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# The doctrine of the Drittwirkung der Grundrechte in the case law of the Inter-American Court of Human Rights

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## *Abstract*[*]

*The study of the of the IACHR case law, shows that the Court has developed a theory of the applicability of fundamental rights in private relations within the Latin American context, with the ultimate goal of approaching the most important social problems of Latin American contemporary history. This theory has contributed to the democratical transition of many countries of the region.*

*The IACHR case law has phases. The first one includes judgments whose main issue were the Member States duties to respect and protect the fundamental rights listed in the Convention. In this judgments the IACHR adopts a doctrine that resembles the American "state action".*

*In the second phase, the IACHR judgments held that the Convention duties were to be considered erga omnes obligations reaching not only state citizen relations, but also inter privates relation.*

*Lastly, the third phase is well represented by its most relevant case the, Advisory Opinion 18/03 solicited by the United Mexican States regarding the legal status of immigrants. The opinion is meant to be crucial for the final recognition of the Drittwirkung of fundamental rights in Latin America.*

*A partir del estudio de la jurisprudencia regional de los últimos veinte años es posible identificar que la Corte Interamericana de Derechos Humanos (CIDH) ha construido toda una teoría sobre la vigencia de los derechos fundamentales en las relaciones entre particulares en el ámbito latinoamericano, a partir de la cual ha abordado los problemas sociales más importantes de la historia latinoamericana contemporánea, contribuyendo así a la transición democrática de muchos países de la región. Este estudio analizará las etapas por las que ha transitado la jurisprudencia de la CIDH, y que han llevado a los criterios que actualmente maneja dicho organismo.*

*La primera etapa se conforma por una serie de sentencias cuyo común denominador es el análisis de la obligación de respeto y vigilancia de los derechos fundamentales por parte de los Estados prevista en el artículo 1.1 de la Convención Americana. Este principio llevará a la Corte Interamericana a planteamientos muy cercanos a los propuestos por la doctrina estadounidense de la state action, al hacer uso de un buen número de sentencias dictadas por la Corte Suprema de los Estados Unidos entre 1960 y 1980.*

*En la segunda fase, la relevancia en la determinación de las características del agente que ha cometido la violación de los derechos fundamentales será sustituida por una serie de planteamientos en los que el carácter de la norma violada se convierte en el centro de atención. En esta etapa, la Corte Interamericana consagra la idea de que los derechos fundamentales previstos en la Convención resultan obligaciones erga omnes, que se imponen no sólo en relación con el poder del Estado sino también respecto a actuaciones de terceros particulares.*

*Por último, la tercera fase en la evolución de la jurisprudencia está representada por el caso más relevante en esta materia: la Opinión Consultiva 18/03 solicitada por los Estados Unidos Mexicanos sobre la*


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*condición jurídica de los inmigrantes. Esta resolución, que marca una tendencia hasta nuestros días, establece definitivamente la eficacia directa de los derechos fundamentales en las relaciones entre particulares.*

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## *Summary*

## *1. Introduction*

In 1970, HÉCTOR FIX ZAMUDIO published a ground-breaking article in the *Revista Jurídica Veracruzana*, entitled "Aspects of the Protection of Human Rights in Relations Between Private Individuals in Mexico and Latin America."[1]. FIX ZAMUDIO, as in many other issues, was one of the first Latin American jurists to suggest the possible enforcement of fundamental rights between individuals.

That pioneering work appeared in a period in which the matter in question was at the forefront of the discussion in comparative doctrine and case law. While in the United States the Supreme Court's doctrine of state action reached its greatest expansive force, on the other side of the Atlantic, the Federal Constitutional Court in Germany consolidated the doctrine initiated in the *Lüth* case of 1958, and the German tenet of the *Drittwirkung der Grundrechte* became a reference for the rest of Continental Europe.[2] At the same time, various Latin American ordinances – as was the case in Argentina, Brazil, Bolivia, Chile, El Salvador, Guatemala, Nicaragua, Paraguay or Uruguay – regulated the diverse aspects of the *amparo* suit and other similar instruments, for the purpose of extending their protective field to certain violations of fundamental rights between individuals.[3]

The discussion about the effect of fundamental rights in private relations has had different fates on the two continents. In the case of Europe, the majority of the Constitutional Courts have developed a solid doctrine in this matter. In Latin America, aside from the extremely rich doctrine elaborated by the Colombian Constitutional Court[4], the case law of constitutional courts regarding the *Drittwirkung* is currently either in a very elemental or practically non-existent phase of development, as is the case with Mexico.

One of the various reasons for the jurisprudential poverty in this matter, at least in the case of Mexico and surely in other countries in the region, is the ignorance and even rejection of a common legal reference that should otherwise be enforced by the national courts in their daily tasks. I refer to the case law of the Inter-American Court of Human Rights. The objective of the present work is to analyze the theories and concepts developed on this jurisprudential body, which, as rich as it is little studied, constitutes an invaluable source for any study that aims to

[1] This work first appeared in French in the Volume III of *Liber Amicorum Discipulorumque René Bassin*, a book in honor of René Cassin.

[2] Throughout this work, I will use the German term *Drittwirkung*, in virtue of the fact that it is the term applied to the problem that we are concerned with in the German system, in which the extensive literature on this topic originated. Legal doctrine in the Spanish and English languages has endorsed this term.

[3] See H. FIX-ZAMUDIO, 1999, pp. 163-165.

[4] For a first approximation to the case of Colombia, see E. CIFUENTES MUÑOS, 1998; and A. JULIO ESTRADA, 2000.

address in a complete manner the applicability of fundamental rights in private relations in the Latin American legal ordinances.[5]

If an unwitting reader were to look at the works that examine the jurisprudential criteria of the Inter-American Court of Human Rights –hereafter IACHR– he would conclude that the *Drittwirkung* is a matter of little significance in the Inter-American case law and has been addressed neither exhaustively nor systematically. Nevertheless, the reality is quite different, since, if one examines the regional case law of the last twenty years, it would not be unreasonable to affirm that the IACHR has constructed an entire theory about the applicability of fundamental rights in relations between individuals in the Latin American sphere. We will structure our analysis in three stages, successive in time and clearly identifiable in the relevant case law.

The first phase is constituted by a series of judgments whose common denominator is the analysis of the obligation of respect for and protection of fundamental rights on the part of the states listed in Article 1.1 of the Convention. This principle, whose study is a constant in the entirety of the IACHR's case law, brings the Inter-American Court very close to the principles of the American doctrine of state action.

In the second phase, the relevance of determining the characteristics of the agent who committed the violation of fundamental rights is substituted by a series of formulations in which the character of the violated norm becomes the focus of attention. It is in this moment that the Inter-American Court establishes the idea that the fundamental rights listed in the Convention are *erga omnes obligations* that are imposed not only in relation to the state but also to the actions of third party individuals.

Lastly, the third phase in the evolution of the case law is represented by the most relevant case in this matter: Advisory Opinion 18/03 solicited by the United Mexican States regarding the legal status of immigrants. This resolution definitively establishes the direct effectiveness of fundamental rights in relations between private individuals.

## 2. *The Obligation of Respect for and Protection of Fundamental Rights: the Assumption of State Action*

*Velásquez Rodríguez v. Honduras* (1987) was not only the first case in which the IACHR considered the question of the effect of fundamental rights in private relations. As the very first contentious case submitted to the Inter-American Court's jurisdiction, it was also the case that established the foundations of the entire Inter-American system of human rights. This case, like those of *Godinez*

[5] In view of the limits and objectives of this work, I will not address two previous problems that must be resolved with respect to the application of the Inter-American system of human rights and internal ordinances. In the first place, the expansion of the catalogue of human rights in national ordinances through the Inter-American Convention on Human Rights and, in second place, the reception of the Inter-American case law by the internal judicial organs. With respect to the analysis of these questions in the case of Mexico, see J. MIJANGOS Y GONZÁLEZ, 2007.

*Cruz v. Honduras* (1987), *Paniagua Morales v. Guatemala* (1988), *Bámaca Velásquez v. Guatemala* (2000) and *Juan Humberto Sánchez v. Honduras* (2003), occurred within the context of the Dirty Wars that engulfed Central America during the 1980s. In all of them, a number of individuals considered to be subversive by the regime were the victims of kidnappings and extrajudicial executions.

In the study of this first phase we will focus on the case *Velásquez Rodríguez.* Manfredo Velásquez, a university student related to subversive groups, was violently arrested without a warrant by elements of the Honduran secret police and by civilians acting under their orders. As in hundreds of other cases in Honduras between 1981 and 1984, Velásquez was assassinated after suffering various forms of torture, and buried in a clandestine cemetery.

The Inter-American Commission referred the case to the jurisdiction of the Court so that it could determine whether the Honduran state violated Articles 4 (the right to life), 5 (the right to personal integrity), and 7 (the right to personal freedom) of the American Convention on Human Rights – hereafter ACHR. For the Court, the analysis of this case, and any other referred to its jurisdiction, comes determined by the scope attributed Article 1.1 of the Convention.[6] In the court's consideration, this article "charges the States Parties with the fundamental duty to respect and guarantee the rights recognized in the Convention [so that] any impairment of those rights which can be attributed under the rules of international law to the *action or omission* of any public authority constitutes an act imputable to the State."[7]

In the terms of Article 1.1, the Member States, upon signing the American Convention, assume a double obligation. The first is the *respect for the rights and freedoms* recognized in the ACHR, while the second calls for *guaranteeing the free and full exercise* of fundamental rights to every person under its jurisdiction -- an obligation that does not end with a normative ordinance, but rather carries with it the need of a governmental conduct that ensures the existence of an effective guarantee of free and full exercise of human rights.[8]

In this line of thought, it is clear that, in principle, the state is responsible for any violation of the rights recognized in the Convention committed by a state authority or by persons who act on powers they possess because of their status as officials. Yet for the Inter-American Court, that is certainly not the only situation in which the State can be held responsible for the violation of human rights. In effect, "an illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State,

[6] Article 1.1 of the ACHR, in the part that interests us, establishes that "the States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms (…)". This general duty of respect runs parallel in other treaties on human rights, for example, Article 2.1 of the Pact of Civil and Political Rights, or Articles 2.1 and 38.1 of the Convention on the Rights of Children.

[7] Case of *Velásquez Rodríguez v. Honduras,* Judgment of July 29, 1988.

[8] *Godinez Cruz v Honduras*, Judgement of January 20, 1989, par. 175; and *Cantos v. Argentina*, Judgement of November 28, 2002 par. 49.

*not because of the act itself, but because of the lack of due diligence* to prevent the violation or to respond to it as required by the Convention."[9]

In this first stage of the Court's case law, fundamental rights are seen by the Court as limits placed on the actions of authorities; the responsibility of the state, nevertheless, extends to those cases in which it is demonstrated that "state authorities supported or tolerated infringement of the rights recognized in the Convention."[10] For the Court, it is irrelevant that the individuals who participated in the kidnapping, torture and assassination of Manfredo Velásquez did not formally belong to the security corps of the Honduran state; what is decisive for the purpose of determining the violation of fundamental rights is that, in all of these cases, there exists a *significant implication* of the Honduran authorities. If such an implication is confirmed – which, in the terms of the Court can be translated as a *lack of due diligence*, *support*, *acquiescence* or *tolerance* – the action of the individuals is seen as equivalent to an act of a state authority, according to Article 1.1 of the Convention.

This type of construction is not novel in comparative case law. In fact, the IACHR adopts a good part of the arguments used in the American doctrine of state action. In the United States of America, as in Mexico, and unlike Continental Europe, the unidirectionality of fundamental rights is maintained as one of the most firm pillars of U.S. constitutional theory. Thus the Amendments to the Federal Constitution of 1787, which form the Bill of Rights in the American legal system, can only be invoked in the case of state action.

It is necessary to keep in mind that the one of the motives for establishing the Bill of Rights was the need to defend the historic liberties of individuals against possible violations committed by one entity in particular: the emerging power of the federation and, specifically, its legislative power. M. Fioravanti points out that "only in the U.S. experience do the historicist, individualist and contractualist models recover their original and common "guarantist" inspiration, against the statist and legal-centric philosophies of Continental Europe."[11] This means that ever since the origins of the American constitutional tradition, rights are conceived of as something to be preserved from the malign, but inevitable, rise of state powers.

Thus, in the framework of such considerations, it is possible to contextualize the principle by which the possible violations of fundamental rights by private individuals, both in terms of validity and effect, are governed by the rest of the infraconstitutional ordinances – a principle which has been *symbiotically* accepted in a large part of the rest of the continent, as it was in the case of Mexico.

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[9] *Velásquez Rodríguez v. Honduras,* Judgement of July 29, 1988, par. 172 (emphasis ours).

[10] *Paniagua Morales v. Guatemala,* Judgment of March 8, 1998, par. 91. This case is also known as *Panel Blanca* ("white van"), due to the fact that in 1987 and 1988, members of the Guardia de Hacienda of Guatemala, heavily armed, forcefully detained people and forced them to into a white van. Eleven people were tortured and killed and their bodies abandoned only a few days after their detention in the city streets of Guatemala and its outskirts.

[11] M. FIORAVANTI, 1998, p. 93. Similarly, see G. ZAGREBELSKY, 1997, p. 54.

Against this background it would appear that the question has been closed from the beginning and that the court's duty would simply involve applying an examination of *state formality* to all those acts constituting a violation of human rights, in order to determine the normative subsystem to which they must be redirected for their adequate resolution. However, since this was evidently too narrow a path to follow, it was precisely the Supreme Court of the United States the one that developed and experimented with a number of alternative criteria for defining the area that lies within state action's penumbra.

A complete examination of the doctrine of state action is beyond the scope of this work.[12] Nevertheless, we will mention some of its most distinct characteristics, since this type of response to the *Drittwirkung* – which evades the substantive problem and which focuses on the expansion of the concept of state authority – is the one adopted by the Inter-American Court in the first phase.

The argumentation of the case *Adickes v. S. H. Kress & Co.* (1970) was the direct source from which the IACHR draw its opinion in *Velásquez Rodríguez.* This case said that what is decisive in assessing the existence of a violation of fundamental rights is whether in fact the actions of the individuals relied upon the support or tolerance of state authority. The case *Adickes v. Kress*[13], like *Traux v. Corrigan*[14], *United States v. Price*[15], or *Joshua DeShanney v. Winnebago County Department of Social Service*[16], are cases in which there exists no doubt that the act in violation of fundamental rights was carried out by a private individual. Nevertheless, the controversy comes about when determining the state's degree of participation or implication in the act of the private individual, with the purpose of *transforming* it into state action, and thus making it an issue of constitutional justice.

The case that serves as a guide to illustrate this aspect of the doctrine of state action dates back to August 1964, in which Sandra Adickes, a white schoolteacher in a black neighbourhood in Mississippi decided to have lunch with six of her black students at a restaurant owned by a Mr. Kress. The owner of the locale refused to serve Adickes because she was in the company of black people. Once the group decided to leave the restaurant, Sandra Adickes was detained by the police due to the commotion she had provoked when refused service.

The majority opinion of the Supreme Court, written by Judge J. M. Harlan, establishes, in the first place, that the 14th Amendment does not prohibit individuals from discriminating based on race,

[12] The most complete study of this matter, in the Spanish language, has been done by J. M. BILBAO UBILLOS, 1997. In English, the essential works are the following: R. J. GLENNON and J. E. NOWAK, 1974, pp. 656-705; I. NERKEN, 1977, pp. 297-366; E. CHEMERINSKY, 1985, pp. 503-557; A. R. MADRY, 1992, pp. 781-884; R. J. KROTOSZYNSKI, 1995, pp. 302-347; W. BROOKS, 2001, pp. 1-75; and M. TUSHNET, 2003, pp. 79-98.

[13] 398 U.S. 144 (1970).

[14] 257 U.S. 312 (1921).

[15] 383 U.S. 787 (1966).

[16] 489 U.S. 189 (1989).

as it is an expression of personal predilections that cannot be limited by the state. Yet the conclusion would be different if the discrimination were to have been the result of a custom or ordinance imposed or applied by the authorities in the restaurants of the State of Mississippi. For the Supreme Court, the fact that segregation is a social custom is not sufficient to establish that there has been a violation of rights, as Adickes alleged. Instead, the plaintiff must demonstrate that the accused acted "under the appearance of the legality of a custom or usage of the state" and with the "implication" of a government employee.[17]

It is logical for the Supreme Court to insist on the participation, to some degree, of some authority, since if the simple inactivity on the part of the state were a determining factor to prove the existence of *state action*, practically any violation of fundamental rights committed by private individuals could be attributed to the state. Specifically, it was not proven that the racial segregation in this case was a practice established by the local authorities, but rather a simple and regrettable custom of the restaurant's owner, for which reason it was concluded that state action did not exist in this case.

The Supreme Court's rejection of state responsibility is a constant in cases with these characteristics since it believes that such responsibility due to the lack protection only exists in those cases in which people are deprived of freedom while in custody of the state.[18] The conclusion of the Inter-American Court, however, would be slightly different. Through these formulations, the IACHR considers the obligation of protection of Member States to be of a *general* nature. It applies to all situations and all people who are within the state's jurisdiction. Once the state's tolerance for the action or its inactivity has been proven, the fact is deemed imputable to the state, for violation of a duty required by Article 1.1 of the Convention.[19]

In its effort to extend the scope of the state's responsibility, the Inter-American Court addresses another of the most significant aspects of the doctrine of state action: the state's *approval* of actions by private individuals that violate fundamental rights.

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[17] Cfr. *Monroe v. Pape* [365 U.S. 167 (1961)].

[18] This is how the Supreme Court ruled in the *DeShanney v. Winnebago* case of 1988, the last of the resolutions in which the highest U.S. court addressed this aspect of state action. The plaintiff in this case was a minor who had been a victim of abuse by his father, whom he lived with. The defendants, the Department of Social Services in a county in Wisconsin, received complaints that the minor was suffering abuse at the hands of his father, and in spite of various measures they adopted to protect the minor, their intervention did not include an order to remove the child from the father's custody. The father hit him so violently that he suffered brain damage and severe mental retardation. The mother of the child alleged the existence of state action, as in her opinion, the knowledge on the part of the authorities of the county of Winnebago of the danger that the minor was in created a "special relation" from which there originated an obligation to protect the child. For the Supreme Court, the state's obligation of protection came not from the authorities' knowledge of the difficulties of an individual or the testimony that he gives about his intention to help him, but rather, exclusively, from the limitations that the state itself imposes on the freedom of the individual, be it through imprisonment or internment in any institution under its control. Regarding this matter, see *Estelle v. Gamble* 429 U.S. 97 (1976); *Youngberg v. Romero* 457 U.S. 102 (1982); as well as the work of D. A. STRAUSS, 1989, p. 67.

[19] *Cfr. Gangaram Panday v. Surinam*, Judgement of January 21, 1995, par. 62.

For the IACHR, "if the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights… This is true regardless of what agent is eventually found responsible for the violation. Where the acts of private parties that violate the Convention are not seriously investigated, those parties are aided in a sense by the government, thereby making the State responsible."[20] In this respect, the duty to investigate and remedy violations is not only understood to refer to the police authorities of the state – it also extends to the judicial bodies, since if their rulings do not remedy the relevant violations, they would be failing to comply with Article 1.1 of the Convention and their actions would subject to a hearing of the Inter-American Court.[21]

It is not difficult to relate this argument to the theory of "mediated effectiveness" proposed by the Federal Constitutional Court of Germany.[22] In this line, the national courts, in virtue of Article 1.1 of the Convention, would be compelled to apply the contents of the American Convention when determining the applicable right; otherwise, the IACHR would be authorized to examine the internal processes of the respective country.

Regardless of the theoretical implications of the mediated effect thesis, which we will not address in this work, the main problem that this doctrinal position originates is that, once again, practically any act by private individuals implies state responsibility. In the American case law, this was precisely the criticism that was aimed at the first resolution that maintained that judicial intervention approving the act of a private individual implied state responsibility: the case of *Shelley v. Kraemer* of 1948. The heart of this case was the possible existence of state action in the judicial enforcement of private agreements that impede ownership or possession of real estate on the basis of racial motives.[23]

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[20] *Velásquez Rodríguez v. Honduras*, Judgment of July 29, 1988, par. 176 and 177. A similar argument can be seen in *Baldeón García v. Peru*, Judgement of April 6, 2006, par. 91.

[21] *Cfr. Villagrán Morales y otros –caso niños de la calle– v. Guatemala*, Judgement of November 19, 1999, par. 222; and *Bámaca Velásquez v. Guatemala,* Judgement of November 25, 2000, par. 188.

[22] In conformity with this thesis, the concretization of fundamental rights in relations between private individuals happens at the moment in which the respective judicial organ applies the fundamental rights as interpretive parameters when it resolves disagreements presented to it. See J. MIJANGOS Y GONZÁLEZ, *La vigencia de los derechos fundamentales en las relaciones entre particulares,* Porrúa, Mexico, 2004, pp. 18-27.

[23] 334 U.S. 1 (1948). *Shelley* is one of the four cases known collectively as the Restrictive Covenant Cases. The three other cases are: *McGhee v. Sipes, Hurd v. Hodge,* and *Urciolo v. Hodge.* The *Shelley v. Kraemer* case originates from the following facts: on February 16, 1911, thirty of a total of thirty nine new owners of real estate in the city of St. Louis, Missouri, signed and registered an agreement. This established that the property was"restricted to the use and occupancy for the term of Fifty (50) years from this date, so that it shall be a condition all the time and whether recited and referred to as (sic) not in subsequent conveyances and shall attach to the land, as a condition precedent to the sale of the same, that hereafter no part of said property or any portion thereof shall be, for said term of Fifty-years, occupied by any person not of the Caucasian race, it being intended hereby to restrict the use of said property for said period of time against the occupancy as owners or tenants of any portion of said property for resident or other purpose by people of the Negro or Mongolian Race" In August 1945, as a result of the sales contract, the signers, who were black, --through a considerable sum—received, from one of the owners, a writ in which they were guaranteed the deed for part of the property in question. The Court that heard the case found that the signers did not know of the restrictive agreement at the time of purchase. In October 1945, owners of other parts of the real estate bound to the terms of the contract, sued in the Circuit Court of St. Louis to have

The Supreme Court of the United States begins its argumentation reminding that, since the decision of the Civil Rights Cases of 1883, it was firmly established that the behaviour prohibited by the first section of the Fourteenth Amendment was only that which could be reasonably classified as an action of state authority. Such constitutional amendment did not raise any barrier against purely private conduct, as wrong or discriminatory as it may be.

In this line, the Supreme Court holds that discriminatory agreements in themselves cannot be considered a violation of any right so long as the terms of these agreements are agreed upon and adhered to voluntarily. The conclusion would be different, however, if these agreements were insured exclusively through the imposition of their terms by state courts.

It is clear that, were it not for the active intervention of the state courts, the plaintiffs would have been free to occupy the property without any restriction. For the Supreme Court, the *Shelley* case is not one of those cases – as it has been suggested – in which state authorities simply abstained from acting, leaving the private individuals free to impose the discrimination they wish. Instead, it was a case in which the courts placed at the individual's disposal all of the coercive power of the state in order to deny the plaintiffs, on the basis of race or colour, the enjoyment of the right to property in an area in which the plaintiffs wanted and could acquire property and in which the sellers were willing to sell. For the plaintiffs in these cases, the difference between imposing the restrictive agreements or not is the difference between being denied the right to obtain property from other members of the community and granting them full enjoyment of these rights based on equality. As a consequence, judicial authorities were the ones who violated equal protection, guaranteed by the Fourteenth Amendment.

This ruling, which caused a great commotion and torrent of commentary, set the basis for a true revolution in the doctrine of state action. The resolution of the Supreme Court implied, in practice, the acceptance of the substantive protection of fundamental rights in private relations. Although the sentence emphasized the execution of the discriminatory pact on the part of the judicial organ, what *Shelley v. Kraemer* really said was that the validity of private pacts depends on their due compliance with the Bill of Rights, as they would otherwise not be validated by the courts.[24] As a consequence, due to the danger presented by the unidirectionality that this doctrine entailed, the American constitutional case law decided to distance itself from this precedent in resolutions such as *Black v. Cutter Laboratories*[25] and *Evans v. Abney*[26].

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the blacks stopped from taking possession of the property, and that they be deprived of the property deed and that this be returned to the seller, or whoever the court decided. The court denied the petition, on the basis that the contract never came to be definitive or complete, as it was the intention of the parties that it would not come into force until it was signed by all of the owners, and all of their signatures were never obtained. The Superior Court of Missouri revoked this last resolution.

[24] *Cfr.* H. WECHSLER, 1959, p. 29; and D. KENNEDY, 1982, p. 1352.

[25] 351 U.S. 292 (1956).

[26] 396 U.S. 435, 445 (1970).

The Inter-American Court, in a stage in which there still existed doubts about the multidirectionality of fundamental rights, was aware of these risks. Combined with has been previously mentioned, its major worry and that which will ultimately lead to the abandonment of the thesis of judicial mediation, was that a doctrine of this type would convert the IACHR into a type of appeals court of the sentences of internal judicial bodies. This would provoke serious friction between the Member States, and would distance it from its nature and its own goals, which the IACHR has been aware of since its first rulings.[27]

For this reason, state responsibility for judicial validation and, in general, the search for state involvement, is abandoned by the Inter-American Court as an element that determines the applicability of fundamental rights in private relations.[28] A substantial number of cases that the court heard at the beginning of this decade and in those in which a private individual violates fundamental rights, will obligate the court to explore new paths in this matter.

## *3. The First Approximation to the Drittwirkung: Fundamental Rights as Erga Omnes Obligations*

The Inter-American court inaugurated, after the case *Blake v. Guatemala*, a new era in its case law in which the study of the nature of the violated norm became the central argument for the purposes of affirming the *Drittwirkung* of the rights listed in the Convention.

In March 1985, two U.S. citizens were assassinated in Guatemala at the hands of the *Civilian Defense Patrols*.[29] The Inter-American Commission referred the case to the IACHR so that it could assess Guatemala's responsibility under the argument that the "civilian patrols" acted as agents of the state. The Guatemalan government, hardened by the various penalties that it had received in the case of the disappearances of political activists by members of its secret police, came up with a strategy to evade its responsibility. According to the Guatemalan government, the IACHR lacked the authority to assess the responsibility for the disappearance of the American citizens because the facts on which the demand was based constituted an "a common criminal act, under

[27] See also *Suárez Roser v. Ecuador*, Judgement of November 12, 1997, par. 37; *Garrido y Baigorria v. Argentina*, Judgement of April 27, 1998, par. 24; and *Cesti Hurtado v. Peru,* Judgement of January 26, 1999, par. 47.

[28] In the last few years we have only been able to identify three relevant cases in which the IACHR has determined the responsibility of the state for having given cover, passively, to the acts of the individuals. See also, *Juan Humberto Sánchez v. Honduras* (Judgement of June 7, 2003); *19 Comerciantes v. Colombia* (Judgement of July 5, 2004); and *Masacres de Ituango v. Colombia* (Judgement of July 1, 2006).

[29] Nicholas Chapman Blake, journalist, and Griffith Davis, photographer, residents of Guatemala, headed for a small village of the country on March 26, 1985. The purpose of the trip was to obtain information to write an article about one of the sectors of the Guatemalan guerrillas. That day they were intercepted by the *Civilian Self-Defense Patrol of El Llano*, a paramilitary organization formed by peasants and indigenous members that carried out patrol work, defence and control of guerrilla movement. Years later it was determined that members of this patrol moved the Americans to an unpopulated place to assassinate them and incinerate their bodies to avoid their discovery.

which are classified homicide and murder, and not a case of the violation of human rights, as are the right to freedom and life."[30]

The IACHR ruled in this case that the civilian patrols acted as agents of the state, since they received resources, arms, training and, at times, direct orders from the Guatemalan military. The acquiescence of the state in relation to the activities of these paramilitary groups allowed the extension of responsibility to Guatemalan authorities. Nevertheless, questions hover over the argumentation of the Court. The Court itself was aware that on occasions it is impossible to demonstrate a general state of impunity with respect to this type of actions, to prove that the violations are attributable to a policy of the state or, simply, to show a connection, as small as it may be, to state authority. The Court dealt with these issues in a series of resolutions in which Colombia was accused of various violations of fundamental rights perpetrated by guerrillas and paramilitary groups, in spite of an active and dedicated policy against these groups.

The protagonist in this search for alternative jurisprudential solutions was the Brazilian A. A. Cançado Trindade. This judge of the IACHR, elected in 1994, issued a vote based on the *Blake v. Guatemala* case that would become the basis for achieving the applicability of fundamental rights in private relations.

Cançado argued that it was necessary to demystify certain frequent and improper postulates such as the existence of eternal and unchanging truths, as these were in reality products of their time, that is, legal solutions formulated in a certain stage in the evolution of law, in agreement with the prevailing ideas of the age. One of these ideas was the one that sees international treaties as norms that limit only the actions of states. The treaties on human rights, rather, establish objective obligations and represent standards of behaviour aimed at the creation of an international *public order*.[31] In his opinion, the absolute nature of the autonomy of will cannot be invoked against the existence *jus cogens* norms such as the fundamental rights listed in the ACHR. These are *erga omnes* obligations of protection and, as a result, are the minimum expression of all legal relations of the national ordinances, including those that occur between non-state actors.[32]

Cançado's arguments would be adopted by all of the judges of the IACHR in the case of *Comunidad de Paz de San José v. Colombia* of 2002. In this case, which is very revealing of the tragedy the Colombian society is still subjected to, it was unquestionable that the perpetrators of

[30] *Cfr. Blake v. Guatemala*, Judgement of July 2, 1996, par. 25. The Guatemalan state argued that the *Civilian Patrol* were voluntary community organizations that originated in areas of conflict and that they were formed by the inhabitants of these areas for the purpose of defending their lives and property from subversion. It pointed out that it was normal for these patrols to be tightly linked to the military, but that this does not mean that their members were part of or had equal functions as that of the Armed Forces, since the members of the patrols did not receive any type of funding from the military nor were they subject to military discipline.

[31] *Blake v. Guatemala,* opinion by judge Cançado in the Judgement of January 24, 1998, par. 20-29, and opinion by Judge Cançado in the Judgement of January 22, 1999, par. 24 and 27; *Las Palmeras v. Colobmia,* opinion by judge Cançado in the Judgement of February 4, 2000 par. 7.

[32] *Personas haitanas y dominicanas de origen haitano en la República Dominicana*, opinion by judge Cançado at the request for provisional measures of August 7, 2000, par. 25.

more than fifty murders in a period of nine months were members of a paramilitary group called *Autodefensas Unidas de Colombia.* In the opinion of the Court, for the general obligation of respect for fundamental rights listed in Article 1.1 of the Convention to be effective, "it is imposed not only in relation to the power of the state, but also in the relations between private individuals (clandestine groups, paramilitary groups or other groups made up of private individuals)."[33]

In this resolution it was established that the legal development of the *erga omnes members* obligations of protection had to assume a greater and greater importance, more than anything because of the diversification of the sources of human rights violations – as evident in a situation of internal armed conflict as in the case of *Comunidad de Paz.* This new situation requires, by the judgement of the Court, "the recognition of the effects of the American Convention *vis-à-vis* third parties (the *Drittwirkung*)".[34]

From the year 2003 on, this recognition comes about in all those cases in which the Court approaches a violation of fundamental rights produced in a relation between private individuals. Thus, in the cases of *Comunidades del Jiguamiandó y del Curbaradó v. Colombia*, of *Pueblo indígena de Kankuamo v. Colombia*, or in that of *Pueblo indígena de Sarayaku v. Ecuador*, the Court insists that the Member States are to be pressured to heed "the wide reach of the e*rga omnes* obligation of protection (...), characterized by the *jus cogens*, from which they emanate, as norms of objective character that cover all the receivers of the legal norms, as well as the members of the organs of the state as well as private individuals."[35]

The relation between the norms of *jus cogens* and *erga omnes obligations*, central aspects in the argumentation of the Court, will not be duly addressed until Advisory Opinion 18/03, a resolution that begins the third stage in the case law of the Court in this matter, covered in the next section. For now, what matters to us is to show that in this phase, multidirectionality is, by the Court's judgement, a characteristic that can be predicated on the entire catalogue of fundamental rights of the American Convention.

Lastly, it should not be thought that in all these cases, the Inter-American Court, in its rulings, forces the States to adopt the necessary measures for the protection and guarantee of the fundamental rights that have been violated. The *instrumental* imputation of the violation to the

[33] *Comunidad de Paz de San José de Apartadó v. Colombia*, Judgement of June 18, 2002, par. 11, and Judgement of November 17, 2004, par 13. *Comunidad de Paz* was not only relevant for the object of study of this work. It also represents a milestone for Inter-American case law, as for the first time it is recognized that the provisional measures that the Court can establish reach a variety of people who, although not identified beforehand, may be victims. Regarding the Colombian problem, see also the interesting work of A. SEAGRAVE, 2001, pp. 525-546.

[34] *Comunidad de Paz* (…) *v. Colombia*, concurrent vote of judge Cançado in the Judgement of June 18, 2002, par. 14.

[35] *Comunidades del Jiguamiandó y del Curbaradó v. Colombia*, Judgment of March 6, 2003, part 11, and Judgment March 15, 2005, part 8; *Pueblo indígena de Kankuamo v. Colombia*, Judgment of July 5, 2004, part 11; and *Pueblo indígena de Sarayaku v. Ecuador*, Judgment of July 6, 2004, part 10. In this last case it is important to highlight that the individual who committed the violation was not a guerrilla or paramilitary group, bur rather a single company: Compañía General de Combustible de Argentina. The security personnel of this company, which carries out petroleum digs on the land of the indigenous Kichwa community, was charged with the violation of the right of movement to the detriment of this indigenous community.

national public organs only fulfils a procedural function, with the objective of correctly articulating the legal procedure provided for in Articles 61 and 62 of the ACHR. However, the trial that the Inter-American Court carries out in the second phase of the case law deals with, invariably, whether the private individuals' actions conform to the fundamental rights listed in the American Convention. Once it has determined the existence of a violation of this type, it reiterates the multidirectionality of the rights directly required by Article 1.1 of the ACHR, and pressures the states to restore the violated right through necessary means specific to each case.[36]

The direct accusation of private individuals with the violation of fundamental rights is a constant since 2003. This situation was definitively agreed upon in Advisory Opinion 18/03, the true leading case of the Inter-American doctrine of the *Drittwirkung.*

## *4. The Direct Effect of Fundamental Rights in the American Convention: Advisory Opinion 18/03*

On May 10, 2002, Mexico, based on Article 64.1 of the ACHR, submitted a request for advisory opinion to the Inter-American Court. According to the Convention itself, the IACHR has two essential powers. The first, within which all of the cases that we have studied to this moment fall, is of a *jurisdictional or litigious* nature. Through this authority, the Court is entitled to hear any case relating to the interpretation and application of the clauses of the Convention submitted to it whenever the Member States recognize such authority. The second authority is of an *advisory* nature. The Member States of the Organization of American States can consult the Court about the interpretation of the Convention or about other treaties concerning the protection of human rights in the American states, as well as the compatibility of any of its internal laws and the mentioned international instruments.[37]

In the exercise of its advisory function, the Court is not called upon to resolve questions of fact, but rather unravel the meaning, purpose and reason of the international norms regarding human rights. In this sense, and unlike the rulings given in its litigious function, there exists no controversy with respect to the legal consequences linked to the "opinions" of the Court. According to the doctrine, and the Inter-American Court itself, the binding nature of the Advisory Opinions with respect to the member states, whether they solicited this opinion or not,

[36] Similarly, *Caballero Delgado y Santana v. Colombia*, Judgement of December 8, 1995, par. 69; *Suárez Rosero v. Ecuador*, Judgement of November 12, 1997, par. 107; and *Castillo Petruzzi y otros v. Peru*, Judgement of May 30, 1999, par. 220.

[37] The Court itself has pointed out that, through its jurisdiction, it can address an interpretation of a treaty whenever it is directly implied in the protection of human rights in a Member State of the Inter-American system, even though this instrument does not come from the regional system of protection. (See Advisory Opinion 1/82 of September 24, 1982, solicited by Peru, relating to the Advisory Function of the Court, par. 38). See also the works of M. VENTURA ROBLES and D. ZOVATTO, 1989; J. M. PASQUALUCCI, 2002, pp. 241-288; and P. NIKKEN, 2003, pp. 161-184.

is given by the international instrument that they interpret, that is to say, a treaty's interpretation has the same value and force as that of the interpreted treaty itself.[38]

Since 1982, the Inter-American Court has given 19 advisory opinions, of which only two were requested by the Mexican government: in 1999, the one relating to the right to information about consular assistance in the framework of the guarantees of due process and, the second, in 2002, relating to the legal condition of immigrants. This last consultative procedure, which will be the object of our study, has generated the greatest mobilization in the history of the Court.[39] The motive was a ruling of the Supreme Court of the United States of America.

In March 2002, the U.S. Supreme Court decided, in the case of *Hoffman Plastic Compounds v. National Labor Relations Board,* that an undocumented worker did not have the right to receive back pay after being illegally fired for attempting to exercise the rights granted to him by labor law, specifically by the National Labor Relations Act.[40] The Supreme Court maintained that the prohibition on working without authorization, established by immigration law, prevailed over the right to form and be part of a union.[41]

The decision in the case of *Hoffman Plastic Compounds* was adopted by a majority 5-4 vote. The author of the minority dissenting opinion was Justice S. G. Breyer, the last of the members of the Court nominated in the Clinton era. He showed that allowing illegal immigrants the access to the same legal resources that citizens have is the only way of assuring the protection of their rights.

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[38] *Cfr.* Advisory Opinion 18/03, cit., par. 60. In this line, see, C. DE SILVA NAVA, "La jurisprudencia, interpretación y creación del Derecho", in *Isonomía. Revista de Teoría y Filosofía del Derecho,* no. 5 (1996), p. 22; H. FAÚNDEZ LEDESMA, *El sistema interamericano de protección de los derechos humanos. Aspectos institucionales y procesales*, Inter-American Institute of Human Rights, San José de Costa Rica, 1996, p. 453; C. MARTÍN, 2004, p. 266; and L. ORTIZ AHLF, 2004, cit., p. 47.

[39] The procedure counted on the participation of twelve American countries, the Inter-American Commission, the United Nations Agency on Refugees, the Consejo Centroamericano de Procuradores de Derechos Humanos, and nine entities of civil society and academia from various countries in the region.

[40] 535 U.S. 137 (2002). This case involved José Castro, a Mexican man hired at the plant of the company *Hoffman Plastic Compounds*, located in a suburb of Los Angeles, California. In 1989, when Mr. Castro helped with the organization of a union to improve the working conditions at the plant, he was fired. In January 1992, the National Labor Relations Board (NLRB) decided that firing him was illegal and ordered back pay and the rehiring of Mr. Castro. In June 1993, during a hearing before an administrative judge of the NLRB to determine the total amount of the back pay and processing, Mr. Castro declared that he had never been legally admitted into the United States nor authorized to work there. Due to this testimony, the administrative judge decided that back pay could not be awarded to him, since it would be in conflict with the Immigration Control Reform Act of 1986. This law prohibits companies from knowingly hiring undocumented workers and workers from using false documents to be hired. In September 1998, the NLRB revoked the decision of the administrative judge and indicated that the most effective form of promoting immigration consisted in providing undocumented workers with the same guarantees and resources that labor laws give to other employees. The NLRB decided that although the undocumented worker did not have the right to be rehired, he was owed back pay and the accumulated interest for 3 years of lost work, a quantity of over $67,000. In 2001, the Federal Appeals Court denied the request for review presented by the company and confirmed the decision of the NLRB.

[41] This decision follows the line set by the case *Sure-Tan v. National Labor Relations Board* [467 U.S. 883 (1984)], in which it was established that workers can be handed over to the National Immigration and Naturalization Service, even when the employer's motive for doing so is an illegal retaliation against a worker dedicated to an activity protected by labor law.

Justice Breyer carefully analyzed the possible impact of the decision on illegal workers, indicating that if undocumented workers cannot receive pay for back pay upon being illegally fired, employers will fire those workers will they attempt to unionize, as there would be no consequence for the employer, at least the first time they use this method.[42]

Conservative estimates suggest that there are at least 5.3 million illegal immigrants working in the United States, and that 2 million of them come from Mexico. Given this fact, the Mexican government's alarm was immediate – understandable if one takes into account that the money that Mexicans residing in the United States send to their families in Mexico is one of the largest sources of income for the Mexican economy.

Thus, two months after the ruling in the case of *Hoffman Plastic Compounds*, the Mexican government decided to solicit an advisory opinion so that the Inter-American Court could address various questions that implied the interpretation of the principle of equality and the duty of respecting fundamental rights listed in the American Convention. The Mexican Government, in the formulation of its observations, does not refer explicitly to the Supreme Court, although it is clear that its written opinion is structured as a response to each of the points made by the highest American court.

It is ironic that the Mexican government, pointed out that "the individual can be an active subject to the obligations in the matter of human rights, as well as responsible for not complying with them (…) since, as they are fundamental norms, and are manifestly true, and whenever there is no doubt as to their applicability, the individual is obliged to respect them, regardless of the internal measures that the state has implemented to ensure compliance with them."[43] It is ironic since the Mexican legal system is structured according to the idea that fundamental rights are limits placed exclusively on the state.[44]

This is not the only perplexing feature of this case. In the considerations of the same text, once the Mexican government adopts the title of "defender of human rights for migrant workers," it points out that in spite of its efforts "it has not been able to avoid the exacerbation of discriminatory legislation and practices against foreigners in a country other than their own, nor the regulation of the labor market based on discriminatory criteria, accompanied by xenophobia," in a clear allusion to the United States.[45] The Mexican government appears to forget its southern region in which thousands of Central Americans, en route to the United States, continually suffer endless privations and humiliations at the hands of Mexican government employees, a situation

[42] It is important to mention that the decision in the case at hand leaves the right to minimum wage and overtime pay intact, in accordance with the Fair Labor Standards Act, as this act only referred to back pay for work that was never done.

[43] Advisory Opinion 18/03, cit., paragraph 19.

[44] See with regard to this matter, J. MIJANGOS Y GONZÁLEZ, 2007, pp. 70-143.

[45] *Ibid*, paragraphs 12 and 13.

that has been verified, *in situ*, a few years ago by the Commission of the Senate of the Republic.[46] In any case, these questions are beyond the object of this research, for which reason I will now proceed to analyze the arguments of the Inter-American Court.

The Court believes that after the considerations posed by the Mexican government it must address the following questions: 1) the obligation to respect and guarantee human rights and the fundamental character of the principle of equality and non-discrimination, 2) the application of this principle to migrants, 3) the rights of undocumented migrant workers and 4) the state obligations in the determination of immigration policies in light of international instruments for the protection of human rights. Our study will focus on the second and third points, which contain a good number of arguments that allow an affirmation of the direct effect of fundamental rights in private relations.

The first task that the IACHR engages in is determining whether the principle of equality and non-discrimination can be qualified as *jus cogens.* In its opinion, this principle, as with the judgements it made previously with respect to the right to life, personal integrity or the free movement of people, can be considered, effectively, as an imperative of general international law, "to the extent that it is applicable to every state, independently of the fact that it may be a member or not in a particular international treaty, and has effects on third parties, including individuals (...) since on it rests all of the legal scaffolding of the national and international public order and it is the fundamental principle that permeates every legal ordinance."[47]

Since the previous stage, the fact that a norm was *jus cogens* was considered by the Court as the first element that allows us to claim the multidirectionality of a norm. Nevertheless, it had not explicitly stated the characteristics of that *jus cogens.* Traditionally linked to the notion of the public legal order, the concept of *jus cogens* supposes that there exist norms so fundamental to the international community that states may not abolish them. This concept was defined for the first time in an international instrument in Article 53 of the Vienna Convention of 1969 regarding the Law of Treaties, according to which "a peremptory norm of general international law is a norm

[46] On August 12 and 13 of August 2004, the Commission of Human Rights of the Senate of the Republic, carried out a visit to the southern border of Mexico, with the purpose of verifying the situation of Central American migrants in the State of Chiapas. According to the report prepared by the Senate, only in the first half of 2004, more than 1,500 violations of fundamental rights committed by forces of Mexico were reported, among which stand out irregular detentions, cruel, inhumane and degrading treatment, bribery, aggravated robbery, fraud, and aggressions committed by various authorities. Also reported were labor violations committed by individuals, consisting of inhumane working hours, withholding of personal documents and salary, deception, verbal and physical harassment, and threats of handing the Central American migrants over to the Mexican immigration authorities (*Gaceta Parlamentaria,* September 13, 2004, no. 58, 2004). With respect to the corresponsibility of the Mexican state in the migration of its nationals to the United States, see the interesting study by J. A. BUSTAMANTE, 2004.

[47] Advisory Opinion 18/03, cit., par. 100 and 101. In the same line of considering the principle of equality and non-discrimination as that of *jus cogens*, see the case of *Yatama v. Nicaragua*, Judgement of June 23, 2005, par. 184 and 185. This case stands out as the first instance in which the IACHR directly addresses the topic of political rights. After the Advisory Opinion 18/03, it is possible to identify a series of resolutions in which another fundamental right, the prohibition of physical or psychological torture, was consolidated as a *jus cogens* norm. See also, among others, *Hermanos Gómez Paquiyauri v. Perú*, Judgement of July 8, 2004, par 112; and *Baldeón García v. Perú,* Judgement of April 6, 2006, par. 35.

accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[48] Nevertheless, *jus cogens* has not been limited to the law of the treaties. Its domain has expanded, also reaching general international law, and covering all acts of a legal nature. This is how the Inter-American Court understands it, pointing out that the true virtue of this concept today can be appreciated in the international responsibility of the states.

Once the Court carried out the review of the most important international resolutions in this matter,[49] it established the fact that fundamental rights listed in the Convention are *jus cogens* norms, but not only because, in the words of A. Gómez Robledo, they represent the juridical expression of the international community itself as a whole, but also because, in addition, the very Member States themselves determined it to be so upon establishing the obligation to respect and guarantee the human rights listed in Article 1.1 of the Convention.[50] Through the union of these two factors, the fundamental rights established in the ACHR become an Inter-American Public Order, that is, *peremptory* norms of the Inter-American system.

Various consequences with specific obligations result from the characterization of fundamental rights as *jus cogens* norms and the general obligation for their respect. The Court determined what these obligations were through examining the matter of the Advisory Opinion: the rights of undocumented migrant workers.

In the framework of a labor relationship in which the state is the employer, the state must respect human rights. But this obligation imposed on the state does not only operate when it is an employer. It also operates when, acting as a legislator, it regulates the relations between private individuals in the work relationship. However, the state's obligations go beyond this, since, in the words of the Court, the state shall be responsible when a violation of fundamental rights is committed and "supported by a state directive or policy that favors the creation or maintenance of discriminatory situations" in the work field.[51] Thus, the obligation of respect contained in Article 1.1 is defined in three aspects of the state's authority: first, as a direct responsibility in its

[48] Article 64 of the same Convention refers to *jus cogens* when pointing out that "if a new peremptory norm of general international law arises, all existing treaties that oppose this norm become null and void." Among the essential works on this topic are A. VERDROSS, 1966, pp. 55-63; E. SUY, 1967, pp. 17-77; A. GÓMEZ ROBLEDO, 1981, pp. 9-217. Similarly, see the works of R. ST. J. MACDONALD, 1987, pp. 115-149; G. A. CHRISTENSON, 1988, pp. 585-628; and G. M. DANILENKO, 1991, pp. 42-65.

[49] See the Advisory Opinion of the International Court of Justice on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide of May 28, 1951, ICJ Reports 1951, p. 15; the case of *Barcelona Traction, Light and Power Company Limited (Bélgica v. España)*, ICJ Reports 1970, p. 3; the case of *Aplicación de la Convención para la prevención y la sanción del delito de genocidio (Bosnia-Herzegovina v. Yugoslavia)* (preliminary objections) ICJ Reports 1996, p. 595; and the case *Prosecutor v. Anto Furndzija*, IT-95-17/1-T, Judgement of December 10, 1998 of the International Criminal Tribunal for the Former Yugoslavia, paragraphs 137-146 y 153-157.

[50] *Cfr*. Advisory Opinion 18/03, cit., par 102 and ss. The quote by A. GÓMEZ ROBLEDO, 1982, pp. 20-21, which comes from his work.

[51] *Cfr*. Advisory Opinion 18/03, cit., par. 147, 152 and 170.

capacity as an employer; second, as an obligation of making its internal law comply with the provisions of the Convention, and third, as a subsidiary responsibility when, through public policies, it promotes actions and practices of third parties that constitute violations of fundamental rights.[52]

Now, in a work relationship made up of private individuals, the IACHR establishes that, being a principle of equality, like the rest of the rights of the ACHR, a *jus cogens* norm gives rise to *erga omnes* obligations, which the Court characterizes as a norm of necessarily objective character and, as a result, one that includes all of the possible receivers, members of the organs of state power as well as private individuals.[53] For the Court, the effects of fundamental rights with respect to third parties are clearly configured in the legal system itself of the American Convention, specifically in Article 1.1, which requires the adherence to the Convention of both the state and private individuals.

Advisory Opinion 18/03, according to the IACHR, is inscribed in "the doctrine called *Drittwirkung*, which is found in a good part of international case law."[54] Thus, for the IACHR, Advisory Opinion 18/03 has significant implications with respect to the Inter-American system, implications very similar to those that *Young, James and Webster v. The United Kingdom* (1981)[55], or *X and Y v. Netherlands* (1985)[56], had on the framework of the European Convention on Human Rights. In the last of these cases, the European Court ruled that even when the object of Article 8 of the Convention (right to the respect for family life) is essentially the protection of the individual against arbitrary interferences by public authorities, inherent positive obligations exist for the effective respect of private and family life, that can imply the "adoption of measures to ensure the respect for private life, even in relations between private individuals." A certain sector of the doctrine has wanted to see in these two sentences a good demonstration that, in the framework of the European Convention, the *Drittwirkung* is mediated, since the European Court cannot directly apply a norm of the Convention to resolve a conflict between two private individuals, but rather at most condemn a state for not providing sufficiently effective protection against other private individuals.[57]

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[52] See also the case *Masacre de Pueblo Bello v. Colombia*, Judgement of January 31, 2006, par. 126 and 151. This last aspect, which has no precedent in the previous case law of the IACHR and which, curiously has its origin in various resolutions of the Supreme Court of the United States, in which the intervention of the state is interpreted as a form of official support that virtually promotes private discrimination – see *Reitman v. Mulkey* [387 U.S. 369 (1967)], is a clear reproach of U.S. immigration policy. It is important to remember that in the case of *Hoffman Plastic Compounds*, origin of the request of the Advisory Opinion, what was basically concluded was that immigration policy must prevail over labor law.

[53] *Cfr.* Advisory Opinion 18/03, cit., par 140 and ss.

[54] *Ibid*, par. 140 y 143.

[55] Judgement of the European Court of Human Rights of August 13, 1981, series A, no. 44, paragraphs 48-65.

[56] Judgement of the European Court of Human Rights of March 26, 1985, series A, no. 91, paragraph 23.

[57] In this way, F. RIGAUX, 1990, pp. 683-685.

We believe that this opinion is not entirely correct since, as with the Inter-American system, it is true that only states can be condemned for a violation of the rights listed in the Agreement, and in this sense we could in fact talk about mediated effect; nevertheless, from a material point of view, the effect is unmediated since what the state's responsibility addresses is the prior violation of an individuals's right by another individual.[58]

In any case, the consequences of the Advisory Opinion 18/03 go beyond the obligation of the state to have the resources necessary for the prevention or correction of violations of rights in private relations.[59] The Inter-American Court categorically declares and without any type of hesitation, as it has done since the second stage of its case law, that "fundamental rights are direct limits on the actions of individuals."[60]

This statement is reiterated in the most recent case law of the IACHR. In the cases *El Nacional, Así es la Noticia y Globovisión v. Venezuela*, which are about the harassment that the independent media has suffered in the last few years in Venezuela at the hands of sympathizers of the *Bolivarian Revolution,* the Court has not focused its arguments on the tolerance and acquiescence of the regime commanded by Hugo Chávez with respect to the activities of these groups. Its efforts are directed at determining that the freedom of expression, as a *peremptory norm* of the Inter-American system, is a direct limit that is imposed in relation to the actions of third parties, and in this sense must be understood and applied by the judicial organs of the Member States.[61]

The doctrine established in Advisory Opinion 18/03 has already been accepted into the most recent case law of some national courts, as in the case of Mexico. The issue *Alianza por Nayarit*, resolved by the Electoral Court of Judicial Power of the Federation in September 2005, is a clear example of this.[62] On July 3, 2005, the elections in the Mexican state of Nayarit took place to choose, among other positions, the Governor of the State. This election launched the victory of

[58] In this way, see, J. M. BILBAO UBILLOS, 1997, p. 340.

[59] The case *Myrna Mack Chang v. Guatemala*, Judgement of November 25, 2003, par. 153; *Hermanos Gómez Paquiyauri v. Peru*, Judgement of July 8, 2004, par. 129; and *Institute de Reeducación del Menor v. Paraguay*, Judgement of September 2, 2004.

[60] Advisory Opinion 18/03, cit., par. 151.

[61] *Diarios El Nacional y Así es la Noticia v. Venezuela,* Judgement of July 6, 2004, part 12; *Emisora de Televisión Globovisión v. Venezuela*, Judgement of September 2004, part 11; *Carlos Nieto v. Venezuela,* Judgement of July 9, 2004, part 9; *Carpio Nicolle v. Guatemala,* Judgement of July 8, 2004; *Gutiérrez Soler v. Colombia*, Judgement of March 11, 2005, par. 7; and *Los niños adolescentes privados de libertad en el "Complexo do Tuatuapé" v. the Federal Republic of Brazil,* Judgement of November 30, 2005.

[62] Judgement of September 14, 2005, given by the Superior Chamber of the Electoral Tribunal of the Judicial Branch of the Federation. In accordance with Article 99 of the Mexican Constitution, the Electoral Tribunal is the highest jurisdictional authority in this matter, with the exception of that provided for in section II of Article 105 of the Constitution itself. This precept gives the Electoral Tribunal the power to resolve cases regarding the contestation of federal, state, and municipal elections; the violation of politico-electoral rights of the citizens, the resolution of labor conflicts between servants of the Federal Electoral Institute and its workers, as well as those aroused by the servants of the tribunal itself. Similarly, the precept provides that the Superior Chamber will carry out the final count of the results for the Presidential Election of the United Mexican States, once the contestation is resolved, and that it will formulate a declaration of validity of the election and the President elect.

the Institutional Revolutionary Party by a slim margin of votes over the electoral coalition called *Alianza por Nayarit*. This coalition brought about a trial of nonconformity before the Electoral Tribunal, against the count and the declaration of the validity of the election. Among the offenses cited, one that stands out is that of the supposed lack of equity in the private media of the entity that, according to the Alianza por Nayarit, blatantly favored the PRI in terms of airtime and content.

It is important to mention here that in the first phase of the trial for the constitutional electoral revision, the Chamber of the Electoral Court of the State of Nayarit determined that the offenses of the electoral commission were unfounded, since the media "is free to select which piece of news or information they wish to give greater time or relevance to, in virtue of the fact that they are engaged in a commercial activity which, as such, has the objective of offering the public a permanent and more efficient communication service, and the one that brings them a greater economic benefit."[63] By the judgement of the Superior Chamber of the Electoral Tribunal, the argumentation of the regional chamber lacked substance, since "the existence of an evident, explicit and clear treatment that is systematically innocuous or discriminatory by the private media toward the political parties can come to *constitute violations of its obligation of respect for third party rights*."[64]

This obligation of respect for fundamental rights on the part of private individuals, by the judgment of the Electoral Tribunal comes from two sources. In the first place, from that provided for by the ACHR and the case law of the Inter-American Court, which "has extended the duty of respect for rights to the administrative, legislative and judicial authorities, as well as other normative subjects like entities of public interest, whatever its nature or formal origin may be, as are electronic media and mass communication[65]" and, in second place, from the normative supremacy of the constitutional provisions, which imply "a principle of linkage, subjection and obligatoryness in first order for the trustees of public power of the state and, in general, for every individual or judicial person, be he official, social or private."[66]

The arguments established in the case *Alianza por Nayarit* has been reiterated by the Electoral Court in the case *State of Mexico*[67], *in the case Coahuila*[68], and in the *Dictamen relativo al cómputo*

[63] Similarly, the regional chamber of the Electoral Tribunal determined that the media in Mexico enjoy the constitutional guarantee of freedom of expression, and is not subject to any limitation other than the right to private life, moral and public peace, for the content of information published by the media in the country is its sole responsibility. The media is therefore in full liberty of choosing who or what they will give greatest attention. (*Cfr.* Judgement of August 19, 2005, by the Second Chamber of the Electoral Tribunal of the State of Nayarit)

[64] Judgement of September 14, 2005, cit., p. 45.

[65] *Ibid*, p. 55.

[66] Judgement of September 14, 2005, p. 54.

[67] Judgement of September 14, 2005, by the Superior Chamber of the Electoral Tribunal of Judicial Power of the Federation, pp. 400-407.

[68] Judgement of November 23, 2005, by the Superior Chamber of the Electoral Tribunal of Judicial Power of the Federation, pp. 157-160.

*final de la elección de Presidente de los Estados Unidos Mexicanos, declaración de validez de la elección y de presidente electo*[69].

These resolutions are not only a demonstration that the debate over the applicability of fundamental rights in private relations has acquired greater complexity in the Mexican legal system after the case law of the IACHR in this matter. It is urgent that the courts and constitutional tribunals of Latin American countries end the traditional and unjustified rejection of the Inter-American Court in their internal ordinances. Its case law has come to have new content and meaning for fundamental rights in Latin America. Ignoring and rejecting its resolutions cannot but intensify the chronic deficit of judicial protection that the inhabitants of our continent suffer.

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[69] Resolution of September 5, 2006, by the Superior Chamber of the Electoral Tribunal of Judicial Power of the Federation, pp. 147-148. It is important to mention that in *Alianza por Nayarit*, as well as in *Estado de México* and *Coahuil*, three members of the Superior Chamber, the justices Fuentes Cerda, Luna Ramos and Navarro Hidalgo, voted individually against the reasoning mentioned above. In their opinion, "neither from the American Convention of Human Rights nor from the Mexican Constitution (…) is it possible to extract a provision that permits us to affirm that the private individuals are obligated to respect fundamental rights." It is clear that the dissenting vote omits, consciously or not, the analysis not only of the recent case law of the Supreme Court of Mexico in this matter, but also the extensive and consolidated doctrine of the *Drittwirkung*, which in recent years the Inter-American Court of Human Rights has agreed upon. They do no more than affirm that what is established in Articles 1 and 2 of the American Convention are mandates directed exclusively at the State and that the multidirectionality of the fundamental rights would be contrary to Articles 102 and 103 of the Mexican Constitution. In-depth analysis of this issue can be found in J. MIJANGOS Y GONZÁLEZ, 2007, pp. 104-143. In any case, the argumentation of the dissenting justices is a clear example that in the majority of cases, the claims against the multidirectionality of fundamental rights do no more than evade the problem with hardly any justification. I'll permit myself to bring up the comparison to "soccer" proposed by J. M. BILBAO UBILLOS, in the sense that "the detractors of this theory never do anything more than practice a game of contention, predominantly destructive, to clear up without much contemplation the balls that come near their area, confident in the superiority of their solid defense. In reality, they have never taken their rival seriously (…)". (J. M. BILBAO UBILLOS, 1997, p. 851).

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|---|
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|---|
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| *Case* |
|---|
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