it by the American Convention. Recently, the Commission has reaffirmed its interpretation of that treaty in the sense that it is authorized to issue such measures. In that respect, the reform to its Rules of Procedure, which came into force on 31 December 2009, sets forth in its pertinent section, the following:

In serious and urgent situations, the Commission may, on its own initiative or at the request of a party, request that a State adopt precautionary measures to prevent irreparable harm to persons under the jurisdiction of the State concerned, independently of any pending petition or case.

(COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS, 2009, art. 25.2, emphasis added by the author).

The fact that the Inter-American Commission grants precautionary measures irrespective of an existing petition has to do with the features of its institutional development and with the general powers conferred to it by several Inter-American instruments. Therefore, since the first years of its existence, it adopted a proactive role that led it, for instance, not to declare the petitions filed inadmissible (although during the first years it did not have the power to process them) but to employ them as input for the elaboration of its Country Reports. Likewise, from the very beginning, the Commission required information from the States regarding the alleged violations; at times, calling upon them to rectify their behavior.

It must be added that certain precautionary measures that, in principle, have no connection to a case, may eventually have it given that, for example, when dealing with measures aimed at the protection of human rights' defenders, the protection of their rights may be essential for the filing of complaints of violations before the Commission.

In addition, this is a consolidated practice accepted by States. In fact, not even the two States (previously mentioned) that question its validity make the distinction between precautionary measures as being related or unrelated to cases. It is worth adding that the compliance of precautionary measures by States is higher than that regarding their observance of decisions on the merits under the Commission's case system.

The issue of precautionary measures not related to the Commission's case system was subject of an internal debate during the elaboration of the 1980 Rules of Procedure, when they were expressly included. In fact, several drafts were written on this matter. In this sense, the first Preliminary Draft that the Executive Secretariat submitted for consideration by the plenary of the Commission proposed the following text regarding this issue (ORGANIZACIÓN DE ESTADOS AMERICANOS, 1980a, p. 13):

The Commission may, at any time during the processing of a petition or communication, request that the State concerned adopt the necessary provisional measures to avoid irreparable harm to the persons referred to in such petition or communication. The recommendation of these provisional measures shall not constitute a prejudgment of the final decision that the Commission may adopt regarding the case under consideration.⁷

As can be observed, that Preliminary draft referred to the Commission's urgent measures as "provisional measures", following the terminology used by the American Convention

when referring to the Court's urgent measures. In addition, it concerned the situation of "persons mentioned in the communication" (victims, witnesses, petitioners) at "any time during the processing of a petition"; therefore, the measures were conceived for a context of a case pending before the IACHR. Furthermore, this provision was included in Chapter II of the Preliminary Draft, entitled "Petitions and Communications referring to State parties to the American Convention on Human Rights".

A few days later, at the request of plenary of the Commission, the Secretariat presented a new version of the Preliminary Draft regarding this matter (ORGANIZACIÓN DE ESTADOS AMERICANOS, 1980b, p. 12), in which the term "precautionary measures" is introduced, together with the notions of "extreme urgency and seriousness", adopting, in this way, the standards set forth by the American Convention for provisional measures; likewise, as in the first Preliminary Draft, urgent measures are linked to the context of pending petitions. Lastly, a temporal limit was established in order to request these measures: it must be before the Commission makes a final decision on the merits.⁸

The issue continued under discussion at the Commission and, finally, a third draft was submitted for its consideration, which would be the definite one included in the new Rules of Procedure. The text read as follows:

1. *The Commission may, on its own initiative or at the request of a party, take any action it deems necessary for the performance of its functions.*
2. *In urgent cases, when it is necessary to avoid irreparable harm to persons, the Commission may request the adoption of precautionary measures to prevent irreparable harm, in case the denounced facts are true.*
3. *If the Commission is not in session, the Chair, or in their absence, one of the Vice-Chairs, shall request the Secretariat to consult with the other members on the application of the aforementioned paragraphs 1 and 2. If this consult was not possible in due time, the Chair shall decide, on behalf of the Commission, and shall immediately communicate it to its members.*
4. *The request for such measures and their adoption do not prejudice the final decision on the subject matter.*

(COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS, 1980, art. 26, unofficial translation).

In this way, the concession of a precautionary measure was not subject to the filing of a petition. In fact, the provision in question was moved from the place it had in the preliminary drafts –under the title referring to the processing of cases– to the general provisions of the Commission's Rules of Procedure.

As had been indicated at the beginning, among the recent modifications introduced to the Rules of Procedure of the Commission there is one that establishes that the Commission shall take into account the context of the situation when deciding whether or not to grant precautionary measures (COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS, 2009, art. 25.4). The nature of this provision is to make evident that when adopting a decision on a petition of urgent measures, the Commission does not consider the issue concerned in isolation. Given the urgency of the requirements

stated, the IACHR's decision relies partly on the assessment regarding the verisimilitude of the facts presented, which in turn, is partly based on the context in which these facts take place. For example, in relation to the precautionary measures requested by Honduran citizens after the *coup d'état* in 2009, this was a relevant factor considering the precarious situation of the protection of human rights in that context at the police and domestic judicial level (COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS, *Patricia Rodas y Otros /Honduras*, 2009a).⁹

4 General aspects of provisional measures

As we have noted, provisional measures are expressly set forth in the American Convention and are only applied to States Party to this instrument. As provided in article 63.2 of that treaty, those measures are advisable “[i]n cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons”. Their inclusion in the treaty leaves no margin for doubt regarding the mandatory nature of provisional measures (CANÇADO TRINDADE, 2003, p. 164).

The same article establishes that, in terms of procedural stages, provisional measures may be granted either in connection with matters under the Court's consideration, or “[w]ith respect to a case not yet submitted to the Court, [in which case] it may act at the request of the Commission.”

Regarding the first hypothesis, during the eighties, the Commission requested the Court to order this kind of measures to the States in the context of the first contentious cases filed before it (CORTE INTERAMERICANA DE DERECHOS HUMANOS, s.d., p. 1-11). In the nineties, in addition to continue to request them in a series of cases pending before the Court, the Commission began to request them in the context of some cases not yet submitted to the Court, but that were pending resolution before the Commission itself. This happened after the cases *Bustíos-Rojas* (CORTE INTERAMERICANA DE DERECHOS HUMANOS, 1990) and *Chunimá* (CORTE INTERAMERICANA DE DERECHOS HUMANOS, 1991).

Applying the logic of the increasing autonomy of the victims once a contentious case has been submitted to the Court,¹⁰ a modification introduced to its Rules of Procedure in 2004 set forth that they could directly file the request for provisional measures. The Court's Rules of Procedure of 2010 state that the measures “must be related to the subject matter of the case.” (CORTE INTERAMERICANA DE DERECHOS HUMANOS, 2009, art. 27.3).¹¹

Considering that in the Inter American System of Human Rights there are, as we have seen, two kinds of urgent measures –precautionary at the Commission and provisional at the Court–, one of the questions that arise is under what circumstances the Commission issues a precautionary measure and disregards requesting a provisional measure to the Court, and in what circumstances it requests the latter. It is worth mentioning that this decision is not final, given that it may occur that the Commission initially grants a petition for precautionary measures and later on decides that the circumstances justify the request for provisional ones before the Court.

In relation to requests for urgent measures that are not related to a contentious case pending before the Court, although there are no express criteria for the

Commission's request for provisional measures to the Court, the logic is the same that currently inspires the filing of contentious cases by the Commission before the Court: when the Commission considers that the State involved will not comply –or has ceased to comply– with the precautionary measure, it files the request for a provisional measure. Further –as we have anticipated– it may happen that, at the beginning, the Commission grants a precautionary measure and after the passing of a significant period of time –and when circumstances so justify it–, decides to ask for a provisional one. This was the case, for instance, of a Chinese citizen, Wong Ho Wing, imprisoned in Peru, who filed a complaint before the Commission for violations to due process and requested a precautionary measure alleging the imminence of his extradition –for the alleged crimes of customs duty evasion, money laundering and bribery– to the People's Republic of China, where he could be sentenced to the death penalty. The Commission granted the precautionary measures in March 2009 (COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS, *Wong Ho Wing respecto de Perú*, 2009b) and the process continued in Peru. Almost a year later, the Commission presented a request for provisional measures to the Court, on the grounds that, to a recent decision of the Peruvian Supreme Court granting the extradition, was added the fact that it explicitly stated that precautionary measures were not mandatory; thus, such measures were rendered insufficient to protect the life of the beneficiary, making it necessary to request the Inter-American Court for provisional measures. The latter granted them in May 2010 (CORTE INTERAMERICANA DE DERECHOS HUMANOS, *Wong Ho Wing respecto de Perú*, 2010).

Regarding the assessment made by the Commission, concurring the respective requirements, in order to decide on the adoption of precautionary measures or, instead, directly requesting provisional ones, Héctor Faúndez Ledesma has observed that

sometimes, the Court itself seems to approve the fact that precautionary measures, granted by the Commission, have been used in the first place and that only subsequently, in case they have been insufficient, they resort to the Court; on the other hand, the Court has considered that the fact that the precautionary measures adopted by the Commission have not produced the protection effects required, and that the government has not taken adequate protection measures, constitute 'exceptional circumstances' that make it necessary to order urgent measures –or provisional measures– to avoid irreparable damage to persons.

(FAÚNDEZ LEDESMA, 2004, p. 518, unofficial translation).¹²

In any case, it is the Commission itself that has the power to request or not a provisional measure to the Court (except in pending cases before the tribunal, in which the victim's representatives are involved).

As we have pointed out, the degree of States' compliance with precautionary measures is higher than that of execution of resolutions of the IACHR concerning specific cases, which is why the number of provisional measures requested and granted is considerably lower than that of precautionary ones. Only under highly qualified circumstances, such as situations in which the execution of a death penalty is imminent

or in which the exceptional context of the situation so justifies it, the Commission directly requests for provisional measures, without previously ordering precautionary ones. However, the logic is the same as the aforementioned, with the difference that in these last two hypotheses it is a question of an *ex ante* appreciation by the Commission. It is worth mentioning that even though, as a general rule, the Commission's assessment of potential compliance refers to the specific measure in question, with reference to those States that systematically deny complying with precautionary measures, the Commission directly files a provisional measure request before the Court.

To the aforementioned, it must be added that the criterion maintained by the Commission and the Court is that provisional measures shall only be requested regarding those States that have recognized the contentious jurisdiction of the Court. Faúndez Ledesma has affirmed that this could be applicable to all the States that have ratified the American Convention on Human Rights, irrespective of whether they have recognized or not the aforementioned jurisdiction. In this sense, the author in question highlights the fact that

within the Inter-American System, this institution [provisional measures] is applied not just as an incident within a pending legal process before the tribunal, but that it can also be the result of a request by the Commission on a matter that has not yet been submitted to the Court

(FAÚNDEZ LEDESMA, 2004, p. 520, unofficial translation),

adding that

provisional measures are not part of the Court's contentious jurisdiction, but of its competence as a body for the protection of human rights. In this sense, we cannot lose sight of the fact that the Court has repeatedly stated that, within International Human Rights Law, the purpose of provisional measures, besides their essentially preventive nature, is the effective protection of fundamental rights, in so far as they seek to avoid irreparable damage to persons.

(FAÚNDEZ LEDESMA, 2004, p. 520, unofficial translation).

The argument is not entirely convincing, given that the American Convention contemplates provisional measures in the context of contentious cases pending before the Court or that are susceptible of being presented for its consideration, something which could not take place if the State concerned has not recognized its contentious jurisdiction. The situation is different regarding the Commission's precautionary measures, explicitly conceived in the broadest scope of the different functions of this body and not only within that of its jurisdiction to consider cases.

As regards the request for provisional measures before the Inter-American Court, this process has undergone several transformations. The first Rules of Procedure of this tribunal provided that if the Court was not in session at the moment of the request, its President had to convene it as soon as possible. The only alternative it considered was that the President required the parties to act so as to facilitate the effectiveness of any measure that could eventually be adopted. This was to be carried out by the President consulting with the Court's Permanent Commission or, if possible, with all the judges.

This resulted in delays in situations that are urgent by nature. Therefore, the Court amended its Rules of Procedure in 1993, establishing that if the Court was not in session, the President could request the State concerned to take urgent measures, decision which was subject to ratification by the tribunal in its following period of sessions.

Subsequently, and as described by former judge and President of the Inter-American Court, Antonio Cançado Trindade, progress was made in this respect that

has strengthened the position of individuals searching for protection. In the case of the Constitutional Court, magistrate Delia Revoredo Marsano de Mur, dismissed from the Constitutional Court of Peru, directly submitted to the Inter-American Court, on 03 April 2000, a request for a provisional measure of protection. This being a case pending before the Inter-American Court and the latter not being in session at that moment, the President of the Court, for the first time in the history of this tribunal, adopted urgent measures, ex officio, through Resolution of 07 April 2000, given the elements of extreme seriousness and urgency, and in order to avoid irreparable harm to the petitioner.

(CANÇADO TRINDADE, 2004, p. 83, unofficial translation).

Later on, the plenary of the Court ratified the decision of its President.

The same happened in the case of *Loayza Tamayo* when, in December 2000, having already received an adverse judgment on the merits and being at the stage of compliance supervision by the Court, a third party, together with the sister of the victim, filed a request for provisional measures, which was granted by the President of the Court and later on ratified by the tribunal.

5 Rights that may be protected through precautionary and provisional measures

A key aspect of the issue being analyzed refers to which are the rights that may be protected through the mechanism of urgent measures of the Inter-American System. Both the American Convention on Human Rights and the Rules of Procedure of the Commission –instruments that, as we have noted, contemplate provisional and precautionary measures, respectively– establish for their concession, among others, the requirement of being situations of imminent irreparable harm to persons. This has meant, in practice, that a very high percentage of the urgent measures granted are in relation to the right to life and the right to humane treatment (personal integrity). In the case of the former, it is typically the case of people at serious risk, caused either by State agencies or by paramilitary or analogous groups, but it can also be the case of people at serious risk within their family nucleus. Such is the case especially in contexts of violence against women or children.¹³ As regards those urgent measures aimed at safeguarding personal integrity, as well as other similar situations –*mutatis mutandi*– to the ones previously described, there are a series of measures that have been granted by the Commission and the Court regarding especially serious prison conditions.¹⁴

Nonetheless, in a series of urgent measures, other rights have been protected either by precautionary or provisional measures. Some emblematic situations have been the protection of the right to indigenous property by means of provisional

measures in the context of the *Awás Tingni* case (CORTE INTERAMERICANA DE DERECHOS HUMANOS, 2002a),¹⁵ as well as through a series of precautionary measures issued by the Commission;¹⁶ provisional measures aimed at protecting the right to freedom of expression in the cases of *Herrera Ulloa* (Costa Rica) (CORTE INTERAMERICANA DE DERECHOS HUMANOS, 2001);¹⁷ “*El Nacional*” and “*Así es la Noticia*” Newspapers *Noticia* (CORTE INTERAMERICANA DE DERECHOS HUMANOS, 2004c)¹⁸ and “*Globovisión*” Television Station *Globovisión* (CORTE INTERAMERICANA DE DERECHOS HUMANOS, 2004d),¹⁹ the last two in Venezuela; and the provisional measures aimed at safeguarding, besides life and personal integrity, the special protection of children in the family and the right to freedom of movement and residence of persons, as expressly mentioned in the Resolution of the Court in the *Case of the Girls Yean and Bosico* (case of Haitians and Dominicans of Haitian Origin in the Dominican Republic) (CORTE INTERAMERICANA DE DERECHOS HUMANOS, 2000).²⁰

Another right that has been subject of the protection of a precautionary measure was that of access to public information. This occurred with the measures that prohibited the destruction of electoral ballots for the Presidential elections in Mexico (COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS, *Rafael Rodríguez Castañeda /México*, 2008b). With the precautionary measure, besides safeguarding the aforementioned right, the preservation of the subject matter of the litigation before the Commission was also sought, given that the question of whether citizens could access electoral ballots or not constitutes the central issue of a case pending before the IACHR (RODRÍGUEZ MANZO; LÓPEZ CANO, 2008). The Mexican State adopted the precautionary measure and avoided the destruction of the electoral ballots.

It is difficult to establish, precisely, which percentage of urgent measures corresponds to the protection of life and personal integrity and which to other rights. Graciela Rodríguez and Luis Miguel Cano made an estimate in that respect, noting that

if an analysis is done regarding the precautionary measures granted by the Inter-American Commission of Human Rights between 1996 and 2007, we can conclude that of the total 597 measures issued in that period, 478 are mainly related to the protection of life and personal integrity of persons and the remaining 119 are related to other issues.

(RODRÍGUEZ MANZO; CANO LÓPEZ, 2008, p. 5).²¹

This results in percentages close to 80% and 20%, respectively. In my opinion, however, elaborating this kind of estimates may lead to misleading results considering that, frequently, precautionary measures do not explicitly mention the rights to be protected, different conclusions may be extracted from a single measure. Indeed, some of the examples mentioned above, as divided by the authors, could be redirected into measures aimed at safeguarding personal integrity, for example, depending on the specific circumstances of the case, situations affecting due process, personal liberty, suspending the expulsion from a country, among others. This does not imply disregarding of the fact that urgent measures involving rights different from those of life and personal integrity, are effectively granted, but rather that their

precise determination is difficult to achieve (FAÚNDEZ LEDESMA, 2004, p. 544ss; PASQUALUCCI, 2003, p. 304-305).²² In any case, they represent a small percentage of the precautionary measures granted by the Inter-American Commission.

6 Urgent measures of a collective nature

The jurisprudential evolution regarding precautionary and provisional measures has included the issue of those of a collective nature. Although the case system of the Commission and the Court has experienced significant diversity in the last two decades, and it is no longer focused, almost exclusively, on massive and systematic human rights violations –as it did during periods of predominance of authoritarian regimes in the region–, given that most of the urgent measures granted refer to situations of serious risk to life and integrity of persons, in not few opportunities, they have made reference to situations of a collective nature. As regards precautionary measures issued by the Commission, the recent modifications to its Rules of Procedure expressly refer to those of a collective nature, by the inclusion of a provision that establishes that

the measures referred to in paragraphs 1 and 2 above [precautionary according to the different grounds] may be of a collective nature to prevent irreparable harm to persons due to their association with an organization, a group, or a community with identified or identifiable members.

(COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS, 2009, art. 25.3).

Thus, some of the provisional measures issued by the Inter-American Court in the paradigmatic cases mentioned in the previous paragraphs, such as that of *Awas Tingni* –among others referring to indigenous peoples–²³ and that of *the Girls Yean and Bosico* (case of Haitians and Dominicans of Haitian Origin in the Dominican Republic) precisely refer to situations of a collective nature.

Urgent measures of a collective nature have also been granted in relation to extreme imprisonment conditions, such as those already mentioned of *Urso Branco Prison* (Brazil), *Uribana Prison* (Venezuela) and *Mendoza Prisons* (Argentina), besides others related to seclusion conditions of children and adolescents (*FEBEM* – Brazil) (CORTE INTERAMERICANA DE DERECHOS HUMANOS, 2005) or of people with mental disability (COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS, *Pacientes del Hospital Neuropsiquiátrico IParaguay*, 2007).

The same occurred in several situations of a similar nature in the context of the armed conflict in Colombia, for instance, the provisional measures ordered by the Inter-American Court in the case of the *Peace Community of San José de Apartadó* (CORTE INTERAMERICANA DE DERECHOS HUMANOS, 2002b) and those of the afro-descendent *Communities of Jiguamiandó and Curbaradó* (CORTE INTERAMERICANA DE DERECHOS HUMANOS, 2003), not to mention the numerous precautionary measures issued by the Commission.

More recently, stemming from the *coup d'état* in Honduras in June 2009, a collective precautionary measure was adopted (COMISIÓN INTERAMERICANA DE

DERECHOS HUMANOS, *Patricia Rodas y Otros / Honduras*, 2009a), which progressively encompassed more beneficiaries, covering several hundreds of people. Most of the situations covered by this precautionary measure refer to the protection of life and personal integrity, although some of them involve serious risks for the exercise of freedom of expression.

7 Implementation and follow-up of urgent measures

Without prejudice to the fact that, in principle, urgent measures may provide for a wide range of issues, such as halting an act of censorship, suspending a specific action or freeing someone, the fact is that, in most cases, what is being ordered is that the State provide for the protection of life and personal integrity. Usually, this is to be carried out through police protection, either with permanent custody or with some other means of protection, like periodic inspection visits to the residence or workplace of the beneficiary.

Police protection may sometimes be problematic for the beneficiaries, particularly when the imminent risk that led them to request the measure derived, precisely, from police forces or other State agents or bodies closely linked to them. In fact, sometimes petitioners seeking precautionary measures are not aware that, in case they are granted, they are likely to consist of police protection. For example, this is exactly what happened with the precautionary measures issued by the Inter-American Commission after the *coup d'état* in Honduras –to which we have already made reference– given that a significant number of beneficiaries did not expect the precautionary measure to consist of police protection and not few of them refused it.

A relevant factor of what happened with the implementation of precautionary measures in Honduras seems to have been that, prior to the *coup d'état*, precautionary measures were not frequent regarding that country, which is why the population had scarce information about them and the way they operated in practice. On the other hand, in countries such as Colombia, Guatemala or Mexico –which are the three that have registered the highest number of precautionary measures granted within the last ten years–, civil society has more information on the way such measures are implemented and, therefore, problematic situations, derived from the fact that such implementation usually consists of police protection, are less frequent.

It is worth mentioning that, in practice, even in contexts in which police bodies may have been with those who intimidated the beneficiaries, in most cases, these bodies comply with their protection role. The reason for this seems to be none other than the closer supervision of the police carried out by other State agencies that are not interested in being internationally exposed in case the beneficiary is the subject of an aggression that the precautionary measure is precisely trying to avoid; all of this, in a context of greater visibility of the urgent situation. This is why it is unusual –although it does, unfortunately, happen sometimes– that beneficiaries of precautionary measures are victims of mortal aggressions.

Regarding the follow-up of precautionary and provisional measures, such as in the case system, it is the Commission and the Court, themselves, that follow-up on them, without any backing or initiatives to that effect, from the political bodies of the OAS. This follow-up is carried out both, by means of written

communications between these bodies, the beneficiaries and the State concerned, and also through hearings. The latter are more frequent at the Court than at the Commission –given the large number of hearings that it holds on other matters such as cases, countries and issues–, although they occasionally do take place, for instance, in situations of serious issues of non-compliance. Thus, for example, the Commission has held several public hearings to follow-up on the precautionary measures issued with respect to persons deprived of their liberty by the United States in Guantanamo (COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS, *Detenidos en Guantánamo /Estados Unidos*, 2002).²⁴

A frequent problem in the follow-up of urgent measures issued by the Commission and the Court consists of their long duration. When these bodies grant a precautionary or provisional measure, they do not set a time limit for it. In practice, a significant number of urgent measures within the Inter-American System have been in force for many years.

The reforms introduced to the Rules of Procedure of the Commission make reference to several aspects pertaining to the follow-up of precautionary measures, also taking into account the duration they often reach, indicating the roles for the Commission and the States, as well as for the participation of beneficiaries. In this sense, it is initially set forth that the Commission “shall evaluate periodically whether it is pertinent to maintain any precautionary measures granted” (COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS, 2009, art. 25.6), as a way of avoiding their prolongation for longer than necessary. As far as the State’s initiative is concerned, the Rules of Procedure provide that “[a]t any time, the State may file a duly grounded petition that the Commission withdraw its request for the adoption of precautionary measures”. Prior to the adoption of a decision, “the Commission shall request observations from the beneficiaries or their representatives” assuring that “the submission of such a petition shall not suspend the enforcement of the precautionary measures granted” (COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS, 2009, art. 25.7).

While a precautionary measure is in force, the Commission may request the information it deems relevant from the State and the beneficiaries regarding its observance. The modification of its Rules of Procedure establishes that “[m]aterial non-compliance by the beneficiaries or their representatives with such a request may be considered a ground for the Commission to withdraw a request that the State adopt precautionary measures” (COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS, 2009, art. 25.8).

8 In conclusion: are urgent measures an international *amparo* action?

Given that through precautionary measures it is possible to obtain an urgent decision from the Inter-American Commission on Human Rights, the question that sometimes arises is whether this request could constitute some sort of *Amparo* action to protect rights at the international level. As we have mentioned, such a request may take place, either in the context of a pending petition before the Commission

or in its absence, due to the Commission's jurisdiction and its broad powers for the protection of human rights. Thus, considering that through the urgent measures' mechanism it is possible to obtain a quick decision from the international body, this could be assimilated, in principle, to the *Amparo* at the national level. This is not a minor issue, considering that in some countries, as it is well known, the *Amparo* action has become an expedited way to "skip" the usual process, especially in the context of internal judicial systems collapsed with work overloads. Given the delays in the processing of cases before the Inter American System of Human Rights, an analogous phenomenon to the one occurring at the local level, could eventually take place at the regional level.

However, both in theory and in practice, this is far from happening. Regarding the first aspect, the requirements for the concession of precautionary and provisional measures are more stringent than those usually considered for the granting of an *Amparo* at the internal level. Such requirements refer to the peremptory condition of urgency of the measures as well as the irreparability of the situation in case they are not granted. Thus, as we have seen, regarding precautionary measures, the Rules of Procedure of the Commission provide that they must be aimed at the prevention of "irreparable harm to persons or to the subject matter of the proceedings in connection with a pending petition or case", whereas the American Convention regulates provisional measures for "cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons."

In practice, the jurisprudential development of the Inter-American Commission and Court regarding precautionary and provisional measures also shows that they are treated very differently from the way *Amparo* actions are treated in internal judicial systems. Thus, even though the subject matter of requests for precautionary and provisional measures covers a wide spectrum of issues, such as, among many others, sustenance of children and adolescents, alleged violations to due process, migration matters, issues relative to the right to property, imprisonment conditions, etc., the fact is that most of the precautionary and provisional measures granted refer to life and personal integrity. Concerning the health conditions of persons deprived of their liberty, it must be said that what the IACHR does is determine whether the particular illness or disease is sufficiently serious that, in case it is not adequately and timely treated, the intended beneficiary could suffer irreparable harm.²⁵

In this sense, and to mention just a few illustrative examples, among the aspects that are usually subject to requests for urgent measures, and which are almost invariably –although not absolutely– excluded from concession within the Inter-American System are disputes regarding sustenance of children which do not purport harm to their life or personal integrity, delays in internal judicial proceedings, allegedly arbitrary judgments, real estate expropriation, etc.

If the number of precautionary measures granted is considered in relation to the total number of requests filed, the conclusion is that their concession is far from being the general rule. In this respect, in the five-year period spanning from 2005 to 2009 inclusive, the figures are as follows:

Year	Precautionary requested	Precautionary granted
2005	265	33
2006	314	37
2007	250	40
2008	301	28
2009	324	34

Source: Inter-American Commission on Human Rights. *Annual Reports*. <www.cidh.org>. Last visited on 23 June 2010.

As it can be observed from the figures above, the usual percentage of precautionary measures granted is slightly over 10% of the filed requests. These figures are similar to those of previous years from the last decade, except for 2002 in which the number of precautionary measures granted was higher. The percentage of provisional measures granted in relation to those requested is higher, but this is fundamentally due to the fact that most of them have previously passed through the “filter” of the Commission. As previously mentioned, the IACHR uses requests for provisional measures as a sort of “last resort” when it cannot resolve the situation by itself. We say that most of the urgent measures requested to the Court have previously passed through the filter of Commission because some of them –the least– are filed directly in relation to cases pending before the Court itself.

Considering this background variety, there do not seem to be grounds for assimilating the urgent measures of the Inter-American System of Human Rights and the *Amparo* action in Comparative Law. The possibility that persons who consider that their rights have been violated turning, *per saltum*, to the Inter-American Commission through precautionary measures, circumventing the case system, would not work out unless the requirements for those measures –different and, in certain aspects, more stringent than those required for the admissibility of a petition– are met.

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NOTES

1. Thus, for instance, the Human Rights Committee and the Committee against Torture of the United Nations and the African Commission on Human and Peoples’ Rights, among the semi-judicial bodies (the same happened with the extinct European Commission of Human Rights); and the European Court of Human Rights and the African Court of Human and Peoples’ Rights, among the judicial bodies. Sources are listed below.

2. This is the case of the United States and Venezuela. Regarding the latter, this has led to the fact that the IACHR, when it considers the circumstances so demand it, files a request for provisional measures before the Court instead of adopting precautionary ones. In turn, in relation to the USA, the Commission issues precautionary measures, given that the Court lacks jurisdiction to hear contentious cases and, consequently,

provisional measures.

3. Inter-American Convention on Forced Disappearance of Persons, adopted on June 9, 1994, at the XXIV Regular Session of the OAS General Assembly

4. Starting with Decision T-558/03, from 07 July 2003.

5. Entered into force on 31 December 2009.

6. Through reform to its art. 25.1.

7. This text was initially included in art. 37. Unofficial translation.

8. The full text of the preliminary draft on this issue was the following:

“1. The Commission may, on its own initiative or at the request of a party, take any action it deems necessary for the performance of its duties.

2. In case of *extreme* urgency and seriousness, when it is necessary to prevent irreparable harm to persons, the Commission, when requesting information from the State concerned on the alleged violations mentioned in a petition, may request the adoption of precautionary measures to avoid consummation of irreparable harm, in case the denounced facts are true.
3. If the Commission is not in session, the Chair, one of the Vice Chairs, or the Executive Secretary by his/her instructions, will consult with the members on the application of the provisions set forth in paragraph 1. If this was not possible in due time, the Chair will take the decision, on behalf of the Commission and shall communicate it to its members.
4. The measures provided for in this Article may be requested at any time during the processing of the petition, before the final decision on the merits. The request of such measures and their adoption shall not prejudice the subject matter of the final decision." (Unofficial translation)
9. Inter-American Commission on Human Rights, Precautionary Measure 196-09, initially adopted on 28 June 2009 and expanded with a series of subsequent decisions by the Commission. See, to that respect, a description in the Report of the Inter-American Commission on Human Rights, Honduras: Human Rights and *coup d'état*, paragraphs 37ss. (2009).
10. Pursuant to which representatives of the victims went from acting as advisors to the Commission in proceedings before the Court, to acquiring autonomy at the reparation stage (1996), and, subsequently, since the beginning of the proceedings before the Court (with the Rules of Procedure of the Court, 2001).
11. Entered into force on 01 January 2010.
12. Two references from the original text have been removed, in which the corresponding case-law sources are mentioned; cases *Vogt and Cemente Teherán and Others* for the first assertion of the author and case *Serech and Saquic* for the second one.
13. See, for example, MC 265/07 *Ms. X et al / Mexico* (COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS, 2008a).
14. See, among others, the provisional measures adopted by the Inter-American Court on the matter of *Mendoza Prisons* (Argentina) (CORTE INTERAMERICANA DE DERECHOS HUMANOS, 2004b); *Uribana Prison* (Venezuela) (CORTE INTERAMERICANA DE DERECHOS HUMANOS, 2007); *Urso Branco Prison* (Brazil) (CORTE INTERAMERICANA DE DERECHOS HUMANOS, 2008); etc.
15. *Case of the Mayagna (Sumo) Awás Tingni Community*. The Court decided, among other issues, "[t]o order the State to adopt, without delay, whatever measures are necessary to protect the use and enjoyment of property of lands belonging to the Mayagna Awás Tingni Community, and of natural resources existing on those lands, specifically those measures geared toward avoiding immediate and irreparable damage resulting from activities of third parties who have established themselves inside the territory of the Community or who exploit the natural resources that exist within it, until the definitive delimitation, demarcation and titling ordered by the Court are carried out." (operative paragraph 1).
16. Inter-American Commission on Human Rights, PM 253-05: Case 12.548 (*Garifuna Community of Triunfo de la Cruz / Honduras*); PM 304-05: Petition 674-06 (*Case Garifuna Community of San Juan / Honduras*); PM 402-02: Petition 4617-02 (*Case of Mercedes Julia Huenteao and others / Chile*); PM 155-02: Case 12.338 (*Twelve Saramaka Clans / Suriname*); PM 204-01: Case 12.313 (*Yakye Axa Indigenous Community of the Enxet-Lengua People / Paraguay*); PM 124-00: Case 12.053 (*Maya Indigenous Communities / Belize*).
17. Order of the Inter-American Court of 7 September 2001, *Case Mauricio Herrera Ulloa*. The Court established:
- "That freedom of expression, recognized in Article 13 of the Convention, is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion. It is also a *condition sine qua non* for the development of political parties, trade unions, scientific and cultural societies and, in general, those who wish to influence the public. It represents, in short, the means that enable the community, when exercising its options, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free." (CORTE INTERAMERICANA DE DERECHOS HUMANOS, 2001, para. 6).
- "That an order must be given to suspend *La Nación's* publication of the operative paragraphs of the judgment of conviction that the San José First Circuit Criminal Trial Court delivered on November 12, 1999 and its creation of a "link" at the *La Nación Digital* website between the contested newspaper articles and the operative paragraphs of that judgment, since such a publication and such a link would cause irreparable harm to Mauricio Herrera Ulloa. No irreparable harm would be done, however, if the other operative paragraphs of that judgment were enforced. Execution of those paragraphs should be suspended until the case is finally settled by the organs of the inter-American system for the protection of human rights." (CORTE INTERAMERICANA DE DERECHOS HUMANOS, 2001, para. 7).
- A footnote from the original text of the judgment has been removed.
18. References to the right to freedom of expression can be found in paragraphs 9 and subsequent. The

operative paragraphs include requesting that the State “adopt forthwith the necessary measures to provide perimeter protection at the offices of the “*El Nacional*” and “*Así es la Noticia*” newspapers.”

19. It is expressly mentioned that the rights protected are life, physical integrity and freedom of expression, besides the protection of the facilities of the broadcasting station (paragraph 18).

20. *Case of Haitians and Dominicans of Haitian Descent in the Dominican Republic*, Considering N° 9, in which it is established “[t]hat the events presented by the Commission in its request show *prima facie* a situation of extreme gravity and urgency as to the rights to life, personal integrity, special protection for children in the family, and to residence and movement, of the persons identified in the June 13, 2000, *Addendum* of the Commission (*supra*, Having Seen N° 3), and specified in the operative part of this Order of the Court (*infra* operative paragraphs 1, 3, 4, 5, 6, and 7).”

21. Two footnote references from the original text have been removed. The authors add that among these other issues are “personal freedom; the investigation of persons’ whereabouts; allowing for the return to the country of origin; the return of identity documents, suspension of orders of expulsion, deportation or extradition; cancellation of arrest warrants and ending of persecutions, and ceasing with threats to persons; the suspension of concessions affecting the environment; the protection of property rights; prevention of confiscation of goods, guarantees of due process; investigation and review of extrajudicial proceedings; allowing for free access to judicial remedies; compliance with *habeas corpus* orders; determination of the legal situation of detainees; suspension of the execution of decisions different from those imposing the death penalty; regularization of the conditions in detention centers; the rights to freedom of assembly, association and political rights; the rights to residence and circulation; the right to a name, to protection of the family, the rights of the children; international adoption of children; guarantee the right to education; protection of indigenous peoples from third parties; freedom of thought, offices protection; protection of archeological centers; protection of radio station facilities, the guarantee to freedom of expression and the right to information.” (RODRÍGUEZ MANZO; LÓPEZ CANO, 2008, p. 5-6).

22. Although not expressly mentioned –except in relation to the right to property, which is expressly mentioned–, Faúndez Ledesma seems to support the fact that provisional measures could only be issued to safeguard the right to life and the right to personal integrity. However, based on the arguments

and jurisprudence presented here, it seems to be clear that those measures can, in fact, be adopted in relation to other rights. The reference to the right to property can be found in Faúndez Ledesma (2004, p. 547). In turn, Jo M. Pasqualucci appreciates an evolution to that respect, stating that “in more recent cases, the Court appears to have broadened its interpretation of irreparable damage to include any type of irreparable damage to persons. For example, a person or community of persons can suffer irreparable damage if their ancestral grounds are logged and denuded of trees. Persons may also suffer irreparable damage in certain cases if their personal possessions or livelihood are taken from them. The Court should be concerned as to whether the threatened action will damage a person in such a way that a monetary judgment in the case will not compensate him or her for the loss. If that be the case, and the injury is serious, the Court should order provisional measures.” (PASQUALUCCI, 2003).

23. See also to this respect, among others, *Matter of Pueblo indígena de Sarayaku* (CORTE INTERAMERICANA DE DERECHOS HUMANOS, 2004e); *Matter of Pueblo indígena de Kankuamo* (CORTE INTERAMERICANA DE DERECHOS HUMANOS, 2004f).

24. Pursuant to those measures, issued approximately two months after the USA began to transfer detainees to Guantanamo, the IACHR requested that the State adopt the necessary urgent measures to have the legal status of the beneficiaries determined by a competent tribunal. In 2005 the Commission expanded the precautionary measures, requesting the United States “to conduct an in-depth and impartial investigation into all instances of torture and other cruel, inhuman, or degrading treatment, and to prosecute and punish those responsible.” Then the IACHR issued Resolution No 2/06, “urging the United States to close the Guantánamo detention facility without delay, transfer the detainees in full compliance with international humanitarian law and international human rights law, and to take the necessary measures to ensure detainees a fair and transparent judicial process before a competent, independent, and impartial decision-maker.” The quotes are from the Press Release 02/09 of the Inter-American Commission on Human Rights, of 27 January 2009.

25. Thus, the Inter-American Commission has granted precautionary measures to persons deprived of their liberty who suffered from tuberculosis, diabetes, complete occlusion of the aorta and gangrene of the lower limbs, tumors in the back, respiratory difficulties, chronic ear infection and duodenal ulcer, prostate problems, etc.

RESUMO

Este trabalho revisa o tratamento dado pelo Sistema Interamericano de Direitos Humanos por meio de seus órgãos na matéria, a Comissão e a Corte Interamericana de Direitos Humanos, às medidas de urgência (cautelares na Comissão e provisórias na Corte), matéria que foi objeto de reformas recentes, por meio de alterações dos regulamentos de ambos os órgãos. Para isso se analisam, entre outros aspectos, questões gerais de tais medidas, suas causas de concessão, os direitos passíveis de proteção, e as medidas de urgência de natureza coletiva.

PALAVRAS-CHAVE

Medidas Cautelares – Medidas Provisórias – Sistema Interamericano de Direitos Humanos

RESUMEN

Este trabajo revisa el tratamiento dado por el Sistema Interamericano de Derechos Humanos a través de la Comisión y la Corte Interamericana de Derechos Humanos, a las medidas urgentes (cautelares en la Comisión y provisionales en la Corte), y las recientes reformas que se les han hecho. Para ello se analizan, entre otros aspectos, cuestiones generales de tales medidas, sus causales de concesión, los derechos susceptibles de protección, y las medidas urgentes de naturaleza colectiva.

PALABRAS CLAVE

Medidas Cautelares – Medidas Provisionales – Sistema Interamericano de Derechos Humanos



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ABSTRACT

The essay deals with some cases within the international, Inter-American, African and European systems for the protection of human rights. It views the subject of military jurisdiction from a regional perspective, using norms, jurisprudence and other sources of the law to understand and act accordingly in those cases in which the military jurisdiction is applied extensively on civilians, either as active or passive subjects. It focuses especially on sentencing in the cases of *Rosendo Radilla Pacheco v. United Mexican States*, issued by the Inter-American Court of Human Rights in November, 2009, and *Öcalan v. Turkey*, issued by the European Court of Human Rights in May, 2005.

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THE RESTRICTION OF MILITARY JURISDICTION IN INTERNATIONAL HUMAN RIGHTS PROTECTION SYSTEMS

Juan Carlos Gutiérrez and Silvano Cantú

1 The extensive application of military jurisdiction today

Both international human rights law and international humanitarian law agree in recognizing a series of principles applicable to the administration of justice, including military jurisdiction. Among these principles we find equality before courts; the right for every person to be judged by competent, independent and impartial courts pre-established by law; the right to an effective appeal; the principle of legality; and the right to an effective and fair trial. That is the purpose behind Article 14 of the International Covenant on Civil and Political Rights (ICCPR), the declarations of which “apply to all courts and tribunals within the scope of that article, whether ordinary or specialized, civilian or military” (expressed in General Comment No. 32 of the UN Human Rights Committee (COMISIÓN DE DERECHOS HUMANOS, 2007)).

Given the above, the military jurisdiction problem lies in determining whether a legal authority has jurisdiction to judge civilians or military personnel who may have committed human rights crimes, especially considering principles such as due process, independence and impartiality of judicial authorities.

To engage in this discussion, one must first consider the *functionality principle*, which has merited the attention of the UNHRC, and the Inter-American Court of Human Rights (IHR Court) and has received mention by the African Commission on Human and People’s Rights, (ACHPR) and the European Courts of Human Rights (ECHR) in several of their resolutions. The functionality principle limits military jurisdiction to crimes committed in relation to the performance of military duties, which effectively limits the principle to *military crimes* committed by *elements of the armed forces*. Principle No. 8 of the Project (“Functional Competence

Notes to this text start on page 96.

of Military Judicial Organs”), included in the Report of the Special Rapporteur of the Sub-Commission of Promotion and Protection of Human Rights of the UN (ONU, 2006a), expressly states “the competence [jurisdiction] of military judicial organs should be limited to infractions committed strictly within the realm of military environments by military personnel.”

The IHR Court agrees with this criterion in Paragraph 272 of the Sentence in the case *Rosendo Radilla v. United Mexican States* (CORTE INTERAMERICANA DE DERECHOS HUMANOS, 2009a), where it states: “[...]In a democratic State of law, the military criminal jurisdiction shall have a restrictive and exceptional scope and be directed toward the protection of special juridical interests, related to the tasks characteristic of the military forces”.

Let us emphasize that it is a jurisdiction that is: 1) restrictive, 2) exceptional, and 3) with functional competence. It is restricted precisely to the functions within its jurisdiction, and therefore it must be exceptional within a democracy. Nevertheless, the aforementioned exceptionality has rarely been truly exceptional, and this is increasingly so. Not only do we live every day with “preemptive” wars whose motives are diluted upon further examination, but it is also common to learn about cases in which armies extend their normal operational scope (for example, their growing participation in public safety tasks in several countries in the world). This type of extension leads to abuses and surpasses the limits of an army’s functionality. The armies of today also undertake “preemptive” penal inquiries as well as “preemptive” counter-insurgency tasks.

The examples of the growth of *legalized* exceptionality are abundant, but perhaps one of its most alarming facets is the extensive application of military jurisdiction. Such a broadening of military jurisdiction disrupts the thin line of functionality that distinguishes a democracy from other types of political regimes.

The Special Rapporteur on the independence of magistrates and lawyers of the United Nations, Leandro Despouy, discussed this topic in his second Report to the General Assembly, dated September 25th, 2006 (ONU, 2006b):

In recent years the Special Rapporteur has noted with concern that the extent of the jurisdiction of military tribunals continues to be a serious obstacle for many victims of human rights violations in their quest for justice. In a large number of countries, military tribunals continue to try members of the armed forces for serious human rights violations, or to try civilians, in clear violation of applicable international principles, and, in some instances, even in violation of their own national laws.

The Report offers us a relevant panoramic vision of the problem by noting, for example:

1. That through the enactment of a new constitution that established the principle of personal jurisdiction, the Democratic Republic of Congo applied military jurisdiction to practically all of the crimes committed both by military personnel as well as civilians, including *crimes against humanity*.

2. That in Islamic countries such as Egypt and Tunisia, military courts prosecuted civilians using national anti-terrorist laws. In Tunisia, the decisions of the military tribunals are not appealable. Jordan, another case mentioned in the report, has national security tribunals comprised of one military and one civilian judge. Those tribunals judge any alleged crime against national security committed by either military personnel or civilians, effectively constituting a form of special jurisdiction because of the participation of military personnel in the trial.
3. In Asia, the Special Rapporteur noted with particular concern a Cambodian case in which military tribunals prosecuted civilians and allowed the impunity of military personnel involved in the perpetration of crimes such as summary execution, breaking both international and internal laws. The investigations of those crimes depend on decisions by the Executive power. Nepal presents another worrying case; its laws allow for the extension of military jurisdiction to cases of forceful disappearance, torture and summary executions. Crimes perpetrated by military personnel while on duty are not penalized.
4. The Report also refers to the prosecution and detention of alleged terrorists in Guantanamo, where the Executive power of the United States of America is the prosecutor, judge and defense attorney for the detainees. Judged by Military Courts created *ex profeso*, the defendants lacked a judicially defined status and were treated as “enemy-combatants,” without enjoying the rights afforded to prisoners of war as contemplated in the Geneva Convention. They were also judged for a crime that did not exist in either international or domestic law (as it is the case of conspiracy). (*cf.* *Caso Hamdan contra Rumsfeld de la Corte Suprema de Justicia de los Estados Unidos de América*, ONU, 2006b: párr. 53).

The Report of the Special Rapporteur indicates that almost all of Latin America contains latent military jurisdiction problems. In light of recent events, it is safe to affirm beyond any doubt that the problem has worsened and that Mexico represents one of the worst offenders. In 2009, the IHR Court issued a sentence against the Mexican government for the case of the forced disappearance of Rosendo Radilla Pacheco, in which the extensive application of military jurisdiction has resulted in more than thirty years of inefficacy and impunity.

Rosendo Padilla was not an isolated case. Recently, the IHR Court has reiterated its criticism of the inappropriate extension of Mexican military jurisdiction and condemned the Mexican state for the following cases – defended, respectively, by the Center for Human Rights of the Mountain “Tlachinollan” and the Center for Human Rights “Miguel Agustín Pro Juárez” (PRODH) – of Ines Fernandez Ortega and Valentina Rosendo Cantu, of the Tlapanec people, who were sexually abused by military individuals still enjoying impunity, and by the environmentalist farmers Rodolfo Montiel Flores and Teodoro Cabrera Garcia, illegally and arbitrarily detained and tortured by military personnel who have not yet been sanctioned (CORTE INTERAMERICANA DE DERECHOS HUMANOS,

2010a, 2010b, 2010c). All these cases as well as other similar ones¹ are directly linked with the unjustified breadth of the military jurisdiction, which continues to cause serious human, political, judicial and social problems derived from the impunity and the breaking of democratic rules.

This aspect is even more worrying considering that the State has not fulfilled its obligation, indicated in Article 10 of the Sentence of the IHR Court on the *Rosendo Radilla* case, to reform Article 57(II)(a) of the Code of Military Justice, which is so imprecise that it facilitates applying military jurisdiction extensively to civilians, breaking international law and Article 13 of the Constitution.

Facing the generalized and serious problems implied by the subject, it becomes imperative to have enough legal arguments to understand and act, in order to demand justice in these cases. For this purpose, the following sections seek to explain the reasons offered by the organs of the regional systems of human rights protection, through which the extensive application of military jurisdiction violates human rights, effectively perpetuating impunity and providing incentives for further violations.

2 Military jurisdiction and the administration of justice in international human rights law

2.1 *Applicable international norms*

International instruments have codified important norms. Both Articles 8 and 10 of the Universal Declaration of Human Rights as well as Articles 2.3(a) and 14 of the ICCPR grant the right for every person to be heard *publicly* (the “publicity principle”) and give them *guaranteed rights* (included in the legal concept of “due process”). International law also mandates that courts be *competent independent and impartial, established by the law* (the “legality principle”),² People also must have an *available recourse* against those courts, which may protect them “against acts that may violate their *fundamental rights* recognized by the constitution or by the law,” or recognized by the international instruments mentioned above. This recourse must be available even when the violation was perpetrated by persons acting in the performance of their official duties.

In the same sense, and practically in the same terms, there were declarations made by both the American Convention on Human Rights “Pact of San Jose” (hereinafter “American Convention”) in its Articles 8.1, 8.5 and 25, as well as the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter “European Convention”) in its Articles 5, 6, 7 and 13. Likewise, Article 7.1 of the African Charter on Human and People’s Rights “Banjul Charter” (hereinafter “African Charter”) recognizes the right of every person to appear before competent national organs against acts that violate their fundamental rights and to be judged by a competent and impartial court or tribunal. Part 2 of this article deals with the legality principle.

As noted above, these dispositions are applicable to all jurisdictions, including military jurisdiction. It must also be noted that there are only a few international

norms referring explicitly to the prohibition of applying military jurisdiction. In that sense we can quote Article IX of the Inter-American Convention on Forced Disappearance of Persons (OEA, 1994), which states:

Persons alleged to be responsible for the acts constituting the offense of forced disappearance of persons may be tried only in the competent jurisdictions of ordinary law in each state, to the exclusion of all other special jurisdictions, particularly military jurisdictions.

The acts constituting forced disappearance shall not be deemed to have been committed in the course of military duties. [...].

2.2 Reports and consultative opinions on military jurisdiction

Among the reports on the independence of magistrates and attorneys mentioned above, the Report to the General Assembly of September 25th, 2006 (ONU, 2006a) and the Project of Principles on the Administration of Justice by Military Tribunals (ONU, 2006b) stand out. Another important report is the Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity recommended by the Human Rights Commission of the UN (COMISIÓN DE DERECHOS HUMANOS, 2005), which under Section 29 states:

[t]he jurisdiction of military tribunals must be restricted solely to specifically military offences committed by military personnel, to the exclusion of human rights violations, which shall come under the jurisdiction of the ordinary domestic courts or, where appropriate, in the case of serious crimes under international law, of an international or internationalized criminal court.

Likewise, the Special Rapporteur of the United Nations on Torture, in the Report issued upon his visit to Mexico in 1997 (ONU, 1998), recommends to the Mexican state in Paragraph 88 that the violations of human rights by military personnel against civilians must be investigated and tried by the civilian courts, “independently of the fact that they may have occurred during service.”

In addition, the Special Rapporteur of the United Nations on Extrajudicial, Summary or Arbitrary Executions recommended in his Report on his visit to Mexico in 1999 (ONU, 1999) that the State guarantee that the civilian jurisdiction be in charge of investigating human rights violations perpetrated in detriment of civilians. He also recommended the demilitarization of society, the avoidance of delegating the maintenance of public order and the fight against crime to the armed forces, and the creation of necessary reforms for civilian justice to try human right violators (*cf.* ONU, 1999, párr. 107).

Likewise, the African system has the Resolution on the Right to a Fair Trial and Legal Aid in Africa (COMISIÓN AFRICANA DE DERECHOS HUMANOS Y DE LOS PUEBLOS, 2001), which establishes in Principle L a prohibition against military tribunals trying civilians. This document aims to promote this prohibition as a right for every civilian:

L. RIGHT OF CIVILIANS NOT TO BE TRIED BY MILITARY COURTS:

- a) *The only purpose of Military Courts shall be to determine offences of a purely military nature committed by military personnel.*
- b) *While exercising this function, Military Courts are required to respect fair trial standards enunciated in the African Charter and in these guidelines.*
- c) *Military courts should not in any circumstances whatsoever have jurisdiction over civilians. Similarly, Special Tribunals should not try offences which fall within the jurisdiction of regular courts.*

It should be noted that in Asia and the Pacific, the LAWASIA (Law Association for Asia and the Pacific) issued in 1995 the Beijing Statement of the Principles of the Independence of the Judiciary (LAWASIA, 1995), which in its Principle 44 states that the jurisdiction of military tribunals must be limited to military crimes. There must be always a right to appeal the decisions of those tribunals before a legally qualified court or tribunal of appeals or other recourse that could potentially nullify military actions.

2.3 Contentious jurisprudence on competence, independence and impartiality of military jurisdiction

Contentious jurisprudence shows both important reasonings and conclusions regarding military jurisdiction, especially when focusing on concrete cases in which the jurisdiction's illegitimacy in its treatment of civilians is evident. In the European system, there are, among other relevant examples, the sentences of the ECHR corresponding to the cases *Incal v. Turkey* (TRIBUNAL EUROPEO DE DERECHOS HUMANOS, 1998a), *Çiraklar v. Turkey* (TRIBUNAL EUROPEO DE DERECHOS HUMANOS, 1998b), *Gerger v. Turkey* (TRIBUNAL EUROPEO DE DERECHOS HUMANOS, 1999a), *Karataş v. Turkey* (TRIBUNAL EUROPEO DE DERECHOS HUMANOS, 1999b) and *Öcalan v. Turkey* (aside from the cases on independence and impartiality of the tribunals in general, which include, for example, the cases of *Ergin v. Turkey*, *Chipre v. Turkey*, *Refineries Stan Greek and Stratis Andreadis v. Greece*, *Findlay v. United Kingdom* and *Ringeisen v. Austria*).

In the *Incal*, *Gerger*, *Karataş* and *Çiraklar* cases, the Turkish military jurisdiction (represented by the National Security Court, comprised of one military and two civilian judges) extended its competency (i.e. jurisdiction) by adjudicating several crimes including the incitation of hatred, separatism and violence, an extension that violates the principles of competence, independence and impartiality, as well as the Turkish constitution itself in Article 138 Paragraphs 1 and 2 (*cf.* TRIBUNAL EUROPEO DE DERECHOS HUMANOS, 1998a, caso *Incal* apartado C.II. y párr. 27). In the *Incal* case (para. 65), the ECHR stated that in order for the tribunal to be truly independent under the terms of Article 6 of the European Convention, its members must be verified and the existence of safeguards against external influence must be assured. The ECHR further stated that there are two ways of establishing impartiality: by trying to determine the personal conviction of a judge in any given

case and by determining whether the judge has offered enough guarantees about his or her impartiality. The ECHR decided that Incal could legitimately doubt the independence and impartiality of the National Security Court due to its semi-military composition, which may have resulted in inappropriate outside influences (TRIBUNAL EUROPEO DE DERECHOS HUMANOS, 1998a, párr. 72).

As far as the African system is concerned, some outstanding examples are *Wahab Akamu and others v. Nigeria* (COMISIÓN AFRICANA DE DERECHOS HUMANOS Y DE LOS PUEBLOS, 1995), *Abdoulaye Mazou v. Cameroon* (COMISIÓN AFRICANA DE DERECHOS HUMANOS Y DE LOS PUEBLOS, 1997), *Oladipo Diya and others v. Nigeria* (COMISIÓN AFRICANA DE DERECHOS HUMANOS Y DE LOS PUEBLOS, 1998), and a case of 24 soldiers represented by the organization *Forum of Conscience* against Sierra Leona (COMISIÓN AFRICANA DE DERECHOS HUMANOS Y DE LOS PUEBLOS, 2000).

In those cases, the ACHR questioned the military tribunals not because they were comprised of army officers but rather to determine whether they conducted their proceedings with justice, equity and impartiality (*cfr.* COMISIÓN AFRICANA DE DERECHOS HUMANOS Y DE LOS PUEBLOS, 1998, párr. 27). Likewise, the ACHR stated that, whatever the character of the individual members of the tribunals that have military participation, the military composition in itself gives the appearance or even the real lack of impartiality, thus violating Article 7.1(d) of the African Charter (*cfr.* COMISIÓN AFRICANA DE DERECHOS HUMANOS Y DE LOS PUEBLOS, 1998, párr 14; COMISIÓN AFRICANA DE DERECHOS HUMANOS Y DE LOS PUEBLOS, 1997, apartado de méritos). This means that the tribunal not only must be impartial, but that it also must appear to be impartial. Moreover, this decisions leads to the possibility that a victim might not necessarily need to show partiality or lack of independence on behalf of the judges or adjudicating authorities but that a tribunal may imply such lack of impartiality from the structure of the adjudicating body. (*cfr.* O'DONNELL, 2004, p. 388).

Perhaps due to the experience of several military dictatorships in Latin America, the jurisprudence of the Inter-American Court of Human Rights on military jurisdiction is the most copious. Most of the main considerations of the inter-American tribunals are to be found in cases such as *Castillo Petruzzini and others v. Peru* (CORTE INTERAMERICANA DE DERECHOS HUMANOS, 1999, párr. 128); *Durand and Ugarte v. Peru* (CORTE INTERAMERICANA DE DERECHOS HUMANOS, 2000a, párr. 117); *Cantoral Benavides v. Peru* (CORTE INTERAMERICANA DE DERECHOS HUMANOS, 2000b, párr. 112); *Las Palmeras v. Colombia* (CORTE INTERAMERICANA DE DERECHOS HUMANOS, 2000c, párr. 51); *19 Comerciantes v. Colombia* (CORTE INTERAMERICANA DE DERECHOS HUMANOS, 2002, párr. 165); *Lori Berenson Mejia v. Peru* (CORTE INTERAMERICANA DE DERECHOS HUMANOS, 2004, párr. 142); *Masacre de Mapiripan v. Colombia* (CORTE INTERAMERICANA DE DERECHOS HUMANOS, 2005a, párrs. 124 y 132); *Masacre de Pueblo Bello v. Colombia* (CORTE INTERAMERICANA DE DERECHOS HUMANOS, 2006a, párr. 131); *La Cantuta v. Perú* (CORTE INTERAMERICANA DE DERECHOS HUMANOS, 2006b, párr. 142); *Masacre de la Rochela v. Colombia* (CORTE INTERAMERICANA DE DERECHOS HUMANOS, 2008a, párr. 200); *Escue*

Zapata v. Colombia (CORTE INTERAMERICANA DE DERECHOS HUMANOS, 2008b, párr. 105), and *Tiu Tojin v. Guatemala* (CORTE INTERAMERICANA DE DERECHOS HUMANOS, 2008c, párr. 118), among others. In all these cases, the Inter-American Court insisted upon the necessity of keeping the military jurisdiction restrictive, exceptional and functional. Many of these considerations can be found in *Rosendo Radilla v. United Mexican States*, which we will analyze in the following chapter as a case study.

3 The case of *Rosendo Radilla* and the wide application of military jurisdiction to civilian human rights violations

The Inter-American Court's sentence in *Rosendo Radilla v. United Mexican States* (case 12.511), dated November 23rd, 2009 (CORTE INTERAMERICANA DE DERECHOS HUMANOS, 2009a), represents a significant triumph for the movement of victims of crimes committed by the State during the "dirty war" and their families, who for decades have been struggling to obtain justice for systematic and massive violations of human rights during that period.

As noted above, the case of Mr. Radilla took about thirty-five years to reach the Inter-American Court. In 2001, the case was presented before the Inter-American Commission on Human Rights (ICHR) by relatives of the victims, assisted by the Association of Families of the Detained, Disappeared and Victims of Human Rights Violations in Mexico (AFADEM, by its Spanish acronym) and the Mexican Commission for the Defense and Promotion of Human Rights A.C. (CMDPDH, by its Spanish acronym). Though the plaintiffs spent twenty-seven years demanding justice from the national authorities, the Secretariat of Foreign Relations argued that they had not yet used all the domestic legal remedies. The ICHR concluded in 2005 that thirty-one years of inefficacy in internal appeals justified the intervention of the regional court. Thus, a total of thirty-five years passed before a sentence was issued against the Mexican state for only one of the hundreds of cases of impunity, pain and injustice during those years.

This case also represents an important precedent for understanding the impact of the extensive use of military jurisdiction for civilian human rights violations. We shall consider this aspect of the case in three sections: a) the incompetence of military jurisdiction to try these cases, b) the lack of judicial protection of civilians in military jurisdiction, and c) the imposition of reserves and interpretative declarations in cases of crimes against humanity under military jurisdiction.

3.1 *The case of Rosendo Radilla and the incompetence of the military jurisdiction to hear cases on civilian human rights violations*

Taking into account the realities of the Inter-American system and the principles of independence and impartiality of the judges, why is the military jurisdiction incompetent to try cases of human rights violations of civilians?

In *Rosendo Radilla* (para. 266), the Inter-American Court highlighted that the ICHR stated that “the military criminal jurisdiction constitutes a violation of Articles 8 and 25 of the American Convention, since it does not comply with the standards of the Inter-American system regarding cases that involve violations to human rights, mainly in what refers to the principle of the competent court”. Likewise, it was careful to declare in Paragraph 273 that:

[...] military criminal jurisdiction is not the competent jurisdiction to investigate and, in its case, prosecute and punish the authors of violations of human rights but that instead the processing of those responsible always corresponds to the ordinary justice system. The judge in charge of hearing a case shall be competent, as well as independent and impartial.

(CORTE INTERAMERICANA DE DERECHOS HUMANOS, 2009a)

Let us consider this assertion under Mexican legislation on military justice. The Political Constitution of the United Mexican States (hereinafter “Mexican Constitution”), Art. 13, imposes a precise limitation to the extension of military jurisdiction:

No one shall be put on trial by using either personalized laws nor by special tribunals. [...] Personalized laws shall be applied, however, to military personnel who have committed criminal offenses or have breached the military discipline; but the jurisdiction of martial courts shall never extend to non-enrolled individuals. Civilians involved in crimes against the armed forces or who have breached the military order shall be put to trial before ordinary courts.

(ESTADOS UNIDOS MEXICANOS, 1917)

In spite of the clarity of the constitutional text, the Code of Military Justice (hereinafter “CJM”) defines “military discipline” broadly, applying military jurisdiction to all crimes committed by military personnel “while they are on duty or acting under motivation of duty,” thus allowing any crime committed by military personnel to be investigated by a military prosecutor and to be judged by military authorities, regardless of the crime’s effect.

Likewise, it must be noted that through Articles 7, 13, 16, 27, 41, 42, and others related to the CJM (ESTADOS UNIDOS MEXICANOS, 1933, the Supreme Military Tribunal (the supreme organ of the Mexican military judicial system, hereinafter “STM” by its Spanish acronym); the War Councils, both Ordinary and Extraordinary; the personnel of the military judicial system; and the Attorney General for Military Justice (in charge of the investigations related to military penal law) and his agents are all comprised exclusively of military personnel. In addition, the Secretary of National Defense must agree with the President (in his role as the Supreme Commander of the Armed Forces) in order to appoint both the Attorney General for Military Justice as well as the magistrates who comprise the STM. Federico Andreu Guzman, in his expert report for the *Radilla* Court, emphasized two characteristic elements of Mexican military justice: 1) high dependency of

judicial officials and Public Ministry military personnel on the Executive Power, and 2) an extensive width of jurisdiction that exceeds the framework of strictly military crimes. (*cf.* ANDREU GUZMÁN, 2009, párr. 11).

The first element is clearly evident from the composition of the Mexican military justice system and directly impacts the independence and impartiality that all authorities acting within a jurisdictional scope should possess. These requirements, if unmet, will clash with the principle of separation of powers within the administration of justice. The notion of independence in justice implies that all tribunals or judges must be independent from the Executive Power, the Legislative Power, and the relevant parties in a given trial. International consensus affirms this notion, as can be seen aforementioned reports by the Special Rapporteur on the independence of magistrates and attorneys, the *Rosendo Radilla* case (para. 272), the European jurisprudence in this matter, for example by the ECHR in *Stan Greek Refineries and Stratis Andreadis v. Greece* (para. 49) (TRIBUNAL EUROPEO DE DERECHOS HUMANOS, 1994), among others. Nevertheless, in the Mexican case, the opposite is true: the Army is the judge of its own cause and the acting tribunal is not part of the Judiciary but rather the Executive.

Now, regarding competence (also called “principle of the natural judge” or “jurisdictional scope”), two additional considerations are possible: fulfilling competence on the basis of either *ratione materiae* (subject matter jurisdiction) or *ratione personae* (personal jurisdiction). Regarding the former, there is a contradictory regulation that pits the Mexican Constitution against the CJM. Though the scope of military jurisdiction is restrictive in the primary norm, in the secondary legislation it “has a phenomenal expansion,” quoting an expression used by Andreu-Guzmán (2009, para. 6 of the expert report). The CJM (Art. 57) broadens the military jurisdiction to include felonies committed against the military and all common felonies committed by military personnel during service or arising from service, in a territory declared under siege or in a place subjected to martial law, or in connection with a strictly military crime, defined in the Code of Military Justice.

Regarding this article of the CJM, the Inter-American Court decided that it surpassed the strict and closed environment of the military, resulting in a broader approach toward the active subject. However, as Miguel Sarre said in his expert report for the *Radilla* case, “it does not consider the passive subject” (CORTE INTERAMERICANA DE DERECHOS HUMANOS, 2009a, párr. 276).

Likewise – said the Inter-American Court in the quoted paragraph – the expert Federico Andreu-Guzman, in a declaration given before the Tribunal, stated that [...] [t]hrough the characterization of the crime during the exercise of duty or during an occasion of service, as established in article 57 of the [CJM], Mexican penal jurisdiction has the characteristics of personal jurisdiction linked to the military condition of the individual on trial, and not on the nature of the crime (citations omitted).

Due to this erroneous substantive expansion, other juridical rights, beyond those within the scope of the military jurisdiction, are affected. On this particular point, the judgment in the *Radilla* case indicates precisely what will happen as a result of the extensive application of military jurisdiction:

274. [...] it shall be concluded that if the criminal acts committed by a person who enjoys the classification of active soldier does not affect the juridical rights of the military sphere, ordinary courts should always prosecute said person. In this sense, regarding situations that violate the human rights of civilians, the military jurisdiction cannot operate under any circumstance.

275. [...] the victims of the violations of human rights and their next of kin have the right to have said violations heard and resolved by a competent tribunal, pursuant with the due process of law and the right to a fair trial. The importance of the passive subject transcends the sphere of the military realm, since juridical rights characteristic of the ordinary regimen are involved.

277. In the present case, there is no doubt that the arrest and subsequent forced disappearance of Mr. Rosendo Radilla-Pacheco, in which military agents participated (*supra para.* 150) are not related in any way whatsoever with the military discipline. From those behaviors juridical rights such as life, personal integrity, personal liberty, and the acknowledgment of the juridical personality of Mr. Rosendo Radilla-Pacheco have been affected. Likewise, in a Constitutional State, the commission of acts such as the forced disappearances of persons against civilians by the members of the military can never be considered as a legitimate and acceptable means for compliance with the military mission. It is clear that those behaviors are openly contrary to the duties of respect and protection of human rights and, therefore, are excluded from the competence of the military jurisdiction.

(CORTE INTERAMERICANA DE DERECHOS
HUMANOS, 2009a, párr. 274, 275, 277)

Considering these arguments and the ones presented by the plaintiffs' defense, the Inter-American Court concluded that Article 57(II)(a) of the CJM (ESTADOS UNIDOS MEXICANOS, 1933, párr. 286):

is an ample and imprecise provision that prevents the determination of the strict connection of the crime of the ordinary jurisdiction with the military jurisdiction objectively assessed. The possibility that the military courts prosecute any soldier who is accused of an ordinary crime, for the mere fact of being in service, implies that the jurisdiction is granted due to the mere circumstance of being a soldier. In that sense, even when the crime is committed by soldiers while they are still in service or based on acts of the same, this is not enough for their knowledge to correspond to the military criminal justice.

Though the expansion of Mexican military jurisdiction is unconstitutional and inadequate compared to international standards, the State continues to allow the Army to try its personnel before its own tribunals, applying a special set of norms, violating procedural rights of the civilian victims and refusing to comply with its obligation to reform the CJM (*cfr.* CORTE INTERAMERICANA DE DERECHOS HUMANOS, 2009a, punto resolutivo 10).

In this regard, it is noteworthy the recent decision of the Supreme Court of

Justice (SCJN), which held last July 12, 2011, as part of the “Consulta a Trámite en el Expediente Varios 489/2010 *Caso Rosendo Radilla Pacheco vs Estados Unidos Mexicanos*” (Opinion regarding Case 489/2010, *Rosendo Radilla vs. United Mexican States*), that all judges in the country, before whom disputes over military jurisdiction might arise, must apply the IACHR criterion regarding the exclusion from their jurisdiction cases of human rights violations perpetrated by the Armed Forces, being the SCJN the court with the judicial power to decide in such situations eventual conflicts of jurisdiction between civil and military authorities. It means that the SCJN, exercising its constitutional authority, declared unconstitutional the Article 57 of the Code of Military Justice (CJM) until the Congress enacts a new provision, in compliance with the IACHR judgments in the cases *Radilla Pacheco*, *Rosendo Cantú*, *Fernández Ortega* and “*Campesinos Ecologistas*”. Undoubtedly, this represents an important step in the process of compliance with the judgment,³ but still requires that the ruling be implemented with the adoption of the jurisprudence and, more importantly, with the reform of the CJM, which is within the scope of the Legislative.

3.2 The case of Rosendo Radilla and the right to count on effective judicial remedies

The problem we are discussing is aggravated by: a) the inexistence of an effective appeal process that may protect victims (CORTE INTERAMERICANA DE DERECHOS HUMANOS, 2009a, párr. 190, 233, 265, 267, 281, 288, 296); b) the reservations and interpretational declarations attached to international treaties on the subject (CORTE INTERAMERICANA DE DERECHOS HUMANOS, 2009a, párr. 236, 312); c) the inexistence or inadequacy of penal classification of crimes that constitute violations of civilian human rights, such as forced disappearance and torture (CORTE INTERAMERICANA DE DERECHOS HUMANOS, 2009a, párr. 235, 238, 240, 288, 315–324); d) the promotion of legislative reforms aiming to protect the persons responsible for serious human rights violations (CORTE INTERAMERICANA DE DERECHOS HUMANOS, 2009a, párr. 285, 286, 288); e) the refusal to investigate the facts (CORTE INTERAMERICANA DE DERECHOS HUMANOS, 2009a, párr. 233); f) the refusal to expedite copies of the penal files, even in the case of serious human rights violations, thus denying the right of every person to participate in his own process (CORTE INTERAMERICANA DE DERECHOS HUMANOS, 2009a, párr. 182, 222, 248, 252); g) the absence of an investigation on responsibility within the chain of command, the basis for identifying the fault of both the actors and the planners (CORTE INTERAMERICANA DE DERECHOS HUMANOS, 2009a, párr. 205); h) the denial of access to truth, in those cases that are in the domain of transitional justice (CORTE INTERAMERICANA DE DERECHOS HUMANOS, 2009a, párr. 180), and i) the creation, in general, of mechanisms pretending to substitute for the punishment of those at fault and the victim’s reparations (CORTE INTERAMERICANA DE DERECHOS HUMANOS, 2009a, párr. 179 y 181).

Regarding the lack of an effective appeal, the IHR Court has frequently repeated that the Member States of the American Convention need to provide effective judicial resources to potential victims of human rights violations, as stated

in Article 25 (*cf.* CORTE INTERAMERICANA DE DERECHOS HUMANOS, 1987, párr. 90, *Excepciones preliminares del Caso Fairén Garbi y Solís Corrales contra Honduras*; CORTE INTERAMERICANA DE DERECHOS HUMANOS, 1988, párr. 91, *Caso Velázquez Rodríguez contra Honduras*; CORTE INTERAMERICANA DE DERECHOS HUMANOS, 2009b, párr. 110, *Caso Kawas Fernández contra Honduras*; CORTE INTERAMERICANA DE DERECHOS HUMANOS, 2009c, párr. 122, *Caso Anzualdo Castro contra Perú*).

What is an “effective appeal”? Diligence is one of the aspects of an effective appeal, as seen in the *Rosendo Radilla* Judgment (para. 191). This paragraph reminds us that the ministerial investigation “requires that the determination of the facts under investigation and, if it were the case, of the corresponding criminal responsibilities be made effective in a reasonable period of time, reason for which, in attention to the need to guarantee the rights of the affected parties, a prolonged delay can constitute, in itself, a violation of the right to a fair trial.” (internal citation omitted). This constitutes a positive verification of the *periculum in mora*, to civilians’ detriment. (*cf.* CORTE INTERAMERICANA DE DERECHOS HUMANOS, 2005c, párr. 4 inciso c) de la Solicitud de medidas provisionales presentada por la CIDH respecto de los Estados Unidos Mexicanos en el caso Jorge Castañeda Gutman).

In the case under discussion, what rendered the ordinary penal appeal illusory was the involvement of high military commands for the commission of the crimes denounced by the family members of Mr. Radilla. As a matter of fact, due to their forced disappearance, the Attorney General of the Republic only called upon three members of the Armed Forces to testify, all already in prison for other crimes (CORTE INTERAMERICANA DE DERECHOS HUMANOS, 2009a, párr. 205 caso Rosendo Radilla). He did so while briefly and ineffectively acting within his role as the “Special Prosecutor for the investigation of actions probably constituting crimes committed by public servants against persons linked with Social and Political Movements of the Past” (FEMOSPP) and with the purpose of clarifying the crimes committed by the Mexican state against the civilian population during the 1960s and 1970s.

The aforementioned leads us to the conclusion that the independence of the tribunal through absence of external influence is a requisite for effective appeals which the military jurisdiction does not have, as indicated by the *Radilla* Judgment and, quoting another clear example of regional jurisprudence, in the ECHR’s judgment in *Incal v. Turkey* (para. 65) (TRIBUNAL EUROPEO DE DERECHOS HUMANOS, 1999a), where the requirement of the absence of external influence is a central element for a judge’s independence.

Now, the same Mexican legislation contains regulations that prevent the effectiveness of the *amparo* proceeding (for the protection of individual guarantees consecrated by the Mexican Constitution) whenever it extends into military jurisdiction, as long as the personal jurisdiction proves to be ineffective. When the relatives of Mr. Padilla attempted to bring the case before the ordinary trial court, the Court of the Second District declined its competence in favor of the military jurisdiction. This decision, in turn, spurred an *amparo* proceeding to revoke this resolution. However, the Court of the Sixth District immediately rejected the demand, deciding that:

[i]n the Mexican judicial system, penal procedures are performed only between the accused party and the Public Ministry, in charge of the penal action and with a monopoly on it, and thus, it is entitled to defend during the process of each and every one of the acts that may happen during this process and which may affect its development, [among] which [...] we may find procedural subjects such as the ones pertaining to the Tribunal before which the case may have to be heard by virtue of its jurisdiction, a topic that can be analyzed through the means of defense proposed before the competent instances under the terms of article 367, fraction VIII, of the Federal Code of Penal Procedures; an appeal that [...] may only be raised by the Public Ministry, unlike the case of the plaintiff before its legitimate representatives, even though they may be represented by the Social Representative [...].

This resolution invokes a norm that violates the right of the parties to participate in the process. It was disputed through an appeal to the Collegiate Court, which affirmed the disposition of the *amparo* on the conflict of competence under the argument that the Collegiate Court had previously decided, and that the *Amparo* Law, art. 73(XVI) establishes that the case cannot proceed “[w]hen the effects of the action being claimed have disappeared.”⁴

For all this, the Inter-American Court concluded that Mr. Radilla’s relatives were “deprived of the possibility to contest the jurisdiction of military courts to hear matters that, due to their nature, shall correspond to the authorities of the ordinary jurisdiction,” (CORTE INTERAMERICANA DE DERECHOS HUMANOS, 2009a, párr. 294), due to the fact that “it is not enough for the recourses to exist formally, but instead it is necessary that they be effective in the terms of that precept. The Court has reiterated that said obligation implies that the recourse be suitable to fight the violation and that its application by the competent authority be effective.” (internal citation omitted) (CORTE INTERAMERICANA DE DERECHOS HUMANOS, 2009a, párr. 296).

3.3 The case of Rosendo Radilla and the imposition of reservations and interpretative declarations in the cases of crimes against humanity under military jurisdiction

The Vienna Convention on the Law of Treaties (ONU, 1969) (hereinafter “Vienna Convention”) regulates in Articles 19 through 23 the right of the States to interpose reservations to international treaties. The Inter-American Court states in its Consultative Opinion OC-2/82 that this norm requires an integral interpretation taking into account that, above all, the final purpose of the treaties on human rights must be the preservation of its subject and its final objective. This preservation requires achieving the recognition and realization of the rights consecrated in the instrument.

Now, the Mexican state imposed a reservation on Article IX of the CIDFP (cited in the paragraph on international norms applicable in this essay) in the following terms:

The Government of the United Mexican States, in ratifying the Inter-American Convention on the Forced Disappearance of Persons, adopted in the city of Belem, Brazil, on June 9, 1994, formulates a concrete reservation on Article IX, due to the

fact that the Political Constitution recognizes the jurisdiction of war, whenever the military has committed any crimes while on duty. The jurisdiction of war does not constitute a special jurisdiction in the sense of this Convention, due to the fact that in accordance with article 14 of the Mexican Constitution nobody may be deprived of life, liberty or properties, possessions or rights, unless there is a trial performed by tribunals established previously, in which the essential formalities of the procedures are observed in accordance with the laws issued before the act in question.

(*cf.* OEA, 1994, párr. 306)

Of course, this reservation renders Article IX of the CIDFP inapplicable, as it precisely intends to establish a procedural rule in which all actions of forced disappearance are to be investigated and tried by civilian authorities. It intends, above all, to establish effective judicial appeals that protect the victims from the risk of impunity associated to the lack of independence, impartiality and competence of the military jurisdictions hearing these matters (*cf.* OEA, 1994, párr. 308). Article IX of the CIDFP puts a special emphasis on military jurisdiction by establishing that cases of disappearances may not be interpreted as actions committed in the performance of military duties. However, the Mexican reservation turns military jurisdiction into personal jurisdiction, violating the right to a natural judge and creating a rule instead of an exception. It thereby contradicts the subject and purpose of the Treaty and its Article IX, as well as the provisions set forth in Article 19 of the Vienna Convention.

For all the above reasons, the Inter-American Court declared the nullity of the reservation presented by the Mexican state to Article IX of the CIDFP, which tried to justify the wide application of military jurisdiction to these type of cases, for being against the object and purpose of the treaty (CORTE INTERAMERICANA DE DERECHOS HUMANOS, 2009a, párr. 312 de la Sentencia).

Finally, as the epilogue of this section, another pernicious effect stemming from the extensive application of military jurisdiction and considered by Inter-American jurisprudence is the concept of impunity that results from the application of laws or decrees of self-amnesty, the configuration of penal types that include the expiration of crimes against humanity or short-term expiration for other types of human rights-related crimes, or through the absolution of crimes against humanity, generally accompanied by ineffective investigations.

On this subject, the Inter-American Court has been emphatic in its affirmation of *Barrios Altos v. Peru* (para. 41) that

all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law.

(CORTE INTERAMERICANA DE DERECHOS HUMANOS, 2001, párr. 41)

A similar declaration was made in the same sense in *Almonacid Arellano v. Chile* (CORTE INTERAMERICANA DE DERECHOS HUMANOS, 2006c) in relation to the application of self-amnesty for public servants who may have committed crimes against humanity (*cf.* particular vote of J. Cançado Trindade).

In *Rosendo Radilla* (CORTE INTERAMERICANA DE DERECHOS HUMANOS, 2009a, párr. 278 y *ss.*), the State showed its intention of putting the procedural schedule to work in favor of impunity through its allegations on the incompetence *ratione temporis* of this tribunal to judge the matter because by the time of the deposit of the instrument of adhesion from Mexico to the American Convention, as well as, later, to the CIDFP, the actions were performed after the subject matter of the *litis*. The State further contended that the continuing character of the forced disappearance was deemed “irrelevant” in the process because of the tardy deposit. The reasons used by the Court to reject this allegation revolved around the fact that, due to its characteristics, the crime of forced disappearance is a crime of permanent execution and non-lapsable, with effects that prolong over time as long as the location or whereabouts of the victim are not established. This is especially so given the group of imperative norms in general international law (*ius cogens*) being applied that imply a non-temporal element. (OEA, 1994, párr. 15-38).

4 The case of *Abdullah Öcalan v. Turkey* in relation to the extensive application of military jurisdiction in civilian trials

Another case to be analyzed is *Öcalan v. Turkey* (TRIBUNAL EUROPEO DE DERECHOS HUMANOS, 2003), in which a civilian was tried before a court made up of military personnel. This case highlights the violation of two procedural rights that have been affected by military jurisdiction: every person’s right to be judged by an independent tribunal (Article 6.1 of the European Convention) and the right to a fair trial (Article 6.1 as related to 6.3). On the subject of independence, the ECHR examined the composition of the Court of National Security (hereinafter “CNS”) of Ankara. This court tried Öcalan for terrorist activities within the framework of his activities as founder and leader of the armed group called the Worker’s Party of Kurdistan (PKK). The court was comprised of two civilian judges and one military judge, in accordance with the Turkish Constitution before the 1999 Amendment to Article 143.

On June 18, 1999, having complied with the Judgment of the *Incal* case, the Great Assembly of Turkey reformed Article 143 of the Turkish Constitution in order to exclude military judges and prosecutors from the proceedings before the CNS and, in accordance with the new legislation, on June 23 the military judge in the Öcalan case was replaced by a civilian (*cf.* TRIBUNAL EUROPEO DE DERECHOS HUMANOS, 2003, párr. 43 y 44). Six days later, the CNS issued the decision: a death sentence due to terrorist and separatist activities (*cf.* TRIBUNAL EUROPEO DE DERECHOS HUMANOS, 2003, párr. 46).

The ECHR observed that the presence of a military judge made the CNS’s independence of the Executive Power questionable (*cf.* TRIBUNAL EUROPEO

DE DERECHOS HUMANOS, 2003, párr. 112), as it would with any tribunal in a democracy (*cf.* TRIBUNAL EUROPEO DE DERECHOS HUMANOS, 2003, párr. 116). As in the cases of *Incal* and *Ibrahim Ülger v. Turkey*, the ECHR observed that Öcalan could legitimately worry that the military judge acted under outside influence. Even after the military judge was substituted by a civilian judge, the doubts on the independence of the tribunal (which includes independence of the Legislative Power) continue to be valid, since the decisions made by the military judge outlived his substitution. Paragraph 115 of the Judgment is very clear in asserting that “where a military judge has participated in an interlocutory decision that forms an integral part of proceedings against a civilian, the whole proceedings are deprived of the appearance of having been conducted by an independent and impartial court.” (TRIBUNAL EUROPEO DE DERECHOS HUMANOS, 2003).

This conclusion is similar to the one espoused by the ACHR in *Akamu and others v. Nigeria* (COMISIÓN AFRICANA DE DERECHOS HUMANOS Y DE LOS PUEBLOS, 1995), in which it questioned the independence of the tribunals provided for by the Robbery and Firearms Act of that country which were comprised of three judges: one civilian (who may be a retired judge); one officer of the army, navy or air force; and another one from the police. This court also issued non-appealable sentences that had to be confirmed by the Executive Power.

In relation to the right to a fair trial, we found several irregularities here as we did during the process before the CNS. To cite a few examples, during detention the detainee was held in seclusion for seven days and then was denied access to an attorney. During the trial, the court restricted the number and duration of meetings between the accused and his attorneys (*cf.* TRIBUNAL EUROPEO DE DERECHOS HUMANOS, 2003, párr. 137). In addition, the defense experienced substantially delayed access to evidence, thus violating the principle of procedural equity (*cf.* TRIBUNAL EUROPEO DE DERECHOS HUMANOS, 1991, párr. 36 y 148, y párr. 66 y 67 de la Sentencia del TEDH sobre el caso Brandstetter contra Austria). The first two hearings were performed without the presence of the accused, thus violating the right for parties to participate in their own proceedings (*cf.* TRIBUNAL EUROPEO DE DERECHOS HUMANOS, 2003, párr. 37). The CNS denied Öcalan the right to appear as a witness for the government officials that conducted the peace negotiations with the PKK (*cf. op. cit.*, párr. 39), and it refused to let him to provide additional documentation or to request new investigations in order to gather more proof, saying that the accused was attempting dilatory tactics (*cf. op. cit.*, párr. 40).

The observance of the principles of due process and the correct administration of justice in cases in which the life of the accused is at stake is of utmost importance (*cf. op. cit.* párr. 136). There is a consensus on this subject in the most recent European regulations, among them the prohibition of the death penalty in common Article 1 of both Protocols No. 6 and No. 13 of the European Convention, as well as the prohibition of the death penalty for terrorists in accordance with Article X.2 of the “Guidelines on Human Rights and the Fight against Terrorism” issued by the Council of Ministers of the European Council in 2002. The Inter-American Court has also provided jurisprudence by stating in *Hilaire, Constantine and Benjamin and others v. Trinidad-Tobago* (para. 148) that “[t]aking into account the

exceptionally serious and irreparable nature of the death penalty, the observance of the due legal process, along with the corresponding rights and guarantees, is even more important when a human life is at stake.” (CORTE INTERAMERICANA DE DERECHOS HUMANOS, 2005b).

5 Conclusion: the significance of human rights against the expansion of militarism and the extensive application of military jurisdiction

The standards of the four systems mentioned above (universal, Inter-American, European and African) generally require that the State recognize the rights related to due process and the right to both access to and protection by justice. For the purpose of explanation we consider the first category to consist of: 1) the recognition of judicial rights of every person (presumption of innocence, right to defense, right to adequate time and means to prepare a defense, etc.); 2) the equality of the parties; 3) the right for every person to be heard without delay; 4) the publicity of the procedures; 5) the right to be present during the procedure; 6) the legality of judges and tribunals, which implies their legal existence as well as the application of relevant legal norms; 7) the competence of said judge or tribunal; 8) its independence; and 9) its impartiality (to which we must add the independence and impartiality of the Public Ministry). In the second category we may find 1) the availability of appeals, 2) the guarantee of compliance with the judgment (which include the right to investigate and sanction human right violations), and 3) the ease and speed of the process (these two are contemplated in the American Convention).

The problem with the extensive application of military jurisdiction in cases in which civilians are involved as either passive or active subjects is that it violates more than one of those principles, depending on the case and the regional jurisprudence mentioned above. It also impacts the quality of democracy as applied by that State. The military jurisdiction completes the circle of State violence, in which civilian judicial interest in due process is violated by not having a competent, independent, fair and impartial trial, as established by international human rights law.

Impunity is the most evident sign of a State that does not offer full guarantees for the realization of human rights, and it casts a shadow on the authenticity of its democracy. Military jurisdiction is, on the other hand, the most deceptive sign of impunity. It is a sign that the State favors of arbitrariness and separation of society between the privileged and the excluded.

Giorgio Agamben, in his book *State of Exception*, insists that since the Second World War “the voluntary creation of a permanent state of emergency (although eventually it went undeclared in the technical sense of the sentence) turned into one of the essential practices of contemporary states, including those so-called democratic states” (AGAMBEN, 2007, p. 25). In fact, the growing *exceptionalization* of the law, reflected in the actions of the Armed Forces in several places in the world, generates a parallel system of “justice” in which procedural arbitrariness leads to arbitrariness in the use of force. It also punishes legitimate demands for

respect and acknowledgment of human rights of hundreds of civilians who were victims of these abuses, as well as entire societies that are exposed to vulnerability before the excess of power. Peace and justice are inconceivable when everything that is intended to be an exception becomes a rule.

For all the above reasons, in a system that involves such a multiplicity of highs and lows that vary by country, the expansion of militarism would seek to evade judicial counterweights applied in democratic States. Therefore, the authors wish to share with readers their conviction that acting in accordance with international human rights law against the extensive application of military jurisdiction represents the vindication of judiciaries everywhere and the high principles promoted by modern democracies worldwide.

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NOTES

1. For further reference on these cases, it is recommended to read of the report entitled "*Uniform impunity. Mexico's misuse of military justice to prosecute abuses in counternarcotics and public security operations*" (HUMAN RIGHTS WATCH, 2009).

2. The American Convention indicates that the tribunal must be established by the law before the process.

3. On July 20, 2011, the UN High Commissioner for Human Rights, Navi Pillay, issued a statement on the occasion of the International Criminal Justice Day, which highlights the SCJN's ruling in the following terms: "As the United Nations High Commissioner for Human Rights, I join the world today in commemorating International Criminal Justice Day [...] I welcome the following positive developments, among many, that we witnessed this year: the arrest and transfer of General Ratko Mladić to the ICTY; the

conviction of General Augustin Bizimungu at the ICTR; the conviction at ICTR of former Rwandan Minister Pauline Nyiramasuhuko for, among other crimes, the rapes committed against her fellow women during the Rwandan Genocide because of her own superior responsibility over the Interahamwe rapists; the very recent conviction by an Argentine national court in Buenos Aires of two former members of the military junta that ran a most repressive regime in Argentina in the 1970s and 1980s; and the judgment of the Supreme Court of Mexico requiring trials of soldiers in civilian courts for the violations of human rights of civilians".

4. It is worth mentioning that the *amparo* proceeding needs the approval of the person affected in the case of acts of authority. In cases of forced disappearance, this requisite prevents the effectiveness of such remedy.

RESUMO

No ensaio são abordados alguns casos dos sistemas global, interamericano, africano e europeu de proteção dos direitos humanos para situar a questão da jurisdição militar em uma perspectiva regional, da normatividade, jurisprudência e outras fontes de direito que possam ser úteis para compreender e agir adequadamente em casos nos quais a jurisdição militar é aplicada extensivamente a civis, sejam eles sujeitos ativos ou passivos. É feita uma menção especial às Sentenças dos casos *Rosendo Radilla Pacheco contra Estados Unidos Mexicanos*, emitida pela Corte Interamericana de Direitos Humanos em novembro de 2009, e *Öcalan contra Turquia*, emitida pelo Tribunal Europeu de Direitos Humanos em maio de 2005.

PALAVRAS-CHAVE

Direitos humanos – Jurisdição militar – Militarismo – Devido processo – Competência – Independência – Imparcialidade – Foro funcional

RESUMEN

En el ensayo se abordan algunos casos de los sistemas universal, interamericano, africano y europeo de protección de los derechos humanos para poner el tema de la jurisdicción militar en perspectiva regional, desde la normatividad, la jurisprudencia y otras fuentes de derecho que pueden ser de utilidad para comprender y actuar adecuadamente en casos en los que la jurisdicción militar se aplica extensivamente sobre civiles, ya sea como sujetos activos o pasivos. Se hace especial mención a las Sentencias del caso *Rosendo Radilla Pacheco vs. Estados Unidos Mexicanos*, emitida por la Corte Interamericana de Derechos Humanos en noviembre de 2009, y *Öcalan vs. Turquía*, emitida por el Tribunal Europeo de Derechos Humanos en mayo de 2005.

PALABRAS CLAVE

Derechos humanos – Jurisdicción militar – Militarismo - Debido proceso – Competencia – Independencia – Imparcialidad – Fuero funcional



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ABSTRACT

This article examines the implications arising out of the recent decision of the African Commission on Human and People's Rights (African Commission) to appoint the Chair of the Committee for the Prevention of Torture in Africa (CPTA) as the Special Rapporteur on Prisons and Conditions of Detention (SRP). The article reviews the mandates of these Special Mechanisms and considers the potential impact of one Commissioner holding both mandates at the same time. The article then considers whether the current practice of the African Commission to appoint Commissioners as Special Rapporteurs can in fact deliver the necessary expertise and level of action required to function effectively and meet the increasing demands for more mechanisms to be established. Finally, the article suggests that lessons can be drawn from the recent review of the UN Special Procedures in order to reform the Special Mechanisms procedure of the African Commission.

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KEYWORDS

Torture – Prison – African Commission on Human and People's Rights

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THE SPECIAL RAPPORTEUR ON PRISONS AND CONDITIONS OF DETENTION IN AFRICA AND THE COMMITTEE FOR THE PREVENTION OF TORTURE IN AFRICA: THE POTENTIAL FOR SYNERGY OR INERTIA?

Debra Long and Lukas Muntingh

1 Introduction

At the 46th Ordinary Session of the African Commission on Human and People's Rights (African Commission), held in The Gambia between 11 and 25 of November 2009, two important and linked resolutions were adopted. The first concerned the renaming of the Follow-up Committee on the Robben Island Guidelines to the 'Committee for the Prevention of Torture in Africa' (CPTA) (ACHPR, 2009b). The same resolution also extended the tenure of the current chairperson, Commissioner Dupe Atoki, for a further two years. The resolution bestowed upon the newly named committee the same mandate as on its predecessor. The change in name was primarily motivated by the conclusion that the mandate to prevent torture was not clearly identifiable in the name of the Follow-up Committee on the Robben Island Guidelines.

The second resolution appointed Commissioner Atoki as the Special Rapporteur on Prisons and Conditions of Detention in Africa (SRP) as well (ACHPR, 2009a). While it is not unique for a Commissioner of the African Commission to hold a Special Rapporteurship at the same time as being a member of a Working Group, it is the first time that the same person has held the position of SRP and Chair of the CPTA, or its predecessor. The "doubling-up" of these particular mandates raises a number of crucial questions regarding the African Commission's approach to issues relating to the deprivation of liberty and the prevention of torture specifically, and the sustainability and efficacy of the African Commission's Special Mechanisms procedure generally.

Notes to this text start on page 116.

This article outlines and compares the mandates and activities of the SRP and CPTA and considers the potential positive and negative consequences of one Commissioner holding both mandates at the same time. The article then considers whether the current Special Mechanisms procedure of the African Commission as a whole can deliver the necessary expertise and level of action required to function effectively and meet the increasing demands for more mechanisms to be established. Finally, the article suggests that the experience and recent review of the UN Special Procedures can be instructive for considering the future sustainability of the African Commission's Special Mechanisms.

2 The mandate of the Special Rapporteur on Prisons and Conditions of Detention in Africa

The position of SRP was established in 1996 following a period of intensive lobbying from NGOs, in particular Penal Reform International (PRI). Once established, PRI continued to be closely associated with the mandate of the SRP, and was responsible for securing funding,¹ organising and accompanying the SRP on various in-country missions, and assisting with the preparation of reports up until 2003 when it was no longer able to provide such assistance. The first person to be appointed as the SRP was Professor Victor Dankwa, a Commissioner of the African Commission and law professor from Ghana. He served as the SRP until 2000 when Commissioner Dr. Vera Chirwa was appointed. She was a well known and respected human rights activist and had herself been arbitrarily detained in Malawi for more than 10 years. In 2005, Commissioner Mumba Malila, the Attorney-General for Zambia at the time, was appointed and served until his election as Vice-Chair of the African Commission in November 2009, at which time Commissioner Dupe Atoki, a lawyer from Nigeria, took over the position.

The mandate of the SRP is to examine the situation of persons deprived of their liberty within the territories of States Parties to the African Charter on Human and Peoples' Rights (African Charter). The SRP's mandate and methods of work were adopted at the 21st Ordinary Session of the African Commission in 1997. In accordance with these terms of reference the SRP is empowered to:

- Examine the state of the prisons and conditions of detention in Africa and make recommendations with a view to improving them;
- Advocate adherence to the African Charter and international human rights norms and standards concerning the rights and conditions of persons deprived of their liberty, examine the relevant national law and regulations in the respective States Parties as well as their implementation and make appropriate recommendations on their conformity with the African Charter and with international law and standards;
- At the request of the Commission, make recommendations to it as regards communications filed by individuals who have been deprived of their liberty, their families, representatives, by NGOs or other concerned persons or institutions;
- Propose appropriate urgent action;
- Conduct studies into conditions or situations contributing to human rights

violations of prisoners deprived of their liberty and recommend preventive measures. The Special Rapporteur shall co-ordinate activities with other relevant Special Rapporteurs and Working Groups of the African Commission and United Nations;

- Submit an annual report to the Commission. The report shall be published and widely disseminated in accordance with the relevant provisions of the Charter. (ACHPR, 1997, p. 21).

This mandate has been described as encompassing four main implementation mechanisms namely: investigation and reporting by way of country visits; intervention through “urgent action”; assistance with communications; and promotion (VILJOEN, 2005, p. 131). However, in practice the SRP has primarily focused his or her attention on visits to places of detention (MURRAY, 2008, p. 205). From 1997 to 2004 the SRP conducted 16 visits to 13 States, due in most part to the external funding and support received from PRI (VILJOEN, 2005, p. 137). Unfortunately, once external support was no longer available to the SRP the productivity of the mandate inevitably declined and, according to the activity reports of the African Commission, between 2005 and 2009 the SRP was only able to carry out one country mission to Liberia in 2008, which, notably, was conducted jointly with the Follow-up Committee on the Robben Island Guidelines. It should also be added that, to date, none of the SRPs have conducted any comprehensive and analytical studies on prisons and conditions of detention in Africa as envisaged in the mandate and similar to that of, for example, the UN Special Rapporteur on Torture.² The mandate of the SRP has also been interpreted in a narrow sense by the successive incumbents, preferring to focus exclusively on prisons and paying scant attention to other situations of detention, for example police cells and immigration detention centres.

3 The mandate of the Committee for the Prevention of Torture in Africa (formerly the Follow-up Committee on the Robben Island Guidelines)

The forerunner to the CPTA, the Follow-up Committee on the Robben Island Guidelines (Follow-up Committee), was established by the African Commission during its 35th Ordinary Session, held in The Gambia from 21 May to 4 June 2004. The Follow-up Committee was established in order to raise the profile of the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa: The Robben Island Guidelines (RIG). The RIG contain a set of provisions dealing specifically with issues relating to the prohibition and prevention of torture and other ill-treatment and the rehabilitation of torture victims. The RIG were drafted in an expert meeting held in South Africa between 12 to 14 February 2002 and were formally adopted by the African Commission through a resolution in October 2002 (ACHPR, 2002). This Resolution also included a commitment to create a Follow-up Committee although it was not until almost two years later that this Special Mechanism was eventually established.³

The mandate of the Follow-up Committee was set out in the African Commission Resolution on the Robben Island Guidelines as follows (ACHPR, 2002):

- To organise, with the support of interested partners, seminars to disseminate the Robben Island Guidelines to national and regional stakeholders;
- To develop and propose to the African Commission strategies to promote and implement the Robben Island Guidelines at the national and regional levels;
- To promote and facilitate the implementation of the Robben Island Guidelines within member States;
- To make a progress report to the African Commission at each ordinary session.

This mandate contrasts starkly with the more detailed mandate of the SRP, being more promotional than investigatory and complaints driven. In particular, the ‘operational’ part of the Follow-up Committee’s mandate i.e. to develop, propose and facilitate strategies to implement the RIG, is less well defined than the many operational aspects of the SRP’s mandate. This perhaps reflects a difference of approach between the two mandates, with the SRP mandated to take a more traditional investigatory approach and the CPTA taking a “preventive” one. (This difference in approach is examined below.) However, this lack of detail in the mandate of the Follow-up Committee has meant that the full scope of its mandate and its terms of reference have been ambiguous from the start and has contributed to a lack of clarity surrounding the relationship between this Special Mechanism and the SRP. (The need to address this lack of clarity is discussed further below.)

In the first few years of its establishment, unlike the SRP, the Follow-up Committee did not receive any external funding and was significantly less active. The first meeting of the Follow-up Committee took place in Bristol on 18 to 19 February 2005 and was hosted by the School of Law at the University of Bristol, UK.⁴ At this meeting the Follow-up Committee adopted its internal rules and procedures and drafted a plan of action. Recommendations for the promotion and implementation of the RIG were also produced at this meeting. However, due to a lack of resources the Follow-up Committee was unable to carry out any official in-country activities between 2005 and 2007. In November 2007, Commissioner Dupe Atoki was elected as Chair of the Follow-up Committee to replace Commissioner Sanji Monageng after she had to stand down from the Follow-up Committee in order to take up the position as Chairperson of the African Commission.

In April 2008, the Follow-up Committee held its second meeting in Cape Town, South Africa, as part of a Conference on the Optional Protocol to the UN Convention against Torture in Africa, which was also organised by the University of Bristol. The purpose of this meeting was to review the progress of the Committee and to draw up an effective programme of activities for the promotion, dissemination and implementation of the RIG. At the 43rd Ordinary Session of the African Commission, held in May 2008, the Chairperson of the Follow-up Committee reported that at the meeting in Cape Town three countries had been identified by the Follow-up Committee for pilot activities,⁵ and that it was decided to arrange another meeting

of the Committee in Nigeria (ACHPR, 2008, p. 1-2). Thus, finally, in July 2008, using additional funding given to the African Commission by the African Union, the Follow-up Committee undertook its first official in-country activity when it held a sub-regional meeting in Nigeria for heads of police and prison services within West African States. Since this first activity the Committee has undertaken a promotional visit or training activity in the following countries: Liberia (September 2008); Benin (October 2009); and Uganda (October 2009). Similarly to her predecessor, the Chairperson has also promoted the RIG during her activities undertaken in her general capacity as a Commissioner of the African Commission.

At the 47th Ordinary Session of the African Commission in November 2009, following the change of name, four of the members of the Follow-up Committee were re-appointed as members of the CPTA and one Commissioner was newly appointed to join the Committee. The CPTA membership continues the past practice of including Commissioners as well as representatives of civil society.⁶

To all intents and purposes the change of name of the Follow-up Committee to the CPTA has not altered the aim and working practices of the CPTA. The change was in name only and the CPTA continues to work within the scope of the mandate established for the Follow-up Committee. Unfortunately, the acronym 'CPTA' raises concerns that this Committee may be perceived as functioning as a monitoring mechanism along the same lines as the European Committee for the Prevention of Torture (CPT) and the UN Subcommittee for Prevention of Torture (SPT), which have very specific preventive mandates including the power to conduct visits to places of detention without prior consent, whereas in fact the CPTA does not have the necessary mandate or powers to function in a similar way. [However, this issue is outside the scope of this article.]

At the time of writing, the CPTA has not carried out a mission to a country and unfortunately the Follow-up Committee has been unable to produce country mission reports due to a lack of resources. As result of this lack of information it is unclear from the few country visits that the Follow-up Committee has carried out what the purpose and methodology are for these visits, and consequently what the difference is between visits conducted by the CPTA and those of the SRP.

4 Synergy or inertia?

On the face of it, the decision to appoint the Chair of the CPTA to the position of SRP could be regarded as nothing more than a pragmatic choice; there are 11 Commissioners of the African Commission and 11 Special Mechanisms (4 Special Rapporteurs; 6 thematic working groups; and a Working Group on Specific Issues related to the work of the African Commission). Accordingly, most of the Commissioners are involved with more than one Special Mechanism at the same time. Yet the decision to have one Commissioner to be the mandate holder of such closely related, but potentially divergent, Special Mechanisms was not simply the result of a number-crunching exercise but was a purposeful choice, and it is likely to create some deliberate and/or unintentional consequences. Time will tell whether this decision will result in a doubling of efforts on related issues or whether the result

will be less than the sum of its parts. It is also uncertain whether the “doubling-up” of these two mandates will be repeated when the tenures are due for renewal at the end of 2011. However, there are some particular opportunities and challenges posed by the current decision to have the Chair of the CPTA as the SRP at the same time.

4.1 The need for transparent working practices and terms of reference

One of the reasons it was felt to be desirable to appoint the Chairperson of the CPTA to be the SRP, was that a nexus exists between the prevention of torture and the deprivation of liberty. Prior to the establishment of the CPTA (and its predecessor the Follow-up Committee) there was no Special Mechanism with the express mandate to consider issues relating to the prohibition and prevention of torture and other ill-treatment. During discussions on the establishment of the SRP, the issue arose as to whether there should be a specific reference to torture and other ill-treatment within the title of the mechanism. However, proponents of the SRP mandate were reluctant to include torture and other ill-treatment within the title of the Special Rapporteur because of a desire that the SRP should be clearly associated with broader issues related to deprivation of liberty. In practice however, the corollary of good prison management is the prevention of abuse, accordingly, the various SRPs have inevitably commented on aspects of conditions of detention and the treatment of persons deprived of their liberty that may amount to a violation of Article 5 of the African Charter. However, the overall approach of the various SRP mandate holders to the documentation of abuse has been rather *ad hoc* and lacking any consistent strategy (MURRAY, 2008, p. 208-210). A further criticism against the SRP missions has been that too much emphasis has been placed on the material conditions of detention as opposed to the legal situation of detention (VILJOEN, 2007, p. 395).

To some extent the development of the RIG and the establishment of a Special Mechanism to promote the prevention of torture and other ill-treatment in Africa was an attempt to respond to criticism that the African Commission lacked a coherent strategy on the prevention of these forms of abuse.⁷ (It is beyond the scope of this article to examine whether the CPTA, and its predecessor, has actually been able to provide a well articulated and considered strategy on torture prevention.) One of the natural consequences flowing from the establishment of the Follow-up Committee was the need to decide how this mandate would work with the SRP and how the two mandates would respond to overlapping issues within their respective mandates. Unfortunately, to date, there has been a failure to provide such clarity. Furthermore, as noted above, this problem has been compounded by a lack of clear and transparent terms of reference for the Follow-up Committee itself. Although, because both mandates have not been that active in recent years this absence of clarity has, so far, not presented so much of an obstacle and uncertainty as it might otherwise have done, nevertheless the appointment of one person as the Chairperson of the CPTA and the SRP can only accentuate the problems caused by a lack of clarity surrounding the relationship between these two Special Mechanisms. This needs to be addressed as a matter of priority.

There have been previous attempts to try and establish a formal collaborative relationship between the two mandates, however these have been largely

unsatisfactory. For instance in 2006, the SRP at that time, Commissioner Malila, was appointed “to sit” on the then Follow-up Committee (ACHPR, 2005, p. 2). Presumably this decision was taken in order to try and strengthen collaboration between the SRP and the Follow-up Committee and assist with a sharing of information and common strategies. This much was indeed required by the 2002 RIG Resolution, namely to involve ‘prominent African experts’ in the work of the Follow-up Committee (ACHPR, 2002). Indeed, this can be presumed from the SRP’s formal participation in the second meeting of the Follow-up Committee in Cape Town in April 2008. It may also have occurred in order to “pool resources” at a time when both mandates, and indeed all the Special Mechanisms, were stymied due to a lack of resources. However, there was some ambiguity in this process and it was not clear externally whether Commissioner Malila was officially a member of the then Follow-up Committee and in what way there was formal cooperation between the two mandates. This collaborative experiment may indeed have led to the joint mission undertaken by the SRP and CPTA to Liberia in 2008. However, it is unclear whether any particular advantage was gained by having a joint mission and to some extent this joint activity may in fact have highlighted the ambiguity surrounding the relationship between these two Special Mechanisms.

It is possible that the bringing together of the SRP and CPTA mandates through one representative may in effect strengthen the collaboration and cooperation between these two mandates on common issues. Yet, now more than ever, there is a pressing need to develop the terms of reference of the CPTA and to set out clearly how the CPTA and SRP will work together and to what extent their mandates and responsibilities will be distinguished from each other.

4.2 A potential blurring of mandates

One of the main challenges facing Commissioner Atoki as Chair of the CPTA and the SRP is that it notoriously difficult for an individual to wear different “hats” at the same time and to maintain the distinctions between roles. Distinctions between different but closely related mandates inevitably blur in the minds of stakeholders and those coming into contact with the mandate holder. On a superficial level, the fact that there may be a blurring of distinctions between missions and activities undertaken in the name of the SRP and those carried out under the auspices of the CPTA may appear to be inconsequential. However, the mandates of the SRP and CPTA do have important and deliberate distinctions at the operational level, which may lead to confusion and unfair expectations as to what can be achieved by the mandate holder of these Special Mechanisms at any one time.

For instance, as noted above, the SRP is mandated expressly to carry out a range of activities that are traditionally associated with Special Rapporteurs, such as carrying out visits to countries and investigating and responding to complaints. The SRP’s mandate, therefore, has a more overtly investigatory, complaints driven and potentially castigatory approach than the CPTA’s mandate. The SRP is also required to ‘conduct studies into conditions or situations contributing to human rights violations of prisoners’ (ACHPR, 1997, p. 21), although in practice this has been a neglected part of the mandate.

The CPTA on the other hand has inherited the ‘promotional’ mandate elaborated for the Follow-up Committee and is not expressly mandated to undertake these more traditional activities assigned to the SRP. At first glance, the CPTA’s mandate may therefore appear to be “weaker” than the SRP’s mandate. It would certainly appear to be less well defined. However, the mandate of the CPTA is influenced by the concept of “prevention”, which has emerged in recent years as a dominant approach within anti-torture initiatives. A preventive approach is characterised by the idea of intervening before a violation has taken place, by establishing constructive dialogue with stakeholders in order to address the root causes of torture and other ill-treatment before they occur or reoccur.⁸ Therefore, a preventive approach is focused more on sustained cooperation than the finding of fault.

While, the wearing of two hats at the same time may in fact enable the SRP and Chair of the CPTA to more easily follow-up on cases at the national level through a mission, there is a concern that the different approaches of the mandates of the SRP and CPTA may lead to confusion with those who come into contact with the mandate holder of these two Special Mechanisms. A situation could easily occur whereby Commissioner Atoki, as the SRP, may receive and respond to urgent actions or communications alleging violations within a particular country and then have to “swop” this quasi-judicial, adversarial role for a more cooperative approach through a visit as Chair of the CPTA to the country concerned. Individuals in this instance may feel less willing to speak openly with the CPTA if they fear that their identity or the information they provide may be disclosed at some later stage as part of a decision on a communication or urgent appeal.

A further practical challenge that cannot be ignored is the sheer workload involved in carrying out these mandates, a problem accentuated by the lack of research and support capacity available to the Special Mechanisms. To have one person responsible for both mandates with little support may indeed reduce both to a state of inertia.

4.3 A need to define the scope of both mandates

Persons deprived of their liberty are particularly at risk of being subjected to torture and other ill-treatment and therefore there will be common issues between these two Special Mechanisms. Furthermore, if both mandates are interpreted in an expansive way i.e. with the SRP looking at the criminal justice system as a whole and the CPTA looking at the prevention of torture in its widest sense, a greater convergence will naturally occur as it is difficult, and perhaps unnecessary, to define where good prison management begins and torture prevention ends and vice versa.

For instance, as noted above, although successive SRPs have concentrated on prisons, the SRP’s mandate is not restricted to prisons only but covers all places of detention and has been described as an “expansive mandate, reaching beyond the ‘how’ of detention to include ‘why’.” (VILJOEN, 2005, p. 132). Indeed, the method of work of the SRP contains an express provision that the SRP “[...]shall conduct studies into conditions or situations contributing to human rights violations of prisons [sic] deprived of their liberty and recommend preventive measures [...]” (ACHPR, 1997, p. 21). Thus, not only is the SRP mandated to investigate and try and secure improvements in the conditions of detention and treatment of persons deprived of

their liberty (the “how” of detention) but the SRP can, and should conduct research and consider whether reforms are required within the criminal justice system as a whole (the “why” of detention) in order to prevent abusive practices.

Similarly, torture prevention in its broadest sense requires a range of complementary measures to be taken in order to tackle practices and behaviour which, if left unchecked, could develop into torture or other ill-treatment. Therefore, torture prevention in the broadest sense may encompass proposals for reforms within the criminal justice system that will strengthen the protection of people deprived of their liberty. For example, overcrowding is the biggest problem facing prisons throughout the world. Overcrowding creates poor conditions of detention, which can itself amount to ill-treatment and a violation of, *inter alia*, Article 5 of the African Charter. The overuse of pre-trial detention, has contributed to this overcrowding crisis. Therefore, it would certainly be within the mandate of the CPTA to make recommendations aimed at reducing pre-trial detention and overcrowding, issues that would normally be considered to be a traditional concern of the SRP.

As a result of this potential overlap, governments, institutions, and individuals may not now understand the need for two Special Mechanisms that are mandated to look at the rights of persons deprived of their liberty. This potential for confusion between the roles of the two mechanisms may be particularly acute because, as discussed above, the lines of division and the relationship between these two mandates have not been transparent since the establishment of the Follow-up Committee in 2004. However, it is in this respect that perhaps having one individual assigned as the SRP and Chair of the CPTA may be beneficial, as it may avoid unnecessary duplication and has the potential to facilitate the development of a more cohesive and systematic message being taken by the different mechanisms on the same issue. There is also the potential that Commissioner Atoki, through her experience as the holder of both mandates, may be able to develop clearer and sustainable distinctions in the duties and working methods of these two Special Mechanisms.

Yet, while there is a potential for synergy between the two mandates and identifiable areas where their activities and interest may converge, equally so it is also clear that their mandates remain distinct, and currently neither one of these Special Mechanisms can, single-handedly, cover the full scope of both mandates. It has to be acknowledged that the SRP’s focus on prisons and conditions of detention covers a much broader range of issues than the prevention of torture and other ill-treatment. This much is evident from the substance addressed in the Kampala Declaration on Prison Conditions in Africa, which the SRP was initially and specifically mandated to promote (ACHPR, 1997, p. 22). Furthermore, the SRP, unlike the CPTA, has an explicit power to conduct visits to places of detention in order to consider a broad range of issues concerning the deprivation of liberty that do not touch upon Article 5 of the African Charter, such as the provision of work, educational facilities, recreational activities and so on. Whereas, the CPTA has a specialised mandate to promote and facilitate the implementation of measures aimed at the prevention of torture and other ill-treatment in Africa.

Accordingly, it is proposed that without a substantial review and amendment of their respective mandates, both Special Mechanisms need to be maintained in order to cover the broad spectrum of issues and level of expertise demanded by their respective mandates.

5 A need for reform of the Special Mechanisms procedure as a whole

The doubling-up of the mandate holder of the SRP and Chair of the CPTA also highlights a problem with the African Commission's Special Mechanisms procedure as a whole. Historically, Commissioners have been appointed as Special Rapporteurs and as Chairs of working groups on thematic issues; however they do not always possess the necessary expertise in the mandate to which they are appointed and, in addition, Commissioners serve part-time and have an onerous amount of work and duties to conduct in this capacity. Therefore the time they can spend on activities, such as the Special Mechanisms, can be limited. This problem has also been compounded by a lack of funding, staff and research capacity within the African Commission. Notwithstanding the obvious commitment of the various Commissioners to their Special Mechanism mandates and their achievements over the years, it is proposed that it is time to revise this practice and consider alternative procedures based on the experience of other human rights mechanisms.

The first Special Mechanism to be established by the African Commission was the Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions in Africa (1994). The establishment of this Special Rapporteur position was instigated by Amnesty International who proposed the idea during its statement at the 14th Ordinary Session of the African Commission, held in Addis Ababa in 1993 (HARRINGTON, 2001, p. 251). During discussions on the appointment of this Special Rapporteur the issue as to whether an individual should be appointed who was not a member of the African Commission was raised. At the time, Commissioner Umozurike has been noted as expressing the view that an external expert should be appointed because a Commissioner would not be able to undertake regular travel, as required by the Special Rapporteur mandate, due to the workload of the African Commission (HARRINGTON, 2001, p. 252-253). However, his opinion did not prevail and the majority of Commissioners preferred to appoint someone to this position from within their own ranks. It was recorded at the time that the reasons behind this decision were that many of the Commissioners considered that appointing "an outside person was not within the competence of the Commission; that in essence outsiders could not be trusted; and that paying an outside consultant would be expensive. Such a course of action would also imply that commissioners were not competent" (HARRINGTON, 2001, p. 252-253). Consequently, Commissioner Ben Salem was duly appointed to take up the position of Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions in Africa (ACHPR, 1994, §26, p.188).

It is interesting to note that at the time of the appointment of the first SRP, which was only the second Special Rapporteurship to be established, the issue of appointing external experts was raised again when PRI proposed that candidates for the position should be considered from outside the African Commission, and they submitted the names of 6 external experts (VILJOEN, 2005, p. 129). However, the African Commission followed the precedent established by the appointment of the Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions in Africa, and appointed the then Vice-Chair of the African Commission, Commissioner Danka, as the first SRP in

1996. With this appointment the practice of selecting Special Rapporteurs from within the ranks of Commissioners appears to have established practice. As noted earlier, at the time of writing, the African Commission has 11 Special Mechanisms (4 Special Rapporteurs; 6 thematic working groups; and 1 Working Group on Specific Issues) and the majority of Commissioners are involved in more than one Special Mechanism.⁹

Over the years, the NGO Forum, which meets prior to the Ordinary Sessions of the African Commission, has called for more Special Mechanisms to be established to focus on a particular human rights issue. The Special Mechanisms procedure is particularly popular with NGOs because it has proved to be an effective way, and arguably the only way, for NGOs to ensure that a particular issue that they are promoting has a sustained profile within the activities of the African Commission. Experience has demonstrated that resolutions on a thematic issue that are not assigned to a Special Mechanism tend to have a short ‘shelf life’ and lack any momentum for further action. The Special Mechanisms procedure has therefore developed as a way to ‘operationalise’ thematic resolutions of the African Commission.

It is proposed that this proliferation of Special Mechanisms and the continued practice of appointing Commissioners to be Special Rapporteurs and Chairpersons of thematic working groups is not sustainable, nor is it the most effective and desirable means to fill these specialised positions. Over the years, the African Commission has been chronically underfunded and a persistent complaint from the Commissioners has been that the Special Mechanisms have consistently lacked the necessary resources in terms of funding, staff, and research capacity to carry out their mandates effectively. Clearly, in order to meet the ever increasing demands being placed upon the Special Mechanisms the procedures and practices governing these mechanisms needs to be reviewed.

The African Commission has tried to address some of the problems facing the Special Mechanisms outlined above. In 2002, the African Commission commenced a review of the use of the Special Rapporteur mechanism because it “was not very successful” (ACHPR, 2004, §32). Consequently, a review was undertaken in order to consider ways in which these types of mechanisms could be strengthened. During this period of review, the African Commission imposed a moratorium on the establishment of Special Rapporteurs and the African Commission decided to appoint focal persons as a “stop gap measure” for projects that were already underway until the review had been concluded (ACHPR, 2004, §32). It was during this time that the Resolution on the RIG was presented for adoption with a request for a Committee rather than a Special Rapporteur.

One of the consequences of this review was the establishment of thematic working groups. While the working groups that have been established are all chaired by a Commissioner, they have enabled external experts to be directly involved in the African Commission machinery. The CPTA, and formerly the Follow-up Committee, is an example of such a working group and its membership is comprised of Commissioners and representatives from civil society. However, working groups can be much more resource heavy than a Special Rapporteur position because they naturally require more funding and coordination to bring the members together in meetings and on missions to countries.

Notwithstanding, this recent review of the African Commission’s Special Rapporteur procedure and the establishment of thematic working groups, it is

proposed that the continued practice of appointing Commissioners as Special Rapporteurs is flawed and unsustainable. It is proposed that in order to ensure that the mandate holders of the various Special Mechanisms possess the necessary expertise required to carry out their particular mandate, and to address the practical problems faced by increasing demands for these Special Mechanisms, lessons can be drawn from the experience of the UN Special Procedures.

The term “UN Special Procedures” is the name given to the range of UN mechanisms that have been established to address specific thematic or country issues. Special procedures are either an individual (called a “Special Rapporteur”, “Special Representative of the Secretary-General” or “Independent Expert”) or a working group usually composed of five members (one from each region of the world).

The UN Special Procedure system was originally established under the UN Human Rights Commission in the 1980s and subsequently assumed by the UN Human Rights Council in 2006. Currently, there are 31 thematic and 8 country UN Special Procedure mandates. The UN Special Procedures receive funding and administrative, research and logistical support to enable them to carry out their mandates from the Office of High Commissioner for Human Rights (OHCHR).

The UN Special Procedures typically have mandates to examine, monitor, advise and publicly report on human rights situations in specific countries or territories or on specific thematic concerns. Various activities are undertaken by the UN Special Procedures including fact-finding missions to countries, responding to individual complaints, conducting studies, and engaging in general promotional activities.¹⁰ Over the years, the UN Special Procedures have proven to be an invaluable resource for monitoring compliance with human rights obligations and developing a greater understanding of international human rights law.

One of the main differences between the UN Special Procedures and the Special Mechanisms of the African Commission is that unlike the African Commission, which as noted earlier has routinely appointed its own Commissioners to hold Special Mechanism mandates, the UN Special Procedures have traditionally been filled by appointing external experts rather than UN staff to these positions.

The UN Special Procedure positions are established and maintained through the adoption of inter-governmental resolutions by the UN Human Rights Council and the UN General Assembly. The method of appointing UN Special Procedures and their mandate is determined by these resolutions. Those UN Special Procedures who are to serve as “representatives of the UN Secretary-General” are selected by the UN Secretary-General, while other Special Procedures are appointed by the Chairperson of the Human Rights Council, after consultations with UN member States. Accordingly, the process for establishing and appointing UN Special Procedures could be perceived as a potentially much more political process than the appointment of Special Mechanisms of the African Commission, and this could raise concerns regarding the objectivity and independence of the UN mandate-holders. However, in practice the UN Special Procedures system has a proven track-record of functioning in an independent manner free from any partisanship.

The appointment of external experts to UN Special Procedure mandates has the benefit of potentially appointing individuals who have a demonstrated

expertise in the particular issue attached to a Special Procedure mandate. While, this is not to bring into question the undeniable commitment of the Commissioners of the African Commission to their respective Special Mechanism mandates, undoubtedly the UN appointment system for the Special Procedures has enabled a more “tailor-made” process to be adopted, so that the greatest effort is made to select an individual for a Special Procedure position who has the necessary and most appropriate expertise for that particular mandate.

It is interesting to note here that the Inter-American Commission on Human Rights (IACHR) has been gradually moving towards an appointment procedure for its Special Rapporteurs that will enable more external experts to be involved with these mandates. Originally, initial appointments for Special Rapporteurs by the IACHR were mainly made from the pool of Commission Members. However, Follow-up appointments have involved both Commission Members and independent experts. In 2006, the IACHR adopted procedural rules for the appointment of Special Rapporteurs which states that “[o]nce the Commission learns that a special rapporteur post will become vacant, the Commission shall organize a public competition and announce it widely, in order to secure the highest number of applications to the post” (IACHR, 2006). It has therefore officially opened the procedure up to applications from outside the Commission.¹¹

Similarly to the Special Mechanisms of the African Commission, the UN Special Procedures have been victims of their own popularity and have suffered from an ever increasing workload while struggling with under-resourcing for many years. Accordingly, in June 2006 a review of the UN Special Procedures system was commenced in order to consider ways to enhance the effectiveness of these mechanisms. This review has helped to identify a number of practices that could be of benefit to the Special Mechanisms of the African Commission.

The result of this review was the adoption by the UN Human Rights Council of a resolution entitled “Institution-building of the United Nations Human Rights Council,” (Resolution 5/1), which included provisions on the selection of mandate holders and the review of all Special Procedure mandates. In accordance with Resolution 5/1, when selecting and appointing individuals to Special Procedure positions, the following general criteria must be considered (UNITED NATIONS, 2007, §39):

- a) Expertise;
- b) Experience in the field of the mandate;
- c) Independence;
- d) Impartiality;
- e) Personal integrity; and
- f) Objectivity.

The process for appointing UN Special Procedures is stated as being driven by the aim of ensuring that eligible candidates are highly qualified individuals who possess established competence, relevant expertise and extensive professional experience in the field of human rights (UNITED NATIONS, 2007, §41).

In accordance with Resolution 5/1 the following entities may nominate candidates as Special Procedures mandate holders (UNITED NATIONS, 2007, §42):

- a) Governments;
- b) Regional Groups operating within the United Nations human rights system;
- c) International organizations or their offices (e.g. the Office of the High Commissioner for Human Rights);
- d) Non-governmental organizations;
- e) Other human rights bodies; and
- f) Individual nominations.

Furthermore, it is particularly interesting to note that the UN Special Procedure process is expressly governed by the “the principle of non-accumulation of human rights functions” (UNITED NATIONS, 2007, §44), which prevents the same individual from holding more than one Special Procedure mandate at the same time. This principle aims to strengthen the efficacy and effectiveness of the Special Procedures by ensuring that one person does not have to divide their time between mandates. In addition, Resolution 5/1 expressly excludes individuals holding decision-making positions in Government or in any other organization or entity, which may give rise to a conflict of interest, from being appointed to a Special Procedure position (UNITED NATIONS, 2007, §46). This provision is a necessary safeguard to protect the actual and perceived independence of the UN Special Procedures. These two provisions have a particular resonance for the African Commission’s approach to its Special Mechanisms, which currently allows Commissioners to hold positions as Special Rapporteurs and Chairpersons of thematic working group at the same time, and Commissioners may also hold positions in government and even political office while holding a Special Mechanism mandate.

As well as benefitting from having experts matched to a particular mandate and safeguards in place to protect the independence of these mechanisms, the fact that the mandate holders of the UN Special Procedures are external experts has also enabled them to be creative when responding to similar problems experienced by the African Commission, such as a lack of institutional support for the mandates; a lack of funding; and a lack of research and logistical support. Many of the mandate holders of the UN Special Procedures have drawn upon external resources to bolster those provided to them by the OHCHR. For example, the current UN Special Rapporteur on Torture, (SRT) Professor Manfred Nowak, as a director of the Ludwig Boltzmann Institute of Human Rights (BIM), Austria, has been able to receive research support from this Institute for his SRT mandate. The BIM has a specific project to provide support to the mandate of the SRT. Under this project, a team at the BIM help the SRT to respond to complaints from torture victims, their families and NGOs on a daily basis, and they assist the SRT in preparing for and following up on fact-finding missions to countries.¹² This arrangement has allowed the SRT considerable flexibility in exercising his mandate, conducting research into thematic issues relevant to his mandate, and strengthening his independent status.

Furthermore, the practice of having external independent experts designated to a particular UN Special Procedure also ensures that there is a separation at the institutional level between the fact-finding and advocacy functions of UN Special Procedures and the quasi-judicial functions of the treaty bodies. However, the current practice of the African

Commission to designate Commissioners to be the Special Rapporteurs does not enable this type of institutional separation between the functions of the Special Rapporteurs, and the consideration of individual communications by the African Commission (MURRAY, 2008, p. 209-210). For example, as a Commissioner the SRP will participate in the quasi-judicial functions of the African Commission when it considers individual communications. During the consideration of these complaints a situation could easily arise whereby the observations made by the SRP during a mission may be recounted and discussed notwithstanding that the mission reports of the SRP have consistently lacked the necessary stringency, consistency and thoroughness required to represent evidence for the determination of a individual complaint (MURRAY, 2008, p. 209-210). It is therefore proposed that the only way that some institutional separation between the functions of the Special Rapporteurs and the quasi-judicial functions of the African Commission can be assured is to appoint external experts to the Special Rapporteur positions.

6 Conclusion

The Special Mechanisms procedure of the African Commission has, over the years, undoubtedly raised the profile of many human rights issues and is a core function of the African Commission's protective mandate. While the appointment of the Chair of the CPTA as the SRP has the potential to facilitate a stronger and more cohesive approach to these mandates, it does also pose some particular challenges for this dual mandate holder. Since 2004, when a Special Mechanism with a torture prevention mandate was first established, the relationship and interaction between this Committee and the SRP mandate has been ambiguous and confusing. Accordingly, as a first step, it is crucial that the terms of reference of the CPTA is elaborated in full and the dual mandate holder sets out clearly how the CPTA and SRP will work together, to what extent their mandates and responsibilities will be distinguished from each other, and when they overlap how this will be resolved. Furthermore, at the end of Commissioner Atoki's tenure as Chairperson of the CPTA and SRP in 2011, a thorough review of this experimental doubling-up of these mandates should be undertaken in consultation with a broad range of stakeholders to examine whether it has been beneficial or whether alternative approaches to these mandates must be considered for the future.

The doubling-up of the mandates of the Chair of the CPTA and the SRP has also highlighted more general concerns with the current practice of appointing Commissioners of the African Commission as Special Rapporteurs. Notwithstanding the notable commitment of the Commissioners to their respective Special Mechanism mandates, the system has struggled to cope with the demands placed upon the mandate holders and is in urgent need of a thorough review. The Special Mechanisms remain restricted by a lack of capacity and resources. The success of the Special Mechanisms will by and large be dependent on the depth and scope of capacity to support the mandates. This must be addressed and innovative funding models should be investigated as a matter of urgency.

It is interesting to note that at the 47th Ordinary Session of the African Commission in May 2010, the Centre for Human Rights and Human Rights Development Initiative (HRDI) called for the establishment of a Special Rapporteur on HIV/AIDs and for an external independent expert to be appointed into this position rather than one of the

Commissioners. In the end, the African Commission decided to follow its more recent practice of creating working groups or committees rather than Special Rapporteurs, and consequently decided to establish a Committee on the Protection of People Living with HIV and Those at Risk and Vulnerable to and Affected by HIV (ACHPR, 2010). Thus it would appear that the African Commission is currently reluctant to establish new Special Rapporteur positions and to appoint external experts into these positions, and instead favours the establishment of working groups and committees comprised of Commissioners and civil society representatives or other external experts. While the working groups and committees established by the African Commission do enable external experts to be directly involved with the Special Mechanisms alongside the Commissioners, this does inevitably have staffing and funding implications for these bodies at a time when the Special Mechanisms as a whole struggle with a lack of capacity and funding.

In relation to the Special Rapporteurs that the African Commission has already created, it is proposed that the only way that these mandate holders can be truly effective is by abandoning the previous custom of appointing Commissioners as Special Rapporteurs and instead to adopt similar practices followed by the UN Special Procedures system and to appoint external, independent experts through a transparent and inclusive appointment process.

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NOTES

1. PRI secured funding from the Norwegian Agency for Development (NORAD) for their project entitled "Prison conditions in Africa, establishment of the position of Special Rapporteur.
2. See for example the UN Special Rapporteur on Torture Report 'Study on the phenomena of torture, cruel, inhuman or degrading treatment or punishment in the world, including an assessment of conditions of detention' (UNITED NATIONS, 2010a) and the Joint Study on Secret Detention by the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism and the Special Rapporteur on Torture (UNITED NATIONS, 2010b).
3. At its 35th Ordinary Session (May to June 2004), the African Commission also designated the following individuals as the first members of the Follow-up Committee:
 1. Commissioner Ms. Sanji Monageng: elected as Chair;
 2. Mr. Jean-Baptiste Niyizurugero: APT Programme Officer for Africa; elected as Vice-Chair;
 3. Ms. Hannah Forster: African Centre for Democracy and Human Rights Studies (ACDHRS);
 4. Ms. Leila Zerrougui: Magistrate and Professor of Law at the National Institute of Magistracy in Algiers and Chairperson of the United Nations Working Group on Arbitrary Detention;
 5. Ms. Karen McKenzie: Director of the Independent Complaints Directorate of South Africa;
 6. Mr. Malick Sow: Executive Secretary of the Senegalese Committee of Human Rights.
4. The School of Law at the University of Bristol hosted the first and second meeting of the Follow-up Committee because it has a strong background in research into the African human rights system and Professor Malcolm Evans, Professor of law at Bristol University, was a member of the core drafting group that elaborated the Robben Island Guidelines in February 2002.
5. These three countries are not named in the activity report.
6. The CPTA is composed of the following members:
 1. Commissioner Dupe Atoki: re-elected as Chair of the CPTA
 2. Mr. Jean-Baptiste Niyizurugero: re-elected as Vice-Chair of the CPTA
 3. Commissioner Musa Ngary Bitaye
 4. Mr. Malick Sow
 5. Ms. Hannah Forster.
7. The prime rationale behind the development of the RIG, which was initiated by the Association for the Prevention of Torture (APT), was to devise an instrument that would encourage political support within Africa for the concept of torture prevention generally, and the then draft Optional Protocol to the UN Convention against Torture, specifically.
8. The Special Rapporteur on Torture is clear on this issue: "The most important method of preventing torture is to replace the paradigm of opacity by the paradigm of transparency by subjecting all places of detention to independent outside monitoring and scrutiny. A system of regular visits to places of detention by independent monitoring bodies constitutes the most innovative and effective means to prevent torture and to generate timely and adequate responses to allegations of abuse and ill-treatment by law enforcement officials." (UNITED NATIONS, 2010a, para. 157).
9. For a list of the current mandates held by the Commissioners of the African Commission see: <http://www.achpr.org/english/List%20of%20Commissioners/list_updated-2010.pdf>.
10. More details on the UN Special Procedures can be obtained at: <<http://www2.ohchr.org/english/bodies/chr/special/index.htm>>.
11. See Press Release of the Inter-American Commission on Human Rights, on the establishment procedural rules for the appointment of Special Rapporteurs (IACHR, 2006). For more information on the different Rapporteurships, see <<http://www.cidh.oas.org/relatorias.eng.htm>>. Last accessed on 2 February 2011. Furthermore, in its Inter-session Report to the 37th Ordinary Session of the ACHPR, the Special Rapporteur on Freedom of Expression in Africa states that "[i]t is necessary here to clarify the status of the OAS Special Rapporteur on freedom of expression. The Special Rapporteur is not a Commissioner of the Inter-American Commission. His office is an independent office which reports to the Commission. It is autonomous with its own staff and budget." (ACHPR, 2007, p. 3).
12. More information on the support provided by the Ludwig Boltzmann Institute for Human Rights to the UN Special Rapporteur on Torture can be found at the following address: <<http://bim.lbg.ac.at/en/human-dignity-and-public-security/support-un-special-rapporteur-torture>>.

RESUMO

Este artigo estuda as consequências decorrentes da decisão recente da Comissão Africana dos Direitos Humanos e dos Povos (Comissão Africana) de nomear, para o cargo de Relator Especial sobre Prisões e Condições de Detenção (REP), a Presidente do Comitê para Prevenção da Tortura na África (CPTA). O presente artigo analisa os mandatos desses dois Mecanismos Especiais e considera o potencial conflito gerado pela cumulação de dois mandatos por um mesmo Comissário. O artigo, em seguida, avalia se a prática atual da Comissão Africana de nomear Comissários para o cargo de Relator Especial é capaz de oferecer a expertise e o dinamismo necessários para desempenhar efetivamente essas funções e satisfazer as demandas pela criação de novos mecanismos. Por fim, este artigo sugere que algumas lições podem ser extraídas da recente revisão dos Procedimentos Especiais da ONU no intuito de revisar os procedimentos dos Mecanismos Especiais da Comissão Africana.

PALAVRAS-CHAVE

Tortura – Prisão – Comissão Africana para os Direitos do Homem e dos Povos

RESUMEN

El presente artículo analiza las implicancias que surgen de la reciente decisión de la Comisión Africana de Derechos Humanos y de los Pueblos (Comisión Africana) de designar al Presidente del Comité para la Prevención de la Tortura en África (CPTA) como Relator Especial sobre Prisiones y Condiciones de Detención (REP). Se examinan los mandatos de estos mecanismos especiales y se considera el impacto que podría tener el hecho de que un mismo Comisionado deba desempeñar ambos mandatos al mismo tiempo. Luego se considera si la actual práctica de la Comisión Africana de designar a miembros de la Comisión como Relatores Especiales puede brindar el nivel de conocimientos especializados y acción necesarios para un funcionamiento efectivo y satisfacer las crecientes demandas de nuevos mecanismos. Por último, el artículo sugiere que pueden extraerse lecciones del último examen de los Procedimientos Especiales de Naciones Unidas a fin de reformar los mecanismos especiales de la Comisión Africana.

PALABRAS CLAVE

Tortura – Prisión – Comisión Africana de Derechos Humanos y de los Pueblos



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ABSTRACT

The development of sub-regional communities in Africa is not a new phenomenon, but the incorporation of human rights into their agenda is relatively new. In effect, REC courts have introduced a new layer of supra national protection of human rights in Africa. The development is welcomed because it is likely to advance the cause for the promotion and protection of human rights. However, considering that the primary focus of the RECs is economic development, their ability to effectively embrace the role of human rights protection is questionable. The development of this mandate for the sub-regional courts is necessitated by the emerging prominence of human rights in the business of RECs. But, its interpretation and implementation has extensive ramifications for the advancement of human rights in Africa; the harmonisation of human rights standard in the region and for the unity and effectiveness of the African human rights system.

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KEYWORDS

Regional integration – Regional economic communities – Human rights mandate – Sub-regional courts – African Human Rights System – Human rights jurisdiction



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THE ROLE OF SUB-REGIONAL COURTS IN THE AFRICAN HUMAN RIGHTS SYSTEM

Lucyline Nkatha Murungi and
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1 Introduction

Regional integration in post-colonial Africa began in 1963, with the adoption of the Charter of the Organisation of African Unity (OAU). This regional initiative was followed by the formation of sub-regional economic communities, commonly referred to as Regional Economic Communities (RECs) such as the East Africa Community (1967), the Economic Community of West African States (1975) and the Southern Africa Development Coordinating Conference (SADCC, 1980). In general, the main objective of the co-operation was the pursuit of economic development of member states.¹ Save for a remote reference to the United Nations Declaration of Human Rights the purposes of the OAU did not include the promotion or protection of human rights. In addition, though the African Charter on Human and Peoples' Rights (African Charter) was adopted in 1981, promotion and protection of human rights only became an objective of the African Union (AU) in the year 2000 upon the adoption of the Constitutive Act of the African Union.²

Similarly, the founding documents of most RECs adopted before the African Charter, did not provide for protection or promotion of human rights whether as a goal or principle thereof. Currently however, promotion and protection of human rights and democracy is part of the fundamental principles or goals of most RECs. In effect, the RECs have introduced a new layer of supranational protection and promotion of human rights in Africa. Their courts now play an important role in the protection of human rights through the determination of human rights cases.

Whereas the entry of RECs as an avenue for protection of rights is generally favourably hailed (VILJOEN, 2007, p. 503), its novelty demands a consideration as

Notes to this text start on page 141.

to their appropriateness as fora for the protection of human rights. Particularly, there is need to establish the place of REC courts within the African human rights system (AHRS) and their relationship with the regional human rights institutions. There is also concern over their capacity to effectively exercise the new competence in light of the economic focus of their founding treaties. The potential impact of the proliferation of human rights courts on the unity of international human rights law in Africa and how best to deal with this reality is another outstanding issue for advocates for human rights in the region.

This article examines the significance of the role of the REC courts in the protection of human rights in Africa. In doing so some of the challenges facing their place in the African human rights system will be interrogated such as their suitability as *fora* to resolve human rights disputes and the implications of their integration into the larger regional framework.

2 Regional integration in Africa - historical background to the inclusion of a general human rights agenda

After the demise of colonial rule in Africa, mainly in the 1960s, the reality of the political and economic fragility of post-colonial African states became apparent. In response to this reality, African states were called upon to integrate politically and economically in order to achieve development and to undo the balkanization of Africa brought by colonialism (LOLETTE, 2005). This was to be done through the creation of larger markets and consolidation of the resources and potential of the poor economies (THOKO, 2004, p. 1). Though this agenda was not immediately achieved at the regional level, states began to come together in their respective sub-regions following a pattern of geographical proximity (ECONOMIC COMMISSION FOR AFRICA, 2006). Hence, most RECs are centred on geographical sub-regions (VILJOEN, 2007, p. 488). The 1996 OAU decision to divide Africa into 5 sub-regions along geographical lines seems to have endorsed this approach (AJULU, 2005, p. 19). In 1980 the OAU adopted the Lagos Plan of Action triggering a process that culminated in the adoption of the Treaty establishing the African Economic Community, commonly referred as the Abuja Treaty (KOUASSI, 2007; RUPPEL, 2009). While the Abuja process postdates the formation of some of the RECs, its influence on the place of human rights in their operations is evident from the framing of their documents which in some cases almost replicate its provisions (EAST AFRICAN COMMUNITY, 2007, art. 3(g), art. 6 (d)).

Pursuit of African economic integration through the African Economic Community (AEC) is a core project of the OAU/AU. Arguments that economic integration did not take centre stage in the transformation of the OAU into the AU (VILJOEN, 2007, p. 480) notwithstanding, the Constitutive Act of the AU recognises the need to coordinate and harmonize policies between the existing and future RECs for gradual attainment of the objectives of the Union (AFRICAN UNION, 2000, art. 3 (c, l)). This reaffirms the centrality of RECs to AU agenda and their role as economic building blocks within the AU. Alongside other factors (RUPPEL, 2009, p. 275),³ the

Abuja process can be regarded as the key driver behind both the formation of RECs across the continent,⁴ and the inclusion of human rights in the agenda of the RECs.

There are other reasons for the integration of human rights into the mandate of RECs. First, the adoption of the African Charter has made human rights a common feature in interstate relations on the continent (EBOBRAH, 2009a, p. 80). The obligations of states emanating from the Charter and other human rights treaties to which African states are party, oblige them to reflect human rights protection in subsequent commitments such as those arising from REC treaties (THOKO, 2004, p. 112).⁵ Second, human rights coupled with good governance create an appropriate investment climate that is critical to furthering economic development (RUPPEL, 2009, p. 279). The adoption of strong human rights values and institutions creates confidence for investors and trading partners and ensures effective participation of individuals.

Finally,

international human rights law emphasises the importance of human rights obligations in all areas of governance and development and requires governments and economic policy forums [such as RECs] to take into account human rights principles while formulating national, regional and international economic agendas.

(OLOKA-ONYANGO; UDAGAMA, 1999, para. 47).

3 Evolution of human rights into the mandate of REC courts⁶

It is evident that in the recent past human rights have become a fundamental component of the task of RECs in Africa. This development can be regarded as a response to the regional agenda as set out in the African Charter and the Abuja Treaty. The mandate of REC courts has also now been extended to cover human rights. However, the approaches adopted by RECs in this regard are dissimilar and uncoordinated. Hence concerns persist as to their suitability as forums for promotion and protection of human rights, the delimitation of such role so as to remain legitimate yet sufficiently utilitarian within the existing frameworks of RECs, and the implications of these new actors on the human rights discourse in the continent.

RECs tend to have an institutional structure that includes a court which is the judicial or principal legal organ of the community to deal with controversies relating to the interpretation or application of the REC's law (RUPPEL, 2009, p. 282). As the organs vested with such responsibility, they have, as a result of the incorporation of human rights into the agenda of RECs, been required to adjudicate over cases, to interpret provisions of their treaties or to advise their principals on questions with implications for human rights. The treaties of most RECs have therefore gradually moved towards according REC courts competence to hear human rights cases (EBOBRAH, 2009a, p. 80).

The evolution of protection of human rights as an agenda of RECs and as part of the jurisdiction of their courts is unique to each one of them, and the approaches adopted in this regard are also different. Thus to trace these developments, it is necessary to look at some of these RECs and their courts in turn.

3.1 *Economic Community of the West African States, (ECOWAS)*

ECOWAS is a fifteen member group of West African states formed in 1975 to promote economic integration of member states.⁷ This scope of co-operation expanded in tandem with the need to respond to issues in the member states which also created an entry point for human rights into the agenda of ECOWAS (EBOBRAH, 2008, p. 7). Its founding Treaty did not contain any references to human rights (EBOBRAH, 2008, p. 9). Gradually however, protocols adopted under the Treaty incorporated different rights in their scope, culminating in the 1991 ECOWAS Declaration of Political Principles which expressed, amongst others, a determination by member states to respect fundamental human rights as embodied in the African Charter.⁸ In 1993 the Treaty of ECOWAS was amended to recognise promotion and protection of human and peoples' rights in accordance with the African Charter as a fundamental principle of ECOWAS.⁹ The move towards rights consciousness was therefore a combination of necessity and changing international dynamics (NWOGU, 2007, p. 349).

The ECOWAS Community Court of Justice (ECOWAS Court) is the judicial arm (ECONOMIC COMMUNITY OF WEST AFRICAN STATES, 1993, art. 6 (1)(e)) and the principal legal organ (ECONOMIC COMMUNITY OF WEST AFRICAN STATES, 1991b) of ECOWAS. The Protocol to operationalize the ECOWAS Court was adopted in 1991 and amended in 2005 and 2006 respectively¹⁰ to give the ECOWAS Court competence to determine cases of violation of human rights occurring in any of the member states (EBOBRAH, 2009a, p. 86). The ECOWAS Court has since admitted and determined several cases on human rights¹¹ and is the only of the courts highlighted in this article that has an express mandate over questions of human rights.

3.2 *The Southern Africa Development Community, (SADC)*

SADC is the Southern Africa sub-regional equivalent of ECOWAS with a current membership of 15 states.¹² The SADC framework of co-operation is based on *inter alia* a guarantee of human rights (SOUTHERN AFRICAN DEVELOPMENT COMMUNITY, 2001, art. 5 (a)(b) (c)(i)(j)(k)) which is also one of the principles of SADC (SOUTHERN AFRICAN DEVELOPMENT COMMUNITY, 2001, art. 4 (c)). The political institution building envisaged by SADC is said to promote economic development into a community based on human rights, democracy and the rule of law (THOKO, 2004, p. 110). However, despite the human rights centred conception of development within the Treaty and the centrality of human rights in its objectives, it is argued that human rights protection under the SADC Treaty has a secondary, almost cursory status (THOKO, 2004, p. 110), and that the promotion and protection of human rights is not the top priority of SADC (RUPPEL, 2009, p. 291).

The SADC Tribunal was established as one of the institutions of SADC (SOUTHERN AFRICAN DEVELOPMENT COMMUNITY, 2001, art. 9 (1), (g)) with the duty to ensure adherence to and proper interpretation of the Treaty and its subsidiary instruments, and to adjudicate disputes referred to it (SOUTHERN AFRICAN DEVELOPMENT COMMUNITY, 2001, art. 16 (1)). The Tribunal has jurisdiction over the interpretation and application of the Treaty, protocols and

subsidiary instruments of SADC and on all matters arising from specific agreements between member states, whether within the community or amongst themselves (SOUTHERN AFRICAN DEVELOPMENT COMMUNITY, 2000, art. 14). However, the provision establishing its jurisdiction omits an express mention of jurisdiction over human rights and therefore it has been argued that the tribunal lacks a clear human rights mandate (EBOBRAH, 2009b, p. 20). Nevertheless, despite the arguments regarding the nature of its jurisdiction over human rights, the SADC Tribunal has thus far heard and determined matters relating to human rights.¹³

The tribunal has the potential to contribute significantly to a deeper harmonisation of law and jurisprudence and to better protection of human rights in SADC. This, however, depends on the commitment of member states and SADC institutions to the enforcement of the tribunal's judgments (RUPPEL, 2009, p. 301) and clarification of the court's jurisdiction over human rights.

3.3 The East Africa Community, (EAC)

Economic integration in post-colonial East Africa dates back to the East African Co-operation Treaty of 1967 concluded between Kenya, Uganda and Tanzania, which later collapsed (ADAR, 2008, p. 2; EAST AFRICAN COMMUNITY, 2007, para. 2 of the Preamble). The EAC was revived in 1999 through the signing of the Treaty Establishing the East Africa Community and its entry into force in 2000. The fundamental principles of the EAC include good governance which entails *amongst others the* recognition, protection and promotion of human and peoples' rights in accordance with the African Charter (EAST AFRICAN COMMUNITY, 2007, art. 6). This provision can be regarded as an entry point for human rights into the EAC. To the extent that the Treaty refers to respect for human rights as a component of good governance, makes reference to aspects of human rights, and even predicates the admission of new members of the community on their human rights record (EAST AFRICAN COMMUNITY, 2007, art. 3 (3)b) then it can be argued that it has incorporated human rights into the treaty (RUPPEL, 2009, p. 277).

The EAC Treaty establishes the East Africa Court of Justice (EACJ) as the judicial organ of the EAC (EAST AFRICAN COMMUNITY, 2007, art. 9) with the responsibility to ensure adherence to law in the interpretation, application of, and compliance with the Treaty (EAST AFRICAN COMMUNITY, 2007, art. 23). The EACJ is vested with an initial jurisdiction over the interpretation and application of the EAC Treaty (EAST AFRICAN COMMUNITY, 2007, art. 27 (1)) and other original, appellate, human rights or other jurisdiction at a subsequent date upon a determination by the Council of Ministers (EAST AFRICAN COMMUNITY, 2007, art. 27 (2)).

Article 27(2) of the EAC Treaty (EAST AFRICAN COMMUNITY, 2007) deals with the jurisdiction of the EACJ. In doing so, reference is made to both an initial as well as 'other jurisdiction as will be determined' by the Council. This indicates that the member states of the EAC intended to develop its jurisdiction in phases (OJIENDA, 2004, p. 95). As a result, the second set of areas of the EACJ's jurisdiction which fall to be determined at a future date (and which includes human rights) is beyond its current jurisdiction. Therefore, in the absence of the relevant determination and adoption

of the necessary protocol, it is said that the EACJ does not yet have jurisdiction over human rights (PETER, 2008, p. 210; OJIENDA, 2004, p. 98; EBOBRAH, 2009b, p. 315).¹⁴

However, the inference of lack of mandate is contested. While some commentators interpret it to mean that the jurisdiction is lacking (RUPPEL, 2009, p. 306),¹⁵ it is also argued that the provision is simply not clear (VILJOEN, 2007, p. 504). The latter view implies the existence of an implied mandate and is backed by several factors including extensive references to human rights under the EAC Treaty and the fact that the EACJ has thus far adjudicated over cases raising human rights questions.¹⁶ Further, exercise of the jurisdiction articles 27(1), 31 and 32 of the EAC Treaty is likely to touch on human rights questions. In these circumstances, the response of the EACJ to issues arising in such instances is of essence in determining whether indeed it has a human rights mandate at all.

Ultimately, the need for a clear provision on the law applicable by the EACJ or for a Protocol as required by article 27(2) is underscored (PETER, 2008, p. 213). This is in view of the fact that the EAC Treaty does not clearly outline the law applicable by the EACJ save for the references made to the principles of the African Charter in the objectives of the EAC (EAST AFRICAN COMMUNITY, 2007, art. 6, 7).

4 Specific issues relating to the human rights mandate of the REC Courts

As highlighted above, the role of RECs in the protection and promotion of human rights in Africa is relatively new. The contribution of REC courts to the protection of rights in Africa notwithstanding, there are concerns in relation to their suitability in this regard and how this impacts on the discourse on human rights in the continent. These concerns are discussed below.

4.1 Relationship of REC courts with the AHRS

A human rights system consists of a set of norms and institutions accepted by states as binding (FREEMAN, 2002, p. 53). Assessed against such a system, the efforts of RECs with respect to human rights fall short of constituting independent human rights systems. This is because despite making extensive references to human rights, they lack corresponding institutions established specifically to deal with human rights. This is the basis of the argument that there are no sub-regional human rights systems existing in Africa but that they are simply sub-regional intergovernmental groupings with human rights as a concern within their mandate (VILJOEN, 2007 p. 10). This may ultimately change if RECs commit to developing the existing initiatives into fully fledged systems. The African Commission on Human and Peoples' Rights (African Commission) at a 2006 brainstorming meeting acknowledged that human rights do not fall under its mandate to the exclusion of the other organs of the AU (AFRICAN COMMISSION ON HUMAN AND PEOPLE'S RIGHTS, 2006, annex 2). This means that the other organs of the AU, including the AEC to which RECs attribute their role, are equally bound to integrate human rights into their mandates and function.

The assertions that the AHRS does not include the role of RECs must be understood to refer to the AHRS as established in the formal documents and institutions of the AU. However, it is submitted that in view of the depth of integration of human rights into the economic and other agenda of the AU, it is difficult to understand human rights in Africa without recognising the role of RECs. It is further arguable that despite the absence of an express linkage between RECs and the AHRS, it is undeniable that RECs sit in a relationship with the AU.

Strengthening the existing RECs and establishing new ones where none exist are the first steps on the road towards the agenda of African economic integration pursued by the AEC.¹⁷ Thus it is argued that RECs as part of the AEC have a duty to respect and promote human rights in their jurisdictions (RUPPEL, 2009, p. 281; AFRICAN UNION, 2000, art. 3 (c), (l)). By analogy, REC courts, to the extent that they preside over matters of human rights, can be deemed to be in an informal relationship with the African Court on Human and Peoples' Rights (African Court) and the African Commission.

A human rights system comprises of a set of norms and institutions accepted by states as binding (FREEMAN, 2002, p. 53). In the AHRS, these are contained in the African Charter and its protocols and the African Charter on the Rights and Welfare of the Child. These treaties establish the African Commission (ORGANISATION OF AFRICAN UNITY, 1986, art. 30), the African Court¹⁸ and the Committee of Experts on the Rights and Welfare of the Child (The Committee)¹⁹ respectively. These bodies promote and protect the rights established under the respective treaties.²⁰ There are, however, different opinions on the scope of the AHRS. Some scholars restrict it to the foregoing documents and institutions (BENEDEK, 2006, p. 46) while others extend it to include all documents adopted by the AU which relate to an element of human rights (HEYNS, 2004, p. 681).

In 2008, the AU adopted a protocol²¹ to establish an African Court of Justice and Human Rights (ACJHR). The statute of the ACJHR is, as at the time of this work, not yet in force pending deposit of the 15th instrument of ratification (AFRICAN UNION, 2008b, art. 60). Once it is in force, the role currently vesting in the African Court will be overtaken by the human rights wing of the ACJHR.²² Hence this article focuses on the African Court, as opposed to the ACJHR, as the only existing judicial enforcement mechanism of the AHRS.

Entry of RECs into the protection of human rights has led to a complex institutional framework in the region (CHIDI, 2003, p. 3). Creation of REC courts with a human rights competence means that the African Court no longer has a monopoly in the interpretation and enforcement of the African Charter. However, the African Charter does not contemplate the existence of other supra-national courts in Africa (such as REC courts) dealing with human rights. This is explained by the fact that the African Charter predates the entry of RECs in the field on human rights.

As discussed in section 2 above, RECs are the building blocks of the AEC that was established out of the Abuja process. As the AEC is a core project of the AU, a relationship can be said to exist between the AHRS and RECs as institutions established under the auspices of the AU. Hence it is arguably incorrect to treat the AEC and the RECs as distinct systems. It is therefore submitted that the literature

and documents of the AHRS have long been overtaken by practice. Nevertheless, this article proceeds on the basis of the formal parameters of the AHRS as described earlier in this section.

4.2 Jurisdictional relationship between REC courts, the African Court and the African Commission

In the absence of any jurisprudence, this relationship may be inferred from the weight that would be accorded to the decisions of REC courts by the African Court and the African Commission. The primary avenue to determine this relationship is to consider the criterion for admissibility of matters before the African Court and Commission as set out in article 56 of the African Charter (VILJOEN, 2008, p. 78). The article raises two issues that could be relevant to the relationship between RECs and the AHRS. These relate to the exhaustion of local remedies and the principle of *res judicata*.

4.2.1 Exhaustion of local remedies

In this regard it is argued that there is no obligation on victims to go to the REC court before submitting their matter to the African Court or the African Commission. The requirement of exhaustion of local remedies is relevant to the relationship between an international/regional court and a state. It is founded on the principle that the national authorities should have an opportunity to remedy the breach within their own jurisdiction (VILJOEN, 2007, p. 336). Local remedies refer to 'the ordinary remedies of common law existing in jurisdictions and normally accessible to persons seeking justice' (AFRICAN COMMISSION ON HUMAN RIGHTS, 2004) as opposed to a supra-national court such as an REC court. Therefore, it is doubtful that the African Commission or African Court could decline to admit a matter on the basis that it has not been heard by the relevant REC court or even that this question might arise at all.

4.2.2 Matters settled by another court or tribunal

Article 56(7) of the African Charter (ORGANISATION OF AFRICAN UNITY, 1986) provides that the African Commission may not admit for consideration cases which have been settled by the states involved in accordance with the principles of the United Nations, the Charter of the OAU or the African Charter. This provision embodies the principle of *res judicata* to the extent that it excludes a matter which has been 'settled by the states' involved (VILJOEN, 2007 p. 340). It however does not preclude the consideration of matters that are before another judicial or quasi-judicial forum, and hence leaves an opening for judicial forum shopping. In the absence of a prohibition of concurrent proceedings on the basis of the principle of *lis pendens* in the 'other forum', it is possible for a litigant to institute concurrent proceedings before a REC court and the African Commission or Court (VILJOEN, 2007, p. 340).

The concern that this raises is whether one whose cause has been heard and determined by a REC court can approach the African Commission or Court for redress in the same case. This depends on both the provisions of each REC regarding the finality of their decisions, and the approach of the African Court or Commission to such matters. However, it is submitted that to allow an unsuccessful litigant at the sub-regional level to pursue a remedy at the regional level would be tantamount to establishing the African Court as an appellate body, which it is not. Helfer makes a similar argument in respect of the European Court of Human Rights and the UN Human Rights Committee (HELPER, 1999, p. 285).²³

The approaches adopted by different RECs on the relationship of their courts with the African Court vary.²⁴ For instance, article 38 of the EAC Treaty provides that a dispute referred to the EACJ cannot be settled by any other method other than that established under the Treaty. This implies finality of the decisions of the EACJ. The Protocol of the SADC tribunal on the other hand is explicit that the decisions of the SADC Tribunal are final and binding (SOUTHERN AFRICAN DEVELOPMENT COMMUNITY, 2000, art. 24 (3)). Difficulty arises where there is no finality clause because in that case it has to be determined whether REC courts are forums for dispute settlement in terms of the principles of the UN Charter, the OAU or the African Charter (VILJOEN, 2007, p. 339).

The Charter of the OAU encourages peaceful settlement of disputes through non-judicial means (ORGANISATION OF AFRICAN UNITY, 1963, art. 7 (4))²⁵ but this does not proscribe judicial means. The provision is not specific to human rights cases, but the recurrent theme is peaceful settlement. To the extent that international judicial settlement is considered a means for the peaceful settlement of disputes (ALFORD, 2000, p. 160), coupled with the presence of finality clauses in the REC treaties, there is potential that the decisions of the REC tribunals could completely oust the jurisdiction of the African Commission and the Court by virtue of article 56(7) of the African Charter.

4.3 Regional and sub-regional human rights mechanisms – the merits and de-merits

Whether or not the proliferation of REC courts may be deemed a blessing or a liability depends partly on its relative advantage or disadvantage over the existing regional mechanisms. There is a general underlying assumption that REC tribunals are favourable forums and an illustration of state commitment to the cause of human rights. But certain issues hold sway on the practical benefit of one relative to the other. These include but are not limited to accessibility, enforcement, the quality of jurisprudence, responsiveness to the peculiar needs of a region, potential for better standards of rights and the capacity to complement existing mechanisms.

First, it is argued that RECs (as opposed to regional mechanisms) are better suited to address sub-region specific issues. The small number of states constituting RECs allows them to address the issues with particular detail to its peculiar circumstances. Also, the notoriety of certain issues in a sub-region necessitates the development of jurisprudence on them in a manner that may

not have been considered at the regional level. In addition, the judges of a REC court are likely to have a better appreciation of the issues affecting a sub-region than those at the broader regional level.

Second, in as far as enforcement is concerned, the African Court has the capacity to make binding decisions²⁶ but it has not really presided over any matter yet.²⁷ The African Commission on the other hand, despite regularly deciding on human rights complaints submitted to it, does not render binding decisions. In these circumstances, it could be argued that the binding decisions (EAST AFRICAN COMMUNITY 2007, art. 35) of REC courts are the best alternative for enforcement of rights. However, the difficulty of enforcing the decisions of international courts arising from the consensual nature of international law equally affects REC courts. As with international courts, REC courts lack institutions with power to compel states to comply with its orders (EBOBRAH, 2009a, p. 96). For instance the government of Zimbabwe expressed its intention not to comply with the judgment of the SADC tribunal in the *Campbell* case (SOUTHERN AFRICAN DEVELOPMENT COMMUNITY TRIBUNAL, 2007; RUPPEL, 2009, p. 300). The only point of recourse for the SADC Tribunal in such circumstance is to refer the finding of non-compliance to the Summit of Heads of States or Governments (SOUTHERN AFRICAN DEVELOPMENT COMMUNITY, 2000, art. 32 (5)). Interestingly, an attempt has been made in recent times to enforce a decision of the SADC Tribunal against Zimbabwe in the South African national courts.²⁸ This is a seemingly novel approach to judicial enforcement of supra-national decisions and the outcome of the case will be instructive regarding the prospects of success of such endeavours.

The third issue for discussion relates to the accessibility of courts. Accessibility may be classified in two categories: physical accessibility and capacity to bring a matter before the forum. With respect to the former, the geographical proximity of REC courts to the victims of rights violations in some cases makes it easier for the victims to approach the court. In this way, the REC courts are more responsive to the needs of the victims. In practical terms, it means less travel cost and ease of litigation especially with respect to witness appearances (NWOGU, 2007, p. 354). While it is recognised that the Interim Rules of Procedure of the African Commission allow it to sit in the state of origin of the claim (AFRICAN UNION, 2008a, art. 30), in the practice of the African Commission however, matters are heard during its sessions which mostly take place in Banjul, the Gambia (VILJOEN, 2007, p. 313). Besides, hosting the sessions has financial implications for the host state thus it is not an attractive option. On this basis, REC courts are a more accessible forum for a victim of rights violations.

Regarding the right to be heard, most REC courts allow individuals direct access (VILJOEN, 2007, p. 507). This contrasts access to the African Court which is subject to the consent of the state concerned, effected by declaration accepting the competence of the Court in terms of article 34(6) of the Protocol on the African Court (AFRICAN UNION, 2004, art. 5(3)). As of December 2010, only four states had tendered such a declaration²⁹ to allow individual communications. Also, some of the REC treaties admit cases without the need for exhaustion of local remedies³⁰ thereby making it easy for individuals to access the court.

Fourth, there is concern with respect to the capacity of the REC Courts to perform their protective functions regarding human rights effectively. RECs have demonstrated the intention to accord human rights a place in their agenda, but their capacity to achieve this goal is doubtful within the existing frameworks. Whereas there are extensive provisions on the duty of the REC member states to protect rights, it has been argued that there are no corresponding institutions to oversee the performance of these obligations or to drive the agenda of human rights in the REC (THOKO, 2004, p. 111).³¹ There is the potential for human rights to become secondary to the economic interests in the day to day business of the REC (LAMIN, 2008, p. 233). This could mean that the REC courts are more focused on the other functions of the REC at the expense of the development of human rights jurisprudence.

Most of the REC courts have a combined jurisdiction, doubling as courts of justice and of human rights (RUPPEL, 2009, p. 307). This vast responsibility and a corresponding small number of judges appointed to the various courts raise questions as to whether these courts are sufficiently equipped to competently discharge their dual responsibilities. A further concern relates to the human rights competence of the judges of REC courts to determine human rights matters. Whereas the appointment of judges at the regional level of the AHRS emphasises their competence in respect of human rights (AFRICAN UNION, 2004, art. 11 (1), 2008b, art. 4), there is no corresponding emphasis on a human rights competence for the appointment of judges to the REC courts (EAST AFRICAN COMMUNITY, 2007, art. 24 (1)).

Despite the foregoing concerns, through litigation before REC courts and the harmonisation of legislation in the member states, there is growing jurisprudence on human rights in the respective sub-regions. In addition, the deliberations emanating from these forums are essential in enriching the human rights discourse in the sub-regions and hence empowering the citizens. Furthermore, the judicial emphasis on respect for human rights emanating from REC treaty obligations serves to create pressure on the member states to adhere to higher standards of rights.

Finally, most RECs in Africa recognise the African Charter as the minimum standard on human rights for the region, hence any attempts at the protection of rights within the RECs would have to build upon those contained in the African Charter (VILJOEN, 2007, p. 500). However, in view of the fact that there is not yet a human rights catalogue in any of the RECs considered in this article, this inference can be deemed speculative. On the other hand the evolution of rights into the agenda of the RECs may reveal disparate approaches to the incorporation of human rights into the mandate of REC courts. These differences would possibly translate into varying degrees of protection in each of the sub-regions. This in turn exposes the entire region to disparate standards and makes it difficult to reach a common African human rights standard. This places in question the competence of the RECs as building blocks to an effective regional human rights mechanism.

The foregoing factors would persist even after the establishment of the ACJHR (NWOGU, 2007, p. 354) and therefore, there is a strong case for the continued development of a human rights competence for REC courts and tribunals.

4.4 *The proliferation of supranational human rights courts in Africa*

The dramatic increase in the number of international judicial bodies represents what is referred to as the proliferation of international courts and tribunals (SHANY, 2003, p. 5). This phenomenon is neither unique to Africa nor specific to REC courts. Rather, it is global, attributable to both the nature of international law and the recent development in the field of international law (OELLERS-FRAHM, 2001, p. 71).³² The ramifications of this phenomenon on the protection of human rights in Africa raise some issues for consideration.

Firstly, in the absence of properly coordinated judicial integration on the continent, it is argued that multiplicity of courts poses a threat to the unity of international human rights law in the region through the establishment of separate uncoordinated systems of international human rights standards and norms in different parts of Africa. This in turn creates the potential for varied interpretations of substantive and procedural human rights norms in the different sub-regions. Whereas it is highly probable that there will be disaggregated jurisprudence emerging from the different REC courts, it is submitted that the real problem is the lack of a systematically coordinated or defined relationship between the different REC courts rather than the issue of multiplicity of courts. Such structural organisation demands the existence of a normative or institutional hierarchy or system established under each relevant treaty.

As stipulated above, RECs do not form part of the AHRS *per se*, hence the threat of disintegration is very real. In addition, the varied approaches of REC courts towards the African Charter impacts on the unity of jurisprudence. For instance the use of the African Charter as a rights catalogue for a REC court as in the case of the ECOWAS Court coupled with a finality clause creates the possibility of variant interpretations of the same provision at regional and REC level. Currently only the EAC proposes a separate rights catalogue, and it may happen that the rights that will be contained therein may be similar in content to rights in the African Charter. Should this occur, there is the potential for the EACJ to decide a case on the same legal basis and reasoning as the African Court but derived from a different normative source and with no obligation to refer to either the African Commission or Court. Having said this, there is no guarantee that there would be a similar reasoning or outcome and likewise there is also a possibility that no conflict may arise.

Nevertheless, it is noted that it is difficult to point at an instance in practice where an REC court or the African Commission contradicted one another. On the contrary, REC courts have often referred to the jurisprudence of the African Commission with approval to aid their decisions.³³ This implies that there is an informal inter-fora respect and interaction. However, it would be important to have this relationship institutionalised to lessen the possibility of subjectivity.

Secondly the proliferation of courts could lead to the overlap of jurisdiction of various courts and the possibility of conflicting decisions on the same law. It is argued that the availability of several judicial forums that have concurrent jurisdiction creates an opportunity for human rights practitioners to pursue the

most favourable option or to institute several proceedings in the various forums. In the current context, it would entail a choice between one REC court over another or a REC court³⁴ and the African Court or Commission. This type of forum shopping is generally regarded in a negative light due to its potential to undermine the authority of the courts, generate conflicting decisions and create possibilities for endless litigation (HELPER, 1999, p. 286-287).³⁵

The concern regarding forum shopping can, in as far as human rights are concerned in Africa, be regarded as perceived rather than real. Certain other factors mitigate the potency of this threat such as the indigence of most victims of rights violations (HELPER, 1999, p. 287),³⁶ and geographical distance from the court. On the other hand, Helfer also argues that if well regulated, forum shopping can materially benefit international human rights law. For instance, forum shopping encourages jurists to dialogue on norms shared in the cross-cutting treaties thereby encouraging the development of jurisprudence. However, in view of the overlapping membership of African states in various RECs (RUPPEL, 2009, p. 283) and the possibility of conflicting decisions, it would be advisable to regulate the practice.³⁷

5 The implications of the human rights mandate of the REC courts

This article identifies three critical issues that arise from the human rights mandate of the REC courts: their jurisdictional competence; the normative framework in which they operate, and their location within the structural framework of the AHRS. Each of these is discussed in more detail below.

5.1 *Jurisdictional competence*

Jurisdiction is a legal term referring to either a power or competence to exercise authority over a legally defined relationship between the subjects (EVANS; CAPPS; KONSTADINIDIS, 2003, p. xix). It creates a capacity to generate legal norms and to alter the position of those subject to such norms (ALEXY, 2002 p. 132). It also refers to the power of a court to determine a case before it in terms of an instrument either creating it or defining the jurisdiction (CHENG, 2006, p. 259). The terms competence and jurisdiction are so deeply intertwined that they are often used interchangeably (KOROMA, 2003, p. 189). But subtle distinctions can be made between the two, such as that while jurisdiction relates to a court's capacity to decide a concrete case with final and binding force, competence regards the propriety of the exercise of such jurisdiction (ROSENNE, 1997, p. 536). A tribunal is generally incompetent to act beyond its jurisdiction (CHENG, 2006, p. 259).

Various approaches have been adopted in defining the jurisdiction of REC courts with respect to human rights. Mainly, such competence is either expressly established by treaty or the specific intention of the state parties to the treaty is not clearly set out. However, despite seemingly clear distinctions between the approaches, the existence of jurisdiction is a matter of interpretation in each case especially where it is not expressly stated.

5.1.1 Express versus implied mandates

Of the three REC courts referred to in this article, the ECOWAS Court is said to have an express human rights mandate (EBOBRAH, 2009a, p. 80). With respect to the EACJ and the SADC Tribunal, the answer is not so obvious though the general inclination is that they have an implied mandate (RUPPEL, 2009, p. 307). It is reported that inclusion of a specific human rights mandate for the SADC Tribunal was discussed and rejected, with a panel of experts mandated to draft a proposal for the tribunal preferring a general jurisdiction with respect to human rights (VILJOEN, 2007, p. 505). The absence of express provisions notwithstanding, both the EACJ and the SADC tribunal have decided cases that impact on human rights issues.³⁸

While the two tribunals are often collectively said to lack express jurisdiction over human rights (EBOBRAH, 2009a, p. 80), a subtle but critical distinction must be made between their provisions regarding human rights. The Protocol on SADC Tribunal is silent on the human rights mandate of the tribunal.³⁹ The EAC Treaty on the other hand expressly excludes such jurisdiction until the adoption of a Protocol to expand the jurisdiction of the EACJ to human rights (EAST AFRICAN COMMUNITY, 2007, art. 27 (2)). In effect, while the silence of the SADC Protocol can be interpreted as indifference on the subject, legitimacy of the exercise of a human rights jurisdiction by the EACJ is even more precarious.

The exercise or assertion of jurisdiction rests on a quest for legitimacy to be found in the expression of state consent (KOROMA, 2003, p. 198). Legitimacy of the court's actions is circumscribed by the bounds of its authority. It affects the response of the parties to the decision rendered; if such decision is deemed to exceed the power of the court, it is unlikely to be enforced effectively. Absence of an express jurisdiction leaves it upon the court and the parties to delimit the scope of the courts authority. This opens an opportunity for subjectivity and conservatism that could injure genuine pursuit of redress.

In *Katabazi and 21 others v Secretary General of the East African Community and another* (EAST AFRICAN COURT OF JUSTICE, 2007), the applicants were part of a group of 21 charged with treason and misprision of treason. The application claimed *inter alia* a breach of articles 6, 7(2) and 8 (1) (c) of the EAC treaty relative to the fundamental principles of the EAC, the operational principles thereof and the general undertaking of the states to implement the EAC Treaty. Counsel for the applicants requested the EACJ to regard the matter as an application for determination of whether the conduct of the state of Uganda was in breach of a fundamental principle of the EAC. Counsel for the respondent on the other hand argued that the claims of the applicants related to a question of human rights over which the EACJ did not have jurisdiction by virtue of article 27(2) of the EAC Treaty.

In response to the question of its jurisdiction, the EACJ stated as follows

Does this Court have jurisdiction to deal with human rights issues? The quick answer is: No it does not have.....It is very clear that jurisdiction with respect to human rights requires a determination of the Council and a conclusion of a Protocol to that effect.

Both of those steps have not been taken. It follows, therefore, that this Court may not adjudicate on disputes concerning violation of human rights per se.

Yet it continued,

While the Court will not assume jurisdiction to adjudicate on human rights disputes, it will not abdicate from exercising its jurisdiction of interpretation under Article 27 (1) merely because the reference includes allegation of human rights violation.

(EAST AFRICAN COMMUNITY, 2007, art. 27 (1)).⁴⁰

On this basis, the EACJ found that the principle of the rule of law, a fundamental principle of the community, had been breached.

The decision of the court to deal with the matter in the face of an express exclusion of its jurisdiction over human rights is nothing short of extreme judicial activism, skewed towards a usurpation of legislative functions (EBOBRAH, 2009a, p. 82). Yet, if the court had determined otherwise, it would indeed have ‘abdicated itself’ from performing a duty with which it is vested in terms of the treaty; that to interpret a provision of the Treaty. Therein lies the dilemma of courts whose express mandate does not sufficiently cover the scope of its functions. The capacity of a court to address an issue is circumscribed by the scope of its mandate. Hence a clear articulation of the mandate of the EACJ is necessary to avoid this impasse.

During the hearing of the main application in the *Campbell* case⁴¹ the respondent contested the jurisdiction of the SADC Tribunal arguing that in the absence of a rights protocol, the tribunal had no jurisdiction over human rights. In response, the SADC Tribunal stated that stipulation of human rights, democracy and the rule of law as a principle of SADC sufficed to grant it jurisdiction over matters of human rights, democracy and rule of law. Though the mandate of SADC Tribunal is not expressly excluded as in the case of the EAC, it is clear that this omission gave an opportunity for contestation and is hence undesirable.

In *Olajide v Nigeria* (ECONOMIC COMMUNITY OF WEST AFRICAN STATES, 2004) the ECOWAS Court declined to adjudicate over questions of human rights arguing that its protocol did not confer such jurisdiction. The matter arose prior to the 2005 amendment of the Protocol relating to the ECOWAS Court which vested the court with jurisdiction over human rights and allowed individual access to the court. The decision was taken despite the existence of ‘sufficient human rights content in the constitutional and other legislative instruments of ECOWAS’ (EBOBRAH, 2008, p. 17). It was argued that where the meaning of the treaty was clear, the court would apply it as such (ECONOMIC COMMUNITY OF WEST AFRICAN STATES, 2004, para. 53-54). The decision has been criticised as shying away from activism in that case since nothing in the Protocol prevented the admission of the matter (VILJOEN, 2007, p. 507). Thus, in light of this case, the benefit of an express mandate is clear.

The foregoing cases illustrate three main issues underlying the exercise of an implied jurisdiction. First, the exercise of such jurisdiction can be interpreted as exceeding the authority of the court and therefore compromise the legitimacy of the decision. It also makes the scope of the power of the court elusive. Secondly, it creates an opening for litigious contestation of the courts authority thereby lengthening the

process unnecessarily which is undesirable for human rights litigation. Lastly, it accords discretion to the judicial officers to determine the court's competence. This introduces subjectivity and in the face of a conservative bench, the likelihood that such matters may not be admitted. This is for instance clear when the decisions of the EAC and the ECOWAS Court in *Katabazi* (EAST AFRICAN COURT OF JUSTICE, 2007) and *Olajide* (ECONOMIC COMMUNITY OF WEST AFRICAN STATES, 2004) are contrasted.

In light of the foregoing factors, it can be concluded that an implied mandate for human rights, whilst not absolutely barring exercise of jurisdiction, does not achieve optimum protection for rights and is inconsistent with the commitment of RECs to protection of human rights evident in their founding documents.

5.2 Normative framework

This refers to the body of law applied by REC courts in dispensing their obligations under their respective treaties and which defines the values and goals pursued by the REC and the primary rules that impose duties on actors to perform or abstain from actions (DIEHL; KU; ZAMORA, 2003, p. 51). The normative sources applied by REC courts in exercise of the human rights mandate vary from one REC to the next. For instance, the literal reading of article 21 of the SADC Protocol on the Tribunal implies sufficiency to direct the tribunal on what law to apply. With respect to human rights, however, the answer is not as obvious. The SADC treaty establishes an obligation for states to abide by the principle of human rights, democracy and the rule of law. But the normative source of such standards is not specified.

Similarly, article 27(2) of the EAC Treaty can be interpreted to mean that the law to be applied by the EACJ with respect to human rights will be defined in the Protocol that will expand the court's jurisdiction. However, the EAC Treaty establishes 'recognition, promotion and protection of human rights in accordance with the provisions of the African Charter as a fundamental principle of the EAC (EAST AFRICAN COMMUNITY, 2007, art. 6 (d)). Hence, a determination of whether a state party is in breach of the treaty would inevitably entail a determination of whether or not the conduct is a breach of the African Charter. That demands an enquiry into the substantive content of the rights. Nevertheless, it is submitted that this does not suffice to establish the African Charter as a normative source or standard of rights in the EAC.

5.2.1 The African Charter as a rights catalogue for REC courts

It has been suggested that in view of the wide recognition of the African Charter as a standard for rights in the RECs, it can be employed as the normative source of rights for REC courts as all the AU members are party to the African Charter (VILJOEN, 2007, p. 500). It is further argued that the development of 'distinct sub-regional human rights standards, such as the SADC Charter of Fundamental Social Rights, is likely to accentuate differences, [thereby] undermining the movement towards African unity and legal integration' (VILJOEN, 2007, p. 501). These arguments are founded on an assumption that the RECs recognize the African Charter as a standard for rights. Notably however, the SADC Treaty does not make any reference to the African

Charter. But this does not mean that failure to refer to it implies discord with its provisions. Indeed, in the *Campbell* case, the SADC Tribunal referred to the African Charter extensively and even relied on the jurisprudence of the African Commission.

The interpretation and enforcement of the African Charter is a function of the African Commission and the African Court. The suggestion of its application by REC courts would create another forum for interpretation and enforcement. Recalling the absence of judicial hierarchy, the use of finality clauses with respect to the decisions of REC courts, the exclusion of REC courts from the formal structure of the AHRS and lack of judicial coordination in the region, the inevitable result of this suggestion is a replication of forums with a similar mandate and a real chance of conflicting decisions. It does not hold promise for addressing the threats to the unity of human rights law in the region.

The use of the African Charter as a rights catalogue blurs the normative hierarchy between the regional and sub-regional human rights instruments that underlies the intention of the eventual unification at the regional level. Such hierarchy is implicit in judicial order and is an invaluable asset for the AHRS. Thus the argument for the African Charter as a rights catalogue for the RECs is not as obviously advantageous as some authors contend.

In supporting his argument for the African Charter as a rights catalogue for RECs, Viljoen observes that separate cataloguing of human rights is likely to accentuate differences and undermine integration (VILJOEN, 2007, p. 500). However, it is submitted that the possibility of accentuating differences is adequately mitigated by the recognition of the African Charter and other international standards of human rights as a normative minimum. For instance the draft East African Bill of Rights (PETER, 2008, p. 336)⁴² has extensive provisions covering both the rights established under the African Charter and beyond. If adopted, it would present better protection than the African Charter. In the case of SADC, there are differences of opinion on whether the SADC Charter of Fundamental Social Rights can be deemed as a rights catalogue for the SADC Tribunal (VILJOEN, 2007, p. 500; RUPPEL, 2009, p. 295-296).

5.3 Structural framework

The structural framework refers to the institutional organisation of the AHRS. A system is a purposeful arrangement of interrelated elements or components which cannot be adequately described and understood in isolation from one another (SHANY, 2003, p. 78). It has been established in the preceding sections that REC courts are not formally recognised as part of the AHRS. A concern arises regarding the relationship between the REC courts and the institutions established at the regional level, and how the AHRS institutional framework can be modified (if at all) to accommodate the role of REC courts.

Generally RECs do not constitute independent human rights systems (VILJOEN, 2007, p. 10). They are created for the pursuit of economic integration and the promotion and protection of human rights is barely incidental to that main purpose. Furthermore, they do not have institutions specifically tailored towards the performance of human rights functions. If RECs indeed fall short of independent human rights systems in Africa, then, in order for them to achieve the optimum

protection of rights as envisaged in their respective documents they need either to fully develop their institutions to a fully fledged system or to align with a better co-ordinated and institutionally established system, namely the AHRS.

6 Conclusion

The significance of the role played by REC courts in the protection of human rights in the Africa today cannot be denied. It is a reflection of a renewed commitment by African states to the realisation of human rights in the region. It also points to the fact that the traditional human rights institutional framework in the region has long been overtaken by practice. The formal parameters of the AHRS do not adequately cater for the role of RECs in the field of human rights. This deprives the region of the benefits of the coordinated development of protective mechanisms that would create an optimum environment for the protection of rights. Though there are numerous problems associated with the emerging role of RECs in the protection of human rights, there is an equal wealth of benefits to be reaped from their work. The problems highlighted in this article render themselves to a solution through proper delimitation of the role of REC courts and restructuring of the system to take cognisance of the recent developments.

Whether or not the region stands to benefit from the role of these new players is almost entirely dependent on the willingness of states to revisit the AHRS and to align the operations of the RECs with the regional framework.

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LIST OF ABBREVIATIONS

African Charter:	African Charter on Human and Peoples' Rights
African Commission:	African Commission on Human and Peoples' Rights
African Court:	African Court on Human and Peoples' Rights
ACJHR:	African Court of Justice and Human Rights
AEC:	African Economic Community
AHRS:	African Human Rights System
AU:	African Union
EAC:	East Africa Community
EACJ:	East Africa Court of Justice
ECOWAS:	Economic Community of the West African States
ECOWAS Court:	ECOWAS Community Court of Justice
OAU:	Organisation of African Unity
REC:	Regional Economic Community
REC Courts:	Regional Economic Community Courts
SADC:	Southern African development Community
SADC Tribunal:	Southern African Development Community Tribunal

NOTES

1. See <http://www2.gtz.de/wbf/4tDx9kw63gma/RECs_Final_Report.pdf> or <http://www.kas.de/upload/auslandshomepages/namibia/Human_Rights_in_Africa/9_Ruppel.pdf> generally for an outline of the existing RECs in Africa and their corresponding memberships. Last accessed on: 6 Dec. 2010.
2. Articles 3(h) and 4(m) of the Constitutive Act of the AU (AFRICAN UNION, 2000) establish promotion, protection and respect of human rights as part of the objectives and principles of the AU. Nevertheless, it is noted that other documents adopted under the auspices of the OAU such as the Treaty Establishing the African Economic Community (1991) had already established human rights as a fundamental concern thereof. This suggests an incremental approach in the adoption of human rights as an agenda of the OAU. See chapter II article 3(g) and 5(1) of the AEC Treaty (AFRICAN ECONOMIC COMMUNITY, 1991).
3. Such as calls by the UN Economic Commission for Africa (UNECA) on African States to work towards a single economic union through the creational of sub-regional economies.
4. There are at least 14 RECs in Africa today, 8 of which are recognised by the African Union. See <www.africa-union.org> for a list of the recognised RECs.
5. Thoko argues that the obligations contained in the Universal Bill of Rights establish the civil, political, economic and social needs of people as rights which may not be curtailed in the pursuit of economic development. It is hence proposed that the Treaties of these RECs may not be interpreted in isolation of the other human rights obligations, but rather in a manner that furthers these objectives. This approach is derived and supported by the provisions of Article 31(3) (c) of the Vienna Convention on the Law of Treaties. In the context of RECs, one is bound to interpret their treaties in line with their obligations as obtaining under other human rights instruments.
6. The term 'courts' as used in this work refers to both courts and tribunals.
7. See generally <<http://www.comm.ecowas.int/sec/index.php?id=about-a&lang=en>>. See also paragraph 6 of the preamble to the 1975 ECOWAS Treaty (ECONOMIC COMMUNITY OF WEST AFRICAN STATES, 1975).
8. See para. 5 of the preamble and paras. 4, 5 and 6 of the substantive part of the Declaration (ECONOMIC COMMUNITY OF WEST AFRICAN STATES, 1991).
9. Article 4(g) of the 1993 Revised Treaty of ECOWAS (ECONOMIC COMMUNITY OF WEST AFRICAN STATES, 1993) which also refers to specific rights and obligations of member states as in article 56(2), 59 and 66(2) c.
10. By Supplementary Protocol A/SP.1/01/05 and A/SP.2/06/06.
11. These include *Ugokwe v Nigeria and Others* (ECONOMIC COMMUNITY OF WEST AFRICAN STATES, 2005b), *Kéïta and Another v Mali* (ECONOMIC COMMUNITY OF WEST AFRICAN STATES, 2007a), *Essein v The Republic of the Gambia* (ECONOMIC COMMUNITY OF WEST AFRICAN STATES, 2007b) AHRLR 131, *Manneh v The Gambia* (ECONOMIC COMMUNITY OF WEST AFRICAN STATES, 2008a) AHRLR 171, *Karou v Niger* (ECONOMIC COMMUNITY OF WEST AFRICAN STATES, 2008b) AHRLR 182, *Registered Trustees of Socio-Economic Rights and Accountability Project (SERAP) v Federal Republic of Nigeria and Another* (ECONOMIC COMMUNITY OF WEST AFRICAN STATES, 2009).
12. See <<http://www.sadc.int>> on the member states of SADC.
13. *Mike Campbell (PVT) Limited and Another v The Republic of Zimbabwe* SADC (T) 2/2007 and in *Luke Muntandu Tembani v The Republic of Zimbabwe*, case number SADC (T) 07/2008 (SOUTHERN AFRICAN DEVELOPMENT COMMUNITY TRIBUNAL, 2008). In the Campbell case, the SADC Tribunal considered whether compulsory acquisition of private land owned by the applicants through an amendment of the Respondent's constitution was a violation of human rights obligations under the SADC Treaty. In the Tembani case, the SADC Tribunal was required to determine whether a provision of the Respondent's law which ousted the jurisdiction of courts in respect of the foreclosure of property charged to loan was a violation of human rights.
14. In 2005, the secretariat of the EAC developed a draft protocol for the expansion of the EACJ's jurisdiction to *inter alia* human rights as required in article 27(2). The process of consultation on the draft was scheduled to be completed by August 2006, and to date has not been finalised. This delay in adoption of the Protocol is attributable to several factors including unrealistic time framing of the schedule for adoption, limited consultation with stakeholders, and susceptibility of the process to political manipulation.
15. He argues that though the Treaty provides for broad protection with regard to human rights, the EACJ has no jurisdiction over human rights issues.
16. *Katabazi and 21 others v Secretary General of the EAC and another* (EAST AFRICAN COURT OF JUSTICE, 2007) and *Nyong'o and 10 others v The Attorney General of Kenya and others* (EAST AFRICA COURT OF JUSTICE, 2006).
17. Article 4(2) of the Treaty Establishing the African Economic Community (AFRICAN ECONOMIC COMMUNITY, 1991). See also article 3(g) of the same Treaty.
18. Article 1 of the Protocol on African Court (AFRICAN UNION, 2004).

19. Chapter 2 of the African Charter on the Rights and Welfare of the Child (ORGANISATION OF AFRICAN UNITY, 1990).
20. See articles 30 of the African Charter (ORGANISATION OF AFRICAN UNITY, 1986), 2 of the Court Protocol (AFRICAN UNION, 2004) and 32 of the African Charter on the Rights and Welfare of the Child (ORGANISATION OF AFRICAN UNITY, 1990).
21. Protocol on the Statute of the African Court of Justice and Human Rights (Statute of the ACJHR) adopted by the eleventh ordinary session of the AU Assembly, held in Sharm el-Sheikh, Egypt, 1st July 2008 (AFRICAN UNION, 2008b).
22. In terms of Article 16 of the Statute of the African Court of Justice and Human Rights, the ACJHR is to have two sections; a general affairs section composed of 8 judges and a human rights section composed of 8 judges. The general affairs section is to be competent to hear all cases submitted under article 28 of the Statute save for those concerning human and/or peoples' rights. The human rights section is to be competent to hear all cases relating to human and or peoples' rights.
23. An analogy can be drawn from his argument to the present relationship between the African Charter and the RECs.
24. Article 38 of the EAC treaty provides that a dispute referred to the EACJ cannot be settled by any other method other than that established under the Treaty. This can be read as establishing the finality of the decisions of the EACJ.
25. Its successor the Constitutive Act of the AU has similar provisions but leaves the definition of peaceful means to the AU Assembly.
26. See articles 30 and 46(2) of the African Charter (ORGANISATION OF AFRICAN UNITY, 1986) and the Statute of the ACJHR (AFRICAN UNION, 2008b) respectively.
27. Only the case of *Michelot Yogombaye v The Republic of Senegal* (AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS, 2008), has been brought before the Court so far. However, the African Court dismissed this matter on the basis that the Respondent state, Senegal, had not accepted the jurisdiction of the African Court in terms of article 34(6) of the 1998 Protocol to the African Charter on African Court (AFRICAN UNION, 2004).
28. In *Louis Karel Fick & Others versus Government of the Republic of Zimbabwe* (SOUTH AFRICA, 2009) the North Gauteng High Court, Pretoria upheld the application by successful litigants before the SADC Tribunal to attach the non-diplomatic property owned by the Government of Zimbabwe in South Africa. However, the Court failed to provide substantive reasons for its order, save for stating it relied on the papers before it. As a consequence, the Government of South Africa is appealing the decision. The appeal is yet to be determined as at the date of this article (SA TO CHALLENGE..., 2010).
29. These are Burkina Faso, Mali, Malawi and Tanzania.
30. Article 10(d) of Supplementary Protocol A/ SP.1/01/05 Amending Protocol A/P.1/7/91 on the Community Court of Justice (ECONOMIC COMMUNITY OF WEST AFRICAN STATES, 2005a) on the requirements for admissibility of a matter before the ECOWAS Court.
31. Thoko argues in respect of SADC that the SADC Treaty does not create any institution with a specific mandate to deal with human rights despite having an unequivocal commitment to human rights.
32. He argues that international law is not a comprehensive body of laws consisting of a fixed body of rules applicable to all states with a central legislative organ. Rather, it is in permanent development with its actors and ambit of activity increasing considerably in the past few years.
33. In the *Campbell* case (SOUTHERN AFRICAN DEVELOPMENT COMMUNITY TRIBUNAL, 2007) for instance, the SADC Tribunal relied on the decision of the African Commission in *Constitutional Rights Project and Others v Nigeria* (AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS, 2000) AHRLR 227 and in *Zimbabwe Human Rights NGO Forum v Zimbabwe* (AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS, 2006) AHRLR128.
34. Countries that are members or party to more than one sub-region have a choice of REC courts to approach (which is the majority of most African countries).
35. He identifies three types of forum shopping based on the nature of choice available to the potential litigant: choice of tribunal, simultaneous petitioning and successive petitioning.
36. He argues that successive litigation is not costless.
37. Article 56(7) of the African Charter (ORGANISATION OF AFRICAN UNITY, 1986) which is material in this regard only prohibits admission of successive claims. This is insufficient to deal with the possibility of forum shopping.
38. See notes 16 and 13 above respectively.
39. Article 15 which provides for the jurisdiction of the SADC Tribunal neither provides for competence over human rights questions nor excludes such jurisdiction.
40. Article 27(1) of the Treaty relates to the jurisdiction of the EACJ to interpret and apply the EAC Treaty.
41. See note 13 above
42. The Draft East African Bill of Rights (PETER, 2008, Annexure II) developed by the National Human Rights Institutions in the East African region under the auspices of Kituo Cha Katiba. The draft, though not formally adopted by the EAC is intended to be a human rights code to guide the human rights jurisprudence and operations of the EACJ.

RESUMO

O desenvolvimento de comunidades sub-regionais na África não é um fenômeno novo, mas a incorporação de direitos humanos em suas agendas é relativamente recente. Com efeito, as cortes das comunidades econômicas regionais introduziram uma nova dimensão de proteção supranacional dos direitos humanos na África. Esse desenvolvimento é bem-vindo, porque provavelmente fará progredir a promoção e a proteção dos direitos humanos. Entretanto, considerando que o foco principal dessas comunidades é o desenvolvimento econômico, sua capacidade de efetivamente compreender o papel da proteção dos direitos humanos é questionável. O desenvolvimento desse mandato para as cortes sub-regionais é necessário pela proeminência emergente dos direitos humanos nos negócios das comunidades econômicas regionais. Sua interpretação e implementação, contudo, tem amplas ramificações para a promoção dos direitos humanos na África, a harmonização dos padrões de direitos humanos na região e para a unidade e a efetividade do Sistema Africano de Direitos Humanos.

PALAVRAS-CHAVE

Integração regional – Comunidades econômicas regionais – Mandato para direitos humanos – Cortes sub-regionais – Sistema Africano de Direitos Humanos – Jurisdição relativa a direitos humanos

RESUMEN

El desarrollo de las comunidades subregionales en África no es un fenómeno nuevo, pero la incorporación de los derechos humanos a su agenda es relativamente reciente. En efecto, los tribunales REC han introducido un nuevo manto de protección supra-nacional a los derechos humanos en África. Este hecho es bienvenido porque puede producir un paso adelante en la promoción y protección de los derechos humanos. Sin embargo, considerando que el objetivo principal de las REC es el desarrollo económico, su capacidad para asumir eficazmente la función de protección de los derechos humanos es discutible. La creciente importancia de los derechos humanos en los asuntos de las REC necesita del desarrollo de este mandato para los tribunales subregionales. Pero la interpretación e implementación que ellos hagan tendrá amplias ramificaciones para el avance de los derechos humanos en África, para la armonización de los estándares de derechos humanos en la región y para la unidad y eficacia del sistema africano de derechos humanos.

PALABRAS CLAVE

Integración regional – Comunidades económicas regionales – Mandato de derechos humanos – Tribunales subregionales – Sistema Africano de Derechos Humanos – Jurisdicción de derechos humanos



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ABSTRACT

Whether included in national bills of rights or regional or global human rights treaties, human rights are often vague. They require interpretation. The article illustrates how regional human rights tribunals have largely followed the rules for treaty interpretation set out in the Vienna Convention on the Law of Treaties. In the interpretation of rights and their limitations the European Court has traditionally put greater emphasis on regional consensus than the Inter-American Court and the African Commission which often look outside their continents to treaties and soft law of the UN and the jurisprudence of other regional tribunals. However, there is a trend towards universalism also in the jurisprudence of the European Court. The article illustrates that the reasoning of the regional tribunals is sometimes inadequate. The quality of the reasoning of the tribunals is important as it provides states and individuals with predictability so that action can be taken to avoid human rights violations. Good reasoning may also help to achieve compliance with the decisions and societal acceptance on controversial issues.

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Treaty interpretation – Regional human rights systems



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INTERPRETING REGIONAL HUMAN RIGHTS TREATIES

Magnus Killander

1 Introduction

Regional human rights courts and quasi-judicial bodies play an important role in providing individual and structural remedies for human rights violations and in the development of international human rights law (HEYNS; KILLANDER, 2010). This article examines the approach to interpretation of the European Court of Human Rights (European Court), the Inter-American Commission on Human Rights (Inter-American Commission), the Inter-American Court of Human Rights (Inter-American Court) and the African Commission on Human and Peoples' Rights (African Commission) with regard to the interpretation of provisions of the treaties they have been established to monitor compliance with.¹

Whether included in national bills of rights or regional or global human rights treaties, human rights are often vague. To establish clear rules of interpretation by national and international courts and quasi-judicial bodies is needed. There are no specific provisions in the European Convention on Human Rights (European Convention), American Convention or the African Charter setting out how these treaties should be interpreted.² As will be shown below regional human rights tribunals have largely followed the rules for treaty interpretation set out in the Vienna Convention on the Law of Treaties (Vienna Convention). Only states are party to this Convention but it is recognised as reflecting customary international law and applicable also to international human rights monitoring bodies as confirmed by the European Court and the Inter-American Commission and Court (EUROPEAN COURT OF HUMAN RIGHTS, *Golder v. United Kingdom*, 1975; INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, *Cases no 9777 and 9718 (Argentina)*, 1988, § V.(6); INTER-AMERICAN COURT OF HUMAN RIGHTS, *Mapiripán Massacre v. Colombia*, 2005c).³

Notes to this text start on page 168.

Human rights treaties are often said to have a special nature. In *Mapiripán Massacre*, the Inter-American Court held (INTER-AMERICAN COURT OF HUMAN RIGHTS, *Mapiripán Massacre v. Colombia*, 2005c, § 104) that:

Since its first cases, the Court has based its jurisprudence on the special nature of the American Convention in the framework of International Human Rights Law. Said Convention, like other human rights treaties, is inspired by higher shared values (focusing on protection of the human being), they have specific oversight mechanisms, they are applied according to the concept of collective guarantees, they embody obligations that are essentially objective, and their nature is special vis-à-vis other treaties that regulate reciprocal interests among the States Parties.

However, the special nature of human rights treaties does not mean that such treaties should be interpreted in a way that is inconsistent with the Vienna Convention. (INTER-AMERICAN COURT OF HUMAN RIGHTS, *Mapiripán Massacre v. Colombia*, 2005c, § 106). Indeed, interpretation approaches of the regional tribunals such as autonomous meaning of treaty norms, evolutive and effective interpretation can easily be fitted under the Vienna Convention framework. (VANNESTE, 2010, p. 227; CHRISTOFFERSEN, 2009, p. 61).

This article first explores the relevant articles in the Vienna Convention and what the European Court, Inter-American Court, Inter-American Commission and African Commission have said about treaty interpretation. The article concludes with three case studies on interpretative approaches by the regional tribunals: corporal punishment, trial of civilians by military courts and positive human rights obligations. The case studies have been chosen because of availability of case law on these issues across the three regional systems.

2 Interpreting human rights treaties

2.1 *The role of the Vienna Convention on the Law of Treaties*

Article 31(1) of the Vienna Convention provides that: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Sub-paragraph 3 provides that any subsequent agreement or state practice indicating agreement or relevant rules of international law shall be taken into account in interpreting the treaty. Article 32 provides for supplementary means of interpretation.

It is rare that provisions of human rights treaties are so clear that one would only need to consider the text of the particular provision. The “ordinary meaning” of a term can often not be determined without considering context. The context includes the treaty text, including the preamble. (VILLIGER, 2009, p. 427). The regional human rights tribunals have emphasised the importance of context. According to the European Court, “[t]he Convention is to be read as a whole”. (EUROPEAN COURT OF HUMAN RIGHTS, *Soering v. UK*, 1989, § 103) The African Commission has noted that “[t]he Charter must be interpreted

holistically”.⁴ (AFRICAN COMMISSION ON HUMAN AND PEOPLES’ RIGHTS, *Legal Resources Foundation v. Zambia*, 2001a, § 70).

The requirement of interpretation “in light of the object and purpose” and in “good faith” is meant to ensure the “effectiveness of its terms” (VILLIGER, 2009, p. 428). Both the European Court and the Inter-American Court have highlighted the importance of “effectiveness” (EUROPEAN COURT OF HUMAN RIGHTS, *Papamichalopoulos and Others v. Greece*, 1993b, § 42; INTER-AMERICAN COURT OF HUMAN RIGHTS, *Ricardo Canese v. Paraguay*, 2004a, § 178; AFRICAN COMMISSION ON HUMAN AND PEOPLES’ RIGHTS, *Scanlen and Holderness v. Zimbabwe*, 2009, § 115). In *Blake v. Guatemala* (INTER-AMERICAN COURT OF HUMAN RIGHTS, 1998, § 96) the Inter-American Court held that “[a]rticle 8(1) of the Convention must be interpreted in an open way so that said interpretation be endorsed both in the literal text of that standard as well as in its essence.” The need for effectiveness follows from the vagueness of many human rights provisions. States have indeed given international tribunals the mandate to interpret what are often not clear rules but rather “objectives or standards” (VANNESTE, 2010, p. 257).

The object and purpose of human rights treaties and the requirement of effectiveness mean that the treaties must not be narrowly construed. For example in *Aminu v. Nigeria* (AFRICAN COMMISSION ON HUMAN AND PEOPLES’ RIGHTS, 2000a) the complainant was “hiding for fear of his life”. The African Commission held (AFRICAN COMMISSION ON HUMAN AND PEOPLES’ RIGHTS, 2000a, § 18) that “[i]t would be a narrow interpretation of this right to think that it can only be violated when one is deprived of it.” The Inter-American Court has held (INTER-AMERICAN COURT OF HUMAN RIGHTS, *Mapiripán Massacre v. Colombia*, 2005c, § 106) that “when interpreting the Convention it is always necessary to choose the alternative that is most favorable to protection of the rights enshrined in said treaty, based on the principle of the rule most favorable to the human being.” This “most favourable” principle is sometimes referred to as the *pro homine* principle.⁵

The following cases illustrate these interpretative principles. In *Caballero Delgado and Santana v. Colombia* (INTER-AMERICAN COURT OF HUMAN RIGHTS, 1995, § 67) the Inter-American Court held that the term ‘recommendations’ in the American Convention, referring to the Inter-American Commission’s decisions, should, in line with the Vienna Convention, be “interpreted to conform to its ordinary meaning (...) For that reason, a recommendation does not have the character of an obligatory judicial decision for which the failure to comply would generate State responsibility.” In *Loayza-Tamayo v. Peru* (INTER-AMERICAN COURT OF HUMAN RIGHTS, 1997, § 80) the Court referred to its earlier judgments on this issue but added that in line with the principle of good faith, as set out in the Vienna Convention, states should “make every effort to comply with the recommendations’ of the Inter-American Commission”.

In *Golder v. UK* (EUROPEAN COURT OF HUMAN RIGHTS, 1975) the European Court held that the right to access to court is implied in the procedural rights in article 6 of the Convention as the procedural rules would be meaningless if there was no access to court in the first place. Vanneste (2010, p. 247), cites *Golder* as a case falling under ‘evolutive interpretation’, discussed below. However, *Golder*

was decided based on ‘effectiveness’ of the norms and not in light of changed circumstances. The cases discussed below in the case study on positive obligations also illustrate the use of the principle of effectiveness.

It is not only the objective and purpose of the whole treaty that is relevant. (Cf. ORAKHELASHVILI, 2008, p. 353). In *Litwa v. Poland* (EUROPEAN COURT OF HUMAN RIGHTS, 2000) the European Court interpreted article 5(1)(e) which allows “the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics, or drug addicts or vagrants”. The Court referred to the object and purpose of article 5(1)(e) which in its opinion showed that the categories of persons referred to in article 5(1)(e) may be detained not only for their danger to “public safety” but in their own interest. The Court concluded that the term “alcoholics” could not be understood only in its ordinary meaning as someone addicted to alcohol but also extended to those “whose conduct and behaviour under the influence of alcohol pose a threat to public order or themselves” (EUROPEAN COURT OF HUMAN RIGHTS, *Litwa v. Poland*, 2000, § 60-61). The Court confirmed this interpretation by reference to the *travaux préparatoires* of the Convention. (EUROPEAN COURT OF HUMAN RIGHTS, *Litwa v. Poland*, 2000, § 63). The Court extended the scope of a literal interpretation of article 5(1)(e) despite noting that “exceptions to a general rule ... cannot be given an extensive interpretation.” (EUROPEAN COURT OF HUMAN RIGHTS, *Litwa v. Poland*, 2000, § 59). That limitations must be interpreted narrowly has also been emphasised by the African Commission (e.g. *Legal Resources Foundation v. Zambia* (AFRICAN COMMISSION ON HUMAN AND PEOPLES’ RIGHTS, 2001a, § 70).

The European Court and the Inter-American Court have on many occasions explained that provisions in the treaties have autonomous meanings, independent from their definition in domestic law⁶ (EUROPEAN COURT OF HUMAN RIGHTS, *Pellegrin v. France*, 1999; INTER-AMERICAN COURT OF HUMAN RIGHTS, *Mapiripán Massacre v. Colombia*, 2005c, § 187; VANNESTE, 2010 p. 229-242). For terms that are used differently in the different member states, the international tribunal must create an international definition. The development of autonomous meaning to treaty terms can be seen to be based either on the meaning in light of the object and purpose (VANNESTE, 2010, p. 234), or on the provision in article 31(4) that “[a] special meaning shall be given to a term if it is established that the parties so intended”. In finding the autonomous meaning the European Court, in most cases, usually looks for a “common denominator” among member states while the Inter-American Court looks for guidance in international instruments (VANNESTE, 2010, p. 239-240). These different approaches rarely lead to different outcomes with regard to the autonomous meaning of a provision.

Article 31(3)(b) of the Vienna Convention provides that “subsequent practice (...) which establishes the agreement of the parties” shall be considered “together with the context” in the interpretation of treaty provisions. Soft law, for example resolutions adopted by the political organs of international organisations, could illustrate emerging consensus on an issue and therefore possibly be considered “practice” in terms of article 31(3)(b). Practice for the purpose of treaty interpretation

has clear linkages with the formation of customary international law, whether regional or global. Traditionally customary international law was formed through state practice together with *opinio juris* (expression by the state that the practice followed from legal obligation). However, increasingly courts and scholar have recognised that *opinio juris* and verbal state practice can in itself form customary international law (WOUTERS; RYNGAERT, 2009, p. 119). The limit of application of such new customary international law, in the context of human rights treaties, is obviously the text of the treaty provision.

Many would argue that article 31(3)(b) only is applicable to state practice (VILLIGER, 2009, p. 431). However, the International Law Association (ILA) has given a wider interpretation of the provision and argues that the work of the UN treaty monitoring bodies, in the form of general comments and views on individual communications, constitute “subsequent practice”, in particular when states have not objected to the interpretation (INTERNATIONAL LAW ASSOCIATION, 2004, § 20-21). Regional tribunals could thus consider the views of UN expert bodies as subsequent practice. Similarly the case law of regional tribunals could clearly also be considered as subsequent practice in relation to the treaties they have been established to monitor (EUROPEAN COURT OF HUMAN RIGHTS, *Soering v. UK*, 1989, § 103; EUROPEAN COURT OF HUMAN RIGHTS, *Cruz Varas and Others v. Sweden*, 1991, § 100). However, this is only a mandate for the regional tribunals to rely on their own precedents, as they already extensively do. Indeed, as discussed below, it is rare that a regional tribunal changes its position on a specific issue. Jurisprudence from other region tribunals cannot be seen as subsequent practice, but can be used as supplementary means of interpretation.

Article 31(3)(c) provides that “relevant rules of international law” should be considered in the interpretation of a treaty provision. According to Orakhelashvili (2008, p. 366) article 31(3)(c) refers only to “established rules of international law”. For example if a widely ratified UN human rights treaty has a clear provision that can help interpret a provision in a regional treaty it should be taken into account. Thus the European Court relied on the prohibition on *non-refoulement* in the UN Convention against Torture to find a similar obligation under the European Convention (EUROPEAN COURT OF HUMAN RIGHTS, *Soering v. UK*, 1989, § 88). According to the European and Inter-American courts, it is not necessary that the relevant state has ratified the international treaty which is used as an aid of interpretation. (EUROPEAN COURT OF HUMAN RIGHTS, *Demir and Baykara v. Turkey*, 2008a, § 78; INTER-AMERICAN COURT OF HUMAN RIGHTS, *Proposed amendments to the naturalization provision of the Constitution of Costa Rica*, *Advisory opinion*, 1984, § 49).

Article 32 of the Vienna Convention provides that “supplementary means of interpretation” may be used to “confirm the meaning resulting from the application of Article 31”. Supplementary means may also be used when the meaning of a provision, after interpretation in terms of article 31, is still “ambiguous or obscure” or would lead to an “absurd or unreasonable” result. The supplementary means include preparatory work and the circumstances of the conclusion of the treaty. The list of supplementary means is not exhaustive.

For example, to the extent that comparative interpretation and soft law are not recognised under article 31(3) they would constitute supplementary means of interpretation.

As illustrated above, regional tribunals largely follow the approach set out in the Vienna Convention. This approach was summarised by the European Court in *Rantsev v. Cyprus and Russia* (EUROPEAN COURT OF HUMAN RIGHTS, 2010a), in which Court held that article 4 of the European Convention dealing with slavery and servitude also covered trafficking, as follows (EUROPEAN COURT OF HUMAN RIGHTS, *Rantsev v. Cyprus and Russia*, 2010a, § 273-275, references omitted):

As an international treaty, the Convention must be interpreted in the light of the rules of interpretation set out in the Vienna Convention of 23 May 1969 on the Law of Treaties. Under that Convention, the Court is required to ascertain the ordinary meaning to be given to the words in their context and in the light of the object and purpose of the provision from which they are drawn. The Court must have regard to the fact that the context of the provision is a treaty for the effective protection of individual human rights and that the Convention must be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions. Account must also be taken of any relevant rules and principles of international law applicable in relations between the Contracting Parties and the Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part. Finally, the Court emphasises that the object and purpose of the Convention, as an instrument for the protection of individual human beings, requires that its provisions be interpreted and applied so as to make its safeguards practical and effective.

The following sections will consider the different approaches taken by the regional tribunals with regard to the relevance of regional consensus, regional and global soft law and judicial dialogue.

2.2 The living instrument, regional consensus and the margin of appreciation

In *Tyrer v. United Kingdom* (EUROPEAN COURT OF HUMAN RIGHTS, 1978b, § 31), discussed below, the European Court held:

[T]he Convention is a living instrument which ... must be interpreted in the light of present-day conditions. In the case now before it the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field. (...)

The Inter-American Court held in *Mapiripán Massacre v. Colombia* (INTER-AMERICAN COURT OF HUMAN RIGHTS, 2005c, § 106), citing *Tyrer*, that the interpretation of human rights treaties “must go hand in hand with evolving times and current living conditions”. This followed similar pronouncements in a number of cases. The African Commission has not explicitly made reference to the doctrine.

The living instrument approach can, as has been shown above, be deduced from “subsequent state practice” and “relevant rules of international law” in article 31(3)(b) and (c) (KAMMINGA, 2009, p. 10). Another approach is to see it as part of the object and purpose of the treaty (VANNESTE, 2010, p. 245). The intention of the drafters of the conventions was to “protect the individual against the threats of the future, as well as the threats of the past.” (OVEY; WHITE, 2006, p. 47). Originalism, the intent of the contracting parties with regard to specific treaty provisions, plays a very limited role with regard to human rights treaties (LETSAS, 2007, p. 59). The approach to the “living instrument” standard varies between the regional tribunals as set out below.

The European Court often compares the position of the member states to determine how far an indeterminate right extend or which limitations can be considered “reasonable” or “necessary” (OVEY; WHITE, 2006 p. 48-50). Consensus does not mean unanimity but rather that the vast majority takes a particular position in line with the object and purpose of the treaty (VANNESTE, 2010, p. 265). When there is no European consensus, the European Court has often held that a state has a greater “margin of appreciation” in determining what action to take. The margin of appreciation has most often been applied with regard to the limitation clauses in the European Convention with regard to article 8 (right to privacy), article 9 (freedom of religion), article 10 (freedom of expression) and article 11 (freedom of assembly and association) and article 1 of the first protocol (right to property). It has also been applied with regard to the “due process” provisions in articles 5 and 6 and the derogation provision in article 15 (ARAI-TAKAHASHI, 2002). Sometimes the Court has extended the margin of appreciation doctrine to other rights. For example, in *Vo v. France* (EUROPEAN COURT OF HUMAN RIGHTS, 2004b, § 82), a case dealing with the accidental abortion of a foetus by a negligent doctor, the Court held that how to define “[e]veryone’s” in article 2 (right to life) fell within the margin of appreciation of member states (criticised by VANNESTE, 2010, p. 319).

With regard to limitation clauses, the lack of regional consensus only determines the existence of a margin of appreciation. The contours of the margin are set with reference to the allowed grounds for limitation. This can be illustrated by the approach of the Court to the use of Islamic head scarves in educational institutions. In *Dahlab v. Switzerland* (2001) an Islamic primary school teacher was not allowed to wear a head scarf in class while in *Leyla Sahin v. Turkey* (2004) university students were prohibited from wearing head scarves. Both situations were held to fall within the margin of appreciation of the states and the European Court allowed the restriction on the freedom of religion that the prohibition of the Islamic head scarf constituted. The determining factor in *Dahlab* was the impressionability of young children. In *Leyla Sahin v. Turkey* the determining factor was that secularism ‘may be necessary to protect the democratic system in Turkey’ (EUROPEAN COURT OF HUMAN RIGHTS, 2004a, § 114; LETSAS, 2007, p. 126)

Regional consensus has played a negligible role in the jurisprudence of the African Commission and the Inter-American Court. In *Constitutional Rights Project and*

Another v. Nigeria (AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS, 1999, § 26) the African Commission held: "The African Charter should be interpreted in a culturally sensitive way, taking into full account the differing legal traditions of Africa and finding expression through the laws of each country." If this approach was followed a state could itself dictate how the Charter should be interpreted. Fortunately, the Commission has not followed this approach (KILLANDER, 2010). Instead, in *Prince v. South Africa* (AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS, 2004) the Commission endorsed the margin of appreciation doctrine as developed by the European Court. However, it did not make any survey of state practice within the African Union. The case dealt with whether the prohibition on the use of marijuana should be lifted with regard to religious use of Rastafarians. The Commission held that the state had a margin of appreciation but made it clear that this did not constitute absolute deference to the state. Similarly in *Vásquez Vejarano v. Peru*, with regard to what constitutes a state of emergency, the Inter-American Commission held (INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, 2000, § 55) that 'the margin of appreciation goes hand in hand with Inter-American supervision.' The Inter-American Court made reference to the margin of appreciation in its advisory opinion on the *Proposed amendments to the naturalization provision of the Constitution of Costa Rica* (INTER-AMERICAN COURT OF HUMAN RIGHTS, 1984, § 62) when it held that 'the Court is fully mindful of the margin of appreciation which is reserved to states when it comes to the establishment of requirements for the acquisition of nationality and the determination whether they have been complied with.' The Court did not consider whether there was any common approach to naturalisation provisions among the states that had ratified the American Convention.

2.3 *The living instrument, universalism and judicial dialogue*

Regional consensus is one of the approaches which can be used within the scope of "the living instrument". Another approach is universalism. The African Charter is unique in that articles 60 and 61 of the Charter provides that the Commission shall "draw from" other international instruments "adopted by the United Nations and African countries" and "take into consideration ... legal precedents and doctrine".⁷ In line with these provisions the African Commission is

more than willing to accept legal arguments with the support of appropriate and relevant international and regional human rights instruments, principles, norms and standards taking into account the well recognised principle of universality which was established by the Vienna Declaration and Programme of Action of 1993 and which declares that 'All human rights are universal, indivisible and interdependent, and interrelated'.

Purohit and Another v. The Gambia
(AFRICAN COMMISSION ON HUMAN AND
PEOPLES' RIGHTS, 2003a, § 48)

The American Convention has no similar provision as those found in the African Charter and its Protocol. The Court can only find violations of provisions in the

American Convention and provisions in the Protocols over which it has been given explicit jurisdiction.⁸ However, this has not prevented the Inter-American Court from being heavily influenced by soft law and comparative jurisprudence when interpreting the provisions of the Convention. Indeed, it has been argued that the Court has converted “global soft law into regional hard law” (NEUMAN, 2008, p. 111). The European Court is also increasingly considering developments outside the Council of Europe.

The effect of the living instrument position is most clearly illustrated when a court changes its position on a specific issue. In a number of cases the European Court held that problems encountered by transsexuals, for example that sex on a birth certificate could not be changed, did not constitute a violation of the European Convention (OVEY; WHITE, 2006, p. 274-278). In 2002, the Court reversed its earlier case law and held that despite the lack of European consensus there was “clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexuality of post-operative transsexuals”, *Goodwin v. UK* (EUROPEAN COURT OF HUMAN RIGHTS, 2002b, § 85).

In *Cruz Varas and Others v. Sweden* (EUROPEAN COURT OF HUMAN RIGHTS, 1991), the European Court considered interim measures adopted by the European Commission in line with its rules of procedure not binding despite the “almost total compliance” of the member states with the interim measures. When the issue of whether interim measures issued by a chamber of the Court (after the Commission was abolished in 1998) came up for decision in *Mamatkulov and Askarov v. Turkey* (EUROPEAN COURT OF HUMAN RIGHTS, 2005a, § 110), the Grand Chamber noted that “[i]n examining the present case, the Court will also have regard to general principles of international law and the view expressed on this subject by other international bodies since *Cruz Varas and Others*’. With reference to article 31(3)(c) of the Vienna Convention the Court held (EUROPEAN COURT OF HUMAN RIGHTS, 2005a, § 111) that the Convention must “be interpreted so far as possible consistently with the other principles of international law of which it forms a part”. The Court’s finding that its interim measures were binding was clearly informed by the interpretation of other international courts and quasi-judicial bodies (EUROPEAN COURT OF HUMAN RIGHTS, 2005a, § 124):⁹

The Court observes that the ICJ, the Inter-American Court of Human Rights, the Human Rights Committee and the Committee against Torture of the United Nations, although operating under different treaty provisions to those of the Court, have confirmed in their reasoning in recent decisions that the preservation of the asserted rights of the parties in the face of the risk of irreparable damage represents an essential objective of interim measures in international law. Indeed it can be said that, whatever the legal system in question, the proper administration of justice requires that no irreparable action be taken while proceedings are pending.

Goodwin and *Mamatkulov* clearly show how the European Court has been influenced by international trends, though the increased social acceptance the Court detected in *Goodwin* was clearly not universal (VANNESTE, 2010, p. 292).

As illustrated by *Goodwin* and *Mamatkulov*, one of the main ways in which regional courts and quasi-judicial bodies interpret their human rights instruments is through citing other international treaties, soft law and the interpretation of other international monitoring bodies.

The judicial dialogue between regional tribunals is to some extent a monologue. The African Commission has extensively cited the European Court. However, the only time the African Commission has been cited by the European Court was with regard to a joint declaration on freedom of expression adopted by the Special Rapporteurs on Freedom of Expression of the UN, the OAS, the OSCE and the African Commission (EUROPEAN COURT OF HUMAN RIGHTS, *Stoll v. Switzerland*, 2007, § 39). African instruments have also rarely been cited. One example is *Vo v. France* (EUROPEAN COURT OF HUMAN RIGHTS, 2004b, § 63) where the European Court took note of the abortion provision in the Protocol to the African Charter on the Rights of Women in Africa. The African Commission's case law has rarely been cited by the inter-American bodies.¹⁰

The Inter-American instruments and case law have been cited by the European Court in some cases.¹¹ The Inter-American Court and Inter-American Commission frequently cite the European Court and the African Commission frequently cites judgments of the European and Inter-American courts. The role of judicial decisions should be limited to the persuasive value of the reasoning of the court or quasi-judicial body (ROMANO, 2009, p. 783). However, sometimes a finding of the other tribunal is referred to, without considering the particular context of the case.

Judges in the European Court and Inter-American Court have sometimes in separate opinions cited the other court as taking a better approach to a particular issue. For example, in his dissenting opinion in *Anguelova v. Bulgaria* (EUROPEAN COURT OF HUMAN RIGHTS, 2002a, § 11), Judge Bonello of the European Court in a partly dissenting opinion noted:

It is cheerless for me to discern that, in the cornerstone protection against racial discrimination, the Court has been left lagging behind other leading human rights tribunals. The Inter-American Court of Human Rights, for instance, has established standards altogether more reasonable.

In other cases individual judges have cautioned against blindly following the approach of another court. In *López Álvarez v. Honduras* (INTER-AMERICAN COURT OF HUMAN RIGHTS, 2006, § 43), Judge Cançado Trindade of the Inter-American Court stated:

If other international organizations for the supervision of human rights have incurred in the uncertainties of a fragmenting interpretation, why would the Inter-American Court have to follow this road, abdicating its avant-garde jurisprudence, that has won it the respect of the beneficiaries of our system of protection as well as of the international community, and assume a different position that has even been abandoned by other organizations that had mistakenly followed it in the past? This does not make any sense.

3 Case studies

3.1 Corporal punishment

The European Convention, the American Declaration, the American Convention and the African Charter all prohibit inhuman or degrading treatment or punishment.¹² The prohibition is absolute. However, to decide what constitutes inhuman or degrading clearly requires interpretation. Therefore the definition may differ between the regional tribunals. This section discusses the approach taken by the European Court, the Inter-American Commission, the Inter-American Court and the African Commission in deciding whether corporal punishment is inhuman or degrading punishment. The approach of the UN treaty monitoring bodies will also be considered.

In *Tyrer v. United Kingdom* (EUROPEAN COURT OF HUMAN RIGHTS, 1978b) decided by the European Court in 1978, 15-year old Anthony Tyrer was convicted by a court in the Isle of Man and sentenced to three strokes with the birch. According to the Court “[t]he birching raised, but did not cut, the applicant’s skin and he was sore for about a week and a half afterwards.” The Court held, § 29, that the punishment was not severe enough to be considered torture or inhuman punishment. The Court then considered whether the punishment was degrading. The Court noted that any punishment has an “inevitable element of humiliation”, but that it would be absurd to consider all punishment degrading in the sense of what was prohibited under article 3 of the Convention.¹³ The Court held, § 30, that whether a punishment is degrading depends on the “nature and context of the punishment itself and the manner and method of its execution.” The Court found, § 33, that the punishment constituted an “assault on precisely that which it is one of the main purposes of Article 3 to protect, namely a person’s dignity and physical integrity.” The age of Mr Tyrer was not discussed as a factor, though the Court noted that the punishment “may have had adverse psychological effects.” (EUROPEAN COURT OF HUMAN RIGHTS, 1978b, § 33).

What is the role of regional consensus in interpreting treaty norms? The reference to the penal policy of member states in *Tyrer*, quoted above, cites European consensus. Opinions differ on whether the regional consensus determined the outcome of the case (LETSAS, 2007, p. 76, regional consensus not decisive; VANNESTE, 2010, p. 280, regional consensus decisive).

In *Costello-Roberts v. United Kingdom* (EUROPEAN COURT OF HUMAN RIGHTS, 1993a), decided by the European Court in 1993, Jeremy Costello-Roberts, aged seven, received “three ‘whacks’ on the bottom through his shorts with a rubber-soled gym shoe” as he had received five “demerit points” for, amongst other transgressions, having talked in the corridor and being late to bed. The Court found that the punishment had not been severe enough to be considered degrading and therefore found that there had been no violation of article 3. Four judges dissented on this finding and held:

[I]n the present case, the ritualised character of the corporal punishment is striking. After a three-day gap, the headmaster of the school ‘whacked’ a lonely and insecure 7-year-old boy. A spanking on the spur of the moment might have been permissible, but

in our view, the official and formalised nature of the punishment meted out, without adequate consent of the mother, was degrading to the applicant and violated Article 3.

At the relevant time the laws relating to corporal punishment applied to all pupils in both State and independent schools in the United Kingdom. However, reflecting developments throughout Europe, such punishment was made unlawful for pupils in State and certain independent schools. Given that such punishment was being progressively outlawed elsewhere, it must have appeared all the more degrading to those remaining pupils in independent schools whose disciplinary regimes persisted in punishing their pupils in this way.

The judgment references the Convention on the Rights of the Child (CRC), but not article 19 that explicitly provides that states “shall protect the child from all forms of physical or mental violence”. This provision clearly outlaws corporal punishment of children much more clearly than the prohibition on inhuman or degrading treatment that is also included in the CRC.¹⁴

In 1982 the UN Human Rights Committee adopted General Comment 7 which states, § 2, that the prohibition in article 7 “must extend to corporal punishment, including excessive chastisement as an educational or disciplinary measure.” The reference to “excessive chastisement” likely references the English common law provision of “reasonable chastisement” of children (EUROPEAN COURT OF HUMAN RIGHTS, *A v. UK*, 1998b, § 23).¹⁵ In General Comment 20, adopted in 1992, the UN Human Rights Committee stated that the prohibition on cruel, inhuman or degrading treatment or punishment in article 7 of the ICCPR “must extend to corporal punishment, including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure”.¹⁶ The new provision could be interpreted as allowing “reasonable chastisement” as punishment for a crime. However, in its decision in *Osbourne v. Jamaica* (UNITED NATIONS HUMAN RIGHTS COMMITTEE, 2000), the Committee held that “corporate punishment constitutes cruel, inhuman and degrading treatment or punishment contrary to article 7 of the Covenant.”¹⁷ As in the General Comments, the Committee provided no reasoning to back up its finding.

In 2003, the African Commission considered corporal punishment in *Doebbler v. Sudan* (AFRICAN COMMISSION ON HUMAN AND PEOPLES’ RIGHTS, 2003c). The complainants were female students who had been arrested for “immorality”, for instance having mixed with boys and wearing trousers. They were sentenced to lashes which “were carried out in public on the bare backs of the women using a wire and plastic whip that leaves permanent scars” (AFRICAN COMMISSION ON HUMAN AND PEOPLES’ RIGHTS, 2003c, § 30). The complainants argued that the punishment was “grossly disproportionate” (AFRICAN COMMISSION ON HUMAN AND PEOPLES’ RIGHTS, 2003c, § 6). The question of proportionality was not considered by the Commission which held that the only dispute was whether “the lashings” constituted cruel, inhuman or degrading punishment (AFRICAN COMMISSION ON HUMAN AND PEOPLES’ RIGHTS, 2003c, § 35). The Commission found a violation of

the African Charter. In support of its findings the Commission noted that in *Tyrer* “even lashings that were carried out in private, with appropriate medical supervision, under strictly hygienic conditions, and only after the exhaustion of appeal rights violated the rights of the victim.” The Commission further referred to its decision in *Huri-Laws v. Nigeria* (AFRICAN COMMISSION ON HUMAN AND PEOPLES’ RIGHTS, 2000c) that “the prohibition of torture, cruel, inhuman, or degrading treatment or punishment is to be interpreted as widely as possible to encompass the widest possible array of physical and mental abuses”. In *Doebbler*, the Commission made no reference to UN treaty monitoring bodies. The Commission did also not take the opportunity to engage with the jurisprudence from African national courts which has found corporal punishment unconstitutional. Neither did the Court examine to what extent corporal punishment was still practiced in AU member states. Such an inquiry could have enriched the decision of the Commission and also sent a clearer message to other states in Africa which have retained corporal punishment. The facts of the case clearly showed a violation of the Charter. However, the Commission’s reasoning, in particular with regard to finding a general prohibition of corporal punishment, was inadequate.

In 2005 it was the Inter-American Court’s turn to consider the issue of corporal punishment. In *Caesar v. Trinidad & Tobago* (INTER-AMERICAN COURT OF HUMAN RIGHTS, 2005a), Mr Caesar was sentenced for attempted rape to 20 years imprisonment with hard labour and 15 strokes of the ‘cat-o-nine tails’. The flogging was carried out almost two years after the confirmation of his sentence. The Court took note of the physical and psychological consequences of the corporal punishment. (INTER-AMERICAN COURT OF HUMAN RIGHTS, 2005a, § 49, p. 30-32).

In its analysis whether corporal punishment violated the American Convention, the Court quoted the UN Special Rapporteur on Torture, cited General Comment 20, the concluding observations of the UN Human Rights Committee on Trinidad and Tobago, the Committee’s case law, including *Sooklal v. Trinidad and Tobago* (UNITED NATIONS HUMAN RIGHTS COMMITTEE, 2001), the European Court’s judgment in *Tyrer v. UK* (EUROPEAN COURT OF HUMAN RIGHTS, 1978b) and *Ireland v. UK* (EUROPEAN COURT OF HUMAN RIGHTS, 1978a). The Court further noted that the Protocols to the Geneva Conventions prohibit corporal punishment. The Court cited domestic court judgments from Zimbabwe, Netherlands Antilles, the United States, Namibia, South Africa, Uganda and Zambia. Finally the Court cited its own judgment in *Loayza Tamayo v. Peru* (INTER-AMERICAN COURT OF HUMAN RIGHTS, 1997) in relation to the “right to physical and psychological integrity”. While the Court noted recent abolishment of corporal punishment in Anguilla, British Virgin Islands, Cayman Islands, Kenya, Pakistan and South Africa, it is noticeable that there is no discussion about the extent to which corporal punishment is still practiced in the states party to the American Convention. In conclusion, the Court noted the universal prohibition of cruel, inhuman or degrading punishment. The Court further

notes the growing trend towards recognition, at international and domestic levels, of the impermissible character of corporal punishment, with regard to its inherently cruel, inhuman and degrading nature. In consequence, a State Party to the American Convention, in compliance with its obligations arising from Articles 1(1), 5(1) and 5(2) of that instrument, is under an obligation erga omnes to abstain from imposing corporal punishment ...

The Court then goes on to find that corporal punishment as practiced in Trinidad and Tobago constitutes torture (INTER-AMERICAN COURT OF HUMAN RIGHTS, 2005a § 73). The Inter-American Commission in *Pinder v. Commonwealth of the Bahamas* held that a sentence of flogging in itself constituted cruel, inhuman or degrading punishment, even if the sentenced had not been executed. (INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, 2007, § 35).

In conclusion, it is clear that corporal punishment of children is clearly prohibited under the Convention on the Rights of the Child. However, using a universal consensus argument, the situation with regard to adults is less clear.¹⁸ Despite the position of the Inter-American Court, the African Commission and the Human Rights Committee it is not clear that there is an international consensus prohibiting all forms of corporal punishment against adults. The tribunals should provide more reasoning for extending their findings in relation to the specific cases before them to all forms of corporal punishment for adults. If such findings are based on values or that that corporal punishment is open for abuse, which an absolute ban prevents, rather than international consensus, then this should be made explicit in the reasoning of the tribunals.

3.2 Military courts trying civilians

The European Convention provides in article 6(1), as part of the right to fair trial, for the right to a hearing by “an independent and impartial tribunal” The ICCPR (art 14(1)) and the American Convention (art. 8(1)) have almost identical provisions but add that the tribunal should also be competent. The right to be tried by an “impartial court or tribunal” is also provided for in article 7(1) of the African Charter. Article 26 of the Charter provides that states have a duty to “guarantee the independence of the courts”. There is no mention of military courts in these treaties.

In General Comment 13, adopted in 1984, the UN Human Rights Committee held that:¹⁹

While the Covenant does not prohibit [military courts which try civilians], nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14.

In its Resolution on the Right to a Fair Trial and Legal Assistance in Africa adopted in 1999, the African Commission went further and held that military

courts “should not in any circumstances whatsoever have jurisdiction over civilians.” The Commission has applied this provision in a number of cases (AFRICAN COMMISSION ON HUMAN AND PEOPLES’ RIGHTS, *Media Rights Agenda v. Nigeria*, 2000b; AFRICAN COMMISSION ON HUMAN AND PEOPLES’ RIGHTS, *Law Office of Ghazi Suleiman v. Sudan (I)*, 2003b). In one case a military court sentenced two civilians and three soldiers to death for offences of a civilian nature. The Commission held (*Wetsb’okonda Koso and Others v. Democratic Republic of the Congo* (AFRICAN COMMISSION ON HUMAN AND PEOPLES’ RIGHTS, 2008) § 87)) that “[i]n the absence of any facts that could convince the Commission of the opposite view, it cannot invalidate the submission by the complainants regarding the inexistence of a fair justice system.”

In *Castillo Petruzzi et al v. Peru* (INTER-AMERICAN COURT OF HUMAN RIGHTS, 1999a), the Inter-American Court quoted the UN Basic Principles on the Independence of the Judiciary to the effect that “[t]ribunals that do not use the duly established procedures of the legal process [...] to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.” (INTER-AMERICAN COURT OF HUMAN RIGHTS, 1999a, § 129). The Court held that “the military tribunals that tried the alleged victims for the crimes of treason did not meet the requirements implicit in the guarantees of independence and impartiality that Article 8(1) of the American Convention recognizes as essentials of due process of law.” (INTER-AMERICAN COURT OF HUMAN RIGHTS, 1999a, § 132). In *Durand and Ugarte v. Peru* (INTER-AMERICAN COURT OF HUMAN RIGHTS, 2000), decided a year after *Castillo Petruzzi*, the Inter-American Court went further and held that civilians should be excluded from military jurisdiction. (INTER-AMERICAN COURT OF HUMAN RIGHTS, 2000, § 117). The case did not deal with trial before a military court, but rather that a military court had been charged with investigating facts and liability with regard to alleged massive violations of human rights committed by the military. In support of its finding, the Court cited two decisions of the UN Human Rights Committee with regard to investigations of human rights violations. The position that civilians should not be tried by military courts was confirmed in *Palamara Iribane v. Chile*, where the Court held (INTER-AMERICAN COURT OF HUMAN RIGHTS, 2005e, § 124), that “only military members should be tried [by military tribunals] for the commission of criminal offenses or breaches which, due to their own nature, constitute an attack on military legal interests.”

Ergin v. Turkey (EUROPEAN COURT OF HUMAN RIGHTS, 2006), decided by the European Court in 2006, dealt with the prosecution before a military court of an editor of a newspaper for “incitement to evade military service”. The question before the Court was whether a trial of a civilian before a military tribunal violated the right to a trial by an “independent and impartial tribunal”. The Court summarized the position in other European countries as follows: “in the great majority of legal systems that jurisdiction is either non-existent or limited to certain very precise situations, such as complicity between a member of the military and a civilian in the commission of an

offence (...). (EUROPEAN COURT OF HUMAN RIGHTS, 2006, § 21). The Court quoted General Comment 13 of the UN Human Rights Committee and concluding observations of the Committee on state reports under the ICCPR. The Court also quoted a report on the administration of justice by military courts submitted to the UN Commission on Human Rights. The Court further noted that “[t]he settled case-law of the Inter-American Court of Human Rights excludes civilians from the jurisdiction of military courts”. (EUROPEAN COURT OF HUMAN RIGHTS, 2006, § 25 citing *Durand and Ugarte v. Peru* (INTER-AMERICAN COURT OF HUMAN RIGHTS, 2000)). The Court cited its own case law on related cases and held that “only in very exceptional circumstances could the determination of criminal charges against civilians in [courts composed solely of military officers] be held to be compatible with Article 6.” (EUROPEAN COURT OF HUMAN RIGHTS, 2006, § 44). The Court noted that it “derives support in its approach from developments over the last decade at international level.” (EUROPEAN COURT OF HUMAN RIGHTS, 2006, § 45). This case thus illustrates the increased use of international developments by the European Court to support its findings.

As noted above the African Commission and the Inter-American Court have held that trial of civilians by military courts violate the right to trial by an impartial court. However, it is noticeable that the cases decided by the African Commission and Inter-American Court on this issue goes beyond this finding and include discussions about how the military courts violated various fair trial guarantees in the specific cases.

3.3 Positive obligations

Human rights treaties do not only prohibit states from taking action. As the African Commission noted in *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (AFRICAN COMMISSION ON HUMAN AND PEOPLES’ RIGHTS, 2001) (§ 44) states have the “duty to respect, protect, promote and fulfil these rights”. These duties to various extents require states to take action. In the *SERAC* case (AFRICAN COMMISSION ON HUMAN AND PEOPLES’ RIGHTS, 2001), the complainants argued that the state had actively participated in violations of the rights of members of the Ogoni people and that the state had failed to protect the population from harm. The Commission cited its own case law as well as *Velásquez Rodríguez v. Honduras* (INTER-AMERICAN COURT OF HUMAN RIGHTS, 1988) and *X and Y v. the Netherlands* (EUROPEAN COURT OF HUMAN RIGHTS, 1985) to demonstrate that governments have a duty to protect their citizens from “damaging acts” perpetrated by private parties. (AFRICAN COMMISSION ON HUMAN AND PEOPLES’ RIGHTS, 2001§ 57).

In *X and Y v. the Netherlands* (EUROPEAN COURT OF HUMAN RIGHTS, 1985), concerning the rape of a mentally disabled girl, the European Court held that since Dutch legislation did not allow criminal proceedings because the girl could not lay a criminal charge, the Netherlands violated the right to privacy in article 8. The Court held (EUROPEAN COURT OF HUMAN RIGHTS, 1985, § 23) that

although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life.

In deciding the case the Court held (EUROPEAN COURT OF HUMAN RIGHTS, 1985, § 27) that “[e]ffective deterrence is indispensable in this area and it can be achieved only by criminal-law provisions.”

The European Court has also found violations of article 8 in a number of environmental cases, (EUROPEAN COURT OF HUMAN RIGHTS, *López Ostra v. Spain*, 1994; EUROPEAN COURT OF HUMAN RIGHTS, *Guerra and Others v. Italy*, 1998a). According to the Court “to raise an issue under Article 8 the interference must directly affect the applicant’s home, family or private life.” (EUROPEAN COURT OF HUMAN RIGHTS, *Fadeyeva v. Russia*, 2005b, § 68). The state has a large margin of appreciation, but the Court will evaluate whether a fair balance has been struck between societal interests and the interests of the affected individual. In determining the interests of the individual the Court has in some cases cited international environmental standards under “relevant law” (EUROPEAN COURT OF HUMAN RIGHTS, *Taşkin and Others v. Turkey*, 2004c).

In *Oluić v. Croatia* (EUROPEAN COURT OF HUMAN RIGHTS, 2010b) Ms Oluić argued that the fact that the authorities had taken no action against the excessive noise levels from a bar located in the house where she lived constituted a violation of the right to privacy in article 8 of the European Convention. The European Court noted that the noise levels exceeded local regulations and also “the international standards as set by the World Health Organisation and most European countries”. (EUROPEAN COURT OF HUMAN RIGHTS, 2010b, § 60). The Court concluded that “in view of the volume of the noise – at night and beyond the permitted levels – and the fact that it continued over a number of years and nightly, the Court finds that the level of disturbance reached the minimum level of severity which required the relevant State authorities to implement measures in order to protect the applicant from such noise.” (EUROPEAN COURT OF HUMAN RIGHTS, 2010b, § 62). While in the similar case of *Moreno Gómez v. Spain* (EUROPEAN COURT OF HUMAN RIGHTS, 2004d), there was no reference to international standards, it is clear that in both cases the judgments were based on a failure by the authorities to enforce local regulations.

The extension of the European Convention to the “right to sleep well” has been criticised (LETSAS, 2007, p. 126). However, criticism of ‘rights inflation’ does not diminish the importance of positive obligations in relation to established rights. In *Öneryıldız v. Turkey* (EUROPEAN COURT OF HUMAN RIGHTS, 2004e) the applicant lived with relatives close to a garbage dump in a slum in Istanbul. A methane explosion at a garbage dump caused the burial of ten dwellings. The Court held (EUROPEAN COURT OF HUMAN RIGHTS, 2004e, § 109) that the city violated the applicant’s right to life in article 2 of the European Convention because the “authorities did not do everything within

their power to protect [the inhabitants of the slum] from the immediate and known risks to which they were exposed”. The Court noted that article 2 “does not solely concern deaths resulting from the use of force by agents of the State but also, in the first sentence of its first paragraph, lays down a positive obligation on States to take appropriate steps to safeguard the lives of those within their jurisdiction”.

The Inter-American Court has interpreted the right to life in article 4 of the Convention to include

not only the right of every human being not to be deprived of his life arbitrarily, but also the right that he will not be prevented from having access to the conditions that guarantee a dignified existence. States have the obligation to guarantee the creation of the conditions required in order that violations of this basic right do not occur and, in particular, the duty to prevent its agents from violating it.

“Street Children” (Villagrán-Morales et al.) v. Guatemala
(INTER-AMERICAN COURT OF HUMAN RIGHTS, 1999b, § 144)

This observation of the Court was made in the context of extra-judicial killings. The Court quoted General Comment 3 of the UN Human Rights Committee to the effect that states have a duty to prevent extra-judicial killings by state agents. In *Juvenile Reeducation Institute* (INTER-AMERICAN COURT OF HUMAN RIGHTS, 2004b, § 158), the Court held:

The right to life and the right to humane treatment require not only that the State respect them (negative obligation) but also that the State adopt all appropriate measures to protect and preserve them (positive obligation), in furtherance of the general obligation that the State undertook in Article 1(1) of the Convention.

This case dealt with conditions of detention, but the principle has broader implications. In *Yakye Axa v. Paraguay* (INTER-AMERICAN COURT OF HUMAN RIGHTS, 2005b) the Court found a violation of the right to life of the members of an indigenous community as the state had not taken ‘measures regarding the conditions that affected their possibility of having a decent life.’ (INTER-AMERICAN COURT OF HUMAN RIGHTS, 2005b, § 176). The Court ordered (INTER-AMERICAN COURT OF HUMAN RIGHTS, 2005b, § 205) that

the State must allocate US \$950,000.00 (nine hundred and fifty thousand United States dollars), to a community development program that will consist of implementation of education, housing, agricultural and health programs for the benefit of the members of the Community. The specific components of said projects will be decided by the implementation committee, described below, and they must be completed within two years of the date the land is given to the members of the Indigenous Community.

In its case law on positive obligations the regional tribunals have stretched the text of the conventions. So far, the Inter-American Court has taken this approach the furthest as illustrated above. However, all the regional systems have followed this approach without any serious backlash from states, though Paraguay is yet to implement the judgment in the *Yakye Axa* delivered in 2005. (AMNESTY INTERNATIONAL, 2010). The objective and purpose of human rights treaties requires the recognition and enforcement of positive obligations.

4 Conclusion

In interpreting the provisions of international human rights treaties, regional tribunals look to the text in context and in light of the object and purpose: The effective protection of human rights. This has led the tribunals to stretch the text of the provisions of the treaties in particular in the development of positive obligations of states. The provisions of a treaty must be applied in good faith. As held by the Inter-American Court in *Loayza-Tamayo* this means that states cannot ignore the findings of the Inter-American Commission just because they are called recommendations.

In giving meaning to terms in the treaties, the tribunals must come up with autonomous definitions, meanings that are independent from how a particular term is defined nationally. Through the living instrument approach, it is recognised that the meaning of many terms are not static and may change over time. The tribunals are aware that they do not exist in isolation but that they form part of a network of states, international institutions and non-governmental actors. The dialogue that has developed has led to an increasingly convergent international human rights law. The African and Inter-American human rights tribunals have generally followed a universalistic approach, by extensively relying on UN and regional human rights instruments (including soft law) as well as decisions from the UN and regional human rights monitoring bodies in interpreting the provisions of the relevant regional treaty. While the European Court has traditionally considered whether there is a regional consensus on an issue, the Court has in recent years increasingly followed a universalistic approach.

It has been noted that the General Comments of the UN treaty monitoring bodies have a harmonising effect on the development of human rights law (PASQUALUCCI, 2007, p. 39). However, the harmonising role of the UN committees is not without its problems. In particular the lack of judicial reasoning in the General Comments and views adopted by the treaty monitoring bodies is problematic (MECHLEM, 2009). The reasoning of regional tribunals is also sometimes unclear. Reasoning is important as it provides states and individuals with predictability so that action can be taken to avoid violations. Good reasoning may lead to better compliance with the decisions of the tribunals and may also help to achieve societal acceptance on controversial issues.

The first port of call for the protection of human rights is the national system. Regional and global human rights tribunals have an important complementary role to play. However, it is a role that these courts and quasi-judicial bodies can only play effectively if they provide well-reasoned decisions.

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NOTES

1. The two commissions and the two courts are in this article collectively referred to as the regional tribunals. The African Court, established in 2006, has not yet produced any substantive case law. It should also be noted that many other courts and quasi-judicial bodies apply the provisions of the European Convention, the American Convention and the African Charter, but other actors would in general follow the approach of the main treaty interpreter. In relation to domestic courts see the UK Human Rights Act s 2 (courts 'must take into account' judgments of the European Court on Human Rights. In relation to other international courts see eg the practice of the European Court of Justice in relation to the European Convention. However, it must be noted that domestic courts often neglect to consider relevant international jurisprudence. See eg Letsas (2007). On the Inter-American Court see Neuman (2008). On the UN human rights treaty bodies see Mechlem (2009). Comparative studies include Shelton (2008); Vanneste (2010).
2. Though see art. 29 of the American Convention and arts. 60 & 61 of the African Charter
3. The African Commission has referred to some of the provisions in the Vienna Convention but never art. 31.
4. The African Commission has sometimes resorted to dictionaries to establish the meaning of a provision. This approach has rarely been applied by the European or Inter-American Court.
5. See e.g. separate opinion of García Ramírez in *Raxcaco Reyes v. Guatemala* (INTER-AMERICAN COURT OF HUMAN RIGHTS, 2005d, § 12).
6. For a list of terms which have been held, explicitly or implicitly, by the European and Inter-American courts to have autonomous meanings see Vanneste (2010, p. 232-235).
7. It should also be noted that the African Commission has on occasion found violations of not only the African Charter but also of other international treaties and even soft law instruments. It remains to be seen whether the African Court will take the same approach. Article 7 of the Protocol establishing the Court provides that '[t]he Court shall apply the provisions of the Charter and any other relevant human rights instruments ratified by the States concerned.' However, this issue of application should be distinguished from interpretation.
8. These include trade union rights and the right to education. See Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, 'Protocol of San Salvador', art. 19(6).
9. The Court notably leaves out the position of the African Commission.
10. African Commission decisions were cited in the decisions of the Inter-American Commission in *Maya indigenous communities of the Toledo district v. Belize* (INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, 2004, § 149) and *Ecuador v. Colombia* (INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, 2010, § 117).
11. See e.g. *Mamatkulov and Askarov v. Turkey* (provisional measures) (EUROPEAN COURT OF HUMAN RIGHTS, 2005a), *Akdivar and Others v. Turkey* (exhaustion of local remedies) (EUROPEAN COURT OF HUMAN RIGHTS, 1996), *Öcalan v. Turkey* (due process in death penalty cases) (EUROPEAN COURT OF HUMAN RIGHTS, 2005c), *Kurt v. Turkey* (EUROPEAN COURT OF HUMAN RIGHTS, 1998c), *Varnava and Others v. Turkey* (EUROPEAN COURT OF HUMAN RIGHTS, 2009a) (enforced disappearances), *Ergin v. Turkey (no 6) (military courts)* (EUROPEAN COURT OF HUMAN RIGHTS, 2006), *Šilih v. Slovenia* (lack of investigation) (EUROPEAN COURT OF HUMAN RIGHTS, 2009b), *Stoll v. Switzerland* (freedom of information) (EUROPEAN COURT OF HUMAN RIGHTS, 2007), *Zolotukhin v. Russia (ne bis in idem)* (EUROPEAN COURT OF HUMAN RIGHTS, 2009c), *Opuz v. Turkey* (state responsibility) (EUROPEAN COURT OF HUMAN RIGHTS, 2009d), *Lexa v. Slovakia* (amnesty) (EUROPEAN COURT OF HUMAN RIGHTS, 2008).
12. The American Convention and the African Charter also includes a prohibition on cruel treatment or punishment. It is not clear how cruel treatment/punishment differs from inhuman treatment/punishment.
13. Cf *Ireland v. UK* (EUROPEAN COURT OF HUMAN RIGHTS, 1978a, § 27) where Judge Fitzmaurice noted in a separate opinion that: "As a matter of interest some dictionary meanings of the notions of 'degrading' and 'degraded' are given in the footnote below, - but in everyday speech these terms are used very loosely and figuratively (...)" On such a basis almost anything that is personally unpleasant or disagreeable can be regarded as degrading by those affected."
14. Cf UNITED NATIONS COMMITTEE ON THE RIGHTS OF THE CHILD (2006)
15. The concept of reasonable chastisement was removed from English common law in 2004.
16. Namibia, South Africa, Zambia & Zimbabwe.
17. See also *Pryce v. Jamaica* (UNITED NATIONS HUMAN RIGHTS COMMITTEE, 2004), *Sooklal v. Trinidad & Tobago* (UNITED NATIONS HUMAN RIGHTS COMMITTEE, 2001), *Higginson v. Jamaica* (UNITED NATIONS HUMAN RIGHTS COMMITTEE, 2002).
18. Cf. the practice and views of some states, Nowak (2010, § 209-227).
19. See also the Committee's case law eg *Abassi v. Algeria* (UNITED NATIONS HUMAN RIGHTS COMMITTEE, 2007).

RESUMO

Em geral, normas de direitos humanos são imprecisas, quer em cartas nacionais de direitos, quer em tratados regionais ou globais de direitos humanos. Essas normas, portanto, demandam interpretação. Este artigo revela como tribunais regionais de direitos humanos têm seguido amplamente as regras de interpretação de tratados estabelecidas pela Convenção de Viena sobre o Direito dos Tratados. Ao interpretar os direitos estabelecidos e as limitações a eles impostas, a Corte Europeia tradicionalmente reserva um espaço maior para o consenso regional do que a Corte Interamericana e a Comissão Africana, as quais frequentemente olham para além de seus continentes, para tratados e instrumentos quase legais [*soft law*] da ONU e para a jurisprudência de outras cortes regionais. Este artigo defende que a fundamentação utilizada por tribunais regionais para suas decisões é por vezes inadequada. A qualidade da fundamentação judicial nesses tribunais é importante, uma vez que garante previsibilidade para que Estados e indivíduos possam evitar futuras violações de direitos humanos. Uma boa fundamentação das decisões também contribui para sua melhor implementação, bem como para uma melhor aceitação pela sociedade de temas controversos.

PALAVRAS-CHAVE

Interpretação de tratados – Sistemas regionais de direitos humanos

RESUMEN

Incluidos en declaraciones nacionales de derechos o en tratados de derechos humanos regionales o mundiales, los derechos humanos a menudo carecen de precisión. Requieren de interpretación. El presente artículo ilustra la forma en que los tribunales regionales de derechos humanos han seguido en gran medida las reglas de interpretación de tratados establecidas en la Convención de Viena sobre el Derecho de los Tratados. En la interpretación de los derechos y sus limitaciones, tradicionalmente el Tribunal Europeo ha puesto mayor énfasis en el consenso regional que la Corte Interamericana y la Comisión Africana, que a menudo miran hacia fuera de sus continentes y recurren al derecho indicativo y tratados de Naciones Unidas y a la jurisprudencia de otros tribunales regionales. Sin embargo, se observa una tendencia hacia el universalismo también en la jurisprudencia del Tribunal Europeo. El presente artículo muestra que el razonamiento que presentan los tribunales regionales suele ser inadecuado. La calidad del razonamiento es importante ya que les brinda previsibilidad a los Estados e individuos de modo que se puedan tomar medidas para evitar las violaciones de los derechos humanos. Un buen razonamiento también puede ayudar a lograr un mayor cumplimiento de las decisiones y aceptación social respecto de cuestiones controvertidas.

PALABRAS CLAVE

Interpretación de tratados – Sistemas regionales de derechos humanos



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ABSTRACT

Enhancing human rights protection at the international level through cooperation between the universal and regional human rights systems has been a common aspiration for both systems since their inception. The establishment of the Universal Periodic Review mechanism in the United Nations has created new opportunities for such cooperation, by outlining various avenues for regional mechanisms to contribute to the process. Widespread interest from Governments, civil society organisations, and human rights mechanisms in both systems, to make effective the Inter-American system's participation in the process, has resulted in the Inter-American system being present in each of the stages of the UPR process, from the first country reviews onward. The article argues, however, that more can be done for the Inter-American system to fully take advantage of the mechanism.

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KEYWORDS

Universal Periodic Review – Inter-American Human Rights System – Universal Human Rights System – United Nations Human Rights Council – Cooperation between universal and regional mechanisms/organisations – United Nations



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COOPERATION BETWEEN THE UNIVERSAL AND INTER-AMERICAN HUMAN RIGHTS SYSTEMS IN THE FRAMEWORK OF THE UNIVERSAL PERIODIC REVIEW MECHANISM

Antonio M. Cisneros de Alencar

1 Cooperation between the Universal and Inter-American Systems, a common aspiration

The potential of achieving enhanced protection at the international level through cooperation between the universal (United Nations) and regional human systems was envisaged ever since the United Nations (UN) and the Organisation of American States (OAS) were established. The UN Charter, for example, devotes one of its chapters to cooperation with regional arrangements and regional agencies, encouraging States to work with these in the settlement of disputes, prior to any UN intervention (UNITED NATIONS, 1945, c. VIII, art. 52-2)¹. The OAS Charter, on the other hand, tasks its General Assembly with strengthening and coordinating cooperation with the UN and its specialized agencies (ORGANIZATION OF AMERICAN STATES, 1951, art.54-c); it also tasks its Permanent Council with preparing agreements to facilitate cooperation with the UN (ORGANIZATION OF AMERICAN STATES, 1951, art.91-d).

The issuing of the American Declaration of the Rights and Duties of Man and the Universal Declaration of Human Right, with only a few months difference² and with a very similar set of civil, cultural, economic, political and social rights to be protected, confirmed that the potential which led each organisation to promote cooperation with the other in their respective Charters, also applied to the protection of human rights.

As each system developed an increasingly more comprehensive and complex set of norms and mechanisms to translate these international precepts into effective human rights protection for all, the avenues for cooperation between both systems multiplied; in the Inter-American system, through the work of the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of

Notes to this text start on page 182.

Human Rights (IACourt); in the UN's system through the work of the former Commission for Human Rights (UNCHR), the numerous Committees established to monitor the implementation of human rights treaties, and the Office of the High Commissioner for Human Rights (OHCHR).

Examples of cooperation between both systems have since multiplied. Mandate holders in both systems have undertaken joint actions, such as issuing joint press releases in response to specific human rights situations³; the IACHR has often encouraged States to ratify UN human rights treaties, along with the regional treaties⁴; the IACHR and OHCHR have already elaborated and issued joint thematic reports⁵; and both systems have even deployed joint missions to the field, to verify the respect of human rights⁶. Many of these initiatives, however, have remained isolated examples, and cooperation between both has largely depended on favorable circumstances.⁷

2 A new UN Human Rights Council, new opportunities for cooperation

Given this history of cooperation between both systems, it came as no surprise that, when the UN replaced the UN Commission for Human Rights with the UN Human Rights Council (HRC) in 2006, new possibilities for cooperation arose; the UN General Assembly specifically calling for the new HRC to work in close cooperation with, *inter alia*, regional organisations (UNITED NATIONS, 2006, p. 3, para. 5-h).

One such new avenue for cooperation between both systems is the Universal Periodic Review (UPR). Established as a cooperative mechanism to review fulfilment by all States of their human rights obligations and commitments (UNITED NATIONS, 2006, p. 3, para. 5-e), the UPR presents several innovations vis-à-vis other human rights mechanisms developed until now in both systems:

1. Universal coverage – while there are human rights bodies in both systems with mandates which are both geographically (all member States) and/or thematically (all human rights) universal, the UPR represents a first concerted and systematic effort to review all countries on all human rights, within a specified time-frame (four years for the first cycle).
2. State-driven process – while human rights evaluations by other mechanism in both systems rely on independent experts to analyze the situation and issue recommendations, the review of the State in the case of the UPR is undertaken by the States themselves (based, *inter alia*, on a background document summarizing observations and recommendations by independent experts).
3. Nature of the recommendations – while recommendations by other human rights mechanisms in both systems are made by independent experts on behalf of the organisation, UPR recommendations remain ascribed to the issuing State, and States under review have the possibility of choosing which recommendations they will give further consideration to, and which they will only note.
4. Voluntary commitments – unlike other mechanisms in both systems, which are focused on measuring advances against obligations previously acquired

by the State, either implicitly (through membership in the organisation, for example), or explicitly (through treaties ratified, for example), the UPR allows States to also present voluntary commitments against which they would also like to be reviewed.

The new mechanism's stated objectives are comprehensive, and include: improving the human rights situation on the ground; enhancing the States' capacity and that of technical assistance; sharing best practices; supporting cooperation in the promotion and protection of human rights; and encouraging cooperation and engagement with other mechanisms (UNITED NATIONS, 2007, p. 3, para. 4). Its effectiveness in achieving these goals will probably require some time to be evaluated properly (especially given that the first cycle is yet to end). However, States, international organisations and civil society organisations have generally provided positive assessments of this new mechanism, as can be evidenced by the current discussions regarding the HRC Review⁸.

3 Cooperation with regional mechanisms, as envisaged for the Universal Periodic Review

Participation by regional organisations in this new mechanism, as a relevant stakeholder, was contemplated from the beginning as one of the mechanism's principles (UNITED NATIONS, 2007, p. 2, para. 3, Principle-m)⁹. But the resolution establishing the mechanism goes further than stating this as one of its principles; it outlines four avenues for regional organisations to contribute in the process, namely:

1. The preparation of the documents which will serve as the basis for the review – The resolution states that regional organisations, as a relevant stakeholder, can provide credible and reliable information for the UPR, for OHCHR to summarize, along with other contributions, in a 10-page report (UNITED NATIONS, 2007, p. 3, para. 15, Documentation-c).
2. The review by the UPR Working Group – The resolution states that regional organisations, as a relevant stakeholder, may attend the review sessions, when it takes place (although the interactive dialogue and issuing of recommendations is limited to States only) (UNITED NATIONS, 2007, p. 4, para. 18, Modalities-c).
3. The adoption of the outcome – The resolution states that regional organisations, as a relevant stakeholder, have the opportunity to make general comments before the adoption of the outcome by the plenary. These are then recorded in the HRC session's report (UNITED NATIONS, 2007, p. 5, para. 31).
4. The follow-up to the review – The resolution states that the outcome of the UPR, as a cooperative mechanism, can be implemented with other relevant stakeholders, such as regional organisations, when appropriate (UNITED NATIONS, 2007, p. 5, para. 32). The resolution also calls for the international community to assist the State reviewed with capacity-building and technical assistance, with its consent (UNITED NATIONS, 2007, p. 5, para. 36).

4 The first cycle of the UPR and cooperation in practice

The relevance of including information regarding the Inter-American System in the UPR review was recognized by States, from the beginning. The Inter-American system is mentioned in all but three of the national reports presented by the 26 American countries reviewed by the UPR Working Group during its first 9 sessions¹⁰. In these reports, Governments noted the efforts their country had undertaken to ratify regional instruments, integrate them into national legislation, cooperate with its mechanisms, or take measures to address the mechanisms' findings or recommendations.

The compilation of relevant official UN documents prepared by OHCHR - the second background document for the review - also included observations regarding cooperation with the Inter-American system from the start. These reports include mentions by UN mechanisms of issues such as: responses provided by the State to inquiries from regional mechanisms (Argentina); follow-up provided by the State to appeals (Barbados) or recommendations (El Salvador) made by regional mechanisms; calls for technical cooperation from OAS entities (Brazil); compliance with judgements (Peru), compensations (Nicaragua), and precautionary measures (Panama) from regional mechanisms; and on amicable settlements in cases before regional mechanisms (Ecuador). In the case of the United States of America, the document recalled a pledge made by the country before UN mechanisms, to cooperate with the IACHR and other regional human rights bodies, by responding to inquiries, engaging in dialogues and hosting visits.

The third background report - namely the summary of information provided by relevant stakeholders - which is also prepared by OHCHR, also mentions the IACHR from the initial sessions, despite the fact that the IACHR only began providing information on the Inter-American system from the 6th Session of the UPR Working Group onward; it has since consistently presented submissions on all the countries being reviewed by the UPR Working Group, for which it has information (either from the IACHR or the IACourt)¹¹, which have been integrated in the summary reports. Prior to the 6th Session, the Inter-American mechanisms were featured in stakeholders' summaries because they had been cited by submissions by civil society organisations¹².

Based on this first cycle then, one can say that there is ample precedent in example, for the Inter-American system to be part of the background information considered by UN member States for the review of American countries in the following UPR sessions. Therefore, the interest of States to ensure the participation of regional organisations, as relevant stakeholders, in the work of the mechanism when it was created, seems to have been met in the case of the Inter-American system; at least in terms of the information made available to States for the review.

But, the key question is: Has the inclusion of information on the Inter-American system in the background documentation that serves as a basis for the UPR translated into the consideration of the issues it raises, in the review of American States? Evidence clearly suggests it has.

Mentions of the Inter-American system, the OAS, its human rights bodies, or its instruments are not many, in the reports of the interactive dialogue held between the reviewing States and the States under review during the first nine

UPR Working Group sessions. Mentions however, are present in the majority of the reviews of American countries undertaken so far¹³.

Notably, it's the States under review that refer most to the Inter-American system in their presentations and/or responses during the interactive dialogue. During their respective reviews, the delegations from Barbados, Belize, Bolivia, Dominica and Peru, all alluded to their country's ratification of Inter-American instruments; Argentina and El Salvador referred to dialogue and friendly settlements reached with victims on cases before the IACHR; Belize, Bolivia, Panama, and Guatemala noted the follow-up they had provided to recommendations or provisional measures by the IACHR, while Chile and El Salvador noted their compliance with decisions by the IACourt; Brazil, Honduras, Jamaica, and Uruguay cited their cooperation with the Inter-American human rights mechanisms. The Peruvian delegation stated that their country would in no circumstances move away from the Inter-American system.

But considerations on the Inter-American system have also been made by the States reviewing American States in the review session. What's more surprising, mentions of the Inter-American system are not limited to American States, but have also been included in interventions by non-American States. Some interventions simply recognized areas in which the State under review had cooperated with the Inter-American system¹⁴, but other interventions noted relevant findings and decisions by Inter-American mechanisms. In Chile's review, for example, Paraguay asked the country to elaborate on its experience as party to cases brought before the Inter-American human rights bodies; Slovenia, asked Colombia for an update on a request for provisional measures made in 2005 by the IACHR, also stating that it hoped to see new draft legislation on reparations for victims of the armed conflict in line with recommendations made by the IACHR. Also in Colombia's review, Uruguay noted that an OAS mission in charge of oversight of the mobilization process had identified over 20 paramilitary groups, recommending Colombia expedite the process to demobilize paramilitary chiefs and combatants. In Honduras' review, Australia expressed support for OAS' recommendations for a continued investigation into the high murder rate, especially with regard to journalists and human rights activists.

The impact of the Inter-American system on the discussions in the review, however, goes beyond these specific mentions of its instruments and organs. Issues that have been followed closely by the Inter-American mechanisms have often been part of the interactive dialogue held during the UPR reviews, even though the Inter-American system was not explicitly mentioned in the statements. It would be difficult to objectively measure the degree to which the Inter-American system contributed in these cases, considering that several of these issues are also followed by UN system mechanisms and by national stakeholders; but there is evidence that its contribution has been significant, even when other stakeholders were involved in the issue.

A good example of this is the Dominican Republic's review. OHCHR's report summarizing stakeholders' contributions notes IACHR information indicating that in 2005, the IACourt ordered the Dominican Republic to adopt within its domestic law, legislative, administrative and other measures needed to regulate the procedure and requirements for acquiring Dominican nationality based on the late declaration of birth. It also reported that in 2007, the IACourt had declared

it would continue monitoring compliance with this order, which it had found pending fulfillment (UNITED NATIONS, 2009k, p. 9, para. 44).

While the IACourt's findings were not cited during the review of the Dominican Republic itself, the Governmental delegation did indirectly refer to the issue, by citing advances since 2007 such as the establishment of a three-year amnesty for late birth registrations for nationals under the age of 16 (UNITED NATIONS, 2010a, p. 3-4, para. 8). Likewise, at least three reviewing delegations referred to the issue; all of them also members of the Inter-American system¹⁵. Canada recommended that the Dominican Republic "ensure that appropriate legal frameworks are in place in line with the international conventions governing the issue of nationality"; a recommendation which closely follows the information provided by the IACHR in the stakeholders' summary report. The recommendation finally did not enjoy the support of the Dominican Republic, on the grounds that the State under review considered that nationality is already established in the Constitution and is not open to interpretation (UNITED NATIONS, 2010a, p. 19, para. 89-1). This, however, shows the interesting interplay that can occur during the UPR review, on issues followed by both the Inter-American and universal human rights systems.

Like Canada's recommendation above, there are various cases of recommendations that do not mention the Inter-American system explicitly, but that deal with issues related to those highlighted by its mechanisms. In the first eight sessions of the UPR Working Group, there are only a few recommendations in which Inter-American system is explicitly mentioned; most are related to the signing or ratifying of regional instruments, but not all. Brazil and Mexico both recommended Canada to consider ratifying/adhering to the American Convention on Human Rights, during its review (UNITED NATIONS, 2009c, p. 7, 9, 17, para. 29, 40, 86-Recommendation 8); while Brazil and Uruguay asked the same of Guyana, when its review took place (UNITED NATIONS, 2010f, p. 17-18, para. 70-Recommendations 7, 8); and Brazil, Uruguay and Venezuela, all asked the United States of America to accede, sign or ratify all pending Inter-American human rights instruments, with Brazil also asking for it to recognize the jurisdiction of the IACourt (UNITED NATIONS, 2010k, p. 13-16, para. 92-Recommendations 92.1, 92.42, 92.43). The case of Honduras is different, Brazil and Ireland both asked the state to comply with the precautionary measures requested by the IACHR, showing that recommendations can go beyond the ratification of regional instruments (UNITED NATIONS, 2010l, p. 15, 17, para. 82-Recommendations 82.35, 82.58). As with the interactive dialogue, however, this limited number of mentions, does not necessarily mean that reviewing States did not take into account other issues raised by the Inter-American system in their review of American States, but rather, that the Inter-American system was not cited in the recommendations.

Of course, the possibility States have under review, of choosing which recommendations they will give further consideration to, and which they will only note, means some of the above recommendations explicitly citing the Inter-American system means some, in the end may only be noted. Those addressed to Canada were not accepted by the State under review, which explained that at present, Canada is not considering becoming a party to the American Convention on Human Rights, although it said that the treaty could be reviewed at a later date

(UNITED NATIONS, 2009i, p. 2, para. 9). But Guyana voluntarily committed itself to actively consider those remaining international human rights instruments, noting that although Guyana has not signed the American Convention on Human Rights, as a member of the OAS, it is obligated to report and to respond to matters raised by Inter-American mechanisms, and does so as requested. (UNITED NATIONS, 2010i, p. 4, para. 23, 29). The recommendations made by Brazil and Ireland in relation to precautionary measures by the IACHR were accepted by Honduras (UNITED NATIONS, 2010l, p. 15, 17, para. 82). The United States of America has yet to pronounce itself on the recommendations on the Inter-American system made by Brazil, Uruguay and Venezuela.

5 The way forward for cooperation, in the framework of the UPR

As this brief review shows, despite the novelty of the UPR, there are now several and varied examples of participation by the Inter-American system in the mechanism. These examples are probably enough so as to conclude that – in the case of the Americas – the mechanism is on the path towards ensuring the kind of participation by regional organisations that had been contemplated when the mechanism was created; the exception being the use of the opportunity granted by the mechanism for the Inter-American mechanisms to make general comments before the adoption of the outcome by the plenary, as no Inter-American bodies have so far taken the floor during the adoption of UPR reports.

The review, however, also shows that there is still ample space for participation, and opportunities for closer cooperation between the Inter-American and the UN human rights systems through this mechanism, that have not been fully exploited in other areas.

One could envisage, for example, the Inter-American mechanisms utilizing it as a basis for bilateral discussions with the States, either during the preparation of their national reports, or in the follow-up to its review, as other stakeholders (such as civil society organisations and national human rights institutions) have done by publishing their submissions, and organizing meetings with the State to be reviewed. Given the UPR's universal nature; such an initiative could be particularly beneficial for the Inter-American mechanisms to establish closer engagement with countries with which they have not worked closely with in the recent past, or on issues they have not followed as closely as others.

One could also envisage member States (especially those from the region) being more proactive in advocating for attention to the findings and recommendations of Inter-American mechanisms, in their interventions during the sessions, when American countries are being reviewed. As the UPR is a State-driven process, there is really no impediment for this. By bringing issues relevant to the Inter-American mechanisms to a fora such as the UPR, States would be reaffirming the important role regional arrangements play in reinforcing universal human rights standards, as they have reiterated in several UN resolutions in the past (for example UNITED NATIONS, 2009d).

Recommendations and voluntary commitments made by States reviewed by the UPR, which are particularly relevant to the work of the Inter-American

system, could also be picked up by its own mechanisms, and integrated into their ongoing dialogue with these countries, as has been done in the past with recommendations from other UN mechanisms. This process could include discussing recommendations that have not enjoyed the support of the State under review, or are under consideration by the State. This would be particularly important when the issues are explicitly or implicitly relevant to findings and recommendations from the Inter-American mechanisms.

Finally, the Inter-American system could become a key partner for the UN and for the States reviewed, in providing advice on the implementation of the UPR outcome, since the mechanism envisages implementation to be carried out with other relevant stakeholders, such as regional organisations, when appropriate. Also, since UPR recommendations remain ascribed to the issuing State, the Inter-American mechanisms could help cement bilateral relations between reviewing and reviewed countries for effective cooperation in implementing some of the recommendations emanating from the UPR.

In short, the opportunities for closer cooperation between the Inter-American system, the UN system, and the American States, within the framework of the UPR mechanism, are considerable, and possibly the broadest to date, in terms of UN human rights mechanisms. Considering the potential that was observed for cooperation between both systems from their inception, it would be unacceptable not to seize on these opportunities now, to strengthen the links that unite both systems together.

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NOTES

1. Chapters VI (articles 33, 36 and 37), and VII (article 47) also refer to the involvement of regional agencies or arrangements in pacific settlements of and solution to disputes.
2. The American Declaration of the Rights and Duties of Man was adopted at the Ninth International Conference of American States in April 1948. The UN General Assembly adopted of the Universal Declaration of Human Rights on 10 December 1948.
3. See for example Organization of American States (2009a) where the Rapporteurs for Freedom of Expression of the UN and of the OAS express their concern regarding comments made by high authorities of the Colombian government against a journalist.
4. For these and other examples of cooperation, see the Report of the Secretary-General on the workshop on regional arrangements for the promotion and protection of human rights, held in Geneva on 24 and 25 November 2008 (UNITED NATIONS, 2009e, p. 12).
5. The IACHR Report on Citizen Security and Human Rights was issued jointly by the IACHR, UNICEF and OHCHR in 2010 (ORGANIZATION OF AMERICAN STATES, 2009b).
6. The International Civilian Mission in Haiti - MICIVIH deployed in 1993. For more information on the mission: <<http://www.un.org/rights/micivih/first.htm>>.
7. Statement by the United Nations High Commissioner for Human Rights at the International workshop on "Enhancing cooperation between regional and international mechanisms for the promotion and protection of human rights", 3 May 2010.
8. See the reports of the different retreats on the HRC held this year in Algeria, Mexico, Paris and Monteuix: <http://www2.ohchr.org/english/bodies/hrcouncil/HRC_review.htm>.
9. HRC resolution 5/1 (UNITED NATIONS, 2007) refers to relevant stakeholders as those defined by General Assembly resolution 60/251 (UNITED NATIONS, 2006), which says the HRC shall work in close cooperation with regional organisations, and Economic and Social Council resolution 1996/31 (UNITED NATIONS, 1996), as well as any decisions the HRC may take in the future.
10. Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Honduras, Jamaica, Mexico, Nicaragua, Panama, Peru, the United States of America and Uruguay (of these, only Canada, Cuba, and the United States of America, failed to mention the Inter-American System in their national reports).
11. From the 6th to the 9th sessions of the UPR Working Group, the IACHR presented submissions for the UPR reviews of Bolivia, Costa Rica, Dominican Republic, Honduras, Jamaica, El Salvador, Guyana, Panama, Nicaragua, and the United States of America.
12. The Inter-American system is cited in the UPR stakeholders' summary reports for Argentina, Barbados, Belize, Brazil, Canada, Chile, Colombia, Dominica, Ecuador, Peru, and Uruguay, despite the IACHR not submitting information on these countries.
13. Mentions to the Inter-American system can be found, for example, in the UPR Working Group outcome reports for Argentina, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Dominica, El Salvador, Grenada, Guatemala, Guyana, Honduras, Jamaica, Panama, Peru, the United States of America, and Uruguay.
14. Pakistan, for example, noted that Barbados had extended the right to seek redress through judicial recourse to the IACourt; the Netherlands referred to fact that Belize is party to the Inter-American Convention Against Corruption; Argentina congratulated Chile for ratifying the Inter-American Convention on Prevention, Punishment and Eradication of Violence Against Women; France welcomed the support by Costa Rica to the resolution of the OAS on human rights, sexual orientation and gender identity; Azerbaijan and Paraguay noted Costa Rica's contribution to the entry into force of the American Convention on Human Rights; Egypt, Iraq and Lao People's Democratic Republic commended El Salvador's for its dialogue with petitioners before the IACourt and its openness to the Inter-American system, while Guatemala congratulated El Salvador on its efforts to ensure compliance with the recommendations and decisions of the Inter-American system; Mexico noted the reestablishment by Peru of the competency of the IACourt; and Canada commended Honduras for having extended an open invitation to international human rights mechanisms, including those of the OAS.
15. Canada noted with concern reports of discriminatory denial of the right to nationality to Dominicans of Haitian descent (UNITED NATIONS, 2010a, p. 7); the United States noted the Government's efforts to improve civil registration access and procedures, but said it remained concerned by the major barriers Dominicans of Haitian descent faced in establishing their citizenship (UNITED NATIONS, 2010a, p. 9); Uruguay indicated that the Dominican Republic should continue strengthening measures aimed at protecting the principles of non-discrimination and the right to an identity (UNITED NATIONS, 2010a, p. 10).

RESUMO

Desde os seus primórdios, os sistemas global e regionais de proteção de direitos humanos compartilham um único objetivo: por meio da cooperação internacional, conferir melhor proteção aos direitos humanos. Conferir melhor proteção aos direitos humanos em âmbito internacional por meio da cooperação entre os sistemas global e regional de direitos humanos tem sido um objetivo comum para ambos os sistemas desde seus primórdios. A criação do Mecanismo de Revisão Periódica Universal (RPU), no âmbito das Nações Unidas, proporciona novas oportunidades para que tal cooperação se concretize, ao estruturar diversas formas pelas quais mecanismos regionais podem contribuir com o processo. Governos, organizações da sociedade civil e organismos de direitos humanos em ambos os mecanismos têm demonstrado interesse na efetiva participação do sistema interamericano no processo, o que resultou na presença do sistema interamericano em cada fase do processo da RPU, desde a revisão dos primeiros países por esse mecanismo. Esse artigo sustenta, entretanto, que muito mais ainda pode ser feito para que o sistema interamericano se beneficie completamente desse mecanismo.

PALAVRAS-CHAVE

Revisão Periódica Universal – Sistema Interamericano de Direitos Humanos – Sistema Global de Direitos Humanos – Conselho de Direitos Humanos das Nações Unidas – Cooperação entre mecanismos/organizações globais e regionais – Nações Unidas

RESUMEN

Mejorar la protección de los derechos humanos a nivel internacional mediante la cooperación entre los sistemas universal y regionales de derechos humano ha sido una aspiración común a ambos Sistemas desde que fueron creados. El establecimiento del mecanismo del Examen Periódico Universal (EPU) en las Naciones Unidas ha creado nuevas oportunidades para dicha cooperación, describiendo diferentes formas en las que los mecanismos regionales pueden contribuir a este proceso. El interés generalizado de los gobiernos, las organizaciones de la sociedad civil y los mecanismos de derechos humanos de ambos sistemas por concretar la participación interamericana en el proceso ha dado como resultado que el Sistema Interamericano esté presente en cada uno de los estadios del proceso del EPU, desde las revisiones del primer país en adelante. No obstante, este artículo argumenta que se puede hacer más para que el Sistema Interamericano aproveche completamente el mecanismo.

PALABRAS CLAVE

Revisión Periódica Universal – Sistema Interamericano de Derechos Humanos – Sistema Universal de Derechos Humanos – Consejo de Derechos Humanos de las Naciones Unidas – Cooperación entre mecanismos/organizaciones universales y regionales – Naciones Unidas

IN MEMORIAM

KEVIN BOYLE – STRONG LINK IN THE CHAIN¹

Borislav Petranov

Professor, practising barrister and activist Kevin Boyle died on Christmas Day 2010 in Colchester, UK, where he had taught several generations of human rights lawyers and activists² over the last 25 years. Fondly remembered by his students as an exceptionally warm and supportive teacher, he was at heart an institution builder and a colleague and enabler extraordinaire. As founding Director of Article 19 (in 1986), a major driving force behind the world renowned Human Rights Centre at Essex, and Chairman of Minority Rights Group International (in 2007-2010), and a lawyer pushing the boundaries of human rights practice, in the words of a friend, he “managed most gracefully to combine politics, legal practice and academic life”.

Described by one of his close collaborators as a “giant of the human rights community”, Kevin’s professional life is the story of the human rights movement in the last decades - from the extraordinary growth of human rights norms and institutions since the mid 1960s and the increasing use of the law for social change to the disappointment at its slow pace and little impact on the victims.

Above all, it is the story of the true origins of human rights in struggles for justice – and a fitting example of the fighter spirit and the human and intellectual qualities that may be at the root of its winning march – despite temporary diversions and setbacks. A story of humility and profound goodness (he “treated the cleaners and Heads of State equally”), a “captivating mix of high-mindedness, boyishness, principle and charm – all laced with humour and affection”, in the words of one of his longest standing friends and colleagues.

Several of the obituaries published in major media cover Kevin’s career and achievements extensively³. However, for his students in particular, and for human rights colleagues around the world, several memories stand out.



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Human rights is about justice in practice

In juggling technical rules and navigating ever more complex and numerous institutions we - lawyers especially – may sometimes forget that what matters ultimately is the justice for the individual who has suffered injustice. Gays in 1960s Northern Ireland, travellers in Ireland, peasants ripped out of their land in Eastern Turkey; activists persecuted for what they believed or journalists persecuted for what they said or allowed others to say publicly (or bombed in their editorial offices⁴), conscientious objectors – all were Kevin’s “clients” in the numerous cases he worked on for the last nearly 40 years. In the words of Conor Gearty, “here seemed to be a new way to do law: get on top of all the stuff, the cases, the statutory provisions, the complex scholarship – all the ramparts with which law protects itself from external scrutiny – and then deploy them not to mystify and stifle the people but rather to empower and therefore to enrich them”⁵.

Pushing the boundaries of human rights law

For a generation which has a sometimes bewildering choice of norms and institutions it is hard to imagine what it has been to be a human rights lawyer in 1966 when Kevin became a young law lecturer in Northern Ireland - the Genocide Convention (in force since 1951) was the only UN global human rights treaty in force (although the Race Discrimination convention was signed in 1965, it did not enter into force until 1969). The European Court of Human Rights issued no judgments in 1966, and in 1972, when Kevin argued one of his first cases before the then Commission, the Court issued 2 judgments (both on just satisfaction and not on the merits)⁶ and the thought that applicants will have direct access to the Court – which in 2010 gave 1499 judgments on 2607 applications - would have struck many as fanciful and unrealistic.

Associated with more than 100 cases, Kevin’s legal career is a history of pushing the boundaries of law to be more “practical and effective” rather than “theoretical and illusory”⁷.

How to vindicate individual rights in situations where general policies and practices (a pattern of violations, an “administrative practice”) make violations routine and remedies illusory has been the dominant theme running through Kevin’s cases – related to Northern Ireland and Turkey in particular. This still remains a major challenge in current human rights protection systems built upon individual complaints, despite reforms of institutions and progress in jurisprudence.

This line of work started with a case filed by Kevin nearly 40 years ago in which (even if declared inadmissible) the then European Commission on Human Rights ruled that it was not necessary to exhaust domestic remedies if it could be shown that the alleged abuses were part of an administrative practice⁸. Developed

Notes to this text start on page 187.

through a series of cases since then⁹, this question – still acute in a number of countries such as Russia, and not unfamiliar to readers across the world, was, of course a central issue in the series of more than 60 cases which Kevin, together with colleagues from NGOs in London and Turkey, and in close collaboration with Essex colleagues, took to the Court over a period of nearly ten years, in which they, in the words of the President of the European Court of Human Rights, made a “major contribution to human rights law generally in the crucial areas of torture, disappearances, unlawful killing and unlawful detention”¹⁰.

Bringing up the new generations of human rights workers

The last 25 years of Kevin’s life were closely associated with the Human Rights Centre at the University of Essex in the UK, after he had founded the Irish Centre of Human Rights at Galway some years before. The Centre at Essex, established upon Kevin’s suggestion to the then Dean of Law at Essex in 1983, took off after both Kevin and Nigel Rodley, a long-time Legal Director of Amnesty International, joined in 1989 and 1990, transforming it into a multidisciplinary power house of research, teaching and support for litigation. Kevin directed the Centre through perhaps half of its existence, in which it expanded its courses, housed many exciting collaborative projects but above all, became like a home to a worldwide net of human rights workers, its more than 1700 alumni from many dozens of countries probably found in nearly every human rights organization.

A born leader - builder of institutions

Two pictures lay on the table at the reception after Kevin’s funeral – one depicting an altar boy with quiet determination in his unflinching gaze, the other a young person with a loudhailer surrounded by police addressing a march in Northern Ireland. At heart – his childhood nickname being the “king” - Kevin was a natural leader but a leader in a consensus building, empowering mould – in the Irish Civil Rights Association in the early 1970s, in setting up or transforming both the Irish and Essex Human Rights Centres, in directing Article 19 and chairing Minority Rights Group International. In all these roles, in the words of some of his colleagues in those NGOs, he “carried his great learning and talents lightly”, everyone loved being around him. He accompanied students on marches in Northern Ireland, paid the fines of poor black women whose trials under the passed laws he observed in South Africa, stopped and encouraged street fundraisers for good causes, took the time to guide colleagues setting up new organizations. It is no wonder he managed to develop extraordinary nearly life-long working relationships with a number of distinguished (and probably quite strong willed) colleagues, such as Tom Hadden, with whom he authored a number of books on Northern Ireland, Françoise Hampson, with whom he worked on scores of cases from Southeast Turkey, and Sir Nigel Rodley, a close colleague at the Human Rights Centre at Essex.

Kevin was also a strong supporter of activists coming from the Global South to Essex, with diverse legal and political background. He was able to understand the many challenges and help his students to value their own experiences and address those challenges. Kevin was creative, generous and open to new initiatives. He helped an entire generation of Brazilian students in Essex, and came to the country several times to support the establishing of new institutions, such as the LL.M. in Human Rights in the State of Pará, and the human rights center at University of Brasília, to provide advice to scholars and organizations and to teach. His legacy is a solid group of academics and activists who are committed to continue along his path.

NOTES

1. From a dedication by Seamus Heaney inscribed personally to Kevin on the flyleaf of a copy of his collection 'Human Chain'.
2. Many of whom could justifiably say they owe their human rights careers to him.
3. See http://www.ehrra.org/index.php?page=memorial&page_ref=19; <http://www.guardian.co.uk/law/2011/jan/02/kevin-boyle-obituary>; http://www.ruthdudleyedwards.co.uk/journalism11/IrInd11_2.html.
4. See European Court of Human Rights, *Bankovic and Others v. Belgium and 16 Other Contracting States* (application no. 52207/99), Decision of 12 December 2001.
5. <http://therightsfuture.com/common-tracks/in-honour-of-kevin-boyle/>, accessed 15 May 2011.
6. See 10.3.1972 - *De Wilde, Ooms and Versyp c. Belgique/v. Belgium* (article 50); and 22.6.1972 - *Ringeisen c. Autriche/v. Austria* (article 50); see also <http://www.echr.coe.int/ECHR/EN/Header/Case-Law/Decisions+and+judgments/Lists+of+judgments/>.
7. In a famous dictum of the European Court of Human Rights. See, e.g., *Artico v. Italy*, 1980, 3 EHRR 1, para. 33.
8. Kevin Boyle & Hurst Hannum, *The Donnelly Case, Administrative Practice and Domestic Remedies Under the European Convention: One Step Forward and Two Steps Back*. *The American Journal of International Law*, Vol. 71, No. 2, pp. 316-321 (1977).
9. The current case law absolves the applicant of the need to exhaust domestic remedies if there is "repetition of acts incompatible with the Convention and official tolerance by the State authorities has been shown to exist, and is of such a nature as to make proceedings futile or ineffective (*Aksoy v. Turkey*, § 52), see *Practical Guide on Admissibility Criteria*, <http://www.echr.coe.int/ECHR/EN/Header/Case-Law/Case-law+information/Key+case-law+issues/>.
10. Kevin listed some of these cases in *Twenty-Five Years of Human Rights at Essex*. *Essex Human Rights Review*, 2008; see also Reidy, Hampson & Boyle. *Gross violations of human rights: invoking the ECHR in the case of Turkey*. *Netherlands Quarterly of Human Rights*, vol. 15, number 2, pp. 161-73 (1997).

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