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Glenda Mezarobba

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By Borislav Petranov



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CONTENTS

GLEND A MEZAROBBA	7	Between Reparations, Half Truths and Impunity: The Difficult Break with the Legacy of the Dictatorship in Brazil
GERARDO ARCE ARCE	27	Armed Forces, Truth Commission and Transitional Justice in Peru
REGIONAL HUMAN RIGHTS MECHANISMS		
FELIPE GONZÁLEZ	51	Urgent Measures in the Inter-American Human Rights System
JUAN CARLOS GUTIÉRREZ AND SILVANO CANTÚ	75	The Restriction of Military Jurisdiction in International Human Rights Protection Systems
DEBRA LONG AND LUKAS MUNTINGH	99	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?
LUCYLINE NKATHA MURUNGI AND JACQUI GALLINETTI	119	The Role of Sub-Regional Courts in the African Human Rights System
MAGNUS KILLANDER	145	Interpreting Regional Human Rights Treaties
ANTONIO M. CISNEROS DE ALENCAR	171	Cooperation Between the Universal and Inter-American Human Rights Systems in the Framework of the Universal Periodic Review Mechanism
IN MEMORIAM		
BORISLAV PETRANOV	184	Kevin Boyle – Strong Link in the Chain

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.



MAGNUS KILLANDER

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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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KEYWORDS

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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.

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SUR 11, v. 6, n. 11, Dec. 2009

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From Massive Violations to Structural Patterns: New Approaches and Classic Tensions in the Inter-American Human Rights System

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Tensions of Human Dignity: Conceptualization and Application to International Human Rights Law

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Disability, Human Rights and Justice

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Love in the Time of Cholera: LGBT Rights in Colombia

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SUR 12, v. 7, n. 10, Jun. 2010

SALIL SHETTY

Foreword

FERNANDO BASCH ET AL.

The Effectiveness of the Inter-American System of Human Rights

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RICHARD BOURNE

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AMNESTY INTERNATIONAL

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VICTORIA TAULI-CORPUZ

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ALICIA ELY YAMIN

Toward Transformative

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SARAH ZAIDI

Millennium Development Goal 6 and the Right to Health: Conflictual or Complementary?

MARCOS A. ORELLANA

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