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SUMÁRIO

AN ESSAY ON WORK RELATIONS AT THE TRINATIONAL BORDER

Fernando Cesar Mendes BARBOSA[1]

This paper has as research *locus* the Trinational Border, formed by *Ciudad del Este*, *Puerto Iguazú* and Foz do Iguaçu, respectively, Paraguay, Argentina and Brazil. In this region, there are frequent flows of cross-border workers who daily cross the boundaries of the Trinational Border to work. These are work relations built by Brazilians who travel to the Paraguayan city to develop work activities, which are mainly of a commercial nature, and by Paraguayan citizens who travel to the Brazilian city to work, mainly the work done in Brazilian houses, as domestic work and works done by men, mainly related to construction activities.

For doing so, the purpose of this research is to investigate the labor relations constructed from the social dynamics existing in the border region between Brazil and Paraguay, specifically between the cities of Foz do Iguaçu and *Ciudad del Este*.

If, on the one hand, there are no legal problems involving the possibility of a citizen from another country work in Brazil, according to the the law, including the border resident (SLOMP, 2014, FARINA, 2015), what has been seen is a great gap between the legal and normative instruments that guarantees protection to the cross-border worker and the reality in which these workers are inserted, one that has been socially and historically constructed at this trinational border. Although these work relations are invisibilized, they are relations that, besides constituting the Trinational Border itself, they also constitute the life of these workers.

The discussion highlights the need to redefine the concept of a cross-border worker who, when characterized as a Paraguayan citizen working in Brazil or as a Brazilian citizen working in Paraguay, strengthens the lines that divide both countries.

In order to recognize and discuss the social and work relations built in this region, methodologically, work relations were analyzed from data collected through more than one research instrument, mainly, from researches already been conducted on the subject.

Historical survey, bibliographical research, analysis of legal instruments and regulatory institutes were instruments used along with a semi-structured interview with Sister Terezinha Mezzalira, coordinator of the Casa do Migrante, in Foz do Iguaçu / PR, was carried out, together with data from the attendances held in that space, seeking to identify working relationships in the border region.

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In this research, the trinational border region is conceived as a border territory that distances itself from what is stipulated to the other regions of the country. This analysis shows that, even before the creation of *Puerto Iguazú, Ciudad del Este* and Foz do Iguaçu, this territory was already been building, through work relations of Argentines, Brazilians and Paraguayans, in the system known as obrages (WACHOWICZ, 1987).

This analysis showed that the work relations of cross-border workers in this region have been considered as “underground work", strongly marked by relations of exploitation (CARDIN, 2015). It was also showed that, despite the existing legal and normative framework, which governs these labor relations, it has been considered that there is state ineptitude in the construction of public policies that make these rights more effective (FARINA, 2015).

Thus, when a Paraguayan citizen daily crosses the boundaries of the Paraguayan and Brazilian States to work in the Brazilian city of Foz do Iguaçu, making his way back at the end of the day, or when a Brazilian citizen goes the same route, to the other side, in order to work in Ciudad del Este, what actually there is, is not a Paraguayan working in Brazil or a Brazilian working in Paraguay. It has been shown that these two workers are working, in fact, in a territory that is not necessarily Brazil or Paraguay, but a border territory that has long been constructed from historical, social and cultural activities.

Finally, it is necessary that there be a joint effort of the States composing the Trinational Border, especially by affirmative actions and public policies that recognize the border as a space of social meanings. This comprehension requires the appreciation of the differences between this region and the other regions of the State. It is necessary that joint actions recognize this border not only as the limit of the State, but as a territory that is not necessarily Brazil or Paraguay, but a border territory that has long been constructed by historical, social and cultural.

It is hoped that the naturalization of inequalities and social exclusion, which insist on maintaining the work of the border resident as a sub-work, will be transformed into practices capable of recognizing border work as a *sui generis* work relationship of the border territory.

REFERENCES

CARDIN, Eric Gustavo. **A expansão do capital e as dinâmicas das fronteiras**. Jundiaí: Paco Editorial, 2015.

FARINA, Bernardo Cunha. **Trabalhadores fronteiriços na tríplice fronteira:** confronto entre a igualdade jurídica e a realidade. 2015. 210p. Dissertação (Mestrado em Sociedade, Cultura e Fronteiras) – Universidade Estadual do Oeste do Paraná – UNIOESTE. Foz do Iguaçu. 2015.

JAQUEIRA, Manoela Marli. **O trabalhador imigrante em Foz do Iguaçu:** a legislação trabalhista

sob a perspectiva dos direitos fundamentais e humanos. 135 f. Dissertação (Mestrado em Sociedade, Cultura e Fronteiras) - Universidade Estadual do Oeste do Paraná, Foz do Iguaçu, 2016.

MEZZALIRA, Terezinha Maria. Terezinha Maria Mezzalira: entrevista [maio 2018]. Entrevistador: Fernando Cesar Mendes Barbosa. Foz do Iguaçu, 2018.mp3. 60 min.

SLOMP, Angélica Cândido Nogara. **A tutela juslaboral do migrante transfronteiriço sob a perspectiva dos direitos humanos.** 214f. Dissertação (Mestrado em Direito) – Faculdade de Direito da Universidade de São Paulo. São Paulo, 2014.

WACHOWICZ, Ruy C. **Obrageros, mensus e colonos**: História do Oeste Paranaense. Curitiba: Vicentina, 1982.

THE ERGA OMNES OBLIGATIONS AND THE BARCELONA TRACTION CASE FROM ICJ

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THEME

The present article aims to deliberate about the incidence of the erga omnes obligations in the International Law, particularly assuming the analysis of the Barcelona Traction Light and Power Company Case from the International Court of Justice, whose judgement defined this new classification of the international obligations of the States.

The right to invoke international responsibility before erga omnes obligations is established in articles 42 and 48 of the Draft Articles On Responsibility of States for Internationally Wrongful Acts (ASR), that settles requirements for a State to invoke this kind of responsibility, which will be discussed in the following topics.

RESEARCH PROBLEM

In 1958 the Belgium State went before the ICJ against Spain requiring reparation of harms caused to Belgium shareholders of a Canadian company called Barcelona Traction Light and Power Company which provided energy services for Catalonia, in Spain and ended failing in virtue of the restrictive measures taken by the Spanish government regarding to the company's activities.

The ICJ, in its judgements of 24 July 1964 and 5 February 1970, declared that the Belgium demand was unfounded because of the lack of jus standi for the diplomatic protection of a Canadian company by the Belgium State, in virtue of the actions of Spain.

In a obiter dictum way, the ICJ established differences between the State's obligations related only to other States, and the State's obligations concerning the international community as a whole, which are erga omnes obligations.

Lastly, the Court decided that the supposed violations in the present case did not have an erga omnes character, since it did not regard to the international community as a whole, thus, Belgium was not legitimized to plead before the ICJ in this matter. This decision opens space for questionings regarding to when an international obligation is considered to be erga omnes and what are the requirements to define these obligations.

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HYPOTHESES

The erga omnes obligations aim to protect rights and values inherent to all human beings and affect the international community as a whole. Any character of obligations, even the ones not established in treaties can be considered erga omnes, including the treaties binding all States, in virtue of its nature.

According to the Case of the “Mapiripán Massacre” v. Colombia and the Advisory opinion OC-18/03 from the Inter-American Court of Human Rights, these obligations are important as baseline and source of the International Law, as an example, the duty to protect and preserve human rights. Also, an erga omnes violation is attributable to the State even when practiced by a non-State actor, because of its important nature.

The application of these obligations in the human rights field, as established in the Barcelona Traction Case, reports to its importance to the international community, in which all States have the duty to disseminate and defend. In conclusion, the right to self-determination was recognized as erga omnes in cases as well as the East Timor (Portugal v. Australia) and the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Advisory Opinion, both from ICJ.

THEORICAL ANALYSIS OF THE METHOD

Article 42 of the ASR mentions the situations in which a State can be considered as injured and consequently invoke international responsibility of another State. One of the described possibilities is when the breach obligation is owed to a group of States, in which this State is included, or if it regards to the international community as a whole, since the breach directly affects that State. In other words, this paragraph describes the erga omnes obligations.

Also, article 48 defines that a State, which is not the injured States in the matter, is able to invoke international responsibility of another State if, among other possibilities, the breached obligation is owed to the international community as a whole, configuring once again, the State’s responsibility before the erga omnes obligations.

CONCLUSION

By the reasons exposed, it is clear the importance of the erga omnes obligations in the International Law, mainly in the human rights sphere, to protect, preserve and disseminate the idea of the human rights preservation.

Moreover, there is a necessity to observe the requirements of the establishment of an

obligation as erga omnes and the reflections of this nomination in treaties, international court's judgements and States relations.

Lastly, the Barcelona Traction Case has an enormous contribution to the establishment of the erga omnes obligations and mainly to the international jurisprudence and its contribution to all international Courts.

REFERENCES

Barcelona Traction Case Last Developments. https://www.icj-cij.org/en/case/50

Barcelona Traction Case Judgements. https://www.icj-cij.org/en/case/50/judgments

Barcelona Traction Case Written Proceedings. https://www.icj-cij.org/en/case/50/written-proceedings

Draft Articles on Responsibility of States for International Wrongful Acts with commentaries. http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf

THE IMPORTANCE OF ‘1976-POUND CONFERENCE’ FOR MULTI-DOOR COURTHOUSE SYSTEM

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THEME

The System of Justice has a major concern about how to improve the courts and the justice administration. Due to high rates of litigation in society and the effects of a globalized world, the importance of giving an accurate adjudication for cases brought to court has been one of the most important issue in the legal system. Not only because time is important but also because people deserve a justice system with quality. In the course of the History, some actions have been taken in regarding to solve the accumulation of case’s court and the improvement of the system as a whole. One of these important initiatives was the Pound Conference occurred in 1976.

RESEARCH PROBLEM

The Pound Conference has happened in St. Paul, MN, USA. It was named in honor of Roscoe Pound – a Professor of Harvard Law School in the 20s and 30s. Professor Pound “In August 1906 at the 29th Annual Meeting of the American Bar Association (…) gave an address entitled The Causes of Popular Dissatisfaction with the Administration of Justice.” Because of his speech concerning the discussion in terms of a better Administration of Justice, the 1976 conference received his name. Moreover, American Bar Association (ABA), whom has promoted the use of Alternative Dispute Resolution (ADR), has sponsored the “Pound Conference.”

Lawyers, judges, law professors, and court administrators met in the Pound Conference in 1976, for debating and examining problems concerning American legal system. This Conference

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discussed some perspective on Justice in the future. The event's theme was "Proceedings of the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice." According to Barret & Barret, "Chief Justice Warren Burger called the Pound Conference of lawyers to examine and discuss the inefficiencies of the justice system." The Conference was a call to promote and support the use of ADR in the justice system. Since there, it has been considered a milestone in the modern resurgence of Alternative Dispute Resolution not only in the U.S.A but also in many different countries.

HYPOTHESES

Professor Sander – from Harvard School – was chosen for giving a speech. His crucial discourse has been a great influence for the resurgence of different methods of solving a dispute. Following the idea of what the conference was called, he gave a tremendous speech presented a "multi-door courthouse, where citizens would be given a number of options for dispute resolution in addition to litigation."

He brought the idea defended for Professor John Barton wherein he wrote an article entitled "Behind the Legal Explosion" discussing that if the number of federal appellate cases increased at the same proportion about the grown happened in the years before, by 2010, he predicted, there be over one million appellate cases. Before Barton's concerns, Professor Sander pointed out some different approaches in order to fight against the grown of litigation rates.

First, the speaker starts saying that a combat against a prediction of litigation rates growing could be done preventing disputes, *i.e.* changing substantive law. Modifying a substantive, in his thought, could work as modifier of certain rules that substantially were responsible to increase the litigation rates. He exemplified by saying that, "If a statute says that marital property on divorce will be divided in the court's discretion there is likely to be far more litigation than if the rule is, as in the community property states, that such property will formally be divided 50-50." Another method of preventing dispute by doing modification in the substantive law is creating preventive laws. Nonetheless, Sander presented a second way of reducing the judicial caseload. In fact, this second approach was the core of his discourse bringing the resurgence of Alternative Dispute Resolution methods such as Mediation, Conciliation, Negotiation, and Arbitration. Based on that, Sander stablished a criterion for helping to know which particular disputes could be resolved by ADR. He discussed the nature of dispute, the relationship between disputants, the amount in dispute, the cost, and the speed of the result of using ADR rather than litigation court process. Giving some implications in result of adopting ADR, Sander explained that "the court were the principal public dispute processors. But that time is long gone." Consequently, it opened a door for

a diversity of different ways of solving a dispute that could be more adaptable to the particular nature of a certain specific cases. According to his words, “What I am thus advocating is a flexible and diverse panoply of dispute resolution processes, with particular types of cases being assigned to some of the criteria previously mentioned.”

THEORICAL ANALYSIS OF THE METHOD

1976 - Pound Conference was an important legacy in terms of using Mediation (and others ADR methods) in Court system with a special mission of giving a variety of ways for solving a conflict other than litigation. It is also a significant discourse because it proposed changes of the usual method of solving disputes based in the litigation brought and decided before court. Its importance is clearly seen because the adoption of diversity types of solving disputes was presented in an event sponsored by American Bar Association. Being presented before lawyers, the conference (and more precisely Sander’s speech) revealed how important Professor Sander’s call was in promoting a new paradigm for a class (lawyers) that are intensively committed with the litigation process. His thoughts produced a change not only in court system but also in the formation (meaning education) of lawyers and other jurists. It provide singular modifications in the system by creating, as well, different profession such as mediators, conciliators, negotiators and so on.

CONCLUSION

Professor Sander gave the speech explaining the multi-door system, which has been considered a revolutionary form of offer different ways of solving a dispute. According to, this conference has been considered as the beginning of the court-related ADR of today. In fact, many countries such as Brazil, Portugal, Spain, Italy etc. has been influenced by Sander’s ideas, and the movement of ADR has begun in those countries in respond of the Pound Conference.

REFERENCES

BARRET, J. T., & Barret, J. P. **A History of Alternative Dispute Resolution**. San Francisco: Jossy-Bass, 2004.

KOVACH, K. K. **Mediation in a Nut Shell**. Austin : Thomson-West, 2003.

Retrived from Global Pound Conference. Available in <http://globalpoundconference.org/about-the-series/1976-pound-conference#.Vx6iy4-cHIU> 2016, April 25.

SANDER, F. E. **Varieties of Dispute Processing**. St. Paul, MN : West Publishing, 1979.

THE INTERNATIONAL LAW RESPONSE TO THE MODERN AUTHORITARIANISM OF CONSTITUTIONAL REGIME

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THEME AND RESEARCH PROBLEM

Between the set of rules and principles that govern states in their relationship, there is the famous principle of non-interference in the internal affairs of states (Charter of United Nations, Article 2, paragraph 7) that is not absolute, especially when, there is a civil war in a country, when there are serious violations of human rights, or when there is a gross failure of the constitutional and democratic system (in the case of a military coup for example).

However, the latter which represent a rude and violent form of access to power in a state, it's less and less used due to a possible international military intervention or to the legal consequences that the actors could suffer through international courts for restoring peace and constitucional order. In this context, we are witnesses of a new constitutional phenomenon that is increasingly emerging and that is calling attention of the international community (in Africa with notably the Arab spring, in South America with the case of Columbia, Venezuela, and Bolivia, and even in Europe with Hungary and Turkey's case).

At the first look, the phenomenon seems to provide constitutional tools and excessive powers to the politicians for keeping themselves in the power for a long time, so appearing the regime, at the same time democratic and constitutional but also abusive and autoritharian.

Moreover, scholars like Barg (online, 2015, P.10), to define the phenomenon, speaks about a stealth authoritarianism and authoritarian governance in which Stealth authoritarian regimes use democratic institutions and practices to create an illusion of legitimacy that masks authoritarianism. Thus for Barg, these practices include rewriting constitutions, constitutional amendments, revising court structures and review powers, appointing judges without oppositional party input, providing bureaucratic or state institutions with increased powers or duties that formerly belonged to judicial or legislative branches, and empowering the executive branch to dominate legislative.

Following the same line, Landau qualify this phenomenom as abusive constitutionalism, described as the use of the mechanisms of constitutional change (constitutional amendment and constitutional replacement) to undermine democracy. According to him, in the international law, the democracy clauses often used not just to punish regimes that come to power through unconstitutional means, but also used to detect traditional military coups, which are openly unconstitutional, are much less effective at detecting abusive constitutionalism, which uses

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means that are either constitutional or ambiguously constitutional.

In Hungary, after winning the parliamentary elections in 2010 the Fidesz party has been able to record a tremendous amount of power and pass legislation without debate or votes from other parties in Parliament. Therefore, the new Constitution was created to give Fidesz members more power.

In South America, Braver (Online, 2018) points out that, in all three countries mentioned, Congress had repeatedly tried and failed to radically change the constitution through the amendment method; eleven in Bolivia; twice in Venezuela; and five times in Colombia. Citizens believed that the congresses were corrupt tools of entrenched interests whether it be the drug cartels in Colombia, oil barons in Venezuela, or the lords of the large landed estates in Bolivia. The Congresses were discredited actors; their popularity was at its peak; Congress was the very problem that constitution-making would seek to fix. The only actor with the necessary legitimacy to write new constitutions was constituent assemblies. Since the constitutions lacked provisions for a constitutional assembly, they could only convoke illegally.

Then, we are able to see that politicians abuse of their popular support for political purposes and personal interests.

From these cases and observations, we can say that the central problem of modern authoritarianism of constitutional regime in international law remains largely unresolved and the fundamental questions, we can make, are about what we understand by modern authoritarian constitutional regime or by abusive constitutionalism? In other words, how to detect this kind of regime? How do modern authoritarian regimes deal with international law pressure? What are the protecting mechanisms of Democracy existing in international law? Are they effectives against this threat?

HYPOTHESES

Throughout these questions, we are able to note that this article investigates under which conditions we can qualify and identify a state like an authoritarian constitutional regime, by giving some specific examples through the case study of the Fidesz government in Hungary and the stupid case of Columbia , of Bolivia and of Venezuela.

Further, this article also aims to examine the discourse surrounding the international community and their member states, the fundamental values violated by this kind of regime, the effectiveness of the solutions and mechanisms suggested by the international law and by some scholars like David Landau.

This article is really revealing because it will help the reader, especially the academician in law, to develop his knowledges in constitutional law and also in international law on a new area of study, the current phenomenon faced by some states.

In spite of the difficulties presented for detecting this new threat, we are going to suggest ways to reinforce democracies, by defining first of all, from specific examples, what is the modern authoritarianism of constitutional regime. Next, we will search which kind of democracy-protection mechanisms the international law offers against this threat, by suggesting and explaining some solutions such as the democracy clauses, as the internalization and compliance with international law proposed by Barg (Online, 2018, P.23) that international law needs to be internalized into the fabric of domestic law to make the international legal rules punishable by domestic legal mechanisms.

Considering that international factors affect domestic structures of the state, we suggest international intervention in case of non-respect of human right (economic trends or legal sanctions) and the creation of a Global Constitutional Court which will be in charge to check out the good use of constitutional mechanisms in each state and to guarantee the internationalization of international values of democracy in the internal struture of each state.

Taking also in consideration that political problems can be fixed with political solutions, we recommend, in international relations, that international organizations supervise the election process, in accordance with national legislation and international election standards in order to facilitate a smooth process (The Organization for Security and Cooperation in Europe's Office for Democratic Institutions and Human Rights – OSCE/ODIHR).

Another important point is that, we recommand more and more regional and international summits to reinforce the democracies, and to give scholars an opportunity to take their proposal to international level. Finally, we will try to check out if these international solutions are effectives for responding to this new authoritarianism and for protecting the constitutional order. It's necessary to create international conditions to reinforce multipartism in these states and to balance the political field.

THEORETICAL ANALYSIS OF THE METHOD

The theoretical approach basis for this analysis is based on the literature which has emerged in international law, constitutional law and international relations to explain the dynamic of this political phenomenon in constitutional regimes.

We use a method of inductive analysis, starting from particular cases for the international scenario, seeking to explain and describe from real facts what is an abusive constitutional regime, as well as, seeking to solve this increasingly present threat.

CONCLUSION

This article provides a roadmap to the new literature on international law and on constitutional law, offering some mechanisms to reinforce national democracies against the modern authoritarianism of constitutional regime. we have seen that this phenomenon is increasingly

studied by some authors who bring important elements so that we can explain and understand it, such as the use of constitutional means for the personal and political purposes to erode the democratic and constitutional order. We realize that these States seem to be democratic, but veiled authoritarianism is established.

From this perspective, we bring various solutions and mechanisms in both international laws and relations, which can be effective in combating this threat and preventing it from being reproduced in several other States. However, we note that there is the need for collaboration from other branches of law and political science, as well as a manifest desire of States to respect and apply the values of democracy.

REFERENCES

BRAVER Joshua, **Putting "Abusive Constitutionalism" and Populism in Perspective**, Tufts University, 2018. Available on http://www.iconnectblog.com/2018/07/putting-abusive-constitutionalism-and-populism-in-perspective-2/#_ednref1

BARG Matt, **Authoritarian Member States in International Organizations: Hungary and Romania in the European Union**, The University of San Francisco, USF Scholarship: a digital repository @ Gleeson Library | Geschke Center, 12-20-2015. Available on : https://repository.usfca.edu/cgi/viewcontent.cgi?article=1197&context=thes

LANDAU David, **Abusive Constitionalism**, University of California, Davis. Available on https://lawreview.law.ucdavis.edu/issues/47/1/articles/47-1_Landau.pdf

GUILFOYLE Douglas, **The Future of International Law in an Authoritarian World**, 2019. Available on https://www.ejiltalk.org/the-future-of-international-law-in-an-authoritarian-world/

OSCE - OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS, Available on https://www.osce.org/odihr/elections

THE RIGHT OF SELF-DEFENSE

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THEME

The present paper aims to analyze the use of the right of self-defense, embodied in Article 51 of UN Charter. United Nations principles ensure a good harmony between countries, so that countermeasures from one state to another should avoid the use of armed force, for either defense or reprisal.

It is important to bear in mind that the use of self-defense is restricted to the case of an armed attack and only can be used when fulfill the formal requirements, existent since the Caroline affair, of an imminent attack, with necessity and proportionality.

RESEARCH PROBLEM

The right of self-defense, laid down in Article 51 of the UN Charter, has therefore become the pivotal point upon which disputes concerning the lawfulness of the use of force in interstate relations usually concentrate. Such disputes not only raise questions of legal interpretation, but even more often questions of fact, as shown by several decisions of the ICJ.

One example where it was rejected was the firing of 23 cruise missiles on 26 June 1993, by US warships in the Red Sea and the Persian Gulf upon Iraqi intelligence headquarters in Baghdad, in response to an unsuccessful Iraqi attempt to murder former US President Bush during his visit to Kuwait in April 1993. That could not be justified as an act of self-defense, as US President Clinton claimed on the evening of the raid. Even if the attempted assassination of former President were to be qualified as an armed attack, it is quite clear that in this situation, such an armed attack no longer existed more than two months later, nor did the threat of such an attack.

HYPOTHESES

As said before the use of self-defense is permitted to the case of an armed attack, in the absence of other exceptions to Article2(4) allowing the use of force by States, it is forbidden to exercise force even for the purpose of ending an illicit behavior of another State. Not even arbitral awards or judgments by the ICJ can been forced through forced self-help (according to Article 94 of

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the UN Charter - enforcement of judgements depends on voluntary acts of the States; the ICJ can only make recommendations).

The ICJ hardly accepts self-defense as a justification for the use of armed force against a State, as can be observed in the Armed Activities on Congo case (par. 147) and in the Nicaragua case (par. 233).

THEORICAL ANALYSIS OF THE METHOD

A State can use the right of self–defense if it is to response an imminent attack provided there is proportionality and necessity in counter attack. So, these three are essential requirements for the application of this institute, as can be seen in the Oil Platforms case and in the advisory opinion of Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, when the absence excluded the self-defense argument.

The principle of proportionality is one of the principles of international humanitarian law that seeks to reconcile the principle of humanity with the principle of military necessity to ensure that there is no excess.

That is why it is important that you have the fulfillment of the requirements brought up so that you can use the institute of self-defense in the correct way.

CONCLUSION

For the foregoing reasons, it is important to have a study on the self-defense institute so that it can prevent countries from using it in a way that masks an attack. So it is the role of the ICJ to ascertain whether the requirements were filled correctly.

It is also necessary that the restriction remain for only armed cases, so that it is not used as a preventive self-defense. For extending the scope of this right would increase the possibility of attack without previous attack, which would break the peace and harmony between countries, thus would have a contradiction to the principles enshrined in the UN Charter.

Therefore, in order to bring the international humanitarian law into line with the right to self-defense, it is necessary to comply with the requirements embodied in Article 51 of UN Charter and in cases already judged by the ICJ.

REFERENCES

Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005, p. l68.

British-American Diplomacy - The Caroline Case. Treaties and Other International Acts of the United States of America, edited by Hunter Miller, Vol. 4, Documents 80-121: 1836-1846, available at: http://avalon.law.yale.edu/19th_century/br-1842d.asp

Georg Nolte, Albrecht Randelzhofer, Ch.VII Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression, Article 51, in Bruno Simma et al. (eds.), The Charter of the United Nations: A Commentary, Volume II (3rd edition) (2012).

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004.

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). Merits, Judgment. I.C.J. Reports 1986, 14

Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment, I.C.J. Reports 2003.

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977

UNITED NATIONS. Charter of the United Nations, adopted June 26, 1945, 1 U.N.T.S. XVI

THE VIOLATION OF THE RIGHTS OF THE CHILD RESULTING FROM FAMILY SEPARATION IN MIGRATORY MOVEMENTS

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THEME AND THEORICAL ANALYSIS OF THE METHOD

This present abstract aims to analyze the rights of the family and the rights of the child with regards to the separation of families according to International Refugee Law, with more focus on the approach by the Inter-American System for the Protection of Human Rights.

The research for this paper builds mainly on the jurisprudence of the Inter-American Court of Human Rights ("IACtHR" or "Court"), including contentious cases and advisory opinions that concern migration and rights of the child. Additionaly, this study considers the stance of United Nations organs on the matter, as well as recent news reports to analyze the current State practice on the treatment of children in the occasion of family separation.

RESEARCH PROBLEM

The American Convention on Human Rights ("Convention") provides the rights of the family and the rights of the child in Articles 17 and 19, respectively. In contentious cases of the Inter-American System[2], these rights are regularly evaluated in correlation since the separation of families will inevitably affect the personal integrity and development of the children[3]. Therefore, the violation of Article 17 will, *as a rule*, lead to the violation of Article 19.

On the other hand, the Court, as well as the United Nations Human Rights Council, recognize the discretion of member-States to establish their own procedure for determining the refugee status, so long as the protection of human rights is properly observed[4]. As a result, a conflict arises between the sovereignty of States to legitimaly protect their borders and the right to family unity.

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2 See: IACtHR. *Pacheco Tineo Family v. Bolivia*, (2013); IACtHR. *Expelled Dominicans and Haitians v. Dominican Republic*, 2014.

3 IACtHR. *The right of boys and girls to a family. Alternative care. Ending institutionalization in the Americas.* Rapporteurship on the Rights of the Child, 2013, §57.

4 IACtHR. *Vélez Loor v. Panama*, 2013, §97; UNHRC. Report of the Special Rapporteur on the Human Rights of Immigrants, Mr. Jorge Bustamante. *"Promotion and Protection of All Human, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development".* February 25, 2008, A/HRC/7/12, §14 (Evidence file, volume V, annex 24 of the brief of pleadings, motions and evidence, page 2017).

HYPOTHESES

In order to solve this conflict of fundamental rights, the IACtHR has stated that the deportation that eventually causes family separation will be exceptionally lawful if it respects the child's best interest[5], for which it must prove to be: (i) suitable; (ii) necessary; and (iii) proportional[6].

The requirement of *suitability* concerns the purpose of the measure, which must be based on an essential public interest, besides being in accordance with the Convention[7]; e.g., national or public security and economic welfare, which are legitimate purposes mentioned by the Inter-American Commision on Human Rights ("IACHR" or "Commision") itself[8]. The *necessity* element, in turn, requires that there must be no other less harmful and as effective measures that could be taken alternatively to achieve the suitable purpose[9], which is related to the legal provisions on the matter. Finally, the action must be *proportionate* in the sense of being necessary to a democratic society[10].

Once the requirements are accurately observed, there will be no infringements of Article 17 of the Convention (rights of the family); and possibly, nor of Article 19 (rights of the child).

Nevertheless, while the first two requirements might be easy to fulfill, the Court demands that to satisfy the last condition, the measure must be the one to "*least restrict the protected rights"*[11], which are, in this scenario, the rights of the child. For this purpose, the separation must be strictly temporary and exceptional[12]. First of all, the children must be taken to their closest relatives[13], and only in the absence thereof, should they be placed in non-detention accommodations, in which their basic conditions[14] must be ensured.

Recent news reports have showed that States have been failing to comply with the latter requirements. In the United States, for instance, after being separated from their families, the children are first dealed with by Social Services, being immeditalely held in custody under the responsibility of the State[15]. They are sent to migration shelters where they have their personal

5 UNHCR. *Executive Committee (ExCom), Refugee Children.* Conclusion No. 47 (XXXVIII), 12 October 1987, available at: http://www.refworld.org/docid/3ae68c432c.html, §(d).
6 IACtHR. Advisory Opinion OC-21/14. *Rights and Guarantees of Children in the Context of Migration And/Or in Need of International Protection*, 2014, §275.
7 Ibid., §276
8 IACHR. *Submissions to the IACtHR in the framework of request for an Advisory Opinion*, §213. Available at: http://www.corteidh.or.cr/sitios/Observaciones/6/6.pdf. Access on: July 7, 2019.
9 IACtHR. OC-21/14, op.cit., §277.
10 Ibid, §278.
11 Ibid, §276; Cf., IACtHR. *Castañeda Gutman v. Mexico*, (2008), §186.
12 IACtHR. Advisory Opinion OC-17/02. *Juridical condition and Human Rights of the Child*, 2002, §75.
13 UNHCR. *Submissions to the Inter-American Court of Human Rights in the framework of request for an Advisory Opinion on Migrant Children presented by MERCOSUR*, §6.2.
14 IACtHR. OC-21/14, op.cit., §§171-184.
15 EL PAÍS. *Órfãos por decreto da Casa Branca.* Available at: https://bit.ly/2JCkxc0. Access on July 16, 2019.

liberty deprived, which would only be legitimate if the measure is legal and temporary[16].

In addition, due to lack of resources, overcrowding and alas, xenophobic migration agents, children are often obliged to endure maltreatment, such as the subjection to extreme cold, starvation, lack of hygiene and humiliation[17], which evidently affect their psychological[18] and physical integrity. In 2019, five children had died under custody of the Customs and Border Patrol by the month of May, due to lack of medical attention.

Their closest family members are contacted only after the detention, but most of them are fearful to respond to the Social Service calls because they are usually indocumented migrants themselves. Consequently, the children remain in detention for an excessive amount of time, which defines the infringement of the right to personal liberty[19]. Adding insult to injury, the parents might be deported before the contact is achieved and the child might be sent to live with foster families, which turns the reconnection of the family almost impossible.

Other countries, such as Mexico, also present serious violations of the right to humane treatment; for example, in some shelters, children may spend four to six days without seeing the light of day nor breathing fresh air[20].

CONCLUSION

Taking into account the framework exposed, States are entitled to establish and put to practice their own proceedings to receive migrants. However, there must be attention to the preservation of the rights of the child; children are entitled to all the rights provided in the Convention, with addition of the requirement of special protection established in Article 19.

Therefore, the illegitimate family separation will not only cause the violation of Articles 17 and 19, but also of all the articles representing each and every right that has been consequently infringed, e.g., the rights to life (Article 4), to humane treatment (Article 5) and to personal liberty and security (Article 7). In this standard, States must adapt their migratory system to be able to provide the necessary aid to children if family unity is not possible, in order to practice their migration policy legitimaly.

16 IACtHR. OC-21/14, op.cit., §190.

17 EL PAÍS. *Crianças imigrantes relatam maus-tratos, frio intenso e humilhações em centros nos EUA.* Available at: https://bit.ly/2Y8eK62. Access on July 16, 2019.

18 FEGERT, J.M. *Psychosocial problems in traumatized refugee families: overview of risks and some recommendations for support services*. Child. Adolesc. Psychiatry Ment. Health, (2018)

19 Supra nota 16.

20 BBC News. *Como o México deteve 138 mil crianças imigrantes em 5 anos, muitas delas separadas dos pais.* Available at: https://bbc.in/2NV91g3. Access on July 16, 2019.