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Message From the Chair

Our Shared Belief in and Commitment to International Law

By Clarissa A. Rodriguez

Dear friends and colleagues, one of the most impressive characteristics of the International Law Section is the special dynamic of our group. ILS members hail from all over the world and practice in many different countries, languages, and diverse areas of law. Despite these differences that could so easily drive us apart, we are instead brought together through our shared belief in the importance of international law. We are not just individuals or an individual organization; we are part of the global community.

CLARISSA A. RODRIGUEZ

I spoke to a number of our members and guests at the 2019 Annual Holiday Party at La Muse Café last December. Without exception, our members were welcoming and having a wonderful time together. Whether long-time members of the section or brand new friends, groups of people gathered, broke apart, and formed new groups, all with laughter and something to talk about in common. Undoubtedly, that dynamic is what our guests are referring to when they remark—over and over again—on the wonderful spirit of the ILS. It is that dynamic that encourages people to remain a part of the section and to deepen their involvement. Indeed, ten previous ILS chairs attended the holiday party—how's that for dedication!

I hope you are reading this address while attending the section's annual "crown jewel" event: the iLaw 2020 Global Forum on International Law at the JW Marriott Marquis in downtown Miami, Florida. This one-day conference offers three tracks in the specializations of international litigation, international business transactions, and international arbitration sponsored by the International Centre for Dispute Resolution. The iLaw 2020 will present high-level programming for practitioners from all walks and at all levels of practice. It also showcases the section's talented members! And, to its credit, this conference is planned and programmed by the section's members—all of whom are practicing attorneys—*without* event planners, marketing groups, or administrative support.

The work and dedication of our members should make us all very proud. Just a few examples: unlike any other Florida Bar section, the ILS is uniquely tasked with evaluating and vetting foreign attorneys to the Florida Supreme Court for certification as foreign legal consultants. Our Legislative Committee monitors and evaluates proposed bills in the Florida Legislature with an eye toward the potential impact those bills might have on the practice of international law in the state. We sponsor and present CLEs and Lunch-and-Learns. We publish a *Weekly Gazette* and this quarterly publication. We organize and produce the one-of-kind iLaw Global Forum Conference, which rivals other major annual conferences held around the world. We host and judge law students participating in the Richard DeWitt Memorial Vis Pre-Moot. Last, but certainly not least, the section offers two specialty Florida Bar board certifications.

Moreover, even as we head into the section's busiest time of year, it is important to remember that the work of the section is *year-round*:

- The Florida Supreme Court and The Florida Bar exclusively rely on the ILS Foreign Legal Consultants Committee, which diligently works with and reviews applicants for certification as a Florida foreign legal

Message From the Chair, continued

consultant, allowing foreign practitioners to continue practicing the law of their home jurisdiction while in Florida.

- The ILS Legislative Committee brings to mind Jack Nicholson's famous lines from *A Few Good Men*: "You want me on that wall, you need me on that wall! We use words like honor, code, loyalty . . . as the backbone of a life spent defending something." The ILS Legislative Committee defends and protects every international practitioner's interests in international law in Florida, striving to make it easier, cleaner, and more accessible. These few good men and women receive late night calls about changes coming through the Legislature and then work nights and weekends preparing legal briefs and statements in defense of international law.
- Through successful lobbying and diligent dedication over many years, the section now proudly offer its members *two* distinct Florida Bar certifications in international law. Generalists apply, are evaluated by the two certification committees, and then are invited to sit for the International Law Certification Exam. Attorneys who primarily work in international litigation and arbitration follow the same procedure to sit for the International Litigation & Arbitration Certification Exam.
- The section offers members and friends upward of *thirty* continuing legal education credits *each year*—more than an active practitioner needs for each CLE reporting cycle.
- And there is more! The section offers more than twenty standing committees, each tasked with its own programming and activities throughout the year. There is no shortage of ways to get and remain involved with the section.

When members join the ILS, they commit to supporting the section's work. When you participate in a standing committee or a program, your committed work counts. When your law firm, organization, or agency sponsors the section, you and your colleagues commit to the importance and sustainability of the work done by the section. These commitments give the ILS a reason to be very proud every day.

As your chair and on behalf of the ILS Board of Directors and Executive Committee, it is our honor to commit to working with you as we bring the ILS into 2020.

With commitment,

Clarissa A. Rodriguez
Chair, International Law Section of The Florida Bar
Board Certified in International Law
Reich Rodriguez PA, Founding Shareholder

29 February 2020
Richard DeWitt Memorial Pre-Moot Vis Competition at JAMS
Miami, Florida

12 March 2020
Examination for Florida Bar Board Certification
International Law
Tampa, Florida

8 May 2020
Examination for Florida Bar Board Certification
International Litigation & Arbitration
Tampa, Florida

17-20 June 2020
Annual Florida Bar Convention
Orlando, Florida

Message From the Guest Editor


EMERCIO J. APONTE NÚÑEZ

In September 2019, as a co-chair of the International Law Section's new Committee for Human Rights, Public International Law, and Global Justice, I contacted Laura Reich, one of the editors of the *International Law Quarterly*, with the intention to put the editors in contact with several professors and experts in democracy and human rights from Latin-American countries who might write an article for this excellent publication. My idea not only was well received by Laura, but to my surprise she invited me to be the guest editor for the winter 2020 edition.

I am very grateful to be the guest editor of this edition, Focus on Global Challenges to Democracy, but I am even more pleased by the great response I received from the professors, colleagues, and experts from Latin-American countries I selected to contribute to this publication. Writing a scholarly article requires time, dedication, and commitment, and the time the authors had to comply with the deadline was short considering how busy their agendas are. I am thankful to all of them for using their free time in order to make this edition a reality, full of outstanding articles.

Our world is not the same as it was fifty, twenty, or even five years ago. Many circumstances have changed the way in which human beings relate to each other, not only within their countries of residency but also outside them, which has an impact on their rights and the protection that democracy should offer to them. This changing reality has created challenges to democracies around the world. Nowadays, democracy must find answers to themes such as corporations' human rights obligations; the risk that certain types of governments may pose to democracy, refugees, and the protections they deserve; new approaches to freedom of religion and conscience; academic freedom as an essential right for democracy; the relationship between the international and the national legal systems for the protection of human rights; and the complex system of judicial and quasi-judicial mechanisms of human rights protection and its impact on the effectiveness of international criminal law.

To this end, **Professor Andres Felipe López Latorre** starts off this edition of the *ILQ* by analyzing the impact of businesses on human rights and the solution that international law should provide to the challenges these entities present for human rights. Next, **Professor Renato Selayaram** scrutinizes the danger posed by certain types of governments, especially in Latin American countries, that despite being elected are unable to meet the basic needs of citizens in terms of employment, health, and safety, creating risk to democracy.

The next two articles explore the challenges faced by refugees in Costa Rica and the United States. In this regard, **Magister Mónica Barrantes** explores the difficulties that Costa Rica has faced in dealing with the Nicaraguan refugee crisis of 2018 and the necessity that all the international actors work together to guarantee the rights of this refugee population. On the other hand, **Magister Jean Pierre Espinoza** provides us with a brief article regarding recent changes to U.S. law that have made it difficult for the victims of domestic violence or gang persecution to demonstrate that their government is unable or unwilling to protect them and that, subsequently, they deserve asylum protection.

Magister Christian González Chacón and Attorney Sara Méndez Niebles explore the necessity of a complete development of freedom of religion and conscience within the Inter-American Human Rights System, in order to guarantee its exercise and the exercise of other human rights that may be interrelated with it. Then **Professor David Gómez Gamboa and I** analyze academic freedom as a human right, its relationship with other rights and democracy, the threats it is facing

Message From the Guest Editor, continued

in the Americas, and the necessity of its international protection as a self-contained right.

Professor Jorge Ernesto Roa Roa explores the principle of subsidiarity that governs the system of protection of human rights created within the framework of the Organization of American States to integrate international and national human rights standards as an expression of recognition that national institutions are the scenarios in which the necessary measures must be taken to cease, investigate, sanction, repair, and guarantee the non-repetition of human rights violations. **Professor Sara Cristina Fernández Rivera** explores how the Rome Statute has been interpreted and applied in accordance with international human rights standards by the International Criminal Court, increasing the legitimacy of its decisions regarding human rights issues. Finally, **Paula Black** offers us an article intended for personal reflection and guidance in relation to the challenges that legal professionals face globally, inviting us to ask what we want and what are our dreams, and giving us eight ideas that will allow us to explore new possibilities for personal and professional development.

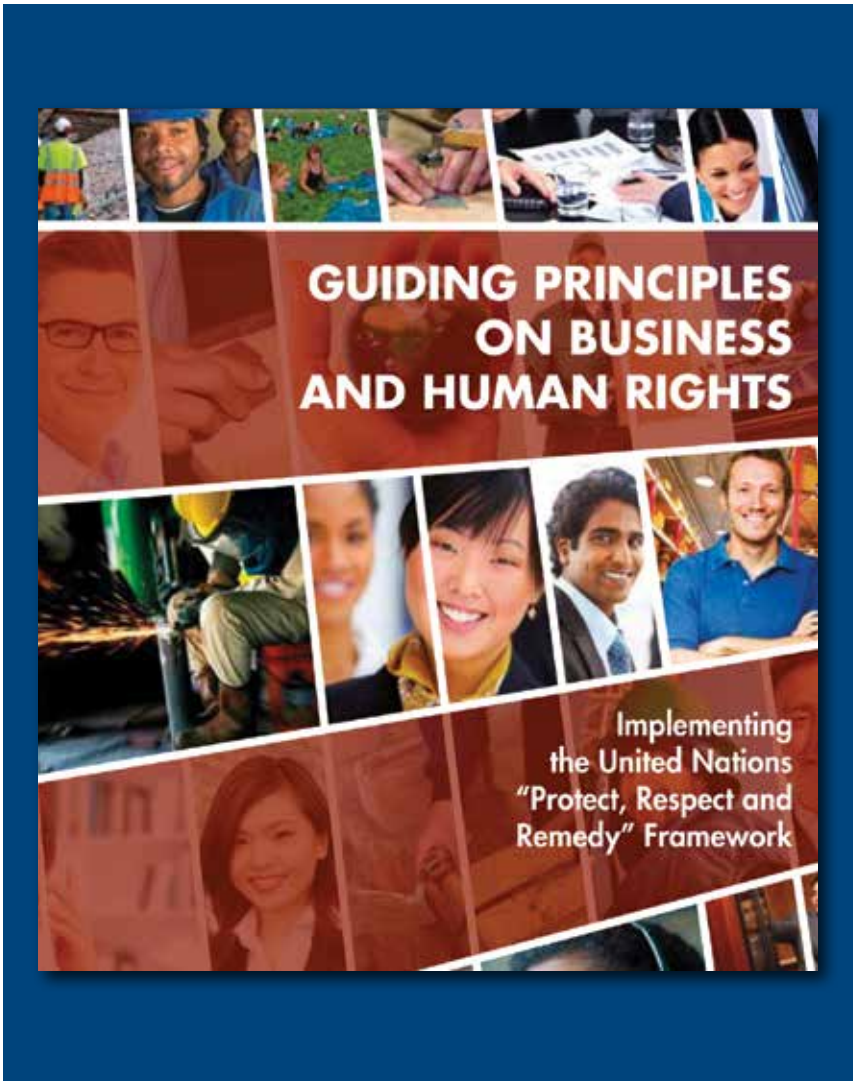
I would like to thank Laura M. Reich and Ana M. Barton for this amazing opportunity, Susan Trainor for her remarkable work, and Andrea Paola Aponte, my daughter, for her ideas and support. I hope you enjoy this wonderful edition.

Sincerely,

Emercio J. Aponte Núñez
Guest Editor

Businesses and Human Rights: International Law as an Imperfect Solution

By Andres Felipe López Latorre, Bogotá, Colombia



Businesses have an impact on human rights through their own activities, their supply chain, and their many commercial relations. From freedom of expression, right to life, and personal integrity, to right to work, access to clean water, and a safe and clean environment, businesses are pivotal in the guarantee of our human rights. The clothes we are wearing, the food we eat, the transportation we use, and the health services we require are constantly mediated through the activity of businesses. That inherent (and increasing) power businesses have to affect our daily lives has opened the possibility for abuses that can harm our most basic rights.

During the last decades, we have seen corporate human rights abuses all over the world. The United Nations Special Representative for Business and Human Rights reported in 2010 more than 300 cases of corporate human rights violations in Latin America, Asia-Pacific, and Africa, caused by North American and European corporations, with private or mixed ownership.[1] There were also reported violations in North America and Europe, but in smaller proportions.[2] Business entities that affect human rights are not only publicly traded corporations or necessarily transnational; local business owners and small corporations also play a relevant role in the promotion or violation of human rights.

The problem is partially created by the unwillingness or inability of states and local authorities to address corporate human rights violations because sometimes they are complicit, corrupt, not present, or are the direct perpetrators of the violation in which businesses participate. Sometimes the unwillingness of the state is not due merely to negligence or evil intention, but to a mistaken understanding about development being driven mainly by economic growth, which neglects the many other human areas that are necessary to promote in order to achieve human development.

The globalization phenomenon, the increase of power of business entities, in particular of transnational corporations, and the problem of states with low governance (especially when due to armed conflicts) have rendered traditional approaches to corporate

Businesses and Human Rights, continued

responsibility ineffective and inadequate. Legal systems remain mostly national, while many large corporations are multinational. In the face of the unequal economic and political power between some states and corporations and the insufficiency of domestic legal systems, it seems that international law is the body of law suited for the task of helping to ensure that businesses do not infringe upon human rights.

States, international organizations, and civil society have attempted in diverse ways to meet the challenge that business entities present for human rights. The result of all these efforts is a multidirectional approach to corporate human rights responsibility through at least four avenues: corporate codes of conduct based on self-regulation (or multi-stakeholder initiatives),[3] soft-law initiatives issued by international organizations,[4] transnational litigation,[5] and a draft treaty to regulate business entities' impact on human rights.[6] The focal point of these initiatives is the United Nations Guiding Principles on Business and Human Rights (UNGPs), which is a soft law instrument endorsed by the UN Human Rights Council in June 2011.[7] From all the initiatives, the treaty seems to be the most promising one since it is not based on businesses' good will nor requires the economic and technical knowledge of transnational litigation. International law has the potential to overcome the incapacity of domestic legal systems to regulate business entities, but it is an imperfect solution.

Although international law seems better suited to address transnational corporate abuses than domestic norms, current international law suffers from various limitations that have to be overcome in order to regulate transnational businesses' negative impact on human rights. Major limitations of current international law include: (1) even if there are indirect obligations that bind non-state actors, the model of enforcement is still dependent on the state, which raises the problem of jurisdiction; (2) even if international law could bound individuals, it cannot reach legal persons; and (3) international human rights law (IHRL) was designed with the intention to bound only states, not businesses.

Even if a treaty on business and human rights is adopted and allocates—at least indirectly—obligations to businesses,[8] those obligations must be enforced by the state parties to those treaties. Accordingly, the effectiveness of businesses' international obligations extends only as far as the states' jurisdictions do. These might change when states create new international tribunals or extend the jurisdiction of human rights regional tribunals to adjudicate over businesses' human rights infringements. For the time being, international law depends on domestic law to incorporate international law and on the states' jurisdiction to enforce the law.

Jurisdiction can be understood as the authority of a state over people, things, and activities, and it is classified into three categories: jurisdiction to prescribe; jurisdiction to enforce; and jurisdiction to adjudicate.[9] The general principle is that a state's authority to prescribe, enforce, or adjudicate is limited to its territory because the

Photo: www.accessnow.org

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OS RISCOS PARA A DEMOCRACIA NOS PAÍSES COM GOVERNOS CONSERVADORES: ESPECIAL ATENÇÃO PARA A AMÉRICA LATINA

Por Renato Selayaram, Porto Alegre, Brazil

Photo: https://venezuelanalysis.com

Introdução

Contemporaneamente, os países da América Latina apresentam uma interessante contradição, isto é, apresentam-se orgulhosamente como representantes da democracia, eis que seus governos realizam eleições periódicas com votos diretos, secretos e universais.

Em contrapartida, vêm apresentando uma florescente crise social, existente em razão das entranhadas desigualdades presentes. Os altos níveis de pobreza e de renda, associados ao baixo crescimento econômico, ocasionam uma insatisfação popular que se manifesta através da eleição de candidatos que prometem o céu ao eleitorado.

O presente artigo procura compreender a contradição demonstrada e sua consequência é que, muito embora tenha sido retomado, já há quase três décadas, o caminho da supremacia da vontade popular, as raízes da democracia navegam em águas um tanto quanto rasas.

Várias são os motivos para tal ilação, sendo que podemos concluir que, apesar de terem sido democraticamente eleitos, os governantes não conseguem atender as necessidades básicas da cidadania, tais como emprego, prestação de serviços de saúde e segurança.

É possível detectar que houve, sim, um aumento da participação popular em ditos processos e que, como consequência, diminuiu a ameaça que ao longo de décadas foi representada pelos riscos de insurreições militares. Entretanto, apesar dos avanços existes, cabe admitir que, seja no âmbito democrático ou no da

economia e relações sociais, a América Latina vivencia mutações que têm gerado crises generalizadas e que tais adversidades exteriorizam as contrariedades reclamadas e a incapacidade dos governantes em resolvê-las.

Segundo Pedro Serrano, diferentemente dos regimes ditatoriais do passado, caracterizados por tropas nas ruas e estados de sítio, os governos ditos democráticos do século XXI são eleitos democraticamente, produzem medidas de exceção por dentro da democracia e podem ser tão letais quanto aqueles. Estas políticas simulam uma aparência de constitucional, jurídica e democrática, mas seu conteúdo material é tirânico.[1]

Os resultados que poderão advir de tais regimes, com manifestações eclodindo quase que simultaneamente pelo continente, não são sabidos. Miebach e De Bem asseguram que, seja qual for a ideologia ou a forma de governo, o processo de desenvolvimento na América Latina hoje é uma incógnita.[2]

O que nos causa sofrimento não é necessariamente o que acontece, mas o momento em que acontece e o processo de aceitação tem relação com critérios típicos de cada cultura.[3] Podemos traduzir este sentimento como a frustração gerada em função de expectativas que foram criadas após largos períodos de regimes ditatoriais. Assim, se ao longo de décadas foram negados direitos aos indivíduos e estes se acostumaram com tais situações, quando houve o esgotamento daqueles, novos horizontes foram descortinados. Entretanto, as expectativas foram sendo gradativamente frustradas e as populações passaram a demonstrar um descontentamento geral com o que, inicialmente, se apresentou como uma crítica específica.

O Surgimento da Democracia na América Latina e Suas Particularidades

Os gregos distinguiam três regimes políticos: monarquia,

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Risks to Democracy in Countries With Conservative Governments: Special Attention to Latin America

By Renato Selayaram, Porto Alegre, Brazil

Introduction

In these modern times, Latin American countries present an interesting contradiction; that is, they proudly present themselves as standard-bearers of democracy, with their governments holding regular elections with direct voting, secret ballots, and universal voting rights.

On the other hand, those same countries apparently have deep social crises due to existing inequalities. High levels of poverty and low income, coupled with low economic growth, have led to people's dissatisfaction, which manifests itself through the election of candidates who promise heaven to the electorate.

This article seeks to understand this contradiction and its consequences—that although the supremacy of the people's will resumed almost three decades ago, democracy still sails in somewhat shallow waters.

There are several reasons for this thesis, and we can conclude that, despite being democratically elected, the countries' rulers are unable to assure the basic needs of the citizens, such as employment, health, and public security.

Popular participation in democratic processes has increased, which over time has weakened the decades-long threat of violent insurrections. Despite these advances, however, we still must admit that, whether in the democratic, economic, or social sphere, Latin America is experiencing changes resulting in widespread crises. These troubles make apparent internal difficulties and the inability of the rulers to resolve them.

According to Pedro Serrano, unlike the dictatorial regimes of the past, characterized by troops in the streets and states of siege, the so-called democratic governments of the 21st century are democratically elected, yet produce measures of exception from democracy and can be as lethal as prior nondemocratic regimes. Their policies manifest a constitutional, legal, and democratic appearance, but their reality is despotic.

The consequences of such regimes—with demonstrations erupting almost simultaneously across the continent—are not predictable. Miebach and De Bem assert that whatever the ideology or form of government, future developments within Latin America are unknown.

What causes us difficulty is not necessarily understanding what happens, but rather that when something happens, the results depend on criteria that are unique to each culture. We must also understand the popular feeling of frustration arising from the failure to meet expectations that are created after long periods of dictatorial regimes. Over the decades, individuals were denied rights and became accustomed to repressive situations. Then, once those repressive situations ended, new possibilities were revealed. Those expectations were gradually frustrated, however, and the population began to show general dissatisfaction with what initially came as a specific idea.

The Emergence of Democracy in Latin America and Its Particularities

The Greeks distinguished three political regimes: monarchy, aristocracy, and democracy. The difference was in the number of people exerting power—one, some, or many. Monarchy is the power of one (mono). Aristocracy is the power of the best, the excellent. They are the ones who have the excellence of the hero. Democracy distinguishes itself not only from the power of one but also from the power of the best ones, who stand out due to their quality. Democracy is the regime of ordinary people, in which everyone is equal. Whether one has been shown to be braver in war, or more

capable in science or art, that does not give anyone the right to rule over others.

The colonization of America was based on the existence of three groups: the administration, the church, and the local elites. In Hispanic countries, the administrative rule by representatives in the cities held political power; the church had its own jurisdictional power; and the local elites had extraordinary economic power. These groups had perks and benefits that separated them from other social strata, primarily indigenous and black people, leading to significant inequalities and ethnic tension that persist to this day.

A review of the path taken by political regimes in Latin America from the beginning of the emancipation processes shows us the coexistence of opposing forces, that is, a dictatorial pressure on one hand and, on the other, a liberal influence resulting from the European colonizing influence.

We can also infer that the foundations of this confusing structure are found in the persistent elimination and isolation of social groups—a process that started with the formation of countries, which generated considerable social inequality—the peripheral position within the international society, and the existence of political authorities who have used oppression as the main instrument of governance.

The formation of Latin American countries was mostly guided by the desire to maximize economic capacity, resulting in a political aristocracy. The next factor was one based on the strength of the populist and military leaders.

Whether in the Hispanic countries or the context of Portuguese colonization, these values remained similar due to the mutual assimilation of European cultures, hence the widespread difference between the various existing social classes. It is important to note that the principle of equality, inherited from the French Revolution, did not reach the disadvantaged classes.

Accordingly, the creation of sovereignty did not result in cultural independence or social evolution, as the constitutions that were written legitimized the exercise of authoritarianism. Thus, it is appropriate to state that the transition from colonies to sovereign states on the continent meant nothing else than the continuation of the status quo by other means. The constitutions functioned as democratic alibis for the exercise of authoritarian and paternalistic power.

At this point, an idea becomes clear; that is, those who have or hold power will not share it with those subjected by it.

Despotism and Treachery as Political Instruments

Until the first half of the last century, the Latin American states had, at least theoretically, a system that could be called liberal in nature, as elections were periodically held and there was some separation and respect among the three branches of government.

Then something fundamental changed, which impacted the continuity of democracy itself. The 1929 economic crisis in the United States represented a turning point in the political leanings of that time. Disadvantaged classes began to be segregated, especially in urban centers. Due to the worsening instability that had arisen, such classes were moved to protest, and the demonstrations sometimes took a violent form.

At this juncture, military governments and populism appeared as political forces, and it became normal for states to led by presidents who were once, or were still, also generals.

Alternating with military governments, populism also emerged as a significant characteristic of regional politics, and it still influences the conduct of Latin American politicians.

Populism requires the construction of “an enemy.” In the case of Latin America, the enemy has always been the oligarchic elites and powerful people in general. Populist politicians come to power by playing up their connection to the so-called underprivileged and making promises to them.

Given the importance of populist governments after the collapse of the military governments, modern populism

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LAS PERSONAS NICARAGÜENSES CON PROTECCIÓN INTERNACIONAL EN COSTA RICA: UNA CONSECUENCIA DE LA CRISIS 2018

Por Mónica Barrantes, San José, Costa Rica

El 03 de abril de 2018, y por varios días, se incendió la reserva natural de Indio-Maíz. La falta de respuesta inmediata por parte del Estado nicaragüense impulsó a que las y los jóvenes nicaragüenses realizaran movilizaciones, las cuales duraron 10 días, para demandar la acción gubernamental.[1]

Días después de este acontecimiento, el Gobierno del presidente Daniel Ortega publicó en el diario oficial, una reforma al sistema de seguridad social que incrementaba los aportes de los trabajadores en un 7% y de los empleadores en un 22.5% mensual; de igual manera, estableció una detracción del 5% en las pensiones por vejez, invalidez y discapacidad.[2]

Estas reformas provocaron protestas pacíficas y autoconvocadas por estudiantes universitarios y personas adultas mayores. Según la Comisión Interamericana de Derechos Humanos (CIDH) "el 18 de abril, en Managua, grupos de terceros armados, también conocidos como fuerzas de choque, grupos parapoliciales o turbas, irrumpieron en la Universidad Centroamericana en Managua para agredir a estudiantes, trabajadores y profesores que estaban protestando pacíficamente."[3]

Como respuesta a esta agresión, los movimientos se expandieron por el país y la represión policial fue mayor. A pesar de que el 22 de abril de 2018, el Gobierno retiró la reforma a la seguridad social,[4] las manifestaciones

Photo: http://todaynicaragua.com

Las Personas Nicaragüenses con Protección Internacional, continued

continuaron y la CIDH condenó[5] la muerte de al menos veinticinco personas, decenas de heridos, la salida del aire por orden oficial de cuatro canales de televisión y la detención arbitraria de 438 personas a mayo de 2018.[6]

Photo: www.nytimes.com

Asimismo, por medio de un comunicado de prensa,[7] cuatro Relatores Especiales de Naciones Unidas expresaron su preocupación ante la respuesta violenta de las fuerzas de seguridad a las manifestaciones, y pidieron respetar los derechos a la libertad de expresión y a la reunión pacífica. Hasta el punto de que, para septiembre de 2018, habían fallecido 322 personas, y más de 2.000 personas habían resultado heridas; así como 300 personas fueron procesadas por su participación en las protestas.[8]

Esta respuesta por parte de las autoridades nicaragüenses conllevó, según Amnistía Internacional,[9] una estrategia de represión, la cual se llevó a efecto por medio de la utilización de grupos parapoliciales para atacar o efectuar posibles ejecuciones extrajudiciales; irregularidades en las investigaciones; la denegación de la atención médica en hospitales públicos; así como los intentos de controlar los medios de comunicación para limitar la libertad de expresión.

De acuerdo con los informes de la CIDH y de Amnistía Internacional, a lo largo de estas manifestaciones varios derechos fueron vulnerados, entre los que se encuentran la privación arbitraria a la vida y la afectación a la integridad personal de personas que participaron en las manifestaciones o afines a estos movimientos.

Es importante resaltar que el derecho a la vida, según se dispone en la Convención Americana sobre Derechos Humanos y la jurisprudencia de la Corte Interamericana de Derechos Humanos[10] (Corte IDH), es la base esencial para la realización de los demás derechos. El derecho a la vida y a la integridad personal fueron lesionados mediante el uso letal de la fuerza y la realización de acciones violentas (vigilar, reprimir) por parte de parapoliciales y grupos terceros armados.[11]

Asimismo, el derecho a la salud y atención médica, de acuerdo con estos informes, fue vulnerado debido a la denegación de la atención médica o la obstaculización de ayuda humanitaria a personas heridas. Se comprobó, además, que el personal médico que brindó esta asistencia fue reprimido o amenazado con ser expulsado del sistema de salud.[12]

Las censuras y amenazas a los medios de comunicación fueron en reiteradas ocasiones denunciadas[13] durante las manifestaciones. De hecho ". . . el 19 de abril de 2018 el Instituto Nicaragüense de Telecomunicaciones (Telecor), habría ordenado sacar del aire el Canal 100% Noticias, el Canal 12, el Canal 23, y el Canal 51."[14]

Por todo lo anterior, miles de nicaragüenses debieron huir de su país con el fin de preservar sus vidas.

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Nicaraguan People With International Protection in Costa Rica: A Consequence of the 2018 Crisis

By Mónica Barrantes, San José, Costa Rica

On 3 April 2018, and for the several days that followed, the Indio-Maíz Biological Reserve caught fire. The lack of an immediate response from the Nicaraguan state prompted Nicaraguan youth to mobilize for ten days demanding government action.

Days after this event, the government of President Daniel Ortega published reforms in the official newspaper of the social security system to increase workers' contributions by 7% and employers' contributions by 22.5% per month; additionally, the reforms reduced old-age or disability pensions by 5%. These reforms also provoked peaceful and self-organized protests by university students and older adults. Yet according to the Inter-American Commission on Human Rights (IACHR), "on April 18, in Managua, armed third party groups, also known as shock forces, para-police groups or mobs, broke into the Central American University in Managua to attack students, workers, and teachers who were protesting peacefully."

In response to this aggression, protest movements expanded throughout the country, and police repression expanded as well. Despite the fact that the government withdrew the social security reforms on 22 April 2018, demonstrations continued and the IACHR confirmed the deaths of at least 25 people, with dozens more wounded, as well as the official closure of four TV channels and the arbitrary detention of 438 people as of May 2018.

Likewise, through a press release, four United Nations special reporters expressed concerns about the violent response of the security forces and asked for respect for the people's freedom of expression and peaceful assembly rights. By September 2018, a total of 322 people had died and more than 2,000 had been injured; also, 300 people were prosecuted for their participation in the protests.

The response by the Nicaraguan authorities, according to Amnesty International, led to a strategy of repression that was carried out by the use of para-police groups to attack or carry out possible extrajudicial executions; irregularities in investigations; the denial of medical care in public hospitals; as well as attempts to control the media to limit freedom of expression.

According to the reports from the IACHR and Amnesty International, throughout these demonstrations several rights were violated, among which were the arbitrary deprivation of life and affronts to the personal integrity of people who participated in the protests or movements.

It is important to highlight that the right to life, as provided in the American Convention on Human Rights and the jurisprudence of the IACHR, is the essential basis for the realization of other rights. The right to life and personal integrity were affected by the lethal use of force and violent actions by police officers and armed third parties.

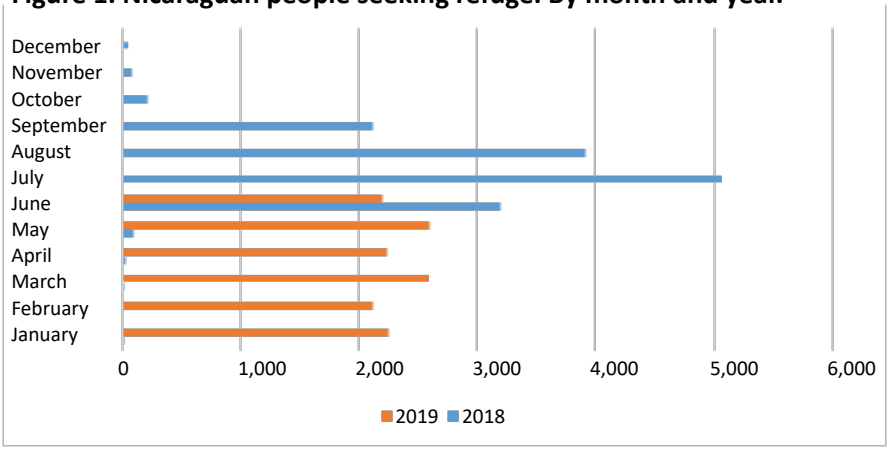
Likewise, the right to health and medical care, according to these reports, was violated by the denial of medical care or the obstruction of humanitarian aid to injured persons. It was also established that the medical staff that provided assistance were hampered or threatened to be expelled from the health system.

Censures and threats to the media were repeatedly reported during the demonstrations. In fact, "On 19 April 2018, the Nicaraguan Institute of Telecommunications (Telecor) ordered the 100% News Channel, Channel 12, Channel 23, and Channel 51 to be taken off the air."

For the reasons above, thousands of Nicaraguans had to flee their country to save their lives. Most of these people traveled to Costa Rica, due to its proximity, cultural relations, and preexisting personal networks

within this country. As of July 31, the Office of the United Nations High Commissioner for Refugees (UNHCR) indicated that 200 Nicaraguans per day register as refugees in Costa Rica.

Figure 1. Nicaraguan people seeking refuge. By month and year.



Source: OIM, 2019

In accordance with the Convention on the Status of Refugees of the United Nations of 1951, the term *refugee* shall apply to any person who has "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

In addition to the previous definition, the Cartagena Declaration on Refugees, signed by the countries of Latin America in 1984, recommends that in addition to the definition given by the 1951 Convention, it be included in the definition of a refugee person who has fled from their country "because their life, security or freedom has been threatened by widespread violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances that seriously disrupted public order."

In line with the previous definitions, the Costa Rican Migration and Foreigners Directorate as of March 2019 received 22,500 formal refuge requests; however, and as a consequence of the large number of applications and the scarce economic and human resources, 26,000 Nicaraguans were waiting as of that date to formalize their refuge applications.

To the previous figures must be added those Nicaraguan people who fled their country but did not formally request refuge from the Costa Rican immigration authorities, since a significant number of Nicaraguan people had family or friends who provided housing and information on the migratory processes in the country.

Of the people seeking refuge, the majority are young university students, doctors, university professors, human rights lawyers, and others. This is because government persecutions were not limited to protesters but were also against professionals suspected of helping or sympathizing in some way with the protesters.

Current Situation of Nicaraguan Refugees or Asylum Seekers in Costa Rica

Costa Rica has been one of those countries where migration has been a steady force due to its geographical and sociopolitical characteristics, indicating that "Costa Rica has become a hopeful destination for immigrant groups, especially Central Americans, who seek to improve their living conditions. This migratory phenomenon has created territorial scenarios with their own characteristics and needs, with an important weight in the economic and social dynamics of the country."

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Asylum Based on Domestic Violence or Gang Persecution in the USA: When Is the Government 'Unable or Unwilling' to Protect the Victim?

By Jean Pierre Espinoza, Lakeland, Florida

Section 208 of the Immigration and Nationality Act (INA) authorizes the granting of asylum to individuals who are physically present or arriving in the United States, regardless of their status, and who meet the definition of refugee.[1]

Under U.S. law, a "refugee" is a person who is unable or unwilling to return to his or her home country because of a "well-founded fear of persecution" due to race, membership in a particular social group, political opinion, religion, or national origin.[2] U.S. asylum law is supposed to offer protection to those who are fleeing something horrible in their native country.

In response to the international community's failure to assist the persecuted that perished at the hands of the Nazis, the U.N. General Assembly established the Office of U.N. High Commissioner for Refugees (UNHCR) in 1950 to protect refugees. A year later, on 25 July 1951, the United Nations adopted the Refugee Convention[3] to protect refugees from persecution and to ensure the best possible exercise of fundamental rights and freedoms without discrimination.[4]

On 31 January 1967, the UN adopted the Protocol of the Refugee Convention to remove the Refugee Convention's temporal and geographical restrictions so that the

Photo: https://amcgraitylaw.com

Asylum, continued

Convention applies universally and is read alongside the 1951 Refugee Convention.[5]

Through this treaty, the state parties created an international legal regime that respects the stabilizing and humanitarian value of the state-citizen relationship.[6] The United States became a party of the Protocol of the Refugee Convention in 1968. Via the *non-refoulement* obligation set out in Article 33, states committed themselves not to return an individual to his or her state of nationality or residence if this person reasonably fears serious harm.[7]

The treaty strongly encourages governments to naturalize refugees, and most of the Refugee Convention provisions speak to a set of political, social, and economic rights as well as state party obligations that enable refugees to rebuild their lives in the new country.[8]

The U.S. government has regulated a complex legal process for merit relief. The Congress enacted legislation in 2005 making it more difficult for asylum seekers to be found credible.[9] More recent developments have extended the complexities beyond credibility determinations and into substantive questions of law. In the past, it was generally recognized that one can qualify for asylum where the persecutors are not part of the government, provided that the government is either unable or unwilling to control them.[10]

On 11 June 2018, then Attorney General Jeff Sessions issued a precedent decision in *Matter of A-B-*[11] where he overruled a prior Board of Immigration Appeals (BIA) case, *Matter of A-R-C-G-*.[12] *Matter of A-R-C-G-* basically held that victims of domestic violence can qualify for asylum based on their particular social group of "married women in Guatemala who are unable to leave their relationship."[13]

Under U.S. law, to qualify for asylum, an asylum seeker must establish past persecution or a well-founded fear of persecution on account of a protected ground, and one of those protected grounds is a particular social group (PSG).

The INA provides little guidance on defining PSGs. The only language on point in the INA is general and nonspecific: "the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant."[14] Beyond this general statement, there is no further clarification on what constitutes "membership in a particular social group."[15]

Indeed, even the definition section of the INA offers no guidance toward understanding Congress's meaning of "particular social group."[16] In 2014, in two simultaneously decided cases, the BIA established a standard three-element test: to qualify as a member of a PSG, it must be established that "the group is (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question."[17]

Matter of A-B- touched on several aspects of asylum law, such as domestic violence, as a basis for asylum and whether a private actor harm supports a past persecution finding.[18] First, the decision attacks the social group formulation of "married women in Guatemala who are unable to leave their relationship" ruling that the group is "defined by the harm."[19] In other words, the reason that A-R-C-G- could not leave the relationship was because she was being abused. Further, the decision indicates that the BIA did not engage in a full PSG analysis applying the three-part test, especially "particularity," in *Matter of A-R-C-G-.*[20]

Second, the decision attacks the past persecution analysis made in *A-R-C-G-*.[21] One of the many things *A-B-* does is to elevate the burden in "private actor" harm. The decision states that the "applicant must show that the government condoned the private actions or at least demonstrated a complete helplessness to protect the victims."[22]

The INA does not establish that harm from private actors cannot form the basis of an asylum claim. The burden on the asylum applicant is to show that the government was "unwilling or unable" to control the private actor persecutor.

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LA LIBERTAD DE CONCIENCIA Y RELIGIÓN EN EL SISTEMA INTERAMERICANO DE DERECHOS HUMANOS: UNA DEUDA PENDIENTE

Por Christian González Chacón, Washington, D.C., y Sara Méndez Niebles, Medellín, Colombia

Introducción

El Sistema Interamericano de Derechos Humanos (SIDH) es el mecanismo regional de derechos humanos más importante de las Américas, y se encuentra conformado por la Comisión Interamericana de Derechos Humanos (CIDH)[1] y la Corte Interamericana de Derechos Humanos (Corte IDH).[2]

La CIDH monitorea la situación de derechos humanos en las Américas de manera geográfica y también temática a través de sus distintas relatorías. Igualmente, examina y decide casos individuales relacionados con graves violaciones de derechos humanos de los tratados interamericanos, siendo el principal instrumento la Convención Americana Sobre Derechos Humanos. La CIDH envía casos a la Corte Interamericana de Derechos Humanos cuando el Estado ha aceptado la competencia contenciosa de la Corte IDH, y no cumple con las recomendaciones indicadas por la CIDH en el informe de fondo del caso.

Por otra parte, la principal función de la Corte IDH es emitir sentencias de casos remitidos por la CIDH o por un Estado, en los que declara si un Estado es o no responsable internacionalmente por la violación de un derecho humano protegido por los tratados del Sistema Interamericano que cuentan con derechos justiciables a través del sistema de peticiones y casos. A la fecha, la Corte IDH ha emitido 390 decisiones de casos sometidos a su conocimiento.[3]

Específicamente, el derecho a la libertad de conciencia y de religión está reconocido en el Artículo 12 de la Convención Americana sobre Derechos Humanos, el cual estipula: (1) toda persona tiene la libertad de conservar, cambiar, divulgar y profesar su religión o sus creencias, individual o colectivamente, tanto en público como en privado; (2) nadie puede ser objeto de medidas restrictivas que puedan menoscabar la libertad de conservar o de cambiar su religión o creencias; (3) la libertad de conciencia y de religión únicamente podrá

limitarse por ley y cuando sea necesario para proteger la seguridad, el orden, la salud o la moral públicas o los derechos o libertades de los demás; y (4) los padres o tutores tienen derecho a que sus hijos o pupilos reciban la educación religiosa y moral que esté de acuerdo con sus propias convicciones.[4]

Pese al expreso reconocimiento del derecho a la libertad de conciencia y de religión en la Convención Americana sobre Derechos Humanos, su desarrollo dentro del Sistema Interamericano de Derechos Humanos ha sido escaso e insuficiente para delimitar su alcance y contenido. Ello se debe, a nuestro criterio, a que el Sistema Interamericano evoluciona debido a los asuntos y casos que son sometidos a su conocimiento, y en escasas ocasiones se han presentado peticiones relacionadas con la violación de la libertad de conciencia y religión.

A continuación, detallamos los principales pronunciamientos de la CIDH y Corte IDH sobre el derecho a la libertad de conciencia y de religión y, tomando en cuenta la jurisprudencia internacional, proponemos una visión crítica sobre aspectos de este derecho que requieren un mayor desarrollo dentro del Sistema Interamericano.

La Libertad de Conciencia y Religion según la CIDH

La Comisión Interamericana de Derechos Humanos se ha pronunciado sobre la libertad de conciencia y religión en al menos cuatro escenarios distintos: (1) la persecución a individuos o grupos por motivos de creencias o religión; (2) la discriminación legal por motivos religiosos; (3) la libertad de conciencia y religión de pueblos indígenas; y (4) la libertad de conciencia y religión y el servicio militar obligatorio.

En cuanto al primer escenario mencionado, a través de una serie de informes temáticos y de país, la CIDH se ha referido a la persecución a líderes religiosos. Por ejemplo, en su Informe sobre Nicaragua de 1978, la CIDH expresó que "los sacerdotes y clérigos encuentran serias restricciones para el ejercicio de su ministerio" que constituyen una forma de represión a la Iglesia.[5]

Asimismo, en su informe respecto de El Salvador de 1979-1980, la CIDH subrayó que, en El Salvador, se cometieron hechos abominables, como el asesinato de sacerdotes que predicaban la convivencia pacífica entre el pueblo salvadoreño y el cese de la represión contra diversos sectores de la sociedad salvadoreña, lo cual vulneró el derecho a la libertad de culto y religión, por lo que instó a dicho a país a tomar las medidas necesarias para prevenir que continuara la persecución de los miembros de la Iglesia católica que actuaban en ejercicio de su misión pastoral.[6]

También, en su informe sobre Guatemala de 1981, la CIDH destacó que tenía información sobre hostigamientos, secuestros, desapariciones y asesinatos de varios religiosos, sacerdotes y auxiliares seglares, por las condiciones creadas por la violencia existente en el país, lo cual en la práctica se tradujo en serios obstáculos para la libertad de conciencia y religión.[7]

Por otra parte, en relación con el segundo escenario, la CIDH se ha referido a disposiciones legales que limitan el libre ejercicio de la libertad de culto y religión. Por ejemplo, en su informe de Argentina de 1980, la CIDH se pronunció sobre una disposición de aquel año que prohibió la actividad de los Testigos de Jehová en todo el país y de los grupos vinculados a este, expresando que tal prohibición vulneraba el derecho de libertad de religión y culto, por lo que recomendó al Estado derogar la prohibición y adoptar las medidas necesarias para hacer cesar la persecución en contra de los Testigos de Jehová.[8]

Igualmente, la CIDH, en su informe sobre Cuba de 1983, recordó que la Constitución de dicho país establecía que es ilegal y punible oponer la fe o la creencia religiosa a la Revolución y expresó que la ideología oficial del régimen cubano era marxista-leninista, ideología antagónica con las concepciones religiosas en general, la cual debía ser profesada a fin de ser miembro del Partido Comunista y como requisito indispensable para ocupar cualquier posición política en Cuba, lo cual necesariamente generaba una discriminación de hecho para acceder a puestos en la Administración pública. Refirió que

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Freedom of Conscience and Religion in the Inter-American Human Rights System: A Pending Debt

By Christian González Chacón, Washington, D.C., and Sara Méndez Niebles, Medellín, Colombia

Introduction

The Inter-American Human Rights System (IACHR) is the most important regional human rights mechanism in the Americas and is composed of the Inter-American Commission on Human Rights (IACHR or Commission) and the Inter-American Court of Human Rights.

The Commission monitors the human rights situation in the Americas geographically and thematically through its various rapporteurships. Likewise, it examines and decides individual cases related to serious human rights violations of the inter-American treaties, the main instrument being the American Convention on Human Rights. The Commission sends cases to the Inter-American Court of Human Rights when the state has accepted the jurisdiction of the court, yet does not comply with the recommendations indicated by the IACHR in the Merits Report of the case.

On the other hand, the main function of the Inter-American Court is to issue judgments for cases referred by the Commission or by a state, in which it declares whether or not a state is internationally responsible for the violation of a human right protected by the treaties of the Inter-American System that have justiciable rights through petitions and cases. To date, the Inter-American Court has issued 390 decisions on cases submitted to its jurisdiction.

Specifically, the right to freedom of conscience and religion is recognized in Article 12 of the American Convention, which stipulates: (1) everyone has the freedom to conserve, change, disseminate, and profess their religion or beliefs, individually or collectively, both in public and in private; (2) no one may be subject to restrictive measures that may impair the freedom to conserve or change their religion or beliefs; (3) freedom of conscience and religion may only be limited by law and when necessary to protect public safety, order, health, or morals, or the rights or freedoms of others; and (4) parents or guardians have the right to have their children or pupils receive religious and moral education that is in accordance with their own convictions.

Despite the express recognition of the right to freedom of conscience and religion in the American Convention on Human Rights, its development within the Inter-American Human Rights System has been inadequate and insufficient to define its scope and content. This is due, in our opinion, to the fact that the Inter-American System is evolving according to the issues and cases that are submitted to it, and only on few occasions have there been petitions related to the violation of freedom of conscience and religion.

Next, we detail the main pronouncements of the Inter-American Commission and Court on the right to freedom of conscience and religion and, considering international jurisprudence, we propose a critical vision on aspects of this right that require further development within the Inter-American System.

Freedom of Conscience and Religion According to the CIDH

The Inter-American Commission has ruled on freedom of conscience and religion in at least four different scenarios: (1) persecution of individuals or groups for reasons of beliefs or religion; (2) legal discrimination on religious grounds; (3) freedom of conscience and religion of indigenous peoples; and (4) freedom of conscience and religion and mandatory military service.

Regarding the first scenario mentioned, through a series of thematic and country reports, the IACHR has considered the persecution of religious leaders. For example, in its report on Nicaragua of 1978, the

Freedom of Conscience and Religion, continued

Commission stated that "priests and clerics find serious restrictions for the exercise of their ministry" that constitute a form of repression of the church.

Likewise, in its report regarding El Salvador from 1979-1980, the IACHR stressed that abominable acts were committed in El Salvador, such as the murder of priests who preached peaceful coexistence among the Salvadoran people and the cessation of repression against various sectors of Salvadoran society, which violated the right to freedom of worship and religion, and therefore urged the country to take the necessary measures to prevent the persecution of members of the Catholic church acting in the exercise of their pastoral mission.

Also, in its report on Guatemala of 1981, the IACHR noted that it had information on harassment, kidnapping, disappearances, and murders of several religious, priests and lay assistants, due to the conditions created by the violence in the country, which in practice translated into serious obstacles to freedom of conscience and religion.

On the other hand, in relation to the second scenario, the IACHR has considered legal provisions that limit the free exercise of freedom of worship and religion. For example, in its report on Argentina of 1980, the Commission ruled on a provision that year that prohibited the activity of Jehovah's Witnesses throughout the country and the groups linked to it, expressing that such prohibition violated the right to freedom of religion and worship, and so it recommended that the state repeal the prohibition and take the necessary measures to stop the persecution against Jehovah's Witnesses.

Likewise, in its 1983 report on Cuba, the IACHR noted that the constitution of that country established that it was illegal and punishable to oppose the Revolution (including based on faith or religious belief) and that the official ideology of the Cuban regime was Marxist-Leninist (ideology antagonistic to religious conceptions in general) and must be professed in order to be a member of the Communist Party and was an indispensable requirement to occupy any political position in Cuba, which necessarily generated a de facto discrimination to access positions in public administration. It was also stated that the initial antagonism between the government and churches gave way to an ideological competition in which the government used its resources to promote official ideology to the detriment of other ideologies.

Regarding this right and indigenous people, the Commission has referred to the importance of guaranteeing indigenous beliefs and culture as an integral part of freedom of conscience and religion. In its 1997 report regarding Ecuador, the IACHR stated that respect for indigenous expression, religion, and culture implies special provisions by the state to ensure, for example, that bilingual education is available; that curricula and materials reflect, communicate, and properly respect the culture of the tribe; and that efforts be made to train teachers within indigenous communities.

Likewise, in its thematic report on the rights of indigenous and tribal peoples on ancestral lands (2009), the IACHR stressed that there is a link between the territorial property rights of indigenous communities and freedom of religion, since by depriving the people of material possession of their territory, their religion, spirituality, or beliefs are also affected, so that states have the obligation to guarantee indigenous peoples the freedom to preserve their own forms of religiosity or spirituality, including the public expression of this right and access to sacred sites.

Finally, the IACHR has analyzed freedom of conscience and religion in cases related to compulsory military service. In the case of *Cristián Daniel Sahli Vera et al. vs. Chile (2005)*, the IACHR ruled on mandatory military service in light of the right to freedom of conscience, and said that Article 12 of the American Convention, read in conjunction with the Article 6.3b of the same instrument, implies that conscientious objection is only protected by the American Convention if it is

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EL PRINCIPIO DE SUBSIDIARIEDAD EN EL SISTEMA INTERAMERICANO DE PROTECCIÓN DE LOS DERECHOS HUMANOS

Por Jorge Ernesto Roa Roa, Bogotá, Colombia

El sistema de protección de los derechos humanos creado en el marco de la Organización de Estados Americanos (OEA), como todos los sistemas regionales de protección de los derechos humanos, se rige por el principio de subsidiariedad.[1]

Este principio es un elemento esencial para conciliar las competencias de los Estados, el pluralismo, la diversidad cultural y el valor intrínseco de los procedimientos nacionales de decisión con la existencia de unos valores universales y de unos objetivos globales que trascienden las fronteras estatales y que se expresan en los tratados sobre derechos humanos.[2]

En términos generales, la subsidiariedad califica la relación entre dos instituciones, normas o sistemas normativos de manera que una de esas instituciones, normas o sistemas normativos complementa al otro solo cuando se cumplen determinadas circunstancias.[3]

El principio de subsidiariedad que rige a los sistemas de protección de los derechos humanos es una expresión del reconocimiento de que las instituciones domésticas de cada uno de los Estados son los escenarios en los cuales se deben adoptar las medidas necesarias para cesar, investigar, sancionar, reparar y garantizar la no repetición de las violaciones a los derechos humanos.

El principio de subsidiariedad también refleja un concepto especial de implementación de los estándares internacionales sobre derechos humanos que centra sus esfuerzos en que las autoridades nacionales decidan los casos de violaciones a los derechos humanos con base en los criterios que habría utilizado el juez internacional.[4] Esta visión se opone a la idea de que todos los casos de violaciones a los derechos humanos sean conocidos por los tribunales supranacionales e internacionales.

Como señala Gerald Neuman, la subsidiariedad impone una obligación y constituye una oportunidad para los

Estados. La obligación proviene de la necesidad de que a nivel interno se establezcan las normas y los procedimientos para garantizar los derechos.

La oportunidad deriva del hecho de que, cumplir adecuadamente con la anterior obligación, generará una menor intervención de los sistemas regionales de protección de los derechos humanos.[5]

En el mismo sentido, Paolo Carozza afirma que la subsidiariedad es un principio paradójico que, por una parte, limita la intervención de los tribunales internacionales cuando la protección estatal interna de los derechos es adecuada.

Sin embargo, por otra parte, la subsidiariedad también es la fuente de legitimidad de la intervención de los tribunales internacionales cuando esta se requiere y justifica en razón de las fallas estatales en la protección de los derechos.[6]

En el ámbito de los sistemas regionales de protección de los derechos humanos existen diferentes mecanismos para implementar la dimensión procedimental del

principio de subsidiariedad, inter alia, el agotamiento de los recursos internos o la fórmula de la cuarta instancia.

Desde luego, el principio de subsidiariedad de los sistemas de protección de los derechos humanos se complementa con la deferencia que los tribunales internacionales muestran a favor de los Estados en el análisis de fondo de los casos (e.g., margen de apreciación nacional) y en las medidas de reparación o remedios que puede proferir un tribunal (deferencia remedial).[7]

Por ejemplo, en materia de reparación a las violaciones a los derechos humanos, el Tribunal Europeo de Derechos Humanos permite que los Estados adopten medidas de reparación adicionales a la justa compensación.

Por el contrario, la Corte Interamericana de Derechos Humanos (Corte IDH) adopta medidas de reparación integral y ordena la adopción de medidas de satisfacción y de garantías de no repetición que dejan poco margen a los Estados. Además, la supervisión del cumplimiento de las decisiones del Tribunal Europeo le corresponde exclusivamente al Consejo de Europa mientras que en América esas funciones las realiza tanto la propia Corte IDH como la Asamblea General de la OEA.

Aún más, en algunos casos, las medidas de reparación ordenadas por la Corte IDH son criticadas porque se confunden con las políticas sociales del Estado y van más allá del remedio del daño para dejar a la víctima en una situación cualitativamente mejor a la que tenía antes de sufrir el daño.

Estas medidas, que se denominan transformadoras, han dado origen a discusiones interesantes sobre la función compensatoria o redistributiva de la reparación.[8] Esta discusión interamericana refleja que la deferencia en materia de reparaciones tiene un alcance menor en el Sistema Interamericano en comparación con lo que ocurre en el ámbito del Consejo de Europa.

Ahora bien, como se verá a continuación, en el marco del Sistema Interamericano se han aplicado los mecanismos de agotamiento de los recursos internos y la fórmula de la cuarta instancia mientras que se discute sobre el uso excepcional e implícito del margen de apreciación nacional.

El Previo Agotamiento de los Recursos Internos: Reglas, Excepciones y Carga de la Prueba

En primer lugar, el agotamiento de los recursos internos es una vía de subsidiariedad negativa, según la cual, los órganos internacionales no pueden intervenir cuando dentro del sistema doméstico se adoptaron todas las medidas necesarias para reparar una violación a los derechos humanos.

Dicho de otra manera, como el sistema de protección internacional de los derechos humanos es complementario del sistema interno de cada Estado, el primero solo puede intervenir cuando este último ha fallado.

El mecanismo de la subsidiariedad mediante el agotamiento de los recursos internos se encuentra establecido en los Artículos 46.1.a de la Convención Americana sobre Derechos Humanos y 31.1 del Reglamento de la Comisión Interamericana de Derechos Humanos (CIDH).[9] Estas dos disposiciones establecen que los peticionarios deben manifestarle a la Comisión Interamericana los recursos judiciales internos que agotaron antes de acudir al Sistema Interamericano.

Photo: https://es.wikipedia.org

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The Principle of Subsidiarity in the Inter-American System of Protection of Human Rights

By Jorge Ernesto Roa Roa, Bogotá, Colombia

The human rights protection system created within the framework of the Organization of American States (OAS), like all regional human rights protection systems, is governed by the principle of subsidiarity.

This principle is essential to reconcile the powers of states, pluralism, cultural diversity, and the intrinsic value of national decision-making with the existence of universal values and global objectives that transcend state borders and that are expressly stated in human rights treaties.

In general terms, subsidiarity limits the relationship between two institutions, norms, or normative systems so that one of those institutions, norms, or normative systems accompanies the other only in certain situations.

The principle of subsidiarity governing human rights protection systems recognizes that domestic institutions in each state are the jurisdictions in which necessary protective measures must be taken to stop, investigate, sanction, repair, and guarantee the non-repetition of human rights violations.

The principle of subsidiarity also reflects a special implementation of international human rights standards focusing on the efforts of national authorities deciding cases of human rights violations based on the criteria that an international judge would have used. This vision is opposed to the idea that all cases of human rights violations are best understood by supranational and international courts.

As Gerald Neuman points out, subsidiarity both imposes an obligation and constitutes an opportunity for states. The obligation stems from the need for internal rules and procedures to guarantee rights.

The opportunity derives from the fact that properly complying with the previous obligation will generate less intervention from regional human rights protection systems.

In the same vein, Paola Carozza affirms that subsidiarity is a paradoxical principle that, on the one hand, limits the intervention of international courts when the internal state protection of rights is adequate.

On the other hand, subsidiarity gives legitimacy to the intervention of international courts when it is required and justified because of state failures in the protection of rights.

In the area of regional human rights protection systems, there are different mechanisms to implement the procedural dimension of the principle of subsidiarity, inter alia, the exhaustion of internal resources.

Of course, the principle of subsidiarity of human rights protection systems is complemented by the deference that international courts show in favor of states in the substantive analysis of cases and in measures of reparation or remedies made by a court.

For example, in the area of reparation for human rights violations, the European Court of Human Rights allows states to take additional reparation measures to affect just compensation.

Conversely, the Inter-American Court adopts comprehensive reparation measures and orders the adoption of measures of satisfaction and guarantees of non-repetition that leave little room for additional action by the states. In addition, the supervision of compliance with the decisions of the European Court corresponds exclusively to the Council of Europe while in the Americas these functions are carried out by both the Inter-American Court itself and the OAS General Assembly.

Moreover, in some cases, the reparation measures ordered by the Inter-American Court are criticized

because they are confused with the social policies of the states and leave the victim in a qualitatively better situation than the states' remedy.

These measures have given rise to interesting discussions about the compensatory or redistributive function of reparations. This inter-American discussion reflects that the deference in matters of reparations has a smaller scope in the Inter-American System in comparison with what occurs in the Council of Europe.

The Previous Exhaustion of Internal Resources: Rules, Exceptions, and Burden of Proof

First, the exhaustion of domestic remedies is a negative view of the principle of subsidiarity, according to which international bodies cannot intervene when within the domestic system all necessary measures were taken to repair a violation of human rights.

In other words, since the international system for the protection of human rights is complementary to the internal system of each state, the former can only intervene when the latter has failed.

The mechanism of subsidiarity through the exhaustion of domestic remedies is established in Articles 46.1.a of the American Convention and 31.1 of the Rules of Procedure of the Inter-American Commission on Human Rights (IACHR or Commission). These two provisions establish that the petitioners must express to the IACHR the domestic judicial remedies they exhausted before going to the Inter-American System.

In its advisory opinions and in its contentious jurisprudence, the Inter-American Court has specified the essential characteristics that internal resources must satisfy in order to be considered as procedural requirements before the Inter-American System: availability, adequacy, and effectiveness.

On the one hand, resources must be available, and that means they must be formally provided within the system and be easily accessible to individuals. In addition, suitability or adequacy refers to the existence of a direct relationship between the violation of the right and the function of the resource to achieve the objective of overcoming that violation of human rights. Finally, effectiveness means that individuals must have the potential to produce the legal and factual result for which the systems were designed.

In addition to the above aspects, the Inter-American Court has analyzed special situations in which it has considered the time in which domestic judicial remedies are resolved, the degree of independence of the judicial authorities before which those remedies are processed, the context of violence and terror that may condition the result of domestic remedies, and the powers of domestic authorities to enforce their decisions against individuals and other national authorities.

When the state considers that the petitioners have not exhausted domestic remedies, it assumes the burden of proving the existence of the resources and their availability, suitability, adequacy, and effectiveness.

The state may introduce that argument into the contentious procedure by presenting a preliminary objection for the Inter-American Commission to declare the petition inadmissible.

The state has the burden of presenting this preliminary objection during the admissibility phase of the procedure before the Commission. This burden of diligence prevents states from using this argument as a late defense when the process is at an advanced stage, when the substantive considerations have been formulated by the Commission, or when the case has already been deferred to the Inter-American Court.

Similarly, when the state presents the preliminary objection to the Commission and it is rejected, the state may insist on the same argument before the Inter-American Court for the court to review whether the IACHR decided the exception with complete and truthful information.

This possibility has generated criticism because it implies a delay and a duplication of the procedures; however, it has remained under the criterion that the Inter-American Court doesn't fully reexamine the preliminary objection

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The Application of Human Rights Standards in the Jurisprudence of the International Criminal Court: Achieving Coherence Through Article 21(3) of the Rome Statute

By Sara Cristina Fernández Rivera, The Hague, Netherlands

The map of international adjudication has radically changed in the last century.[1] Initially, the only institution with jurisdiction to dispute settlements in the international sphere was the Permanent Court of International Justice (PCIJ). Currently, there are more than three dozen international tribunals.[2] This phenomenon has been referred to by some as the "proliferation" of international adjudicative bodies, and it creates a complex system of judicial and quasi-judicial mechanisms.[3]

The multiplication of international tribunals constitutes a significant development for international law, but it also represents a challenge.[4] At the international level, the different courts and tribunals exist without a hierarchical integrated system to organize the dynamics between their work.[5]

For some, this characteristic of the international adjudicative system creates the risk of fragmenting international law, given that tribunals can reach incoherent or conflictive decisions and interpretation of norms. This, they alert, may damage the idea of law as a unity in the international sphere. For others, it represents an occasion to allow a degree of experimentation and exploration, which could lead to developments that generate improvements in international law.[6] In order for this complex system to continue developing in a coherent way, it is important for the tribunals to implement certain techniques to manage the risk of fragmentation.

Article 21(3) of the Rome Statute, which indicates that the International Criminal Court (ICC) must apply and interpret norms in accordance with internationally recognized human rights, has a double dimension. For one part, it safeguards the right to a fair trial in the proceedings before the ICC. In its second dimension, it represents an important tool for the coherent

development of international criminal law and international human rights law. Both dimensions of Article 21(3) have been applied in the jurisprudence of the ICC in the reparation proceedings decided by the court.

Article 21(3): The Application and Interpretation of the Rome Statute in Accordance With International Human Rights Standards

As part of the international system, international criminal tribunals and human rights courts coexist. Each of them acts in accordance with its own mandate, but they interact on important legal issues that impact both areas of law.

The ICC and the regional human rights courts have, based on their nature and origins, different mandates. In international human rights law, there are only three regional tribunals created with jurisdiction to give binding decisions on breaches of human rights norms.[7] The regional human rights tribunals decide on a state's responsibility for human rights violations on the basis of specific human rights treaties. Their ratione materiae jurisdiction is attached to a binding international human rights instrument.[8]

The ICC is an international permanent tribunal that exercises criminal jurisdiction, and its proceedings seek to decide on individual criminal responsibility for crimes against humanity,[9] war crimes,[10] genocide,[11] and the crime of aggression.[12]

The proceedings at the ICC do not involve state responsibility, but "the prosecution, conviction, and punishment of individuals."[13] Nevertheless, because the ICC is "principally concerned with the exercise of a repressive jurisdiction over individuals,"[14] it must safeguard the human rights of those undergoing criminal proceedings under its jurisdiction. In this sense, the judges of the ICC have had the opportunity to analyse human rights principles and standards when interpreting and applying the Rome Statute and its rules. In this regard, the protection of the human right to a fair trial represents an important part of the work of the ICC.

The legal framework of the ICC comprehensively and adequately safeguards the rights of the accused through very detailed provisions, which also increases legal certainty.[15] Article 66 of the Rome Statute recognises the presumption of innocence, Article 67 indicates the rights to which the accused is entitled, including, among others: the rights to a public hearing; the right to be informed promptly and in detail of the nature, cause, and content of the charge; the right to be tried without undue delay; and the right to be present at the trial. This creates a wide area for interaction between the ICC and international human rights courts.

The right to fair trial has been extensively analysed and applied by the regional courts in the application of Article 8 of the American Convention and Article 6 of the European Convention. As analysed by these courts, the right to a fair trial comprises a double nature. In principle it consists of the guidelines of due process, which contain inter alia the right of every person to be heard, with due guarantees and within a reasonable time, by a competent, independent, and impartial judge or court, previously established by law, in the substantiation of any accusation of a criminal nature made against him.[16]

The right to a fair trial is also inherent for the proper administration of justice.[17] In this sense, fair trial implies that the proceedings must be conducted with due diligence,[18] good faith,[19] in an expeditious manner,[20] and ensuring that the interests of all the parties to the proceedings are appropriately protected.

Through Article 21(3), the ICC has imported these principles and standards of the right to a fair trial in order to ensure the rights of the accused in the criminal proceedings and the rights of the convicted person and the victims in the reparation proceedings.[21] Overall, this has allowed the judges to materialize the objectives of the Rome Statute and ensures the right to a fair trial and the proper administration of justice.

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Academic Freedom as a Human Right and the Need to Ensure Its International Protection

By David Gómez Gamboa, Maracaibo, Venezuela, and Emercio José Aponte Núñez, Gainesville, Florida

Introduction

Academic freedom finds its ground in international human rights law. According to the Lima Declaration on Academic Freedom and Autonomy of Institutions of Higher Education, academic freedom means "the freedom of members of the academic community, individually or collectively, in the pursuit, development, and transmission of knowledge, through research, study, discussion, documentation, production, creation, teaching, lecturing, and writing."[1]

Academic freedom includes the liberty of individuals to freely express opinions about the institution or system they work for, to fulfill their functions without discrimination or fear of repression by the state or any other actor, to participate in professional or representative academic bodies, and to enjoy all the internationally recognized human rights applicable to other individuals in the same jurisdiction.[2]

Likewise, the United Nations Committee on Economic, Social and Cultural Rights (CESCR) upholds that the enjoyment of academic freedom requires the autonomy of higher education institutions, which implies the existence of the degree of self-governance necessary for the effective decision-making on behalf of higher education institutions in relation to their academic work, standards, management, and related activities.[3]

The 1940 Statement of Principles on Academic Freedom and Tenure, and its 1970 Interpretative Comments, recognizes academic freedom as the essential characteristic of a higher education institution that encompasses the right of faculty to "full freedom in research and in the publication of results, freedom in the classroom in discussing their subject," and the right of faculty to be "free from institutional censorship or discipline" when they speak or write as citizens.[4]

Academic freedom applies to both teaching and research. Freedom in research is fundamental for the advancement of truth. Academic freedom in its teaching aspect is fundamental for the protection of the rights of the educator in teaching and of the student in learning. That is why institutions of higher education are conducted to promote the common good and not to further the interest of either the educator or the institution as a whole. The common good depends upon the free search for truth and its free exposition.[5]

In other words, "academic freedom is derived from the notion of freedom of thought, which is a basic human right. Academic freedom therefore implies the freedom to teach and the freedom to learn, both of which are central to the proper functioning and purpose of higher education."[6]

Academic Freedom and Its Relations With the Right to Education, the Freedom of Expression, the Right Not to Be Discriminated, and Democracy

This right of academic freedom is related to the right to education, the freedom of expression, the right not to be discriminated, and democracy. In relation to the right to education, the Universal Declaration of Human Rights clearly upholds that access to educational institutions and to the cultural and scientific resources of society shall be available to all and shall be directed to the full development of the human personality and the strengthening of respect for human rights and fundamental freedoms.

The CESCR has maintained that the right to education can only be enjoyed if accompanied by the academic freedom of both students and staff, especially when considering "institutions of higher education because, in the Committee's experience, staff and students in higher education are especially vulnerable to political and other pressures which undermine academic freedom."[7] The CESCR emphasized, however, that throughout the education sector, students and staff are entitled to academic freedom.[8]

The relationship between academic freedom and freedom of expression is undeniable, since every human being should have the freedom to execute academic labor and scholarship without fear of restriction, censorship, or harassment. Therefore, academic freedom also implies the freedom to freely express critical opinions about the institution or system in which a person works or studies, without suffering any discrimination or repression by the state or any other institution.

Just like freedom of expression, academic freedom has two dimensions: the individual and the collective. The individual dimension refers to the right of the faculty not to be arbitrarily impaired or prevented from researching, discussing and manifesting, or publishing their thoughts and academic arguments; and the collective dimension implies the right of the society to receive academic information.

The principle of academic freedom requires institutions of higher education to guarantee students the free expression of their opinions on any national or international issue.[9] Remarkably, universities represent the necessary space for producing scientific knowledge within democracies, and the critical debate among academicians (professors, researchers, students, and different societal actors) is more than necessary, it is binding.

Quinn and Levine maintain that universities are essential to discovery, innovation, economic prosperity, national progress, and international cooperation. They model and pass on to society the skills and knowledge necessary for democratic value systems to function properly, most notably a democratic "knowledge-over-force" principle that rejects violence and force as determinants of outcomes, in favor of process, evidence, reasoned discourse, and quality.[10]

All members of the academic community have the right to fulfill their functions without discrimination of any kind and without fear of interference or repression from the state or any other source.[11] In this sense, measures such as suppressing research topics considered controversial by the university or the state, prohibiting the function of independent organizations because they are considered political, or not authorizing the organization of seminars on human rights are actions that not only affect academic freedom, but also affect freedom of expression and opinion.[12]

Therefore, protecting academic freedom is essential for democracy due to the importance of promoting knowledge and critical thought within every society. The relationship between academic freedom and democracy is inherent and reciprocal. The university represents for democracy the necessary space for the birth and proliferation of scientific knowledge, as well as new ideas that arise out of academic debates between professors, researchers, students, and different societal actors.

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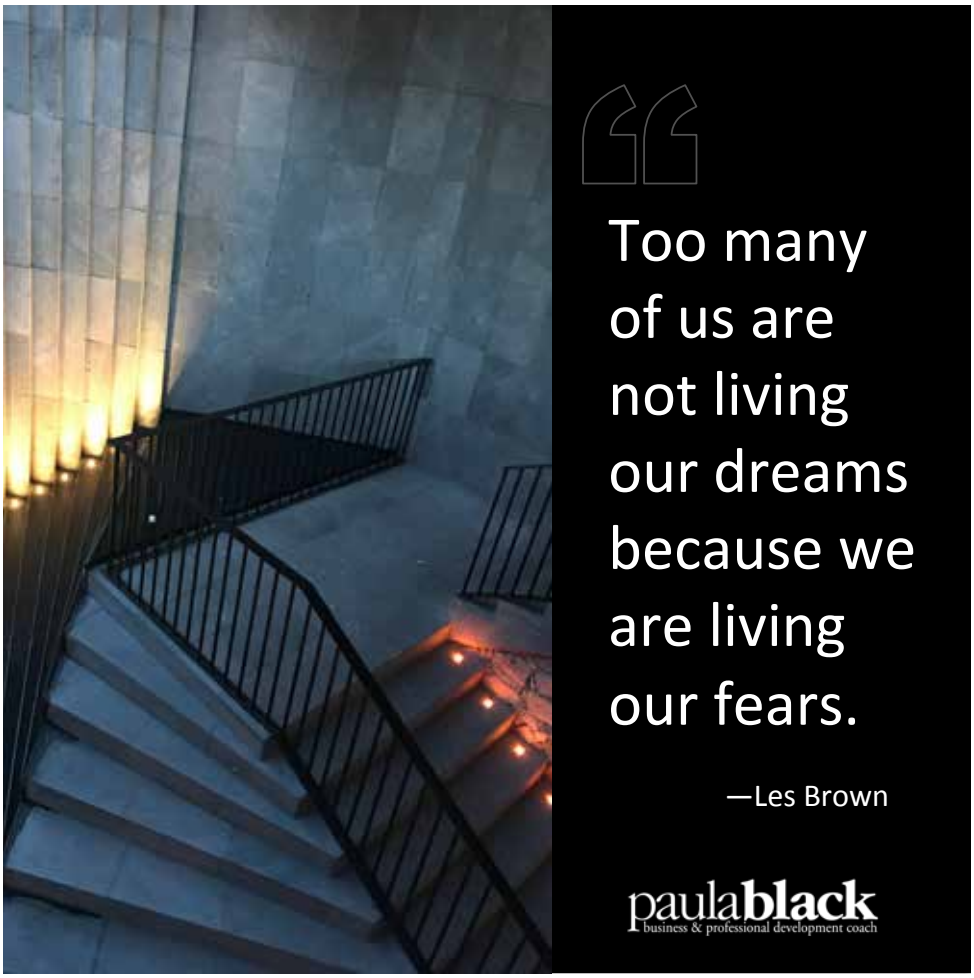
Create a Life—Beyond Your Wildest Dreams!

By Paula Black



Beyond your wildest dreams—First, you have to dare to dream! Sometimes there is a fine line between pain and pleasure . . . dreams and nightmares. We have all had that experience of not being sure. I have worked with many clients that I have coaxed out onto thin ice to find they were quite safe being there . . . and now very comfortable staying there.

What are your dreams? I have asked many a lawyer that question, and I get answers like . . . "Be a great lawyer." To me, that isn't a dream . . . that is reality . . . generally my clients are already great lawyers. Could they be better? Of course.

What do you want in your life that is beyond your wildest dreams? That is the question! Is it to grow your practice to an unthinkable level? Is it to turn your sights on politics? Is it to leverage your legal knowledge into a business venture? Is it to use your compassion and knowledge of the law as a judge? Is it to become the next John Grisham? Is it to make a nice living and be there for your kids and spouse? All of this is possible if you dare to dream.

Sometimes when I'm working with a client, I can see that there is something unspoken . . . lawyers resist. You are great at presenting all the evidence as to why your dream isn't a good idea. **I beg you . . . *let go!***

Seth Godin has a great take on this . . .

> In search of a timid trapeze artist? Good luck with that, there aren't any. If you hesitate when leaping from one rope to another, you're not going to last very long. And this is at the heart of what makes innovation work in organizations, why industries die, and how painful it is to try to maintain the status quo while also participating in a revolution. Gather up as much speed as you can, find a path, and let go. You can't get to the next rope if you're still holding on to this one.

Stop the hesitation. Think about what you want, what you dream about, and your unspoken longings. Here are eight ideas to ponder:

1. Is there a practice area you really enjoy? Would you like to become the go-to expert and build a niche?
2. Is there an industry you find fascinating? How could you get more work from the industry? Would you like to attend their conferences and trade shows?

Is your interest more than just the legal aspect of the industry?

3. Do you have a hobby you love? How could you center your practice on that area, people, and industry?
4. Would you like to be able to travel more? How could you focus your practice area in a way that would incorporate travel to places you can include personal days for exploring?
5. Would you like to spend more time with your family? How can you organize your practice so you can make a good living and manage your schedule to be available for your family?
6. Would you like to grow your firm to the next level or maybe downsize it to a more manageable level? What would it take to start that journey?
7. Do you love politics or have a burning desire to be of service in a big way? What would that look like? Could that be to become a judge, a representative, a mayor, or a senator? What would have to be in place to make the leap?
8. Do you love to write? When you work on a case do you think—that would make a great novel—and you can envision the details? Could you commit to writing 1,000 words a week?

Every single one of these ideas was a dream my clients dared to speak out loud. Yes, there was fear—but the dream was stronger and represented the possibility of a new life that would be more fulfilling. When they committed to their dream, there was no hesitation to take the first step and start the journey!

Hesitation is the kiss of death. I'm sure all of you know a lawyer who has lost his or her passion and is just going through the motions of everyday life. Don't let that be you. Go for it! **Explore the possibilities beyond your wildest dreams and begin your journey!**

Paula Black *is an author, keynote speaker, and one of the world's leading business development coaches for lawyers. She teaches them how to attract more clients and grow their practices while also creating a life more fulfilling than they ever thought possible. She is the award-winning and bestselling author of The Little Black Book series including A Lawyer's Guide to Creating a Life Not Just a Living: Ordinary Lawyers Doing Extraordinary Things. She recently released her sixth book, a collaboration with Jack Canfield, A Recipe for Success: The World's Leading Entrepreneurs and Professionals Reveal Their Secret Ingredients for Health, Wealth and Success Today. Ms. Black was voted one of the Top Legal Business Development Coaches and is a member of the Forbes Coaches Council.*

India Subcommittee Hosts Delegation From India

On 15-16 October 2019, the Asia Committee/India Subcommittee hosted a delegation from India, consisting of lawyers and law students. The purpose of this program was to provide an interactive platform for the Indian delegates and members of the Miami legal community to exchange insights and ideas on various legal issues that impact cross-border transactions and disputes and provide an opportunity for all participants to make meaningful networking connections.

On the first day of the program, the Indian delegates had the opportunity to discuss practitioner insights on trade and investment law, and international arbitration at the law firm of Shutts & Bowen LLP in Miami. Thereafter, the delegates were hosted by the Florida International University College of Law for a lunch and learn, and a campus tour. On the second day, the delegates visited the law firm of Carlton Fields in Miami to discuss international tax matters; during this meeting, the participants also engaged in an interesting discussion regarding the liberalization of the Indian legal market. The program concluded with the delegates' visit to JAMS Miami.

The program was indeed a successful one where the participants were able to exchange ideas and information and make meaningful connections. The India Subcommittee is organized under the Asia Committee of The Florida Bar's International Law Section. The program was organized by Neha Dagley (chair of the India Subcommittee) and Susanne Leone (chair of the Asia Committee) in conjunction with Manuj Bhardwaj who serves as executive secretary of the Indian National Association of Legal Professionals (INALP).

The FIU College of Law hosts a lunch and learn for delegates from India.

Lawyers and law students from India receive a briefing at JAMS Miami.

Sherman Humphrey, Agam Partap Singh, Rishi Upadhyay, Mercedes Armas Bach, Manuj Bhardwaj, Vivek Bansal, Clarissa Rodriguez, Neha Dagley, Susanne Leone

The delegation from India discusses trade and investment law and international arbitration during a session at Shutts & Bowen LLP.

Carlton Fields hosts a discussion of international tax matters and liberalization of the Indian legal market.

WORLD ROUNDUP

ASIA

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SINGAPORE

Singapore Convention provides framework for enforcement of settlement agreements.

The United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention), which was signed by forty-six countries in Singapore on 7 August 2019, provides a framework for the direct enforcement of mediated settlement agreements by local courts in signatory countries. The Singapore Convention is widely expected to increase confidence in mediation as an international dispute resolution process. Previously, if a party failed to comply with a mediated settlement agreement, the other party could only enforce it by commencing litigation or arbitration. The Singapore Convention is scheduled to enter into force six months after three countries have ratified it. Given the number of countries that have already signed it (including the United States, China, India, and South Korea), it is expected that three countries will ratify very soon and that it will enter into force shortly.

Amendments considered for Singapore's International Arbitration Act.

In June 2019, Singapore's Ministry of Law commenced a public consultation regarding six proposed amendments to Singapore's International Arbitration Act (IAA). The proposed amendments included:

(1) Introducing a default mode of appointment of arbitrators in multiparty situations by clarifying that in such situations the claimants (where there are more than one) shall jointly nominate an arbitrator and the respondents (where there are more than one) another.

(2) Allowing parties, by agreement, to request an arbitral tribunal to decide on jurisdiction at an early stage.

(3) Recognizing that arbitral tribunals and the Singapore High Court have powers to enforce confidentiality obligations in arbitrations. Such obligations are already recognized at common law, but the proposed amendment seeks to make explicit the power to enforce them.

(4) Allowing a party to arbitral proceedings to appeal to the Singapore High Court on a question of law arising out of an award made in the proceedings, with the leave of the court, provided parties have agreed to opt in to this mechanism.

(5) Allowing parties to agree to waive or limit the annulment grounds set out in Section 24(b) of the IAA (breach of natural justice) and Article 34(2)(a) of the UNCITRAL Model Law (i.e., incapacity of a party or invalidity of arbitral agreement, improper notice of appointment of an arbitrator or of arbitral proceedings, inability to present one's case, lack or excess of jurisdiction, improper composition of the arbitral tribunal, or procedure not in accordance with the agreement of the parties or the law of the seat) after an award has been rendered. Parties will not be allowed to limit or waive by agreement the annulment grounds set out in Section 24(a) of the IAA (i.e., fraud or corruption in the making of the award) and Article 34(2)(b) of the UNCITRAL Model Law (i.e., non-arbitrability of the subject matter or contravention of public policy).

(6) Providing that the Singapore High Court shall have power to make orders in respect of the costs of arbitral proceedings where a party is successful in setting aside an arbitral award (where the arbitral tribunal would generally be functus officio and not able to make a costs order).

Proposals (4) and (5) are designed to expand the scope of party autonomy by explicitly conferring upon parties direct control over the situations where recourse against an award may be pursued.

Proposal (4), to allow for opt-in appeals on questions of law, has some similarities to Section 69 of the English Arbitration Act 1996, which permits appeals on questions of law unless the parties opt out (although, notably, English courts have held that parties opt out when they agree to arbitral rules that exclude the possibility of appeal), and to Schedule 2, Sections 5-6 of the Hong Kong Arbitration Ordinance (Cap. 609), where appeals on questions of law are permitted where parties have either opted in or where the court grants leave.

The opt-in mechanism in Proposal (4) is different from that in Hong Kong because there is no mechanism in the proposal for the court to grant leave to appeal in the situation where the parties have not agreed to permit appeals.

Proposal (5) is a proposal to permit ex post waiver of certain annulment grounds. It is designed to give discretion to parties to agree to increase the level of finality of arbitral awards. One question may be what effect the proposal will have if adopted because parties may be unlikely to agree to such a waiver after the arbitral tribunal has ruled on the merits.

Because Singapore is a leading arbitration jurisdiction, the final results of the consultation will be keenly awaited by many.

MAINLAND CHINA/HONG KONG

New Hong Kong-PRC arrangement allows parties to Hong Kong-seated arbitrations to seek interim measures from Mainland Chinese courts.

The Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administrative Region (the Arrangement) between the Supreme People's Court of the People's Republic of China and the Government of the Hong Kong Special Administrative Region came into effect on 1 October 2019. With the Arrangement, parties to Hong Kong-seated arbitrations administered by certain "prescribed institutions" are permitted to seek interim measures from Mainland Chinese courts. These prescribed institutions at present are HKIAC, CIETAC Hong Kong Arbitration Centre, ICC (Asia Office), Hong Kong Maritime Arbitration Group, South China International Arbitration Centre (HK), and eBRAM International Online Dispute Resolution Centre, but this list may be supplemented in the future.

The first orders applying the Arrangement in Mainland Chinese courts have already been made. The Arrangement should increase the attractiveness of Hong Kong as a seat for arbitrating disputes against Chinese parties, especially since there is otherwise no general power in PRC law for Chinese courts to order interim measures in support of arbitrations that are not administered by a Chinese arbitration institution.

JAPAN

JCAA amends arbitration rules and reformulates mediation rules.

The Japan Commercial Arbitration Association (JCAA) amended its Commercial Arbitration Rules and its Administrative Rules for UNCITRAL Arbitration on 1 January 2019. The key amendments to the JCAA Commercial Arbitration Rules are that:

(1) Arbitrators shall investigate potential conflicts of interest before accepting appointment and throughout their appointment.

(2) Arbitrators shall not delegate any assignments that substantially influence their decision-making to tribunal secretaries, but may appoint tribunal secretaries with the parties' written consent after providing certain information about the secretary.

(3) Arbitrators are prohibited from disclosing dissenting opinions in any manner, and all members of a tribunal are required to keep any differing opinions within the tribunal.

(4) Expedited procedures are available for disputes not exceeding JPY50 million (approximately US$460,000).

At the same time, JCAA announced its new Interactive Arbitration Rules, which differ from the Commercial Arbitration Rules in providing for more active tribunal participation:

(1) The tribunal shall prepare a summary of the parties' positions and factual and legal issues at an early stage and consult the parties on this.

(2) Before making a decision on whether a hearing is necessary, the tribunal shall deliver preliminary views on key factual and legal issues to the parties and give the parties an opportunity to comment on them. These views are not binding on the final award at this stage.

Following the introduction of the 2019 JCAA Commercial Arbitration Rules, JCAA also began a process of reforming its 2009 Mediation Rules by undertaking a public consultation. The proposed reforms seek to introduce the following three changes:

(1) Claimants will be permitted to state in their requests for mediation any agreement between the parties or any proposal made by the claimant to the respondent as to procedural steps for the mediation.

(2) Options will be provided regarding the remuneration of mediators, such as a time-charge system, a fixed-fee system, and a contingent-fee system.

(3) A new option for each party to appoint one mediator and thereby undertake mediation by two mediators (instead of one or three) will be provided.

In addition, for simplicity, JCAA will integrate two previously existing mediation rules (the Commercial Mediation Rules and the International Commercial

Mediation Rules) into one. JCAA aims to implement the new Mediation Rules on 1 January 2020.

Japan International Dispute Resolution Centre to commence operation in Tokyo.

Following the new establishment of the Japan International Dispute Resolution Centre in Osaka (JIDRC-Osaka) in May 2018 as previously reported (*Arbitration in Japan*, INTERNATIONAL LAW QUARTERLY, Fall 2018), the Japan International Dispute Resolution Centre in Tokyo (JIDRC-Tokyo) will commence operation of its hearing facility in Toranomon, Tokyo, in March 2020. JIDRC-Tokyo will offer hearing rooms for fees ranging from JPY20,000 (small) (approximately US$180) to JPY50,000 (large) (approximately US$450) per four hours, and JIDRC-Osaka will offer rooms generally in the same price range. This should be comparatively cheaper than hearing facilities at leading arbitration centers such as Maxwell Chambers in Singapore and HKIAC in Hong Kong.

KOREA

First investor-state arbitration award rendered under Korea-United States FTA.

On 24 September 2019, in *Jin Hae Seo v. South Korea*, the tribunal found that the claimant had no "investment" under the 2012 Korea-United States FTA. The tribunal found that the alleged investment, "a relatively modest residential property . . . initially used exclusively as the private dwelling of the owner's family and only subsequently and partially rented out" was "simply too far away" from the idea of an "investment" within the meaning of the FTA. In addition, the FTA's protections only covered investments that were either "in existence" as of the FTA's date of entry into force or "established, acquired or expanded" thereafter. The first limb, "in existence," was not satisfied because the claimant had only acquired United States nationality a year after the FTA became effective and therefore was not a U.S. investor at the time of the FTA's entry into force. As for the second limb, the claimant did not "acquire" or "establish" the alleged investment after the FTA's effective date in view of her having obtained ownership of the property twelve years prior to that date. The claimant also did not "expand" the asset because the term "expanded" could not cover the minor renovation works (amounting to only approximately 2% of the property's worth) allegedly performed by the claimant after the FTA's effectiveness.

This was the first investment arbitration award under the Korea-United States FTA. There are two further cases pending.

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INDIA

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Amazon launches 'Project Zero' in India to block counterfeits.

In November 2019, Amazon announced its launch of "Project Zero" in India. According to Amazon, Project Zero is "a new program that empowers brands to help drive counterfeits to zero." The project combines machine learning and other advanced technological tools with brand owners' knowledge of their intellectual property to detect counterfeit products.

According to Amazon, three powerful tools are used in connection with Project Zero: automated protections, a self-service counterfeit removal tool, and product serialization. *Automated protections* proactively scan product listings for suspicious listings and improve blocking of potential counterfeits. The *self-service tool* provides brands with the ability to directly remove listings from the marketplace, and *product serialization* is enabled by a unique code applied by brands in their manufacturing and packaging process, thus allowing Amazon to confirm authenticity in its marketplace.

More than 7,000 brands are associated with Amazon's Project Zero globally. The global project was initially launched by Amazon in early 2019 in the United States, Europe, and Japan. Various Indian brands participated in

an implementation pilot to test the experience in India. Dharmesh Mehta, vice president of worldwide customer trust and partner support, stated in a blog post-dated 12 November 2019, "[w]ith this launch, we're excited to see many more brands in India, from small and emerging entrepreneurs to large multi-national brands, partner with us to drive counterfeits to zero and deliver a great shopping experience for our customers."

The initiative has already received positive feedback from various brands, including Hindustan Unilever, Webby, House of Quirk, and Skudgear.

Supreme Court of India strikes down provision granting automatic stay on arbitral awards.

On 27 November 2019, the Supreme Court of India struck down the newly inserted Section 87 of the Indian Arbitration and Conciliation Act 1996 (ACA 1996). This decision was set forth in the matter of *Hindustan Construction v. Union of India* where writ petitions challenging the constitutional validity of Section 87, and the repeal of Section 26, were heard together by the Supreme Court.

Under the original ACA 1996, when a challenge or an appeal was filed under Sections 34 and 37, an automatic stay of enforcement of the award applied. Section 34 outlines the procedure to set aside an arbitral award on certain grounds, and Section 37 provides jurisdictional basis for the courts to hear appeals from orders of an arbitral tribunal. The 2015 amendments to the ACA 1996 changed this position so that the mere filing of an appeal *would not* result in an automatic stay of enforcement; Section 26 dealt with the applicability of the 2015 amendments to pending arbitral proceedings. It was subsequently held that Section 26 applied to court proceedings under the ACA 1996 that were commenced after the date on which the 2015 amendments took effect, even if they arose out of or were in relation to arbitral proceedings commenced *prior to* the effective date of the 2015 amendments.

Thereafter, the 2019 amendments to the ACA 1996 introduced Section 87, which provided as follows:

> Unless the parties otherwise agree, the amendments made to this Act by the Arbitration and Conciliation (Amendment) Act, 2015 shall– **(a)** not apply to- *(i)* arbitral proceedings commenced before the commencement of the Arbitration and Conciliation (Amendment) Act, 2015; *(ii)* court proceedings arising out of or in relation to such arbitral proceedings irrespective of whether such court proceedings are commenced prior to or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015; **(b)** apply only to arbitral proceedings commenced on or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015 and to court proceedings arising out of or in relation to such arbitral proceedings.

Section 87 effectively reinstated the principle of automatic stays to proceedings commenced before 23 October 2015. The 2019 amendments also removed Section 26.

With the recent decision of the Supreme Court of India striking down Section 87, however, the position subsequent to the 2015 amendments has been restored; there will be no automatic stay of an award unless the court specifically grants a stay under a separate application, regardless of when the appeal was filed. The Supreme Court held, in part, that the provision was manifestly arbitrary and in violation of Article 14 of the Constitution of India. Specifically, the court noted, "[t]he retrospective resurrection of an automatic-stay not only turns the clock backwards contrary to the object of the Arbitration Act, 1996 and the 2015 Amendment Act, but also results in payments already made under the amended Section 36 to award-holders in a situation of no-stay or conditional-stay now being reversed." *Hindustan Construction v. Union of India*, para. 50.

Through its decision, the Supreme Court clarified that even if the arbitral proceedings commenced prior to 23 October 2015, the 2015 amendments are still applicable if related court proceedings are initiated after 23 October 2015. The November 2019 decision is significant because it emphasizes the pro-arbitration stance of the Supreme Court of India, a stance that is necessary if India wants ultimately to become a global arbitration hub.

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LATIN AMERICA

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European Union-Mercosur free trade agreement goes to the next step.

After twenty years of negotiations, on 28 July 2019, European Union and Mercosur reached an "agreement in principle" on a free trade agreement as part of a broader association agreement. The negotiation was launched during the G20 Summit in Osaka.

The core of the new rules is to provide a gradual (immediate, in some instances) reduction of import taxes between European and South American countries—in some instances, lowering taxes to zero. In practice, the tax reorganization will make the agricultural and industrial products sheltered under the agreement cheaper, increasing the volume of trade between the continents.

The agreement was favorably welcomed by the European industry associations and subsectors of agriculture, which have an interest in the Latin American market.

The members of Mercosur also see the agreement as an opportunity to raise exportation and to benefit the economy, especially in the context of the current economic and political crisis that has emerged across Latin America.

The agreement has already passed through the preparation and negotiation phases, but it still needs to be signed, approved by the European Parliament, and ultimately ratified.

Given Brazil's position on environmental policies—which became even more evident with the fires and increasing deforestation in the Amazon during 2019—the conclusion of the agreement may be postponed. The optimistic view is that the agreement will move forward in late 2020.

Elections in Argentina and Uruguay place the countries under new political perspectives.

In 2019, Latin America was consistently in the news due to political outbreaks, such as the institutional crises in Venezuela and Bolivia, and the protests in Chile. With these scenarios as a backdrop, Argentina and Uruguay went through elections to choose the presidents who will govern the countries in 2020.

Both countries have undergone a significant change in political perspectives. Uruguay—which came from consecutive Frente Ampla left-wing coalition governments, led by Pepe Mujica and Tabaré Vázquez—will now be governed by center-right Luis Lacalle Pou.

Lacalle Pou promises to make Mercosur more flexible, to fight corruption, and to promote economic policies to reduce the fiscal deficit. This view is close to the one endorsed by the Brazilian government, led by Jair Bolsanoro, who has already declared his intentions to strengthen trade relations with Lacalle Pou. In turn, in Argentina, the elected president is Alberto Fernández, supported by his vice and former president, Cristina Kirchner. Fernández, left-wing, defeated current president Mauricio Macri.

With these changes, Latin America still lacks hegemony of political stance. It will require intense dialogue between countries to defend common interests between countries, such as the European Union–Mercosur free trade agreement.

Peruvian authority proposes guidelines on antitrust compliance, rewarding programs, and dawn raids procedures.

Between September and November 2019, the Peruvian National Institute for the Defense of Free Competition and the Protection of Intellectual Property (Indecopi) published a series of proposed guidelines to enhance antitrust regulations in the country; namely, they are the Program of Antitrust Compliance, Antitrust Rewards Program, and Guidelines on Dawn Raids.

According to Indecopi, the guidelines are based on legislation from the United States, South Korea, and the United Kingdom, as well as the successful initiatives of the Brazilian Antitrust Authority, the Administrative Council for Economic Defense (CADE).

All three projects are still under discussion. Still, the proposals are expected to change the legal landscape of the country, which is already preparing to adapt to a more regulated and solid antitrust environment.

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MIDDLE EAST

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Egyptian appeals court upholds conviction of three arbitrators for sham award.

In 2015, three arbitrators in the Cairo-based International Arbitration Centre (IAC) issued a US$18 billion award against Chevron and Saudi oil company Aramco. The award granted damages to thirty-nine Saudi and Egyptian nationals who claimed they were entitled to more than US$82 billion because they were heirs to a 1933 land concession granted by their ancestors to the oil companies' predecessor. They had argued that the concession ended in 1993 and that the land was not returned to them.

Chevron brought a criminal complaint alleging that the arbitration was a sham. The trial court found the arbitrators and the two IAC employees guilty of misappropriation and forgery of a sham arbitration award. In late summer 2019, the Egyptian appellate court affirmed the convictions.

UAE and Qatar resolve WTO dispute.

In mid-2019, the United Arab Emirates filed a complaint with the World Trade Organisation (WTO) regarding Qatar's ban of UAE products. Qatar's ban was in the wake of the UAE and others severing diplomatic ties with Qatar. Shortly after the UAE filed its complaint, Qatar reversed the ban and the WTO dispute was withdrawn.

DIFC announces new intellectual property law.

The Dubai International Financial Centre's (DIFC) new intellectual property law is now in effect. Key aspects of the law include recognition of UAE registered trademarks, patents, utility certificates, industrial designs, and drawings. The law allows DIFC entities to protect their intellectual property rights within the DIFC.

German scrap metal recycler brings ICSID claim against Morocco.

An ICSID tribunal has been constituted to hear German scrap metal recycler Scholz Holding's €60 million claim against Morocco under the Germany-Morocco bilateral investment treaty. The dispute relates to Scholz's Moroccan subsidiary, Scholz Metall Marokko (SMM), as Scholz alleges that SMM's operation was paralyzed by blanket bans imposed by the Moroccan Ministry of Industry in 2012 and 2013 on the export of scrap metal to the EU—as well as on the import of a type of steel SMM processed at its plant. Scholz alleges that the measures were implemented at the behest of local competitors who viewed its subsidiary as a threat.

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NORTH AMERICA

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USMCA's anticorruption provisions expected to come into effect in 2020.

The United States-Mexico-Canada Agreement (USMCA) contains a number of new provisions on anticorruption, including ethics codes and anticorruption policies for public and private institutions. Upon ratification, expected in 2020, the USMCA will supersede NAFTA and will standardize "measures to prevent and combat bribery and corruption in international trade and investment."

While the United States and Canada already have laws prohibiting corruption and bribery consistent with the USMCA provisions, the greatest effect of the new requirements of the USMCA will likely be felt in Mexico, which will require the enactment of new federal laws (similar to the United States' Foreign Corrupt Practices Act). Mexico has signaled its willingness to comply with the USMCA by enacting new anticorruption laws and by educating its companies about the need to change some deeply ingrained practices such as gifts to government officials.

Canada passes Act affirming indigenous peoples' right to jurisdiction over child and family services.

Canada's *Act respecting First Nations, Inuit and Métis children, youth and families* came into force in its entirety on 1 January 2020. This Act was developed in partnership with various indigenous people groups with the express goals of keeping indigenous children connected to their families and communities and reducing the number of indigenous youth in care. According to Canada's 2016 census, indigenous children represent more than half of the children in private foster homes in Canada, despite accounting for less than 8% of the overall population of children under 15 years old.

Changes to U.S.-Mexico sugar deals invalidated.

On 18 October 2019, the U.S. Court of International Trade invalidated tariff changes to U.S.-Mexico sugar deals negotiated by the Trump administration. The American Sugar Coalition has appealed the decision to the Federal Circuit. The Mexican government and a Mexican trade group have also announced they may join the appeal or appeal separately. About 35% of U.S. sugar imports and just under 10% of the total U.S. sugar supply is imported from Mexico, based on U.S. needs and production.

California's groundbreaking privacy law takes effect in January 2020.

The California Consumer Privacy Act, the most comprehensive privacy law in the United States, gives Californians a number of new tools to protect themselves online. Under the new regulations, Californians can demand that companies disclose what personal information has been collected on them and request a copy of that personal information. Additionally, companies must delete a consumer's personal data upon request and may not sell such information if the customer instructs them not to via a mandatory "do not sell" link on the company's website. Consumers cannot be discriminated against if they instruct a company not to collect or sell their information. Businesses are scrambling to comply with the new law, which is expected to apply to approximately 500,000 businesses.

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WESTERN EUROPE

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New BCCA has staggered effect.

The new Belgian Code of Companies and Associations (BCCA) that became effective on 1 May 2019 modernizes and simplifies Belgian company and association law, improving Belgium's competitiveness in a European and international context.

One of the key elements of the new BCCA is the abolishment of the two shareholder requirement. The new BCCA allows having a sole shareholder without losing the benefit of limited liability. The "one share, one vote" rule is also dismantled, permitting multiple voting rights. This can be a useful instrument when establishing joint ventures or private equity structures. The BCCA will also make it possible to fully exclude a shareholder from a company's losses.

In addition, the BCCA implements new governance structures. From a governance perspective, a sole director can be appointed instead of a board of directors. This will provide greater flexibility for decision-making in group companies. The new BCCA also reduced the number of different company types. Specifically, the following legal forms will be eliminated: the agricultural partnership, the partnership limited by shares, the economic interest grouping, the cooperative partnership with unlimited liability, and the silent and the temporary partnership. Another key element is a monetary cap on the liability of directors.

For companies existing prior to 1 May 2019, a transitional period will apply from 1 January 2020, until 1 January 2024, during which time all mandatory BCCA provisions will apply, regardless of provisions to the contrary in their articles of association. All nonmandatory provisions will apply by default, but only to the extent that such provisions are not contrary to their articles of association.

The new simplicity of the BCCA improves the attractiveness of Belgium as a place of business and enhances its competitiveness in the EU.

Digital modernization in EU company law enables online company formation.

Directive (EU) 2019/1151 of the European Parliament and of the Council of 20 June 2019 amending Directive (EU) 2017/1132 regarding the use of digital tools and processes in company law has established new rules to modernize company law in the EU. The amended directive allows digital company formation and enables reorganization and cross-border moves based on common rules.

So far, only seventeen countries have a process whereby all the steps required to register a company can be processed online. There are currently significant differences between member states when it comes to the availability of online tools enabling entrepreneurs and companies to communicate with authorities on matters of company law. Some member states provide comprehensive and user-friendly services entirely online, while others are unable to provide online solutions at certain major stages of a company's lifecycle.

The directive is designed to enable companies to complete all the steps required to establish a limited liability company or a branch office using online procedures. Digitization is intended to make start-ups more efficient and less expensive. Online registration takes half as long, on average. The commission expects online registration procedures to bring savings of between €42 million and €84 million annually, in line with the new rules for European companies. Also, companies no longer have to submit the same information to different authorities on multiple occasions. In the future, more information about companies in the business registers will be available free of charge.

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International Law Section Annual Retreat

2019 October 11-13 • The Ritz-Carlson, Amelia Island, Florida

From October 11 to 13, International Law Section members traveled to the The Ritz-Carlton Amelia Island for the annual section retreat. Attendees were treated to a Friday night cocktail reception on the Ritz's moonlit lawn and a closing night dinner on the lush pool deck. On Saturday, attendees heard presentations by professional development coach Paula Black, cyber-security firm Smart Security, and international investigator Marc Hurwitz from Crossroads Investigations. The weather was glorious, and a wonderful time was had by all!

Cristina Vicens and Bob Becerra on their way from Miami to Jacksonville for the retreat

Checking in: Ana Barton, Manuel Gómez, Arnie Lacayo, and Cristina Vicens

The pool deck at The Ritz-Carlton, Amelia Island—a welcoming venue for networking and socializing during the ILS Annual Retreat

Manny Supervielle and Carolina Obarrio

Saturday Seminar: Paula Black of Legal Business Development

Saturday Seminar: Leticia Monteagudo and Ed Silva of Smart Security

Saturday Seminar: Marc Hurwitz of Crossroad Investigations

Cristina Vicens, Bob Becerra, Arnie Lacayo, Manuel Gómez, Adrian Nuñez, and Ana Barton

ILS Chair Clarissa Rodriguez and Laura Reich

Past ILS Chair Arnie Lacayo, ILS Chair-Elect Bob Becerra, Christiana Becerra, Adrian Nuñez, and Yamilet Toro

Bertha Cooper-Rousseau and Alexandra Rousseau

Nouvelle Gonzalo, Clarissa Rodriguez, Ana Barton, and Bob Becerra

International Law Section Annual Holiday Luncheon

7 November 2019 • Orlando Citrus Club

International Law Section members gathered in Orlando for their annual holiday luncheon on November 7. Past ILS Chair J. Brock McClane welcomed the group and presented an ILS Talk entitled Hot Topics on Data Privacy with co-presenter Penelope B. Perez-Kelly, an ILS executive council member.

Co-host Brock McClane welcomes attendees to the annual Orlando Luncheon at the Citrus Club on 7 November 2019.

Co-hosts Brock McClane and Penelope Perez-Kelly

ILS Chair-Elect Bob Becerra and co-host Penelope Perez-Kelly

ILS Chair Clarissa Rodriguez, Donna Draves, and co-host Penelope Perez-Kelly

Orlando Luncheon attendees at the Citrus Club on 7 November 2019

International Law Section Annual Holiday Party

10 December 2019 • La Muse Café, Miami

The holidays provide a great time for International Law Section members to get together and celebrate another year of working together to promote the field of international law. It's always a festive time when old friends reconnect and new friends join in the fun.

The ILS Holiday Party was held on 10 December at La Muse Café in Downtown Miami.

We partied like these people!

Ana Barton and Jacqueline Villalba

Arnie Lacayo and Cristina Vicens

Bob Becerra, Gisele Leonardo, and Laura Reich

Chris Johnson and Joseph Raia

Paula Black

Peter Quinter, Adrian Nuñez, Scott Silverman, and Clarissa Rodriguez

Al and Mayra Lindsey

Party time!

Laura Reich and Clarissa Rodriguez

Adrian Nuñez, Omar Ibrahim, and Aida Rodriguez

Adrian Nunez, Eddie Palmer, and Claudia Martin

Margarita Munia and Rahul Ranadive

Clarissa Rodriguez and Joseph Raia

Christina Olivos, Harout Samra, Ed Mullins, Gary Davidson, Bob Becerra, and Grant Smith

Businesses and Human Rights, from page 11

existing international legal system is built on the idea of equal coexisting independent states, which cannot intervene in the affairs of other states.[10] Therefore, in the current international system, extraterritoriality understood as the exercise of state authority in the territory of other states is the exception and not the rule because it is a violation of the principle of nonintervention outlined in Article 2(7) of the UN Charter.[11]

One possibility to overcome the problem of limited territorial jurisdiction of states is to allow international law to reach non-state actors directly. Thus, international obligations created by the treaty on BHR would not depend on its incorporation through domestic law. The evolving international practice shows that states and international tribunals have developed several mechanisms that allow for the faster and easier impact of international law on domestic law such as self-executing treaties and doctrines like the *bloque de constitucionaldiad*[12] or the *control de convencionalidad*,[13] all of which blur the sharp division between domestic and international law. Nevertheless, the enforcement of businesses' international obligations would necessarily depend on state jurisdiction.

Another option would be to allow states to regulate businesses extraterritorially based on the international obligations created by the treaty on BHR or other existing conventions. Although state jurisdiction has been the bedrock of the international system, it should be reinterpreted in a more flexible way. The principle of solidarity and the positive aspect of the principle of subsidiarity[14] provide a justification for the transition of the current model to one in which, in some circumstances, state jurisdiction could reach businesses performing activities extraterritorially.

Solidarity is the shared responsibility every social actor has toward the common good of its community. This principle calls for action beyond the "do not harm" rule, to active involvement in seeking the good of others.[15] The positive aspect of the principle of subsidiarity requires that higher communities assist lower communities when they are not able to achieve their ends or common good by themselves.[16]

These principles combined justify the extension of state jurisdiction over businesses incorporated in the state's territory performing commercial activities abroad. When the host state is unable or unwilling to regulate businesses, home states should be the ones providing effective remedies to human rights victims and extending their jurisdiction to prescribe over the activities of those businesses.[17] Even if businesses' conduct does not affect the citizens or territory of the host states, they should protect the human rights of foreigners from those businesses incorporated in their territory as a requirement of the principle of solidarity.

The second limitation of international law is that, in principle, international law cannot regulate legal persons. Not even those international obligations that have been accepted to bound individuals can reach legal persons. International crimes, which constitute a minimum protection of human rights, have been limited to individuals, leaving aside organizations or businesses. Historically, international criminal tribunals have understood that these crimes only apply to natural persons and not to legal persons because only natural persons have the moral capacities to violate international law. Legal persons are only fictions through which natural persons operate. Hence, international responsibility for the actions of a corporation can only fall to those who represent the corporations, such as the CEO, but not to the legal person.[18]

Nevertheless, customary international law has recognized that non-state actors can violate international norms, such as the prohibition of piracy or slave trade.[19] The mechanism of enforcement of these international prohibitions was to make liable the vessel through which businesses engaged in transnational commercial transactions, and not only the business owner.[20] After World War II, the Nuremberg tribunal broadened the application of international law over legal persons "from the prohibition of piracy and slave trading to include international humanitarian law."[21]

The Nuremberg Charter (Charter) allowed the International Military Tribunal to declare "groups or organizations" criminal. Following the Charter, the

United States Military Tribunal found that I.G. Farben Corporation had violated international law.[22] Farben and other insurance companies were found accountable for aiding and abetting Nazis during the Second World War. Consequently, these corporations were seized, dissolved, and had their assets liquidated.[23] In these cases, corporations were found to be responsible for the violation of international humanitarian law, but they were not prosecuted because of jurisdiction limitations of the tribunal.[24]

Moreover, various international conventions ascribe criminal or civil liability on legal persons, such as the OECD Convention on Combating Bribery of Foreign Public Officials, the UN Convention for the Suppression of the Financing of Terrorism, the UN Convention Against Transnational Organized Crime, and the Optional Protocol to the Convention on the Rights of the Child regarding the sale of children, child prostitution, and child pornography. These treaties require state parties to impose criminal or equivalent sanction on legal persons because of aiding and abetting direct violations to a treaty provision. Therefore, international treaties allocate obligations on legal persons and not to their owners or representatives.

In 2014, the Appeals Chamber of the Special Tribunal for Lebanon (STL) ruled that a Lebanese media corporation could be prosecuted for contempt of court because the corporation published names of individuals alleged to be witnesses in a case related to the murder of the former Lebanese Prime Minister Rafic Hariri.[25] This is the first time in which an international tribunal decided it had jurisdiction to prosecute a legal person criminally. The Appeals Chamber reached this decision through a broad interpretation of the term "person" contained in Rule 60 bis of the STL's Rules of Procedure and Evidence. The question was whether "person" includes legal persons, or only refers to natural persons. The Appeals Chamber concluded that "the ordinary definition of the term 'person' in a legal context can include a natural human being or a legal entity (such as a corporation) that is recognized by law as the subject of rights and duties."[26]

The example of the Nuremberg tribunal, the various treaties that allocate obligations on a legal person, and the decision of the STL demonstrate that international practice has found legal persons are not immune from international law. From piracy and slave trade to international humanitarian law and international criminal law, tribunals have recognized that international law can reach legal persons. Although this is not the case in all international regimes, it is clear that many international norms allocate obligations on legal persons and might give place to their international responsibility.

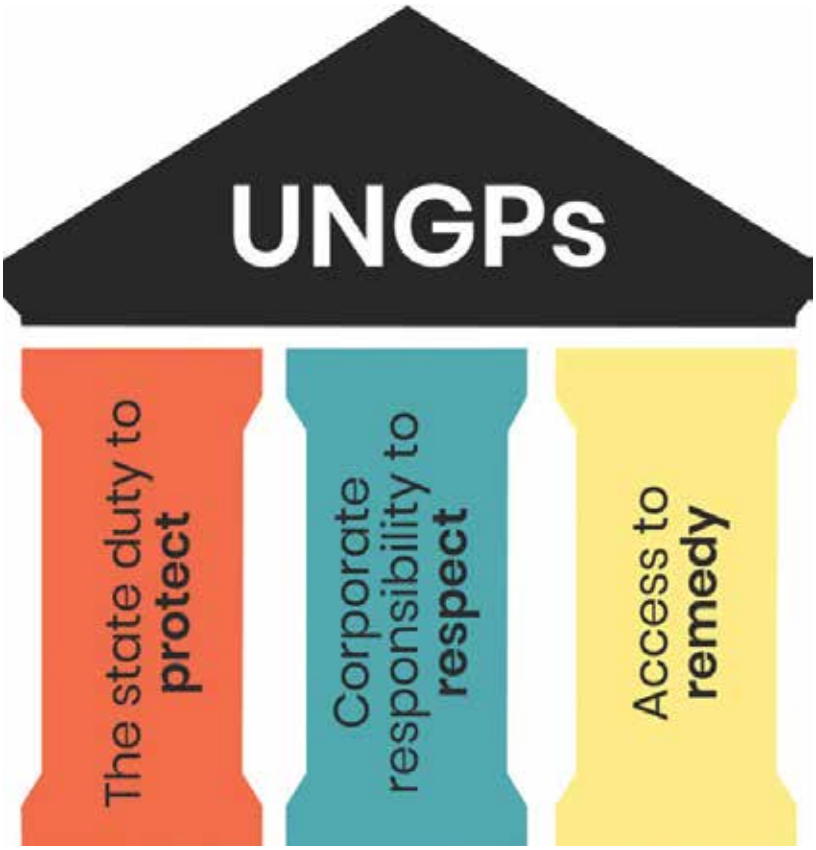

Photo: www.brodiepartners.com

The third limitation of current international law is that international human rights were created with the intention to bound only states. An interpretation of

IHRL beyond that would contradict the nature of human rights as limitations to public power and responsibility of the states, not of businesses or other non-state actors. Despite the fact that one of the obligations of the states is to protect people's human rights from third parties, third parties are not bound by international human rights law.

Although states indeed created current international human rights treaties to bound themselves, in the beginning, human rights were conceived as a responsibility of all social actors. The Universal Declaration of Human Rights preamble states that "every individual and organ of society" shall strive to promote and respect the rights enshrined in this declaration. Moreover, a combined reading of the preamble with Articles 29 and 30 of the declaration leads us to conclude that this instrument was intended to extend human rights obligations to entities beyond the state.

Furthermore, treaty bodies such as the UN Committee on Economic, Social and Cultural Rights have asserted that businesses play a crucial role in the realization of the rights included in those instruments, and should be aware of the negative impact they can produce with their economic activity.[27] Similarly, the Inter-American Court of Human Rights (ICHR) has found that businesses or private entities have various direct obligations correlative to the rights protected in the American Convention on Human Rights, such as to give information to patients to enable them to make informed decisions on their health,[28] to respect the right to work and freedom of expression of their syndicated workers,[29] or the obligation not to harm the environment or negatively affect the rights that indigenous communities enjoy.[30]

Although human rights treaties have been negotiated and ratified by states, these examples demonstrate that the states intended to allocate responsibilities to non-state actors. Human rights are demands for justice based on the distinctive dignity of the human person, not only limitations to state power. Thus, human rights norms allocate obligations to businesses since the same right might create a variety of obligations for different actors. While the state retains the primary responsibility, IHRL also allocates secondary correlative obligations to other actors.

Photo: www.candeavisory.com

In short, businesses are negatively impacting human rights around the globe. Domestic norms are incapable of addressing this situation because of the growing power of corporations and the unwillingness or incapacity of host states. International law is an imperfect solution and has many limitations when it comes to regulating businesses. Nevertheless, these limitations are remnants of an old model of international law that is changing through international practice. Historically, international human rights law has been centered in the states, but reality shows us that non-state actors can also infringe human rights. The change of power structures produced by globalization requires leaving aside the state-centric fixation and opening the door of international law to regulate non-state actors, too.

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Endnotes

1 Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporation and Other Business Enterprises, John Ruggie UN. Doc. A/HRC/14/27/Add.2 (2010) *See also*, John Gerard Ruggie, *Just Business: Multinational Corporations and Human Rights*. (New York: W.W. Norton & Company, 2013).

2 According to Ruggie, in this matter, the report "cannot be taken as conclusive evidence that there are fewer cases of corporate-related human rights abuse in Europe and North America than elsewhere. What it does indicate is that there are far more cases in the Asia-Pacific region, Africa, and Latin America that are not being dealt with effectively through exiting forums, or that such forums do not exist there in the first place." *A Survey of the Scope*, Ruggie Report, Add.2 2008.

3 Sean D. Murphy, *Taking Multinational Corporate Codes of Conduct to the Next Level Essays in Honor of Oscar Schachter*, Colum. J. Transnat'l L., 2004, 43, p. 391.

4 The most relevant initiatives developed by international organizations are the United Nations Global Compact (UN Global Compact), the European Union Green Paper on Corporate Social Responsibility (Green Paper), the OECD "Guidelines for Multinational Enterprises" (OECD Guidelines), and the International Finance Corporation Sustainability Framework (IFC).

5 Andres Felipe López Latorre, *Addressing Transnational Corporate Human Rights Abuses through Soft-Law and Transnational Human Rights Litigation* in *Derechos Humanos y empresas y Sistema Interamericano de Derechos Humanos*, Reflexiones y diálogos, editado por Ricardo Abello y Walter Arevalo. Bogotá, Colombia: Universidad del Rosario, 2019. https://editorial.urosario.edu.co/gpd-derechos-humanos-y-empresas-y-sistema-interamericano-de-derechos-humanos-reflexiones-y-dialogos.html

6 Sub-Commission on the Promotion and Protection of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN ESCOR, 55th sess, 2nd mtg, Agenda Item 4, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 [hereinafter UN Sub-Commission Norms] Office of the U.N. High Commissioner for Human Rights, *Reports, and other documents of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, http://www.ohchr.org/EN/Issues/Business/Pages/Reports.aspx (last visited 22 Aug. 2017); Olivier De Schutter, *Towards a New Treaty on Business and Human Rights*, Business and Human Rights Journal, 2016, 1, pp. 41-67.

7 UN Human Rights Council, *Protect, respect and remedy: a framework for business and human rights: Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie*, 7 Apr. 2008, A/HRC/8/5, available at: https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf

8 Carlos M. Vazquez, *Direct vs. Indirect Obligations of Corporations under International Law Essays*, 43 Colum. J. Transnat'l L. 927-960 (2004).

9 Report of the International Law Commission, 58th Sess. (1 May-9 June and 3 July-11 Aug. 2006) Annex E, U.N. Doc. A/61/10 (2006). p. 519.

10 Military and Paramilitary Activities in and Against Nicaragua (*Nicar. v. U.S.*), 1986 I.C.J.14, 181 (June27)(separate opinion of Judge Ago), para. 202; Jeffrey L. Dunoff, Steven D. Ratner, and David Wippman, International Law, Norms, Actors, Process: A Problem-Oriented Approach (2015) 327.

11 U.N. Charter art. 2, para.7

12 Corte Constitucional de Colombia [Constitutional Court], 4 febrero 2003, Sentencia C-067/03, Gaceta de la Corte Constitucional [G.C.C] (Colom). Édgar Hernán Fuentes Contreras, Materialidad de la Constitución: la doctrina del bloque de constitucionalidad en la jurisprudencia de la Corte Constitucional (Bogotá: Grupo editorial Ibáñez, 2010).

13 *Almonacid-Arellano v. Chile* Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 154, § 124 (26 Sept. 2006). *See* Ariel E. Dulitzky, *An Inter-American Constitutional Court - The Invention of the Conventionality Control by the Inter-American Court of Human Rights*, 50 Tex. Int'l L. J. 45-94 (2015).

14 *See* Gerald L. Neuman, *Subsidiarity*, in The Oxford Handbook of International Human Rights Law (Dinah Shelton ed., 2013).

15 *See generally* Rüdiger Wolfrum, *Solidarity*, *in* The Oxford Handbook of International Human Rights Law (Dinah Shelton ed., 2013) 401.

16 Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 Am. J. Int'l L. (2003).

17 Rome Statute of The International Criminal Court, 2187 U.N.T.S. 90, *entered into force* 1 July 2002.

18 *See e.g., Presbyterian Church of Sudan v. Talisman Energy, Inc*., 244 F. Supp.2d 289 (S.D.N.Y. 2003).

19 Menno T. Kamminga and Saman Zia-Zarifi, Liability of Multinational Corporations Under International Law 8-9 (2000) 75-77.

20 Ralph Steinhardt, *Multinational Corporations and Their Responsibilities under International Law*, *in* Corporate Responsibility for Human Rights Impacts: New Expectations and Paradigms 27-50 (Lara Blecher, Nancy Kaymar Stafford, Gretchen C. Bellamy, ed., 2014) at 45, 46; For an example of the liability of the vessel and not only the business owner, *see The Little Charles*, 26 F. Cas 979, 982 (No. 15,612) (C.C Va. 1818). "It is a proceeding against the vessel, for an offence committed by the vessel," at 45, 46.

21 *Id* at 46.

22 Andrew Clapham, *The Question of Jurisdiction Under International Criminal Law Over Legal Persons: Lessons from the Rome Conference on an International Criminal Court*, in Liability of Multinational Corporations Under International Law 139, 160-71 (2000).

23 Steinhardt, *supra* note 20 at. 47; Control Council Law No. 57, Dissolution and Liquidation of Insurance Companies Connected with the German Labor Front (30 Aug. 1947), *reprinted in* 8 Enactments and Approved Paper of the Control Council and Coordinating Committee 1, https://www.loc.gov/rr/frd/Military_Law/enactments-home.html

24 Beth Stephens, *The Amorality of Profit: Transnational Corporations and Human Rights Stefan A. Riesenfeld Symposium 2001*, 20 Berkeley J. Int. Law 45-90 (2002) 77.

25 Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings in Al Jadeed S.A.L. & Ms. Khayat Case No. STL-14-05 (Special Trib. for Leb. 2014) [hereinafter Contempt Proceedings STL].

26 *Id*. § 36.

27 Committee on Economic, Social and Cultural Rights, General Comment No. 12: Right to adequate food, 20th sess U.N. Doc. E/C.12/1999/5 (12 May 1999); *see also* Committee on the Elimination of Discrimination against Women, General Recommendation No. 25, Article 4, paragraph 1 of the Convention (temporary special measures), U.N. Doc HRI/GEN/1/Rev.8.

28 *Case I.V. v. Bolivia.* Serie C No. 329 (2016) Corte IDH 158, 189.

29 *Case Lagos del Campo v. Perú.* Serie C No. 340 (2017) Corte IDH 142.

30 *Case Pueblos Kaliña y Lokono v. Surinam*. Serie C No. 309 (2015) Corte IDH 223.

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aristocracia e democracia. A diferença era o número de pessoas exercendo o poder—um, alguns ou muitos. Monarquia é o poder de um só (mono). Aristocracia é o poder dos melhores, excelentes. São os que têm a excelência do herói. Assim, a democracia se distingue não apenas do poder de um só, mas também do poder dos melhores, que se destacam por sua qualidade. A democracia é o regime do povo comum, em que todos são iguais. Não é porque um se mostrou mais corajoso na guerra, mais capaz na ciência ou na arte, que terá direito a mandar nos outros.[4]

A colonização da América teve como base a existência de três grupos: a administração, a Igreja e a elite locais. A administração, preponderantemente realizada por representantes da metrópole, nos países hispânicos, detinha o poder político; a Igreja gozava de poder jurisdicional e as elites locais detinham um extraordinário poder econômico. Estas castas detinham regalias e proveitos que as afastavam dos demais estratos sociais, sobretudo indígenas e negros, o que importou em significativas desigualdades e em uma tensão étnica que perdura até os dias de hoje.

Um exame do caminho seguido pelos regimes políticos na América Latina, desde o início dos processos de emancipação, nos mostra a coexistência de forças opostas, quais sejam, um ingrediente ditatorial por um lado e, de outro, de um influxo liberal, resultado da influência colonizadora europeia.

Assim, na América Latina habitam o arcaico-moderno, o patrimonial-racional, o indo-americano, o afro-americano, a costa-serra, o litoral-sertão, o ibérico-europeu, a barbárie-civilização, o caliban-ariel.[5]

Também podemos inferir que os alicerces desta confusa estrutura é representada pela contumaz eliminação

e alienação de grupos sociais – processo iniciado na formação dos Estados - o que gera uma considerável desigualdade social, à posição periférica na sociedade internacional e à existência de autoridades políticas que têm na opressão seu principal instrumento para governar.

A formação dos países do continente ocorreu tendo como essência a cultura da autoridade baseada na capacidade econômica, o que fez refletir uma aristocracia política. A etapa seguinte foi aquela baseada na força dos líderes populistas e militares.

Podemos dizer que, seja nos países hispanos, seja no âmbito da colonização portuguesa, os valores permaneceram inalterados em função da assimilação dos preceitos europeus.[6] Daí a grande diferença entre os diversos grupos sociais existentes. Anote-se, por importante, que o princípio da igualdade, herança da Revolução Francesa, não chegou até as classes desfavorecidas, as quais não foram alcançadas por este fundamento.[7]

Isto nos mostra que a conquista de soberania não teve como resultado uma independência cultural ou evolução social e que as Constituições que passaram a ser editadas materializavam o exercício do autoritarismo.[8] Portanto, a afirmação que cabe é que a passagem de colônias para Estados soberanos no continente significou, tão somente, a continuidade de um status quo por outros meios. As Constituições então elaboradas funcionavam como álibis democráticos para o exercício do poder autoritário e paternalista.[9]

Desta forma, fica manifesta é a ideia de que o poder não é algo que se partilhe entre aqueles que o têm ou o detêm exclusivamente e aqueles que não o têm e são submetidos a ele.[10]

O Despotismo e a Sedução Como Instrumentos Políticos

Até a primeira metade do século passado os Estados latino-americanos possuíam, ao menos dogmaticamente, um arranjo que se poderia denominar de cunho liberal, eis que eram realizadas eleições amiúde e existia uma separação, e respeito, entre os poderes.

Mas veio a ocorrer algo muito importante para o conceito de democracia e uma guinada em relação a sua continuidade. A crise de 1929, nos Estados Unidos, representou uma reviravolta nas inclinações liberais até então vigentes. Passou a haver, principalmente nos centros urbanos, uma segregação das classes desfavorecidas, as quais, fruto do agravamento da precariedade surgida, passou a ser instigada a protestar, por vezes de forma violenta.

Nesta conjuntura, dois eventos políticos assomaram no continente, os governos militares e o populismo, tendo se tornado usual a sucessão de Estados comandados por Presidentes Generais.[11]

Alternando-se com os governos militares, surge aquele que ficou indelevelmente marcado como expressiva característica da política regional, ainda hoje influenciando a conduta de políticos latino-americanos, o populismo, o qual se relaciona à lógica da articulação de certos conteúdos ideológicos e políticos – independentemente de quais sejam estes conteúdos.[12]

Ainda, não há populismo sem a construção de um inimigo e no caso latino-americano, o inimigo sempre foi representado pelas elites, geralmente oligárquicas, e os poderosos em geral.[13] O modo como estes políticos alcançam o poder é resultado da conexão estabelecida com os chamados desvalidos e também de suas promessas.[14]

Dada a importância adquirida por este movimento após a derrocada dos governos militares, pode-se separar o populismo em dois grupos: o populismo das cúpulas e o populismo das massas. No primeiro, estariam governantes, políticos, burguesia nacional, burocratas e sindicalistas vinculados ao movimento. E no segundo, estariam operários, migrantes de origem rural, grupos de classe média baixa, estudantes, intelectuais e partidos de esquerda.[15]

Ressalte-se que esta simbiose não ocorre de maneira pacífica, sem um preço. Na realidade, os integrantes da primeira categoria manipulam os da segunda em busca de seus objetivos, manipulando-os. Momentos de

menores inquietudes até podem transmitir a impressão de concórdia entre os dois, mas os primeiros, assim que surja um aumento de voltagem, a menos representação de risco para os seus interesses, reprime os anseios dos segundos, dificultando ou mesmo tolhendo suas pretensões políticas.

Os primeiros utilizariam taticamente os segundos para perseguir seus objetivos e manipulariam as possibilidades de atuação política das massas. Em ocasiões menos tensas, a impressão seria de harmonia entre os dois grupos. Em momentos críticos, porém, a cúpula abandonaria as massas, impedindo que avançassem em suas lutas políticas.[16]

Os políticos populistas acreditam que ser um bom político significa obedecer aos que comandam, enriquecer com os que dominam e parecer-se com os que controlam. Acreditam que assim é a vida e, até dizem e se dizem, que a história também é assim. Que aqueles que não entendem as modificações atuais se apegam a um passado que já não existe.[17]

A Encruzilha Democrática

Mas nos perguntamos: afinal, qual a razão pela qual acreditamos que estamos em uma encruzilhada no que diz respeito à democracia na América Latina? O que faz com que se encontre em um momento tão sensível? Poderíamos apontar diferentes razões para a incerteza. A existência de uma crise política, moral, econômica e social. Trata-se, portanto, de uma crise abrangente, que engloba diferentes atividades humanas.

Espinoza apontava que as emoções básicas dos seres humanos são o medo e a esperança. A incerteza é a vivência das possibilidades que emergem das múltiplas relações que podem existir entre o medo e a esperança. A maioria dos grupos sociais vivem entre estes dois polos, com mais ou menos medo, com mais ou medo esperança.[18]

Em sua grande maioria, os cidadãos não são levados em consideração no que diz respeito às decisões políticas. São, tão somente, objeto dos discursos vazios, ocasionando sofrimento e desesperança na mente, na alma e no corpo.

As expectativas criadas pela cidadania são sempre dirigidas ao Estado e, por tabela, aos políticos. Por esta razão, o que esperam é que as instituições públicas (o governo ou os partidos políticos que logrem alcançar o poder) atendam suas reivindicações. Contudo, não entendem que as autoridades são vítimas de suas próprias palavras, pois aquilo a que se comprometeram não poderá, de nenhuma maneira, ser atendido.

Por esta razão, é clara a razão pela qual existe uma rotatividade muito grande entre os políticos. Não se trata do processo salutar de alternância na vida pública, senão da desesperança que representam uma vez que assumem o poder.

As manifestações, quase simultâneas, que têm ocorrido no continente poderiam levar-nos a pensar que estaríamos próximos ao fim da história, como dito no livro de Francis Fukuyama.[19] Entretanto, não é isto o que ocorre. As populações se mostram saturadas com promessas vãs, sem conteúdo, de um futuro promissor que não alcançam ou quando lhes chega se mostra insuficiente. A polarização continua a existir, não é possível negá-la, representada por direita-esquerda, ricos-pobres, brancos e negros, cristãos-não cristãos, todos defendendo seus próprios interesses. Mas o que se mostra importante é a capacidade de reação da cidadania, a sua enorme capacidade de resiliência e o receio que impõem aos governantes.

A Título de Conclusão

Como seria possível acreditar em um cenário improvável ou inconcebível, para o futuro da democracia? Importante aspecto a ser levado em consideração acerca do que nos propusemos a apresentar neste artigo é a qualidade da democracia, eis que não é suficiente que ela seja visível, mas deve possuir atributos de virtuosidade.

A partir dos anos 1980 houve um crescimento no número de países contabilizados como democráticos, o que ocorreu, sobremaneira, em função da passagem do comunismo para o capitalismo de Estados da Europa do leste e do fim das ditaduras latino-americanas. E não podemos esquecer a denominada Primavera Árabe, no norte da África.

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Naquele período, de grande regozijo nos demais países democráticos, seria impensável conceber que em pouco tempo verificar-se-ia uma *recessão democrática.*[20]

Acredito que não exista lugar nos dias de hoje para golpes militares no continente. Entendo que se trata de uma afirmação bastante forte, mas é assim que devemos pensar a morte de democracias: nas mãos de homens armados. Durante a Guerra Fria, golpes de Estado foram responsáveis por quase três em cada quatro colapsos democráticos. As democracias em países como Argentina, Brasil, Gana, Grécia, Guatemala, Nigéria, Paquistão, Peru, República Dominicana, Tailândia, Turquia e Uruguai morreram dessa maneira.[21]

Mas, também de acordo com Levistki e Ziblatt, há outra maneira de arruinar uma democracia. É menos dramática, mas igualmente destrutiva. Democracias podem morrer não nas mãos de generais, mas de líderes eleitos—presidentes ou primeiros-ministros que subvertem o próprio processo que os levou ao poder.[22] E esta possibilidade sim, nos causa certo temor.

Para tanto, não se faz necessária força bruta, mas a habilidade do discurso do pretendente ao cargo político, que se aproveita da credulidade daqueles que são ignorados ou afligidos. Ao assumir o poder, o governante, aos poucos vai sedimentando o seu caminho rumo à opressão dos opositores, aparelhando o sistema estatal e as instituições.

É assim que as democracias morrem agora. A ditadura ostensiva—sob a forma de fascismo, comunismo ou domínio militar—desapareceu em grande parte do mundo. Golpes militares e outras tomadas violentas do poder são raros. A maioria dos países realiza eleições regulares. Democracias ainda morrem, mas por meios diferentes. Desde o final da Guerra Fria, a maior parte dos colapsos democráticos não foi causada por generais e soldados, mas pelos próprios governos eleitos. O retrocesso democrático hoje começa nas urnas.[23]

A caminho do poder, há um direcionamento do discurso, voltado para a modificação das regras preexistentes, reportando-as como inúteis e a serviço de uma elite desonesta. Esta predicação enganosa acerta em cheio as massas e sedimenta o acesso ao poder. Uma vez eleito, passa a exibir um desdém em relação a tudo e a todos e, não raro, temos exemplos no continente, permite a reeleição uma e outra vez.

Estas condutas, por sua vez, não dissipam os problemas existentes nem aqueles surgidos e, ao contrário, fragmentam ainda mais a sociedade e mantém a cidadania longe de alcançar um padrão de vida digno. Ainda, não há respeito aos direitos mínimos dos indivíduos, ocorrendo, não raras vezes, violação de direitos humanos (vide o caso dos protestos no Chile).

Por fim, mas não menos importante, e se bem que não há como negar que nestes casos o poder tenha sido alcançado por meios democráticos, isto não significa dizer que as democracias não estejam em risco. A busca pelo poder com o mandamento de *custe o*

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que custar, com líderes que buscam se perpetuar no poder, configurando o cenário estatal à sua imagem e procurando se consolidar como maior força política em um Estado, representa uma enorme ameaça à democracia.

Uma democracia realmente válida presume um Estado eficiente e, portanto, é necessário que este tenha legitimidade ante a cidadania. Assim, vivendo ambos, Estado e democracia, uma simbiose, considera-se a necessidade de consolidação dos grandes desígnios atuais para a sobrevivência desta última, segurança, saúde, educação, justiça.

O modo de garantir a sua existência e aprimorar seus atributos é continuar trabalhando, acreditando na sua validade. Usufruir a democracia quer dizer que temos que correr riscos, mas não aqueles que ameaçam a sua essência e, sim, os riscos para mantê-la viva, atuante, presente e fulgurante.

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Notas Finais

1 SERRANO, Pedro Estevam. *Golpismo e autoritarismo na América Latina: breve ensaio sobre jurisdição e exceção*. São Paulo: Editora Alameda, 2016, p. 34.

2 MIEBACH, A. D. DE Bem, A. *Pode* a América *sentir-se grande de novo?* Panorama Internacional, FEE, v. 2, 2016, p. 6.

3 DIAS, Daison. *Dois*. Rio de Janeiro: Publit, 2015, p. 13.

4 RIBEIRO, Renato Janine. *A democracia*. 3ª edição. São Paulo: Publifolha, 2008, p. 9.

5 IANNI, Octavio. *A questão nacional na América Latina*. *Estudos Avançados*, Vol.2 no.1. São Paulo Jan./Mar. 1988, p. 187.

6 BETHELL, Leslie. *O Brasil e a ideia de "América Latina" em perspectiva histórica*. *Revista Estudos Históricos*. Rio de Janeiro, vol. 22, n. 44, jul./dez. 2009, p. 289.

7 ROUQUIÉ, Alain. *O Extremo-Ocidente*: *introdução* à América Latina. São Paulo: Ed. da Universidade de São Paulo, 1992, p. 86.

8 VAYSSIÈRE, Pierre. *L`Amérique latine*: de 1890 à nos jours. Paris: Hachette, 2006, p. 40.

9 CARVALHO, José Murilo. *Mandonismo, Coronelismo, Clientelismo: uma discussão conceitual*. *Pontos e Bordados*: escritos de história e política. Belo Horizonte: Editora UFMG, 2005, p. 155.

10 FOUCAULT, Michel. *Em defesa da sociedade: curso no Collège de France (1975-1976).* São Paulo: Martins Fontes, 2005, p.35.

11 MALAMUD, Carlos. *América Latina, siglo XX:* la busqueda de la democracia. Madrid: Editorial Sintesis, 2003, p. 133.

12 LACLAU, Ernesto. *La Rázon Populista*. Cidade do México: Fondo de Cultura Económica, 2005, p. 33.

13 *Idem*, p. 39.

14 FREIDENBERG, Flavia. *La tentación populista. Una vía al poder en América Latina*. Madri: Síntesis, 2007, p. 87.

15 IANNI, Octavio. *A formação do Estado populista na América Latina*. Rio de Janeiro: Civilização Brasileira, 1991, p. 144.

16 HERMET, Guy. El populismo como concepto. *Revista de Ciencia Política*, v. 23, n. 1, 2003, p. 5-18.

17 CASANOVA, Pablo González. *América Latina y el mundo: crisis, tendencias y alternativas*. Ciudad Autónoma de Buenos Aires: Editorial La Página S.A., 2016.

18 SANTOS, Boaventura de Souza. América Latina: la democracia en la encrucijada. Nicolás Trotta y Pablo Gentilli (Compiladores). Buenos Aires: New Press Grupo Impresor S.A., 2016, p. 161.

19 Francis Fukuyama nasceu é PhD em Ciência Política pela Universidade de Harvard. Integrou o Conselho de Planejamento Político do Departamento de Estado dos EUA. Seu primeiro livro, "O fim da história e o último homem" (1991), figurou nas listas dos mais vendidos em diversos países, como EUA, França, Japão e Chile, e ganhou o Los Angeles Times Book Critics Award e o Prêmio Capri na Itália.

20 O termo recessão democrática foi utilizado pelo cientista político norte-americano Larry Diamond (Universidade Stanford) no artigo Facing Up to the Democratic Recession ("Enfrentando a recessão democrática"), publicado no Journal of Democracy (volume 26, Number 1 January 2015) e disponível em https://www.journalofdemocracy.org/sites/default/files/Diamond-26-1_0.pdf.

21 Levitsky, Steven; Ziblatt, Daniel. Como as democracias morrem. Rio de Janeiro: Jorge Zahar Editor, 2018, p. 15.

22 *Idem*, p. 16.

23 *Ibidem*, p. 17.

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can be separated into two groups: summit populism and mass populism. In the first, rulers, politicians, national bourgeoisie, bureaucrats, and union organizers lead the movement. In the second, workers, migrants from rural areas, lower-middle-class groups, students, intellectuals, and leftist parties lead.

It should be noted that symbiosis between these groups does not occur peacefully; there is a price to pay. In fact, to achieve their goals, members of the first category manipulate those in the second category. While in moments of minor unrest both groups may give the impression of harmony, as soon as an increased strain arises, no matter how small the risk to its interests, the higher class group suppresses the desires of the working class group, highlighting its political pretensions.

In order to pursue its objectives, the first group uses the second one tactically and manipulates the political action possibilities of the masses. Again, on less tense occasions, there is an apparent concord between the two groups. But, at critical moments, the summit abandons the masses, preventing them from making progress with their political struggles.

Populist politicians believe that being a good politician means obeying those who command, becoming rich with those who dominate, and identifying with those in control. They say those who do not understand the changes in the present are merely clinging to a long extinguished past.

Democracy at a Crossroads

We ask ourselves, "After all this, why do we believe we are at a crossroads with regard to democracy in Latin America? What makes the present moment of democracy so sensitive?" There are several different reasons for uncertainty. A political, moral, economic, and social crisis exists. The current crisis is comprehensive and encompasses many different human activities.

Espinoza pointed out that human beings have two basic emotions: fear and hope. Uncertainty is what results from the multiple positions between fear and hope. Most social groups live between these two poles, with more or less fear, and with more or less hope.

The vast majority of citizens are not taken into consideration when it comes to political decisions. They are only the object of empty speech, which causes suffering and hopelessness in the mind, soul, and body.

The expectations created by the citizens are always directed at the state and, indirectly, at politicians. Thus, the citizens expect that public institutions (the government or political parties that succeed in coming to power) will meet their demands. The populace does not understand that the authorities are victims of their own words, for what they have promised can in no way be met.

This is the obvious reason why the replacement rate of politicians is so high. It is not about the beneficial process of alternation in public life, but the hopelessness that those persons represent once they assume their political positions.

The almost simultaneous demonstrations that have been taking place on the continent could lead us to think that we are nearing the end of this history, as stated in Francis Fukuyama's book. This is not the case. The populations are completely tired of useless, empty promises of a hopeful future they do not achieve, or that when achieved, proves inadequate. No one can deny that polarization still exists in many forms—right/left, rich/poor, white/black, Christian/non-Christian—all defending their interests. What has changed, however, is the people's ability to react, their enormous resilience, and the fear they impose on their rulers.

Conclusion

Is a hopeful future for democracy an unlikely or inconceivable scenario? An important aspect to be taken into consideration, within the scope we set out in this article, is the quality of democracy. It is not enough that democracy is visible; it must be meritorious.

Since the 1980's, there has been an increase in the number of countries considered democratic, mainly due to the transition from communism to capitalism by eastern European states and the end of Latin American

dictatorships. Moreover, we should not forget the Arab Spring in North Africa. In this period of great rejoicing in democratic countries, it would be unthinkable to conceive that, in a short time, there could be a *democratic recession*.

I believe there is no place for military coups on the continent these days. I understand this is a powerful statement, but that is how democracies die: at the hands of armed men. During the Cold War, coups d'état accounted for nearly three of every four failed democracies. Democracies in countries such as Argentina, Brazil, Ghana, Greece, Guatemala, Nigeria, Pakistan, Peru, the Dominican Republic, Thailand, Turkey, and Uruguay died this way.

According to Levistki and Ziblatt, however, there is another way to ruin democracy. It is less dramatic, but equally destructive. Democracies can die not only at the hands of generals but also at the hands of their elected leaders—presidents or prime ministers who subvert the very process that brought them to power. This possibility does cause us some fear.

For that purpose, brute force is not mandatory; the skillful speech of candidates for political offices, who take advantage of the credulity of those who are ignored or afflicted, is enough. After coming to power, the rulers start gradually to strengthen their oppression of opponents, rigging the state system and institutions.

That is the way modern democracies die. Blatant dictatorship—in the form of fascism, communism, or military domination—has disappeared in much of the world. Military coups and other violent takeovers of power are rare. Most countries hold regular elections. Yet democracies still die by different means. Since the end of the Cold War, most collapses have happened not because of generals and soldiers, but because of the elected governments themselves. Nowadays, democratic regression *begins*, rather than ends, at the polls.

On the way to power, speech is directed to change preexisting rules—called useless—and in the service of dishonest elites. This misleading speech hits its intended target—the masses—and solidifies the elites' path to power. Once elected, those elite rulers show disdain for everything and everyone, and then—we have multiple examples on the continent—allowing reelection over and over again.

These actions, in turn, do not ameliorate new or existing problems; to the contrary, these actions further fragment society and keep citizens from achieving a decent standard of living. There is no respect for an individual's minimum political rights, and even violation of human rights (see the case of the demonstrations in Chile).

Last but not least, while there is no denying that in some cases power has been achieved by democratic means, this does not mean that democracy is not at risk. The pursuit of power under the mantra "*whatever the cost*," with leaders seeking to perpetuate themselves in power, setting the state panorama in their image, and intending to establish themselves as the leading political force in a state, poses a huge threat to democracy.

A genuinely healthy democracy requires an efficient state, which must have legitimacy with citizens. Thus, as both the state and the democracy live in symbiosis with each other, for the survival of the latter, there is a need for the achievement of key individual desires, namely security, health, education, and justice.

A democracy's continued existence and improvement rely on the population continuing to better the system and believing in its validity. Enjoying democracy means the right to take risks, but not such risks that threaten the system's very essence; the risks are to keep the system alive, active, present, and bright.

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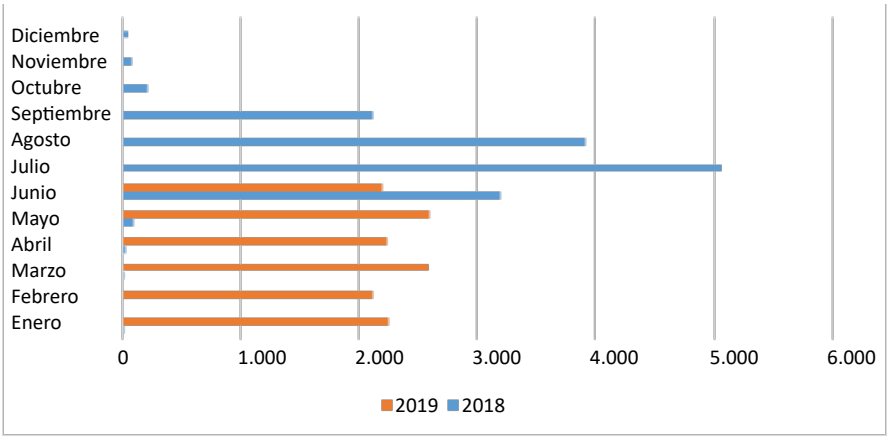
La mayoría de estas personas se movilizaron hasta Costa Rica, debido a su cercanía, a las relaciones culturales, y a las redes personales preexistentes que se tienen en este país. Al 31 de julio, la Oficina del Alto Comisionado de las Naciones Unidas para los Refugiados (ACNUR) indicaba que 200 personas nicaragüenses por día se registraban como refugiados en Costa Rica.

Gráfico 1. Personas Nicaragüenses Solicitantes de Refugio. Por Mes y Año.



Fuente: OIM, 2019

De acuerdo con la Convención sobre el Estatuto de los Refugiados de las Naciones Unidas de 1951, el término refugiado se aplicará a toda persona que posea "fundados temores de ser perseguida por motivos de raza, religión, nacionalidad, pertenencia a un grupo social determinado, o por opinión política, se encuentre fuera del país de su nacionalidad y no pueda o, a causa de dichos temores, no quiera acogerse a la protección de tal país; o que, careciendo de nacionalidad y hallándose, a consecuencia de tales acontecimientos, fuera del país donde antes tuviera su residencia habitual, no pueda o, a causa de dichos temores, no quiera regresar a él."[15]

Adicionalmente a la anterior definición, la Declaración de Cartagena sobre Refugiados, firmada por los países de Latinoamérica en 1984, recomienda que además de la definición dada por la Convención de 1951 c "porque su vida, seguridad o libertad han sido amenazadas por la violencia generalizada, la agresión extranjera, los conflictos internos, la violación masiva de los derechos humanos u otras circunstancias que hayan perturbado gravemente el orden público."[16]

En consonancia con las anteriores definiciones, la Dirección de Migración y Extranjería de Costa Rica a marzo de 2019 había recibido 22.500 solicitudes formales de refugio; sin embargo, y como consecuencia de la gran cantidad de solicitudes y los escasos recursos económicos y humanos, 26.000 nicaragüenses esperaban a esa fecha poder formalizar sus solicitudes de refugio.[17]

A las anteriores cifras se les debe agregar aquellas personas nicaragüenses que huyeron de su país pero que no solicitaron formalmente el refugio ante las autoridades migratorias costarricenses; ya que una importante cantidad de personas nicaragüenses contaban con familiares o amigos, los cuales suministraron vivienda e información sobre los procesos migratorios en el país.

De estas personas solicitantes de refugio, la mayoría son jóvenes universitarios, doctores, profesores universitarios, abogados de derechos humanos, entre otros. Ello debido a que, las persecuciones no sólo fueron contra manifestantes, sino también contra profesionales que se sospechaba ayudaban o simpatizaban de alguna manera con las personas manifestantes.[18]

Situación Actual de las Personas Nicaragüenses Refugiadas o Solicitantes de Refugio en Costa Rica

Costa Rica ha sido uno de esos países donde la migración ha emergido con gran fuerza por sus características geográficas y sociopolíticas, por lo que se indica que "Costa Rica se ha convertido en un destino esperanzador para grupos de inmigrantes, especialmente centroamericanos, que buscan mejorar sus condiciones de vida. Este fenómeno migratorio ha configurado escenarios territoriales con características y necesidades

Las Personas Nicaragüenses con Protección Internacional, continued

propias, con un peso importante en la dinámica económica y social del país."[19]

A pesar de la historia migratoria que existe entre Nicaragua y Costa Rica, la masiva llegada de personas nicaragüenses solicitantes de refugio evidenció que las autoridades migratorias de Costa Rica no estaban preparadas para estas crisis migratorias.

A modo de ejemplo, al detonar la crisis en Nicaragua, la Dirección General de Migración y Extranjería de Costa Rica (DGME) agregó el paso de "pre-solicitud," donde la solicitud queda pendiente hasta que la DGME pueda atenderla.[20] Por ello, el tiempo que deben esperar las personas solicitantes de refugio para formalizar su estatus migratorio, o recibir el permiso laboral, se demora varios meses.

Anteriormente, en el 2016, Costa Rica creó albergues para atender las crisis migratorias de personas cubanas, haitianas y africanas. Para esta nueva crisis, en estos albergues también se hospedaron miles de personas nicaragüenses que huyeron de su país. En agosto de 2018 el Gobierno costarricense elaboró el Protocolo para el Manejo de Flujos Extraordinarios, con la finalidad de atender las necesidades de estas personas por medio de una atención interinstitucional articulada y con la colaboración de organismos internacionales.

No obstante, varias publicaciones[21] muestran la situación de las personas nicaragüenses solicitantes de refugio, señalando que estas personas sobreviven en albergues temporales sin empleo, con escaza comida y con algunos colchones que se han encontrado en la basura.

Según un estudio de la Organización Internacional para las Migraciones (OIM) una gran cantidad de personas refugiadas nicaragüenses que se desplazaron a Costa Rica entre los meses de junio 2018 a julio 2019, se reubicaron en las provincias del Gran Área Metropolitana (GAM); siendo el cantón de Alajuelita donde mayoritariamente se asentaron estos grupos.

Con respecto a las oportunidades de empleo, estas son muy limitadas sin el permiso laboral que brinda la DGME. La duración para recibir este permiso no es uniforme, ya que algunas personas refugiadas comentan

Las Personas Nicaragüenses con Protección Internacional, continued

Photo: www.bbc.com

que debieron esperar tres meses después de recibir la formalización de la solicitud de refugio para obtener el carnet laboral,[22] mientras otras llevan más de seis meses esperando por el mismo.

Según la OIM, los mayores obstáculos que enfrentan las personas nicaragüenses solicitantes de refugio a nivel laboral son la discriminación y la falta de un permiso laboral.[23] A julio de 2019, solamente el 13% de las personas nicaragüenses solicitantes de refugio han obtenido su permiso laboral, las demás personas trabajan desde la informalidad o viven de la caridad.[24]

Con respecto al derecho a la educación, Costa Rica ha ratificado la Convención Internacional sobre los Derechos del Niño. De igual forma, en este país prevalece una garantía jurídica para que todas las personas menores de edad, sin importar su nacionalidad, accedan a la educación preescolar, primaria y secundaria.[25]

Con la crisis en Nicaragua, el Ministerio de Educación Pública de Costa Rica reportó[26] en el 2018 una matrícula de 30.649 niños y niñas nicaragüenses en centros educativos públicos, privados y subvencionados.

Asimismo, varias universidades ofrecieron oportunidades de continuar con los estudios a varias personas estudiantes nicaragüenses que debieron huir de su país por participar en las protestas de abril de 2018. Un ejemplo de lo anterior fue el trabajo en conjunto que se realizó entre la Asociación Ticos y Nicas somos Hermanos y la Universidad Latinoamericana de Ciencia y Tecnología (ULACIT) que brindó becas de un 100% de la colegiatura a jóvenes nicaragüenses con destrezas de liderazgo y buen rendimiento académico.[27]

Sobre el ejercicio del derecho a la salud por parte de las personas nicaragüenses solicitantes de refugio, existe escaza información, ello debido a varios factores: la mayoría de estas personas no buscan asistencia médica en una institución estatal relacionada con salud,[28] ya que si bien en Costa Rica los servicios de salud se brindan de manera ilimitada a las mujeres embarazadas

y a las personas menores de edad, sin importar su condición migratoria, no obstante, la cobertura para las personas con estatus migratorio irregular solo existe en situaciones de emergencia.

Además, las condiciones laborales en las que muchas de estas personas se encuentran dificultan que las mismas cuenten con el derecho a la seguridad social, lo que empeora su realidad, ya que los trabajos que principalmente desempeñan son los más propensos "al riesgo de accidentes laborales, de contraer enfermedades infecciosas relacionadas con el medioambiente laboral, de intoxicaciones por el uso de plaguicidas y el empleo de tareas que se realizan sin instrumentos adecuados de protección."[29]

Igualmente, y según el reporte de la CIDH, muchas personas nicaragüenses indicaron haber adquirido "el VIH/SIDA u otras enfermedades de transmisión sexual, luego de ser víctimas de violaciones sexuales durante periodos de detención."[30]

De acuerdo con reportes de la CIDH, la situación de los derechos humanos en Nicaragua sigue siendo grave. Un ejemplo de lo anterior es el aumento de las solicitudes de medidas cautelares en un 5471% de 2017 al 2018. Y entre el año 2018 al 2019, se han otorgado o ampliado setenta y dos medidas cautelares sobre Nicaragua en treinta y seis resoluciones.

Por lo tanto, "la CIDH ha llamado a los Estados de la región y a la comunidad internacional a implementar una respuesta regional e internacional basada en la responsabilidad compartida y el respeto y garantía de los derechos humanos de estas personas, a efectos de responder adecuada y efectivamente ante esta situación."[31]

Al respecto, Costa Rica ha dado un buen ejemplo a la comunidad internacional al recibir a miles de personas nicaragüenses que debieron huir de su país. No obstante, en este país aún persisten desafíos para garantizar efectivamente los derechos de acceso a la salud, vivienda, educación y trabajo a las personas nicaragüenses con necesidad de protección internacional.[32]

Por consiguiente, se requiere de la colaboración de todos los actores internacionales para que las personas nicaragüenses que han sido perseguidas no sólo puedan gozar de todos sus derechos en los países de acogida, sino que también se debe actuar en defensa de aquellas que continúan en su país y cuyos derechos se encuentran siendo vulnerados.

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Notas Finales

1 La Prensa, "Así te contamos la marcha de los jóvenes que exigen una respuesta al incendio en Indio Maíz," 12 de abril de 2018. Disponible en: https://www.laprensa.com.ni/2018/04/12/nacionales/2402930-en-vivo-policia-dispersa-marcha-de- jovenes-que-exigen-una-respuesta-al-incendio-en-indio-maiz

2 Confidencial, Tres escenarios tras la insurrección de abril en Nicaragua, Análisis del Centro de Investigación de la Comunicación (CINCO), 8 de mayo de 2018. Disponible en: https://confidencial.com.ni/tres-escenarios-tras-la- insurreccion-de-abril-en-nicaragua/

3 Comisión Interamericana de Derechos Humanos, Graves violaciones a los derechos humanos en el marco de las protestas sociales en Nicaragua, junio 2018.

4 El Nuevo Diario, Ortega retira reforma al INSS y rechaza condiciones del COSEP, 23 de abril de 2018. Disponible en: https://www.elnuevodiario.com.ni/nacionales/461877-ortega-retira-reforma-inss-rechaza-condiciones-cos/

5 CIDH, CIDH expresa preocupación por muertes en el contexto de protestas en Nicaragua, 24 de abril de 2018.

Las Personas Nicaragüenses con Protección Internacional, continued

6 CIDH, Observaciones preliminares de la visita de trabajo de la CIDH a Nicaragua, 21 de mayo de 2018.

7 Naciones Unidas. Comunicado de Prensa. Nicaragua: Expertos de la ONU expresan su consternación por la respuesta violenta del gobierno a las protestas pacíficas. 27 de abril 2018.

8 *Ibíd.*

9 Amnistía Internacional, Disparar a matar: Estrategias de represión de la protesta en Nicaragua, 2018.

10 Corte I.D.H., Caso de la Comunidad Indígena Yakye Axa Vs. Paraguay. Sentencia de 17 de junio de 2005. Serie C No. 125, párr. 161; Caso de los Hermanos Gómez Paquiyauri Vs. Perú. Sentencia de 8 de julio de 2004. Serie C No. 110, párr. 128.

11 Comisión Interamericana de Derechos Humanos, Graves violaciones a los derechos humanos en el marco de las protestas sociales en Nicaragua, junio 2018. Amnistía Internacional. Disparar a matar. Estrategias de represión de la protesta en Nicaragua. 2018.

12 La Prensa. Médicos se rebelan en el hospital de León e informan que atenderán a universitarios. 11 de mayo de 2018. Disponible en: https://www.laprensa.com.ni/2018/05/11/departamentales/2417744-medicos-se-rebelan-en-el- hospital-de-leon-e-informan-que-atenderan-a-estudiantes

13 CENIDH. Informe No 2, 17 de mayo de 2018.

14 Amnistía Internacional. Disparar a matar. Estrategias de represión de la protesta en Nicaragua. 2018, p. 28.

15 Convención sobre el Estatuto de los Refugiados, 1951, Artículo 1.

16 Declaración de Cartagena, 1984, Sección III.

17 UNHCR, One year into Nicaragua crisis, more than 60,000 forced to flee their country, 16 Apr. 2019. https://www.unhcr.org/news/briefing/2019/4/5cb58bd74/year-nicaragua-crisis-60000-forced-flee-country.html

18 UNHCR, Nicaraguan professionals seek safety in Costa Rica, 12 Sept. 2019. https://www.unhcr.org/news/stories/2019/9/5d6cdeb24/nicaraguan-professionals-seek-safety-costa-rica.html

19 Organización Panamericana de la Salud, Ministerio de Salud de Costa Rica y Facultad Latinoamericana de Ciencias Sociales. Desarrollo y salud en Costa Rica: Elementos para su análisis. 2003, p. 4.

20 Organización Internacional para las Migraciones. Estudio Preliminar de Flujos Migratorios Mixtos Nicaragüenses. 2019.

21 Teletica.com, El drama de los nicaragüenses refugiados en Costa Rica, 5 de julio de 2019. Disponible en: https://www.teletica.com/230277_el-drama-de-los-nicaraguenses-refugiados-en-costa-rica. El país, Refugiados nicaragüenses a salvo pero en la indigencia, 09 de abril de 2019. Disponible en: https://elpais.com/elpais/2019/04/05/planeta_futuro/1554463655_609409.html

22 Repretel.com, Migración amplía horario de permisos de trabajo temporales para solicitantes de refugio, 08 de noviembre de 2018. Disponible en: http://www.repretel.com/actualidad/migracion-amplia-horario-de-solicitudes-de-permisos-de-trabajo-temporales-para-solicitantes-de-refugio-132958

23 OIM. Estudio Preliminar de Flujos Migratorios Mixtos Nicaragüenses abril 2018-junio 2019. 2019.

24 Teletica.com, El drama de los nicaragüenses refugiados en Costa Rica, 05 de julio de 2019. Disponible en: https://www.teletica.com/230277_el-drama-de-los-nicaraguenses-refugiados-en-costa-rica

25 OIM. Hallazgos del estudio de línea base sobre migración y desplazamiento en la región del SICA. 2019.

26 Ministerio de Educación Pública. (2018). Alumnos nicaragüenses en educación regular. San José.

27 Delfino.com, Costa Rica abre sus brazos a Nicaragua, 22 de octubre de 2018.

28 OIM. Estudio Preliminar de Flujos Migratorios Mixtos Nicaragüenses abril 2018-junio 2019. 2019.

29 UNFPA. Facilitando Condiciones y Estilos de Vida Saludables: Jóvenes en situación de exclusión social en la prevención del VIH-SIDA. 2005.

30 CIDH. Migración forzada de personas Nicaragüenses a Costa Rica. 2019, p. 151.

31 CIDH. Mecanismo Especial de Seguimiento para Nicaragua. Balance preliminar de resultados. 24 de junio de 2019, p. 7.

32 CIDH. CIDH culmina visita de trabajo a Costa Rica y Honduras para monitorear en terreno la situación de los nicaragüenses que se han visto forzados a huir de su país. 12 de junio de 2019.

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Despite the migration history that exists between Nicaragua and Costa Rica, the effects of the massive arrival of Nicaraguan people seeking refuge demonstrated that Costa Rica's immigration authorities simply were not prepared for these migratory crises.

As an example, when the crisis in Nicaragua began, the General Directorate of Migration and Foreigners of Costa Rica (DGME) added the "pre-application" step, where the request is pending until the DGME can attend to it. Therefore, it takes several months for shelter applicants to formalize their immigration status or to receive a work permit.

Previously, in 2016, Costa Rica created shelters to address the migratory crises of Cuban, Haitian, and African people. During this new crisis, thousands of Nicaraguan people who fled their country have also stayed in these shelters. In August 2018, the Costa Rican government drew up the Protocol for the Management of Extraordinary Flows to meet the needs of these people through coordinated institutional care with the collaboration of international organizations.

Several publications show the deteriorating situation of Nicaraguan people seeking refuge, however, noting that these people survive in temporary shelters without employment, with scarce food, and with some mattresses that have been scavenged from the garbage.

According to a study by the International Organization for Migration (IOM), a large number of Nicaraguan refugees who moved to Costa Rica between the months of June 2018 and July 2019 relocated to the provinces of the Greater Metropolitan Area (GAM); most of these groups are now settled in the canton of Alajuelita.

Employment opportunities are very limited without a work permit provided by the DGME. The time to receive this permit is not standard, as some refugees comment that they had to wait three months after receiving the formalization of their shelter applications to obtain the work card while others waited for it for more than six months.

According to IOM, the greatest obstacles faced by Nicaraguans seeking refuge to work are discrimination and the lack of a work permit. As of July 2019, only 13% of Nicaraguan people seeking refuge have obtained their work permit while others work without official permission or live off charity.

Regarding the right to education, Costa Rica has ratified the International Convention on the Rights of the Child. Similarly, in Costa Rica there is a legal guarantee that all minors, regardless of their nationality, have access to preschool, primary, and secondary education. With the crisis in Nicaragua, the Ministry of Public Education of Costa Rica reported in 2018 an enrollment of 30,649 Nicaraguan children in public, private, and subsidized schools.

Likewise, several universities offered opportunities to continue with their studies for several Nicaraguan students who had to flee their country after participating in the protests of April 2018. An example of the above was the joint work that was done between the Ticos and Nicas: We Are Brothers association and the Latin American University of Science and Technology (ULACIT), which provides scholarships of 100% tuition to Nicaraguan youth with leadership skills and good academic performance.

On the exercise of the right to health by Nicaraguan people seeking refuge, there is little information, due to several factors: the majority of these people don't seek medical assistance in a state institution related to health, although in Costa Rica health services are provided without limitation to pregnant women and minors, regardless of immigration status. Coverage for other people with irregular immigration status exists only in emergency situations.

In addition, the working conditions in which many of these people find themselves make it difficult for them to have the right to social security, which worsens their situation, since the jobs they primarily perform are the most prone "to the risk of occupational accidents, of contracting infectious diseases related to the work environment, of poisonings from the use of pesticides, and from tasks performed without adequate protection instruments."

Nicaraguan People With International Protection, continued

Likewise, and according to the IACHR report, many Nicaraguan people indicated that they had acquired "HIV/AIDS or other sexually transmitted diseases, after being victims of rape during periods of detention."

According to IACHR reports, the human rights situation in Nicaragua remains serious. An example of the above is the increase in requests for precautionary measures by 5,471% from 2017 to 2018. And between 2018 and 2019, seventy-two precautionary measures on Nicaragua have been granted or extended in thirty-six resolutions.

Therefore, "the IACHR has called on the States of the region and the international community to implement a regional and international response based on shared responsibility and respect and guarantee of the human rights of these people, in order to respond adequately in this situation."

In this regard, Costa Rica has set a good example to the international community by receiving thousands of Nicaraguan people who had to flee their country; however, there are still challenges to effectively guarantee the rights of access to health, housing, education, and work to Nicaraguan people in need of international protection.

Therefore, collaboration of all international actors is required so that Nicaraguan people who have been persecuted not only can enjoy their rights in host countries, but also act in defense of those who continue in their country and whose rights are being violated.

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Former U.S. Attorney General Jeff Sessions

Third, the decision touched on the nexus element of the asylum definition. The decision states that *Matter of A-R-C-G-* does not cite to any evidence that A-R-C-G-'s husband attacked her based on her PSG, but rather that he attacked her because of his personal relationship with her.[23] The decision goes on to note that if the "persecutor is not even aware of the group's existence, it becomes harder to understand how the persecutor may have been motivated by the victim's membership in the group."[24]

Finally, the decision discusses gang-related asylum claims and makes the assertion that, in general, gang violence perpetrated by non-governmental actors will not qualify for asylum.[25] This assertion was not supported with any evidence or case law, nor was gang violence an issue in *Matter of A-B-* or in *Matter of A-R-C-G-*.

On 19 December 2018, a U.S. District Court for the District of Columbia issued an order in connection with a lawsuit challenging certain aspects of the attorney general's decision in *Matter of A-B-* and the USCIS's implementing policy memorandum as applied to credible fear interviews conducted by asylum officers and credible review hearings conducted by immigration judges.[26]

The case in the district court found that certain aspects of *Matter of A-B-* and the USCIS's policy memorandum, as applied to the credible fear process, violated the INA and the Administrative Procedure Act (APA).[27] The interview for credible fear is conducted by USCIS officers when the alien is facing expedited removal and asserts credible fear of persecution or torture in case of removal.[28]

The court declared those aspects of the decision and policy memorandum unlawful, vacated, and enjoined the asylum officers and immigration judges from relying on them in any credible fear proceeding.[29] The district court ruled that immigration judges cannot affirm a negative credible fear determination based solely on the fact that an alien has claimed a fear of persecution based on gang-related or domestic violence.[30]

Also, it was ruled that the immigration judges cannot require that an alien whose credible fear claim involves non-governmental persecutors "show the government condoned the private actions or at least demonstrated a complete helplessness to protect the victim."[31] Additionally, the district court enjoined certain aspects of the USCIS's policy memorandum to asylum officers concerning implementation of *Matter of A-B-* in the credible fear process.[32]

Specifically, the court enjoined the USCIS's memorandum's rule that the domestic violence-based PSG definition that includes "inability to leave" a relationship is impermissibly circular and, therefore, not cognizable in credible fear proceedings.[33]

It also enjoined the requirement that, during the credible fear stage, individuals claiming credible fear must delineate or identify any PSG in order to satisfy credible fear based on the PSG.[34] The district court's opinion and order applied nationwide to all credible fear review hearings conducted by immigration judges.

In a recent amicus brief, the Office of the United Nations High Commissioner for Refugees (UNHCR) stated that "the hallmark of state protection is the state's

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ability to provide effective protection, which requires effective control of non-state actors."[35] The whole point of asylum is to provide humanitarian protection to victims of persecution; therefore, the test must be the effectiveness of the protection.

The UNHCR argued that the fact that a government has enacted laws affording protection is not enough, as "even though a particular State may have prohibited a persecutory practice . . . the State may nevertheless continue to condone or tolerate the practice, or may not be able to stop the practice effectively."[36] The UNHCR recognizes that even where there is good intent, "there may be an incongruity between avowed commitments and reality on the ground.[37] Effective protection depends on both de jure and de facto capability by the authorities."[38]

U.S. law has somehow recently changed the course. In unpublished decisions, the BIA began applying what seemed like a "good faith effort" test, concluding that the asylum applicants had not met their burden of establishing that the government was "unable or unwilling to protect" if there was evidence that the government showed some interest in the issue and took some action (whether entirely effective or not) to provide protection.[39] Such approach wrongly ignores whether the government's efforts actually resulted in protecting the asylum seeker.[40]

Attorney General Sessions weighed in on the topic in his decision in *Matter of A-B-*, in which he equated a government's unwillingness to control the persecutors with the much narrower requirement that it "condones" the group's actions.[41] He further opined that an inability to control requires a showing of "complete helplessness" on the part of the government in question to provide protection.[42]

These changes have resulted in the denial of asylum to individuals who remain at risk of persecution in their country of origin. In a recent decision from the U.S. Sixth Circuit Court of Appeals, it was noted that the evidence that convinced the BIA of the Guatemalan government's ability to afford protection included a criminal court judge's order that the victim be moved to another city, be scheduled for regular government check-ins as to her continued safety there (which the record failed to show actually occurred), and the judge's further recommendation that the victim seek a visa to join her family in the United States.[43]

A criminal court judge's order to relocate to another city and then leave for a safer country hardly seems like evidence of the Guatemalan government's ability or willingness to provide adequate protection; quite the opposite.[44] But that is how the BIA chose to interpret it. The court first set out two broad categories, consisting of (1) evidence of the government's response to the asylum seeker's persecution, and (2) general evidence of country conditions.[45]

Within broad category (1), the court created three subcategories for inquiry, namely: (1) whether the police investigated, prosecuted, and punished the persecutors after the fact; (2) the degree of protection offered to the asylum seeker, again after the fact of being persecuted; and (3) any concession on the part of the government.[46] Under broad category (2) (i.e., country conditions), the court established two subcategories for inquiry, consisting of (1) how certain crimes are prosecuted and punished, and (2) the efficacy of the government's efforts.[47]

Where the government has stipulated that the respondent suffered persecution on account of a protected ground, the government should not place the additional burden on the victim of having to satisfy the "unable or unwilling" test. It would be more efficient to create a rebuttable presumption of asylum eligibility by allowing the asylum applicant to establish that the persecution would not ordinarily have occurred if the government had been able and willing to provide the protection necessary to have prevented it from happening.[48]

Upon such showing, the burden would shift to the Department of Homeland Security (DHS) to prove that the government had the effective ability and will to prevent the persecution from happening in the first

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place. Shifting the burden to the DHS would make more sense and would improve the effective protection to victims of persecution.

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Endnotes

1 Regina Germain, ASYLUM PRIMER, 11 (AILA 2010). *See* also 8 USC § 1158.

2 INA § 101(a)(42); 8 USC §1101(a)(42).

3 Convention relating to the Status of Refugees, 25 July 1951, 189 U.N.T.S. 150.

4 Andrew I. Schoenholtz, *The New Refugees and the Old Treaty: Persecutors and Persecuted in the Twenty-First Century*, 16 Chi. J. Int'l L.85, 85 (2015).

5 The 1967 Protocol. Andrew & Renata Kaldor Centre for International Refugee Law. UNSW Law, available at: https://www.kaldorcentre.unsw.edu.au/publication/1967-protocol (Last visited 6 Dec. 2019).

6 Andrew I. Schoenholtz, *The New Refugees and the Old Treaty: Persecutors and Persecuted in the Twenty-First Century*, 16 Chi. J. Int'l L. 85, 85 (2015).

7 *Id.*

8 *Id.*

9 *See* REAL ID Act of 2005, Pub. L. No 109-13, div B, 119 Stat. 231, 302-23. Under the REAL ID Act provisions were added to § 208 of the INA regarding credibility determinations, corroboration, the burden of proof, and judicial review.

10 *See Khilan v. Holder*, 557 F. 3d 583, 585 (8th. Cir. 2009).

11 *Matter of A-B-* 27 I&N Dec. 227 (A.G. 2018).

12 *Matter of A-R-C-G-* 26 I&N Dec. 388 (BIA 2014).

13 *Id.*

14 INA § 208(b)(1)(B)(i). *See* also 8 U.S.C. § 1158(b)(1)(B)(i) (2012).

15 Christopher C. Malwitz, *Particular Social Groups: Vague Definitions and an Indeterminate Future for Asylum Seekers*, 83 Brook. L. Rev. 1151, 1151 (2018).

16 *See Id. See* also § 101(a), 8 U.S.C. § 1101(a). This section provides no definition of "particular social group."

17 *Matter of W-G-R-,* 26 I&N Dec. 208 (BIA 2014); *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014).

18 *Matter of A-B-* 27 I&N Dec. at 316.

19 *Id.*

20 *Id.*

21 *Id.*

22 *Id.* at 337.

23 *Id.* at 339.

24 *Id.*

25 *Id.*

26 *Grace v. Whitaker*, 344 F. Supp. 3d. 96 (D.D.C. 2018).

27 *Id.*

28 Sabrineh Ardalan, *Refugee Protection at Risk: Remain in Mexico and Other Efforts to Undermine the U.S. Asylum System,* Harv. L. Rev. Blog (26 May 2019), available at: https://blog.harvardlawreview.org/refugee-protection-at-risk-remain-in-mexico-and-other-efforts-to-undermine-the-u-s-asylum-system/ (Last visited 22 Oct. 2019).

29 *Grace v. Whitaker*, 344 F. Supp. 3d. 96.

30 *Id.*

31 *Id.*

32 *Id.*

33 *Id.*

34 *Id.*

35 UNHCR intervention before the United States Court of Appeals for the First Circuit in the case of *Dimbil Noor Hassan v. Jefferson B. Sessions, III, Attorney General*, available at: https://www.refworld.org/docid/5a159e404.html (Last visited 14 Oct. 2019).

36 *Id.*

37 *Id.*

38 *Id.*

39 *See* Jeffrey S. Chase, A Better Approach to "Unable or Unwilling" Analysis? (21 Apr. 2019), available at: https://www.jeffreyschase.com/blog/2019/4/21/a-better-approach-to-unable-or-unwilling-analysis (Last Visited 14 Oct. 2019).

40 *Id.*

41 *Id.*

42 *Id.*

43 *K.H., A Minor Child v. William P. Barr, Att'y Gen.,* 920 F.3d 470 (6th Cir.2019).

44 *Id.*

45 *Id.*

46 *Id.*

47 *Id.*

48 *See* Jeffrey S. Chase, A Better Approach to "Unable or Unwilling" Analysis? (21 Apr. 2019), available at: https://www.jeffreyschase.com/blog/2019/4/21/a-better-approach-to-unable-or-unwilling-analysis (Last Visited 14 Oct. 2019).

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el antagonismo inicial entre el Gobierno y las Iglesias cedió el paso a una competencia ideológica, en la cual el Gobierno utilizaba sus recursos a fin de promover la ideología oficial en detrimento de otras ideologías.[9]

En cuanto a este derecho y los pueblos indígenas, la CIDH se ha referido a la importancia de garantizar las creencias y cultura indígena como parte integrante de la libertad de conciencia y religión. En su informe de 1997 respecto de Ecuador, la CIDH refirió que el respeto por la expresión, religión y cultura indígena implica disposiciones especiales por parte del Estado para garantizar, por ejemplo, que esté a disposición la educación bilingüe; que los planes de estudio y los materiales reflejen, comuniquen y respeten adecuadamente la cultura de la tribu; y que se realicen esfuerzos para capacitar maestros dentro de las comunidades indígenas.[10]

Igualmente, en su informe temático sobre derechos de los pueblos indígenas y tribales sobre tierras ancestrales (2009), la CIDH subrayó que existe un vínculo entre el derecho de propiedad territorial de las comunidades indígenas y la libertad de religión, pues al privárseles de la posesión material de su territorio, se afecta también su propia religión, espiritualidad o creencias, por lo que los Estados tienen la obligación de garantizar a los pueblos indígenas la libertad de conservar sus formas propias de religiosidad o espiritualidad, incluyendo la expresión pública de este derecho y el acceso a los sitios sagrados.[11]

Finalmente, la CIDH ha analizado la libertad de conciencia y religión en casos relacionados con el servicio militar obligatorio. En el caso de *Cristián Daniel Sahli Vera y otros vs Chile* (2005) la CIDH se pronunció sobre el servicio militar obligatorio a la luz del derecho a la libertad de conciencia, y refirió que el Artículo 12 de la Convención Americana sobre Derechos Humanos, leído conjuntamente con el Artículo 6.3 b del mismo instrumento,[12] implica que la objeción de conciencia únicamente está protegida por la Convención Americana si la misma está reconocida a su vez por la legislación nacional del país, por lo que, y ante la ausencia de una legislación nacional al respecto, la falta de reconocimiento por parte del Estado de la objeción de conciencia a las presuntas víctimas no constituye una violación al Artículo 12 de la Convención Americana.[13]

Es importante hacer notar que tal decisión fue emitida tomando en cuenta la jurisprudencia vigente en ese momento, por lo que será importante que la CIDH emita una decisión a la luz de los tiempos actuales sobre servicio militar obligatorio y libertad de conciencia, tomando en cuenta que recientemente diversos organismos internacionales han referido que la libertad de conciencia protege el derecho de objeción al servicio militar obligatorio independientemente de su reconocimiento en la legislación nacional.[14]

La Libertad de Conciencia y Religión y la Corte Interamericana

Por su parte, la Corte Interamericana de Derechos Humanos se ha pronunciado respecto de la libertad de conciencia y religión en tres supuestos distintos: (1) censura previa y libertad de conciencia; (2) derecho a la libertad de religión de personas privadas de libertad; y (3) derecho de enterrar a los muertos y conservar territorios conforme a propias creencias y religión.

En el caso *Olmedo Bustos y otros vs. Chile* (2001), ante la censura judicial impuesta a la exhibición de la película "La Última Tentación de Cristo," por considerar que era una blasfemia contra la persona de Jesucristo, un grupo de individuos argumentó que dicha censura era un atentado contra su derecho de conciencia y religión, ya que se intentaba imponer una visión de un sector sobre lo que podían ver los demás ciudadanos.

Sin embargo, la Corte IDH desestimó este alegato al subrayar que la prohibición de la exhibición de la película no privó o menoscabó a ninguna persona su derecho de conservar, cambiar, profesar o divulgar su religión o creencias; no obstante, subrayó que este derecho "es uno de los cimientos de la sociedad democrática. En su dimensión religiosa, constituye un elemento trascendental en la protección de las convicciones de los creyentes y en su forma de vida."[15]

En el caso del *Instituto de Reeducación del menor vs. Paraguay* (2004), relacionado con las condiciones de detención en dicho centro, así como una serie de

incidentes en el mismo, tales como incendios, la Corte IDH sin analizar el contenido del Artículo 12 de la Convención Americana hizo una mera mención respecto a que la libertad religiosa debe ser efectivamente garantizada para toda persona privada de libertad.[16]

Finalmente, la Corte IDH, en el caso de *Masacres de Rio Negro vs. Guatemala* (2012), referido a una serie de masacres ejecutadas por el ejército de Guatemala y miembros de patrullas de autodefensa civil en 1980 y 1982 en la comunidad maya de Rio Negro, tomando en cuenta que el Estado no había localizado ni identificado a la mayor parte de los restos de personas supuestamente ejecutadas durante las masacres y a diecisiete personas que se encontraban desaparecidas forzadamente, declaró la violación del Artículo 12.1 de la Convención Americana al considerar que los familiares de la mayoría de víctimas de las masacres no pudieron enterarlos ni celebrar los ritos fúnebres de acuerdo a sus creencias religiosas.

En esta oportunidad, la Corte IDH afirmó que el derecho de enterrar a los muertos, conforme a sus propias creencias y a preservar lugares sagrados, es un componente del derecho a la libertad de religión, recordando que, conforme a un peritaje, los rituales de despedida de los muertos tienen una importancia fundamental en la cultura maya. Asimismo, hizo notar que, como consecuencia de la masacre, las victimas perdieron sus lugares sagrados, lo cuales se encontraban ocupadas para ese entonces por una hidroeléctrica.[17]

Aspectos Pendientes de Desarrollar

Los análisis realizados a este derecho por parte del Sistema Universal y Europeo de protección de derechos humanos dan luz sobre aspectos todavía no explorados en el Sistema Interamericano, que pueden en un futuro presentarse como retos para la interpretación de este derecho tanto para la CIDH como para la Corte IDH. En particular, distinguimos al menos tres aspectos no desarrollados por el Sistema Interamericano que sí cuentan con desarrollo normativo o jurisprudencial en el Sistema Universal y Europeo: (1) el derecho de no adscribirse a ninguna religión; (2) el derecho de manifestar las creencias o religión y las limitaciones al proselitismo; y (3) el derecho de padres a que sus hijos reciban educación conforme a sus propias convicciones.

En cuanto al primer aspecto, por ejemplo, el Comité de Derechos Humanos de Naciones Unidas ha referido que este derecho incluye la posibilidad de no adscribirse a ninguna religión en específico, y que no puede ser suspendido ni siquiera en estados de emergencia pública.[18]

Con respecto al segundo aspecto mencionado, en el caso *Kokkinakis vs. Grecia*, el Tribunal Europeo de Derechos Humanos se pronunció sobre el derecho a manifestar la propia religión y el proselitismo. En dicho caso, el señor Kokkinakis, un Testigo de Jehová fue sancionado por el delito de proselitismo, razón por la cual alegó ante el tribunal que la consagración de tal delito y la sanción que le fue impuesta vulneró su derecho a la libertad de pensamiento, conciencia y religión.

El tribunal afirmó que mientras la libertad de religión es en un primer momento un asunto de conciencia individual, también implica inter alia la posibilidad de los individuos de manifestar su religión. Esta manifestación puede darse en privado, en público o dentro del círculo de personas con las cuales se comparte creencias. De igual forma, hace parte de la manifestación de las creencias el derecho de tratar de convencer a los otros de la fe que se profesa, y la posibilidad de todos los individuos de cambiar sus creencias o religión.[20]

En este sentido, las actividades de difusión de la fe fueron diferenciadas por el tribunal, de las actividades de proselitismo inadecuado, actividad tipificada en el ordenamiento jurídico griego. El Tribunal Europeo definió el proselitismo inadecuado como actividades que a través del ofrecimiento de mentiras o ventajas sociales buscan ganar nuevos miembros para una Iglesia, o el ejercicio inapropiado de presión a personas en situaciones de angustia o necesidad para que se unan a ciertas creencias religiosas, concluyendo el tribunal de que proselitismo inadecuado no es compatible con la libertad de conciencia, pensamiento o religión.[21]

En cuanto a la tercera cuestión mencionada, el Convenio Europeo de Derechos Humanos reconoce la libertad de pensamiento, de conciencia y de religión en su Artículo 9. Dentro de este, no está contemplado el derecho de los padres de guiar la educación moral y/o religiosa de sus hijos, el cual si fue consagrado en el Artículo 2 del Protocolo adicional al mencionado Convenio, el cual se refiere al derecho a la educación y señala que "[E]l Estado, en el ejercicio de las funciones que asuma en el campo de la educación y de la enseñanza, respetará el derecho de los padres a asegurar esta educación y esta enseñanza conforme a sus convicciones religiosas y filosóficas."[22]

En el caso *Kjeldsen, Busk Madsen y Pedersen vs Dinamarca*, el Tribunal Europeo de Derechos Humanos analizó esta dimensión del derecho a la educación y su relación con el derecho a la libertad de pensamiento, conciencia y religión. En el caso los peticionarios alegaron que el Estado estaba afectando sus derechos a la educación y a la libertad de pensamiento, conciencia y religión, debido a que el Gobierno de Dinamarca había hecho obligatoria la educación sexual integral en todos los colegios públicos lo cual llevó a los peticionarios a solicitar la exención de asistir a estas clases para sus hijos, petición que fue posteriormente negada por el Estado.

El Tribunal reiteró que el derecho de los padres a guiar la educación moral y religiosa de sus hijos hace parte del derecho a la educación y, por lo tanto, la educación religiosa debe ser entendida como cualquier otra asignatura escolar.[23] Asimismo, subrayó que derecho debe ser respetado tanto en centros educativos públicos como privados[24] y manifestó que es una obligación estatal diseñar el currículo escolar en forma objetiva, crítica y pluralista, sin tener como objetivo el adoctrinamiento.[25]

Finalmente, el Tribunal subrayó que el derecho de los padres de guiar la educación religiosa de sus hijos no implica que los padres tengan la posibilidad de objetar la existencia de estas materias sobre educación sexual en el currículo escolar debido a que la educación y su implementación se dificultaría en extremo.[26]

Conclusiones

Si bien el Sistema Interamericano ha desarrollado en ciertos supuestos del derecho a la libertad de conciencia y religión, se advierte que este es uno de los derechos con menor desarrollo jurisprudencial. El tratamiento dado particularmente por el Sistema Europeo al derecho a la libertad de pensamiento, conciencia y religión evidencia ciertas situaciones que todavía no se han presentado en el Sistema Interamericano frente a este derecho, y pueden dar lugar a diferentes interpretaciones de este, acordes al contexto americano y las situaciones que este presenta.

En un primer momento resaltamos que el Sistema Interamericano no ha desarrollado con suficiente precisión el contenido de la libertad de conciencia y de la libertad de religión, ni los componentes ni alcances de cada derecho. No se advierte, por ejemplo, que la CIDH o la Corte IDH hayan desarrollado con precisión el derecho

de manifestar las propias creencias, o el derecho de no adscribirse a ninguna religión, o supuestos de tensión entre ambos derechos como la situación del proselitismo.

Por otra parte, el derecho de manifestar la conciencia o religión en público o en privado, también puede generar tensiones con otros derechos o principios, como el principio de igualdad y no discriminación, en supuestos en los que en el ejercicio de dicho derecho se formulen expresiones que puedan incitar al odio o la violencia contra determinados grupos de personas, sobre todo cuando se encuentran en situación de vulnerabilidad.[27] En virtud de ello, seria de particular relevancia que, en un caso individual, la CIDH o la Corte IDH analizaran las restricciones admisibles a la libertad de conciencia y religión tomando en cuenta los fines específicos del test de proporcionalidad estipulados en el Artículo 12.3 de la Convención Americana.

Finalmente, también surge que, en contraste con el Sistema Europeo de Derechos Humanos, el Sistema Interamericano no cuenta con ningún desarrollo respecto del Artículo 12.4 relacionado con el derecho de los padres de educar a sus hijos conforme a sus propias convicciones. El Sistema Interamericano puede profundizar en la tensión que se encuentra entre el derecho de los padres a direccionar la educación moral y religiosa de sus hijos, entendido dentro del derecho a la libertad de conciencia y religión, y el derecho a la educación teniendo también en cuenta su consagración en otros instrumentos internacionales como el Protocolo de San Salvador, y los pronunciamientos del Comité de Derechos Económicos, Sociales y Culturales de las Naciones Unidas relativos al derecho a la educación.[28]

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Notas Finales

1 La CIDH fue creada por la Carta de la OEA en 1959. Es una entidad autónoma compuesta por siete miembros elegidos por la Asamblea General de la OEA por un período de cuatro años y elegibles para ser reelegidos una vez, y tiene la tarea de promover los derechos humanos reconocidos por la Declaración Americana de los Derechos y Deberes del Hombre, adoptada por la OEA en 1948 y por los tratados de derechos humanos que conforman el Sistema Americano de Derechos Humanos.

2 La Corte IDH fue establecida el 3 de septiembre de 1979, mediante la entrada en vigor de la Convención Americana sobre Derechos Humanos el 18 de julio de 1978. Es una institución judicial autónoma compuesta por siete jueces, nacionales de los estados miembros de la Organización de los Estados Americanos, elegidos por un período de seis años y pueden ser reelegido solo una vez, y tienen el mandato de interpretar y aplicar la Convención Americana y los tratados de derechos humanos del Sistema Interamericano.

3 Las decisiones pueden consultarse en: http://www.corteidh.or.cr/cf/Jurisprudencia2/busqueda_casos_contenciosos.cfm?lang=es

4 OEA, Convención Americana Sobre Derechos Humanos, "Pacto de San José," No *American Convention on Human Rights, "Pact of San Jose,"* 22 de noviembre de1969.

5 CIDH, Informe de la Situación de Derechos Humanos en Nicaragua, Libertad de Consciencia, Pensamiento y Religión. OEA/ / ser.L/V/II.45 doc.18 rev.1, 17 de noviembre 1978.

6 CIDH. Informe Anual de la Comisión Interamericana de Derechos Humanos 1979-1980, Situación de los derechos humanos en varios países, D. El Salvador, OEA/Ser.L/V/II.50 doc. 13 rev.1, 2 de octubre de 1980.

7 CIDH. Informe sobre la situación de los derechos humanos en la República de Guatemala. Capítulo VI. Libertad de conciencia y religión, OEA/Ser.L/V/II.53 Doc.21 rev.2, 13 de octubre de 1981, párrs 3 y 4.

8 CIDH. Informe sobre la situación de los derechos humanos en Argentina, OEA/Ser.L/V/II.49 doc.19, 11 de abril de 1980, Capítulo X, Derecho de libertad religiosa y de cultos, párrs. 1-4.

9 CIDH, La Situación de los Derechos Humanos en Cuba, Séptimo Informe, Capitulo VII Derecho a la Libertad religiosa y de culto, OEA/Ser.L/V/II.61 Doc.29 rev.1, 4 de octubre de 1983.

10 CIDH, Informe sobre la situación de los derechos humanos en Ecuador, OEA/Ser.L/V/II.96, Doc.10 rev.1, 24 de abril de 1999, Capítulo IX.

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11 CIDH, Derechos de los Pueblos Indígenas y Tribales sobre sus tierras ancestrales y recursos naturales, OEA/Ser.L/V/II.Doc 56/09, 30 de diciembre de 2009.

12 El Artículo 6.3.b de la Convención Americana Sobre Derechos Humanos dispone: Prohibición de la Esclavitud y Servidumbre (. . .) 3. No constituyen trabajo forzoso u obligatorio, para los efectos de este artículo: (. . .) b. el servicio militar y, en los países donde se admite exención por razones de conciencia, el servicio nacional que la ley establezca en lugar de aquél; (. . .)."

13 CIDH, Informe No 43-05, Caso 12.219, Fondo, Cristián Daniel Sahli Vera y otros, Chile, 10 de marzo de 2005, párr. 99 y 100. Esta postura fue ratificada por la CIDH en el caso *Alfredo Díaz Bustos vs. Bolivia* (2005)

14 Cfr. Comité de Derechos Humanos, Durdyyev C Turkmenistán, párr. 7.3; Min-Kyu Jeong y otros c. la República de Corea (CCPR/C/101/D/1642-1741/2007), para. 7.3; Jong-nam Kim y otros c. la República de Corea, párr. 7.4; Abdullayev c. Turkmenistán, párr. 7.7; Mahmud Hudaybergenov c. Turkmenistán, párr. 7.5; Ahmet Hudaybergenov c. Turkmenistán, párr. 7.5; Sunnet Japparow c. Turkmenistán, párr. 7.6; Akmurad Nurjanov c. Turkmenistán, párr. 9.3; y Shadurdy Uchetov c. Turkmenistán, párr. 7.6. ver también Observación General No. 22, Comentarios Generales adoptados por el Comité de Derechos Humanos, Artículo 18-Libertad de pensamiento, de conciencia y de religión, 48 período de sesiones, U.N. Doc. HRI/GEN/1/Rev.7 (1993).

15 Corte IDH. Caso "La Última Tentación de Cristo" (Olmedo Bustos y otros) Vs. Chile. Fondo, Reparaciones y Costas. Sentencia de 5 de febrero de 2001. Serie C No. 73., para. 79.

16 Corte IDH. Caso "Instituto de Reeducación del Menor" Vs. Paraguay. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 2 de septiembre de 2004. Serie C No. 112., para. 155.

17 Corte IDH. Caso Masacres de Río Negro Vs. Guatemala. Excepción Preliminar, Fondo, Reparaciones y Costas. Sentencia de 4 de septiembre de 2012. Serie C No. 250, para. 153-165; véase también Solicitud de la Comisión Interamericana de Derechos Humanos a la Corte Interamericana de Derechos Humanos en el caso 11.763 "Plan de Masacre de Sánchez" vs. la República de Guatemala, párr. 190.

18 Naciones Unidas, Comité de Derechos Humanos, Observación general 22, Artículo 18 (Cuarenta y ocho sesiones, 1993). Comité de DDHH, Comentario General Nº22. Artículo 18. 1993, pág. 2

19 Corte Europea de Derechos Humanos, *Kokkinakis vs Grecia*. 25 de mayo de 1993, pág.13.

20 *Ibid.* pág.14.

21 *Ibid.* pág.17.

22 Protocolo Adicional a la Convención Europea de Derechos Humanos, Artículo 2. 1952.

23 Corte Europea de Derechos Humanos, *Kjeldsen, Madsen y Pedersen vs Dinamarca*. Diciembre 7 de 1976, pág. 22

24 *Ibid.* pág. 22

25 *Ibid.* pág. 23

26 *Idem.*

27 Bertoni, Eduardo (2006) "Hate Speech Under The American Convention On Human Rights," *ILSA Journal of International & Comparative Law*: Vol. 12: Iss. 2, Article 1, p. 571. See also, IACHR, Annual Report of the Special Rapporteur for Freedom of Expression, 2004.

28 Protocolo adicional a la Convención Americana sobre Derechos Humanos en Materia de Derechos Económicos, Sociales y Culturales "Protocolo de San Salvador."

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recognized in turn by the national legislation of the country. So, in the absence of national legislation in this regard, the state's lack of recognition of alleged victims' conscientious objection does not constitute a violation of Article 12 of the American Convention.

It is important to note that such decision was issued taking into account the jurisprudence in force at that time, so it will be important for the IACHR to issue a decision on compulsory military service and freedom of conscience in light of current times, taking into account that several international organizations have recently reported that freedom of conscience protects the right to object to compulsory military service regardless of its recognition in national legislation.

Freedom of Conscience and Religion and the Inter-American Court

For its part, the Inter-American Court of Human Rights has ruled on freedom of conscience and religion in three different cases: (1) prior censorship and freedom of conscience; (2) right to freedom of religion of persons deprived of liberty; and (3) right to bury the dead and to preserve territories according to a people's own beliefs and religion.

In the case *Olmedo Bustos et al. v. Chile (2001)*, before judicial censorship was imposed on the exhibition of the film "The Last Temptation of Christ," considering it blasphemy against the person of Jesus Christ, a group of individuals argued that said censorship was an attack on their right of conscience and religion, as it was intended to impose the views of one segment of society on what other citizens could see.

The Inter-American Court dismissed this allegation, stressing that the ban on the exhibition of the film didn't deprive or impair any person's right to preserve, change, profess, or disclose their religion or beliefs; however, the court stressed that this right "is one of the foundations of democratic society. In its religious dimension, it constitutes a transcendental element in the protection of the beliefs of believers and in their way of life."

In the case of the *Juvenile Reeducation Institute v. Paraguay (2004)*, related to the conditions of detention in said center, as well as a series of incidents therein, such as fires, the Inter-American Court without analyzing the content of Article 12 made a mere mention that religious freedom should be effectively guaranteed for every person deprived of liberty.

Finally, the Inter-American Court in the case of *Massacres of Rio Negro v. Guatemala (2012)*, referring to a series of massacres executed by the Guatemalan army and members of civil self-defense patrols in 1980 and 1982 in the Mayan community of Rio Negro, taking into account that the state had not located or identified the largest part of the remains of people allegedly executed during the massacres and seventeen people who were forcibly disappeared, declared a violation of Article 12.1 of the American Convention considering that the relatives of a majority of the victims of the massacres could not celebrate rites or funerals according to their religious beliefs.

On this occasion, the Inter-American Court affirmed that the right to bury the dead, according to a people's own beliefs, and to preserve sacred places is a component of the right to freedom of religion, recalling that, according to an expert opinion, the farewell rituals of the dead have a fundamental importance in the Mayan culture. The court also noted that, as a result of the massacre, victims lost their sacred places, which were then occupied by a hydroelectric plant.

Pending Aspects to Develop

Consideration of these rights by the Universal and European Human Rights Protection System has shed light on aspects not yet explored in the Inter-American System, which may in the future present challenges to the interpretation of this right for both the IACHR and for the Inter-American Court. In particular, we distinguish at least three aspects not developed by the Inter-American System that do have normative or jurisprudential development in the Universal and European System: (1) the right not to ascribe to any religion; (2) the right to express beliefs or religion, and limitations to proselytizing; and (3) the right of parents to have their

children receive education according to their own convictions.

Regarding the first aspect, for example, the United Nations Human Rights Committee has mentioned that this right includes the possibility of not subscribing to any specific religion, and that it cannot be suspended even in states of public emergency.

With respect to the second aspect mentioned, in the case of *Kokkinakis vs. Greece*, the European Court of Human Rights ruled on the right to manifest one's religion and proselytism. In that case, Mr. Kokkinakis, a Jehovah's Witness, was punished for the crime of proselytizing, and he argued that the sanction imposed on him violated his right to freedom of thought, conscience, and religion.

The court stated that while freedom of religion is initially a matter of individual conscience, it also implies inter alia the possibility of individuals to practice their religion openly. This manifestation can occur in private, in public, or within the circle of people with whom beliefs are shared. Likewise, the right to try to convince others of the faith that is professed, and the possibility of individuals changing their beliefs or religion, is part of the manifestation of beliefs.

In this sense, the court differentiated appropriate proselytizing activities from the activities of inappropriate proselytizing, activities typified in the Greek legal system. The European Court defined inappropriate proselytizing as activities that, through offering lies or social advantages, seek to win new members to a church, or the inappropriate exercise of pressure on people in situations of distress or need to accept certain religious beliefs. The court concluded that inappropriate proselytism is not compatible with freedom of conscience, thought, and religion.

Regarding the third issue mentioned, the European Convention on Human Rights recognized freedom of thought, conscience, and religion in its Article 9, and within this, the right of parents to guide moral and/or religious education of their children, enshrined in Article 2 of the Additional Protocol to the aforementioned Convention, which refers to the right to education and states: "[T]he State, in the exercise of the functions assumed in the field of education and teaching, will respect the right of parents to ensure this education and teaching according to their religious and philosophical convictions."

In the case of *Kjeldsen, Busk Madsen and Pedersen vs. Denmark*, the European Court of Human Rights analyzed the right to education and its relation to the right to freedom of thought, conscience, and religion. The petitioners alleged that the state was affecting their rights to education and freedom of thought, conscience, and religion because the Danish government had made comprehensive sexual education compulsory in all public schools, which led the petitioners to request an exemption from attending these classes for their children, a request subsequently denied by the state.

The court reiterated that the right of parents to guide the moral and religious education of their children is part of the right to education and, therefore, religious education must be understood to be like any other school subject. It also stressed that the law must be respected in both public and private educational centers and stated that it is a state obligation to design the school curriculum in an objective, critical, and pluralistic manner, without aiming at indoctrination.

Finally, the court stressed that the right of parents to guide the religious education of their children does not imply that parents have the ability to object to the existence of lessons on sexual education in the school curriculum.

Conclusions

Although the Inter-American System has developed in certain cases the right to freedom of conscience and religion, it is noted that this is one of the rights with less jurisprudential development. In particular, the treatment of the European System to the right to freedom of thought, conscience, and religion evidences certain situations that have not yet been presented in the Inter-American System, and may give rise to different

interpretations of this right, according to the American context and the situations that present.

First, we highlight that the Inter-American System has not yet developed the boundaries of the rights of freedom of conscience and religion with enough precision, or the components or scope of each right. We have not seen, for example, that the IACHR or the Inter-American Court has precisely developed the right to express one's beliefs, or the right not to ascribe to any religion, or assumptions of tension between the two rights, such as in the situation of proselytism.

On the other hand, the right to express conscience or religion in public or in private can also generate tensions with other rights or principles, such as the principle of equality and nondiscrimination, in cases in which the exercise of said right is formulated by expressions that may incite hatred or violence against certain groups of people, especially when they are vulnerable. As a result, it would be of particular relevance that, in an individual case, the IACHR or the Inter-American Court analyze the admissible restrictions on freedom of conscience and religion, taking into account the specific purposes of the proportionality test stipulated in Article 12.3 of the American Convention.

Finally, it also appears that, in contrast to the European Human Rights System, the Inter-American System hasn't developed with respect to Article 12.4 related to the right of parents to educate their children according to their own convictions. The Inter-American System can deepen the tension between the right of parents to direct the moral and religious education of their children, understood within the right to freedom of conscience and religion and the right to education, also taking into account its consecration in other international instruments such as the Protocol of San Salvador and the pronouncements of the United Nations Committee on Economic, Social and Cultural Rights regarding the right to education.

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Protección de los Derechos Humanos, from page 27

En sus opiniones consultivas y en su jurisprudencia contenciosa, la Corte IDH ha precisado las características esenciales que deben satisfacer los recursos internos para ser considerados como requisitos de procedibilidad ante el Sistema Interamericano: disponibilidad, adecuación y efectividad.

Por una parte, los recursos deben estar disponibles y eso significa que deben estar previstos formalmente dentro del ordenamiento y ser de fácil acceso para los individuos. Además, la idoneidad o adecuación se refiere a la existencia de una relación directa entre la vulneración del derecho y la función del recurso para lograr el objetivo de superar esa situación de violación a los derechos humanos. Finalmente, la eficacia de los recursos internos significa que estos tengan el potencial para producir el resultado jurídico y fáctico para el cual fueron diseñados.[10]

Además de los anteriores aspectos, la Corte IDH ha analizado situaciones especiales en las que ha considerado el tiempo en que son resueltos los recursos judiciales internos, el grado de independencia de las autoridades judiciales ante las cuales se tramitan esos recursos, el contexto de violencia y terror que puede condicionar el resultado de los recursos internos o las competencias de las autoridades domésticas para hacer cumplir sus decisiones frente a los particulares y a las demás autoridades nacionales.[11]

Cuando el Estado considera que los peticionarios no han agotado los recursos internos, asume la carga de probar la existencia de los recursos, su disponibilidad, idoneidad, adecuación y efectividad.[12]

El Estado puede introducir ese argumento dentro del procedimiento contencioso mediante la presentación de una excepción preliminar con el fin de que la Comisión Interamericana declare inadmisible la petición.[13]

El Estado tiene la carga de presentar esa excepción preliminar durante la fase de admisibilidad del procedimiento ante la Comisión.[14] Esta carga de diligencia evita que los Estados utilicen este argumento como una defensa tardía cuando el proceso se encuentra en una etapa avanzada, cuando se han formulado las consideraciones de fondo por parte de la CIDH o cuando el caso ya ha sido deferido a la Corte IDH.[15]

Del mismo modo, cuando el Estado presenta la excepción preliminar ante la CIDH y esta es rechazada, el Estado puede insistir en el mismo argumento ante la Corte IDH con el fin de que el tribunal revise si la CIDH decidió la excepción con información completa y veraz.[16]

Esta posibilidad ha generado críticas porque implica una dilación y la duplicidad de los procedimientos. Sin embargo, se ha mantenido bajo el criterio de que la Corte IDH no reexamina totalmente la excepción preliminar, sino que verifica que la CIDH la haya resuelto con todos los elementos de juicio necesarios.[17]

Adicionalmente, la intervención de la Corte IDH en el control de legalidad de una actuación realizada por la CIDH está orientada por la necesidad de garantizar el derecho de defensa de las partes del proceso interamericano.[18]

Desde luego, las víctimas de una violación a los derechos humanos no deben agotar los recursos internos cuando estos no satisfacen los requisitos de idoneidad establecidos por la Corte IDH. Además, el Artículo 46.2 de la Convención Americana sobre Derechos Humanos y 31.2 del Reglamento de la CIDH establecen tres excepciones al deber de agotamiento de los recursos internos.

Por una parte, no se puede exigir a la víctima que agote un recurso interno cuando este no ofrece garantías suficientes en el marco del debido proceso. En segundo lugar, tampoco se aplica la regla del agotamiento de los recursos internos cuando la víctima aduce precisamente la violación de su derecho a un recurso efectivo en virtud de que se le impidió materialmente acceder al sistema judicial nacional. En tercer lugar, la regla del agotamiento de los recursos internos no es exigible cuando existe una dilación injustificada de los procedimientos internos que debían ser agotados, de manera tal, que se ha producido un incumplimiento del plazo razonable.[19]

En este ámbito opera una carga dinámica de la prueba que funciona de la siguiente manera. Si el peticionario aduce que no debía agotar los recursos internos porque

concurría una de las excepciones, el Estado asume la carga de probar que los recursos existían, se encontraban disponibles, eran adecuados y efectivos.[20] En cualquiera de los dos casos, tanto el requisito de agotamiento de los recursos internos como sus excepciones deben ser interpretados a favor de las víctimas.[21]

La Mal Denominada Fórmula de la Cuarta Instancia

El segundo mecanismo de subsidiariedad que opera en el ámbito del Sistema Interamericano es la

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incorrectamente denominada fórmula o regla de la cuarta instancia. Esta tiene el objetivo de evitar que los tribunales internacionales se erijan en una instancia más de revisión de los errores procesales, probatorios o de interpretación en que pueden incurrir los jueces domésticos.[22]

Esta fórmula se aplica cuando una petición individual solicita que los órganos del Sistema Interamericano revisen la manera como los jueces nacionales valoraron el material probatorio o interpretaron y aplicaron el derecho interno.[23] Según la propia Corte IDH, esa institución "no es, por tanto, un tribunal de alzada o de apelación para dirimir los desacuerdos que tengan las partes sobre determinados alcances de la prueba o de la aplicación del derecho interno en aspectos que no estén directamente relacionados con el cumplimiento de obligaciones internacionales en derechos humanos."[24]

La fórmula de la cuarta instancia establece que la mera inconformidad con las decisiones judiciales de las instancias nacionales no es un fundamento suficiente para buscar la protección de una pretensión ante los órganos del Sistema Interamericano.

En consecuencia, se puede haber agotado los recursos internos y obtenido una decisión judicial desfavorable a las pretensiones y, ese hecho, por sí solo no justifica la intervención de los órganos del Sistema Interamericano. La idea central es que la protección internacional no es una instancia más a la que se puede acudir para revisar o corregir las decisiones de los jueces nacionales.

Conclusiones

La regla del agotamiento de los recursos internos es un mecanismo de subsidiariedad establecido a favor de los Estados, "pues busca dispensarlo de responder ante un órgano internacional por actos que se le imputen, antes de haber tenido la ocasión de remediarlos con sus propios medios."[25]

De esa consideración se deriva que se trata de un beneficio renunciable expresamente cuando los Estados así lo señalan o tácitamente cuando no se invoca la excepción preliminar de manera oportuna.[26]

Por otro lado, y más allá de su incorrecta denominación,la fórmula de la cuarta instancia evita la intervención de la Corte IDH para lograr la perfectibilidad de los sistemas judiciales nacionales o el mejoramiento de sus métodos de investigación, juzgamiento, o decisión.[27]

En consecuencia, no existe ninguna razón para pensar que el derecho de acceso a la jurisdicción interamericana es una especie de recurso de apelación de las decisiones judiciales nacionales o que representa una ruptura de la idea de unos tribunales de cierre dentro de los ordenamientos jurídicos nacionales.

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Notas Finales

1 *Vid*. CADH (Preámbulo). Un texto esencial sobre el origen histórico, el concepto y la aplicación del principio de subsidiariedad en los sistemas de protección internacional de los derechos humanos: Carozza, Paolo. "Subsidiarity as a Structural Principle of International Human Rights Law." *The American Journal of International Law*, vol. 97, nº 1, 2003, pp. 38-79.

2 Carozza, Paolo. "Subsidiarity as a Structural Principle of International Human Rights Law." *The American Journal of International Law*, vol. 97, nº 1, 2003, p. 63. Sobre la dificultad para construir un concepto preciso de subsidiariedad y justificarlo cuando se trata de la protección internacional de los derechos humanos: BESSON, SAMANTHA. "Subsidiarity in International Human Rights Law — What Is Subsidiary about Human Rights?" The American Journal of Jurisprudence, vol. 61, nº 1, 2016, pp. 69-107.

3 Neuman, Gerald. "Subsidiarity." En: Shelton, Dinah (ed.). *The Oxford Handbook of International Human Rights Law*. Oxford University Press, Oxford, 2013, p. 362.

4 Algunas autoras se refieren a este fenómeno bajo la idea de los efectos reflejo de las sentencias de la Corte Interamericana. *Vid*. Acosta-López, Juana Inés y Londoño Lázaro, María Carmelina. "El papel de la justicia nacional en la garantía del derecho a un recurso efectivo internacional." *International Law. Revista Colombiana de Derecho Internacional*, nº 16, 2010, p. 96.

5 Neuman, Gerald. "Subsidiarity." En: Shelton, Dinah (ed.). *The Oxford Handbook of International Human Rights Law*. Oxford University Press, Oxford, 2013, p. 365.

6 Carozza, Paolo. "Subsidiarity as a Structural Principle of International Human Rights Law." *The American Journal of International Law*, vol. 97, nº 1, 2003, p. 44.

7 Neuman, Gerald. "Subsidiarity." En: Shelton, Dinah (ed.). *The Oxford Handbook of International Human Rights Law*. Oxford University Press, Oxford, 2013, pp. 373-364.

8 Henao, Juan Carlos. "Las formas de reparación en la responsabilidad del Estado: hacia su unificación sustancial en todas las acciones contra el Estado." *Revista de Derecho Privado*, nº 28, 2015, pp. 277-366 y Uprimny, Rodrigo y Guzmán, Diana. "En búsqueda de un concepto transformador y participativo para las reparaciones en contextos transicionales." *Revista Colombiana de Derecho Internacional*, nº 17, 2010, pp. 231-286.

9 Sobre el agotamiento de los recursos internos en el ámbito del Sistema Interamericano: Burgorgue-Larsen, Laurence y Úbeda de Torres, Amaya. *The Inter-American Court of Human Rights. Case Law and Commentary.* Oxford University Press, Oxford, 2011, pp. 129-145 y Pasqualucci, Jo M. *The Practice and Procedure of the Inter-American Court of Human Rights*. Cambridge University Press, Cambridge, 2013, pp. 92-98. Sobre el agotamiento de los recursos internos en el ámbito del Sistema Europeo de Protección de los Derechos Humanos: Convenio Europeo para los Derechos y las Libertades Fundamentales (artículo 35.1) y TEDH. Asunto *Vučković y otros v. Serbia*, nº 17153/11, sentencia de 25 de marzo de 2014, párrs. 69-91.

10 En este aspecto, la jurisprudencia de la Corte Interamericana es muy cercana a la del Tribunal Europeo de Derechos Humanos sobre la misma materia. Vid. Spano, Robert. "Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity." *Human Rights Law Review*, vol. 14, nº 3, p. 500.

11 Corte IDH. *Excepciones al agotamiento de los recursos internos (Arts. 46.1, 46.2.a y 46.2.b, Convención Americana sobre Derechos Humanos). Opinión Consultiva OC-11/90 de 10 de agosto*

de 1990. Serie A No. 11, párrs. 32 y 35. Algunos casos difíciles sobre el cumplimiento del requisito de agotamiento de los recursos internos en: Pasqualucci, Jo M. *The Practice and Procedure of the Inter-American Court of Human Rights*. Cambridge University Press, Cambridge, 2013, pp. 97-98.

12 Corte IDH. Caso *Cantoral Benavides Vs. Perú*. Excepciones Preliminares. Sentencia de 3 de septiembre de 1998. Serie C No. 40, párr. 31

13 El estado no puede alegar la falta de agotamiento de los recursos internos cuando la violación a los derechos humanos constituye un delito que debe ser investigado y sancionado de oficio por las autoridades nacionales (i.e. desaparición forzada). Tojo, Liliana y Elizalde, Pilar. "Competencia de la Comisión Interamericana de Derechos Humanos." En: Steiner, Christian y Uribe, Patricia (eds.). *Convención Americana sobre Derechos Humanos. Comentario*. Temis–Konrad Adenauer Stiftung, Bogotá, 2014, p. 779.

14 Corte IDH. Caso *Brewer Carías Vs. Venezuela*. Excepciones Preliminares. Sentencia de 26 de mayo de 2014. Serie C No. 278, párr. 77.

15 Corte IDH. Caso *Herrera Ulloa Vs. Costa Rica*. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 2 de julio de 2004. Serie C No. 107, párr. 81. Sobre la estrategia de litigio de los Estados mediante la utilización tardía de la excepción preliminar de falta de agotamiento de los recursos internos: Burgorgue-Larsen, Laurence y Úbeda de Torres, Amaya. *The Inter-American Court of Human Rights. Case Law and Commentary.* Oxford University Press, Oxford, 2011, pp. 132-136.

16 Hasta el momento, el único proceso en el que la excepción del agotamiento de los recursos internos ha prosperado cuando el caso ya se encontraba bajo el conocimiento de la Corte Interamericana fue: Corte IDH. Caso Brewer Carías Vs. Venezuela. Excepciones Preliminares. Sentencia de 26 de mayo de 2014. Serie C No. 278, párr. 144.

17 Pasqualucci, Jo M. *The Practice and Procedure of the Inter-American Court of Human Rights*. Cambridge University Press, Cambridge, 2013, p. 94.

18 Corte IDH. Caso *Brewer Carías Vs. Venezuela*. Excepciones Preliminares. Sentencia de 26 de mayo de 2014. Serie C No. 278, párr. 102.

19 La Corte Interamericana ha diseñado un test para evaluar la posible existencia de dilaciones injustificadas y la resolución de los recursos internos dentro de un plazo razonable en los términos del artículo 8.1. de la Convención. De acuerdo con el Tribunal Interamericano, el plazo razonable varía en función de cuatro criterios: i) la complejidad del asunto, ii) la actividad probatoria y el interés del afectado, iii) la conducta de las autoridades judiciales y iv) el impacto sobre los derechos de los peticionarios derivado de su situación jurídica. Vid. Corte IDH. Caso *Valle Jaramillo y otros Vs. Colombia*. Fondo, Reparaciones y Costas. Sentencia de 27 de noviembre de 2008. Serie C No. 192, párr. 155.

20 Corte IDH. Caso *Brewer Carías Vs. Venezuela*. Excepciones Preliminares. Sentencia de 26 de mayo de 2014. Serie C No. 278, párr. 84.

21 Burgorgue-Larsen, Laurence y Úbeda de Torres, Amaya. *The Inter-American Court of Human Rights. Case Law and Commentary.* Oxford University Press, Oxford, 2011, pp. 138-143.

22 Neuman, Gerald. "Subsidiarity." En: Shelton, Dinah (ed.). *The Oxford Handbook of International Human Rights Law*. Oxford University Press, Oxford, 2013, p. 372.

23 Duhaime, Bernard. "Subsidiarity in the Americas. What room is there for deference in the Inter-American System?." En: Gruszczynski, Lukasz y Werner, Wouter. *Deference in International Courts and Tribunals*. Oxford University Press, Oxford, 2014, pp. 291 y 292.

24 Corte IDH. Caso *González Medina y familiares Vs. República Dominicana*. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 27 de febrero de 2012. Serie C No. 240, párr. 38.

25 Corte IDH. Caso *Duque Vs. Colombia.* Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 26 de febrero de 2016. Serie C No. 310, párr. 35.

26 Corte IDH. Caso *Brewer Carías Vs. Venezuela*. Excepciones Preliminares. Sentencia de 26 de mayo de 2014. Serie C No. 278, párr. 57.

27 "La Corte recuerda que corresponde a los tribunales del Estado el examen de los hechos y las pruebas presentadas en las causas particulares. No compete a este Tribunal sustituir a la jurisdicción interna estableciendo las modalidades específicas de investigación y juzgamiento en un caso concreto para obtener un mejor o más eficaz resultado, sino constatar si en los pasos efectivamente dados a nivel interno se violaron o no obligaciones internacionales del estado derivadas de los artículos 8 y 25 de la Convención americana." Corte IDH. Caso *Nogueira de Carvalho y otro Vs. Brasil*. Excepciones Preliminares y Fondo. Sentencia de 28 de noviembre de 2006. Serie C No. 161, párr. 80.

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but verifies that the Commission has resolved it with all the necessary elements of judgment.

Additionally, the intervention of the Inter-American Court in the control of the legality of an action carried out by the Commission is guided by the need to guarantee the right of defense of the parts of the inter-American process.

Of course, victims of a human rights violation should not exhaust domestic remedies when they do not meet the eligibility requirements established by the Inter-American Court. In addition, Articles 46.2 of the Convention and 31.2 of the Commission's Regulations establish three exceptions to the duty of exhaustion of domestic remedies.

On the one hand, the victim cannot be required to exhaust an internal remedy when it does not offer enough guarantees of due process. Second, the rule of exhaustion of domestic remedies does not apply when the victim argues precisely that the violation of his right was that he was physically prevented from accessing the national judicial system. Third, the rule of exhaustion of domestic remedies is not enforceable when there is an unjustified delay of internal procedures that should be exhausted, in such a way that there has been a breach of a reasonable period.

The Misnamed Formula of the Fourth Instance

The second subsidiarity mechanism that operates within the scope of the Inter-American System is the incorrectly called "formula" or "rule of the fourth instance."

This formula is applied when an individual petition requests that the Inter-American System review the way national judges assessed the evidence or interpreted and applied domestic law. According to the Inter-American Court itself, it "is not, therefore, a court of appeal to settle the disagreements that the parties have about certain scope of the evidence or the application of domestic laws in aspects that aren't directly related with the fulfillment of international obligations in human rights."

The formula of the fourth instance establishes that mere disagreement with the judicial decisions of the national system is not a sufficient basis to seek protection from the organs of the Inter-American System.

Consequently, domestic remedies may have been exhausted and a judicial decision unfavorable to the claims may have been obtained, yet that fact alone does not justify the intervention of the organs of the Inter-American System. The central idea is that international protection is not another appellate court that can be used to review or correct the decisions of national judges.

Conclusions

The rule of exhaustion of domestic remedies is a subsidiary mechanism established in favor of states, "as it seeks to prevent them from the need to respond to an international body for acts attributed to it before it has had the opportunity to remedy such acts with its own means."

It follows from this consideration that this benefit is expressly waived, indirectly or tacitly, when states do not hear the dispute in a timely manner.

Ultimately, the formula of the fourth instance avoids the intervention of the Inter-American Court as an "appellate court" for national judicial systems to seek the improvement of those systems' methods of investigation, judgment, or decision.

Consequently, there is no reason to believe that the right of access to inter-American jurisdiction represents a breakdown of the idea of closing courts within national legal systems.

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Article 21(3) as a Mechanism to Achieve Coherence Between International Criminal Law and International Human Rights Law

In order to avoid conflictive interpretation of norms and fragmentations, international courts and tribunals often apply an informal rule of precedent. The informal rule of precedent constitutes a coordination technique on a case-by-case basis, which presents a realistic approach to the problem of fragmentation.[22]

This technique allows international tribunals to show deference for the interpretations and the decisions taken by another tribunal, either expressly endorsing previous holdings or harmonizing prior decisions without disavowing any of them.[23] Using this informal rule of precedent has allowed for international tribunals to develop a procedural cross-fertilization on some issues of procedural and substantive law.[24]

Notwithstanding, this technique has a very limited legal impact. In accordance with Article 21 of the Rome Statute, decisions of other international tribunals are not binding for the ICC.[25] In Article 38(d) of the statute of the International Court of Justice, decisions of other tribunals appear as a subsidiary source.[26] On the contrary, under Article 21(3), judges of the ICC are obliged to interpret and apply the norms in accordance with internationally recognized human rights, which have been abundantly analyzed and developed by the human rights courts.

In this sense, the existence of Article 21(3) serves as a direct way to import developments in human rights law

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in the cases of the ICC in a systematic and organized manner. Its inclusion is an important feature of the Rome Statute that shows the importance given by the drafters to international human rights law as a fundamental part of the ICC legal framework.[27]

The appeals chamber of the ICC has recognised the importance that Article 21(3) has in the statute. In an appeals judgment, the court recalled that "Article 21(3) of the Statute stipulates that the law applicable under the Statute must be interpreted as well as applied in accordance with internationally recognized human rights." The chamber went further to assert that "[h]uman rights underpin the Statute; every aspect of it, including the exercise of the jurisdiction of the Court."[28]

It is important to mention that Article 21(3) must be applied coherently with the subject-matter jurisdiction of the ICC and in the framework of the Rome Statute, which is based partly on state cooperation. In this sense, it is reasonable that the developments made by the regional human rights courts will be used primarily to interpret and apply norms contained in this legal framework in the conduction of criminal proceedings and the proceedings of reparations.

This is so because both criminal and reparations proceedings have deeply embedded within them the protection of the rights of the accused and the victims of the case. Meanwhile, it may not be used as frequently when interpreting and applying the norms in the periphery of the activities of the court, namely, when it is deciding on issues related to state cooperation.[29]

It can then be argued that Article 21(3) of the Rome Statute not only serves to guarantee and respect the rights of the accused and other parties involved in the proceedings, but that it also ensures a coherent interpretative development of human rights between the ICC and the regional human rights courts.

The Double Dimensions of Article 21(3) Applied in the Reparation Proceedings of the ICC

The ICC has constructed the system of reparations of Article 75 of the Rome Statute based closely on the developments of the human rights courts. To date, the ICC has followed reparations proceedings in the cases against *Thomas Lubanga Dyilo*, *Germain Katanga*, and *Ahmad Al Faqi Al Mahdi*.

When deciding on reparations, the court has been guided by the principle of restitutio in integrum. According to this principle, "[r]estitution should, as far as possible, restore the victim to his or her circumstances before the crime was committed."[30] In this sense, the court has consulted the regional human rights courts to determine that "[i]ndividual and collective reparations are not mutually exclusive, and they may be awarded concurrently";[31] that "[c]ompensation requires a broad application, to encompass all forms of damage, loss and injury";[32] and that the crimes contemplated in the Rome Statute include moral and non-material damage.[33]

The recognition of a special type of harm caused to a person's life plan is a clear import from the jurisprudence of the Inter-American Court of Human Rights (IACtHR). It was initially developed by the IACtHR in the *Loayza Tamayo* case against Peru. In this case, the court explained the notion as follows:

> The concept of a "life plan" is akin to the concept of personal fulfillment, which in turn is based on the options that an individual may have for leading his life and achieving the goal that he sets for himself. Strictly speaking, those options are the manifestation and guarantee of freedom. An individual can hardly be described as truly free if he does not have options to pursue in life and to carry that life to its natural conclusion. Those options, in themselves, have an important existential value. Hence, their elimination or curtailment objectively abridges freedom and constitutes the loss of a valuable asset, a loss that this Court cannot disregard.[34]

The ICC has acknowledged the existence of this type of harm suffered by the victims of the war crime of conscripting or enlisting children under the age of fifteen into the national armed forces or using them to participate actively in hostilities, most commonly referred to as child soldiers.

In a recent judgment, the ICC determined "the need to recognise and address, as one type of harm, in the projects being implemented, the damage to a life plan/

the project of life" suffered by child soldiers.[35] The chamber asserted that "the concept of 'damage to a life plan,' adopted in the context of State responsibility at the IACtHR, may be relevant to reparations at the Court."[36]

This meant that in the identification of the harm suffered by the victims of Mr. Lubanga's[37] crimes, certain elements had to be taken into consideration, namely, the interruption and loss of schooling and the lack of development of civilian life skills, which resulted in a disadvantage to the victims, reflected by unemployment. The appeals chamber emphasised that it was crucial to recognise the special situation of child soldiers in order to appropriately remedy their harm in order to determine the reparations.[38]

The application of the notion of damage to the project of life in the *Lubanga* case allowed the judges in the reparations proceedings to adequately illustrate the different dimensions of the damage suffered by child soldiers and represents an example of a good method of procedural cross-fertilization from human rights courts.

Another important development in which the ICC has highly based its decision in jurisprudence of the regional courts is the standard of fair trial, which should apply in reparations proceedings. In this regard, when interpreting Rule 97(3) of the Rules, which provides that, "[i]n all cases, the Court shall respect the rights of victims and the convicted person," the appeals chamber noted that "[a]s the trial of the person has concluded, in the context of reparations, this right is understood to be the right to fair and impartial reparations proceedings."[39]

The chamber then proceeded to provide an extensive description of how the concept of fair and impartial trial has been constructed by the regional human rights courts. Revising some case law decided by the European Court of Human Rights (ECtHR)[40] and by the IACtHR,[41] the court came to the conclusion that "the concept of a

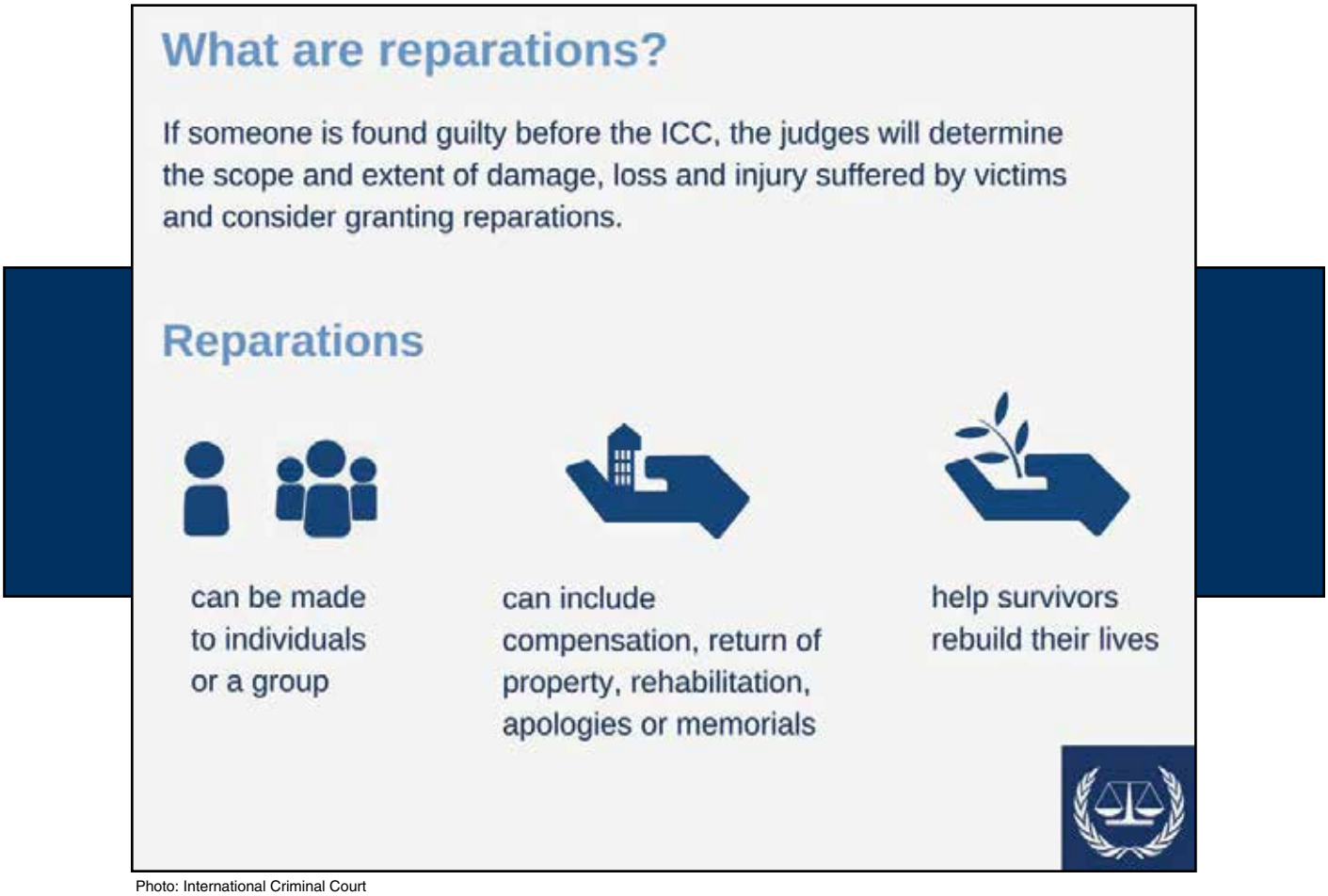

Photo: International Criminal Court

'fair and impartial trial' includes the principle of equality of arms in an adversarial proceeding which, in principle, is the same in both civil and criminal cases."[42] The court also concluded that "[e]quality of arms implies that each party must be afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage vis-à-vis the other party."[43]

Through the analysis and application of human rights standards in reparations proceedings, the ICC has adopted a victim-centered approach that strikes a balance between the rights of the convicted person and the victim. At the same time, it has achieved a coherent development of reparations issues, namely, the concept of restitutio in integrum, the modalities of reparations, the damage to the project of life, and the judicial nature of the proceedings.

Conclusions

The coherence between different areas of public international law has been a subject of worries and doubts. Given the nature of criminal and reparations proceedings and the broad set of rights involved therein, the ICC has also been presented with cases in which different human rights issues need to be decided.

In this context, Article 21(3), which determines that the ICC must interpret and apply the norms of the Rome Statute and its rules in accordance with human rights standards, aids in achieving two different purposes:

First, it safeguards the rights of the accused or convicted person and the rights of the victims of the crimes under the jurisdiction of the court.

Second, it creates a mechanism through which the ICC has systematically applied human rights standards, achieving a coherent development with the jurisprudence of human rights courts and lowering the risk of fragmentation.

Both dimensions can be found in the decisions regarding proceedings of reparations, namely, in the adoption of the notion of restitutio in integrum, the damage to the project of life, and the modalities of reparations.

Moreover, looking at what the regional tribunals of human rights are deciding and interpreting may be a useful resource for the ICC. It would have the benefits of both increasing the legitimacy of the decisions taken by the ICC in human rights issues and of developing a more coherent body of international human rights law.

Finally, and although Article 21(3) may not indicate that the judges at the ICC will always follow the previous decisions of the human rights court, the existence of different views should not be seen as fragmentation but as an adaptation of some general norms to the special nature of international criminal proceedings.

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Endnotes

1 Cesar Romano et al., *Mapping International Adjudicative Bodies, the Issues, and Players*, in Cesar Romano et al. (eds), The Oxford Handbook of International Adjudication 9 (2018).

2 Cesar Romano et al., *supra* 1, 9.

3 Pierre-Marie Dupuy & Jorge Viñuales, *Challenge of Proliferation: An Anatomy of the Debate*, in Cesar Romano et al. (eds), The Oxford Handbook of International Adjudication 137 (2018), 137.

4 *Id.* at 143.

5 Cesar Romano et al., *supra* 1, 9

6 Pierre-Marie Dupuy & Jorge Viñuales, *supra* 3; Jonathan I. Charney, *Is international law threatened by multiple international tribunals?* in The Hague Academy of International Law (eds), Collected Courses of the Hague Academy of International Law 347 (1998).

7 The three regional human rights courts are the Inter-American Court of Human Rights (IACtHR), the European Court of Human Rights (ECtHR), and the African Court of Human and People's Rights (ACtHPR).

8 Solomon T. Ebobrah, *International Human Rights Courts*, in Cesar Romano et al. (eds), The Oxford Handbook of International Adjudication 226 (2018).

9 Rome Statute, Article 7.

10 Rome Statute, Article 8.

11 Rome Statute, Article 6.

12 Rome Statute, Article 8 bis.

13 William Schabas, *International Criminal Courts*, in Cesar Romano et al. (eds), The Oxford Handbook of International Adjudication 206 (2018).

14 *Id.* at 214.

15 Karolina Kremens, *The Protection of the Accused in International Criminal Law According to the Human Rights Law Standard*, Wroclaw Review of Law, Administration & Economics Vol 1:2, 47 (2011).

16 IACtHR, *Yvon Neptune v. Haiti, Merits, Reparations and Costs*, 6 May 2008. Series C No. 180, 79.

17 ECtHR, *Boddaert v. Belgium*, application No. 12919/87, (1992), 39.

18 IACtHR, *Rochela Massacre v. Colombia*, Merits, Reparations and Costs, 11 May 2007. Series C No. 163.

19 IACtHR, *Tristan Donoso v. Panama*, Preliminary Objection, Merits, Reparations and Costs. 27 Jan. 2009, Series C No. 193, 165.

20 IACtHR, *Genie Lacayo v. Nicaragua*, Merits, Reparations and Costs, 29 Jan. 1997, Series C No. 30, 77.

21 *See* ICC, *The Prosecutor v. Dominic Ongwen*, Judgment on the appeal of Mr. Dominic Ongwen against Trial Chamber IX's Decision on Defence Motions Alleging Defects in the Confirmation Decision, 17 July 2019, ICC-02/04-01/15-1562, 131; *Prosecutor v. Jean-Pierre Bemba Gombo*, Fourth Decision on Victims' Participation, 12 Dec. 2008, ICC-01/05-01/08-320, 40; *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54(3)(e) Agreements and the Application to Stay the Prosecution of the Accused, Together with Certain Other Issues Raised at the Status Conference on 10 June 2008, 13 June 2008, ICC-01/04-01/06-1401, 92; *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on Mr. Mathieu Ngudjolo's Complaint Under Regulation 221(1) of the Regulations of the Registry Against the Registrar's Decision of 18 November 2008, 10 Mar. 2009, ICC-RoR217- 02/08-8, 41.

22 Pierre-Marie Dupuy & Jorge Viñuales, *supra* 3, 144.

23 Pierre-Marie Dupuy & Jorge Viñuales, *supra* 3, 146.

24 Armin Bogdandy & Ingo Venzke, *Spell of Precedents: Lawmaking by International Courts and Tribunals*, in Cesare P. R. Romano et al. The Oxford Handbook of International Adjudication (2018).

25 Article 21 of the Rome Statute states that: "The Court shall apply: (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence; (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict; (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards."

26 Article 38(d) of the statute of the ICJ states that: "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

27 Emma Irving, *The other side of Article 21(3) coin: Human Rights in the Rome Statute and the limits of Article 21(3)*, Leiden Journal of International Law 32, 840 (2019).

28 ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19 (2) (a) of the Statute of 3 October 2006, 14 Dec. 2006, ICC-01/04-01/06-772, 37-38.

29 Emma Irving, *supra* 27, 850.

30 ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, Annex A to Judgment on the appeals against the Decision establishing the principles and procedures to be applied to reparations of 7 Aug. 2012 order for reparations (amended), 3 March 2015, ICC-01/04-01/06-3129- AnxA, 67.

31 *Id.* at 33.

32 *Id.* at 39.

33 *Id.* at 40.

34 IACtHR, *Loayza Tamayo v. Peru*, Reparations and Costs, 27 Nov. 1998, Series C No. 42, 148.

35 ICC, *The Prosecutor v. Thomas Lubanga Dylo*, Public redacted Judgment on the appeals against Trial Chamber II's Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable, 18 July 2019, ICC-01/04-01/06-3466-Red, 38.

36 *Id.*

37 Thomas Lubanga Dylio is the former president of the Union of the Congolese Patriots. He was found guilty by the ICC on 14 Mar. 2012 of war crimes. The information is available at: https://www.icc-cpi.int/drc/lubanga

38 *Id.*

39 *Id.* at 248.

40 ECtHR, *Dombo Beheer B.V. v. the Netherlands*, application no. 14448/88, 27 Oct. 1993; *Nideröst-Huber v. Switzerland*, application 104/1995/610/698, 18 Feb. 1997; *Werner v. Austria*, applications 138/1996/757/956, 24 Nov. 1997; and *Perić v. Croatia*, application no. 34499/06, 27 Mar. 2008.

41 IACtHR, *Ivcher-Bronstein v. Peru*, Merits, Reparations and Costs, 6 Feb. 2001, Series C No. 74.

42 The ICC analysed the following case law: ECtHR, *Dombo Beheer B.V. v. the Netherlands*, application no. 14448/88, 27 Oct. 1993, 33; *Nideröst-Huber v. Switzerland*, application 104/1995/610/698, 18 Feb. 1997, 23 & 28; *Werner v. Austria*, applications 138/1996/757/956, 24 Nov. 1997, 61-66; *Perić v. Croatia*, application no. 34499/06, 27 Mar. 2008,18 &19; and IACtHR, *Ivcher-Bronstein v. Peru*, Merits, Reparations and Costs, 6 Feb. 2001, Series C No. 74, 103.

43 ICC, *The Prosecutor v. Thomas Lubanga Dylo*, Public redacted Judgment on the appeals against Trial Chamber II's Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable, 18 July 2019, ICC-01/04-01/06-3466-Red, 248.

Academic Freedom as a Human Right, from page 33

Restrictions on and Threats to Academic Freedom

Any restriction or limitation on academic freedom, as well as any human right, must be circumscribed by the context of a democratic society and must be justifiable for the fulfillment of legitimate, reasonable, and proportional purposes for such limit on freedom, given that the exercise of academic freedom imposes on the scholar certain obligations to society, which subordinates it to the general welfare.

Unfortunately, many concerns arise today in the Americas regarding the respect, protection, and fulfillment of academic freedom, not only because some states are developing practices of discrimination and criminalization against universities and academicians, but also because violence is being used against vulnerable groups within universities.

History has shown that dictatorships tend to attack academic freedom, universities, and academicians because "universities have been the center of the critical and plural thinking of a nation, where ideas generated from a scientific-academic process emerge directly and foster democracy itself."[13] Authoritarian regimes often restrict the freedom to research, to express, and to inform, both in and out of universities, which consequently hinders the production of scientific knowledge and critical debate within society, and thus undermines democracy.

This situation has attracted the attention of the Inter-American Commission on Human Rights (IACHR), which in its 171st session conducted a thematic hearing on the recurrence of incidences and patterns of violation of academic freedom, autonomy of higher education institutions, as well as discrimination practices and criminalization of protest.

Different violations of the above-mentioned rights were denounced in Bolivia, Brazil, Canada, Colombia, Cuba, Chile, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Venezuela, and the United States, among others. The current contexts in Venezuela and Nicaragua are the most serious, as they are not only restricting the rights of professors and university students, but also breaking down democracy itself.

The Venezuelan and Nicaraguan governments have each developed a policy of restrictive actions to criminalize protests, and attacks and break-ins are occurring at university campuses. Military personnel, police officers, and armed civilians are exercising control and conducting surveillance, as well as intervening in actions within universities and their surroundings.[14]

In Nicaragua, between April and November 2018, more than 500 students were detained and tortured by the government.[15] In Venezuela, between 2010 and 2018, at least fifty judicial decisions violated universities' institutional autonomy and, consequently, academic freedom.[16] In May 2018, students of the National Autonomous University of Honduras (UNAH by its acronym in Spanish) were brutally repressed and detained in a protest against the privatization of universities.[17]

Consequently, the violation of the rights to life, personal integrity, expression, association, and peaceful assembly, of which the university actors from the above-mentioned countries have been victims, has inhibited these actors from exercising their right to freedom of speech and

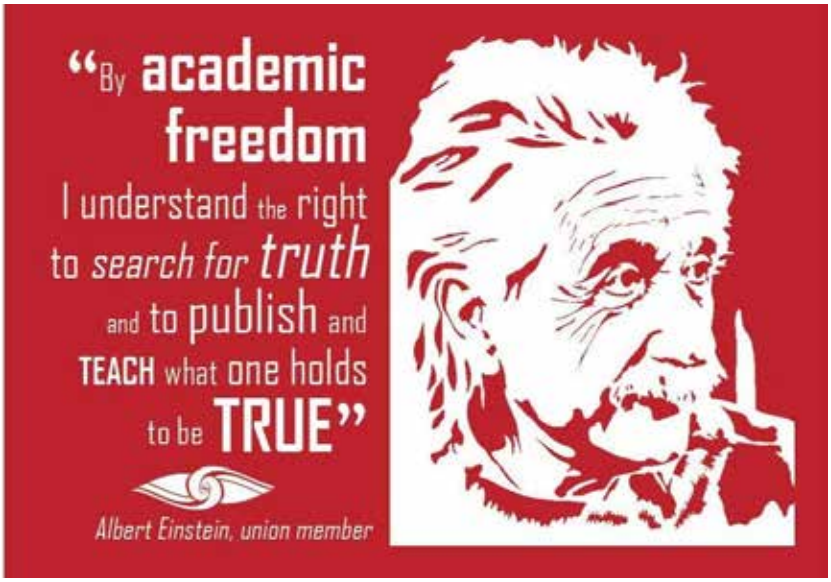

Photo: www.veteranstoday.org

education, undermining not only academic freedom but democracy itself.

With regard to the violation of economic, social, and cultural rights in university environments and discrimination in the sphere of higher education, there are some concerns related to the practice of dismissals, loss of position, or expulsions as sanctions for academic work, such as statements in the classroom, published writings in specialized magazines or blogs, professional or student union activity, demonstrations by student movements, and criticism of leadership or higher education policy in the Americas.[18]

Likewise, serious concerns also persist regarding access to higher education. In Colombia, difficulties in accessing higher education due to high costs stand out, and the polarization in the discussion of topics linked to the "post-conflict" represent a threat scenario within the universities. In Chile, access to a public university education represents a great challenge for the vast majority of the population. In Argentina and Bolivia, the decrease of the budget for higher education and for the improvement of salary conditions for professors emerges as a threat to academic freedom.

The above-mentioned situations highlight the necessity to discuss the meaning of academic freedom, its nature, scope, and limits, to determine the grounding of academic freedom in the framework of international human rights law, its relationship with other human rights, and with democracy itself, in order to ensure its protection and exercise.

Conclusions

Due to the relationship between academic freedom and the right to education, the freedom of expression, and the right not to be discriminated, it is essential per se that professors, researchers, and universities enjoy the protection and independence necessary to add to scientific knowledge, since they are the ones who ensure the development of democracy in society and allow the enjoyment of full freedoms.

The relationship between academic freedom and democracy is inherent and reciprocal. The university represents for democracy the necessary space for the birth and the proliferation of scientific knowledge, as well as the new ideas that arise from academic debate between professors, researchers, students, and different societal actors. The exercise and enjoyment of academic freedom benefit not only professors, students, and educational institutions, but also and primarily the democratic society, through the creation of new knowledge, which leads to political, economic, and social development.

Academic freedom finds its ground in international human rights law. Consequently, any action or practice that impedes or violates it compromises the international responsibility of the states, and any restriction imposed on academic freedom by states or private actors with the aim to punish, restrict, persecute, and/or discriminate its exercise constitutes a violation of international human rights law.

The use of policies, norms, and practices to suppress academic freedom and university autonomy, to criminalize protest, to persecute university actors, and to attack or break-in at university campuses constitutes a violation not only of the international obligations of the state to protect, promote, and fulfill human rights, but also to promote and defend democracy as a right of the peoples of the Americas, which should not be tolerated by the international community.

Finally, despite the fact that academic freedom is regulated under international human rights law,[19] the role of international human rights bodies is vital to develop the international human rights corpus iuris on academic freedom, determining its nature, scope, limits, restrictions, and links to the right to education and freedom of expression, among others,[20] in order to overcome the thought that academic freedom is not a self-contained right.

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Endnotes

1 Lima Declaration on Academic Freedom and Autonomy of Institutions of Higher Education, 1988.

2 Declaration on Rights and Duties Inherent in Academic Freedom, 1982 (International Association of University Professors and Lecturers (IAUPL), Italy, the Magna Charta Universitatum, (Standing Conference of Rectors, Presidents, and Vice Chancellors of the European Universities, CRE, 1988); the Guide to Implementing the Principles of State Responsibility to Protect Higher Education from Attack, 2016; the Guidelines for an Institutional Code of Ethics in Higher Education (International Association of Universities and the Magna Charta Observatory, 2012), among others.

3 Committee on Economic, Social and Cultural Rights (CESCR), "General Comment No. 13 on the right to education," 1999, p. 237-238, paragraph 40.

4 American Association of University Professors, AAUP, "Glossary of Acronyms & Terms," 2007, http://www.akronaaup.org/documents/aaupglossary.pdf

5 American Association of University Professors, "Interpretive Comments to the 1940 Statement of Principles on Academic Freedom and Tenure," adopted by AAUP in April 1970, https://www.aaup.org/file/1940%20Statement.pdf

6 Patrick Blessinger & Hans de Wit, *Academic freedom is essential to democracy* (6 Apr. 2018). https://www.universityworldnews.com/post.php?story=20180404101811251

7 CESCR General Comment No. 13: The Right to Education (Art. 13) paragraph 38.

8 *Id.*

9 Lima Declaration on Academic Freedom and Autonomy of Higher Education Institutions, 1989. https://www.wusgermany.de/sites/wusgermany.de/files/userfiles/WUS-Internationales/wus-lima-englisch.pdf

10 Robert Quinn & Jesse Levine, *Intellectual-HRDs & Claims for Academic Freedom Under Human Rights Law*, International Journal of Human Rights, 18, pp.7-8, 898-920. (2014).

11 Lima Declaration on Academic Freedom and Autonomy of Institutions of Higher Education, 1988. Principle 3.

12 Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Report of the Special Rapporteur on access to information, criminal libel and defamation, the police and the criminal justice system, and new technologies, Economic and Social Council Fifty-sixth session, E/CN.4/2000/63, 18 Jan. 2000, paragraph 37.

13 *Universities in Venezuela: Assaults, repression and death during 2017*, Aula Abierta. (4 Apr. 2018, updated 3 Jan. 2019). http://aulaabiertavenezuela.org/index.php/2018/04/04/universities-in-venezuela-assaults-repression-and-death-during-2017/

14 *See* Aula Abierta, *Preliminary report: Attacks and repression against professors and university students in Venezuela, February-October 2017*, http://aulaabiertavenezuela.org/wp-content/uploads/2017/08/Aula-Abierta-Venezuela.-Restricciones-y-represalias-contra-estudiantes-y-profesores-universitarios-en-Venezuela-Febrero-Julio-2017-CON-IMAGENES-1-1.pdf; *See* Aula Abierta, *Report on the situation of Professor Freddy Quezada and the patterns on criminalization of protest in Nicaragua*, http://derechosuniversitarios.org/index.php/2018/11/21/patrones-de-violacion-a-la-libertad-academica-y-autonomia-universitaria-se-repiten-en-nicaragua/

15 *See* Aula Abierta, *Report on the situation of Professor Freddy Quezada and the patterns on criminalization of protest in Nicaragua*, http://derechosuniversitarios.org/index.php/2018/11/21/patrones-de-violacion-a-la-libertad-academica-y-autonomia

16 *See* Aula Abierta, *A Public Statement in Rejection of the Decisions of the Venezuelan Judiciary that Violate the Autonomy of Institutions of Higher Education and Academic Freedom,* http://aulaabiertavenezuela.org/index.php/2018/11/27/comunicado-en-rechazo-a-las-decisiones-del-poder-judicial-venezolano-que-vulneran-la-autonomia-universitaria-y-la-libertad-academica/

17 Georgio Trucchi, (23 Aug. 2017). *Honduras. Crisis es el reflejo del autoritarismo del régimen*. Resumen Latinoamericano. http://www.resumenlatinoamericano.org/2017/08/23/honduras-crisis-universitaria-es-el-reflejo-del-autoritarismo-del-regimen/

18 In Brazil, the university campuses were immersed in campaigns of political activism in the framework of the elections of October 2018. Although the Constitutional Court of Brazil stopped the attack against universities, there are still great risks for university autonomy.

19 *See* Aula Abierta, *Academic Freedom Within the Framework of the International Law of Human Rights. Case: Venezuela*, http://aulaabiertavenezuela.org/index.php/2018/04/27/la-libertad-academica-en-el-marco-del-derecho-internacional-de-los-derechos-humanos-caso-venezuela/

20 In this context, the author recommends to the United Nations Human Rights Council to schedule a discussion on the creation of a rapporteur on academic freedom.

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