

**SOME CONSIDERATIONS ON THE LEGAL ROLE OF THE SENTENCES AND  
RECOMENDATIONS OF INTERNATIONAL BODIES CREATED FOR THE  
PROTECTION OF HUMAN RIGHTS\***

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**ABSTRACT:** This article aims at reflecting about the role of pronouncements of the various specialized bodies for the protection of human rights and the legal meaning and scope of the "weight" assigned by the International Court of Justice in the Case *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* - sentence of 30 November 2010- to the interpretations adopted by the independent bodies that were established specifically to supervise the application of human rights treaty.

**KEY WORDS:** Human rights specialized bodies – Role of the pronouncements – Universalization.

The International Court of Justice in the Case *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* -sentence of 30 November 2010- referred to the "jurisprudence" ("case law") of the Human Rights Committee and ruled that "(a)lthough the Court is no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant [International Covenant on Civil and Political Rights] on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty."<sup>1</sup>

This leads us to reflect about the role of the pronouncements of the various specialized bodies for the protection of human rights and the legal meaning and scope of the "weight" assigned by the Court to the interpretations of human rights instruments by expert entities.

**Some international bodies created for the protection of human rights**

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<sup>1</sup> 66. « *L'interprétation qui précède est pleinement corroborée par la jurisprudence du Comité des droits de l'homme institué par le Pacte en vue de veiller au respect de cet instrument par les Etats parties (voir, par exemple, en ce sens: Maroufidou c. Suède, no 58/1979, par. 9.3; Comité des droits de l'homme, observation générale no 15: situation des étrangers au regard du Pacte).*

*Le Comité des droits de l'homme a, depuis sa création, développé une jurisprudence interprétative considérable, notamment à l'occasion des constatations auxquelles il procède en réponse aux communications individuelles qui peuvent lui être adressées à l'égard des Etats parties au premier Protocole facultatif, ainsi que dans le cadre de ses «Observations générales.*

*Bien que la Cour ne soit aucunement tenue, dans l'exercice de ses fonctions judiciaires, de conformer sa propre interprétation du Pacte à celle du Comité, elle estime devoir accorder une grande considération à l'interprétation adoptée par cet organe indépendant, spécialement établi en vue de superviser l'application de ce traité. Il en va de la nécessaire clarté et de l'indispensable cohérence du droit international ; il en va aussi de la sécurité juridique, qui est un droit pour les personnes privées bénéficiaires des droits garantis comme pour les Etats tenus au respect des obligations conventionnelles ».*

67. « *De même, lorsque la Cour est appelée, comme en l'espèce, à faire application d'un instrument régional de protection des droits de l'homme, elle doit tenir dûment compte de l'interprétation dudit instrument adopté par les organes indépendants qui ont été spécialement créés, si tel a été le cas, en vue de contrôler la bonne application du traité en cause (...)* ». (CIJ Recueil 2010, paras. 66-67). The French is the authoritative text.

## Universal Level<sup>2</sup>

The *United Nations Human Rights Council* (subsidiary body of the United Nations General Assembly established in 2006, successor of the *United Nations Commission on Human Rights*) is an inter-governmental body of 47 States responsible for strengthening the promotion and protection of human rights around the globe and for addressing situations of human rights violations and making recommendations on them (specific country situations or thematic issues). The format of the outcome of the review will be a *report* consisting of a summary of the proceedings of the review process; *conclusions and/or recommendations, and the voluntary commitments* of the State concerned. Special procedures may be individual ("Special Rapporteur" or "Independent Expert") or carried out by a working group usually composed of five members (one from each region). In 2007, the Human Rights Council decided to create an Advisory Committee of eighteen members to provide expert advice and adopted a new Complaint Procedure, established to address consistent patterns of gross and reliably attested violations of all human rights and all fundamental freedoms occurring in any part of the world.

The *Human Rights Committee*<sup>3</sup> -the principal quasi-judicial human rights body within the U.N. human rights system- has 18 independent experts who are persons of high moral character and recognized competence in the field of human rights. The committee monitors the implementation by its State parties of the International Covenant on Civil and Political Rights (adopted by General Assembly resolution 2200A (XXI) of 16 December 1966, in force from 23 March 1976).<sup>4</sup> States must report initially one year after acceding to the Covenant and then whenever the Committee requests (usually every four years). The Committee examines each report and addresses its *concerns and recommendations* to the State party in the form of *concluding observations*, generally divided into the following sections: Introduction, Positive factors, and Principal subjects of concern and recommendations. In addition to the reporting procedure, article 41 of the Covenant provides for the Committee to consider inter-state complaints,<sup>5</sup> and under the First Optional protocol, individual complaints.<sup>6</sup> The Committee also publishes its interpretation of the content of human rights provisions, known as *general comments*.

The *Committee on Economic, Social and Cultural Rights* (CESCR) is the body of 18 independent experts that monitors the implementation of the International Covenant on Economic, Social and Cultural Rights by its States parties. All States parties submit regular reports to the Committee on how the rights are being implemented. States must report initially within two years of accepting the Covenant and thereafter every five years. The Committee examines each report and addresses its *concerns and recommendations* to the State party in the form of *concluding observations*. With regard to individual complaints, in 2008, the General Assembly adopted an Optional Protocol (GA resolution A/RES/63/117) to the International Covenant on Economic, Social and Cultural Rights which provides the Committee competence

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<sup>2</sup> V. <http://www.ohchr.org>

<sup>3</sup> Office of the United Nations High Commissioner for Human Rights United Nations, "Civil and Political Rights: The Human Rights Committee", *Fact Sheet No. 15* (Rev.1).

<sup>4</sup> The Committee meets in Geneva or New York and normally holds three sessions per year. We specially remember the outstanding participation of Professor Dr. Budislav Vukas as Member of the Croat Delegation before de Human Rights Committee in matters relating to the protection of human rights in the Croatian territory as a result of war in the former Yugoslavia.

<sup>5</sup> If a matter referred to the Committee (article 41) is not resolved, the Committee may, with the prior consent of the States parties concerned, appoint an *ad hoc* Conciliation Commission with instructions to complete its business and submit a *report* to the Chairperson of the Committee and, through that person, to the parties in dispute.

<sup>6</sup> Boerefijn, Ineke. "Towards a Strong System of Supervision: The Human Rights Committee's Role in Reforming the Reporting Procedure under Article 40 of the Covenant on Civil and Political Rights." *Human Rights Quarterly* 17 (1995): 767.

to receive and consider communications. The Committee transmits its findings, together with *comments* and *recommendations*, to the State Party concerned. The Committee publishes its interpretation of the provisions of the Covenant, known as *general comments*.

The ***Committee on the Elimination of Racial Discrimination*** (CERD) is the oldest body created for the protection of human rights. It has 18 independent experts that monitor implementation of the Convention on the Elimination of All Forms of Racial Discrimination by its State parties. States parties are obliged to submit regular reports to the Committee on how the rights are being implemented. States must report initially one year after acceding to the Convention and then every two years. The Committee examines each report and addresses its concerns and recommendations to the State party in the form of *concluding observations*. The Convention establishes three other mechanisms through which the Committee performs its monitoring functions: the early-warning procedure, the examination of inter-state complaints and the examination of individual complaints. The Committee includes in its annual *report* a summary of the communications and, where appropriate, a summary of the explanations and statements of the States Parties concerned and of its own *suggestions* and *recommendations*. The Committee also publishes its interpretation of the content of human rights provisions (*general recommendations* or *general comments*).

The ***Committee on the Elimination of Discrimination against Women*** (CEDAW) is the body of 23 independent experts that monitors implementation of the Convention on the Elimination of All Forms of Discrimination against Women. States parties are obliged to submit regular reports to the Committee on how the rights of the Convention are implemented. During its sessions the Committee considers each State party report and addresses its *concerns* and *recommendations* to the State party in the form of *concluding observations*. In accordance with the Optional Protocol to the Convention, the CEDAW receives communications from individuals or groups of individuals. These procedures are optional and are only available where the State concerned has accepted them. The Committee also formulates general *recommendations* and *suggestions*.

The ***Committee Against Torture*** (CAT) is the body of 10 independent experts that monitors implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by its State parties. States parties submit regular reports to the Committee on how the rights are being implemented. States must report initially one year after acceding to the Convention and then every four years. The Committee examines each report and addresses its *concerns* and *recommendations* to the State party in the form of *concluding observations*. The ***Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*** (“SPT”), composed of 25 independent and impartial experts, started in 2007 pursuant to the Optional Protocol of the Convention against Torture. It is a new kind of treaty body with purely *preventive mandate* (visits, assessment, advices). It produces *recommendations* and *observations* to States.

The ***Committee on the Rights of the Child*** (CRC) is the body of 18 independent experts that monitors implementation of the Convention on the Rights of the Child by its State parties. It also monitors implementation of two optional protocols to the Convention, on involvement of children in armed conflict and on child trafficking, child prostitution and child pornography. On 19 December 2011, the UN General Assembly approved a third optional protocol on a Communications Procedure, which will allow individual children to submit complaints regarding specific violations of their rights under the Convention and its first two optional protocols. The Protocol opened for signature in 2012 and will enter into force upon ratification by 10 UN Member States. States parties submit regular reports to the Committee initially two years after acceding to the Convention and then every five years. The Committee examines each report and addresses its *concerns* and *recommendations* to the State party in the form of *concluding observations*.

The *Committee on the Protection of the Rights of All Migrant Workers and Members of their Families* (CMW) is the body of 14 independent experts that monitors implementation of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families by its State parties. States parties submit regular reports to the Committee initially one year after acceding to the Convention and then every five years. The Committee examines each report and addresses its *concerns* and *recommendations* to the State party in the form of *concluding observations*. Under certain circumstances, the Committee is also able to consider individual complaints or communications from individuals claiming that their rights under the Convention have been violated once 10 States parties have accepted this procedure in accordance with article 77 of the Convention. At the moment, two States have accepted this procedure.

The *Committee on the Rights of Persons with Disabilities* (CRPD) is the body of 12 (later 18) independent experts which monitors implementation of the Convention by the States Parties. States parties submit regular reports to the Committee on how the rights are being implemented. States must report initially within two years of accepting the Convention and thereafter every four years. The Committee shall examine each report and shall make *suggestions* and *general recommendations* on the report. The Optional Protocol to the Convention gives the Committee competence to examine individual complaints with regard to alleged violations of the Convention by States parties to the Protocol. After examining a communication, the Committee shall forward its *suggestions* and *recommendations*, if any, to the State Party concerned and to the petitioner.

The *Committee on Enforced Disappearances* (CED) is the body of 10 independent experts which monitors implementation of the Convention by the States Parties. States must report initially within two years of accepting the Convention. The Committee examines each report and shall make such *suggestions* and *general recommendations* on the report. A State Party may, at the time of ratification of the Convention or at any later time, declare that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction claiming to be victims of a violation by this State Party of provisions of this Convention. The Committee produces *comments, observations or recommendations*.

### **Regional level**

#### *Europe*<sup>7</sup>

The *European Court of Human Rights* (ECtHR) is a court established in 1959 by the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) and hears complaints about a contracting party having violated the human rights enshrined in the Convention and its 14 protocols.

It consists of a number of judges equal to the number of member States of the Council of Europe. The Court's judges sit in their individual capacity and do not represent any State. In dealing with applications, the Court is assisted by a Registry consisting mainly of lawyers from all the member States (who are also known as legal secretaries). They are entirely independent of their country of origin and do not represent either applicants or States.<sup>8</sup>

The Court receives complaints by individuals or other contracting states. The Convention was adopted under the auspices of the Council of Europe and all of its 47 member states are parties to the Convention.<sup>9</sup> In final *judgments* the Court declares that a contracting

<sup>7</sup> <http://www.echr.coe.int> (Accessed February 2, 2013).

<sup>8</sup> European Court of Human Rights Council of Europe-Registry. "Questions and Answers", Cedex, [www.echr.coe.int](http://www.echr.coe.int) (Accessed August 24, 2012).

<sup>9</sup> Under Protocol no.11 of the Convention, the Court became full-time and the European Commission of Human Rights was abolished.

state has violated (or not) the Convention, and may order the State to pay material and/or moral damages and the legal costs of the case. The Convention states that Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties. *Advisory opinions* are not binding, regardless of legal weight in the system they have.

### *America*<sup>10</sup>

The legal regime to which the organs of the inter-American system of protection of human rights must adhere is based on the declaration of the fundamental human rights in the Organization of American States (OAS) Charter and the American Declaration of the Rights and Duties of Man, and -as a result of progressive efforts during the twentieth century-, a *sui generis* system has been completed by: the American Convention on Human Rights; the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights; the Protocol to the American Convention on Human Rights to Abolish the Death Penalty; the Inter-American Convention to Prevent and Punish Torture; the Inter-American Convention on Forced Disappearance of Persons; the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women and the Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities. However, the Charter and the Convention are the only instruments that establish rules of due process for the proceedings of the system's organs (Inter-American Commission and Inter-American Court). The other instruments refer to the Convention with regard to everything that concerns proceedings. The OAS Charter establishes the powers and competence of the Commission. So, in the case of the OAS Member States not parties to the Convention, the due process regime refers the administration of requests and communications to Articles I, II, III, IV, XVIII, XXV and XXVI of the American Declaration, based on the provisions of Article 24 of the Statute of the Commission which, in turn, refers to its Rules of Procedure. In the case of the parties to the Convention, the competent organs are the Inter-American Commission of Human Rights and the Inter-American Court of Human Rights.<sup>11</sup> Both the Commission and the Court -in different ways- are empowered to interpret the Convention. The Commission is an organ of the OAS; but, it is also an organ of the American Convention, and its powers are established in Article 41 of this instrument. As an organ of the Convention, the Commission is linked to the Court, because both have the authority to examine individual and State communications in accordance with Articles 44, 45, 51, 61 and *ff.* of the Convention, though in different ways. Only in the mentioned area, the Court has the power to review whether the Commission has complied with the provisions of the American Convention and the different inter-American human rights instruments. The Inter-American Court controls due process of law in the proceedings before the Inter-American Commission of Human Rights in relation to the processing of matters that have been submitted to the Court's consideration, in accordance with the competence granted to it by the American Convention and other inter-American instruments for the protection of human rights. In the other areas the Commission and the Court have autonomy and functional independence.<sup>12</sup>

### ***Inter-American Commission of Human Rights***

The Inter-American Commission of Human Rights (IACHR) is a principal and autonomous organ of the OAS, created in 1959, composed of seven independent members. Together with the Inter-American Court of Human Rights, the Commission is one of the institutions of the American Convention on Human Rights (ACHR, Pacto of "San José-Costa Rica").

<sup>10</sup> <http://www.corteidh.or.cr> and <http://www.oas.org/es/cidh> (Accessed February 2, 2013).

<sup>11</sup> V. Inter-American Court of Human Rights (IACtHR) Advisory Opinion OC-19/05 of November 28, 2005 (requested by the Bolivarian Republic of Venezuela), Control of due process in the exercise of the powers of the Inter-American Commission on Human Rights (Articles 41 and 44 to 51 of the American Convention on Human Rights). (Para. 13).

<sup>12</sup> *Ibidem*, paras. 24, 25, 31.

The Commission exercises three types of function with the basic purpose of the promotion, observance and protection of human rights: (i) administrative; (ii) advisory and promotional, and (iii) quasi-judicial, as set forth in Articles 44 to 51 of the Convention.<sup>13</sup>

The Commission makes *requests* or *recommendations* to the governments of the member states, prepares *studies* or *reports*, and issues *conclusions*.

#### ***Inter-American Court of Human Rights***

The Inter-American Court of Human Rights (seven judges, nationals of the member states of the OAS) is the judicial organ of the American Convention on Human Rights, established in San José-Costa Rica, in 1979.

The Court enforces and interprets the provisions of the ACHR through its *adjudicatory* and *advisory functions*. Only the States Parties and the Commission have the right to submit a contentious case to the Court.

The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of the ACHR that are submitted to it, provided that the States parties to the case recognize or have recognized such jurisdiction, whether by special declaration, or by a special agreement.

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

The States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties. The *judgment* of the Court is final and not subject to appeal (admits only interpretation at request). The advisory function of the IACtHR enables it to respond to consultations submitted by agencies and member states of the OAS (*advisory opinion* on domestic laws and proposed legislation, and whether or not they are compatible with the Convention's provisions).

#### ***Africa***<sup>14</sup>

##### ***African Commission on Human and Peoples' Rights***

The African Charter established the African Commission on Human and Peoples' Rights (eleven members) to promote, protect, interpret the rights enshrined under the Charter, and to ensure that member states comply with their obligations undertaken under the Charter. The Commission was inaugurated on 2 November, 1987. Later the Commission was charged also with the functions of protection and promotion of human and peoples' rights and the interpretation of the African Charter on Human and Peoples' Rights. The Commission produces *reports* and *recommendations*.

##### ***African Court on Human and Peoples' Rights***

The Court (eleven judges) was established by virtue of Article 1 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, which was adopted by Member States of the then Organization of African Unity (OAU) in Ouagadougou, Burkina Faso, in June 1998. It has jurisdiction over all cases and disputes submitted to it concerning the interpretation and application of the African Charter on Human and Peoples' Rights, the Protocol and any other relevant human rights instrument ratified by the States concerned.

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<sup>13</sup> *Ibidem*, para 13.

<sup>14</sup> African Commission on Human and Peoples' Rights-Centre for Human Rights of the University of Pretoria. "Celebrating the African Charter at 30: A Guide to the African Human Rights System." Pretoria University Law Press (2011). (Accessed February 2, 2013 <http://www.achpr.org> and <http://african-court.org>).

The Court complements the protective mandate of the African Commission on Human and Peoples' Rights conferred upon it by the African Charter on Human and Peoples' Rights.

The Court's jurisdiction applies only to states that have ratified the Court's Protocol.

The Court may receive complaints and/or applications submitted to it either by the African Commission of Human and Peoples' Rights or State parties to the Protocol or African Intergovernmental Organizations. Non-Governmental Organizations with observer status before the African Commission on Human and Peoples' Rights and individuals from States which have made a Declaration accepting the jurisdiction of the Court can also institute cases directly before the Court. The *judgment* of the Court shall be final and not subject to appeal. At the request of a Member State of the OAU, the OAU, any of its organs, or any African organization recognized by the OAU, the Court may provide an *opinion* on any legal matter relating to the Charter or any other relevant human rights instruments, provided that the subject matter of the opinion is not related to a matter being examined by the Commission.

The African Court on Human and Peoples' Rights is seized with matters of interpretation arising from the application or implementation of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

#### ***African Committee of Experts on the Rights and Welfare of the Child***

The African Charter on the Rights and Welfare of the Child (ACRWC) adopted in 1990, established the African Committee of Experts on the Rights and Welfare of the Child (eleven members), *i.a.* to promote and protect the rights enshrined in the ACRWC; to monitor the implementation and ensure protection of the rights enshrined in the Charter; to interpret the provisions of the Charter at the request of a State Party, an Institution of the Organization of African Unity or any other person or Institution recognized by the Organization of African Unity, or any State Party. The Committee monitors the implementation of the Charter and may receive communication, from any person, group or non-governmental organization recognized by the OAU, by a Member State, or the United Nations, relating to any matter covered by the Charter. As final outcome, it produces *reports*.

#### ***Some partial reflections***

As we can see, the different bodies, with the exception of the courts, have a merely *recommendatory or informative role* and are not able to produce genuine jurisprudence.

Some domestic tribunals have recognized the binding value of the pronouncements of quasi-judicial bodies and have called "jurisprudence" their resolutions.<sup>15</sup>

José Ovalle Favela remembers that Norberto Bobbio stated that the activities of international organizations for the protection of human rights can be considered under three aspects: the promotion (set of actions that aims at inducing states to introduce or improve internal regulation), the control (set of international measures implemented to check whether the recommendations have been accepted and to what extent), and the ensuring (real organization of jurisdictional international protection).<sup>16</sup> Some quasi-judicial bodies interpret the law with guarantees similar to those of the courts.

<sup>15</sup> For example, the Supreme Court of Argentina, in the case "Bramajo, Hernán Javier s/ incidente de excarcelación" (12/09/1996), has stated: "The opinion of the Inter-American Commission on Human Rights should serve as a guide for the interpretation of the provisions of the American Convention on Human Rights" (Para. 4); "(...) (T)he contested decision should be reversed because the interpretation adopted by the lower court of Art. 1 of Law 24,390 has been inconsistent with the case law developed by the Inter-American Commission on Human Rights (...)" (Para 15). In the Case Simón, Julio Héctor y otros (14/06/2005), has said: "(...) (A)s has been recognized by this Court on several occasions, the jurisprudence of the Inter-American Court of Human Rights and the Inter-American Commission directives, are an indispensable guide for interpreting the duties and obligations of the American Convention on Human Rights" (Para 17).

<sup>16</sup> Ovalle Favela, J. "La Influencia de la CteIDH en el Derecho interno de los Estados Latinoamericanos." Boletín Mexicano de Derecho o Comprado nueva serie. Año LXV n° 134, mayo-agosto 2012: 595 *et sq.*

As Thomas Buergenthal noted, the system has its built-in limitations: the initial step rests with the states, which must first ratify or accede to a legally binding instrument; the system continually requires at least some level of voluntary cooperation by states; and there are no effective sanctions for noncompliance with the obligations States parties have accepted.”<sup>17</sup>

In regard to the courts, the American Court has been more expansive and progressive than the European and African courts. This may find its basis in the wide powers assigned by the Convention to the American tribunal, which exceed those provided by the European and African conventions. The American Court is mandated *i.a.* to assure the injured party the enjoyment of his right or freedom that was violated.<sup>18</sup>

### **Legal meaning and scope of the pronouncements of the different human rights bodies**

Only in the regional level (European, American and African), there are human rights courts able to render judgments which are binding for the States parties involved in a case, and -according to broad interpretations of these courts-, binding inclusively *erga omnes*.<sup>19</sup>

There are human rights bodies at all levels capable of producing quasi-judicial pronouncements. The International Court of Justice has described these pronouncements as "jurisprudence", and regional and domestic courts have considered these documents, valid interpretation of general application as part of a treaty-living instrument.<sup>20</sup>

However, many scholars and domestic tribunals understand that the statements of quasi-judicial bodies are mandatory for the states involved in a case, as there is a real process

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(Accessed November 18, 2012. [www.bibliojuridoca.unam.mx](http://www.bibliojuridoca.unam.mx)). Also v. Garcia-Sayán, Diego. “The Inter-American Court and Constitutionalism in Latin America.” 89 Tex. L. Rev (2010-2011): 1835 *et sq.*

<sup>17</sup> Buergenthal, Thomas. “The U.N. Human Rights Committee.” Max Planck Yearbook of United Nations Law 5 (2001): 341-398, 391 *et sq.* Although the author only referred to the Human Rights Committee, the statement is valid for the entire system.

<sup>18</sup> American Convention on Human Rights. Art. 63. 1. *If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.*

Convention for the Protection of Human Rights and Fundamental Freedoms. Art. 41 *Just satisfaction. If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.*

Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights. Art. 27 *Findings. 1. If the Court finds that there has been violation of a human or peoples' right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.*

<sup>19</sup> V. *infra*.

<sup>20</sup> Hellen Keller and Geir Ulfstein consider a common view that international human treaties should be interpreted as ‘living instruments’. They assert: -“As a result of this constant progress, comparisons with the law as laid down at the time of ratification become difficult. In addition, even new rules of interpretation may develop over time, if there is state consensus and corresponding practice in this regard.” -“Then, a new customary rule of treaty interpretation has developed.” -“There appear to be two possible ways in which consensus may legitimise a certain human rights interpretation and connected to both is the object and purpose of the human rights treaty.” (...) The first refers to the object and purpose of the treaty as a whole, and the second to the object and purpose of the individual treaty provision. Regarding the whole treaty, its object and purpose is possibly expressed in its preamble, which informs us about the general scope of state consensus. As every human rights treaty is limited to a particular set of rights, any interpretation which goes beyond that scope is questionable, and likely to be illegitimate. Concerning individual treaty provisions, it is the consensus and practice of the states members to the treaty, which may legitimise a subsequent interpretation. If the majority of states parties to the treaty consent to and practice a certain interpretation of a particular human rights provision, also at the national level, there is a strong indication that this interpretation will be legitimate.” Keller, Helen and Geir Ulfstein, “Human rights treaty bodies: law and legitimacy, Aspects of Human Rights Interpretation by the UN Treaty Bodies.” Cambridge (UK)-New York: Cambridge University Press 2012.



with all guarantees. Furthermore, the resolutions have the same formalities as the judgments.<sup>21</sup> Nevertheless they have only indirect binding effects.

The principal arguments to support the jurisdictional role of the non judicial bodies are: the protection system “is endowed with a series of guarantees that ensure the principle of the supremacy of the Convention;” “some of the guarantees, such as the principles of good faith and *pro homine*, guide the proceedings;” “there are some specific guarantees related to the individual petition proceedings, namely: conditions for the admissibility of petitions, and the principles of adversarial proceedings, procedural balance, and legal certainty;” “the proceedings before the quasi-jurisdictional bodies contain guarantees for adversarial proceedings similar to those that exist in litigation proceedings before the Courts;” “one of the functions of the quasi-jurisdictional bodies (...) is to monitor the adherence of its *quasi*-jurisdictional proceedings to these principles.”<sup>22</sup>

In relation to what we have said in the preceding paragraphs, given the limitations of extension of this work, we will only cite as examples some of the pronouncements that reflect such situations.

The Inter-American Court, in expansive perception, has expressed:

44. “Owing to the manifest incompatibility of **self-amnesty laws** and the American Convention on Human Rights, **the said laws lack legal effect** and may not continue to obstruct the investigation of the grounds on which this case is based or the identification and punishment of those responsible, nor can **they have the same or a similar impact with regard to other cases** that have occurred in Peru, where the rights established in the American Convention have been violated.”<sup>23</sup> (Emphasis added)

14. “In its request for interpretation, the Commission asked the Court to determine the following: ‘Is the Judgment in the Barrios Altos Case, concerning the incompatibility of laws Nos.26479 and 26492 with the American Convention, general in scope or confined to that specific case only?’ The Commission’s contention is that **‘the effects of the Court’s judgment are not confined exclusively to the Barrios Altos Case, but rather to all those in which those amnesty laws were applied.’** It points out that paragraph 44 of the Court’s judgment of March 14, 2001 “can hardly be interpreted any other way.”<sup>24</sup> (Emphasis added)

18.” *The Court decides (...)* 2. That given the nature of the violation that amnesty laws No. 26479 and No. 26492 constitute, **the decision in the judgment on the merits in the Barrios Altos Case has generic effects.**<sup>25</sup> (Emphasis added)

115 “**The corpus juris of international human rights law comprises a set of international instruments of varied content and juridical effects (treaties, conventions, resolutions and declarations).** Its dynamic evolution has had a positive impact on international law in affirming and building up the latter’s faculty for regulating relations between States and the human beings within their respective

<sup>21</sup> V. Hitters, Juan Carlos. “¿Son vinculantes los pronunciamientos de la Comisión y de la Corte Interamericana de Derechos Humanos? (control de constitucionalidad y convencionalidad).” *Revista Iberoamericana de Derecho Procesal Constitucional* 10 (2008): 131-156; Also v. Sagües, Néstor P. “Nuevamente sobre el valor para jueces argentinos de los pronunciamientos de la Corte Interamericana y de la Comisión Interamericana de Derechos Humanos.” *Jurisprudencia Argentina* 1999-II: 364.

<sup>22</sup> Inter-American Court of Human Rights (IACtHR) *Advisory Opinion OC-19/05* of November 28, 2005 (requested by the Bolivarian Republic of Venezuela), *Control of due process in the exercise of the powers of the Inter-American Commission on Human Rights (Articles 41 and 44 to 51 of the American Convention on Human Rights)*, para.13.

<sup>23</sup> IACtHR. *Case of Barrios Altos v. Peru*. Judgment of March 14, 2001 (Merits).

<sup>24</sup> IACtHR. *Case of Barrios Altos et al. v. Peru*. Judgment of September 3, 2001 (Interpretation of the Judgment of the Merits).

<sup>25</sup> *Ibidem*.

*jurisdictions. This Court, therefore, must adopt the proper approach to consider this question in the context of the evolution of the fundamental rights of the human person in contemporary international law.*"<sup>26</sup> (Emphasis added)

101. "Accordingly, this Court considers that the **principle of equality before the law, equal protection before the law and non-discrimination belongs to jus cogens**, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws. Nowadays, no legal act that is in conflict with this fundamental principle is acceptable (...)." <sup>27</sup>(Emphasis added)

34. "(...)(I)t is necessary to emphasize that **the system of international protection must be understood as an integral whole (...). (T)he adoption of a restrictive interpretation as to the scope of the Tribunal's jurisdiction would not only be contrary to the purpose and end of the Convention**, but it would also affect the effective application of the treaty and of the guarantee of protection that it provides, with negative consequences for the alleged victim in the exercise of his right to access to justice."<sup>28</sup> (Emphasis added)

99. **Pursuant to the principle of effectiveness and the need of protection in those cases of people or groups in situation of vulnerability,**<sup>(...)</sup> **this Tribunal shall interpret and give essence to the rights enshrined in the Convention, according to the evolution of the international corpus juris** existing in relation to the human rights of migrants, taking into account that the international community has recognized the need to adopt special measures to ensure the protection of the human rights of this group <sup>(...)</sup>."<sup>29</sup> (Emphasis added)

225. "This Court has held in its case law that it is aware that domestic authorities are bound to respect the rule of law, and therefore, they are bound to apply the provisions in force within the legal system.<sup>(...)</sup> But when a State has ratified an international treaty such as the American Convention, all its bodies, including its judges, are also bound by such Convention, which forces them to see that all the effects of the provisions embodied in the Convention are not adversely affected by the enforcement of laws which are contrary to its purpose and end. (...) To perform this task, **the Judiciary has to take into account not only the treaty, but also the interpretation thereof made by the Inter-American Court, which is the ultimate interpreter of the American Convention.**"<sup>(...)</sup>."<sup>30</sup> (Emphasis added)

In Separate opinion, judge Cançado Trindade, in the *Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala*, said:

9. "In my view, the absence of an objective criterion of assessment of human suffering should not be invoked as a justification for a 'technical' - or rather mechanical - application of the relevant juridical norms. To the contrary, the lesson which appears to me necessary to extract from the present case of the "Street Children" (and also from the case Paniagua Morales and Others) is in the sense that one ought to be guided by the victimization and the human suffering, as well as the rehabilitation of the surviving

<sup>26</sup> IACtHR. Advisory Opinion OC-16/99 of October 1, 1999. *The Right to Information on Consular Assistance. In the Framework of the Guarantees of the due Process of Law.*

<sup>27</sup> IACtHR. Advisory Opinion OC-18/03 of September 17, 2003. *Juridical Condition and Rights of Undocumented Migrants.*

<sup>28</sup> IACtHR *Case of Vélez Loo v. Panama*. Judgment of November 23, 2010 (Preliminary Objections, Merits, Reparations, and Costs).

<sup>29</sup> *Ibidem.*

<sup>30</sup> IACtHR. *Case of Cabrera-García and Montiel-Flores v. Mexico*. (Preliminary Objection, Merits, Reparations, and Costs). Judgment of November 26, 2010.

victims<sup>(...)</sup>, also in order to fill gaps in the applicable juridical norms and, furthermore, on the basis of considerations of equity, to reach a solution *ex aequo et bono* for the concrete case in conformity with Law. Ultimately, the jurisdiction (*jus dicere, jurisdictio*) of the Tribunal is summed up in its power to declare the Law, and the sentence (from the Latin *sententia*, etymologically derived from "sentimiento", feeling) is something more than a logical operation in the framework of predetermined juridical limits."<sup>31</sup> (Emphasis added)

Ashley Manson understands that the Court's expansion of the American Convention was supported by the Inter-American Court's previous case law and advisory opinions interpreting the American Convention, the European Court of Human Rights' case law, and global soft law of human rights.<sup>32</sup> We can add that the expansion has also been supported on considerations of equity, judges' feelings and transitional -ideological perception of justice.<sup>33</sup>

The ECHR, for example, expands the applicable law. The Grand Chamber in the *Case Demir and Baykara v. Turkey* (Application no. 34503/97), judgment of 12 November 2008 concludes:

85. "The Court, in defining the meaning of terms and notions in the text of the Convention, can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values. The consensus emerging from specialized international instruments and from the practice of Contracting States may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases." (Emphasis added)

86. "In this context, it is not necessary for the respondent State to have ratified the entire collection of instruments that are applicable in respect of the precise subject matter of the case concerned. It will be sufficient for the Court that the relevant international instruments denote a continuous evolution in the norms and principles applied in international law or in the domestic law of the majority of member States of the Council of Europe and show, in a precise area, that there is common ground in modern societies (see, *mutatis mutandis*, Marckx, cited above, § 41)." (Emphasis added)

Some experts criticize such kind of *constructivism*, which creates new rights and obligations, in regard to substantive and procedural aspects.

Julian Arato considers, that unlike formal amendment (through the express decision of the member States according to a certain procedure), informal transformation occurs more subtly, through the practice of the specialized bodies. He thinks that the question is not whether the Court's interpretation does or does not expand a Convention right, but rather whether its

<sup>31</sup> IACtHR. *Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala*. (Reparations and Costs). Judgment of May 26, 2001.

<sup>32</sup> Mason, Ashley. "Interpretation of the American Convention in Latin America: The impact of the Inter-American Court of Human Rights' decision in *Vélez Loor v. Panama* on irregular migrant rights." *Law & Bus. Rev. Am.* 18 (2012):71 *et sq.*

<sup>33</sup> V. Abramovich, Victor. "From massive violations to structural patterns: New approaches and classic tensions in the Inter-American Human Rights System." *SUR Int'l J. on Hum Rts* (2009): 7-11. (Accessed August 28, 2011. [http://www.surjournal.org/eng/conteudos/getArtigo11.php?artigo=11,artigo\\_01.htm](http://www.surjournal.org/eng/conteudos/getArtigo11.php?artigo=11,artigo_01.htm)). The author states the cascading effect of the pronouncements of the Court and the Commission and their influence in the domestic tribunals as Argentine courts (*i.a.* Simón, Julio Hector *et al.*, 2005), Chilean courts (*i.a.* Pinochet, Augusto, 2001) and issues of transitional justice in Guatemala, El Salvador, Honduras, Paraguay and Uruguay, as well as in the cases alleging crimes against humanity that were committed during the 'Cold War' brought before the Court of Brazil (IACtHR, Julio Gomez Lund *et al vs.* Brazil, 2009c), Bolivia (IACtHR, Renato Ticona Estrada *et al vs.* Bolivia, 2007b), Mexico (IACtHR, Rosendo Radilla Pacheco *vs.* Mexico, 2008b).

approach to interpretation entails a novel assertion of authority over the States Parties. So, from the political perspective it represents a critical shift in the powers of the Court to hold the States Parties to legal instruments beyond their control and will. “By pushing the limits of the technique a court can dramatically expand its competence to consider legal materials beyond the treaties to which it has supposedly been confined.”<sup>34</sup> The Courts asserts a competence over and above the States Parties in clear manifestation of judicial activism. The same author, in a different article, mentions Rietiker, who argues that “the mere label of ‘human rights’ instrument is, as such, not relevant to justify special treatment” with regard to interpreting a treaty as evolutive. Rietiker does not object the evolutive interpretation as such, but rather the reasoning that such an interpretation is warranted for the interpretation of human rights treaties *per se*.<sup>35</sup>-  
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John Tobin notes that monitoring bodies and advocates can be quick to offer interpretations that reflect personal and political preferences. He says that “such ‘result driven jurisprudence’ may well persuade those who focus on what the law should be (*lex ferenda*) but its impact is limited to those who focus on what they perceive the law is (*lex lata*). Moreover, this *lex ferenda* approach encourages criticisms like David Kennedy’s, that the human rights movement degrades the legal profession by encouraging a combination of overly-formal reliance on textual articulations that are anything but clear or binding and sloppy humanitarian argument.’ Simply clothing an assertion about the content of an internationally recognized human right with the apparel of humanity may satisfy a moral or political urge, but it does not necessarily accord with the nature of the *legal* obligations actually assumed by a state under a human rights treaty.”<sup>37</sup>

Although the International Court of Justice in the *Case Ahmadou Sadio Diallo* has explicitly referred to the Human Rights Committee in relation to the International Covenant on Civil and Political Rights, the concept of ‘external system coherence’ seeks to accommodate and exceeds the requirements under Article 31(3)(c) of the Vienna Convention on the Law of the Treaties, that the application of the general rule under Article 31(1) takes into account any relevant rules of international law applicable in the relations between the parties. The requisite of external system coherence requires a consideration of the entire system of international law, especially the provisions of other human rights treaties (in this case, also its bodies), but also other multilateral treaties and regimes within international law.<sup>38</sup>

At the time of their adoption, the conventions on human rights aimed at laying down minimum standards. This approach is generally based on the argument that the Court respects the sovereignty of the states and the necessity of the cooperation of the states parties. The human rights’ tribunals (following Conventions) have adopted the position that their role is subsidiary to that of the contracting states. The principle of ‘subsidiarity’ refers to the subsidiary role of the Convention machinery and entails, first of all, what may be termed a ‘procedural relationship’ between the national authorities responsible for implementing the Convention and deciding human rights issues on the one hand and the Convention institutions on the other.<sup>39</sup> Nevertheless, the judges and their literal interpretation of law, face obstacles pushed by the reality. In addressing the issues raised by parties in litigation, judges exercise choices because the parties argue that the same laws apply in different ways in regard to the underlying case. The

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<sup>34</sup> Arato, Julián. “Constitutional Transformation in the ECtHR: Strasbourg’s expansive recourse to external rules of International Law.” *Brook. J. Int’l L.* 37 (2011-2012): 349 *et sq.* Also V. Lixinski, Lucas. “Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law.” 21 *EuR. J. Int’l L.* (2010): 585 *et sq.*

<sup>35</sup> Arato, J. “Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation over Time and Their Diverse Consequences.” 9 *Law & Prac. Int’l Cts. & Tribunals* (2010): 443 *et sq.*

<sup>36</sup> V. *supra* Note 20.

<sup>37</sup> Tobin, J. “Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation.” 23 *Harv. Hum. Rts. J.* (2010): 1-2. V. Kennedy, D. “The International Human Rights Movement: Part of the Problem?.” 15 *Harv. Hum. Rts. J.* (2002):101 *et sq.*

<sup>38</sup> Tobin, J. “Seeking to Persuade (...)”, *Op Cit*, p. 34.

<sup>39</sup> Ambrus, M. “Comparative Law Method in the Jurisprudence of the European Court of Human Rights in The Light of the Rule of Law.” *Erasmus Law Review* 2-3 (2009): 353 *et sq.*

task of the person who decides is not to satisfy logical precepts, but the objectives of law<sup>40</sup>, which entail various theories of justice, based on philosophical doctrines and ideological positions. A purposive approach to judicial interpretation involves teasing out the meanings behind the words of the law, based on the intended purpose behind the law. George Letsas, the author of the definition of *autonomous concepts* ("technical terms that are employed in legal sources and are invested with special, non-ordinary meaning"), considers that in invocation of "non-ordinary meaning", judges assign freely the scope and significance of the law, "making" new law.<sup>41</sup> Deeper opening occurs in cases of evolutionary, progressive or innovative interpretation. It is observable that the specialized bodies often produce interpretations contrary to the drafters' intentions, giving precedence to the Convention's purpose or to the feeling of the judges over the international instrument. Giuseppe Martinico, in relation to the European system of human rights protection interrogates himself if the European Convention is going to be "supreme."<sup>42</sup>

### Some final considerations

In a great number of cases, jurisprudence and quasi-jurisprudence of tribunals and other specialized bodies has changed the real substance of the human rights conventions and has entered itself with supreme character in the legal bloodstream of the states. At this time, the International Court of Justice has allowed human rights case-law enter into international law as a "body" of great weight, incorporating and legitimizing thereby, not only the achievements but also the excesses of those agencies.

However, in subsequent cases, as *Georgia v. Russian Federation* (judgment of 1 April 2011),<sup>43</sup> the I.C.J. has not kept that humanized position. The Court declared itself not competent based on a formalistic interpretation of the Art. 22 of the CERD, and ignored the value (declared "great weight") of the Concluding Observations of the Committee on the Elimination of All Forms of Racial Discrimination.<sup>44</sup> -<sup>45</sup> It also ignored the *pro homine* principle sustained in all specialized bodies of human rights. Perhaps the fact that Russia was the defendant may have influenced the decision of the Court, given the inconvenience of taking a position in relation to a sensitive political situation.

Despite the above, one wonders if the "great weight" that the Court gives to the "jurisprudence" of specialized human rights bodies does not imply a new parameter for the interpretation of treaties and general international law, and constitutes the basis of a human rights new constitutional and moral superiority in the international legal system.

<sup>40</sup> Popovic, Dragoljub. "Prevailing of judicial activism over self-restraint in the Jurisprudence of the European Court of Human Rights." *Creighton L. Rev.* 42 (2008-2009): 361 *et sq.*

<sup>41</sup> Letsas, George. "The Truth in Autonomous Concepts: How to Interpret the ECHR." *Eur. J. Int'l L.* 15 (2004): 285 *et sq.*

<sup>42</sup> Martinico, Giuseppe. "Is the European Convention Going to Be 'Supreme'? A Comparative-Constitutional Overview of ECHR and EU Law before National Courts." *EJIL* 23-2 (2012): 401 *et sq.*

<sup>43</sup> I.C.J. *Case concerning application of the international Convention on the Elimination of all Forms of Racial Discrimination* (Georgia v. Russian federation). Preliminary objections. Judgment of 1 April 2011.

<sup>44</sup> Committee on the Elimination of All Forms of Racial Discrimination, Concluding Observations: Georgia, para. 4 (Apr. 27, 2001), UN Doc. CERD/C/304/Add.120. The said document expresses: "[...]the situations in South Ossetia and Abkhazia have resulted in discrimination against people of different ethnic origins, including a large number of internally displaced persons and refugees. On repeated occasions, attention has been drawn to the obstruction by the Abkhaz authorities of the voluntary return of displaced populations, and several recommendations have been issued by the Security Council to facilitate the free movement of refugees and internally displaced persons."

<sup>45</sup> In their Joint dissenting opinion, Owada, Simma, Abraham, Donoghue and Gaja found that the Court's interpretation of Article 22 is questionable and that the Court's analysis on this point ignores or gives short shrift to arguments which might have led to a different conclusion (para. 3). Meanwhile, the Judge Cañado Trindade, in his dissenting opinion, stressed that the CERD is a *living* instrument, but that the Court has interpreted it in formalist-static way, although a dynamic-evolutive interpretation is present in international case-law of the I.C.J and of the other bodies of human rights (para 169 *et sq.*).

This means that decisions and recommendations of the judicial and quasi-judicial bodies specializing in human rights –and their evolutionary standards- can enter in the bloodstream of the international law, and create a new *Law ad gentes*, sacred right to expand and impose.<sup>46</sup>

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<sup>46</sup> V. Prieto Sanchís, Luis. “Ideología e Interpretación Jurídica.” Madrid: Tecnos 1993 13 *et sq.* Also v. Orozco Henríquez, José de Jesús. “Human Rights and the New Amendment to Article 1 of the Constitution.” *Rev. IUS* 5-28 (2011).