

## The Interpretation of Jurisdictional Clauses in Human Rights Treaties

### *La interpretación de las cláusulas jurisdiccionales en los tratados de derechos humanos*

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RESUMEN: Este documento analiza los métodos por los que las cláusulas jurisdiccionales contenidas en tratados de derechos humanos deben ser interpretados. El trabajo rechaza la idea de que existan reglas especiales para interpretar las reglas de derechos humanos por lo que las posturas que defienden tal idea no pueden ser extendidas a la interpretación de las cláusulas jurisdiccionales contenidas en tratados en derechos humanos. Sin embargo, el autor sostiene que los valores protegidos por los derechos humanos pueden ser utilizados para interpretar una cláusula jurisdiccional, siempre y cuando sean incorporados dentro del método contenido en el artículo 31 de la Convención de Viena sobre el Derecho de los Tratados.

**Palabras clave:** tribunales internacionales, jurisdicción, interpretación de tratados, fragmentación del derecho internacional, derechos humanos.

ABSTRACT: This paper assesses the methods by which jurisdictional clauses contained in human rights treaties shall be interpreted by international tribunals in order to determine their jurisdiction over them. The work rejects the idea that special rules for interpreting human rights rules and consequently postures that defend this idea cannot be extended to the interpretation of human rights jurisdictional clauses. Nevertheless, the author concludes that values protected by human rights can indeed be used to interpret a jurisdictional clause, as long as they are incorporated in the method of interpretation contained in article 31 of the Vienna Convention on the Law of Treaties.

**Descriptors:** International tribunals, jurisdiction, treaty interpretation, fragmentation of international law, human rights.

RÉSUMÉ: Le présent document examine les méthodes par lesquelles les clauses juridictionnelles des traités des droits de l'homme doivent être entendues. Le document rejette l'idée selon laquelle il existe des règles particulières pour l'interprétation des règles relatives aux droits de l'homme ainsi que les positions défendues cette idée ne peut pas être étendue à l'interprétation des clauses juridictionnelles des traités des droits de l'homme. Cependant, l'auteur soutient que les valeurs protégées par les droits de l'homme peuvent être utilisés pour interpréter une clause attributive de juridiction, à condition qu'ils soient intégrés dans la méthode prévue à l'article 31 de la Convention de Vienne sur le droit des traités.

**Mots-clés:** tribunaux internationaux, compétence judiciaire, interprétation des traités, fragmentation du droit international, droits de l'homme.

## I . INTRODUCTION

Human rights are a powerful cause that can overthrow regimes, transform states, and unite societies. The principles and values protected by them are so suggestive that it is sometimes now affirmed that they have changed the structure of the international legal system causing the inapplicability of its current rules.

The purpose of this paper is to demonstrate that such principles and values can be applied for the interpretation, not only of substantive rules of international law, but also of the rules concerning the jurisdiction of international tribunals. This is possible not as a consequence of the nature and goals of human rights, but in application of the current rules of international law. The international legal system is still capable of accommodating all of its values, tensions, and expectations.

First, this work assesses the nature of human rights and submits that they should be understood as a subsystem of international law that, as such, must follow the rules of the international legal system. Second, it analyses the method of interpretation of international rules and rejects the necessity of special rules for the interpretation of human rights treaties. Finally, it elaborates on the nature of international adjudication in order to explain how tribunals determine their jurisdiction over human rights treaties and concludes that by applying the general rule of interpretation, jurisdictional clauses may be interpreted in light of human rights values and principles.

Towards the beginning of the past century Professor Oppenheim remarked that '[h]e who would portray the future of international law must first of all be exact in his attitude towards its past and present'.<sup>1</sup> This postulate becomes of particular relevance when it comes to the understanding of human rights and its relationship with international law, especially nowadays when a trend for *human rightism*, as Professor Pellet has properly named the phenomenon, seem to have affected the interpretation of the system.<sup>2</sup> The future of the international human

<sup>1</sup> Oppenheim, L., *The Future of International Law*, London, OUP, 1921; 1.

<sup>2</sup> Pellet, Alain, "Droits-de-l'Hommeisme' et Droit International", in Gilberto Amado Memorial Lecture at the Palace of Nations (July 18, 2000), 2. Available at <http://untreaty.un.org/ilc/sessions/52/french/amado.pdf>, visited 29 November 2010.

rights regime rests in the understanding that international law's values are not longer limited to interstate relations and in which the interests of individuals play a central role in its development,<sup>3</sup> but in which the system continues to have states as its primary actors.

The existence and development of human rights can only be accomplished if they are understood, interpreted, and applied as a set of rules pertaining to the international legal system. International law and the values it protects can only develop in accordance with the true expectations of states and societies. This can only be accomplished if all the values of the system are pondered and if its rules are systemically interpreted.

## II. HUMAN RIGHTS IN THE CONTEXT OF INTERNATIONAL LAW: PROLEGOMENON AND STATE OF THE ART

Human rights rules can only be properly interpreted if their legal nature is understood. Human rights are part of international law and not a separate system of law and, as such, they must be developed and interpreted within the international legal regime itself. They cannot be understood in a form that undermines the basic foundations of the system, such as the principle of sovereignty. A posture like that will not only be inaccurate, but can also undermine the development of human rights themselves as the state remains the basic source of legitimacy in international law.

In the pursuit of understanding international human rights, the present chapter explores the conceptual framework and the problems underlying the relationship between international law and human rights and pretends to show the position of human rights in international law and how, as part of the international legal system, their rules should be understood and applied.

<sup>3</sup> Lauterpacht, Hersch, *The Function of Law in the International Community*, London, Clarendon Press, 1933, pp. 430-431.

International law has left to be a system of rules that only governs the relationship between states,<sup>4</sup> or as Professor Brierly defined it, ‘the sum of the rights that a state may claim for itself and its nationals from other states, and of the duties which in consequence it must observe towards them.’<sup>5</sup> It is a system in expansion<sup>6</sup> that has updated its traditional fields and developed new areas.<sup>7</sup> A substantial change in the values pursued by the international community has been produced and a new focus on individuals and their dignity is embraced by states.<sup>8</sup> International law has become a system of values in which human rights play a preponderant role in its development<sup>9</sup> and non-state actors have an increasingly active participation in the processes that lead to its making.<sup>10</sup>

Nevertheless, even in this new context, the very substance of international law has not changed: states are the entities that create international law. Regardless of the origin of the inputs within the political processes that lead to the signature of an international convention or the adoption an international resolution, states are still the entities that have the last word on their creation. When this issue is underlined in the context of international human rights law, an inevitable clash presents. How should human rights be understood when they are contained in a document that finds its legitimacy and rests its existence on the very notion from which they are protecting? Can the nature of human rights supersede the foundations of international law?

<sup>4</sup> Oppenheim (n1) 9.

<sup>5</sup> Brierly, J. L., *The Outlook for International Law*, New York, OUP, 1944; 5.

<sup>6</sup> Sørensen, Max, “Principes de Droit International public: Cours General”, *RCADI*, 101, Leiden, Martinus Nijhoff Publishers, 1960, P. 6; Dupuy, Pierre-Marie, “The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice”, 31 *N.Y.U. J. Int’l L. & Pol.* 791, p. 795.

<sup>7</sup> Abi-Saab, Georges, “The International Court as a World Court” in Lowe Vaughan, and Fitzmaurice, Malgosa (eds.), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* Cambridge, CUP, 1996, pp. 3 and 13; Higgins, Rosalyn, “Respecting Sovereign States and Running a Tight Courtroom” (2001) 50 *ICLQ* 121, 121.

<sup>8</sup> Henkin, Louis “Introduction”, in Henkin, Louis (ed), *The International Bill of Rights: The International Covenant on Civil and Political Rights*, New York, Columbia University Press, 1981, 1, 4; Singh, Nagendra, *Enforcement of Human Rights in Peace and War and the Future of Humanity*, Leiden, Martinus Nijhoff, 1986, 1.

<sup>9</sup> Lauterpacht, Hersch, *International Law and Human Rights*, London, Stevens, 1950, 68;

<sup>10</sup> See Boyle, Alan & Chinkin, Christine *The Making of International Law*, New York, OUP, 2007, 46.

Human rights by themselves are no more than a set of aspirations. In order for them to be effective it is necessary to establish a system of rules that guarantee their protection.<sup>11</sup> Without a set of secondary rules that determines its boundaries any human right would be ineffective. In the absence of this element fundamental human rights at most would have a dissuasive nature, but not an actual scope of application or protection. This is true whether the right in question is part of a domestic legal system or of international law. As such, any attempt to create, develop, or delimit international human rights should be done within the context of international law itself.

This does not mean that once human rights have entered into the international law system, through codification or recognition in an international convention or custom, they are to lose their philosophical foundations or be understood differently. What it means is that as part of a system of law, in this case international law, human rights and the quest for their protection cannot avoid the rules and structure of the system itself.

However, the emergence of new human rights or the development of existing ones seem nowadays to be justified, not under treaties or customary rules, but by appealing to general principles ‘in which moral and humanitarian considerations find a more direct and spontaneous expression in legal form.’<sup>12</sup> This has led to a misunderstanding of human rights as a system of law and not just only as a set of rights for individuals. As Justice Simma accurately underlines it: ‘caution is far from being a characteristic of human rights literature.’<sup>13</sup>

This situation has led to an *overproduction* and extensive judicial interpretation of rights that lacks a process of reflection of the costs and gains of their recognition in the context of international law.<sup>14</sup> As a con-

<sup>11</sup> Chaloka Beyani, “The Legal Premises for the International Protection of Human Rights”, in Goodwin, Guy S. & Talmon, Stefan (eds.), *The Reality of International Law: Essays in Honour of Ian Brownlie*, London, Clarendon Press 1999; 21, 30.

<sup>12</sup> Higgins, Rosalyn, “The International Court of Justice and Human Rights”, in Wellens, K. (ed.), *International Law: Theory and Practice: Essays in Honour of Eric Suy*, Leiden, Martinus Nijhoff, 1998, 691, 693; Simma, Bruno & Alston, Philip, “The Sources of Human Rights Law: Custom, *Jus Cogens*, and General Principles” (1988-1989) 12 *AustYBIL* 82; 105.

<sup>13</sup> *Ibidem*, 84.

<sup>14</sup> Baxi, Upendra, “Too many, or too few, human rights?” (2001) 1 *HRLR* 1.

sequence of this phenomena, international human rights are now seen everywhere, causing their *raison d'être* to start deluding.<sup>15</sup>

In this scenario the relationship between human rights and international law becomes complex. On the one hand, international human rights law can only develop inside the framework of international law. This means that any campaign that wishes to promote or develop human rights through international law has to take into consideration the political processes that lead to the adoption of international norms and, especially, the will of the states to pursue such a campaign. After all, the formal structure of international law is still based on sovereignty, negotiation and consensus, which can be built in a variety of ways.<sup>16</sup> Being that states are the entities that are ultimately obliged by human rights norms, with no form of reciprocity, the advancement of new norms or regulations can get frozen as a consequence of their lack of will. On the other hand, eager to develop international human rights law, human rights lawyers have turned towards literature in order to pursue their agenda. However, without state action such literature can at most be considered as persuasive. States remain the main source of legitimacy for political decisions and still play the central role in the protection of human rights despite the current non-state actors supervision.<sup>17</sup> As such, international human rights law shall be understood and developed not only in accordance with their nature, but also with the rules of international law applicable to them.<sup>18</sup>

As a consequence of the expansion and specialization of the international legal regime, the tension between general international law<sup>19</sup> and

<sup>15</sup> Bianchi, Andrea, "Human Rights and the Magic of Jus Cogens" (2008) 19 *EJIL* 491, 506

<sup>16</sup> Crawford, James, *International Law as an Open System*, London, Cameron May, 2002, 28.

<sup>17</sup> Paulus, Andreas L., "Commentary to Andreas Fischer-Lescano & Gunther Teubner, The Legitimacy of International Law and the Role of the State" (2004) 25 *MichJIL* 1047, 1057.

<sup>18</sup> Steiner, Henry J. *et al.* (eds.), *International Human Rights in Context*, 3 edn, New York, Oxford University Press, 2008, 59.

<sup>19</sup> The term 'general international law' is hereby understood as those rules of custom, whether codified or not, that compose the basic structure of public international law. See, e.g., Kelsen, Hans *Principles of International Law*, London, Rinehart & Company, Inc, 1952; 19;. Tunkin, Grigory I "Co-existence and International Law", *RCADI*, 95, Leiden, Martinus Nijhoff Publishers, 1958, 23.

international human rights law has broadened.<sup>20</sup> Nevertheless, whether this phenomenon is seen as a mean to fragment the system or to specialize it,<sup>21</sup> this tension has certainly to be considered anachronistic. The International Court of Justice (ICJ), for instance, since 1984 made clear that ‘where human rights are protected by international conventions, that protection takes the form of such arrangements for monitoring or ensuring respect for human rights as are provided for in the conventions themselves’.<sup>22</sup>

In this context, human rights cannot be considered as a *self-contained regime*, but rather they shall be envisaged as a subsystem of international as referred by the International Law Commissions’ Report on Fragmentation of International Law. This means that even though international human rights law may have special rules, particularly secondary rules such as those regarding reparations, all vacuums within the subsystem may be solved through general rules of treaty law<sup>23</sup> and falling back on the rules of customary international law.<sup>24</sup> There is no need to claim the necessity of special sub-system rules if general international law can provide the tools to solve a normative conflict.<sup>25</sup> A sub-system of international law is ought to have only the special rules absolutely

<sup>20</sup> Brownlie, Ian “Problems Concerning the Unity of International Law” in *Le droit international a l’heure de sa codification: Etudes en l’honneur de Roberto Ago* (Giuffrè, 1987) 153, 156.

<sup>21</sup> For discussions on the pros and cons of specialization see Simma, Bruno, “Fragmentation in a Positive Light” (2004) 25 *MichJIL* 845; 846; Sørensen, Max, “Autonomous Legal Orders: Some Considerations Relating to a Systems Analysis of International Organizations in the World Legal Order” (1983) 32 *ICLQ* 559, 575; Guillaume, Gilbert, “The Future of International Institutions” (1995) 44 *ICLQ* 848; 862; Oellers-Frahm, Karin, “Multiplication of International Courts and Tribunals and Conflicting Jurisdictions - Problems and Possible Solutions”, (2001) 5 *MPUNYB* 67; 71; Hafner, Gerhard, “Pros and Cons Ensuing from Fragmentation of International Law” (2004) 25 *MichJIL*. 849; 854-857.

<sup>22</sup> *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Merits, ICJ Reports (1986), p. 14;134.

<sup>23</sup> Koskenniemi, Martti, *Fragmentation of International Law: Difficulties Arising From The Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission*, International Law Commission, Fifty-eighth session UN Doc A/CN.4/L.682. para 128; Pauwelyn, Joost, *Conflict of Norms in Public International Law. How WTO Law Relates to Other Rules of International Law*, Cambridge, CUP, 2003; 37.

<sup>24</sup> Simma, Bruno “Self-Contained Regimes” (1985) 16 *NethYBIL* 115; 118.

<sup>25</sup> Dupuy, Pierre-Marie, “L’unité de l’ordre juridique international: Cours Général de Droit International Public”, *RCADI*, 297, Leiden, Martinus Nijhoff Publishers, 2002, 27; Ze-



necessary for its subsistence and development. As Professor D'Amato affirms: 'human rights norms are just like any other international law norms in that they are enforced through reciprocal entitlement-violations within the system itself.'<sup>26</sup>

Notwithstanding the foregoing, it is true that under the idea that the old conception of sovereignty is inconsistent with the interests and purposes of the international community, some commentators have stemmed that the relationship between human rights and international law has changed considering now human dignity as source of law in itself and as the basic foundation of the international legal system.<sup>27</sup> Under this theory, international law is *jus gentium* itself<sup>28</sup> and, as such, the beliefs, values, ethics, ideas and human aspirations are the solely relevant factors to determine the existence and application of rules.<sup>29</sup> In words of Professor Allot, international law, as traditionally understood, 'is a deformation of all selfhoods.'<sup>30</sup>

However, even human rights' enthusiasts have criticized these approaches. They emphasize that such theories have widely exaggerated the object/subject dichotomy of human rights and the position and role of the state towards it.<sup>31</sup>

As valuable as these positions in principle may be, the international legal system still relies on the basis that cooperation and restrictions between states are the ultimate regenerators of rules. International human

manek, Karl , "The Legal Foundations of the International System", *RCADI*, 266, Leiden, Martinus Nijhoff Publishers, 1997, 62.

<sup>26</sup> D'Amato, Anthony, *International Law: Process and Prospect* , New York, Transnational Publishers Inc, 1995; 165-166.

<sup>27</sup> Cançado Trindade, Antônio Augusto "International law for humankind : Towards a New *Jus Gentium* : general course on public international law" *RCADI* 316, Leiden, Martinus Nijhoff Publishers, 2005, 316.

<sup>28</sup> Allott, Philip "The International Court and the voice of justice" in "Lowe, Vaughan and Fitzmaurice, Malgosia (eds.) *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* Cambridge, CUP, 1996; 17.

<sup>29</sup> Cançado Trindade, (n27) 177.

<sup>30</sup> Allott, Philip, "Reconstituting Humanity-New International Law", 1992, 3 *EJIL* 219; 247.

<sup>31</sup> Tomuschat, Christian, *Human Rights: Between Idealism and Realism*, New York, Oxford University Press, 2003; 61; Higgins, Rosalyn, "Conceptual Thinking about the Individual in International Law", 1978, 24 *NYL Sch L Rev* 11, 16.

rights find their structure on general international law and constitute a sub-system of international law. This means that they have to adjust and adapt to other rules of the system itself. In regard with the relation between human rights and a tribunal's jurisdiction, this seem to have been set clear by the ICJ in its recent decision in the *Jurisdictional Immunities* case by asserting that procedural and substantive rules may never enter into conflict since they address different matters, not even if the substantive rule has acquired a *jus cogens* status.<sup>32</sup>

To abruptly promote a transition of values by challenging the structure of the international legal system may lead to its inefficacy and eventually to its peril. Ultimately, in order to avoid *human rightism* jurists have to 'describe legal roles as they are and not as they would like to be, even if it means judging them severely'.<sup>33</sup>

### III. THE INTERPRETATION OF HUMAN RIGHTS RULES

Acknowledging human rights as a subsystem of international law inevitably leads to the task of identifying the essential rules that it needs to subsist and develop. The distinctive nature of human rights has lead scholars to believe that special rules of interpretation are necessary in such subsystem. This is a misconception of the rules that general international law provides and an inaccurate understanding of the position of human rights as part of the international legal system.

The present chapter analyzes the rule of interpretation established in the Vienna Convention on the Law of Treaties<sup>34</sup> (VCLT) and characterizes the object and purpose of a treaty as the determinant element for interpretation. It then explores the methods of interpretation and the understanding of the subsystems that regional and international tribunals endorse. Finally, an assessment on the characteristics of the subsystem and its so-called special rules of interpretation is made in order to

<sup>32</sup> *Jurisdictional Immunities of the State* (Germany v. Italy: Greece Intervening) Judgment, 3 February 2012; para 93

<sup>33</sup> Pellet, Alain "Droits-de-l'Hommeisme' et Droit International" (n2) *idem*.

<sup>34</sup> Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331.

conclude that human rights must be interpreted in accordance with the rules of general international law provided by the VCLT. The subsystem does not hold characteristics that imply the necessity for special rules of interpretation and the ones identified as such can be explained through the rule envisaged in the VCLT.

The unity and stability of international law, and of human rights as a part of it, relies on the capacity to create bridges and interconnect its islands. This can only be accomplished through the rules established in the VCLT.

1. *The Vienna regime and the object and purpose of the treaty as the key element for interpretation*

Interpretation is the ‘the process of assigning meaning to texts and other statements for the purposes of establishing rights, obligations, and other consequences relevant in a legal context.’<sup>35</sup> Treaty interpretation is an *ars*.<sup>36</sup> Although, as any art, it needs to be disguised as a science in order to be compelling.<sup>37</sup> In the international legal regime the disguise for this art is method. Such method is established on Articles 31 and 32 of the VCLT.

Article 31

*General rule of interpretation*

1. 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.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

<sup>35</sup> Herdegen, Matthias, “Interpretation in International Law”, *Max Planck Encyclopedia of Public International Law*, online edition, visited on 14 February 2011, para. 1.

<sup>36</sup> Amerasinghe, C. F., “Interpretation of Texts in Open International Organizations” (1994) 65 *BYBIL* 175.

<sup>37</sup> Jennings, Robert, “General Course on Principles of International Law”, *RCADI*, 121, Leiden, Martinus Nijhoff Publishers, 1967; 323.

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

#### Article 32

##### *Supplementary means of interpretation*

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

Article 31 envisages the general rule of interpretation. As defined in paragraph 1, interpretation requires four elements. Namely, interpretation has to be done 1) in good faith, 2) in accordance with the actual meaning to be given to the terms of the treaty, 3) in their context and, 4) in the light of its object and purpose. Paragraph 2 defines what should be considered to determine the context of the treaty and paragraph 3 determines that the practice of the parties in regard to a treaty shall be also considered relevant for interpreting it. On the other hand, Article 32 establishes that, *inter alia*, the *travaux préparatoires* of an international agreement shall be taken into consideration for its interpretation when the application of the method envisaged in Article 31 leads to an ambiguous or obscure meaning or to a manifestly absurd or unreasonable result.

The content and possible approaches to the rule of interpretation established in the VCLT have been subject of wide discussions. The most relevant of them refer to the adequacy of weighing the textual approach against the intention of the parties,<sup>38</sup> the principles and maxims underlying interpretation,<sup>39</sup> and the hierarchical structure of the Articles.<sup>40</sup> However, as a commentator affirms, the actual terms of Articles 31 and 32 terminate any doctrinal discussion regarding the existence and extent of the rules of interpretation of international agreements.<sup>41</sup> This is confirmed by the International Law Commission itself whom in its commentaries to the VCLT stated that the rules established in such Articles are based on the conception that the words of the treaty contain the intentions of the parties and that they can be confirmed by the *travaux préparatoires*, that considerations of logic and not legal hierarchy determined the arrangement of the elements of such rules, and that such regime has some degree of flexibility in order to allow the treaty to have appropriate effects.<sup>42</sup> The ICJ has also asserted the importance of these rules by validating their customary nature.<sup>43</sup>

The general rule of interpretation shall be considered as a unity. Yet, it is the object and purpose of the treaty the most relevant of its elements since it is the only one that requires both a factual and a normative analysis for its determination. The fact that the other elements may be assessed only through an empirical test gives a preponderant role to

<sup>38</sup> See Corten, Oliver & Klein, Pierrem, *Les Conventions de Vienne sur le droit des traités: commentaire Article par Article*, Antwerp, Bruylant, 2006; Sinclair, Ian, *Vienna Convention on the Law of Treaties* Manchester, Manchester Univesrity Press, 1984.

<sup>39</sup> See Lauterpacht, Hersch, “Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties” (1949), 26 *BYBIL* 48.

<sup>40</sup> Elias, T.O., *Modern Law of Treaties*, Leiden, Sitjoff, 1974; Linderfalk, Ulf, “Is the Hierarchical Structure of Articles 31 and 32 of the Vienna Convention Real or Not? Interpreting the Rules of Interpretation 2007”, 54 *NethILR* 133.

<sup>41</sup> Torrez Bernárdez, Santiago, “Interpretation of Treaties by the International Court of Justice Following the Adoption of the 1969 Vienna Convention on the Law of Treaties” in Hafner, Gerhard (ed) *Liber Amicorum Professor Ignaz Seidl-Hohenveldern, In Honour Of His 80th Birthday*, Leiden, Kluwer 1998, 721.

<sup>42</sup> International Law Commission, *Draft Articles on the Law of Treaties with Commentaries*, International Law Commission, Eighteenth session, (1966) *Yearbook of the International Law Commission*, vol. II 219-221.

<sup>43</sup> *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia / Malaysia)*, Judgment, I. C. J. Reports 2002, p. 625; p. 635, para. 37.

the normative evaluation of the object and purpose of the treaty since the values privileged in such analysis will necessarily determine the interpretation of a particular provision in a conflicting situation.

Whereas the concept of good faith is still a diffuse notion, judicial interpretation and commentators have usually related it to the reasonableness of the parties' behavior and understanding of their obligations towards a treaty.<sup>44</sup> Hence, the term envisages a *juris tantum* presumption that parties behave reasonably in their contractual relationships. This seems to be a precondition for analyzing the terms of the treaty in its context and in accordance with its object and purpose.

The interpretation of a treaty begins with the ordinary meaning of its terms.<sup>45</sup> Yet, words can have several ordinary meanings.<sup>46</sup> As such, a word cannot be interpreted in an isolated fashion.<sup>47</sup> The context in which the word is circumscribed is the relevant element to determine its *ordinary meaning*.<sup>48</sup> Fortunately, paragraphs 2 and 3 of Article 31 of the VCLT give sufficient elements to determine the ordinary meaning of the terms of a treaty within its context. Until this part of the logical process of interpretation, the structure of this Article portrays a precondition for the start and a conjunction of the terms of the treaty within its context. These elements have a common feature: they can be determined through an empirical analysis since they share a factual background. Both the previous conduct of the parties and the aspects of the treaty that determine the context and the subsequent practice of the parties constitute facts. However, this does not seem to be the case of the object and purpose of the treaty.

<sup>44</sup> *Territorial Dispute* (Libyan Arab Jamahiririya/Chad), Judgment, ICJ Reports 1994, p.6; p. 19, para.41; Jennings, Robert & Watts, Arthur (eds.), *Oppenheim's International Law*, London, Longman, 9 ed. 1992; 1272.

<sup>45</sup> Villiger, Mark *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Leiden, Martinus Nijhoff, 2009; 426.

<sup>46</sup> Schwarzenberger, Georg, "Myths and Reality of Treaty Interpretation: Articles 27-29 of the Vienna Draft Convention on the Law of Treaties" (1968) 9 *Virginia JIL* 1; 13.

<sup>47</sup> *Avena and other Mexican Nationals* (Mexico v. USA) Judgment, I.C.J. Reports 2004, p. 12; p.48, para. 84.

<sup>48</sup> *South West Africa* (Ethiopia v. South Africa; Liberia v. South Africa) Preliminary Objections, Judgment of 21 December 1962, p.319;335; Richard Gardiner, *Treaty Interpretation* (Oxford University Press 2008) 165; Bernhardt, Rudolf "Interpretation and Implied (Tacit) Modification of Treaties. Comments on Arts. 27, 28, 29 and 38 of the ILC's 1966 Draft Articles on the Law of Treaties (1967) 27 *ZaöRV* 491, 498.

The object and purpose of the treaty is the teleological element of the general rule of interpretation.<sup>49</sup> This element has also been subject of academic discussions, but scholars seem to agree in the fact that it is an element of interpretation that has also to be interpreted.<sup>50</sup> Nevertheless, establishing a method for the interpretation of the object and purpose of a treaty is, to say the least, difficult.<sup>51</sup> The aforementioned is mainly a consequence of the subjective character of the concept itself.

International tribunals have taken into account other parts of the treaty in order to determine its object and purpose.<sup>52</sup> Whether looking into the terms of the treaty or the statements of the parties in the diplomatic conferences that lead to their draft, some commentators have also follow a factual approach.<sup>53</sup> However, all these attempts have proven to fall short to elucidate the concept. On the one hand, interpreting the object and purpose of a treaty in accordance with factual considerations is a method that overlaps with the method for determining its context. On the other hand, the object and purpose of a treaty is its *raison d'être* and its *ratio legis*.<sup>54</sup> As such, factual considerations cannot be the only elements taken into consideration. Whether considered as international community's aspiration<sup>55</sup> or a moral value,<sup>56</sup> a normative element has to

<sup>49</sup> Fitzmaurice, Gerald "Vae Victis or Woe to the Negotiators! Your Treaty or Our Interpretation of it (1971) 65 *AJIL* 358.

<sup>50</sup> Buffard, Isabelle & Zemanek, Karl "The Object and Purpose of a Treaty: An Enigma?", (1998) 3 *Austrian Rev Int'l & Euro L* 311, 319;

<sup>51</sup> Pellet, Alain, *Tenth report on reservations to treaties, Addendum*, International Law Commission, Fifty-seventh session, UN Doc A/CN.4/558/Add 1 para 81.

<sup>52</sup> *Case concerning rights of nationals of the United States of America in Morocco*, Judgment of August 27th, 1952; I.C. J. Reports 1952, p. 176; 196.

<sup>53</sup> Buffard, Isabelle & Zemanek, Karl (n50) 330-343; Klabbbers, Jan "How to Defeat a Treaty's Object and Purpose Pending Entry into Force: Toward Manifest Intent" (2001) 34 *Vand. J Transnat'l L* 283, 289-291.

<sup>54</sup> *Reservations to the Convention on Genocide*, Advisory Opinion, I.C. J. Reports 1951, p. 15, 21.

<sup>55</sup> Bianchi, Andrea, "The Act of State: The State of the Act, Judicial Interpretation and Human Rights Enforcement" in Kohen, Marcelo (ed) *Promoting Justice, Human Rights and Conflict Resolution Through International Law, Liber Amicorum Lucius Caflisch*, Leiden, Martinus Nijhoff 2007, 129; 148.

<sup>56</sup> Letsas, George, "Strasbourg's Interpretative Ethic: Lessons for the International Lawyer" (2010) 21 *EJIL* 509, 541.

be taken into consideration in order to assess the object and purpose of a treaty. Nevertheless, this normative element will always be subject to the considerations of the interpreter and, consequently, can be as broad or as narrow as the he or she understands it to be. The object and purpose of the treaty is the flexible element of the general rule of interpretation and, as such, this gray area of understanding of a normative value is the key element for the interpretation of treaties.

As long as it is not tantamount to undermining the certainty which *jus scriptum* intended to provide,<sup>57</sup> flexibility cannot necessarily be considered as a bad thing for interpreting a treaty. As mentioned before it allows the effective interpretation of the treaty, but most importantly, it enables the development of a treaty's aspirations through time and taking into consideration the normative evolution of rules and the practice of the parties to it.

As Professor Pellet submits, there is not a single formula to determine the object and purpose of a treaty. The process to elucidate it requires more *esprit de finesse* than *esprit de géométrie*, thus allowing interpretative flexibility.<sup>58</sup> Method is only an explanation of the process. It is the pursuit of fineness that characterizes interpretation as an art and not a science.

## 2. Judicial interpretation of human rights

Judicial decisions and current trends on the human rights' discipline tend to suggest that they should be interpreted in light of human rights concerns.<sup>59</sup> Whereas most tribunals claim their allegiance to the VCLT rule of interpretation, some commentators believe that departure from such rules is justified for interpreting human rights. These academic positions emphasize that an interpretation that underpins the individu-

<sup>57</sup> Villiger, Mark, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, (n43) 441.

<sup>58</sup> Pellet, *Tenth report on reservations to treaties* (n51) 90.

<sup>59</sup> Meron, Theodor, *The Humanization of International Law*, Leiden, Martinus Nijhoff, 2006; 445.



al's interests<sup>60</sup> and impairs state sovereignty shall be preferred.<sup>61</sup> Other positions suggest that human rights treaties have such a special object and purpose that traditional rules of interpretation should be adapted to them.<sup>62</sup>

The present section gives a general overview of how international tribunals interpret human rights instruments and the special approaches given to them within the international and regional context. This analysis will focus on the most comprehensive human rights treaties. As a matter of practicality and exposure, special attention will be given to the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACtHR) and the interpretation they give to their constitutive instruments, the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the American Convention on Human Rights (ACHR), respectively. Finally some attention will be given on how the ICJ has dealt with the interpretation and application of the International Covenant on Civil and Political Rights (ICCPR).

In the famous decision *Austria v. Italy* the European Commission of Human Rights (ECommHR) determined that:

‘[T]he obligations undertaken by the High Contracting Parties in the [European] Convention [on Human Rights] are essentially of an objective character, being designed rather to protect the fundamental rights of individual human beings from infringements by any of the High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties themselves’<sup>63</sup>

This rationale constitutes one the cornerstones of tribunals’ understanding an interpretation of human rights. Under this approach, par-

<sup>60</sup> Cançado Trindade, Antonio Augusto, “Coexistence and Coordination of Mechanisms of Protection of Human Rights”, *RCADI* 202 Leiden, Martinus Nijhoff Publishers, 1987; 9; 91-112.

<sup>61</sup> Crema, Luigi, “Disappearance and New Sightings of Restrictive Interpretation(s)”, (2010) 21 *EJIL* 681; 694.

<sup>62</sup> Schwelb, Egon, “The Law of Treaties and Human Rights,” in Reisman and Weston (eds) *Towards World Order and Human Dignity: Essays in Honour of Myres S McDougal*, New York, Macmillan, 1976; 263, 266-272.

<sup>63</sup> *Austria v. Italy*, App no 788/60 (EcommHR, 11 January 1961) 140.

ticularly, regional human rights tribunals have developed different theories of interpretation for human rights. Whereas both the ECtHR<sup>64</sup> and the IACtHR<sup>65</sup> have asserted the applicability of the rules of the VCLT to interpret their respective constitutive instruments, they have also endorsed special methods of interpretation for human rights.

The ECtHR, although it scarcely mentions it,<sup>66</sup> follows the rules of the VCLT for interpreting the ECHR. However, the Court claims to have developed a further theory of interpretation for the Convention. This theory derives from the *Golder* case in which the ECtHR determined that even though Article 6 of the Convention does not state a right of access to courts or tribunals in express terms, it is implicitly included among the guarantees set forth on it.<sup>67</sup> The Court reached that conclusion after analyzing the text, context, and object and purpose of the Convention, but, most importantly, after submitting that in the hypothetical situation that the ECHR did not guarantee such right, states ‘could without acting in breach of that text, do away with courts, or take away their jurisdiction to determine certain class of civil actions and entrust it to organs dependent on the Government’.<sup>68</sup> Finally, the ECtHR submitted that such ‘[was] not an extensive interpretation forcing new obligations on the Contracting States: it [was] based on the very terms of the first sentence of Article 6 para. 1 (art. 6-1) read in its context and having regard to the object and purpose of the Convention, a lawmaking treaty... and to general principles of law.’<sup>69</sup>

The *Golder* decision is considered to be the basis of what has been called by scholars as the evolutive theory of interpretation of the ECHR. This theory of interpretation was later developed by the ECtHR in the *Tyrer* case in which it stated that the ‘Convention is a living

<sup>64</sup> *Saadi v United Kingdom*, App no 13229/03 (ECtHR, 29 January 2008), para. 26.

<sup>65</sup> *Ivcher Bronstein v Peru* [Competence] (IACtHR, 24 September 1999), para. 38.

<sup>66</sup> Villiger, Mark, “Articles 31 and 32 of the Vienna Convention on the Law of Treaties in the Case-Law of the European Court of Human Rights” in Bröhmer, Jürgen *et. al.* (eds.) *Internationales Gemeinschaft und Menschenrechte, Festschrift für Georg Ress*, Carl Heymanns, Verlag, 2005, 317, 330.

<sup>67</sup> *Golder v United Kingdom* App no 4451/70 (ECtHR, 21 February 1975) para. 31.

<sup>68</sup> *Ibidem*, 35.

<sup>69</sup> *Ibidem*, 36.

instrument which..., must be interpreted in the light of present-day conditions.’<sup>70</sup> Under this theory, scholars stress that the ECHR must not only be interpreted light of the current conditions, but also disregarding the original intention of the parties if they enter into conflict with the full protection of rights envisaged on it.<sup>71</sup> Ever since the *Golder* and *Tyrer* cases the Court has adopted a systematic dynamic interpretation of the Convention.<sup>72</sup>

The abovementioned constitutes a general theory of interpretation of the ECHR as a whole. Nevertheless, the ECtHR has also developed methods of interpretation that apply to specific circumstances. This is the case of the *autonomous method of interpretation* that proposes that in international adjudications, courts shall not restrict themselves to interpret a right under the meaning of the domestic law of the contracting party, but must search for its international significance.<sup>73</sup> The Court has also developed the vastly explored *margin of appreciation* theory by which, in general terms, it has to address the relationship between individual freedoms and collective goals and the limits of the rights envisaged in the ECHR in order to determine their scope of application.<sup>74</sup> Finally, it is also worth mentioning that the Court has also interpreted the ECHR taking into consideration non-human rights instruments<sup>75</sup> and *soft law* human rights documents.<sup>76</sup>

The IACtHR also follows the evolutive theory of interpretation.<sup>77</sup> Moreover, it usually applies *soft law* instruments as guidelines for

<sup>70</sup> *Tyrer v United Kingdom* App no 5856/72 (ECtHR, 25 April 1978) para. 31.

<sup>71</sup> Letsas, George, *A Theory of Interpretation of the European Convention on Human Rights*, New York, OUP, 2008; 65.

<sup>72</sup> *A, B and C v Ireland*, App no 25579/05 (ECtHR, 16 December 2010) para. 234.

<sup>73</sup> Vanneste, Frédéric *General International Law Before Human Rights Courts: Assessing the Specialty Claims of International Human Rights Law*, Antwerp, Intersentia 2010, 229; Letsas, George, “The Truth in Autonomous Concepts: How to Interpret the ECHR”, 2004, 15 *EJIL* 279.

<sup>74</sup> See Arai-Takahashi, Yutaka, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, Antwerp, Intersentia, 2002.

<sup>75</sup> *Al-Adsani v United Kingdom* App no 35763/97 (ECtHR, 21 November 2001); *Fogarty v United Kingdom*, App no 37112/9797 (ECtHR, 21 November 2001).

<sup>76</sup> *Russian Conservative Party of Entrepreneurs v Russia*, Apps nos 55066/00 and 55638/00 (ECtHR, 11 January 2007).

<sup>77</sup> *Sawhoyamaya Indigenous Community v Paraguay* [Merits, Reparations and Costs] (IACtHR, 29 March 2006) para 117.

interpretation,<sup>78</sup> other human rights instruments,<sup>79</sup> and non-human rights documents<sup>80</sup> to determine the scope of application of the rights contained in the ACHR. However, it does not follow the autonomous and margin of appreciation theories as the ECtHR does. A possible explanation of this difference with the European system could be that whereas the ECtHR has developed its interpretative theories without any conventional basis, besides the one established in the VCLT, the IACtHR does have a conventional interpretative guideline in Article 29 of the ACHR, providing that a state, in the exercise of its sovereignty, may not restrict the enjoyment of rights in a matter incompatible with the ACHR. In other words, this Article seeks to equate the principle of state sovereignty with the principle of human dignity. The Court's jurisprudence shows a rather disorganized method of interpretation of the rights and obligations contained in the ACHR. However, a former President of the IACtHR suggests that this Article is the basis of what the Court has named the *pro homine* principle of interpretation.<sup>81</sup> This principle proposes that human rights should be interpreted and applied extensively in all that favors the human being and his full enjoyment of rights and, conversely, they should be interpreted restrictively in everything that impairs such enjoyment of rights.<sup>82</sup> Under the *pro homine* principle in a situation of conflict of rules the solution must always be the one that favors individuals the most.<sup>83</sup>

<sup>78</sup> *Cabrera-García and Montiel-Flores v Mexico* [Preliminary Objection, Merits, Reparations, and Costs] IACtHR, 26 November 2010) para 135.

<sup>79</sup> *Claude-Reyes et al. v Chile* [Merits, Reparations, and Costs] (IACtHR, 19 September 2006) para 76.

<sup>80</sup> *Chaparro-Álvarez and Lapo-Íñiguez v Ecuador* [Preliminary Objections, Merits, Reparations, and Costs] (IACtHR, 21 November 2007) paras. 173-218.

<sup>81</sup> Gros Espiell, Héctor, "Los Métodos de Interpretación Utilizados por la Corte Interamericana de Derechos Humanos en su Jurisprudencia Contenciosa", in Nieto Navia, Rafael, *La Corte y el Sistema Interamericanos de Derechos Humanos*, San José, Corte Interamericana de Derechos Humanos, 1994. 223, 228.

<sup>82</sup> Ventura Robles, Manuel, "Los principales aportes del Juez Rodolfo E. Piza Escalante a la Corte Interamericana de Derechos Humanos (1979-1988)", in *Justicia, libertad y derechos humanos: Ensayos en homenaje a Rodolfo E. Piza Escalante*, San José, IIDH, 2003, 253, 274.

<sup>83</sup> *Juridical Condition and Rights of the Undocumented Migrants* [Advisory Opinion OC-18] (IACtHR 17 September 2003) para 21.

Finally, whereas the ICJ is not a human rights court, it has had an important role in the development of human rights, as some of its decisions clearly show.<sup>84</sup> Nevertheless, the ICJ has had very few opportunities to interpret the ICCPR as the most comprehensive human rights treaty. The most relevant *dicta* on this treaty were its decisions on the advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,<sup>85</sup> where the ICJ analyzed the concordance of Israel's actions on Palestinian territory with the ICCPR,<sup>86</sup> and the *Ahmadou Sadio Diallo* case, where the Court analyzed if a Guinean national's rights not to be subject to illegal expulsion of a state, illegal arrest or detention or inhuman or degrading treatment were breached by the Democratic Republic of Congo.<sup>87</sup>

While the Court has not addressed a specific method of interpretation of the ICCPR, it is worth mentioning that in the *Ahmadou Sadio Diallo* case it stated that a great weight to the decisions adopted by the Human Rights Committee, as the body specifically established to do so, shall be given to interpret the Covenant. Remarkably, the ICJ based this contention on the necessity to achieve clarity and consistency in international as well as legal security for both the states and individuals.<sup>88</sup> Moreover, it is also worth mentioning that in order to give content to the rights envisaged in the ICCPR the Court used as interpretative guidelines the African Charter on Human and Peoples' Rights,<sup>89</sup> to which the Democratic Republic of Congo is a party of, and the ECHR and ACHR<sup>90</sup> to which, evidently, it is not. Besides these approaches to interpret the ICCPR, the ICJ has also underlined that in conventions that protect fundamental rights states do not have any interests of their own, but rather a common interest in their accomplishment,<sup>91</sup> and that

<sup>84</sup> Schwebel, Stephen, "Human rights in the World Court" (1991), 24 *Vand J Trans L* 945, 946.

<sup>85</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, I.C.J. Reports 2004, p. 136.

<sup>86</sup> *Ibidem*, paras 127-129; 134; 136-137.

<sup>87</sup> *Case Concerning Ahmadou Sadio Diallo* (Republic of Guinea v. DRC) Judgment of 30 November 2010. paras 68-98.

<sup>88</sup> *Ibidem*, para. 66.

<sup>89</sup> *Ibidem*, para. 65.

<sup>90</sup> *Ibidem*, para. 68.

<sup>91</sup> *Reservations to the Convention on Genocide*, (n80) 23.

obligations arising for the protection of fundamental human rights are of an *erga omnes* character.<sup>92</sup>

The above-mentioned shows the clear willingness of international tribunals to ascribe a special value to human rights treaties. Moreover, it portrays the changing structure of international law in which individuals and their protection are gaining a similar status *vis-à-vis* states. As seen, regional human rights tribunals have created specific rules of interpretation for human rights that search for their correct application. Regardless of the specific theory used by each tribunal they all tend to grant further protection to individuals and diminish the capacity of the state to impose restrictions on human rights.

### 3. *Assessing the speciality of human rights interpretation*

It is clear until now that human rights play a preponderant role in current international life. The expansion of the international law of human rights and international tribunals' interpretation show a clear tendency to give a special value to human rights rules. Nevertheless, the ever-growing human rights aspirations and the process of humanization of international law cannot by themselves be sufficient to say that the current rules of international law are not applicable anymore.

As elaborated in the previous chapter, the existence of a *lex specialis* is only justified if such rule is fundamental for the working of the system itself or is clearly and unequivocally established on a treaty secondary rule. There is no doubt that international human rights are a special regime in relation to its subject matter and do contain special rules that deviate from general international law. However, assessing the need and existence of special rules of interpretation is not only inaccurate, but it actually undermines the regime itself.

It is true that, as many other treaties, human rights treaties contain normative clauses and that they display this feature in a striking fashion. However, besides that, there is absolutely nothing unique about human

<sup>92</sup> *Barcelona Traction, Light and Power Company, Limited*, Judgment, I.C.J. Reports 1970, p. 3; paras 33-34.

rights treaties that allows for a different understanding and application of their rules.<sup>93</sup>

It is correct to assert, as the ICJ did in its advisory opinion on the *Genocide Convention*,<sup>94</sup> that in human rights treaties states do not have any interests of their own, but rather a common interest in their accomplishment. However it does not follow that human rights treaties lack of an interstate reciprocal nature as a consequence of the *Austria v. Italy* decision of the ECommHR.<sup>95</sup> Human rights treaties also create reciprocal obligations between the parties as a matter of treaty law and all states parties to a treaty have an interest in its compliance, as the ICJ also made clear in its recent decision in the *Obligation to Prosecute and Extradite* case, in relation to the Torture Convention.<sup>96</sup> Evidence of this is the willingness of states to submit disputes concerning such obligations to international litigation.<sup>97</sup> Furthermore, the individual petition system is not sufficient to reject that idea. *Locus standi* clauses for individuals in human rights treaties are no more than specific rights created under a specific treaty.

Unfortunately, myths over human rights have led to their mischaracterization and the misinterpretation of their rules. In reality, are the *pro homine*, evolutive, autonomous, or margin of appreciation theories special rules of interpretation? The answer is no.

The preambles of all the ICCPR, the ECHR, and the ACHR, in very similar terms, stress the utmost importance of human dignity and the complete exercise of fundamental freedoms. In the case of the ACHR, Article 24 is nothing but a reaffirmation of the preamble itself. In every single diplomatic conference on human rights the respect of the fundamental freedoms of individuals is submitted to be the axis of under-

<sup>93</sup> Pellet, Alain, *Second report on reservations to treaties*, International Law Commission, Fifty-seventh session, Un Doc A/CN.4/477 Add 1 paras. 86-87

<sup>94</sup> *Reservations to the Convention on Genocide*, (n80) 23.

<sup>95</sup> Alain Pellet, *Second report on reservations to treaties* (n119) 85.

<sup>96</sup> *Obligation to Prosecute or Extradite* (Belgium v. Senegal) ICJ, Judgment of 20 July 2012, paras. 64-70 See also, Gaja, Giorgio, "The Concept of an Injured State", in Crawford, James et al. (eds.), *The Law of International Responsibility*, New York, OUP, 2010; 941, 942; Crawford, James, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge, CUP, 2002; 258-259.

<sup>97</sup> *Cyprus v Turkey* App no 25781/94 (ECtHR, 10 May 2001).

standing. It is fair to say that, under human rights law, the protection of human dignity is the object and purpose of each treaty. This is the value that the system is enshrining and as such it is the normative element that ultimately determines the interpretation of the rules contained on it.

Interpreting a treaty is no more than assigning meaning to texts when they are unclear. If texts are clear as they are drafted, there is no need to interpret.<sup>98</sup> Enhancing the object and purpose of treaty for interpreting implies that words are not sufficiently clear in their context and that a further element – also contained in the rule – should be employed. When words in human rights treaties are not clear or absent, it is perfectly logical to interpret them in accordance with the current conditions of the rights contained in them, in a fashion that restricts unnecessary inherence, or in a manner that extensively aims to the protection of such rights.

As long as interpretation does not mean legislation, it is accurate to perform it in way that protects its *raison d'être*. This remains true for any treaty. The so-called special rules of interpretation of human rights are no more than an affirmation of the importance of human dignity and fundamental freedoms as normative values of the treaty. The human rights subsystem does not hold sufficient characteristics to deviate from the general rule of interpretation.

Human rights scholars have consistently applauded the existence of special rules of interpretation for the human rights system and judicial activism for their protection.<sup>99</sup> While it is acceptable that human rights tribunals apply a value-oriented scheme of interpretation, an indiscriminate advancement of rights with no legal justification is simply wrong.<sup>100</sup> The process of humanization of international law has not arrived to a stage in which human rights tribunals can legitimize their

<sup>98</sup> *Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion, I.C.J. Reports 1950, p. 8.

<sup>99</sup> Lixinski, Lucas, "Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law", (2010) 21 *EJIL* 585; 588; Merrills, J. G., *The Development of International Law by the European Court of Human Rights*, 2edn, Manchester, Manchester University Press, 1993, 69.

<sup>100</sup> Mahoney, Paul, "Judicial Activism and Judicial Self- Restraint in the European Court of Human Rights: Two Sides of the Same Coin (1990)", 11 *HRLJ* 57.



decisions on the sole basis of their concern of human rights and their relationship with human beings.<sup>101</sup> Decisions outside of what is contained in the rules envisaged in human rights treaties are simply *ultra vires* and not an advancement on the protection of human rights.

The never-ending frenzy of human rights has to be kept within the boundaries of international law in order for human rights to develop and gain full protection. It is in the best interest of human rights tribunals that their decisions are complied by states.<sup>102</sup> Their only means to accomplish that end and legitimize their decisions is through their analytical rigor and their attachment to the rules of the system. Ignoring the role of states in the protection and compliance with human rights will inevitably lead to their peril.

#### IV. JURISDICTION OVER HUMAN RIGHTS TREATIES

International adjudication follows a particular set of rules that find their basis on each tribunal's constitutive instruments or statutes. Nevertheless, the fundamental aspects of the concept jurisdiction remain the same for all international tribunals. As such, the method for interpreting a tribunal's jurisdiction over a treaty is essentially the same.

This chapter first shows the essential features of the concept of jurisdiction and the differences among the sources from which it emerges. In second instance an analysis on how human rights tribunals assess all the aspects of their jurisdiction is made and conclusions on this are given in the final section.

In application of the rules of the VCLT, jurisdictional clauses can be interpreted taking into consideration the values and principles contained in each treaty. Nevertheless, the determination of a tribunal's jurisdiction is a complex process that also requires a factual analysis and in which both an *esprit de finesse* and an *esprit de géométrie* are necessary.

<sup>101</sup> Neuman, Gerald L., "Import, Export, and Regional Consent in the Inter-American Court of Human Rights" (2007), 19 *EJIL* 101.

<sup>102</sup> Mechlem, Kerstin, "Treaty Bodies and the Interpretation of Human Rights", 2009, 42 *Vand J Transnat'l L* 905. 922

1. *Basic considerations on the notion of jurisdiction  
in international adjudication*

It would be highly complicated to assess the existence of a common set of rules that regulate the procedure of all international courts and tribunals. Reasons for this are the variations between their constitutive instruments, their rules of procedure and the purposes they seek to protect.<sup>103</sup> Nevertheless, some common features of international adjudication can be found among all international tribunals. As such, they constitute the minimal customary rules of international procedural law.<sup>104</sup> The rules pertaining to the jurisdiction of a tribunal are part of such set of norms.

‘Jurisdiction is the link between the general political level of the diplomatic dispute and the functioning of the court or tribunal seised of the case, the legal dispute.’<sup>105</sup> Under international law, consent is the fundamental character of international adjudication and the necessary requisite for a court’s jurisdiction.<sup>106</sup> The forms in which a state may express its consent to jurisdiction vary in accordance with each tribunal’s constituent instruments. However, jurisdictional or compromisory clauses and optional declarations are the most common means for

<sup>103</sup> Kolb, Robert, “General Principles of Procedural Law”, in Zimmermann, Andreas *et al.* (eds.), *The Statute of the International Court of Justice. A Commentary*, New York, OUP, 2006; 793; 794.

<sup>104</sup> Brown, Chester, *A Common Law of International Adjudication*, New York, Oxford University Press, 2007, p.5; Rosenne, Shabtai, *The Law and Practice of the International Court of Justice*, vol. II, Leiden, Martinus Nijhoff 4ed, 2006; 505-584; Gray, Christine, *Judicial Remedies in International Law*, New York, OUP, 1987; 122-127.

<sup>105</sup> Rosenne, Shabtai, “Jurisdiction and Admissibility of Inter-State Applications”, in *Max Planck Encyclopedia of Public International Law*, online edition, visited on 4 March 2011. para 1.

<sup>106</sup> Statute of the International Court of Justice, 26 June 1945, 3 Bevans 1153, Article 36; American Convention on Human Rights, 22 November 1969, OASTS 36, OAS Off Rec OEA/ Ser L/II 23, Doc 21, Rev 6 (1979), Article 45; Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS 5 (1950) as amended by Protocol No 11, 11 May 1994, ETS 155 (1994), Article 46; Pellet, Alain “The Anatomy of Courts and Tribunals”, in Valencia-Ospina, Eduardo (ed.), *The Law & Practice of International Courts and Tribunals*, Leiden, Martinus Nijhoff, 2008; 275; 28.

expressing their consent.<sup>107</sup> The terms in which they are drafted determine the scope of jurisdiction of the court or tribunal.<sup>108</sup>

Any tribunal has to determine it holds jurisdiction *ratione personae* and *ratione materiae* in order to adjudicate upon the merits of a dispute. The first condition refers to the capacity of the court to exercise jurisdiction over a particular person. The second refers to the conditions regarding the tribunal's jurisdiction over the subject matter of the dispute. This latter element, while not determinant, holds a close relationship with the applicable law to be applied by the court in solving the dispute.<sup>109</sup> Both forms of jurisdiction may also be affected by place and time. The first is termed jurisdiction *ratione loci* and it refers to the capacity of a tribunal to uphold jurisdiction and apply a set of rules over facts occurred in a particular geographical area.<sup>110</sup> The latter is called jurisdiction *ratione temporis*, and it refers to the capacity of a court to adjudicate upon the merits of a dispute and apply a particular instrument in relation with the time in which the facts occurred.<sup>111</sup>

When a party objects the jurisdiction of a court to adjudicate upon the merits of a dispute it is essentially asserting that one of the former requirements is not present.<sup>112</sup> This should not be confused with objecting the admissibility of a claim. Objections to admissibility are those established when believed that, 'even if the Court has jurisdiction and the facts stated by the applicant [s]tate are assumed to be correct, nonetheless there are reasons why the Court should not proceed to an

<sup>107</sup> Charney, Johnathan I., "Compromissory Clauses and the Jurisdiction of the International Court of Justice" (1987) 81 *AJIL* 855.

<sup>108</sup> Higgins, Rosalyn *Problems and Process: International Law and How We Use It* (Oxford University Press 1995) 186-187; García Ramírez, Sergio, *La Jurisdicción Interamericana de Derechos Humanos*, México, Comisión de Derechos Humanos del Distrito Federal, 2006, pp. 81 y 82; Buergenthal, Thomas *et al.*, *International Human Rights in a Nutshell*, 3a. ed., West Group, 2002, 257.

<sup>109</sup> Bartels, Lorand, "Jurisdiction and Applicable Law Clauses: Where does a Tribunal Find the Principal Norms Applicable to the Case Before It", in Broude, Tomer and Shany, Yuval (eds) *Multisourced Equivalent Norms in International Law*, New York, OUP, 2011; 115-141.

<sup>110</sup> Vanneste (n73) 141.

<sup>111</sup> Rosenne, Shabtai, "Jurisdiction and Admissibility of Inter-State Applications" (n105) paras 7-8.

<sup>112</sup> Thirlway, Hugh, "Preliminary Objections", in *Max Planck Encyclopedia of Public International Law*, online edition, visited on 4 March 2011, para, 5.

examination of the merits.<sup>113</sup> While jurisdiction relates to the consent to the parties in the dispute, admissibility addresses the requirements that may result from the application of general rules of international law or from specific agreements between the parties concerned.<sup>114</sup> In any event, in accordance with the principle of *kompetenz-kompetenz*, any tribunal has competence to ascertain its own jurisdiction and the admissibility of the claims before it.<sup>115</sup>

## 2. *Precedents on the interpretation of jurisdiction over human rights treaties*

Controversies over human rights treaties are a rather new phenomenon and, as such, international jurisprudence is still in development. Nevertheless, the judgments hereby chosen constitute very relevant decisions on the approaches to these problems. Issues regarding jurisdiction are here analyzed under a treaty interpretation perspective and thus wider academic discussions were not taken into consideration.<sup>116</sup> Finally, due to the scarcity and lack of clarity of international tribunal's assessments on the matter, an analysis of jurisdiction *ratione personae* was left outside of the section.<sup>117</sup>

### A. *Jurisdiction ratione materiae*

Decisions on jurisdiction *ratione materiae* are usually restrained to the procedural conditions to access the Court or the complexity of the clause allegedly granting the tribunal's jurisdiction. The judgments hereby analyzed constitute perfect examples of the complexity of inter-

<sup>113</sup> *Ibidem*, para. 4.

<sup>114</sup> Tomuschat, Christian, "Article 36", in Zimmermann, Andreas *et al.* (eds.), *The Statute of the International Court of Justice. A Commentary*, New York, OUP 2006; 589, 646.

<sup>115</sup> Amerasinghe, Chittaranjan F. , *Jurisdiction of International Tribunals*, Leiden, Kluwer 2003) 121.

<sup>116</sup> This particularly refers to the issue of extraterritorial applicability of human rights treaties. See, *inter alia*, Milanovic, Marko, *Extraterritorial Application of Human Rights Treaties* (OUP, 2011); Coomans, Fons & Kamminga, Menno *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004); Meron, Theodor "The Extraterritoriality of Human Rights" (1995) 89 *AJIL* 81;

<sup>117</sup> See *Constitutional Court v Peru* [Competence] (IACtHR, 24 September 1999).

pretation of such clauses and the application of the rules and values of the system for such task.

a. Armed activities on the territory of the Congo / Application of the International Convention on the Elimination of All Forms of Racial Discrimination

The *Armed activities on the territory of the Congo* case constitutes one of the first times the ICJ analyzed its jurisdiction under the compromissory clauses of several human rights treaties.<sup>118</sup>

The case was brought by the Democratic Republic of Congo (DRC) alleging ‘massive, serious and flagrant violations of human rights and of international humanitarian law’ supposedly committed by Rwanda while undertaking military activities on the territory of the former. The DRC, *inter alia*, invoked as basis for the jurisdiction of the Court Article IX of Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention)<sup>119</sup>, Article 22 of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD)<sup>120</sup>, and Article 29, paragraph 1 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)<sup>121</sup>.

The Court first declined its jurisdiction under Genocide Convention and the CERD after observing that Rwanda had imposed reservations over their relevant Articles.<sup>122</sup> Relying on previous decisions, the ICJ submitted that the nature of the obligation allegedly breached is irrelevant for determining its jurisdiction over a treaty.<sup>123</sup> The Court then

<sup>118</sup> *Armed Activities on the Territory of the Congo* (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006, p. 6.

<sup>119</sup> Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277

<sup>120</sup> International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, 660 U.N.T.S. 195. UN Doc A/6014 (1966)

<sup>121</sup> Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979. 1249 UNTS 1 UN Doc. A/34/46. (1979)

<sup>122</sup> *Armed activities...* (n113) paras. 28-79.

<sup>123</sup> *Ibidem*, paras. 67; 79.

analyzed its jurisdiction under Article 29, paragraph 1 of the CEDAW which provides:

Any dispute between two or more States Parties concerning the interpretation or application of the present Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

The Parties disagreed on the interpretation of such Article and on the existence and satisfaction of the requirements contained thereof.<sup>124</sup> As such, the ICJ had to consider whether the conditions established by Article 29 had been satisfied. Although the Court acknowledged that the DRC had brought claims against Rwanda before multilateral fora, it submitted it had no sufficient evidence to believe that it sought to commence negotiations in respect of the interpretation or application of the CEDAW. It further added that the DRC had not attempted to institute arbitration proceedings and that its impossibility argument could not be upheld since such was a condition formally set out in Article 29. Consequently, the Court declined its jurisdiction to interpret and apply the CEDAW.<sup>125</sup> On separate opinions, Judges Kooijmans and Al Khasawneh criticized that, in contrast with previous decisions, the ICJ had adopted a narrow interpretation by establishing that bringing claims before multilateral fora did not amount to negotiation and by requiring the DRC to specifically establish them in respect of the interpretation or application of the CEDAW.<sup>126</sup>

The importance of this decision relies on the fact that it was the first time the ICJ had to extensively analyze a jurisdictional clause contained in a human rights treaty. Its findings on the importance of state's consent and the irrelevance of the human right allegedly breached *vis-à-vis*

<sup>124</sup> *Ibidem*, paras. 81-86.

<sup>125</sup> *Ibidem*, paras. 87-92.

<sup>126</sup> *Ibidem*, Declaration of Judge Kooijmans, para.74; Separate Opinion of Judge Al-Khasawneh, paras 9-13.

the tribunal's jurisdiction constitute an important step on the construction of the jurisprudence on the matter. It is also fair to say that the Court adopted a rather narrow interpretation of the satisfaction of the conditions set out in Article 29 of the CEDAW, as was raised by the separate opinions. In doing so, the Court performed a factual analysis of the terms in its context, but no reliance was ever made to the object and purpose of the CEDAW.

Six years after such decision the Court rendered an order under similar circumstances on the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* case between Georgia and Russia.<sup>127</sup>

In granting the provisional measures sought by Georgia against Russia for its alleged use of force that amounted to racial discrimination against Georgians the ICJ had to satisfy it had *prima facie* jurisdiction over the CERD. As such, the Court had to interpret Article 22 which provides:

Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement'

Whereas the Parties accepted they had held bilateral and multilateral discussions, they disagreed that issues relating to the CERD had been brought in them and that they amounted to negotiation under the sense of the Convention.<sup>128</sup> In its decision the Court submitted that the plain meaning of Article 22 does not 'suggest that formal negotiations in the framework of the Convention or recourse to the procedure referred to in [a]rticle 22 thereof constitute preconditions to be fulfilled before the seisin of the Court'<sup>129</sup> and, as such 'the fact that CERD [had] not been

<sup>127</sup> *Application of the International Convention on the Elimination of all Forms of Racial Discrimination* (Georgia v. Russian Federation), Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008, p. 353.

<sup>128</sup> *Ibidem*, para. 13.

<sup>129</sup> *Ibidem*, para. 114.

specifically mentioned in a bilateral or multilateral context [was] not an obstacle to [its seisin].<sup>130</sup> Consequently, the ICJ upheld its jurisdiction.<sup>131</sup> The dissenting judges criticized the decision by submitting that, while there was evidence of bilateral and multilateral negotiations, ‘[t]he very substance of the CERD was never debated between the [P]arties’.<sup>132</sup> It is also worth mentioning that the dissenting judges specifically claimed that the Court had wrongly interpreted the ordinary meaning of Article 22 within its context.<sup>133</sup>

Nevertheless, in its decision on jurisdiction, the Court reversed such dictum specifically relying on the general rule of interpretation.<sup>134</sup> Whereas this change in the interpretation of Article 22 was considered as controversial and strict,<sup>135</sup> it was not a decision against the object and purpose of a treaty, but it rather implied that the Court needed to perform a factual assessment on the existence of negotiations as a precondition for its seisin.<sup>136</sup>

As such, an evolution of the interpretation of the Court can be asserted, though this does not necessarily implies a reliance on the object and purpose of the treaty *per se*, but can also respond to previous decisions of the Court on the interpretation of procedural requirements that need to be satisfied for its seisin.<sup>137</sup> The fact that the ICJ expressed the necessity to interpret Article 22 in accordance with general rule of interpretation implies that it bestows the applicability of the VCLT regime also to jurisdictional clauses, but that this is also a process that involves an evidentiary analysis.

<sup>130</sup> *Ibidem*, para. 115.

<sup>131</sup> *Ibidem*, para. 48.

<sup>132</sup> *Ibidem*, Joint dissenting opinion of Vice-President Al-Khasawneh and Judges Ranjeva, Shi, Koroma, Tomka, Bennouna and Skotnikov, para. 12.

<sup>133</sup> *Idem*, para. 18.

<sup>134</sup> *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, I.C.J. para 122.

<sup>135</sup> *Ibid*, Joint Dissenting Opinion of President Owada, Judges Simma, Abraham and Donoghue and Judge Ad Hoc Gaja para 38; Dissenting Opinión of Judge Cançado Trindade, para. 167.

<sup>136</sup> *Ibid*, Separate Opinión of Judge Koroma, para. 5.

<sup>137</sup> *SouthWest Africa* (n74) p. 319, 346; *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, pp. 392, 427-428.



b. *González et al. (“Cottonfield”) v. Mexico*

Apart from the ACHR, under the Inter-American system, a number of conventions seeking for the protection of human rights have been drafted. This is the case of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women (IAW).<sup>138</sup> Article 12 of the IAW provides:

Any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Inter-American Commission on Human Rights containing denunciations or complaints of violations of Article 7 of this Convention by a State Party, and the Commission shall consider such claims in accordance with the norms and procedures established by the American Convention on Human Rights and the Statutes and Regulations of the Inter-American Commission on Human Rights for lodging and considering petitions.

On the *González et al. (“Cottonfield”) v. Mexico*, a case concerning the state’s failure to investigate the homicides of three women in Mexico in the context of mass gender violence, Mexico objected the jurisdiction of the IACtHR over the IAW alleging the inapplicability of Article 12 for such purposes.<sup>139</sup> In a rather odd interpretation of the IAW and the procedures established in the ACHR, the IACtHR concluded that the terms of Article 12 were sufficiently clear to suggest its jurisdiction; that, under a systemic interpretation of the IAW with other instruments of the Inter-American system and a teleological interpretation of the Convention, its jurisdiction over the treaty was clear; and that, even though an article on the original draft of the IAW that specifically granted contentious jurisdiction to the IACtHR was dismissed by the delegates at the Convention’s Diplomatic Conference, ‘inasmuch as it relates to a subsidiary method of interpretation, the preparatory works are completely insufficient to provide solid grounds to reject [its] in-

<sup>138</sup> Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women, 9 June 1994, 33 ILM 1534.

<sup>139</sup> *González et al. (“Cottonfield”) v. Mexico* [Preliminary Objection, Merits, Reparations, and Costs] (IACtHR, 16 November 2009) para. 31.

terpretation' of Article 12.<sup>140</sup> As such, the Court upheld its jurisdiction over the IAW.

Despite its rather disorganized method of interpreting the terms of Article 12 of the IAW within its context, and its blatant disregard of the *travaux préparatoires*, it is important to submit that the Court referred the applicability of the VCLT for interpreting jurisdictional clauses.<sup>141</sup> Furthermore, the Court underlined that an interpretation of a jurisdictional clause must be made in lieu of avoiding a 'deterioration in the protection system embodied in the Convention.'<sup>142</sup> Finally, the IACtHR stressed that object and purpose of human rights treaties, and the rules that derive thereof are established to develop the values of the system itself.<sup>143</sup>

Although in the practice of the IACtHR the methods of application of the general rule of interpretation may not be clear, the Court emphasizes the development of the rules of such regional system under the umbrella of the VCLT and in application of the values protected by the system itself. While this may seem reasonable due to the nature of the tribunal, it also shows its willingness to develop its rules within the system. Nevertheless, the form in which the Court undertakes this task will be closely linked to how it understands the general rule of interpretation and experience shows it can lead to unfortunate results.

### B. *Jurisdiction ratione loci*

The relationship between the scope of application of a treaty and the jurisdiction *ratione loci* of a tribunal has raised serious debates over the past few years. In practice, this relationship has proven to be complicated, as tribunals have been faced to jointly analyze issues of procedural and substantive nature in different stages of their proceedings. The absence or overlapping of concepts within the clauses of treaties has also proven to be a difficult task of treaty interpretation.

<sup>140</sup> *Ibidem*, paras. 35-42, 43-65, 73.

<sup>141</sup> *Ibidem*, paras. 32, 43.

<sup>142</sup> *Ibidem*, para. 42.

<sup>143</sup> *Ibidem*, para. 33.

a. *Loizidou v. Turkey* / *Bankovic v. Belgium*

Article 1 of the ECHR provides that '[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention'. Under several decisions, the ECtHR has consistently affirmed that, in accordance with the object and purpose of the treaty, the term *jurisdiction* should be interpreted as allowing the possibility that a state may incur in international responsibility for acts it committed when exercising acts of authority outside its territory.<sup>144</sup> In the preliminary objections phase in *Loizidou v. Turkey*, a case concerning Turkish actions in northern Cyprus and their relation with the acts of the so-called "Turkish Republic of Northern Cyprus" (TRNC), the Court was asked to uphold jurisdiction *ratione loci* over the ECHR. In its judgment, the ECtHR emphasized that in a decision involving its jurisdiction over the Convention, it needs not to satisfy the state's "effective control" over non-state actors and adjudicate on its responsibility, since that would constitute a question of merits, but only needs to determine 'whether the matters complained of by the applicant are capable of falling within the "jurisdiction" of [the state] even though they occur outside [its] national territory.'<sup>145</sup> In other words, the Court asserted that in order to uphold its jurisdiction *ratione loci* over the ECHR, in relation to acts committed outside the territory of the state, it only needs evidence of state action abroad. In its merits judgment, the ECtHR determined that as consequence of the 'effective overall control over that part of the island' the acts of TRNC were attributable to Turkey, and a breach of the ECHR was hence found.<sup>146</sup>

The decision on jurisdiction in the *Loizidou* case constitutes a cornerstone of international adjudication over human rights treaties. It is a crucial decision to understand the relationship between the scope of application of treaties and the jurisdiction of the tribunal over it. Although both concepts are strictly related, as evidenced by the fact that the ECtHR interpreted the term 'jurisdiction' in Article 1 of the ECHR

<sup>144</sup> *Soering v United Kingdom* App no 14038/88 (ECtHR, 7 July 1989) para. 91.

<sup>145</sup> *Loizidou v Turkey* [Preliminary Objections] (ECtHR, 23 March 1995) para. 61.

<sup>146</sup> *Loizidou v Turkey* [Merits] App no 15318/89 (ECtHR, 18 December 1996) para. 56.

for determining both the scope of application of the Convention and its *ratione loci* jurisdiction over the treaty, the former involves a question of international responsibility and the latter a question of procedure. The Court made two very important determinations on this distinction. First, that the amount of evidence required to satisfy that acts committed abroad fall within the jurisdiction of the ECtHR is less than that required to determine the state's responsibility, as the former only needs to show the existence of actions undertaken extraterritorially. Second, that in determining its jurisdiction *ratione loci* over a treaty the Court does not need to conduct a test of attribution of acts committed by non-state actors.

Unfortunately, the *effective control* language used both in the jurisdiction and merits decisions of the *Loizidou* case, led the applicants and the Court itself to a disastrous result in *Bankovic v. Belgium*. In its jurisdiction judgment, this case involving a claim brought against Belgium and other 16 states for their involvement in NATO bombardments in Kosovo, the ECtHR determined that under state practice and the *travaux préparatoires* of the ECHR the term *jurisdiction* could only apply extraterritorially when the state exercises public powers.<sup>147</sup> This decision was unfortunate because in analyzing the effective control test and questions of attribution in the jurisdictional phase the Court essentially disregarded the evidentiary and procedural/substantive law distinctions accurately determined in the *Loizidou* case.

Despite *Bankovic's* unfortunate outcome, the Court explicitly ascertained the applicability of the VCLT rules and the application of the evolutive principle to the interpretation of Article 1 for the purposes of assessing its jurisdiction *ratione loci*.<sup>148</sup> Whether the outcome of the judgments was satisfactory or not, the process of interpretation of its jurisdiction over the *Loizidou* and *Bankovic* cases settled solid foundation for future decisions on the matter.

<sup>147</sup> *Bankovic v. Belgium et. al.* App no 52207/99 (ECtHR, 12 December 2001) paras. 61-69.

<sup>148</sup> *Idem* paras 55, 62.

b. Legal Consequences of the Construction of a Wall  
in the Occupied Palestinian Territory / Application  
of the International Convention on the Elimination of All  
Forms of Racial Discrimination

The relationship between the scope of application of a treaty and the jurisdiction *ratione loci* of the tribunal can also be seen through the evolution of the ICJ's jurisprudence. In its 2002 Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*<sup>149</sup> the Court conducted an analysis under the VCLT rule of interpretation and determined the extraterritorial applicability of the ICCPR.

The Court analyzed the phrase contained in Article 2, paragraph 1: 'Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant.' The ICJ held that an interpretation in accordance with the object and purpose of the ICCPR has to lead to the conclusion that the term *jurisdiction* envisages the possibility of the extraterritorial application of the Convention. The tribunal adopted the same position *vis-à-vis* the Convention on the Rights of the Child.<sup>150</sup> Remarkably, despite the fact that the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>151</sup> lacks a provision on its scope of application, the ICJ also asserted its extraterritorial applicability.<sup>152</sup>

This advisory opinion is significant because it constitutes the first time the ICJ determined the extraterritorial applicability of human rights. In adopting such decision the Court specifically relied on the object and purpose of the convention being interpreted. Finally, the fact that it also arrived to the same conclusion in regard to the ICESCR, may imply that the Court is interpreting silence in light of the object and purpose of human rights treaties, and as such asserting that the absence of a jurisdictional clause enables the treaty's extraterritorial application.

<sup>149</sup> *Legal Consequences of the Construction of a Wall* ..., (n85) *ibid.*

<sup>150</sup> Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3 UN Doc A/44/49 (1989)

<sup>151</sup> International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3 UN Doc. A/6316 (1966)

<sup>152</sup> *Legal Consequences of the Construction of a Wall*..., (n85) para. 112.

These conclusions can also be drawn from the order rendered in the *Georgia v. Russia* provisional measures phase where the Court's *ratione loci* jurisdiction over the CERD was objected by the Respondent. Although the Court only had to determine its *prima facie* jurisdiction, it determined the extraterritorial applicability of the CERD under the basis that no general or specific restriction was established in the Convention. In doing so, the ICJ stressed that the 'provisions of CERD generally appear to apply, like other provisions of instruments of that nature, to the actions of a State party when it acts beyond its territory' and, consequently, upheld its jurisdiction.<sup>153</sup>

The Court did not analyze its *ratione loci* jurisdiction on its 1 April 2011 decision, since it upheld the *ratione materiae* objection presented by Russia.<sup>154</sup> Nevertheless, it is worth mentioning that Russia acknowledged during the oral phase of the proceedings that such objection was not exclusively of a preliminary nature, remarking thus the complex nature of such kind of determination. This is still a pending question in international law. In further cases the Court can still depart from its decision on the *Wall opinion*. If it does so, it would imply that extra-territorial application of human rights treaties and thus the tribunal's jurisdiction over them depend on an explicit rule containing the scope of application of the Convention. If the ICJ confirms its decision of the order, it will imply that silence over the scope of application of a human rights convention can be interpreted not as a restriction to its jurisdiction, but as sign of consent for it. As a concluding remark, it is important not to undermine the very conclusive and enthusiast language that the Court adopted on its determinations in this regard, in contrast with the much cautious language used by the ECtHR. This may suggest the current willingness of the ICJ to the very least analyze human rights disputes, as long as any admissibility impediment is not present.

### C. Jurisdiction *ratione temporis*

Problems concerning the conceptual overlap of jurisdiction, applicable law and state responsibility become more evident in the analysis of a

<sup>153</sup> *Application of...* (Provisional Measures) (n127) para. 109.

<sup>154</sup> *Application of...* (Preliminary Objections) (n135) para. 185.

tribunal's jurisdiction *ratione temporis*.<sup>155</sup> The problem is even more complicated within the regional human rights systems. A state can only be bound by the ECHR or the ACHR after they have signed and ratified them.<sup>156</sup> In principle, since the VCLT prohibits the retroactive application of treaties<sup>157</sup> and neither the ECHR nor the IACHR indicate otherwise, it is until then that the ECtHR and IACtHR may exercise jurisdiction over them. However, both the ECHR<sup>158</sup> and the IACHR provide that the jurisdiction of the tribunals is subject to an optional declaration of the Parties. It is common that such declarations indicate time and acts for which the tribunals have jurisdiction. Moreover, acts, that in breach of an obligation can generate international responsibility, are not necessarily static. As such, their nature and continuity are also relevant for assessing a tribunal's jurisdiction.

In this scenario, the task for the tribunals is difficult. First, they have to determine the critical date for their jurisdiction in accordance with the intention of the Parties as expressed in their declaration. Second, they must determine the nature of the acts at stake by a mere factual assessment. Third, in accordance with the general rule of interpretation, they are to construe the nature of the claimed breach contained in the conventions in relation to the nature acts or omissions that can constitute it, in order to determine which were committed, after or before the critical date, and which have a continuous nature. The decisions hereby explored, constitute the minimum common ground between both tribunals and their understanding of the three core concepts in relation with time.

#### a. *Martín del Campo v. Mexico/Blecic v. Croatia*

In *Martín del Campo v. Mexico* the applicant claimed to have been tortured by police agents in 1992. Under its optional declaration, Mexico

<sup>155</sup> See Higgins, Rosalyn, "The Time and the Law: International Perspectives on an Old Problem (1997) 46 *ICLQ* 501.

<sup>156</sup> VCLT, (n60) Articles 2, 24.

<sup>157</sup> *Idem*, Article 28.

<sup>158</sup> With the adoption of Protocol 11, this provision became moot for the new Parties to the ECHR.

recognized the jurisdiction of IACtHR from December 1998 onwards. In relation to the alleged torture, the Court submitted it had to assess the acts were instantaneous or continuous.<sup>159</sup> Concluding that acts of torture are instantaneous, the Court held that in accordance with the principle of non-retroactivity of treaties and Mexico's declaration, it had to decline jurisdiction.<sup>160</sup> In recalling both the principle and the declaration the Court was implying the double nature of its analysis pursuant to it would have to apply both the rule of interpretation of treaties and the intention approach to interpret unilateral declarations.

*Blecic v. Croatia* is a case relating the decisions of several domestic tribunals to terminate an applicant's protected tenancy. In its decision the ECtHR analyzed the continuity of a judicial procedure as a single act and determined that interference, if any, with a person's rights has to be determined when a judgment becomes *res judicata*. The ECtHR held that being that the relevant judicial decision was rendered before the critical date, it could not uphold its jurisdiction.<sup>161</sup> In reaching this decision, the Court considered as applicable law the prohibition on the retroactive application of treaties contained in the VCLT and the customary rules of state responsibility and submitted that in order to establish a Court's temporal jurisdiction it is essential to determine the exact time of the alleged interference, taking into account both the facts and the scope of the rights allegedly breached.<sup>162</sup>

From both decisions it can be envisaged that, in principle, jurisdiction *ratione temporis* over breaches concluded before the critical date implies a factual assessment of treaty application and not of treaty interpretation, as there is simply no clause to interpret. Nevertheless, it is relevant to stress how both tribunals fell back to the general rules of application of a treaty contained the VCLT and the rules of responsibility in order to determine the continuity of the acts and the moment in which the breach was perfected.

<sup>159</sup> *Martín del Campo v Mexico*, Preliminary Objections, IACtHR, 3 september 2004, para. 78.

<sup>160</sup> *Ibidem*, para. 85.

<sup>161</sup> *Blecic v Croatia* App no 59532 (ECtHr, 8 March 2006) para. 92.

<sup>162</sup> *Idem*, paras. 77, 81.



b. *Moiwana village v. Suriname/Silih v. Slovenia*

The task for human rights tribunals becomes more complicated when the breach is committed prior to the ratification of conventions or the acceptance of their compulsory jurisdiction, but has effects that continuously develop through the critical dates. This is the case of criminal investigations derived from a breach of an instantaneous nature.

This situation was analyzed by the IACtHR in its *Moiwana village* case, which involved the obligation to punish and prosecute the responsible parties of a massacre occurred prior to Suriname's ratification of the ACHR. After assessing that Suriname's optional declaration contained no temporal limits and submitting the applicability of the non-retroactivity principle envisaged in the VCLT, the Court determined that the obligation to prosecute is of a continuous nature and, as such, even if the act that gave rise to those obligations fell outside the jurisdiction of the IACtHR, it could know of that claim starting from the date when Surinam recognized the Court's competence.<sup>163</sup> While the non-retroactivity analysis, in relation with the intent of the Party, seems perfectly accurate, the fact that the Court explicitly referred to continuous obligations and not continuous acts seems to be a preliminary assessment of responsibility that would fall under the merits phase of the proceedings. Nevertheless, this determination seems reasonable in light of all the factors the Court has to take into consideration in order to determine its temporal jurisdiction.

In contrast with the IACtHR, before *Silih v Slovenia* the ECtHR had considered the obligation to carry an investigation as an accessory procedural obligation of the other rights envisaged in the ECHR.<sup>164</sup> Therefore, when an allegation regarding a failure to prosecute acts committed before the critical date was presented, the Court normally dismissed claiming lack of jurisdiction *ratione temporis*.<sup>165</sup> Citing the *Moiwana village* precedent and the *Blecic* test as the applicable standard for the examina-

<sup>163</sup> *Moiwana village v Suriname* [Preliminary Objections, Merits, Reparations and Costs] (IACtHR, 15 June 2005) para. 43.

<sup>164</sup> *B v United Kingdom* App no 9840/82 (ECtHR, Judgment 8 July 1987) para 63.

<sup>165</sup> See *Moldovan and others v Romania* Apps nos 41138/98 and 64320/01 (ECtHR, 13 March 2001).

tion of jurisdiction *ratione temporis*, the ECtHR reversed this criterion in *Silih v. Slovenia*. In the case involving a failure to investigate the death of a person due to medical negligence prior to the state's ratification of the ECHR and referring to the principle of non-retroactivity and the general rules of responsibility, the Court determined that the obligation to prosecute a murder has 'evolved into a separate and autonomous duty'.<sup>166</sup> Nevertheless, the ECtHR stressed that only procedural acts can fall within its temporal jurisdiction and that there must exist a genuine connection between them and alleged death.<sup>167</sup> Under these circumstances, the Court upheld its jurisdiction *ratione temporis*.

Once again, the decisions of both Courts show that assessing a tribunal's temporal jurisdiction is a factual question that has to be solved between the boundaries of Article 28 of the VCLT, and not a question of interpretation. Moreover, implicitly, both tribunals show a tendency to evolve the protection envisaged in their respective Conventions by virtually submitting the ever-continuous nature of omissions regarding criminal prosecutions. However, the fact that both tribunals undertake their analysis under a continuity of obligations approach, rather than a continuity of acts or omissions seems not in accordance with the questions at stake. The continuity of an obligation can only be determined if its nature is analyzed in light with the facts of a particular situation. That would be an analysis of responsibility and thus falling outside the jurisdiction phase of the proceedings. This problem is usually presented in forced disappearance cases.<sup>168</sup> Besides, the evidentiary assessments necessary for determining the continuity of acts are less than the required for the continuity of obligations. As such, both tribunals seem to be *overworking* in a situation that does not require it.

<sup>166</sup> *Silih v Slovenia* App no 71463/01 (EctHR, 9 April 2009) para. 159.

<sup>167</sup> *Idem*, paras. 161-162.

<sup>168</sup> *Serrano-Cruz Sisters v El Salvador* [Preliminary Objections] (IACtHR, 23 November 2004) para 68; *Radilla-Pacheco v. Mexico* [Preliminary Objections, Merits, Reparations, and Costs] (IACtHR, 23 November 2009) para 21.

### 3. *Conclusions on the interpretation of jurisdictional instruments*

In essence, whether explicitly or implicitly mentioned, all tribunals seem to rely on the rules established in the VCLT for the interpretation of jurisdictional clauses. However, this interpretation can also reasonably be affected by previous decisions and understanding of the concept of jurisdiction and procedural aspects of adjudication, as the ICJ's decisions on its jurisdiction *ratione materiae* suggest. This shall not be understood as a dismissal of the content of the rule of interpretation, but as evidence of the process that procedural rules follow before tribunals, the context in which they develop, and their purpose.

The values of the human rights protection systems have also proven to play an important role on interpreting overlapping concepts, the absence of provisions and in assessing the strictness on the satisfaction of procedural requirements as the decisions *ratione materiae* and *ratione temporis* of the IACtHR and the ICJ's judgments on its jurisdiction *ratione loci* demonstrate.

The abovementioned seems reasonable if the context in which these decisions are adopted is considered. The *Georgia v. Russia* case involves massive human rights violations in the territory of the former. The *Cottonfield* case is inserted in the worst scenario of gender violence that Latin America has ever seen. The cases arising from the Kosovo crisis and the Cypriot incident all raise important human rights and political issues. All these values and concerns are known by judges. They inevitably hold personal views and since the process of interpretation eventually culminates in their own assessments of the facts and the law, it would be incorrect to assume these considerations do not permeate in their analysis. The tension will always remain in their capacity to insert these considerations under the scope of application of the rules regarding interpretation, and as such apply the other elements of the process, or their pursuit to apply them as a subterfuge to uphold their jurisdiction.

The interpretation of a tribunal's jurisdiction has also proven to be a challenging art. It is a complex procedure where factual determinations, procedural aspects, and substantive assessments collide. Decisions may vary within this composite scenario, but the true key for a correct interpretation and determination of a tribunal's jurisdiction relies in the analytical rigor as shown by the ECtHR in the *Loizidou* case.

At the end of the day, it also has to be accepted that the rule of interpretation of the VCLT may not always be applicable, as there may be times in which there is no rule to interpret. Analyzing the jurisdiction of a tribunal also requires other processes and factual assessments that in some circumstances fall outside the scope of application of the VCLT itself.

However, the mere existence of a jurisdictional clause under a treaty opens the door for interpreting it in accordance with the principles and values protected by the Convention as enshrined in its object and purpose. This is not a feature of human rights treaties, but of any treaty that contains a jurisdictional clause.

While the principles and values underlying each treaty may indeed affect the interpretation of its substantive and adjudication rules, they do not create rights or legal entitlements. Invoking them for such purposes constitutes a way of diluting the structure of international law and, hence, cause its inefficacy. The common ground between true international legal scholars and practitioners relies in the understanding that only through a rigorous and serious analysis of the rules at stake, the values of the system can be protected.<sup>169</sup> The art of interpretation is not designed to apply to canons that are simply nonexistent.

The international legal system can still explain and has the capacity to accommodate all the values, tensions and anxieties of all its subsystems. Such capacity is treasured under the VCLT.

## V. CONCLUSION

The general rule of interpretation contained in the VCLT has proven to be applicable, not only for human rights substantive treaty rules, but also for the clauses that give rise to an international tribunal's capacity

<sup>169</sup> Crawford, James, "Continuity and Discontinuity in International Dispute Settlement: An Inaugural Lecture" (2010), 1 *J Int'l Disp Sett* 3,24; Pellet, Alain, "Remarques sur l'(in) efficacité de la Cour Internationale de Justice et d'autres juridictions internationales", in *Liber amicorum Jean-Pierre Cot: Le procès international*, Antwerp, Bruylant, 2009, 193; 211; Orrego Vicuña, Francisco, *International Dispute Settlement in an Evolving Global Society*, Cambridge, CUP, 2004, 30; Schwebel, Stephen, *Justice in International Law*, Cambridge, CUP, 1994, 603.

to adjudicate upon them. As such, the values and principles protected by human rights, enshrined in the object and purpose of each treaty, may influence the process of interpretation without the necessity of evoking a claim for specialty. This portrays how the international legal system is still capable to include all of its values and maintain its unity.

International law is as fragmented as tired legal thinking wants it to be. The reality is that the current rules of the international legal system can still unite and develop all of its subsystems. However, the pursuit of unity is only relevant if it endorses the development of international law itself.

Submitting the existence of self-contained regimes would now be impossible and it is true that the existence of special rules is sometimes necessary for the protection of the values that each subsystem enshrines, but it is also true that the number of special rules that each subsystem contains determines its degree of isolation. An isolated subsystem cannot interact with other subsystems and, as such, the values that each one of them protects cannot be pondered.

The state is still not only the primary actor of the international legal system, but it is also the one that has to give full effect to all of the values it pursues and protects. Suggesting that all of the values protected by all of the subsystems hold the same degree of relevance for states and societies is unreasonable. No state has the capacity to give full effect to the values protected by international law if they are all considered to be the most important.

Determining the true status of each of the values of the international legal system is relevant for establishing the amount of measures needed for their protection and development, in accordance with the expectations of states and societies. This is true for all of the values protected by human rights and to all of the values protected by each subsystem of international law. Such task can only be accomplished if the features and rules of all of the subsystems of international law can be interpreted systemically.

The real task for the human rights regime is to understand itself as part of a broader and more complex regime that needs to accommodate all of its subsystems' values in order to assure their stability and development.