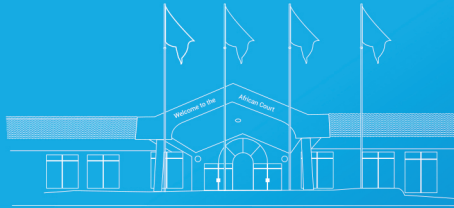


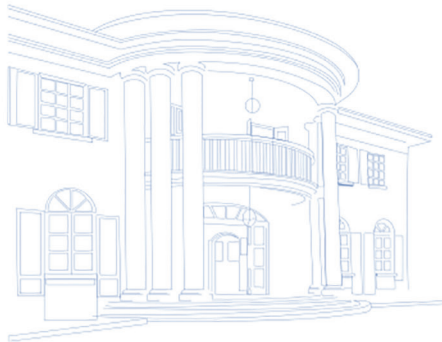


DIALOGUE BETWEEN REGIONAL HUMAN RIGHTS COURTS





DIALOGUE BETWEEN REGIONAL HUMAN RIGHTS COURTS



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PREFACE

On July 17, 2018, the first Dialogue between Regional Human Rights Courts was held at the seat of the Inter-American Court of Human Rights in San José, Costa Rica. Presidents and judges of the African Court on Human and Peoples' Rights, the European Court of Human Rights and the Inter-American Court of Human Rights took part in this event, together with eminent international experts.

The purpose of the Dialogue between Regional Human Rights Courts was to strengthen interaction and cooperation between the three courts. This first meeting was a historic milestone and the logical consequence of different initiatives held previously to strengthen the ties between the courts. These included bilateral meetings or meetings in Arusha, Strasbourg and San José, staff exchanges, joint publications, and the signature of cooperation agreements.

On this 40th anniversary of the entry into force of the American Convention on Human Rights and the creation of the Inter-American Court of Human Rights, we are witnesses to the progress made by international human rights law and national legal systems. However, the situation today also reminds us that, throughout the world, there have been significant setbacks and also attacks on human rights and the international protection mechanisms.

In the face of this reality, the Inter-American Court has considered it essential to strengthen the dialogue and increase the cooperation and the ties between our institutions in order to improve the protection of the human rights of everyone, regardless of the continent where they live. Consequently, our Court has proposed, first, to hold a meeting of the three regional Courts and, second, to set out in a declaration the intention that such working meetings should be formalized and repeated regularly.

The first of these proposals has materialized with the holding of the first Dialogue between Regional Human Rights Courts, the objectives of which were: (a) to share the most important legal, institutional and case law developments of the three courts; (b) to discuss the main challenges and difficulties they face, and (c) to define joint courses of action, reinforcing cooperation and dialogue.

To achieve these objectives, three working sessions were held: the first dealt with the passage from the interpretation of norms to social change; the second addressed matters relating to the authority and legitimacy of the regional courts, and the third focused on questions relating to cooperation between the three courts. Each session began with a brief introduction by the moderator; an expert then gave an initial presentation, which was followed by the comments of a judge of each court, before a discussion was held between all the participants. At the end of each session, the moderator presented the main conclusions of the discussion.

This publication includes the presentations made during the Dialogue in order to preserve a record of this historic event and, also, to disseminate the productive discussions held on that occasion. The publication also includes the addresses given by the United Nations Secretary-General, António Guterres, and the President of the Republic of Costa Rica, Carlos Alvarado Quesada, who accompanied us on July 16, 2018, in the inauguration of the week of commemorations of the 40th anniversary. Lastly, this publication includes the *Declaration of San José*, Costa Rica, signed by the Presidents of the three regional courts and by the President of the Republic of Costa Rica, acting as witness of honor. The *Declaration of San José* officialized the intention of the three regional human rights courts to increase their joint efforts by holding a Permanent Forum for Institutional Dialogue. The purpose of the Forum is to strengthen the protection of human rights and access to international justice of all those subject to the jurisdiction of the three courts; to contribute to State efforts to strengthen their democratic institutions and mechanisms for the protection of human rights, and to overcome common difficulties and challenges for the effective realization of human rights.

We hope that this text contributes to an extensive reflection on our work and, ultimately, to improving the protection of the human rights of everyone. It just remains for me to express deep appreciation to the three courts and to all those who made this historic event possible. Evidently, the Inter-American Court would also like to highlight the generous contribution of the German cooperation agency, GIZ, and especially, the significant support of the DIRAJUS II Program based

in Costa Rica which enabled us to hold this meeting in San José and made this publication possible.

Judge Eduardo Ferrer Mac-Gregor Poisot

President of the Inter-American Court of Human Rights, 2018 - 2019



INAUGURATION OF THE 40TH ANNIVERSARY COMMEMORATIONS

July 16, 2018

Inaugural Addresses

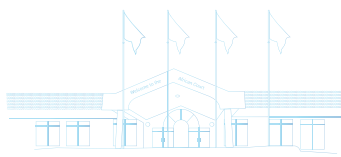




Judge

Eduardo Ferrer Mac-Gregor Poisot

President of the Inter-American Court of Human Rights



Inauguration of the
40th Anniversary Commemorations



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As President, and on behalf of my colleagues of the Inter-American Court of Human Rights, it is a great honor to give the opening address to this week of events to commemorate the 40th anniversary of the entry into force of the American Convention on Human Rights and the creation of the Inter-American Court. This commemoration is especially significant because this year is also the 70th anniversary of both the American Declaration and the Universal Declaration of Human Rights.

First, I would like to express the gratitude of the Inter-American Court's judges and officials to the President of the Republic of Costa Rica who is visiting this court for the first time following his election as President of this great nation last April 1. It is no coincidence that Costa Rica was the first country to ratify the American Convention and to accept the contentious jurisdiction of our court. Today, Mr. President, we can celebrate this anniversary thanks to Costa Rica and, above all, owing to the vision and commitment, 40 years ago, of a group of idealistic women and men of this country; a country that is an example of civic commitment, democracy and human rights. I would like to highlight that several of those visionaries or their family members are here with us today. Through you, Mr. President, and on behalf of the Inter-American Court, I would like to thank the people and the State of Costa Rica for their hospitality and generosity; for having been our home throughout these 40 years.

I would also like to extend this gratitude to the United Nations Secretary-General who accepted to make space in his increasingly complex global agenda to visit the Inter-American Court for the first time and to accompany us in this important week of commemorations. His presence demonstrates his exceptional commitment to human rights and his commendable initiative to make them the focus of our shared task.

We also appreciate the presence of the President of the Inter-American Commission on Human Rights, a fellow institution that, next year, will celebrate its 60th anniversary of productive existence and which, in conjunction with this Court, comprises the organs

for the protection and promotion of the inter-American system of human rights. Together with the Inter-American Commission, we have an immense common task ahead of us on our continent, in the face of authoritarianism and fundamentalism and to address the violence that attempts to silence those who think differently just a few kilometers from here.

In a commemoration such as the one that begins today, it was natural that our fellow courts, the African Court on Human and Peoples' Rights and the European Court of Human Rights, had to be present. Our gratitude to the Presidents of these courts for their presence, as well as to their judges and legal staff who are also with us today. In addition, we are honored to have the presence of the former presidents of the Inter-American Court, as well as of former judges and secretaries of the Court.

I would also like to thank the international community, especially the donor community, that has accompanied us during these 40 years and who are also with us today. Thank you for your support; thank you for your confidence.

You are all very welcome to the human rights court of the Americas.

The central elements of the week of events that begins today are not only the commemoration of the 40th anniversary of the entry into force of the Pact of San José, Costa Rica, the international treaty that gives life to the Inter-American Court and all it means for the American continent, but also an extraordinary and historic effort to foster and promote the necessary multi-level dialogue with organs of the United Nations and the OAS, with the regional human rights courts, high national jurisdictions and authorities of the Americas, and civil society.

The unifying element of the dialogue and the multi-level protection is, and must always be, international human rights law, which is defined by the principle of the greatest possible protection of the individual and his or her dignity. Working in this perspective is what gives meaning to the function shared by all those present.

The judicature, national and international judges, warrants a special mention. Apart from our specific competencies, we basically perform the same function: guaranteeing rights, protecting the individual. Although the tasks and the traditional methods of imparting justice

have evolved and adapted to the different realities, we evidently have similar tasks and common objectives when it come to the defense and guarantee of human rights. Hence the importance of using international treaties, such as the Pact of San José, Costa Rica, which constitutes a touchstone to give effect to the fundamental rights at the national and international level. This leads us to understand a judicature of shared responsibilities and a common law in the area of human rights.

This is especially relevant in the current world climate, in which fundamentalist discourse and actions can be observed that promote discrimination, exclusion, injustice and social inequity. Hence the need to pause and together reflect on our achievements and also take note of the obstacles and challenges we face, with a firm vision of a more equitable society based on the values of humanity and solidarity.

Guided by this vision, it is our wish that this 40th anniversary of the Inter-American Court be an opportunity for celebration, but also for work and reflection. This is why we have organized a series of different events and initiatives during the week, which will initiate a year of work, dialogue, and learning about shared responsibilities, to be implemented intensively throughout the hemisphere.

Following this inauguration ceremony, tomorrow, in this same courtroom, we will hold a *Dialogue between Regional Human Rights Courts*. This will be a working session, a private seminar between the Courts of Arusha, Strasbourg and San José, to follow up on the already fluid and useful relationship that the Inter-American Court has with its fellow international courts.

Although we have met occasionally or bilaterally over the years, on this occasion we will do so with official delegations from the three courts. In the spirit of intensifying our collaboration, we are creating a permanent dialogue forum between the world's three regional human rights courts.

Tomorrow, we will have the opportunity to share experiences, points of view, and objectives in relation to our achievements and the challenges we now face. This will be an unprecedented event in San José, Costa Rica, that seeks to strengthen the relations between our regional courts and to enhance the effectiveness of the protection of human rights and the rule of law on our continents. In addition, as

a result of this dialogue, we hope to adopt the first joint declaration between the world's three regional human rights courts.

Simultaneously, tomorrow, there will be an event organized by the Inter-American Court in conjunction with the Universidad de Costa Rica with the participation of a much loved former president of the Court and two very distinguished scholars, friends of the Court. This event, together with the signature of two agreements with Costa Rican universities today, initiates – on this 40th anniversary – a program of academic linkages with the universities of this country and throughout the hemisphere. We are convinced that a better future awaits us and that it is built on human rights education.

On the following days, the Court will hold an international seminar entitled *Successes and challenges in regional human rights systems*, to which you are all cordially invited. It will take place on Wednesday, July 18, in the National Theater of Costa Rica – an emblematic venue where the American Convention was signed and this Court was formally installed – and on Thursday, July 19, in the Main Auditorium of the Universidad de Costa Rica. This will be a world-class event with distinguished participants and an international audience. We are profoundly grateful to those who have given their support to this initiative and those who have traveled to San José to accompany us on this occasion. Participants in the event include judges of the three regional courts, the most eminent international experts in the field of human rights, former presidents and former judges of the Inter-American Court, authorities of the Inter-American Commission on Human Rights, and also presidents and judges of national high courts, representatives of State authorities, human rights defenders, academics with vast experience, victims of human rights violations, and representatives of civil society.

Without doubt, this forum will allow us to reflect together with all the key actors on the past, present and future, not only of the inter-American system of human rights, but also of the Universal, African and European human rights systems, bearing in mind that the problems and realities we have as a society result in the need to confront them globally and comprehensively.

As President of the Inter-American Court, I am delighted to have the opportunity to share experiences and reflections on the

strengthening of our systems for the protection of human rights. I not only predict the success of all the meetings and discussions we will have, but am convinced that this represents only the beginning of the firm commitment of our Court to closer and more productive collaborations in order to advance towards the effective protection of human rights: our common task and our core mission.

Ladies and gentlemen, the commemorative events that begin today symbolize the firm commitment of everyone here present to respect for the dignity of all human beings. Your presence here endorses not only what the Pact of San José, Costa Rica, and the work of the Inter-American Court protecting rights over the course of 40 years signifies for our American hemisphere, but also shows empathy for the struggle and suffering of the victims of the most egregious human rights violations. We have been witnesses of their stories, their suffering and their testimony, here, in this courtroom. Your presence also supports all those institutions and organizations that, from the start, have attempted to ensure that the world inherited by future generations is defined by values such as peace, justice, respect, equality, tolerance and solidarity.

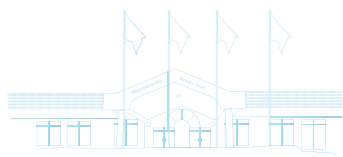
With this vision, we will humbly continue the legacy of those women and men, visionaries of this country and of other States of our region. We will continue working together towards a common objective and aspiration: the full realization of human rights, democracy and the rule of law for all the inhabitants of our hemisphere.

Thank you for your presence and, once again, welcome.



António Guterres

Secretary-General of the United Nations



Inauguration of the
40th Anniversary Commemorations



I am delighted to be here with you to celebrate the 40th anniversary of this important Inter-American Court of Human Rights.

I would like to pay homage to the court's judges and to the human rights tradition over which you preside. It is logical that the seat of this court of human rights is in San José, owing to the Pact of San José and because Costa Rica has made multilateralism and respect for international law pillars of its national identity. I give thanks to Costa Rica not only for providing the court with a home, but also for embodying the fundamental principles that this organ represents.

In a part of the world ravaged by violence, authoritarianism and corruption, Costa Rica has always been conspicuous for its commitment to the principles of democracy, the rule of law, peace and human rights.

Ladies and gentlemen, this is a year of historic celebrations for the Americas. Seventy years ago, the American Declaration of the Rights and Duties of Man was adopted. This was the first significant international document on human rights. Some months later, the Universal Declaration of Human Rights was adopted, making human rights one of the three pillars of the United Nations, together with peace and development. As in the case of a tripod, each of these pillars is equally important; there can be no development without peace, or peace without development, and neither of them can prosper without full respect for human rights.

This is why this Court is so important. Forty years ago, the American Convention on Human Rights entered into force, and this resulted in the establishment of the Court where, today, we are assembled.

During the four decades of its existence, the Inter-American Court has been at the forefront of legislative and constitutional reforms, as well as with regard to policies that support human rights. You encourage the States to comply with human rights standards and hold them accountable for the violation of those rights.

You provide moral leadership, and act to eliminate human rights violations and to punish those who perpetuate them. You have provided

redress for thousands of victims who have suffered the violation of their rights, and you have revealed the essential nature of the regional human rights systems, even in contexts of social conflict where violations of these rights are widespread. When the Court was established, authoritarian regimes predominated in this region. Egregious human rights violations, including enforced disappearances and torture, were common. And, although it came into being in such an inauspicious context, the inter-American system of human rights has prospered and has been able to reduce the violations of those rights; it has enforced accountability, and it has strengthened human rights standards.

The work of the Inter-American Court and the Inter-American Commission on Human Rights has made a significant contribution to the wave of democratization in the hemisphere. In 1988, the historic judgment in the case of *Velásquez Rodríguez v. Honduras* established the responsibility of the States to investigate, punish, and make reparation for human rights violations such as enforced disappearance.

The Court has also contributed to promoting the rights of indigenous peoples and Afro-descendants to land and natural resources. More recently, the Court has ruled on a wide range of human rights problems such as the right to nationality, the responsibilities of the judiciary, and the elaboration of standards of due diligence in cases of violence against women.

However, despite these positive developments, the principles of the fundamental human rights continue to be put to the test, not only in the Americas, but in every region. We see how criticism is penalized and human rights defenders and environmental activists are intimidated and murdered. We see attempts to undermine the independence of the judiciary. We see the denial of women's reproductive rights and we see racist and xenophobic elements deliberately fan the flames of hate and discrimination.

We also see that marginalized communities are discriminated against and excluded from development and opportunities while inequalities increase. These actions represent a danger to all of us. It is essential that, throughout the world, the people and their leaders

renew their commitment to defend all the human rights: civil, political, economic, social and cultural.

These are the values that underlie our desire for a better world, one that is safer and more just for everyone, as reflected in the Agenda 2030 for sustainable development.

Ladies and gentlemen, the region has made great strides since the dark days of the 1970s and 1980s. Nevertheless, some parts of this region continue to face important challenges with regard to human rights such as impunity, widespread violence and insecurity, a reduction of democratic space, and high rates of gender-based violence, poverty, inequality and discrimination.

Corruption impedes the ability of the State to deal with these problems that undermine the people's confidence in the democratic system. Those who support the burden of human rights violations are all those who, historically, have suffered discrimination and marginalization: children, women, indigenous communities, Afro-descendants, migrants, refugees, the rural poor, persons with disabilities, and lesbian, gay, bisexual, transgender and intersex persons. This Court is their resource. It has given a voice to the victims and those who are vulnerable. It plays an essential role in the promotion of respect for the rules and standards of human rights and has established essential parameters with which domestic courts must comply.

However, 40 years after the Court's creation, several States have still not accepted its jurisdiction. And there are States that have accepted it, but where there are dangerous precedents because domestic rulings are issued that fail to recognize the binding nature of the decisions of this organ. We also see political leaders who criticize the very foundations of the human rights system.

We must overcome the false dichotomy between human rights and national sovereignty. Human rights and national sovereignty go hand in hand. The provision of human rights strengthens States and societies, thereby strengthening sovereignty; and the best defenders of human rights are well-functioning sovereign States. Consequently, we must all remain vigilant. The promotion and protection of human rights cannot be taken for granted; human dignity, freedom and safety are at stake.

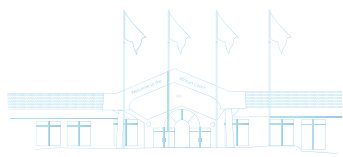
Ladies and gentlemen, 25 years ago, the World Conference on Human Rights supported efforts to increase the effectiveness of the regional human rights systems and highlighted the importance of cooperation with the human rights system of the United Nations. I am here to affirm that the United Nations will continue working to support your efforts. While we celebrate the history of this Court and the 70th anniversary of the Universal Declaration of Human Rights, we should not forget that human rights are much more than mere words, they are the bedrock of our progress as peoples and are essential for peace and development. They need to be implemented, especially in the daily life of the poorest and most marginalized.

Human rights are our collective responsibility and we all have a role to play in their preservation and promotion. On the 40th anniversary of the Inter-American Court of Human Rights let us remember that there can be no sustainable prosperity unless everyone can benefit from it. There can be no lasting peace without justice and without respect for human rights.

I commend the efforts of this Court and urge you to be vigilant and resolute in order to protect and promote human rights throughout the American continent.



Carlos Alvarado Quesada
President of the Republic of Costa Rica



Inauguration of the
40th Anniversary Commemorations



As President of the Republic of Costa Rica, it is an immense honor to take part in this historic celebration, precisely because this is the place where the principal human rights charter of the Americas was signed, and on the occasion of the 40th anniversary of its entry into force. Moreover, I would also like to say that, for me as a Costa Rican, it is truly an honor that the history of the Inter-American Court of Human Rights is associated with the efforts of eminent Costa Rican men and women: women such as Sonia Picado and Elizabeth Odio; men such as Rodrigo Carazo, former President of Costa Rica, and Rodolfo Piza Escalante, among many other Costa Ricans who have contributed to this endeavor of the Americas. Against this background, I feel bound to honor this American legacy and this Costa Rican contribution.

Despite the major challenges that the globalization process faces and that, today, we are undeniably experiencing, it has been able to relativize the importance of national borders while enhancing the value of dialogue and concertation as effective ways of achieving goals that go beyond the interests of a single State.

The nations that form the global community are increasingly interconnected owing to the need to associate and find consensual solutions to their common problems, which are also standardized due to globalization. Multilateralism is the form taken by relations between the societies of the twenty-first century. The need to find common goals and joint strategies makes it increasingly necessary to overcome the barriers of nationalism, unilateralism and introspection, that are also fomented by the irrationality that today we observe in political events in the region and in the world.

Major changes have been possible in today's societies due to the common efforts of the nations; in particular, their active participation in the different international and supra-national organizations. The Americas have provided an example of how to resolve the problems that face both the region and the States that form part of it on a multilateral basis. In the areas of human rights, the Americas have been a pioneer in the signature of numerous international instruments

that have consolidated democracy and strengthened inclusion and respect for the dignity of everyone.

During the 1969 Inter-American Specialized Conference on Human Rights, held in this city, the delegates of the OAS Member States drafted the American Convention on Human Rights, known as the Pact of San José, Costa Rica, the hemisphere's most relevant international instrument. The fact that the countries of the Americas have been able to develop robust protection institutions based on a modern American *corpus iuris* that guarantees rights and is making constant progress confirms that multilateralism is the way forward. Dialogue within and between States is the key to the region's development.

Today, we celebrate the 40th anniversary of the entry into force of one of the most important human rights instruments on the planet. The post-war world gave rise to an international awareness of the need to recognize and protect human rights as an imperative responsibility of the States. This was realized in the Universal Declaration of Human Rights.

The American Convention consolidates the rights recognized in the Universal Declaration. It consolidates the regime of personal liberty and justice that should permeate the domestic legal systems of all the States. It makes the individual the subject of international protection and the center of public action. As the preamble to the American Convention states, "the ideal of free men enjoying freedom from fear and want can be achieved only if conditions are created whereby everyone may enjoy his economic, social, and cultural rights, as well as his civil and political rights."

In the institutional sphere, the Inter-American Commission and the Inter-American Court of Human Rights have confirmed their status as strong and effective organs for the protection of the individual and the enforcement of the obligations of the States.

The State of Costa Rica is highly honored that the American Convention on Human Rights was signed in its territory and that it is called the Pact of San José. Costa Rica has always been a promoter and defender of the inter-American system. This country was one of the two States that signed the Convention on November 22, 1969; it was the first country to adhere to the Convention on March 2, 1970,

and it was the first to deposit the ratification instrument on April 8, 1970. These facts form part of Costa Rica's historical legacy to the international community as a defender of human rights. And, it was because of this, that our country received the great honor of hosting the seat of the Inter-American Court. It was also the first State to accept the jurisdiction of the Inter-American Court on July 2, 1980.

By Law 6889 of September 9, 1983, Costa Rica ratified the Headquarters Agreement for the seat of the Inter-American Court of Human Rights. This law recognized that the decisions issued by the full Court or by its President had the same binding nature as the decisions delivered by Costa Rican courts. The State was the first to use the advisory function under Article 64(2) of the Convention and it is Costa Rica that has used this mechanism most: on five occasions. In this way, it has demonstrated its genuine interest in achieving the broadest possible protection of the rights of those who inhabit the Americas. Costa Rica has been a party in contentious proceedings, the judgments in which have led to important changes in internal standards and in the exercise of public powers. And, throughout these 40 years, a vigorous jurisprudential dialogue has been developed between the domestic courts, especially the Constitutional Chamber, and the Inter-American Court. We must honor and strengthen our country's solid tradition of control of conventionality.

Respect for human rights forms part of what distinguishes and characterizes us before the international community. Nevertheless, progress in the field of human rights is not always as rapid as it should be, or as we would wish, or as the circumstances allow, but we must continue in this struggle.

From all the remarks I have heard today, I wish to recall something that the United Nations Secretary-General – to whom I wish to offer my thanks for his presence here today, because it clearly demonstrates support at the highest level for the human rights system – shared with me in private: the importance of defending the values of the enlightenment. His reflection moved me because it reminded me of the origin of many of my values, which I had not thought about conceptually for some time. I believe that this provides us with a rich vein to mine in order to strengthen our resolve in the face of the struggles that lie ahead, because we are convinced that we must move

forward; and even more convinced, knowing that the circumstances are not necessarily favorable. However, we do know where we want to arrive, and that makes all the difference.

Today, 40 years after that July 1978, we must celebrate the progress that, as a region, we have made owing to the entry into force of the American Convention. This commemoration is crucial in the face of attempts to weaken the inter-American protection system. Our hemisphere must never return to the times in which the nations defended a reserved sovereign domain, while their people saw their rights violated without a supranational body to protect them.

Let us celebrate that our system of protection continues to respond promptly and firmly to the persistent needs in the most unequal region in the world, and hope that its jurisprudence will evolve constantly to attenuate these disparities. As President of Costa Rica, I hope that, within ten years, when we meet to celebrate the 50th anniversary of the entry into force of the Convention, our hemisphere will be increasingly inclusive and respectful of all; a hemisphere that has abolished discrimination, abuse, hate, and that has understood its historic duty to eliminate all the barriers that separate people, and that seeks to attain the ideal state of dignity, personal fulfillment and happiness for all.



DIALOGUE BETWEEN REGIONAL HUMAN RIGHTS COURTS

July 17, 2018

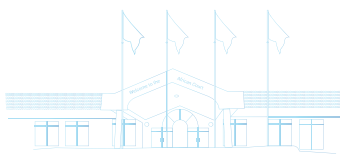
Inaugural Addresses





Eduardo Ferrer Mac-Gregor Poisot

President of the Inter-American Court of Human Rights



Dialogue between
Regional Human Rights Courts



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On behalf of my colleagues of the Inter-American Court of Human Rights and of myself, I would like to extend a warm welcome to you on the occasion of this first Dialogue of the Regional Human Rights Courts. In particular, I am most grateful to Sylvain Oré and Guido Raimondi and the judges and judicial officials of the African Court on Human and Peoples' Rights and the European Court of Human Rights who have come to San José. I would also like to thank the international experts who are with us and who have the task of facilitating the dialogue today: Mónica Pinto, Anja Seibert-Fohr, Michelo Hansungule, Manfred Nowak and Armin von Bogdandy.

This historic meeting of the three courts would not have been possible without the very generous international cooperation of the Federal Republic of Germany. On behalf of the Inter-American Court, I would like to thank the Ambassador, a.i., André Scholz, for accompanying us in this inaugural event and, evidently, the GIZ agency for all its hard work, especially Hellen Ahrens and her team.

I would like to begin by highlighting the relevance of this first meeting of the three regional courts which takes place in a year that is of great significance for human rights throughout the world. In addition to the 40th anniversary of the entry into force of the American Convention and the creation of our regional court, as I remarked yesterday, it is also the 70th anniversary of the American Declaration and the Universal Declaration of Human Rights, pioneering instruments that have had a positive influence on legal systems and State practices worldwide.

This first meeting of our three courts has been preceded by numerous and productive bilateral meetings and exchanges. In the past, the three courts have interacted and learned a great deal from each other; we have benefited from a close relationship and from the dialogue between Arusha, Strasbourg and San José. This dialogue has increased in recent years during which judges and lawyers from the Inter-American Court have taken part in meetings with our peers at the seats of the African Court and the European Court of Human

Rights. Similarly, judges and lawyers from Arusha and Strasbourg have come to San José.

The general purpose of these exchanges has been to share information on developments in case law and the impact of the work of the courts, their relationship with domestic courts, and present and future challenges. In addition, they allowed those concerned to reach a better understanding of different aspects of the functioning of each Court, and their different services and internal procedures, in order to learn about their best practices.

In addition to these working meetings, we have carried out exchanges of Secretariat/Registry staff by the incorporation of lawyers from one Court into the working team of the others. These exchanges reinforce working relationships and allow the case law, functions and procedures of our courts to be shared in a practical and comprehensive manner, facilitating the exchange of best practice between our legal teams and, ultimately, between our courts.

Our shared efforts have even resulted in joint publications such as *Dialogue across the Atlantic: Selected case-law of the European and Inter-American Human Rights Courts*, published by our courts in English and Spanish in 2015. This publication, in addition to disseminating outstanding precedents in Europe and the Americas, reveals the existence of convergence in the way the two human rights treaties are interpreted. In addition, in 2015, we signed a cooperation agreement with the African Court to develop joint initiatives that benefit our institutions, and we continue exploring new ideas for future joint efforts.

However, the interaction between our courts goes beyond the working meetings, staff exchanges, joint publications and cooperation agreements. The Inter-American Court has benefited significantly from the reasoning of its fellow courts. Conventions are living instruments that remain valid owing to the interpretations made by each of the courts, and each Convention was adopted based on the specific needs of its context and has had its own evolution. Nevertheless, we should mention the impact that the European system and the European Convention for the Protection of Human Rights and Fundamental Freedoms has had on the inter-American normative system and institutional design.

This normative and institutional impact has been reflected in the case law of the Inter-American Court from the start. In its first advisory opinions and contentious cases, the San José Court, in its task of interpreting the American Convention, frequently used the precedents of the European Court. The similarity in the wording of the rights and freedoms in the European and American Conventions, in the development of admissibility criteria and interpretation principles, as well as the increasing similarity of the issues brought before the courts in Strasbourg and San José, have internalized the dialogue with European case law in our work up until the present day. Currently, no decision is adopted by the Inter-American Court until it has previously studied the relevant Strasbourg precedents.

With the development of the African human rights system, our possibilities of jurisprudential dialogue increased to our advantage, using its norms and precedents on diverse issues. With the definitive installation and functioning of the African Court, we began to study and to assess its case law and our decisions benefited from the reasonings of our colleagues in Arusha. Even though this interaction is more recent, we have the highest expectations of being able to benefit from the jurisprudential dialogue with the African Court on Human and Peoples' Rights.

Thus, the dissemination and use of African and European case law developments and standards has allowed us to create a common way forward and a minimum standard for the protection of the human rights of everyone, wherever they are.

Nevertheless, this important moment when we are commemorating milestones in the history of human rights – the anniversaries of the American and the Universal Declarations and the American Convention – as a result of which we have accomplished incredible institutional and legal developments, such as the very existence of our three courts – is accompanied by significant setbacks for human rights and for the institutions that safeguard their protection: global threats, non-compliance, and opposition to international human rights law by some States, and discrimination and violence *vis-à-vis* expressions of human diversity by important social sectors.

In this context, we believe it is opportune, and even imperative, to strengthen institutional and jurisprudential dialogue, and to increase

cooperation and institutional ties in order to enhance the protection of the human rights of those under the jurisdiction of our three courts.

Consequently, we proposed, first, to hold this meeting of the three regional courts and, second, to record in a declaration our intention that these working meetings be officialized and regularly repeated in Arusha, Strasbourg and San José.

We observe with optimism that the first of these proposals has been implemented and, today, we are holding this first Dialogue of Regional Human Rights Courts, which has three basic objectives: (a) to share our most significant normative, institutional and jurisprudential advances; (b) to discuss the most important difficulties and challenges, and (c) to define joint courses of action to confront them, reinforcing cooperation and dialogue.

To achieve these objectives, we have proposed to divide today's event into three working sessions: (a) the first entitled *From the interpretation of norms to social change: Human rights treaties as living instruments in light of reality*; (b) the second entitled *Authority and legitimacy of the regional courts: Impact, resistance, difficulties and challenges*, and (c) the third *Strengthening cooperation between the three regional human rights courts*.

As planned, each session will begin with a brief introduction by the moderator, after which an expert will make an initial 15-minute presentation, followed by 10 minutes of comments by a judge of each court. The session will then be opened up to a discussion among all the participants. At the end of each session, the moderator will present a brief overview of the main conclusions.

Regarding future efforts, we have proposed to Judges Sylvain Oré and Guido Raimondi, in their capacity as Presidents of their respective courts, that we sign a document that we will call the *Declaration of San José*. The Declaration will officialize this intention to enhance our relations, our joint efforts, and the exchange of knowledge. Under the *Declaration of San José*, it is proposed to establish a permanent forum for institutional dialogue between the African Court on Human and Peoples' Rights, the European Court of Human Rights and the Inter-American Court of Human Rights.

The purpose of the forum is to strengthen the protection of human rights and access to international justice of those who are subject to

the jurisdiction of the three courts; and to contribute to State efforts to strengthen their democratic institutions and mechanisms for the protection of human rights, and to overcome the common difficulties and challenges for the effective exercise of human rights. The forum would meet in private and public sessions on a rotating basis at the seat of each court, on an annual or a biennial basis depending on the needs and possibilities of the courts. The forum will provide sustainability to the effort we are initiating today and will continue the dialogue on the issues that unite us: (a) our most important development; (b) our impact, and the difficulties and challenges we face, and (c) reinforcement of our joint efforts.

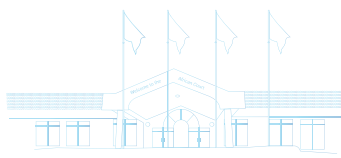
We hope that these two initiatives, within the framework of the 40th anniversary of the entry into force of the American Convention on Human Rights and the creation of the Inter-American Court of Human Rights, will increase the rapprochement between our three courts and that the results will form the basis for improving the protection and effective exercise of the human rights of everyone on our continents.

Once again, I would like to extend a warm welcome to you and to thank you for your presence here at the Inter-American Court of Human Rights.



Sylvain Oré

President of the African Court on Human and Peoples' Rights



Dialogue between
Regional Human Rights Courts



CORTE IDH
Protegiendo Derechos

When addressing such a distinguished audience gathered together on an occasion that I would describe as one of the most important recent events in international human rights justice, I am tempted to propose an audacious premise. Thus, I propose that, in our times, when human rights justice has broken the myth of geographic borders and legal systems, judicial dialogue is no longer a possible choice but rather a mandatory decision. To espouse this imperative, I would like to present my remarks from a double perspective: jurisprudential judicial dialogue and institutional judicial dialogue.

Justifiably qualified as the doctrine of “the commerce of court decisions,” which may be liberal or reserved, jurisprudential judicial dialogue converts the judge into an agent who imports or exports solutions to similar litigations in order to administer a justice that is increasingly global. In the case of regional human rights justice, a dialogue of this type has become almost traditional. It can correctly be noted that, in the important decisions in human rights cases in Africa, the African Court, the African Commission, the ECOWAS Court of Justice, the East African Court of Justice, and the SADC Tribunal have constructively and decisively referred to the rulings of the European Court or the Inter-American Court of Human Rights. We can mention, among others, the decisions of the African Commission in the case of *SERAP v. Nigeria*, which relates to the justiciability of social and economic rights; of the African Court reprising the decriminalizing approach to press offenses in the judgment in *Konaté v. Burkina Faso*, or of the East African Court of Justice that, in the case of the *Burundi Journalists Union v. Burundi*, imported from Strasbourg the function of democratization inherent in freedom of expression. These case law transactions are not exclusively trans-Atlantic because one can observe the explicit reference by the East Africa Court of Justice and the SADC Tribunal to the decisions of the African Commission on Human and Peoples’ Rights, in particular, the former in the case of *Katabazi v. Uganda* on the principle of the rule of law and, the latter, in the well-known judgment in the case of *Campbell v. Zimbabwe*.

Ladies and gentlemen, honorable presidents and colleagues, having observed this liberalism followed by the African regional jurisdictions in relation to their colleagues on other continents, one is forced to note that the dialogue is imperfect because there is no evidence of the inverse trend. Regarding the increasingly globalized issues relating to the fundamental rights and freedoms that form the common denominator of the contentious cases submitted to us, it is essential to pass from a jurisprudential judicial dialogue to an institutional judicial dialogue. This second aspect of the proposal that I announced at the start of my remarks, commands us as regional human rights judges not to let the jurisprudential dialogue take shape by itself but to bring about the institutional framework that is essential for its birth, its development, its flowering, its consolidation. As I mentioned previously, this refers to a structural constraint, because the contemporary challenges facing human rights go beyond the borders of our continents, whether these are migrants' rights, challenges to security owing to terrorism, socio-economic rights threatened by commercial and financial liberalism, or even freedom of expression and political participation in light of the global narrowing of the civil and civic space.

Mr. President of the Inter-American Court of Human Rights, distinguished host, you will understand, thus, that I congratulate you in my own name, and on behalf of the African Court on Human and Peoples' Rights for the brilliant initiative of this inter-continental gathering. By placing it in the context of the celebration of the 40th anniversary of your jurisdiction, unanimously acclaimed as an icon for the reparation of human rights violations in the Americas and throughout the world, you have blazed a trail, materialized a symbol, embarked on a project. The *Declaration of San José* that you have proposed as a tri-continental alliance is, in my opinion, the wisest expression of this. To close my remarks, I would therefore like to express the hope that the *Declaration of San José* will be the point of reference for the start of the institutional dialogue towards an ideal and complete jurisprudential dialogue. I hope that this Declaration will prove to be a catalyst for interaction between jurisdictions, between judges, between legal traditions, between jurisprudential

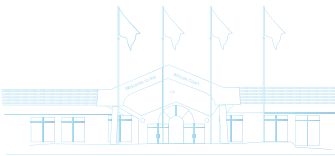
reasoning, but from a single perspective: the effective protection of human rights in Africa, in Europe, and in the Americas.

Mr. President, thank you for your kind invitation, thank you for this inspiring initiative. Distinguished colleagues and guests, thank you for your kind attention.



Guido Raimondi

President of the European Court of Human Rights



Dialogue between
Regional Human Rights Courts



CORTE IDH
Protegiendo Derechos

It is a great honour for me, as well for as my fellow judges from the European Court of Human Rights, to celebrate with you the 40th anniversary of the entry into force of the American Convention on Human Rights and the establishment of your court. I am joined here at the seat of the Inter-American Court of Human Rights, by Judge Ganna Yudkivska, Section President, and Judge Branko Lubarda, Section Vice President, as well as Abel Campos, Section Registrar.

This year, in Strasbourg, we are also celebrating an anniversary. It is the 20th anniversary of the establishment of the new European Court of Human Rights as a full-time single body, following the entry into force of Protocol No. 11 to the European Convention on Human Rights in 1998. This was a highly significant development for the European human rights protection system. The original system established in 1950, which was structured around the Commission and the old Court, and which lasted for nearly 50 years, bore a strong resemblance to the current inter-American system.

While both systems have kept their differences in terms of structure and procedures, the two regional human rights courts have intensified their relations and dialogue in recent times. They have increased their direct contact, in the form of institutional and working visits by their respective presidents and judges. Following the visit in 2012 by one of my predecessors, Sir Nicolas Bratza, and the two vice-presidents at the time, to your court, the two courts agreed to implement a number of practical steps to intensify dialogue and allow for a more continuous exchange. We put in place a programme of staff exchanges between our Registries which has been extremely successful, allowing lawyers from each registry to familiarise themselves with the working methods and the case-law of each court. In 2014, we had the pleasure of receiving in Strasbourg a one-week visit from your court in full, with a view to exchanging views on issues of substantive case-law and procedure with our judges. We also published the first joint annual compilation of cases of both courts in a book called “*Dialogue across the Atlantic*” (in 2015) and we now disseminate your case-law in our Case-law information notes and through our website.

This strengthening of direct contact and institutional cooperation has resulted in a better understanding of one another contributing to improving judicial dialogue and increasing the cross-references to each other's jurisprudence.

For instance, the European Court has drawn inspiration across the years from the Inter-American Court on issues such as the death penalty,¹ enforced disappearances,² torture,³ the compulsory character of interim measures,⁴ and more recently, amnesties in respect of grave breaches of human rights,⁵ procedural safeguards in cases of removal of judges,⁶ and the right of access to information.⁷ For its part, the Inter-American Court has systematically included references to our case-law in its judgments. This judicial dialogue is natural given the similarity of most of the rights and freedoms protected by both Conventions, but also because we share a common approach and similar methods of interpretation. In addition, the types of cases and issues that have to be decided by both courts have become increasingly similar. Let me name just two types of cases: those involving gross human rights violations in conflict and war zones, and those concerning attacks against the independence of the judiciary. This increasing similarity has conferred a new relevance on our judicial dialogue.

But there is also a deeper reason for dialogue: the principle of the universality of human rights, which underpins international human rights law and which should guide us in our efforts to avoid

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- 1 ECHR, *Öcalan v. Turkey* [GC], no. 46221/99, § 166, 12 May 2005.
 - 2 ECHR, *Varnava and Others v. Turkey* [GC], no. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90), § 147, 18 September 2009.
 - 3 ECHR, *Gäfgen v. Germany* [GC], no. 22978/05, § 108, 1 June 2010.
 - 4 ECHR, *Mamatkulov and Askarov v. Turkey*, nos. 46827/99 and 46951/99, §§ 112-113 and 124, 4 February 2005.
 - 5 ECHR, *Marguš v. Croatia* [GC], no. 4455/10, §§ 131 and 138, 27 May 2014.
 - 6 ECHR, *Baka v. Hungary* [GC], no. 20261/12, §§ 114, 121 and 172, 23 June 2016.
 - 7 ECHR, *Magyar Helsinki Bizottság v. Hungary* [GC], no. 18030/11, § 146, 8 November 2016.

fragmentation as much as possible when it comes to the interpretation of our core rights.

It is true that there are many areas in which there is still room for strengthening our dialogue. I am thinking, for instance, of the valuable experience of the Inter-American Court in advisory opinions, which can be of great interest to the European Court in view of the forthcoming entry into force of Protocol No. 16 to the Convention on August 1 this year. This Protocol will expand considerably our advisory jurisdiction in respect of those States that have ratified it. Let me also mention your rich jurisprudence on reparations and execution of judgments. We could possibly draw inspiration from it when we use our power to indicate general and individual measures for the execution of our own judgments under Article 46 of the Convention.

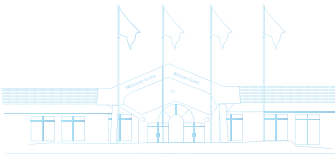
Finally, I would like to conclude by congratulating the Inter-American Court on its 40th anniversary, both personally and also on behalf of all the 47 judges of the European Court of Human Rights. You have contributed greatly to the enforcement of human rights and the consolidation of democratic institutions in the Americas during all these years, while at the same time facing important challenges and threats. Your jurisprudence has become a normative yardstick for national courts and authorities in your continent, and at the same time a very well-respected source of inspiration for other regional systems such as our Court and the African Court.

I sincerely hope that this joint celebration and the exchanges that will follow will serve to develop further the already excellent relations and dialogue between our courts. Thank you.



André Scholz

Chargé d'affaires a.i. of the Embassy the Federal Republic of Germany to Costa Rica



Dialogue between
Regional Human Rights Courts



CORTE IDH
Protegiendo Derechos

First, on behalf of the Government of the Federal Republic of Germany, I would like to congratulate the Inter-American Court of Human Rights, and its judges and its collaborators on this 40th anniversary of its existence and in recognition of the work carried out to date to strengthen human rights. It is a special honor for me to welcome you to this international dialogue between the three regional human rights courts which seeks to create a permanent forum between them.

It gives me great pleasure to see the Presidents of the three courts with their secretary/registrars and lawyers together in this courtroom. I would also like to greet and express our gratitude to the panelists in this dialogue who have accepted to share with us their experience and knowledge and who will facilitate the discussions held during this historic day.

Ladies and gentlemen, we are living in exciting times that culminate in a crucial question: Is our strength and determination sufficient to find common answers to the current challenges and, in particular, the threat to the multilateral world order? There is no doubt that, today, the world is immersed in a very tense and difficult moment of its history. The generation who lived through the horrors of the Second World War and who, in the wake of the conflict, forged an institutional legal framework to preserve the peace, are disappearing. Now we observe policies and attitudes that take us back to a previous stage; it seems that the law of the jungle is returning and the force of the law is decreasing. International law has become relativized, and even denied completely; moreover, conflicts, discrimination, poverty, inequality and terrorism are disasters created by man that are mutually reinforcing and that, today, devastate too many individuals and communities.

In this negative context, an increase in the repression of human rights can be noted; evidently, this does not resolve these conflicts but is just another factor that causes them. We should take note of these “anti-developments,” but we should not let them mislead us in our convictions. The work of untangling the web of conflicts

and replacing it by a process that results in human dignity, security, and peace is the urgent concern of Germany, revealed by its strong approval of the Agenda 2030.

We know that without peace, stability, human rights and effective governance based on the rule of law, it is not possible to achieve sustainable development.

Accordingly, Germany is providing support to both the African Union, through the project: *Support of the African Governance Architecture*, and the Organization of American States, with the project: *Regional international law and access to justice in Latin America*. To this is added the contributions that Germany is making within Europe. It is as a result of this, that we have been able to gather here today in the courtroom of the Inter-American Court of Human Rights, where the Court hears the victims of human rights violations and where it seeks to restore their human dignity. Now, in this place, you have the difficult task of addressing the challenges to human rights that the future holds and, consequently, monitoring the institutions created to guarantee them.

I therefore wish you a successful and productive discussion to address the future challenges to human rights and to enhance the institutional framework of each court; also to strengthen cooperation between the three courts. Germany will soon once again assume an important responsibility as a non-permanent member of the UN Security Council; it will be a reliable and active partner to all those who are committed to strengthening the international jurisdiction, including in the area of human rights.



SESSION 1

From the interpretation of norms
to social change:
human rights treaties as living
instruments in light of reality

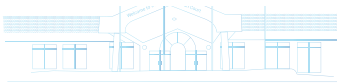




Armin von Bogdandy

*Director of the Max Planck Institute
for Comparative Public Law and International Law*

The mandate of the Inter-American System:
transformative constitutionalism by a common law of
human rights



SESSION 1

From the interpretation of norms to social change:
human rights treaties as living instruments in light
of reality



CORTE IDH
Protegiendo Derechos

We come together to celebrate the 40th anniversary of the entry into force of the American Convention on Human Rights. In German, one way to congratulate a person on their birthday is to sing: “how wonderful that you were born, otherwise we would have really missed you”. This is, of course, somewhat silly, but the sentiment can be carried over to the American Convention. Why is this? Because the Convention, due to the work of many individuals and institutions, developed into something truly important: a cornerstone of Latin American transformative constitutionalism.

How has that been possible? Is it in conformity with the law? These questions lead to the topic I have been asked to talk about. “From the interpretation of norms to social change: Human rights treaties as ‘living instruments’ in light of social reality.”

Transformative constitutionalism implies interpreting norms so that they can have effects on reality and produce social change. Particularly in Latin America this constitutionalism aims at bringing human rights into the social processes that tackle structural problems.¹ The magnitude of these problems is not minor; of particular importance are violence, social exclusion and the weakness of institutions: for example, a lack of judicial independence. Indeed, the American Convention might be the most important international instrument in the world to advance this type of social change.

Of course, courts cannot, and should not, provide for such change alone. Transformations of that magnitude require a strong commitment of many actors throughout a society and much political will.² As the

1 Armin von Bogdandy, Eduardo Ferrer Mac-Gregor, Mariela Morales Antoniazzi, Flávia Piovesan, Ximena Soley, “*Ius Constitutionale Commune in Latin America: A Regional Approach to Transformative Constitutionalism.*” in Armin von Bogdandy, Eduardo Ferrer MacGregor, Mariela Morales Antoniazzi, Flavia Piovesan, Ximena Soley (eds), *Transformative Constitutionalism in Latin America. The Emergence of a New Ius Commune* (Oxford University Press 2017) 5, 7.

2 Alexandra Huneus, “Courts Resisting Courts: Lessons from the Inter-American Court’s Struggle to Enforce Human Rights,” (2011) 44(3) *Cornell International Law Journal*; Ariel E Dulitzky, “El impacto del control de convencionalidad.

Inter-American Court has made clear with its conventionality control doctrine, all institutions (and not only the judiciary) are responsible for the protection of human rights. This does not diminish the importance of the judiciary's contribution to these ends. It can be observed in many countries: for example, in the punishment of state terrorism in Peru, the inclusion of indigenous peoples in the political process in Ecuador, the protection of gay persons in Chile,³ or, for a mostly nationally-driven example, the development of a true public health system in Colombia.⁴

How does court-steered transformative constitutionalism work? This can be explained by the other topics that I have been asked to address, namely whether human rights courts should participate in building a common law for a region, whether they should advance social change, and how that squares with a possible margin of appreciation.

I will develop my argument in three steps. I will first explain how the inter-American system received, through a continent-wide constitutional development, its mandate for supporting transformative constitutionalism. Second, I will show what that mandate means and what the safeguards against "judicial activism running wild" are. Third, I will deduce yardsticks to evaluate such evolutive interpretation of human rights.

Un cambio de paradigma en el sistema interamericano de derechos humanos?" in Julio César Rivera (ed), *Tratado de los Derechos Constitucionales* (Abeledo Perrot 2014) 533 ff; Soley, "The Transformative Dimension of Inter-American Jurisprudence" in von Bogdandy *et al.*, (eds), *Transformative Constitutionalism in Latin America*, supra note 1, 338, 344.

3 I/A Court HR, *Barrios Altos v. Peru* (March 14, 2001) Series C No. 75, Merits; I/A Court HR, *Barrios Altos v. Peru* (September 3, 2001) Series C No. 83, Interpretation of the judgment on merits; I/A Court HR, *La Cantuta v. Peru* (November 29, 2006) Series C No. 162, Merits, reparations and costs; I/A Court HR, *Kichwa Indigenous People of Sarayaku v. Ecuador* (June 27, 2012) Series C No. 245, Merits and reparations; I/A Court HR, *Atala Riffo and daughters v. Chile* (February 24, 2012) Series C No. 239, Merits, reparations and costs.

4 Constitutional Court of the Republic of Colombia, Second Review Chamber, July 31, 2008, Judgment T-760/08.

1. The mandate

Today, the American Convention provides the institutions of the inter-American system with a mandate to participate in transformative constitutionalism in the Americas.⁵ This mandate is the legal basis for a human rights case law that addresses core structural problems of the region, namely weak institutions, social exclusion and violence. This case law feeds a common law of human rights in the region, a sort of *Ius Constitutionale Commune* in Latin America.

How is this legally possible? There is little in the text of the American Convention on Human Rights to support such a mandate. Indeed, virtually nobody imagined, either in 1969 or 1978 or 1979, that the Convention could provide the basis for transformative constitutionalism. It suffices to remember the outlook of the governments at the time.⁶ Nevertheless, today, it is safe to assume that the Convention entrusts the inter-American system, not least its Court, with such a mandate.

How did it happen? In the 1960s and 1970s, most Latin American countries were under authoritarian or repressive governments. Only from the 1980s onwards, did the countries of the region slowly made the transition to democracy. When they did so, they had clear ideas what to do. The most important has been the maxim “*nunca más*”, “never again”. But the countries also looked for broader social consensus.

To this end, they took various steps. Of particular importance is that most constitutions adopted rich, often progressive catalogues of rights and opened up to international human rights. Many also attributed rights treaties and the decisions of the Inter-American Court a special

5 The contemporary debate started with Karl Klare, “Legal Culture and Transformative Constitutionalism” (1998) 14 *South African Journal on Human Rights*, 146; see also, Michaela Hailbronner, “Transformative Constitutionalism: Not Only in the Global South” (2017) 65 *American Journal of Comparative Law*, 527.

6 On the previously unimagined potential of the Convention, as well as the unexpected evolution that led to innovative outcomes, see Tom J Farer, “The Rise of the Inter-American Human Rights Regime: No Longer a Unicorn, Not Yet an Ox” (1997) 19 *Human Rights Quarterly*, 514 ff; also Sabrina Ragone, “The Inter-American System of Human Rights: Essential Features”, in von Bogdandy *et al.* (eds), *Transformative Constitutionalism in Latin America*, supra note 1, 281.

place in their domestic legal orders.⁷ Thereby, domestic constitutions overcame an often overly-rigid understanding of sovereignty and set up a two level system of human rights entrenchment.

In this context, the Inter-American Court, inspired by the Commission, NGOs and, importantly, like-minded domestic forces, started interpreting the provisions of the Convention in a specific evolutive way that led to a distinct Latin American form of transformative constitutionalism. Transformative constitutionalism, i.e. where constitutional law is understood as an instrument for profound change, can be found in many countries. The Mexican Constitution of 1917 or the Italian one of 1947 are fine examples; the problem there was that the courts did not follow the transformative program laid down in the text. In contrast, the South African and Indian apex courts did take their transformative constitutions and mandate seriously by developing a distinct jurisprudence that addresses structural problems.

Transformative constitutionalism is a global phenomenon, but there are two Latin American particularities that should be stressed. First, its transformative constitutionalism is not only supported by domestic constitutions, but also by an international regime with two operative institutions, the Inter-American Commission and Court.⁸ Second, this two-tier system is supplemented with a horizontal dialogue between the domestic institutions that share this outlook, in particular domestic judges entrusted with constitutional adjudication. Through this regional discourse, domestic institutions of various countries involved in transformative constitutionalism supported each other and thereby strengthen the phenomenon. The international level is crucial for this horizontal entrenchment because decisions of the Inter-American Court provide much of the substance that feeds the regional discourse. The domestic judges can connect at a much

7 Mariela Morales Antoniazzi, *Protección supranacional de la democracia en Suramérica. Un estudio sobre el acervo del ius constitutionale commune* (UNAM, 2014).

8 Rodrigo Uprimny, “Las transformaciones constitucionales recientes en América Latina”, in César Rodríguez Garavito (ed), *El derecho en América Latina. Un mapa para el pensamiento jurídico del siglo XXI* (Siglo XXI Editores 2011) 109, 114.

deeper level when they discuss how to respond to a common regional system, to cases that concern them all. This, in a continuous loop, feeds the legitimacy of the Inter-American Court, whose foundations are not pillars, but a dense network of capillary roots that grow deep into the social tissue of each State in the region.

With its bold step of creating the doctrine of conventionality control, the Court did much to energize this development.⁹ The term *common law* is a fitting concept for what is developing because conventionality control implies that the Convention and the Inter-American Court's case law must inform and even guide the decisions of every judge in the region. Accordingly, every national judge becomes an inter-American judge. This dramatically expands the reach of the Convention. To understand the full social and political importance of this doctrine, one needs to remember the political salience of many leading cases, e.g. gross human rights violations committed by actors often still alive and sometimes still in power.

It seems easy to depict such an evolutive interpretation of the Inter-American Court as "judicial activism," as exceeding the mandate, or being *ultra vires* and hence illegal. And yet, few domestic institutions have come to that conclusion. Many accept this development as legal and legitimate. Why? Because this evolutive interpretation did not come about in a one-sided, unilateral, top-down process from a court seeking hegemony. Rather, it was a common process of many actors.

First, most constitutions attribute to the Convention and its institutions a key role in their domestic legal system. They are received in the constitutional foundations of the Convention's member states; doctrinally this is referred to as the block of constitutionality, formed

9 I/A Court HR, *Almonacid Arellano et al. v. Chile* (September 26, 2006) Series C No. 154, Preliminary objections, merits, reparations and costs; see, Eduardo Ferrer Mac Gregor, "El control difuso de convencionalidad en el Estado constitucional", Héctor Fix-Zamudio and Diego Valades (eds), *Formación y perspectiva del Estado Mexicano* (El Colegio Nacional-UNAM 2010) 151 to 188; Miriam Henríquez and Mariela Morales Antoniazzi (eds), *El control de convencionalidad: un balance comparado a 10 años de Almonacid Arellano vs. Chile* (DER Ediciones, 2017).

by the domestic constitution and the Convention.¹⁰ Accordingly, in terms of constitutional theory and doctrine, this development of the mandate can be explained as an instance of constitutional change. The doctrine of constitutional change shows how deep moral and political shifts in societies can impact on the meaning of the law without any formal change (Georg Jellinek, Bruce Ackerman).¹¹ This is particularly so with open-textured provisions, human rights being the prime example.

Second, the case law of the Court responds to expectations and interpretations brought to it by numerous actors.¹² Indeed, the Court's evolutive interpretation is fed and informed by many developments on the ground throughout the region. Civil society organizations play a key role here. In turn, the possibility of litigation before the Court helps the development of such civil society organizations. These are essential not only for the flourishing of human rights, but also for democracy in the region.

Third, many domestic institutions have recognized this development of the mandate. Domestic courts have accepted and endorsed this interpretation, understanding its value in fulfilling their national constitutional mandates. This can be seen in the reception of inter-American case law in many domestic decisions. Domestic judges even speak of a "common law" and explicitly refer to themselves as "inter-American judges."¹³ Also, the political branch has responded positively. Just consider the case of Uruguay, which, in 2018, nominated as a judge to the Inter-American Court a judge of its Supreme Court

10 Manuel Góngora Mera, *Inter-American Judicial Constitutionalism. On the Constitutional Rank of Human Rights Treaties in Latin America through National and Inter-American Adjudication* (IIDH 2011).

11 For more details, Carlos Bernal, "Prefacio Cambio Constitucional Informal: Una Introducción Crítica" in Richard Albert and Carlos Bernal (eds), *Cambio constitucional informal*, (Editorial Universidad Externado 2016) 9.

12 Soley, "The Transformative Dimension of Inter-American Jurisprudence" in von Bogdandy *et al.* (eds), *Transformative Constitutionalism in Latin America*, supra note 1, 352-355.

13 See the contributions by Arturo Zaldívar Lelo de Larrea (Mexico), Carmen María Escoto (Costa Rica) and Dina Ochoa Escribá (Guatemala) to the conference held on July 18 and 19, 2018, at <https://vimeo.com/channels/1390762>.

who had called for the implementation of the Inter-American Court's Gelman judgment against Uruguay. This is a very strong signal of endorsement considering the strident critique that the Inter-American Court has received for it.¹⁴ And fourth, many domestic actors entrust the Court to solve domestic institutional blockages – that is, to trigger action where bureaucratic inertia and path dependency stand in the way of necessary change.¹⁵

Of course, not all agree with the Court assuming this powerful and transformative mandate. But the forces who interpret the Convention in this way have sufficient arguments for supporting its legality. And, no less important, they have also mustered enough support for advancing along this path.

2. Guidelines and limits

The mandate to advance a transformative constitutionalism in Latin America through a common human rights law is an open mandate, but not an indeterminate one. Judges cannot do whatever they think best. They are guided and constrained by the circumstances of the cases, the legal methods, collegiality and procedures, precedents and the need to build and protect the Court's authority.

The mandate finds contours in the challenges which come from social reality. Interpreting the Convention in light of social reality in Latin America means, above all, addressing institutional weakness,

14 Roberto Gargarella, "Sin lugar para la soberanía popular: Democracia, derechos y castigo en el caso Gelman," Seminar in Latin America on Constitutional Theory and Policy (Yale University, 2013) https://law.yale.edu/system/files/documents/pdf/sela/SELA13_Gargarella_CV_Sp_20120924.pdf (last accessed August 26, 2018); Pietro Sferrazza Taibi, "¿Amnistías democráticas? El Caso Gelman vs. Uruguay de la Corte Interamericana de Derechos Humanos: Un caso práctico para una reflexión teórica," in Sonia Alda Mejías and Silvia Ángel Santano (eds), *La seguridad, un concepto amplio y dinámico: V Jornadas de estudios de seguridad* (IUGM- UNED 2013) 93-124.

15 Oscar Parra Vera, "The Impact of Inter-American Judgments by Institutional Empowerment", in von Bogdandy *et al.* (eds), *Transformative Constitutionalism in Latin America*, supra note 1, 376.

social exclusion, and violence.¹⁶ In Latin America there is broad agreement that these are challenges that States must address. It is also clear that this transformative constitutionalism needs to be advanced by structural measures, addressing structural deficiencies.¹⁷ The mandate of the Court therefore reaches far beyond deciding whether, in the case at hand, there has been a violation of the Convention.¹⁸ This explains the Court's creative and far reaching orders on reparations which have grown to be a key site of the praxis of transformative constitutionalism.¹⁹

If this is a broad field with still much discretion for the Court, there are nevertheless many standards and safeguards against "judicial activism running wild."²⁰ In this respect, lawyers refer extensively to the 'protocols' of legal reasoning, which include the methods of legal interpretation. Indeed, any judicial decision must be linked *lege artis* to the basic source of a court's authority, in our case the American Convention on Human Rights. However, one should not overestimate this standard. The dedicated research shows that these protocols, including the methods of interpretation, hardly ever determine the outcome of a decision; particularly decisions of

16 Flávia Piovesan, "*Ius Constitutionale Commune en América Latina: Context, Challenges, and Perspectives*", in von Bogdandy *et al.* (eds), *Transformative Constitutionalism in Latin America*, supra note 1, 50-51.

17 Alexandra Huneus, "Reforming the State from Afar: Structural Reform Litigation at the Human Rights Courts" (2015) 40 *Yale Journal of International Law*, pp. 1 ff; Victor Abramovich, "From Massive Violations to Structural Patterns: New Approaches and Classic Tensions in the Inter-American Human Rights System" (2009) 6 *Sur—International Journal on Human Rights*, 7 ff.

18 Soley, "The Transformative Dimension of Inter-American Jurisprudence", in von Bogdandy *et al.* (eds), *Transformative Constitutionalism in Latin America*, supra note 1, 337 ff.

19 *Ibid.*, pp. 346-348; Mariela Morales Antoniazzi and Pablo Saavedra, "Inter-Americanization. Its Legal Bases and Political Impact", in von Bogdandy *et al.* (eds), *Transformative Constitutionalism in Latin America*, supra note 1, 267-275.

20 On the topic, see Christoph Schönberger, *Höchstrichterliche Rechtsfindung und Auslegung gerichtlicher Entscheidungen, Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* (2012) 71 *VVDStRL*, 296; Armin von Bogdandy and Ingo Venzke, *In Whose Name? A Public Law Theory of International Adjudication* (Oxford University Press, 2014) 156 ff.

supreme, constitutional or international courts. What these protocols do is frame the decision and provide standards of critique. The margin of appreciation doctrine is one such standard: it can be a useful argumentative tool by which a court justifies its decisions. At the same time, it is certainly no ‘silver bullet’ to determine a particular outcome or to draw the line of *ultra vires*.

These protocols provide for just one standard and safeguard among many. There is the process of selecting inter-American judges. Each judge is selected and elected with an idea of what the Convention is for and how it should be developed. A most important safeguard is the principle of collegiality. For a human rights court, any decision rests on the judgement of several judges. Dworkin’s Hercules provides a wrong idea of what happens in Arusha, San José or Strasbourg. Disputes among judges are built into the systems and provide a core feature of framing and constraining any decision.

Further guidance and constraints flow from the process that develops the case, the actors with their submissions, the specific context and path of the case and the likely implications of different possible decisions. Then there is the identity of the system, created by the path it has travelled so far, laid down in the case law as well as the legacy of the struggles that reached it. Last, not least, there is the anticipation of the reception that it is likely to receive, in particular from domestic courts, from political actors, from public opinion, from civil society, from academia. The authority of courts, their most important asset, is never settled, but rest on a continuous interaction with a wide range of stakeholders. This holds particularly true for international courts. For all these reasons, international human right courts are rather constrained institutions.

3. How to evaluate evolutive interpretation

Perhaps the most common standard for the success of international courts is compliance. In particular, when it comes to social change, it might seem self-evident to focus mainly on whether the States

comply with a ruling. It is well known that the Inter-American Court of Human Rights fares badly on this standard.²¹

However, we need to look far beyond compliance. Compliance should not be the decisive criterion to evaluate the operation of an international court, in particular of a human rights court that addresses structural problems.²² This is particular so when its mandate is that of contributing to transformative constitutionalism. The Inter-American Court, following this mandate, is ordering reparations that are often extremely difficult to comply with fully, such as prosecuting individuals who form part of powerful social groups. If the Court was looking for full compliance, it would have to give up on its mandate. That does not make sense. In transformative constitutionalism, compliance should give way to the wider concern of impact, which also accounts for the process (and not just the result) of compliance, and the numerous actors involved in that process.

21 For blunt analyses on compliance, Fernando Basch and others, “The Effectiveness of the Inter- American System of Human Rights Protection: A Quantitative Approach to its Functioning and Compliance with its Decisions” (2010) 7 Sur — International Journal of Human Rights, 9; Damián A. González-Salzburg, “La implementación de las sentencias de la Corte Interamericana de Derechos Humanos en Argentina: Un análisis de los vaivenes jurisprudenciales de la Corte Suprema de la Nación” (2011) 8(15) Sur — Revista Internacional de Derechos Humanos 117. For a more nuanced view of compliance see James L Cavallaro and Stephanie Erin Brewer, “Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court” (2008) 102 American Journal of International Law, 768 ff; regarding the Commission, Ariel Dulitzky, *Derechos Humanos en Latinoamérica y el Sistema Interamericano: Modelos para Desarmar* (Instituto de Estudios Constitucionales del Estado de Querétaro, 2017) 299-304; regarding orders against Colombia, Sergio Iván Anzola, Beatriz Eugenia Sánchez, and René Urueña, *Después del fallo: El cumplimiento de las decisiones del Sistema Interamericano de Derechos Humanos. Una propuesta de metodología*, (Unianandes, Documentos Justicia Global 11, 2015) 447 ff.

22 Cavallaro and Brewer, supra note 23, 768 ff; Soley, “The Transformative Dimension of Inter-American Jurisprudence”, in von Bogdandy *et al.* (eds) *Transformative Constitutionalism in Latin America*, supra note 1, 347-348; Robert L Howse and Ruti Teitel, “Beyond Compliance. Rethinking Why International Law Really Matters” (2010) 1 Global Policy Journal, 127 ff.

If we look at impact, many issues come to the fore.²³ I will conclude with the one that struck me most as a lawyer. Forty years ago, human rights were a normative standard few actors in Latin America took seriously.²⁴ Because of the work of the inter-American system, the Court, the Commission as well as the institutions and individuals that constitute its social system, human rights have become, over these past four decades, operative on many important issues. Today, political discourses and struggles in the region are often framed and developed in a new language, the language of human rights. Being lawyers, we know that form, language, words matter, matter a great deal.

Is Latin America today a better place for that reason? The situation is dire for many people. But it seems safe to assume that Latin America would be worse off without the evolutive interpretation of the Convention, an interpretation that feeds a common law of human rights in the region.

We rightly celebrate this anniversary, without necessarily celebrating every decision the system has produced. Not least, celebrating the system sharpens the sense of what can be easily lost. The Court, with just four appointments to its bench, could totally change its outlook and become an agent of *regressive* constitutionalism. This possibility again emphasizes the great achievement of the Court today, and gives us reason to celebrate these 40 years which mark the significant path of international human rights adjudication.

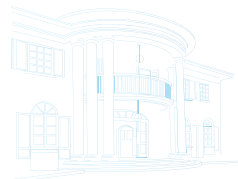
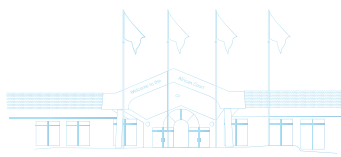
23 Oscar Parra Vera, "The Impact of Inter-American Judgments by Institutional Empowerment" in von Bogdandy *et al.* (eds) *Transformative Constitutionalism in Latin America*, supra note 1, 357.

24 See the contribution by Rafael Nieto Navia, former President of the I/A Court HR, to the conference held on July 18 -19, 2018, at <https://vimeo.com/channels/1390762>.



Ângelo Matusse

Judge of the African Court on Human and Peoples' Rights



SESSION 1

From the interpretation of norms to social change:
human rights treaties as living instruments in light
of reality



CORTE IDH
Protegiendo Derechos

Introduction

The African Court on Human and Peoples' Rights (the Court) is a continental court established by Member States of the African Union to ensure the protection of human and peoples' rights in Africa. The Court was established by virtue of Article 1 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (the Protocol). The instrument that sets out the rights and duties relating to human and peoples' rights in Africa and provides a framework within which the African Court on Human and Peoples' Rights was created is the African Charter on Human and Peoples' Rights.

The Protocol establishing the African Court on Human and Peoples' Rights was adopted on 9 June 1998 in Burkina Faso and came into force on 25 January 2004 after it was ratified by more than 15 countries. The Court has its permanent seat in Arusha, the United Republic of Tanzania.

The African Court on Human and Peoples' Rights was established to complement and reinforce the functions of the African Commission on Human and Peoples' Rights (the African Commission – often referred to as the Banjul Commission), which is a quasi-judicial body charged with monitoring the implementation of the Charter.

The mission of the Court is to enhance the protective mandate of the African Commission on Human and Peoples' Rights by strengthening the human rights protection system in Africa and ensuring respect for and compliance with the African Charter on Human and Peoples' Rights, as well as other international human rights instruments, through judicial decisions (*Cf.* Arts. 2 and 3 of the Protocol).

The purpose of this paper is to share the experience of the Court in bringing about normative and social change. To that effect, the paper highlights how the Court interpreted the African Charter and other human rights treaties as living instruments in three selected cases.

***Reverend Christopher Mtikila v. United Republic of Tanzania*, Application No. 011/2011 (Judgment delivered on 14 June 2013)**

In this case, the applicants averred that the respondent had, through certain amendments to its Constitution aimed at prohibiting independent candidates from contesting presidential, parliamentary and local government elections, violated their citizen's right to freedom of association, the right to participate in public/governmental affairs and the right to non-discrimination (*Cf.* Art. 13(1) of the Charter; art. 20 of the Universal Declaration of Human Rights (UDHR) and art. 22 of the International Covenant on Civil and Political Rights (ICCPR)). The respondent justified its law by, amongst others, citing historical and social reasons that relate to maintaining the unity and integrity of the nation.

The Court, in this case, noted that the respondent had an obligation to make laws that are in line with the interests and purposes of the Charter. It was the Court's view that while the contested clauses of the Constitution envisage the enactment of the rules and regulations for the enjoyment of the rights enshrined therein, such rules and regulations may not be allowed to nullify the rights and freedoms that they seek to regulate. The Court further noted that, to the extent that the provision in question reserves to the citizen the right to participate directly or through representatives in government, any law that requires the citizen to be part of a political party before he/she can become a presidential, parliamentary or local government election candidate is an unnecessary fetter that ultimately denies citizens the right of direct participation and therefore amounts to a violation.

The Court found that Tanzania could not use Article 13(1) of the Charter as a reason for not complying with international standards and that, having ratified the Charter, it was under an obligation to enact laws that were in line with the Charter.

In conclusion, the Court found a violation of the right to participate freely in the government of one's country, since to participate in presidential, parliamentary or local government elections in Tanzania, a citizen must belong to a political party.

The respondent was directed to take constitutional, legislative and all other necessary measures within a reasonable time to remedy the violations found by the Court and to inform the Court of the measures taken.

In interpreting the relevant provisions of the Charter, the UDHR and the ICCPR, the Court, in this case, found it unacceptable for the respondent State to maintain the same justifications in the light of present day standards of human rights, even though the constitutional provision banning individuals from standing in elections as independent candidates without party affiliations was justified by historical and social reasons of safeguarding national unity and State integrity.

Lohé Issa Konaté v. Burkina Faso, Application No. 004/2013 (Judgment delivered on 5 December 2014)

In this case, the Court delivered a landmark judgment in its first case concerning freedom of the press. The Court overruled the conviction of journalist Issa Konaté, who had faced harsh criminal penalties levied by Burkina Faso following charges of defamation for publishing several newspaper articles that alleged corruption by a state prosecutor.

The Court found that the conviction was a disproportionate interference in the applicant's guaranteed right to freedom of expression. It was the Court's view, interpreting Art. 9 of the Charter, Art. 19 of the ICCPR and Art. 66 of the Revised ECOWAS Treaty, that criminal defamation laws should be used only as a last resort, when, for example, there is a serious threat to the enjoyment of other human rights. It noted that public figures, such as prosecutors, must tolerate more criticism than private individuals.

Furthermore, the Court ordered Burkina Faso to amend its legislation on defamation to make it compliant with international standards by repealing custodial sentence for acts of defamation; and to adapt its legislation to ensure that other sanctions for defamation meet the test of necessity and proportionality, in accordance with the country's international obligations.

This decision sets the standard that governments should not criminalize defamation. Historically, a custodial sentence for criminal defamation was not, as such, objectionable and, indeed, many countries still have it in their criminal laws. However, in this case, the Court found that it was no longer acceptable and this has set a strong precedent for the region.

Actions pour la Protection des Droits de l'Homme (APDH) v. The Republic of Côte d'Ivoire, Application No. 001/2014 (Judgment delivered on 18 November 2016)

In 2014, APDH, a human rights NGO based in Abidjan, Côte d'Ivoire, made an application to the Court asking it to rule that Ivorian Law No. 2014-335 (the law) relating to the functioning and composition of the nation's Independent Electoral Commission (IEC) was in violation of a number of human rights instruments. The IEC had been established in October 2001 and its mandate was to organize and supervise elections, accredit national and international observers, count ballots, and proclaim the final results of an election. The IEC was composed of 17 members, most of whom were either representatives of government ministers or representatives of political parties. Civil society representatives did form part of the IEC; however, they accounted for only 4 of the 17 positions available. Decisions of the IEC were made by a simple majority.

In its submissions, APDH argued that the impugned law rendered the IEC neither independent nor impartial. As a result, it claimed that the law violated Article 17(1) of the African Charter on Democracy, Elections and Governance (Democracy Charter) as well as Article 3 of the ECOWAS Protocol on Democracy and Good Governance (ECOWAS Protocol). The applicant also claimed that by adopting the law, a situation had been engineered by which the President could influence the electoral system during elections in order to benefit himself and/or candidates that he supported. This, the applicants claimed, was a violation of the principle of the equality of all citizens before the law and the equal protection of all citizens by the law,

enshrined in Article 10(3) of the Democracy Charter, Article 3(2) of the ACHPR and Article 26 of the ICCPR.

Applying the key concepts of *independence* and *impartiality* derived from an interpretation exercise to the structure of the IEC, the Court noted that government representatives outnumbered all others on the IEC and, in particular, that the government was represented by eight members to four from other parties, which demonstrated a clear imbalance. It was, therefore, neither independent nor impartial and, subsequently, violated Article 17 of the Democracy Charter as well as Article 3 of the ECOWAS Protocol.

Furthermore, the Court held that, through the imbalance that the law created, the President was in a far more advantageous position in the run-up to elections than other candidates and that, by not placing all candidates on an equal footing in the run-up to elections, the law also violated the principle of equal protection enshrined in Article 10(3) of the African Charter, Article 3(2) of the ACHPR and Article 26 of the ICCPR.

In light of these violations, the Court ordered Côte d'Ivoire to amend the law and submit a report on the amendments within one year.

With this judgment, the Court set a valuable precedent, which, if effectively implemented, has the potential to strengthen the justness of electoral systems and the electoral bodies that govern them in Africa.

One striking aspect of this judgment is the Court's assertive approach in dealing with a matter that is essentially political in nature. Although the composition of electoral institutions could be considered a political arrangement, the Court interpreted the African Charter on Democracy, Elections and Governance and held that as long as the rights and freedoms of individuals are implicated in the process, it maintains the power to monitor and even check whether electoral institutions are in line with international standards.

The challenge

Of the three cases, only the *Lohé Issa Konaté case* (judgment delivered on 5 December 2014) has been fully implemented so far. In the *Reverend Mtikila case* (judgment delivered on 14 June 2013),

the respondent reported that the constitutional, legislative, and all other necessary measures to be taken to remedy the violations found by the Court in the main on the merits were contingent on the outcome of the referendum. The holding of the referendum is ‘*a statutory requirement that the government has highlighted as a national priority, the same with finalizing the new Constitution*’. In the APDH case, the Respondent State has not reported on measures taken to implement the judgment.

In conclusion

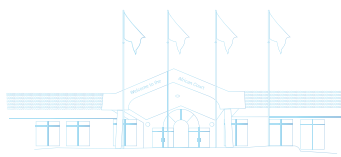
As can be deduced from the above cases, by interpreting the human rights instruments in light of current realities, the African Court has positioned itself as an agent of social change. Its landmark judgments have set strong normative foundations for the protection of human rights in the continent. On some occasions, its decisions have also brought about some concrete changes including the amendment of the laws of member states. This has not only been a source of hope but also inspiration and courage for the Court to keep its momentum and ensure the protection of human rights by adopting the progressive approach the day demands.

It is the Court’s firm belief that nothing remains static and the interpretation and application of human right should not likewise be rigid. However strong the resistance it may encounter, the Court does not therefore shy away from making sure that the African human rights instruments and other international standards are interpreted and applied in a living manner. Anything detached from reality is not only obsolete in itself but also risks being ignored and disused.



Branko A. Lubarda

Judge of the European Court of Human Rights



SESSION 1

From the interpretation of norms to social change:
human rights treaties as living instruments in light
of reality



CORTE IDH
Protegiendo Derechos

Introductory remarks¹

The European Court of Human Rights (ECtHR), in its adjudication, implements the rules of evolutive (or evolutionary) interpretation of international treaties, as embedded in the Vienna Convention on the Law of Treaties (VCLT) adopted in 1969 (Articles 31 and 32). The purposive method of interpretation in the VCLT attaches particular importance to the object and purpose of treaties, with which the interpretation must be compatible (the “golden rule” of interpretation) (Harris et al., 2014; Rainey et al., 2014). The preamble to a treaty is seen as an integral part of the context (Article 31 § 2), and the Preamble to the European Convention on Human Rights (ECHR) refers to both the “maintenance” and the “further realisation” of human rights and fundamental freedoms. Further realisation of human rights engages judicial creativity, thereby extending the reach of the Convention guarantees (Tulkens, 2011; *Dialogue between Judges*, 2011).

The ECHR grants the ECtHR interpretative authority (Article 32). In a large number of judgments, the ECtHR has found that human rights treaties are living instruments, whose interpretation must consider the changes over time and must reflect the “present-day conditions” (*Tyrer v. the United Kingdom*, 1978; whether the practice of corporal punishment in schools was in compliance with the ECHR). In the *Tyrer* judgment, the ECtHR made use of the evolutive interpretation for the first time and established the living instrument doctrine. This doctrine has since been used for a broad variety of Convention rights, both the absolute rights (Articles: 2 –right to life; 3 – prohibition of torture and inhuman or degrading treatment; 4 – prohibition of slavery and forced labour; 7 – no punishment without law; Article 4 of Protocol No. 7 – right not to be tried or punished twice), and

1 In preparing this text I have greatly benefited from discussions with and suggestions by my colleagues from the European Court of Human Rights: Judges G. Raimondi, A. Sicilianos, G. Yudkivska and R. Spano, and also James Brannan, senior translator.

the qualified rights (particularly in Articles 8 to 11 of the ECHR and Articles 1 to 3 of Protocol No. 1).

ECtHR maintains the view that its interpretation should continuously evolve to reflect developments in the following areas:

(a) Societal change, e.g., *Konstantin Markin v. Russia*, Grand Chamber [GC], 2012: violation of Article 14 in conjunction with Article 1 of Protocol No. 1 regarding the right to parental leave of military personnel (gender discrimination based on stereotypes, in contrast to contemporary European societies with equal sharing of family responsibilities between the two parents).

(b) Changes in the law, e.g., *Scoppola v. Italy (no. 2)* [GC], 2009: violation of Article 7 in respect of *lex mitior*, the most lenient criminal law provision between the commission of the offence and the final judgment (with reference to Article 9 of the American Convention on Human Rights – ACHR); *S.W. v. the United Kingdom*, 1995: no violation of Article 7 regarding the issue of no immunity for the rape by the applicant of his wife; *Magyar Helsinki Bizottság v. Hungary* [GC] 2016: the right to seek information as an aspect of freedom of expression under Article 10; *Demir and Baykara v. Turkey* [GC], 2008: Article 11 was extended to the right to collective bargaining.

(c) Changes in technological innovations, e.g., *Roman Zakharov v. Russia* [GC], 2015: violation of Article 8 in respect of abusive secret surveillance of mobile telephone communications; *Barbulescu v. Romania* [GC], 2017: violation of Article 8 in respect of monitoring of employees' communications by the employer.

(d) Scientific research and progress, cases of *Rees v. the United Kingdom*, 1986: violation of Article 8; *Christine Goodwin v. the United Kingdom* [GC], 2002: violation of Articles 8 and 12; *Evans v. the United Kingdom* [GC], 2006: no violation of Articles 2, 8, 14 (whether a British law requiring the consent of both genetic parents to the implantation of embryos created through *in vitro* fertilisation is in compliance with the Convention); and *Parillo v. Italy* [GC], 2015: ban on donation of an embryo from *in vitro* fertilisation for scientific research.

(e) Moral and ethical issues, e.g., *Evans v. the United Kingdom* [GC], 2006; *A., B. and C. v. Ireland* [GC], 2010: procedural aspects of Article 8 in relation to abortion; *Pretty v. the United Kingdom*, 2002:

no violation of Articles 2, 3, 8, 9 and 14; *Koch v. Germany*, 2012: violation of Article 8; *Gross v. Switzerland* [GC], 2014: application inadmissible for abuse of right; *Lambert and Others v. France* [GC], 2015: no violation of Article 2 – all four cases concerning the ethical and human aspects of euthanasia; *Vallianatos and Others v. Greece* [GC], 2013: violation of Article 14 in conjunction with Article 8, regarding the exclusion of same-sex couples from civil unions; *Stübing v. Germany*, 2012: Article 8 regarding incest.

(f) Specific values, e.g., *Bayatyan v. Armenia* [GC], 2011: recognition under Article 9 of the right to conscientious objection to army service; *S.A.S. v. France* [GC], 2014: the concept of “living together” and no violation of Articles 8 or 9.

Although certain objections to the evolutive interpretation of international treaties could be raised, particularly the fear that case-law built on the living instrument doctrine might bypass the will of the contracting parties and overtake the legislative role, thus demonstrating a “judicial activism”, the declarations on the reform of the European Convention system emanating from the conferences in Interlaken (2010), Izmir (2011), Brighton (2012), and Brussels (2015), have not raised concerns about the doctrine.

While stressing the importance of the principle of subsidiarity, the Copenhagen Declaration, adopted by all member States of the Council of Europe in 2018, maintains the importance of the living instrument doctrine (§ 26): “The Court provides a safeguard for violations that have not been remedied at national level and authoritatively interprets the Convention in accordance with relevant norms and principles of public international law, and, in particular, in the light of the VCLT, gives appropriate consideration to present-day conditions”.

In contrast to the Inter-American Court of Human Rights (IACtHR), which is considered to be characterised by judicial activism, the ECtHR is more self-restrained in its evolutive interpretation because its living instrument doctrine is largely based on: (a) positive obligations of a State; (b) the (emerging) European consensus; (c) autonomous definitions of certain legal terms in the Convention and the principle of effectiveness in the protection of human rights and freedoms, and (d) human dignity as the universal value and a method of interpretation. This framework diminishes potential criticism of

“judges abdicating their responsibility of independent review of government action” (Mahoney, 1990).

Living instrument doctrine and positive obligations of a State

The living instrument doctrine is related to the positive obligations of a State, which must take action to secure human rights (Harris et al., 2014; Sudre, 2016; Yudkivska, 2016). Positive obligations are associated with economic, social, and cultural rights. The ECtHR has established positive obligations as necessary to make civil and political rights effective, while addressing the conduct of private persons only indirectly through such obligations (Raimondi, 2008).

The living instrument doctrine relates, for example, to the positive obligation to protect life, i.e. to take appropriate steps to safeguard the lives of those within their jurisdiction (e.g., *Oneryildiz v. Turkey*, 2004: the issue of a State responsibility for deaths caused by an explosion and landslide at the municipal rubbish tip – violation of Article 8 and Article 1 of Protocol No. 1; *Opuz v. Turkey*, 2009: the landmark judgment on domestic violence against women and gender-based discrimination – violation of Articles 2, 3 and 14 in conjunction with Articles 2 and 3; *Brincat and Others v. Malta*, 2014: the issue of occupational health due to exposure to asbestos during employment and subsequent death – violation of Article 2, or disease – violation of Article 8). The living instrument doctrine has extended positive obligations to situations where the risk to life came from the victim himself/herself (*Keenan v. the United Kingdom*, 2002; *Reynolds v. the United Kingdom*, 2012).

The living instrument doctrine has added a new dimension to Article 3 in respect of the prevention of torture and inhuman or degrading treatment abroad. This principle was first applied in a case on extradition in *Soering v. the United Kingdom*, 1989, followed by the deportation cases of *Chahal v. the United Kingdom*, 1996; *Saadi v. Italy* [GC], 2008; and *Abu Qatada v. the United Kingdom*, 2012. Article 3 imposes positive obligations on States, including the obligation not to return an individual to a country in which he or

she is likely to be subjected to ill-treatment. In so doing, the ECtHR has confirmed that there are no derogations to be made from Article 3, irrespective of the character of the person involved (even when terrorism has become an imminent threat; Shachor-Landau, 2015).

The notion of torture itself evolved from the initial definition used in the cases of *Ireland v. the United Kingdom*, 1978, and *Aksoy v. Turkey*, 1996, to the case of *Selmouni v. France*, 1999 (ill-treatment of persons suspected of involvement in drug-trafficking), in which inhuman and degrading treatment was upgraded to torture (see also the case of *Maslova and Nalbandov v. Russia*, 2008: torture concerning Maslova, inhuman and degrading treatment concerning Nalbandov).

The application of Article 3 had a pronounced humanitarian character in the medical treatment case of *D. v. the United Kingdom*, 1997 (albeit, due to related financial burdens, not in the case of *N. v. the United Kingdom* [GC], 2008), and in the asylum-seeker cases of, *inter alia*, *M.S.S. v. Belgium and Greece* [GC], 2011, *A.A. v. Switzerland*, 2014, and *Tarakhel v. Switzerland* [GC], 2014. Additionally, the ECtHR used an evolutive interpretation in respect of Article 3 and broadened the scope of its applicability to humanitarian ends in the case of *Hirsi Jamaa v. Italy* [GC], 2011: the interception of migrants on the high seas by Italian military vessels and their handing over to Libya; the events were interpreted to have fallen within Italy's jurisdiction, thus entailing violations of Article 3 and of Article 4 of Protocol No. 4 (the removal being of a collective nature).

Under Article 4 (prohibition of slavery and forced labour), the ECtHR has used the notion of European consensus to establish positive obligations of a State to investigate and prosecute instances of servitude and forced labour (*Siliadin v. France* [GC], 2005). In the landmark judgment of *Rantsev v. Cyprus and Russia* [GC], 2010, the ECtHR ruled that human trafficking fell within the scope of Article 4, even though there was no explicit reference in the Convention to this effect. The ECtHR has thus affirmed that positive obligations under Article 4 do require States to conduct a comprehensive investigation into allegations of human trafficking. States are required to take all reasonable steps available to them to secure the evidence, and to cooperate with the authorities of other States when investigating allegations of cross-border trafficking. The exploitation of workers also constitutes one aspect of human trafficking, as first ruled in the case of *Chowdury and Others*

v. *Greece*, 2017. This novelty in the case-law is another example of the evolutive interpretation of the ECHR (“the law is in the process of becoming” –Rudolf von Jhering, 1872).

Living instrument doctrine and autonomous legal terms of the ECHR

The living instrument doctrine is related to the autonomous meaning of certain legal terms of the ECHR, which allows the ECtHR to determine the scope of the corresponding Convention rights (that may evolve over time). These terms include, *inter alia*: legal terms under Article 5 (right to liberty and security) such as judge and, in the French, *juge* together with *magistrat* (e.g., *Moulin v. France*, 2010); legal terms under Article 6 (right to fair trial), such as “civil rights and obligations”, “tribunal” (e.g., *Didier v. France*, 2002) or “criminal charge” and “witness”; under Article 8 (right to respect for private and family life), the term “private life”; and, under Article 1 of Protocol No. 1 (protection of property), the term “possession”. The criteria for the interpretation of the autonomous concept of “criminal charge” under Article 6 (independently of the classification of legal proceedings in national law) were established in the case of *Engel and Others v. the Netherlands*, 1976. The ECtHR extended the applicability of Article 6 (under its civil limb) to social security disputes in the case of *Salesi v. Italy*, 1993. The living instrument doctrine was also used to extend the scope of the applicability of Article 6 to employment in the public sector with the adoption of the judgment in *Pellegrin v. France*, 1999. That extension of scope went further in the case of *Vilho Eskelinen and Others v. Finland*, 2007, establishing a presumption of applicability of Article 6 in all types of disputes concerning public officials, including judges. This jurisprudence is confirmed by the judgment in *Baka v. Hungary* [GC], 2016.

The autonomous meaning of the term “victim”, interpreted independently of its meaning in national law, has been used in the case of *Blidaru v. Romania*, 2007, and in *Micallef v. Malta* [GC], 2009. The evolutive interpretation of the *locus standi* of a non-

governmental organisation, as *de facto* representative of the victim in exceptional circumstances, was implicit in the case of *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], 2014. Additionally, in the case of *Roman Zakharov v. Russia* [GC], 2015, the ECtHR accepted that the applicant could claim to be the victim of a violation of the Convention by the mere existence of secret surveillance measures, under certain criteria related to the scope of legislation, availability of remedies at national level, the risk of secret measures being applied to the applicant, and procedural safeguards against arbitrary surveillance.

The ECtHR has interpreted Article 8 to encompass a wide array of rights, covering, among others, environmental protection, such as air pollution (*Lopez Ostra v. Spain*, 1994), noise pollution from an airport (*Hatton and Others v. the United Kingdom* [GC], 2003), and cyanide contamination of water (*Taskin and Others v. Turkey*, 2005). Furthermore, the living instrument doctrine was used to establish the autonomous concept of the term “possession” under Article 1 of Protocol No. 1 (in a manner which is consistent with the concept of pecuniary rights under Article 6 § 1), including the right to social security benefits (beginning with the case of *Gayguzus v. Austria*, 1996). The autonomous meaning of “possession” was expanded to include the notion of “legitimate expectation” (the case of *Kopeccky v. Slovakia* [GC], 2004), in addition to “existing possessions or assets”.

European consensus and the limits to the living instrument doctrine

The European consensus doctrine has played an important role in regulating the pace of the evolution in case-law. The establishment of such a consensus is based on the development of comparative law and international treaties on human rights. Comparative law assures a judge that he or she is treading on safe ground in reaching a legitimate solution (Barak, 2015). For example, in the case of *Bayatyan v. Armenia*, 2011, the Grand Chamber gave an evolutive interpretation of Article 9, based on comparative law development, noting a trend

towards recognising the right of conscientious objection among Council of Europe member States during the late 1980s and 1990s.

The interpretations of the ECHR, in harmony with the development of other international human rights treaties (with reference to their *travaux préparatoires* as a supplementary means of interpretation in line with Article 32 VCLT), further contribute to the legitimacy of the ECtHR's rulings (e.g. *Varnava and Others v. Turkey* [GC], 2009: in deciding on allegations of disappearances, the ECtHR followed the approach taken by the IACtHR, *Blake v. Guatemala*, 1998, and *Heliodoro Portugal v. Panama*, 2008). To a considerable extent, the European consensus doctrine makes the ECtHR's reasoning and rulings foreseeable, thus providing a desirable balance between legal certainty and flexibility (Tulkens, 2011). It has been additionally argued that "European consensus operates on the edge of the margin of appreciation and evolutive interpretation: both of these are necessary to maintain the stability of the Strasbourg system" (Dzehtsiarou and O'Mahony, 2013). The ECtHR applies the European consensus doctrine to a broad variety of absolute and qualified rights. Based on the living instrument doctrine, the ECtHR is able to provide an interpretation of the Convention that "upholds individual rights as practical and effective, rather than theoretical and illusory" (*Airey v. Ireland*, 1979; *Artico v. Italy*, 1980).

A consensual interpretation of Article 10 (freedom of expression) has contributed to the protection of whistleblowers in order to confront the problem of corruption and conflict of interest, particularly in countries of Central and Eastern Europe during their period of transition. Representative cases include *Guja v. Moldova* [GC], 2008 (which dealt with public interest in having information about undue pressure on the independence of the judiciary and wrongdoings within the public prosecutor's office), and *Heinisch v. Germany*, 2011 (concerning the reporting of irregularities by employers in the healthcare sector). The rulings in both of these cases were made after the adoption of the Civil Law Convention against Corruption, and the Criminal Law Convention on Corruption by the Council of Europe in 1999, as well as the adoption of the Convention against Corruption by the United Nations in 2003. Protection of the right to whistleblow under Article 10 may be interpreted as indirectly

protecting the right to work (holistic approach by the ECtHR). The applicants had been dismissed after disclosure in good faith of information of public interest. This was confirmed in the case of *Guja v. Moldova (no. 2)*, 2018, where, after balancing the different interests involved, the ECtHR found a violation of Article 10: "... the Court considers that ... the applicant's second dismissal from his employment was not related to an ordinary labour dispute, but had all characteristics of another act of retaliation for his disclosing the letters in 2003". Systemic problems of corruption have also been identified and addressed in Latin American countries (Bogdandy et al., 2017) and in African countries.

The living instrument doctrine under Article 10 was applied to establish a (limited) right of access to information of public interest in the case of *Maygar Helsinki Bizottsag v. Hungary* [GC], 2016, after the refusal of domestic authorities to provide the names of State-appointed defence counsel. The ECtHR so ruled despite the fact that the ordinary meaning of the text of Article 10 § 1 is limited to the freedom to receive information and ideas and does not include the freedom to seek information. (In that respect, the text of Article 10 § 1 is unlike Article 13 of the ACHR, Article 19 of the Universal Declaration of Human Rights, and Article 19 § 2 of the International Covenant on Civil and Political Rights.)

Another example of consensual interpretation may be found in the case of *Demir and Baykara v. Turkey* [GC], 2008. Under Article 11 (freedom of assembly and association), the ECHR does not explicitly mention the right to collective bargaining, but only the right of everyone to form and to join trade unions for the protection of their interests. The ECtHR noted that the consensus emerging from specialised international instruments (in this case, the International Labour Organization's conventions and the European Social Charter) may constitute a relevant consideration for the Court when interpreting the provisions of the Convention, thus expanding the scope of applicability of Article 11 to a right to collective bargaining. Similarly, in the case of *Energi Yapi-Yol Sen v. Turkey*, 2009, the living instrument doctrine led to recognition of the right to strike under Article 11 of the ECHR. Thus, while evolutive interpretation may be *praeter legem* (if absolutely necessary), it cannot lead to an

interpretation *contra legem*. For the sake of comparative analysis, it may be noted here that the Additional Protocol to the ACHR in the Area of Economic, Social and Cultural Rights (“Protocol of San Salvador”, 1988) explicitly excluded the right to strike from the jurisdiction of the IACtHR (see its Article 8 § 1 (b) in conjunction with Article 19 § 6).

Living instrument doctrine: principle of subsidiarity and the margin of appreciation, and principle of proportionality

The lack of European consensus entails a broader margin of appreciation, as stated in the case of *Lautsi and Others v. Italy* [GC], 2011: the issue of crucifixes displayed in the classrooms of a State school – no violation of Article 2 of Protocol No. 1 (right to education), and in the case of *Stummer v. Austria* [GC], 2011: the issue of whether prisoners who work are to be included in a national social security system – no violation of Article 14 (prohibition of discrimination) in conjunction with Article 1 of Protocol No. 1 (protection of property).

Without a European consensus on the scientific and legal definition of a term, the State’s margin of appreciation should be considered. For example, if there is no consensus on the scientific and legal definition of the beginning of the right to life, it is difficult to answer the question whether the unborn is a person to be protected under Article 2 (right to life). The margin of appreciation enables a State to strike a balance between the conflicting interests of the mother (right to life) and the protection of the embryo or unborn child.

The margin of appreciation is invoked to deal with numerous differences in the law and practice of European States. This can be recognised in the case of artificial insemination (*Evans v. the United Kingdom* [GC], 2006: father of frozen embryos refused to give his consent to the mother bearing the child, no violation of Articles 2, 8 and 14); the right of prisoners to vote (*Scoppola v. Italy (no. 3)*, 2012, no violation of Article 3 of Protocol No. 1 – right to free elections); and in relations between Church and State (*Sindicatul ‘Păstorul Cel Bun’ v. Romania* [GC], 2013, no violation of Article 11 – freedom

of assembly and association). However, in the case of *Hirst v. the United Kingdom (No. 2)*, 2005, the ECtHR ruled that a blanket ban on British prisoners exercising the right to vote was disproportionate (contrary to Article 3 of Protocol No. 1), thus exceeding the acceptable margin of appreciation in a democratic society. In the case of *Schalk and Kopf v. Austria*, 2010, the ECtHR did not recognise the right of same-sex couples to marry, because a comparative law study had not shown a European consensus on this issue (no violation of Article 14 in conjunction with Article 8), and consequently the ECtHR did not oblige member States to legally recognise same-sex marriages. On the other hand, with respect to the right to civil union of a same-sex couple, and based on comparative law research, the ECtHR found a violation of Article 14 in conjunction with Article 8 in the case of *Vallianatos and Others v. Greece*, 2013, because the Greek legislator had provided for a right to civil union only for heterosexual couples.

The living instrument doctrine should be understood in relation to the principle of subsidiarity and the margin of appreciation established by the case-law of the ECtHR. The ECHR system was emphasized at the Interlaken Conference as being subsidiary in nature (Costa, 2011). Regarding the margin of appreciation as a functional tool of the principle of subsidiarity, it has been characterised as “our past, our present and our future” (Spielmann, 2012). The origin of the margin of appreciation can be traced back to cases concerning vital national interests (*Ireland v. the United Kingdom*, 1978, when the ECtHR for the first time explicitly used the term “margin of appreciation”). The margin of appreciation reflects the subsidiary role of the ECtHR in protecting Convention rights (“the initial and primary responsibility for the protection of human rights lies with the member states to secure the rights in the Convention”; Sudre, 2012).

The living instrument doctrine could be viewed as being at odds with the margin of appreciation doctrine. However, the extent of the margin of appreciation depends on the nature and importance of the right, and the nature and the object of the interference. This was elaborated upon in the case of *S. and Marper v. the United Kingdom* [GC], 2008: holding/retention of DNA samples in the national DNA Database, where the Court found a violation of the right to privacy. In the case of *A., B. and C. v. Ireland* [GC], 2010, having rejected

all complaints under Article 3, the ECtHR reaffirmed that a margin of appreciation was to be afforded regarding the question of when the right to life began, ruling that Article 8 did not confer a right to abortion.

In contrast to Article 2 of the ECHR, which is silent on temporal limitations on the right to life, Article 4 of the ACHR states that the right to life must be protected “in general, from the moment of conception” (in the case of *Artavia Murillo et al. v. Costa Rica*, 2012, the IACtHR ruled on a ban on *in vitro* fertilisation in Costa Rica, stating that “conception occurs only from the moment the embryo is implanted in the uterus”). By contrast, the ECtHR refused to interpret *contra legem* Article 2 ECHR as it would have led to a “distortion of [the Convention’s] language”, since it cannot be interpreted as conferring the diametrically opposite right, namely a right to die (*Pretty v. the United Kingdom*, 2002, § 39).

A clear distinction should be made between absolute and qualified rights. “Core and absolute Convention rights protect values and interests which emanate from the core of the human person and his/her dignity and therefore, by definition, those rights are not amenable to balancing or proportionality-type analysis” (Spano, 2018). For example, *Chahal v. the United Kingdom*, 1996 and *Saadi v. Italy* [GC], 2008 are cases in which the prohibition of deportation of individuals to face ill-treatment is an absolute right (positive obligations of States under Article 3, including cases concerning the threat from terrorism).

The scope of the margin of appreciation varies according to the consequences, the subject matter and the background (e.g., *Schalk and Kopf v. Austria*, 2010). Regarding qualified rights, a wide margin of appreciation is used in: (a) public emergency cases (under Article 15 – derogation from the ECHR “in time of war or other public emergency threatening the life of the nation”, e.g., *Brannigan and McBride v. the United Kingdom*, 1993); (b) certain national security cases (e.g., *Leander v. Sweden*, 1987, and *Regner v. the Czech Republic* [GC], 2017); (c) cases related to the protection of public morals (e.g., *Handyside v. the United Kingdom*, 1976); (d) cases with sensitive ethical issues (e.g., *Lautsi and Others v. Italy* [GC], 2011, and *Hamalainen v. Finland* [GC], 2014); (e) cases concerning implementation of economic and social policy (e.g., *Koufaki and ADDEDY v. Greece*

(dec.), 2013); (f) cases involving transition from communist to free market economies (e.g., pilot judgment *Broniowski v. Poland* [GC], 2004), and in other cases (Sicilianos, 2015; Seibert-Fohr, 2018). A narrow margin of appreciation is applied to cases where a sensitive element of an individual's identity is at stake (e.g., *Evans v. the United Kingdom* [GC], 2006), or for the protection of the authority of the judiciary (e.g., *Sunday Times v. the United Kingdom*, 1979), or in cases of freedom of expression in matters of public interest (e.g. *Thoma v. Luxembourg*, 2001, and *Morice v. France* [GC], 2015).

The margin of appreciation is also used in cases involving the proportionality of interferences with qualified rights. The principle of proportionality is most common when the ECHR explicitly allows restrictions upon the right (for example, under Articles 8 to 11 and Article 1 of Protocol No. 1). The proportionality principle thus constitutes a strong barrier against the over-use of the margin of appreciation doctrine (e.g., *Sidabras and Džiautas v. Lithuania*, 2004: the ban on employment of a former KGB agent in both public and private sectors constituted a disproportionate measure – violation of Article 14 in conjunction with Article 8).

The legitimacy of the margin of appreciation doctrine has been challenged. It has been argued that the doctrine undermines the universality of human rights and that it is becoming a tool of excessive judicial self-restraint (Dzehtsiarou and O'Mahony, 2013; Bjorge, 2014). The objection has also been raised that the scope of the margin of appreciation is unclear, thus causing uncertainties in case-law.

The margin of appreciation doctrine is not used in the IACtHR, which does not accord a degree of difference to member States (judicial activism); e.g., *Lagos del Campo v. Peru*, 2017: direct enforceability of economic, social and cultural rights under Article 26 of the ACHR –violation of the right to work. However, in the case-law of the IACtHR, an implicit reference to the margin of appreciation of member States has been made with respect to restrictions on political rights. In the case of *Castaneda Gutman v. Mexico*, 2008, regarding the obligation that a political party present a candidate for the presidential elections, the IACtHR did not find that the system of registering candidates for elected office by political

parties constituted an unlawful restriction on the right to be elected, as established in Article 23 § 1 (b) (Burgorgue-Larsen and Übeda de Torres, 2011; Rota, 2018).

Some argue that the ECtHR's "substantive embedding phase" (approximately 1970 to 2010), particularly regarding the establishment/formulation of general principles for interpretation of Convention rights, has been superseded by the "procedural embedding phase", whose aim is to secure a higher level of Convention rights protection within the member States (Spano, 2018). The elements of the procedural embedding phase include, *inter alia*, the exhaustion of domestic remedies (*Vučković and Others v. Serbia* [GC], 2014), and the guidelines for Convention-based assessment at the domestic level. In the *Barbulescu v. Romania* judgment, 2017, dealing with the issue of an employer's monitoring of an employee's email usage in the workplace, the Grand Chamber set out six criteria for the assessment of the proportionality of such measures, which include the extent of the monitoring and the degree of intrusion into privacy, the possibility of less intrusive methods, the consequences of the monitoring, and whether the employee has been provided with adequate safeguards.

Living instrument doctrine and human dignity

While the ACHR is based on the (philosophy of) human dignity as the foundation of human rights, the ECHR is founded on the (philosophy of) liberty (Burgorgue-Larsen and Übeda de Torres, 2011; Rota, 2018). However, the case law of the IACtHR and the case law of the ECtHR converge in respect of human dignity, irrespective of the philosophical origin of human dignity (Dupré, 2015; Weinrib, 2016), be it the inherent dignity of human beings (Immanuel Kant) as a kind of "mother right" (Barak, 2015), or a dignity of theological origin (*Gloria Dei est vivens homo*; Pontifical Council for Justice and Peace, 2005).

The African Charter on Human and Peoples' Rights (adopted 1981, entered into force 1986) states in its Article 5 that "every individual shall have the right to the respect of the dignity inherent in a human being". This approach regarding the African Commission's

interpretation of the right to human dignity is a communitarian concept, focusing on the role of the individual in society, equality and material security (see, e.g., *The Social and Economic Rights Action Center et al. v. Nigeria*, 2001; *Purohit and Moore v. the Gambia*, 2003; *Center for Minority Rights Development (Kenya) and Minority Rights Group International v. Kenya*, 2009; *The Nubian Community of Kenya v. Kenya*, 2015).

Some authors distinguish between “inherent dignity” and “status dignity”, and link human rights to status dignity (Valentini, 2017). This approach could be used in the consideration of the human dignity of vulnerable persons in the case-law of the ECtHR (see the landmark judgment in the case of *Vinter v. the United Kingdom*, 2013: review of sentence for prisoners serving a life sentence and importance of rehabilitation; or in the case of *Bouyid v. Belgium* [GC], 2015: the minimum level of severity and role of human dignity, where minors had been slapped in the face while in police custody, entailing a violation of Article 3 of the ECHR).

The living instrument doctrine is related to human dignity not only as the universal value, but also as the method of (evolutive) interpretation of both absolute rights and qualified rights. It has repeatedly been stated in the case law of the ECtHR that the very essence of the Convention is respect for human dignity and liberty (e.g., *S.W. v. the United Kingdom*, 1995; *Christine Goodwin v. the United Kingdom*, 2002; *Pay v. the United Kingdom*, 2008; *Stübing v. Germany*, 2012). Several cases can be mentioned regarding human dignity and absolute rights. The so-called marital rape case of *S.W. v. the United Kingdom*, 1995, under Article 7 (no punishment without law), was the first ruling in which the ECtHR invoked the link between the two in an explicit and significant way. The ECtHR pointed out that “the abandonment of the unacceptable idea of a husband being immune against prosecution for rape of his wife was in conformity not only with the civilised concept of marriage, but also, and above all, with the foreseeable objectives of the Convention, the very essence of which is respect for human dignity and human freedom”. In the case of *Nachova and Others v. Bulgaria* [GC], 2005, the ECtHR found a violation of Article 2 in conjunction with Article 14, because “racial violence is a particular affront to human dignity”. This link was also

identified under Article 3 in the case of *Kudla v. Poland* [GC], 2000 (where the ECtHR confirmed that a State “must ensure that a person is detained in conditions which are compatible with respect for his human dignity”), and in the case of *Muršić v. Croatia* [GC], 2016 (the issue of a personal space in prison). The link between the living instrument doctrine and human dignity was also used to expand the scope of applicability of Article 3 to encompass the responsibility of the State for poor living conditions when an applicant, wholly dependent on State support, was in a situation of serious deprivation incompatible with human dignity (decision *Budina v. Russia*, 2008). In the case of *Svinarenko and Slyadnev v. Russia* [GC], 2014, the Court ruled that the use of a metal cage in a courtroom was in itself an affront to human dignity. In the landmark judgment on human trafficking in the case of *Rantsev v. Cyprus and Russia* [GC], 2010, the ECtHR found that “trafficking threatens the human dignity and fundamental freedoms of its victims” (violation of Article 4). Finally, in the case of *M.S.S. v. Belgium and Greece* [GC], 2011, it was found that the conditions of subsistence and extreme destitution of asylum seekers, while they waited for the authorities to process their applications, undermined human dignity and constituted degrading treatment, contrary to Article 3.

The consideration of human dignity was instrumental in the ECtHR’s ruling regarding the beginning of the right to life. The Court stated in the case of *Vo v. France* [GC], 2004 (no violation of Article 2) that “[t]he potentiality of [the embryo/foetus] and its capacity to become a person ... require protection in the name of human dignity, without making it a ‘person’ with the ‘right to life’ for the purposes of Article 2”. Furthermore, again in respect of the human embryo or foetus, in the case of *Parillo v. Italy*, 2015, the ECtHR concluded that “human embryos and foetus must be treated in all circumstances with the respect due to human dignity”. The ECtHR interpreted Article 8 of the ECHR in harmony with the Oviedo Convention on Human Rights and Biomedicine from 1997 (prohibition of production of human embryos for research). The Oviedo Convention and also the EU Charter of Fundamental Rights both prohibit reproductive human cloning.

The commitment to human dignity as the universal value and method of interpretation has been embedded in a number of cases which address qualified rights, e.g., *Christine Goodwin v. the United Kingdom*, 2002: personal autonomy of transsexuals to live in dignity and legal recognition of their new sexual identity – violation of Articles 8 and 12; and *Oršuš and Others v. Croatia* [GC], 2010: access to education for Roma children – violation of Article 14 in conjunction with Article 2 of Protocol No. 1.

It should be noted that the living instrument doctrine is of particular importance in the case law of the ECtHR for the protection of social rights, which are related to a certain extent to human dignity (from the case of *Gayguzus v. Austria*, 1996, to the case of *Čakarević v. Croatia*, 2018). Indeed, “social security forms an integral part of human dignity” (Morvan, 2011), and “equality of treatment is part of the individual right of the worker to respect for personal dignity” (Deakin and Morris, 2012).

Living instrument doctrine and social rights in IACtHR and ECtHR case law

For a long time (“forty years of solitude”, from the adoption of the American Convention on Human Rights in 1969 – it entered into force in 1978), there was no realisation of social rights or their protection by the IACtHR in accordance with Article 26 – Progressive Development (ACHR: Chapter III – Economic, Social, and Cultural Rights), because the Court could not decide on the intended nature and scope of progressive development in that Article. This persisted until the landmark judgment of 2009 in the case of *Acevedo Buendía et al. [Discharged and Retired Employees of the Comptroller’s Office] v. Peru*, delivered one year after the adoption of the UN Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (which provides for the right of individual petition). The IACtHR ruled that Article 26 should become fully actionable or justiciable, making reference in its ruling to the principle of the indivisibility of rights and interdependence between first-generation rights (civil and political) and second-generation rights (economic,

social and cultural) (Burgorgue-Larsen and Übeda de Torres, 2011). The Inter-American Court also made reference to the case of *Airey v. Ireland* (1979), in which the ECtHR stated that “there is no watertight division separating [social and economic rights] from the field covered by the Convention”.

It has been noted that this activist approach taken by the IACtHR was, to a certain extent, inspired by the social philosophy of the ACHR (deeply rooted, as it was, in the history of constitutionalism – the Mexican Constitution of 1917 was first to constitutionalise social rights, two years before the 1919 Weimar Constitution in Germany). The activist approach was confirmed in the case of *Lagos del Campo v. Peru* (2017), in which the Court found a violation of the right to work of the workers’ representative (president of the Electoral Committee), since his dismissal after giving an interview to a magazine in the context of working conditions was found unjustified and arbitrary.

The above rulings of the IACtHR demonstrate that enforcement of social rights under Article 26 of the ACHR is not tied to the Protocol of San Salvador (Additional Protocol to the ACHR in the Area of Economic, Social and Cultural Rights from 1988). The Protocol of San Salvador recognises justiciability – the system of individual petition (Article 19 § 6) only for two social rights: trade union rights under Article 8 § 1 (a), and the right to education under Article 13. For the remaining social rights, according to the Protocol, the States Parties undertake to submit periodic reports. However, the Protocol does not provide for a collective complaints procedure (by contrast, such a system has been established under the Additional Protocol to the European Social Charter of 1995).

While the *Acevedo Buendía* judgment was a turning point in the case law of the IACtHR, the turning point in the case law of the ECtHR regarding social rights, particularly the right to social security, was the judgment in the case of *Gayguzus v. Austria*, 1996 – violation of Article 14 of the Convention in conjunction with Article 1 of Protocol No. 1 (after “forty-four years of solitude” – Protocol No. 1 had been adopted in 1952): “*Ce silence était annonciateur de bouleversements: des articles fort généraux de la Convention ont été interprétés par la Cour européenne des droits de l’homme de la manière la plus inattendue et la plus extensive qui soit*” (Morvan,

2011). The ECtHR ruled in the *Gayguzus* judgment that “the right to emergency assistance ... is a pecuniary right for the purposes of Article 1 of Protocol No 1”. In that way, the ECtHR protected the right to property in respect of social benefits. The ECtHR extended the right to property (under Article 1 of Protocol No. 1) to non-contributory social benefits in the case of *Stec and Others v. United Kingdom* (decision on admissibility), 2006. By this decision, the Court protected internal consistency and harmony between various provisions of the ECHR and its additional protocols, confirming its holistic approach to protecting human rights. As mentioned earlier, both contributory and non-contributory social benefits are also protected by the right to a fair hearing under Article 6 of the Convention.

The ECHR does not guarantee economic and social rights as such, including the right to work, the right to free medical assistance, and the right to rent-free dwelling, as stated in *Pančenko v. Latvia* (dec.), 1999, since the social rights are set forth in the European Social Charter (1961) and the revised European Social Charter (1996) of the Council of Europe, which has its own mechanism of supervision (periodic reports review and procedure for collective complaints examined by the European Committee of Social Rights). However, the case law of the ECtHR enables an indirect protection of social rights by means of the living instrument doctrine, through the protection of civil and political rights (*Airey v. Ireland*, 1979), because of the interdependence between civil and political rights, on the one hand, and economic, social and cultural rights, on the other (Nowak et al., 2012; Dorssemont et al., 2013).

Closing remarks

The living instrument doctrine in the case law of the European Court of Human Rights greatly contributes to the most effective protection of a broad variety of absolute and qualified human rights, including indirect protection of social rights. This is accomplished by means of positive obligations of States and autonomous legal terms, preserving respect for human dignity and ensuring compliance with the principle of subsidiarity, the margin of appreciation, and

the principle of proportionality. The evolutive interpretation of human rights treaties is inherently embedded in the case-law of the European Court of Human Rights, the Inter-American Court of Human Rights, and the African Court on Human and Peoples' Rights, thus significantly contributing to the maintenance and further realisation of human rights and fundamental freedoms.

Bibliography

- Barak, A., *Human Dignity – The Constitutional Value and the Constitutional Right*, Cambridge University Press, 2015.
- Bjorge, E., *The Evolutionary Interpretation of Treaties*, Oxford University Press, 2014.
- Bogdandy, A. von, MacGregor, E.F., Antoniazzi, M.M., Piovesan, F., Soley, X. (eds.), *Transformative Constitutionalism in Latin America - The Emergence of a New Ius Commune*, Oxford University Press, 2017.
- Burgorgue-Larsen, L., Übeda de Torres, A., *The Inter-American Court of Human Rights - Case Law and Commentary*, Oxford University Press, 2011.
- Costa, J.-P., On the legitimacy of the European Court of Human Rights' judgments, *European Constitutional Law Review*, Vol. 7 (2), pp. 173–182, 2011.
- Deakin, S., Morris, G., *Labour Law*, 6th ed., Hart Publishing, Oxford, 2012.
- Dorssemont, F., Lörcher, K., Schömann, I. (eds.), *The European Convention on Human Rights and the Employment Relation*, Bloomsbury Publishing, 2013.
- Dupré, C., *The Age of Dignity, Human Rights and Constitutionalism in Europe*, Oxford and Portland, Oregon, 2015.
- Dzehtsiarou, K., O'Mahony, C., *Evolutive interpretation of rights provisions: a comparison of the European Court of Human Rights and U.S. Supreme Court*, Colum. Hum. Rts. L. Rev., Vol. 44 (2), p. 309, 2013.
- European Court of Human Rights, *Dialogue between Judges 2011, What are the Limits to the Evolutive Interpretation of the Convention?* Strasbourg, 2011.
- Harris, D.J., O'Boyle, M., Bates, E., Buckley, C., Harris, O'Boyle and Warbrick: *Law of the European Convention on Human Rights*, Oxford University Press, 2014.

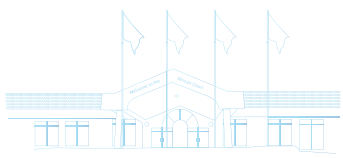
- Jhering, R. von, *The Struggle for Law* (translated from the 5th German edition), The Law Book Exchange, Clark, New Jersey, 1997.
- Mahoney, P., *Judicial activism and judicial self-restraint in the European Court of Human Rights: two sides of the same coin*, Human Rights Law Review, Vol. 11, p. 57, 1990.
- Morvan, P., *Droit de la Protection Sociale*, 5e éd., Lexis Nexis-Litec, 2011.
- Nowak, M., Januszewski, K., Hofstätter, T. (eds.), *All Human Rights for All – Vienna Manual on Human Rights*, Neuer Wissenschaftlicher Verlag, Vienna/Graz, 2012.
- Pontifical Council for Justice and Peace at the Request of John Paul II, *Compendium of Social Doctrine of the Church*, Veritas Publications, Dublin, 2005.
- Raimondi, G., *Consiglio d'Europa e la Convenzione europea dei diritti dell'Uomo*, Editoriale Scientifica, Naples, 2008.
- Rainey, B., Wicks, E., Ovey, C., Jacobs, White, and Ovey: *The European Convention on Human Rights*, Oxford University Press, 2014.
- Rota, M., *L'Interprétation des Conventions Américaine et Européenne des Droits de l'Homme*, LGDJ, Paris, 2018.
- Seibert-Fohr, A., *Digital surveillance, meta data and foreign intelligence cooperation: unpacking the international right to privacy*, 2018 (<http://dx.doi.org/10.2139/ssrn.3168711>).
- Shachor-Landau, C., *The European Convention on Human Rights (ECHR) 1950, as a living instrument in the twenty-first century*, Israel Yearbook on Human Rights, Vol. 45, pp. 169–189, 2015.
- Sicilianos, L.-A., *The European Court of Human Rights at a time of crisis in Europe, SEDI/ESIL Lecture*, European Court of Human Rights, pp. 1–13, 2015. (http://esil-sedi.eu/wp-content/uploads/2018/04/Sicilianos_speech_Translation.pdf); also 2 European Human Rights Law Review, pp. 121–135, 2016.
- Spano, R., *The future of the European Court of Human Rights – subsidiarity, process-based review and the rule of law*, Human Rights Law Review, 2018 (<https://doi.org/10.1093/hrlr/ngy015>).
- Spielmann, D., *Allowing the right margin: the European Court of Human Rights and the national margin of appreciation doctrine: waiver or subsidiarity of European review?*, Cambridge Yearbook of European Legal Studies, vol. 14, pp. 381–418, 2012.
- Sudre, F., *Droit Européen et International des Droits de l'Homme*, 13e éd., Presses Universitaires de France – P.U.F., Paris, 2016.
- Tulkens, F., in *Dialogue between Judges 2011, What are the Limits to the Evolutive Interpretation of the Convention?* pp. 6–11, European Court of Human Rights, Strasbourg, 2011.

- Valentini, L., *Dignity and human rights: a reconceptualization*, *Oxford Journal of Legal Studies*, Vol. 37 (4), pp. 862–885, 2017.
- Weinrib, J., *Dimensions of Dignity: The Theory and Practice of Modern Constitutional Law*, Cambridge University Press, 2016.
- Yudkivska, G., *Territorial Jurisdiction and Positive Obligations of an Occupied State: some reflections on evolving issues under Article 1 of the European Convention*, 2016 (<http://dx.doi.org/10.2139/ssrn.2825208>) [in *The ECHR and General International Law*, Anne van Aaken and Iulia Motoc (eds.), Oxford University Press, forthcoming].



Elizabeth Odio Benito

Judge of the Inter-American Court of Human Rights



SESSION 1

From the interpretation of norms to social change:
human rights treaties as living instruments in light
of reality



CORTE IDH
Protegiendo Derechos

From the presentation and the documents with which Professor Bogdandy has provided me on this issue, *Transformative Constitutionalism by a Common Law of Human Rights*, one concept appears to me to be especially important as regards the transformative mandate, because, in my opinion, it operates through evolutive interpretation.

The American Convention on Human Rights was adopted 40 years ago, but from the moment that this Court began to function, from its first advisory opinions and, above all, from the time that it delivered its first judgment – *Velásquez Rodríguez* – that transformative mandate of the Court has been operating through evolutive interpretation. This Court, throughout these years, through its case law, has made it very clear that human rights laws and instruments are not written in stone; they are not divine commandments that must be obeyed to the letter of the law because, if this was so, neither the court nor the judges would be necessary. Thus, the Court has functioned in the context that human rights treaties are living instruments and that their interpretation has to evolve with the times and contemporary conditions.

We do not have much time, but I would like to mention that the way in which the Court has examined, from an evolutive perspective, the rights of groups and collectives that have traditionally been discriminated against, has been fundamental for social change. I would like to emphasize, in particular, how the Convention's essential principle of non-discrimination, which connects us to all human rights instruments starting with the Universal Declaration, must be examined with a differentiated approach, from a gender-based perspective, and one that takes into account children and diversity. This is fundamental, but developing this would take a long time. Therefore, I will merely give three emblematic examples to illustrate the way in which the Court has used the interpretive method.

One case relates to the freedom and autonomy of women in the area of sexual and reproductive health; another concerns the benefits of social security for same-sex couples, and a third, regarding the

rights of the child, incorporates the standard of comprehensive protection for children, as subjects of rights, when they are victims of sexual offenses.

In the case of *I.V. v. Bolivia*, a judgment delivered in 2016, a woman underwent sterilization in a hospital. She was a refugee in a neighboring country; she was sterilized, and her informed consent was not sought or obtained. Although the State said that it had tried to obtain her authorization, this fact was never proved. The judgment handed down by the Court was fundamental because it recognized a woman's right to freedom to decide about her body and her health, rather than leaving this right to decide in the hands of the doctors. This was an extremely important paradigm shift, because it was made clear that women have the right to receive appropriate and timely information and it established the State's responsibility on this point. This is reflected in one section of our judgments—the reparations—through which the Court has made an enormous contribution to international human rights law.

Second is the case of *Duque v. Colombia*, which relates to a same-sex couple. One of them died and the companion claimed the right to the pension. Even though Colombia has laws that would have allowed this to be applied correctly, the pension was denied. The Court heard the case and reiterated that sexual orientation and gender identity were categories protected by the American Convention and the surviving companion was granted the right to his partner's pension.

Lastly, there is the 2018 judgment in the case of *V.R.P. and V.P.C. et al. v. Nicaragua*. A child suffered atrocious sexual abuse and rape at the hands of her father and, when the domestic courts heard the case, the jury declared that the accused was innocent and this verdict of innocence was then confirmed by the judge. When the Commission submitted this case to the Court, the Court based itself on the rights recognized in the Convention on the Rights of the Child and reinforced them with special specific measures that included the protection of the victim, when he or she is a child or an adolescent, in any case of sexual violence.

The case law of the Court has referred to significant social issues in our hemisphere. The Court's case law, with a gender-based perspective, has revealed very clearly, starting with the case of *the*

Miguel Castro Castro Prison, the differentiated impact of human rights violations on women and men. There are major differences in the impact suffered and that impact has been highlighted by our Court in highly significant judgments. One of the most emblematic was the *Cotton Field*, but there were also *Rosendo Cantú* and *Fernández Ortega*, as well as a group of judgments that analyzed the differentiated impact of crimes involving sexual violence, in particular, when the victim was a man or when it was a woman.

In my opinion, and following the line of thought of Professor Bogdandy, the transformative mandate of our Convention is evident, and this is clearly revealed by our case law. The Court's case law has gradually incorporated the block of constitutionality and the Court has put a great deal of effort into conventionality control to ensure that our case law is integrated into the decisions of the domestic courts.

I would like to end by stressing that the contributions made by our three courts, in America, Africa and Europe, have been particularly important for social change. They have opened up spaces of respect for human rights that, prior to our conventions and our courts, did not exist.

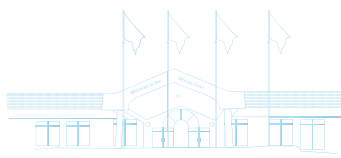
Nevertheless, we cannot lose sight of the fact that, recently, there have been setbacks in domestic case law, and even in the case law of constitutional courts. I consider that the judgment of a Spanish court in the case of the gang rape of a girl who was taking part in the festival of San Fermín, concluding that it was not rape but merely indecent assault, was a brutal retrogression.

In our hemisphere we are not totally exempt from this type of retrogression and we now face a serious problem: religious fundamentalism. Religious fundamentalism that is electing members of Congress and ambassadors and that could eventually elect judges, in which case a very important part of this social progress could be lost, especially with regard to women's rights and sexual and reproductive rights, which have led to luminous moments for our Court – such as in the case of *In vitro fertilization* in Costa Rica. This is why these meetings and these exchanges are so important; this is why it is so important that we keep in mind our judgments and our advisory opinions in order to keep alive the impact of human rights on social change.



Mónica Pinto

Professor at the Universidad de Buenos Aires



SESSION 1

From the interpretation of norms to social change:
human rights treaties as living instruments in light
of reality



CORTE IDH
Protegiendo Derechos

Conclusions

First, I would like to thank everyone for their presentations and input. Our main speaker, Armin von Bogdandy, spoke of the judicial interpretation of norms and that norms can produce social change. He explained that the regional courts, such as the Inter-American Court, received this transformative mandate following an era of dictatorships. The new constitutionalism movement that arose at the beginning of the 1980s, when democratic governments started to re-emerge in our countries opened the door to long lists of human rights and also gave a privileged place to human rights instruments in the legal hierarchy. Mr. von Bogdandy proposed that the issue of conventionality control, to which the Inter-American Court referred in the case of *Almonacid Arellano v. Chile*, is an appropriate tool to develop a common *iuris* in the Americas.

What does transformative constitutionalism mean? Mr. von Bogdandy affirms that human rights have become a particularly important standard. The three judges who took part in and contributed to this session, Judge Matusse of the African Court, Judge Lubarda of the European Court and Judge Odio Benito of the Inter-American Court, found common elements. Thus, they referred to rulings that have expanded the limits of each of the systems in order to enhance the interpretation of the protected rights and to permit new interpretations that, in the words of Judge Elizabeth Odio, have evolved with the times and interpreted the situations of individuals.

Meanwhile, Judge Matusse, recalled that the mandate of his court was to reinforce the African Commission and also to achieve social change and referred to three cases in which he considered that the African Court had been an agent of social change. This change occurred through amendments to and changes in domestic law. Judge Lubarda made his remarks in the context of the living instrument doctrine of the European Court that goes back to its initial moments. He made a distinction between ethics and values. As Saint-Exupéry once said, “what is essential is invisible to the eye.” Shared ethics and values also evolve with the times. In addition, he spoke of the

notion of the European consensus and mentioned the principle of subsidiarity and the margin of appreciation.

Judge Odio Benito indicated that the mandate of transformative constitutionalism had always existed and referred to the first judgment of the Inter-American Court, *Velásquez Rodríguez*, which is an instructive example. At that time nothing was ready, nothing had been done, there were no precedents, and Latin America was waiting for the Court to make a strong statement that the systematic practice of forced disappearances was a crime against humanity. And, that is what the Court did; and its definition of forced disappearance is still valid today even though there are two applicable international conventions on this issue in the region. Judge Odio Benito also referred to the sexual and reproductive rights of women and indicated how the Court's judgments had expanded existing boundaries when addressing the rights of women and children, and sexual orientation and gender identity as protected rights.

All these interventions covered the issues of our session this morning. One comment with regard to the remarks of Vice President Vio Grossi, who suggested that transformative constitutionalism appeared to be based on the primacy of constitutional law when, according to Article 27 of the Vienna Convention on the Law of Treaties, priority should be given to international law. I understand his position because we are both steeped in international law. I also agree with Judge Sierra Porto that judicial activism and interpretation should serve to give legitimacy to judges. It is extremely important that the interpretations made by these three courts are understood and recognized as impartial and independent; as interpretations that address issues that concern the ordinary individual.



SESSION 2

Authority and legitimacy of the
regional courts:
Impact, resistance, difficulties and
challenges

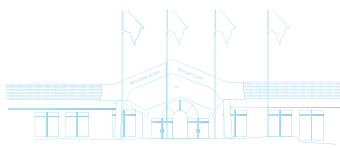




Manfred Nowak

Professor at the University of Vienna

Authority and legitimacy of the regional courts:
Impact, resistance, difficulties and challenges



SESSION 2

Authority and legitimacy of the regional courts:
Impact, resistance, difficulties and challenges



CORTE IDH
Protegiendo Derechos

Introduction

On the occasion of the 40th Anniversary of the entry into force of the American Convention on Human Rights and the creation of the Inter-American Court of Human Rights, the Inter-American Court, with the support of the German Development Cooperation Agency GIZ, invited the Presidents and judges from the three regional human rights courts in the Americas, Africa and Europe and organized a remarkable high-level conference that took place in San José from 16 to 19 July 2018. Part of this conference was a dialogue between the three regional human rights courts and invited experts, which took place on 17 July at the seat of the Inter-American Court. The experts were requested to address certain questions in a comparative perspective. The following contribution addresses the authority and legitimacy of the three regional courts by assessing their impact, but also existing resistances, difficulties and challenges. It will first provide a short overview of the legal basis and foundations of the three courts, followed by a comparative statistical analysis, the major challenges to the authority and legitimacy of the courts and the way these challenges have been addressed by the respective courts and the regional organizations concerned. In the final conclusions, the specific challenges will be put into the context of the current global crisis of human rights, democracy and the rule of law. This article will close by assessing the remarkable achievements of the three regional human rights courts.

Legal basis and foundation of the three regional courts

The oldest of the three regional courts is the European Court of Human Rights (ECtHR). It was established in the framework of the Council of Europe (CoE) by the European Convention of Human Rights (ECHR) 1950, which entered into force in 1953. At that time, access to the Court was severely restricted. Individual applications were optional, i.e. dependent on a special declaration by the respective

States parties, and only inter-State complaints were compulsory. Both types of applications needed first to be submitted to the European Commission of Human Rights, which decided on the admissibility and, in fact, declared most individual applications inadmissible. If declared admissible, the Commission adopted an opinion which was submitted to the Committee of Ministers, the highest political body of the Council of Europe, consisting of the Ministers of Foreign Affairs of the member States of the CoE or their diplomatic representatives, in Strasbourg, the seat of the CoE and the Court. Only the States concerned, or the Commission, could refer an application to the Court, on the condition that the respective State party had made another optional declaration accepting its jurisdiction. If the case was not or could not be referred to the Court, the Committee of Ministers decided by a two-thirds majority whether or not the respective State party had violated the ECHR. Even if 60% of the CoE member States were in favour of a violation, the official decision was “non-violation”! In other words, States could become a party to the ECHR without accepting the right to individual application and/or the jurisdiction of the Court. Turkey, for example, became a State party in the early 1950s without making either of the two optional declarations. The only possibility of subjecting the human rights situation in Turkey to supervision by the Strasbourg monitoring bodies was an inter-State complaint, which, in fact, was lodged by Denmark, France, the Netherlands, Norway and Sweden in 1982 at the time of a military dictatorship involving gross and systematic human rights violations. It was only as a result of a friendly settlement before the Commission that Turkey finally accepted the right to individual applications and the jurisdiction of the Court.

The “European model”, which illustrated the fear of States to lose sovereignty if their domestic human rights situation was subjected to scrutiny by independent monitoring bodies or even to a legally binding judgment of a regional human rights court, was later followed by other regions. In 1969, the American Convention on Human Rights (ACHR) was adopted by the Organization of American States (OAS), and entered into force in 1978. It followed the “two track system” of the ECHR and entrusted the already existing Inter-American Commission on Human Rights with dealing with

mandatory individual complaints and optional inter-State complaints. As with the European model, cases can only be referred to the Inter-American Court of Human Rights (IACtHR) by the respective States or by the Commission on condition that the State concerned has submitted a declaration accepting its jurisdiction under Article 62 of the ACHR. There is thus no direct access by individuals to the Inter-American Court.

The African Charter on Human and Peoples' Rights (AfChHPR or Banjul Charter), which was adopted in 1981 by the Organization of African Unity (OAU), the predecessor of the African Union (AU), and entered into force in 1986, was even weaker, as it did not establish an African Court. In addition to inter-State communications, the African Commission on Human and Peoples' Rights may deal, however, with a variety of "other communications" under Article 55, which may be lodged by individuals or NGOs. The Protocol to the Banjul Charter was adopted in 1998 and entered into force in 2004. It established the African Court on Human and Peoples' Rights (AfCtHPR) and provides that cases can be submitted to the Court by the Commission, the respective States and African intergovernmental organizations. In addition, Articles 5(3) and 34(6) of the Protocol entitle States to make an optional declaration to the effect that individuals and NGOs have direct access to the Court. In 2008, the AU adopted another Protocol which foresees the merger of the AfCtHPR and the African Court of Justice, but this Protocol has not yet entered into force.

With the entry into force of the 11th Additional Protocol (AP) to the ECHR in 1998, the "two track system" was abolished in Europe in favour of a permanent and full-time European Court of Human Rights. The former European Commission of Human Rights was abolished, as were all optional clauses and the role of the Committee of Ministers to decide on complaints. This meant that the new European Court decides on both the admissibility and merits of inter-State and individual complaints, and the Committee of Ministers supervises the execution of the Court's judgments. Usually, the Court hears cases in Chambers of seven judges, only highly important cases are dealt with in the Grand Chamber of 17 judges. Clear inadmissibility decisions can also be decided by a committee of three judges. With the entry into force of the 14th AP, the procedure was streamlined and

the competence of single judges was introduced.¹ So far, this “new European model” has not yet been followed in any other region.

In practice, the (part-time) European Court of Human Right was established in 1959 in Strasbourg, the full-time European Court in 1998, while the Inter-American Court was established in 1979 in San José and the African Court in 2006 in Arusha. Of the three regional organizations, the AU is the largest one and currently has 55 Member States, followed by the CoE with 47 and the OAS with 35 Member States. 54 of the 55 AU Member States (all but Morocco) have ratified the African Charter, but only 30 ratified the Protocol establishing the African Court, and only 8 States have accepted the direct access of individuals and NGOs to the Court (Burkina Faso, Malawi, Mali, Tanzania, Ghana, Côte d’Ivoire, Benin and Tunisia). Rwanda even withdrew its earlier acceptance of this possibility in 2016. Of the 35 member States of the OAS, only 23 are currently parties to the ACHR. The United States, Canada and a number of Caribbean States never ratified the ACHR, while Trinidad and Tobago and Venezuela later withdrew. Of these 23 States parties, only 20 have accepted the binding jurisdiction of the Court under Article 62 of the ACHR. On the other hand, all 47 member States of the CoE, including Turkey and the Russian Federation, are parties to the ECHR, and the CoE even requests new member States to ratify the ECHR as an entry requirement. This means that roughly 800 million human beings living in the 47 member States of the CoE have a right to submit individual applications directly to the ECtHR.

While the Inter-American Court consists of only 7 and the African Court of 11 judges, each of the currently 47 member States of the CoE is “represented” by one judge in the full-time European Court. As a matter of principle, Article 26(4) of the ECHR requires the national judge elected in respect of a State against which an application has been lodged to sit *ex officio* in the respective Chamber which deals with this case, as well as in the Grand Chamber. On the contrary, Article 22 of the Protocol to the AfChHPR explicitly prevents judges from hearing a case against a State of which they are nationals. Article 55 of the ACHR is somewhat ambiguous on this

1 See below under 6.

controversial question, but in 2009 the Inter-American Court, in an Advisory Opinion, interpreted this provision in the sense that national judges shall also be prevented from participating in the deliberation of cases against a State of which they are nationals.²

Jurisdiction of the three regional courts

The main task of regional human rights courts is their contentious jurisdiction, i.e. to decide in a final and legally binding manner on individual and inter-State applications, in the case of the African Court also on communications submitted by NGOs as a kind of *actio popularis*. This is what distinguishes regional human rights courts from non-judicial or quasi-judicial bodies, such as all the treaty monitoring bodies of the United Nations or the Inter-American and African Commissions on Human Rights. While Articles 32 of the ECHR and 62 of the ACHR restrict the contentious jurisdiction of these two Courts to all matters relating to the interpretation or application of the respective conventions (ECHR and ACHR), Article 3 of the Protocol to the Banjul Charter is broader and empowers the African Court to decide on “all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant human rights instrument ratified by the States concerned”.

In addition, all three regional courts have advisory jurisdiction. According to Article 64 of the ACHR, all OAS Member States and certain OAS organs may consult the Inter-American Court regarding the interpretation of the ACHR “or of other treaties concerning the protection of human rights in the American States”. In addition, the Court may provide OAS Member States with advisory opinions regarding the compatibility of any of their domestic laws with the ACHR and “other treaties”.³ Similarly, Article 4 of the Protocol to the Banjul

2 See IACtHR, Advisory Opinion 20/09 of 29 September 2009. For an assessment of the different solutions to this question, see below under 7.

3 On the meaning of “other treaties”, see IACtHR, Advisory Opinion OC-1/82 of 24 September, 1982.

Charter empowers the African Court to provide an advisory opinion relating to the Charter or any other relevant human rights instruments at the request of an AU member State, any AU organ or any African organization recognized by the AU. By comparison, Article 47 of the ECHR is much more restrictive: only the Committee of Ministers of the CoE may request the European Court to give advisory opinions on legal questions concerning the interpretation of the ECHR and its Additional Protocols, but not of “other treaties”. However, Article 1 of the 16th AP to the ECHR of 2013, which entered into force on 1 August 2018, empowers the highest courts and tribunals of States parties, in the context of a case pending before them, to request the European Court to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the ECHR and its Additional Protocols.

While the supervision of execution of judgments of the European and African Court is entrusted to the highest political bodies, namely the Committee of Ministers of the CoE and the Assembly and Council of Ministers of the AU, the Inter-American Court must itself supervise the execution of its judgments by the OAS Member States.

Statistics on cases, judgments and violations found

The following comparative statistical table is based on the most recent figures provided by the three regional courts on their respective websites and, in addition, by representatives of the three courts to the author during the San José Conference in July 2018.

	Inter-American Court of Human Rights	African Court on Human and Peoples' Rights	European Court of Human Rights
Total number of applications	276 (1979 –July 2018)	178 (2006 – June 2018)	816.150 (1959 – June 2018)
Total number of cases decided	237 cases decided with 354 judgments (1979 – July 2018)	58 (2006 – June 2018)	780.151 (1959 – June 2018)
Total number of cases decided on the merits	233	19 (2006 – June 2018), of which 17 on the bases of direct access	21.662 judgments (1959 – June 2018)
Total numbers of judgments where at least 1 violation was found	229 (96,5% of all cases)	18 (2006 – June 2018) 95% of all judgments	17.304 judgments (1959-2017) 80% of all judgments
Total numbers of advisory opinions	25	12	3 (16 th AP foresees the possibility of highest domestic courts to request advisory opinions)

These statistics show considerable discrepancies. During the roughly 60 years of its existence, more than 800,000 applications have been submitted to the European Court, which has decided over 780,000 of them and delivered more than 21,000 judgements. In more than 17,000 of these judgements (roughly 80%) the European Court found at least one violation of the ECHR. Some 40% of all judgments concerned three States parties, namely Turkey (3,386 judgments until the end of 2017), Italy (2,382 judgments) and the Russian Federation (2,253 judgments). In 2017, most judgments concerned the Russian Federation (305), followed by Turkey (116), the Ukraine (87) and Romania (69). While the “old” European Court delivered a total of 837 judgments during the 40 years of its existence until 1998, the “new” European Court delivers more than 1,000 judgments annually, which in fact deal with thousands of individual applications. More than 50% of all judgments of the European Court found violations of Articles 6 (right to a fair trial) and 5 (right to personal liberty),

followed by the right to property in Article 1 of the 1st AP (almost 12%), the prohibition of torture, inhuman or degrading treatment or punishment in Article 3 (more than 11%) and the right to an effective domestic remedy in Article 13 (almost 9%). In recent years, serious violations of the rights to life (Article 2) and personal integrity (Article 3) have increased significantly, above all in relation to the Russian Federation and Turkey. In 2016, more than a quarter of all judgments concerned violations of these two important provisions! A large number of judgments against countries like Croatia, Greece, Hungary, Poland, Russia or Ukraine deal with deplorable prison conditions. More than half the currently pending cases have been brought against four States, namely Ukraine, Turkey, Hungary and the Russian Federation, followed by Romania and Italy. In recent years, a growing number of individual and inter-State applications have related to armed conflicts (e.g. between Russia and Georgia and between Russia and Ukraine), and to terrorism and human rights violations in the context of states of emergency in Europe. Finally, the economic crisis and the current crisis of the European migration and refugee policies has led to an influx of individual applications.⁴

In comparison to these impressive figures, the relevant statistics of the two other regional courts look very modest. In the roughly 40 years of its existence, the Inter-American Court has received a total of 276 applications and decided 237 cases with 354 judgments (on preliminary objections, on the merits, and in relation to reparations). Of the 233 cases decided on the merits, in 229 cases (96,5%) at least one violation of the ACHR was found. In recent years, the number of applications received per year amounted to between 9 in 2008 and 23 in 2011. Until the end of 2017, the highest number of cases decided by the Inter-American Court concerned Peru (42), followed by Guatemala (24), Ecuador (21), Venezuela (20), Colombia (18), Argentina (17) and Honduras (13). Many of these judgments established

4 See, for a more detailed analysis of these trends, Christina Binder, “Challenges to Access to Justice before the European and the Inter-American Courts of Human Rights”, in Helen Ahrens/Horst Fischer/Veronica Gomez/Manfred Nowak, *Equal Access to Justice for All and Goal 16 of the Sustainable Development Goals: Challenges for Latin American and Europe*, Münster 2018 (in print).

gross and systematic violations of human rights during the Latin American military dictatorships, such as enforced disappearances, torture and arbitrary executions. Other important judgments have dealt with amnesty laws and with the rights of indigenous peoples.⁵

During the 12 years of its existence, a total of 178 applications were submitted to the African Court, which has so far decided 58 cases. Of these, 19 cases were decided on the merits, and of these only 2 were referred by the African Commission whereas 17 were directly submitted by the applicants; 3 cases were declared inadmissible, all other decisions were based on the lack of jurisdiction of the Court.⁶ The clear majority of all cases have been submitted directly by death row prisoners against Tanzania.

Statistics on the number of advisory opinions provide the opposite picture. While the Inter-American Court has so far rendered 25 advisory opinions, many of which were of high importance for the interpretation of the ACHR, and the African Court has already published 12 advisory opinions within 12 years, the European Court has only rendered 3 advisory opinions in the 60 years of its practice! This situation will, however, change as the highest domestic courts in the European States will soon start to request advisory opinions from the Strasbourg Court in accordance with the 16th AP to the ECHR.

Challenges to the authority and legitimacy of the three courts

The above statistics show already that the major challenge to the European Court is the high number of applications which results in a considerable backlog of currently some 80,000 cases⁷ and pressure on the Court to be more effective. There are various reasons for this impressive number of more than 800,000 applications and more than

5 Ibid, 13 ff. See also IACourtHR/GIZ, 40 years protecting rights – Some facts and figures, San José 2018.

6 See Frans Viljoen, “Understanding and Overcoming Challenges in Accessing the African Court on Human and Peoples’ Rights”, in 67 ICLQ 2018, 63 (67 ff).

7 Binder (op cit.), 5.

20,000 judgments. First, all roughly 800 million inhabitants of the 47 member States of the CoE, including the Russian Federation and Turkey, have the right to directly submit applications to the Court after having exhausted all relevant domestic remedies. Secondly, during the roughly 60 years of its existence, the European Court has built up a reputation of being a highly professional court which provides an effective remedy to individual victims of human rights violations with judgments that are usually complied with by the respective States parties. Often, the European Court is seen, therefore, as a “victim of its own success”. Thirdly, the ECHR is directly applicable in most CoE member States, well known by victims and lawyers and rightly regarded as the “Magna Carta of Europe”. At the same time, domestic remedies in many member States, above all the Russian Federation, Turkey, Ukraine, Moldova, Romania, Hungary and other Central and Eastern European States, are not functioning effectively and are, therefore, not providing an effective remedy to many victims of human rights violations. Finally, with the recent backlash to human rights, the actual human rights situation in Europe is deteriorating and even gross and systematic violations of human rights seem to be on the rise.

Although the human rights situation in the Americas and Africa is certainly not better than in Europe, the total number of applications submitted to the other two regional courts is still very low and certainly not representative of the actual situation. Again, there are various reasons for this low turn-out. First of all, only little more than half of all OAS and AU member States have ratified the respective treaties and accepted the jurisdiction of the Inter-American and African Courts. Secondly, there is no direct access of victims to the Inter-American Court, and even after it amended its Rules of Procedure in 2001,⁸ the Inter-American Commission is very reluctant to refer

8 The amended Rules of Procedure of the Inter-American Commission state that, in principle, cases should be referred to the Court if the State concerned has accepted its jurisdiction and does not comply with the recommendations of the Commission.

cases to the Court.⁹ In Africa, the situation is not much better: the African Commission has submitted very few cases to the Court and only 8 of the 30 States parties to the Protocol to the Banjul Charter (Burkina Faso, Malawi, Mali, Tanzania, Ghana, Cote d'Ivoire, Benin and Tunisia) have accepted the right of direct access to the Court in accordance with Article 34(6) of the Protocol. Rwanda even withdrew its respective declaration in 2016.

While the number of applications shows significant discrepancies between the European Court on the one hand, and the other two courts on the other hand, there are other challenges which apply similarly to all three courts. One is the limited State compliance with judgments. The Inter-American Court is well-known for its detailed and far-reaching reparation orders, which, in principle, is one of the assets of the Court, as they have a strong impact even with only partial compliance. It is, therefore, fairly difficult to provide reliable statistics on State compliance. Nevertheless, full compliance is reported in only about 10% of all cases, and partial compliance in 83% of cases. With respect to specific remedies, the compliance rate is about 34%.¹⁰ Looking at the African Court, the number of judgments is still so small that the compliance rate is not very conclusive. Of the 19 judgments delivered so far, full compliance is only reported with respect to two cases against Burkina Faso, while Tanzania complied partially in one case. As regards the other 16 judgments (84%), there is still no compliance. While the European Court has long been famous for its highly satisfactory compliance rate, this is unfortunately on the decrease. While States paid compensation to the victims in some 65% of all cases (2016 statistics), compliance with more specific orders by the Court have only been reported in 37% of all cases.¹¹ More than 10,000 cases are still awaiting supervision by the Committee of Ministers.

Another challenge, above all for the Inter-American Court, is its limited budget. While the European Court had a budget of US\$71,670,500

9 Christina Binder (op cit., at 17) speaks in this respect of a “certain rivalry between Commission and Court”.

10 See *ibid*, 18 with further references.

11 *Ibid*, 7 with further references.

(in 2018) and the African Court had US\$10,386,101 (in 2016), the Inter-American Court had no more than US\$4,412,793 (in 2017) as its disposal. Only 62,4% of this overall budget is provided by the OAS, the remaining part of more than one third is made available by voluntary contributions from States and international donors.

This extremely limited funding shows a significant lack of respect by American States for the work of the Inter-American Court.¹² This situation is exacerbated by a growing political opposition of certain States to the practice of the Court, which is regarded as unduly restricting State sovereignty. For example, Trinidad and Tobago and Venezuela, in reaction to certain judgments of the Court, even withdrew from the ACHR. Peru and Dominican Republic have also contested the jurisdiction of the Court. However, the situation is not much better in the two other regions. Tanzania, for instance, openly refused to implement orders for provisional measures, namely not to execute prisoners on death row while their cases are pending before the African Court, and Rwanda recently withdrew its declaration, which had provided victims direct access to the Court.¹³ Even in Europe, certain governments are openly refusing to implement judgments of the European Court they disagree with. For example, the United Kingdom and Russia strongly criticised judgments which had found violations of the right to vote (Article 3 of the 1st AP to the ECHR) of convicted prisoners. The British Government even threatened to withdraw from the ECHR, while the Russian Federation has recently decided to stop paying its financial contributions to the CoE,¹⁴ which also has serious consequences for the Court. However, political opposition to the “dynamic interpretation” of the ECHR by the Court has also been voiced by some of the “old” member States of the CoE. During their respective years of chairing the CoE, the United Kingdom and Denmark have shown a strong opposition to

12 Ibid, 17 ff.

13 For a detailed discussion of the cases before the African Court and the compliance of African States with the Court’s judgments see Frans Viljoen (op cit.), 65 ff.

14 See Norbert Paul Engel “Russland testet das Rückgrat des Europarates / Einstellung der Beitragszahlungen zum Haushalt des Europarates als politisches Druckmittel”, *Europäische Grundrechte Zeitschrift (EuGRZ)* 2017, 720-722.

the Court and pushed for significant restrictions of its freedom and competences.¹⁵ One result of these initiatives was the adoption of the 15th AP to the ECHR in 2013 which explicitly added the “margin of appreciation” doctrine, which had been developed by the jurisprudence of the Court over decades, as a “right” of States parties.

Finally, the three regional courts are also confronted with a certain competition with sub-regional courts. In Africa, certain sub-regional courts, such as the ECOWAS Court, the SADC Tribunal and the EA Court of Justice, have been entrusted with a specific human rights mandate, which might prompt certain AU member States not to ratify the Protocol to the Banjul Charter or at least not to accept direct access of victims to the African Court. Together, these three sub-regional courts have dealt in recent years with 56 human rights cases resulting in 25 judgments finding human rights violations.¹⁶ Although there are also a number of sub-regional courts in the American hemisphere, such as the Mercosur Court, the Andean Community Court, the Central American Court or the Caribbean Court, they do not seem to have a specific human rights jurisdiction. Although the Court of Justice of the European Union has the power to apply the ECHR and the EU Charter of Fundamental Rights which, to a large extent, is modelled after the ECHR, there does not seem to be much competition between the Strasbourg and Luxembourg Courts.¹⁷

15 See Binder (op cit), 8 ff.

16 See the detailed analysis by Daniel Abebe, “Does International Human Rights Law in African Courts Make a Difference?”, 56 *Virginia Journal of International Law* 2017, 527 at 555.

17 See, e.g., Emma Lehtinen, *The European Court of Justice and European Court of Human Rights: A complex interaction and coexistence between the two courts*, Blog post Workshop on the ECtHR Tampere 2015 of 7 March 2016, <https://blogs.uta.fi/ecthrworkshop/2016/03/07/lehtinen/> (last visited 27 August 2018); Federico Fabbrini/Joris Larik, “The Past, Present and Future of the Relation between the European Court of Justice and the European Court of Human Rights”, *Yearbook of European Law*, Volume 35, Issue 1, 1 December 2016, 145–179; Sybe A. De Vries, “EU and ECHR: Conflict or Harmony?”, *Utrecht Law Review*, Volume 9, Issue 1 (January) 2013, 78-79; Dean Spielmann, “The Judicial Dialogue between the European Court of Justice and the European Court of Human Rights Or how to remain good neighbours after the Opinion 2/13”, *FRAME Lecture*, Brussels, 27 March 2017, <http://www.fp7-frame.eu/>

However, in its recent Advisory Opinion on the access of the EU to the ECHR, the EU Court has blocked the EU's accession, which was seen partly as an attempt to avoid a situation where the Strasbourg Court might be in a position to overrule a respective judgment of the Luxembourg Court.¹⁸

Reactions to these challenges

In Europe, much has been done to address the problem of the huge caseload and backlog of cases before the Strasbourg Court. Most importantly, the 14th AP to the ECHR was adopted in 2004 but, due to Russian obstruction, only entered into force in 2010. It introduced the possibility of single judges to declare inadmissible or strike out individual applications in accordance with Article 27 of the ECHR “where such a decision can be taken without further examination”. Today, the clear majority of all applications is dealt with by single judges in this streamlined procedure. According to Article 26(3) of the ECHR, national judges are excluded from dealing with applications against their own State as single judges. Secondly, the Committees of three judges, which were originally only competent to declare cases inadmissible, also gained competence under Article 28(1)(b) of the ECHR to render, by a unanimous vote, a judgment on the merits if the underlying question in the case was already the “subject of well-established case-law by the Court”. Thirdly, a new inadmissibility ground was added in Article 35(3)(b) of the ECHR to the effect that applications can be declared inadmissible if the applicant has not suffered a “significant disadvantage”. Finally, the procedure for the supervision of the execution of judgments has been

wp-content/uploads/2017/03/ECHRCJUEdialog.BRUSSELS.final_.pdf (last visited 27 August 2018).

18 Court of Justice of the European Union, Advisory opinion 2/13 of December 18, 2014; Elisabeth Steiner/Ioana Ratescu “The Long Way to Strasbourg – The Impact of the CJEU’s Opinion on the EU’s Accession to the ECHR”, 15 *European Yearbook on Human Rights*, 51-60; Maria Berger/Clara Rauegger “Opinion 2/13: Multiple Obstacles to the Accession of the EU to the ECHR”, 15 *European Yearbook on Human Rights*, 61-76.

improved by strengthening the interaction between the Committee of Ministers and the Court. According to Article 46 of the ECHR, the Committee of Ministers, by a two thirds majority, may refer problems of interpretation of a judgment back to the Court for a ruling on this question of interpretation, and may bring infringement proceedings before the Court against States which do not abide by the Court's judgments. Such infringement proceedings have, e.g., been lodged against Azerbaijan.¹⁹

In addition to the 14th AP, the Strasbourg Court itself has initiated in 2004 a highly successful pilot judgment procedure in case of structural problems in a particular country. The Court indicates to the respective States what measures it should take to address such structural problems, and at the same time it puts all similar cases on hold. Pilot judgments are prioritized by the Committee of Ministers together with other leading cases in the supervision of the execution of judgments, and this enhanced supervision procedure seems to lead to a better compliance rate.²⁰

The pilot judgment procedure and the increased attention paid to the domestic execution of judgments aims at addressing the root causes of the high number of applications, i.e. the non-functioning of the domestic systems for the protection of human rights. This is also illustrated by the growing number of cases in which the European Court found a violation of the right to an effective domestic remedy in Article 13 ECHR. The Court, therefore, engages in increased dialogues with domestic courts.²¹ This positive trend will certainly be strengthened by the possibility of the highest domestic courts to request advisory opinions from the Strasbourg Court in accordance with the 16th AP to the ECHR, which entered into force on 1 August 2018.

This increased interaction between regional and domestic courts can also be observed in the two other regions. Most importantly, the Inter-American Court has developed since 2001 two procedures

19 See Binder (op cit.), 23.

20 Ibid, 21.

21 Ibid, 23.

which require domestic courts to directly apply the ACHR and its own binding jurisprudence.²² In a number of leading cases against Peru and Chile it declared that domestic amnesty laws violated the ACHR and were, therefore, null and void. By giving direct effect to these judgments, the Court forced the domestic courts no longer to apply such amnesty laws. This jurisprudence was accepted by the domestic courts and triggered a new wave of criminal prosecutions against some of the main perpetrators of gross and systematic human rights violations during the period of the military dictatorships. In addition, the San José Court asked domestic courts to exercise a “conventionality control” in situations where the domestic legislator failed to amend deficient national laws violating the ACHR. Both forms of norm control entrust the domestic courts and judges to give direct effect to the ACHR and to exercise a kind of constitutional control over domestic laws. In addition, by requesting States to report about compliance and by conducting private hearings with domestic courts and other national stakeholders, the Inter-American Court has increased its interaction with domestic courts and strengthened its role in the supervision of the execution of its judgments and far-reaching reparation orders in accordance with Article 63 ACHR.²³

The African Court has started a similar dialogue with domestic and sub-regional courts every two years aimed at delegating the implementation of its judgments at the domestic and regional levels.

The other structural problems and challenges outlined above, such as the low number of cases before the Inter-American and African Courts, the severe budgetary constraints and the growing opposition by States against supervision by regional human rights courts are much more difficult to address as they are symptoms of a more general backlash against democracy, the rule of law and human rights in all world regions.

22 Ibid, 29 ff.

23 Ibid, 28.

Conclusions

The current crisis of multilateralism and the growing opposition of authoritarian and populist governments in all world regions to the fundamental and interrelated values of pluralist democracy, the rule of law and human rights have a profound impact on the authority, legitimacy, acceptance, funding and well-functioning of regional human rights courts in the Americas, Africa and Europe. In order to deal effectively with these alarming problems, difficulties and challenges, world leaders would have to address the root causes of the current global and financial crises, climate change, armed conflicts, failed and fragile States, rising economic inequality, poverty, global migration and refugee flows, organized crime, terrorism, radicalisation, extremism, populism and new authoritarianism. In my opinion, there is no doubt that globalisation driven by neoliberal economic policies and its effects on an extremely unjust economic and social world order is one of the major root causes for all these interrelated crises symptoms.²⁴ However, political leaders seem to be more concerned to provide a vigorous response to the symptoms of these crises, such as terrorism and global migration and refugee flows, rather than addressing the root causes. This leads to a dangerous vicious cycle that strengthens nationalistic tendencies and bilateral power politics, although it should be evident that these global crises can only be solved by strengthening, rather than weakening, international organizations and multilateralism in general. As long as these short-sighted and dangerous policies are not reversed and joint efforts are not undertaken at the international level to address the root causes of such multiple crises, human rights, democracy and the rule of law will remain under attack.

Needless to say, under these conditions, it is extremely difficult to improve the functioning of regional human rights protection systems and regional human rights courts. If nationalist leaders in the United

24 Cf, e.g. Manfred Nowak, *Menschenrechte - Eine Antwort auf die wachsende ökonomische Ungleichheit* (Human Rights – An Answer to the Growing Economic Inequality), Hamburg/Wien 2015; Manfred Nowak, *Human Rights or Global Capitalism – The Limits of Privatization*, Philadelphia 2017.

Kingdom have forced the Brexit from the European Union on the British people and threaten to withdraw from the ECHR, it is difficult to enhance the acceptance of judgments of the European Court by the people and nationalist media in this country, which was once the cradle of democracy and human rights in the world. The same holds true if nationalist leaders in the Russian Federation, Turkey, Hungary or Poland openly attack the Strasbourg Court and Russia suspends its financial contributions to the CoE. In the face of “America First” policies in another country that was once seen as a pioneer of democracy and human rights in the world, it will be difficult to advocate for a quick ratification of the ACHR and recognition of the jurisdiction of the Inter-American Court. After nationalistic leaders in Venezuela decided to withdraw from the ACHR, little can be done to strengthen the impact of the San José Court on the deplorable human rights situation in that country. The same applies for Rwanda after nationalistic policies led to the withdrawal of the right of victims of human rights violations to directly access the African Court.

Despite this general backlash, we can also observe certain positive developments and actions that were undertaken to address some of the other challenges to the well-functioning of regional human rights courts. In Europe, the biggest challenge remains the huge caseload and backlog of cases. However, as was described in the last chapter, much has been achieved by streamlining the procedure in accordance with the reforms introduced by the 14th AP to the ECHR in 2010, by introducing the pilot judgments procedure and by enhancing the dialogue with national courts in order to strengthen the domestic execution of the judgments of the European Court. Similar positive trends have been developed by the jurisprudence of the Inter-American Court regarding “conventionality control” and declaring domestic amnesty laws null and void. On the same lines of delegating the implementation of its judgments, the African Court has started regular dialogues with sub-regional and domestic courts.

Less has been achieved by addressing the comparatively low number of cases that have reached the Inter-American and African Court so far. One would need to launch a campaign in both regions to convince governments to ratify the respective human rights treaties, to accept the jurisdiction of the regional courts as well as direct

access by individuals. The policy of the CoE to require ratification of the ECHR as a condition for entry into the organization might be seen as a model to be followed in other regions. In this respect, the inter-American system is the most restrictive, as individuals still lack any direct access to the Court. Experience shows that the “two track system” with a Commission as a first instance and the power to decide whether cases are referred to the Court simply does not work and leads to a certain rivalry between the two bodies. The solution would either be to abolish the “two track system”, as was the case in Europe with the entry into force of the 11th AP to the ECHR in 1998, or to permit direct access to the Court in addition to referrals by the Commission, as provided for in the Protocol to the Banjul Charter. Of course, more States will have to make this optional declaration under Article 34(6) of the Protocol in order to significantly increase the number of cases.

One controversial, though not necessarily the most important, question that I was explicitly asked to address, is whether judges, who are nationals of a State against which a case is brought, should be involved in the respective decisions by regional courts. Although judges are, by definition, independent from the governments that have nominated them, such involvement may lead to a conflict of interest which might put the impartiality of the respective national judge in question. This is the reason why all relevant UN human rights treaties and Article 22 of the Protocol to the Banjul Charter explicitly exclude national judges from hearing a case against their “own” government. Article 55 of the ACHR is more ambiguous in this respect but the Inter-American Court, in an Advisory Opinion of 2009, ruled that national judges shall be excluded. The ECHR and the European Court, which consists of a number of judges equal to the number of States parties to the ECHR, follow a different philosophy. According to Article 26(4), in cases before a Chamber or the Grand Chamber, the judge elected in respect of a State against which a case has been lodged, shall sit as an *ex officio* member. This provision goes back to the early days of the European Court and has always been defended by the argument that the national judge is needed as only he or she knows the domestic legal situation well enough to explain it to the other judges. With the introduction of committees of three judges by

the 11th AP and, even more, by single judges in accordance with the 14th AP, this philosophy is difficult to maintain. Article 28(3) provides for a “compromise solution” to the effect that if the national judge is not a member of the committee (in other words, the national judge is no longer required to participate), the committee may at any stage of the proceedings invite that judge to replace another committee member. However, for single judges, Article 26(3) opted for the opposite philosophy, namely, to exclude the national judge. Even for the member States of the CoE it obviously would have been odd to entrust all decisions of single judges to nationals of States against which these applications were directed! In my opinion, the argument that national judges are needed for their specific knowledge of the domestic legal situation is not very strong, as there are enough highly skilled members of the staff in the Registry of the European Court who are very familiar with the legal system in their countries of origin. On the other hand, even in Europe, where the judges are highly independent as they are elected for a period of nine years without the possibility of re-election according to Article 23(1) as amended by the 14th AP, and where every State is “represented” by a national judge, participation in cases against one’s “own” government may raise a conflict of interest, feelings of loyalty or a certain bias (in favour or against one’s “own” government) which should be avoided in order to guarantee the impartiality of decisions. However, as I said at the outset, this is not one of the most important questions as, in practice, this European philosophy of involving national judges seems not to have led to major problems with respect to the impartiality of judges.

Despite the fact that, in times of a global crisis of human rights, democracy and the rule of law, the three regional courts of human rights are, of course, affected by such crisis in their acceptance, legitimacy, authority and well-functioning, as the many problems and challenges I have outlined above illustrate, I wish to conclude this short comparative analysis with a positive note. All three courts have made a remarkable contribution to the development, awareness, implementation and enjoyment of human rights in their respective regions. The European Court, as the oldest one, has dealt with almost a million cases during its 60 years of existence, has provided justice to many thousands of victims of human rights violations,

has contributed by its dynamic interpretation and application of the ECHR to many constitutional, legal and policy changes in Europe, has raised the awareness of Europeans about the importance of human rights tremendously, and can rightly be considered a “victim of its own success” by attracting tens of thousands of individual applications from its 47 States parties each year. It has also shown a remarkable flexibility by successfully addressing its enormous caseload and backlog in difficult times, when under attack from different quarters and for different reasons. The Inter-American Court, which was established at a time when many Latin American countries were ruled by ruthless military dictatorships, gained a remarkable reputation by fearlessly ruling on gross and systematic human rights violations, such as enforced disappearances, torture, arbitrary detention and extrajudicial executions and by ordering far-reaching and innovative measures of reparation to the governments concerned. Although the total number of its judgments during its 40 years’ practice is very limited, many decisions, such as on the rights of indigenous peoples, have a strong impact which goes far beyond the individual cases in question. Its recent tendency to force domestic courts to directly apply the ACHR and to ignore or invalidate domestic laws, which were found to violate the ACHR, is a remarkable achievement. Although the African Court is still in its early stage of developing its jurisprudence and its proper place in the legal landscape of Africa, having to compete with a number of sub-regional courts, it has already built a solid reputation and authority as the most important human rights court in a continent where massive human rights violations take place on a daily basis. This positive experience with the three regional human rights courts certainly justifies repeating the long-standing call upon the United Nations to establish a World Court of Human Rights.²⁵

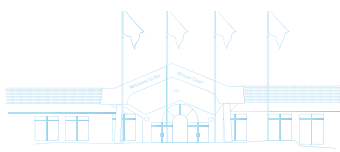
25 See, e.g., Manfred Nowak, “It’s Time for a World Court of Human Rights”, in M. Cherif Bassiouni/William Schabas (eds.), *New Challenges to the UN Human Rights Machinery. What Future for the UN Treaty Body System and the Human Rights Council Procedures?* Morsel (Belgium) 2012, 17-34; Julia Kozma/Manfred Nowak/Martin Scheinin, *A World Court of Human Rights – Consolidated Statute and Commentary*, BIM Studienreihe Bd.2, Wien/Graz 2011.

The *Declaration of San José*, which was adopted by the three regional courts on the occasion of the celebration of the 40th Anniversary of the creation of the Inter-American Court of Human Rights in July 2018, is a welcome initiative to enhance the dialogue and cooperation between the three regional courts and to join forces in standing up to defend human rights in difficult times.



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SESSION 2

Authority and legitimacy of the regional courts:
Impact, resistance, difficulties and challenges



CORTE IDH
Protegiendo Derechos

Introduction

From the outset, I would like to point out that I use the terms “authority” and ‘legitimacy’, in their broad sense, including normative legitimacy, institutional legitimacy and sociological legitimacy. To avoid repeating what has been said already, I will not dwell on this issue at length, suffice it to say that by: (i) *normative legitimacy*, I mean the purpose or mandate of the court, that is, its authority to issue binding judgments, decisions or opinions which must be complied with; (ii) *institutional legitimacy* which includes independence of the court, and (iii) *sociological legitimacy*, which stems from its acceptance in the perceptions or beliefs of its audience that the court has such authority and is effective in exercising it.

The notion of authority or legitimacy bears on all factors that, positively or negatively affect a court’s existence and achievement of its objectives such as its ability to render decisions, the proper execution of its decisions, and the perception and acknowledgment by its stakeholders (in the case of the African Court, the States, African Union policy organs, individuals, civil society organizations, etc.) that its existence has a purpose and it is living up to such purpose. The tasks of protecting human rights and maintaining legitimacy for the court, reinforce each other: the more the court is able to effectively protect human rights, in principle, increases its acceptance among victims, human rights defenders and other stakeholders, helps it to live up to its purpose and ultimately boosts its legitimacy. The absence of an international police force to enforce the decisions of an international tribunal underlines that its legitimacy is indispensably critical for its success.

Despite the fact that the African Court epitomizes the characteristics of the other regional human rights tribunals in Europe and the Americas, it has its unique and Africa-specific challenges, some of which are common to any nascent international judicial body, others that are specific to the African continent and to the environment within which the African Court operates.

In this presentation, an attempt is made to highlight the issues that weigh down on the effectiveness of the African Court, as well as its impact, and the resistance and difficulties the Court faces. I will only highlight some of the challenges relevant to this presentation as a colleague will dwell more on the other general challenges in a presentation planned for later.

Sources of legitimacy of the African Court

Normative legitimacy: consent of member States

The African Charter is the instrument that provides the substantive rights that the Court was put in place to protect. The Charter has been universally ratified by all AU states except Morocco, which re-joined the African Union in 2017. However, there is limited awareness of the Charter and its application at the national level; in particular, domestication or incorporation into national law, where required, is limited.

To contextualize the Charter, according to one of its prominent drafters and Chairperson of the drafting team, Keba Mbayé, and I quote: “In Africa, law is not conceived as a kind of sword put into the hands of the individual to enable him to defend against the group. The law is rather considered as a set of protective rules of the community of which the individual is a part” (our own translation).

In Africa, it has been said that negotiation and mediation are better suited to the socio-economic, political and cultural realities of Africans than an adversarial adjudication –something that was considered a “foreign idea” introduced by colonialists. For this reason, during the discussions leading to the adoption of the Charter, the idea of establishing a judicial entity was dropped and, in its place, the African Commission on Human and Peoples’ Rights (the Commission) was instituted as a quasi-judicial body.

As diverse as the Africa continent is, with considerable cultural, social, economic and political disparities across countries and regions, and despite some shared values, there has never been a uniform conception of justice and the law on the continent. The idea of

establishing a regional human rights court did not therefore vanish with the creation of the Commission.

It is against this background that the African Court was created through a Protocol to the Charter, adopted on 9 June 1998, in Ouagadougou, Burkina Faso. The Protocol entered into force on 25 January 2004 after attaining the requisite deposit of 15 ratifications. The Court became fully operational in January 2006 with the swearing-in of the first judges and has just completed a decade of its existence. The Court is composed of 11 judges, elected by the Assembly of Heads of State and Government of the African Union, on the basis of their moral character, competence and academic and judicial experience (Article 11 of the Protocol).

The Court was established with a mandate to complement the Commission's mandate of human rights protection and is empowered to interpret and apply the African Charter and any other human rights instruments to which the States concerned are parties. The Protocol specifies the Court's, functions, jurisdiction, structure, composition.¹ By becoming parties to the Protocol, States consent and undertake "to comply with the judgment [of the Court] in any case to which they are parties within the time stipulated by the Court and to guarantee its execution." It can thus be deduced that the Protocol, as an expression of the consent of member States of the African Union, is the main source of the Court's normative legitimacy for both its existence and authority. On the basis of its provisions, the Court asserts its power to make binding decisions and to require States to fully enforce them.

Normative legitimacy is an important prerequisite for any international court to exercise its power of adjudication in a meaningful manner. Normative legitimacy is often derived from the consent, as expressed in a constitutive document, of those States that have established the court. By agreeing to its creation, and by willingly submitting themselves to its jurisdiction and authority to take decisions, which may be contrary to their perceived national interests, States bestow upon a court legal legitimacy.

The Court's normative legitimacy is also continuously affirmed by the supervisory role of the Executive Council of Ministers over

1 See Articles 3, 11, and 24 of the Protocol.

execution of the Court's decisions and by regular consideration and adoption of its reports by the Assembly of Heads of State and Government of the African Union through binding resolutions. Similarly, civil society organizations have supported the work of the Court and agitated for implementation of the Court's decisions by concerned states.

Challenges to the legitimacy of the African Court and protection of human rights.

The African Court faces a number of challenges that affect attainment of full institutional and sociological legitimacy and its ambition to be a fountain of justice for violations of human rights on the continent. These challenges are multi-dimensional in nature and manifest themselves in many ways.

Limited political will

One of the biggest challenges affecting the Court's normative and institutional legitimacy is lack of political will on the part of AU member States as evidenced by the fact that more than 10 years after its operationalization, only 30 out of 55 countries have ratified the Protocol and only 8 of them have deposited the said declaration. In effect, this means that only a very limited number of individuals and NGOs can access the Court. The Court has, on at least three occasions, proposed eliminating the requirement of a declaration, allowing individuals and NGOs to access the Court, but these proposals have been dismissed out of hand without a proper hearing and the Court was asked not to bring back these proposals again.

Limited knowledge about the Court

As already indicated above, the Court's sociological legitimacy is affected by the limited knowledge of its existence among ordinary Africans and the low compliance rate with its decisions by States. While the primary responsibility to educate citizens on their rights and how to access the Court rests with States parties, which they have not done well, if at all, the Court has also taken certain initiatives in

this regard to promote its work and visibility among African citizens. These include undertaking sensitization visits to different countries to create awareness, promoting ratification and filing of the declaration by organizing seminars and workshops for State officials, judicial officers, civil society organizations, the media, bar associations, women groups, etc., as well as a biennial continental judicial dialogue with heads of the judiciary and constitutional courts in member states.

Lack of adequate human and financial resources

Any court which depends on direct budgetary assistance from States and partner organizations for its operational or programmatic expenses may be perceived, at least in the eyes of outsiders, as not having full independence even if the judges are discharging their mandate without fear or favour. What is not always understood is that all international and regional courts and tribunals rely fully on budgets provided by States except notably the Caribbean Community Court of Justice, which is largely funded by an Endowment Fund set up by its States parties. The Court proposed a similar mechanism to the AU policy organs but it was not accepted. In addition, all States, including those found in violation of human rights take part in the discussions at the level of the AU policy organs. And yet the Court has to rely on the same States that it has condemned to ensure implementation of its decisions and to consider and approve the budget of the Court. This a bit of challenge in a continent where a culture of respect for human rights, tolerance and accommodation is work in progress.

Low compliance rate with the Court's decisions

Finally, regarding the relationship between execution of the Court's decisions and legitimacy, it is obvious that a court whose decisions are not properly implemented cannot be proud of its legitimacy – the underpinning assumption being that States comply with its decisions only if they accept that a court has the power to make such decisions and that these decisions are binding upon them. *A contrario sensu*, there is strong reason to doubt the legitimacy of a court whose decisions are not complied with. For a court, legitimacy is not just

the right to exist but also able to function properly and achieve the objectives it was established for, of course, without losing sight of the other factors, apart from legitimacy, that may impede a court from operating properly or living up to its *raison d'être*.

Presently, the responsibility for ensuring execution of the African Court's judgments rests with the Executive Council, which is made up of Ministers for Foreign Affairs. Although generally speaking, compliance with the decisions of the African Court has been quite good, except in a few cases involving two States, the absence of a clear and coherent monitoring mechanism to monitor implementation of its decisions has occasioned a low rate of execution by States. With this in mind, the Court is currently working on a Framework for Compliance Monitoring and Enforcement of Judgments of the African Court on Human and Peoples' Rights in collaboration with the African Union policy organs.

Resistance, backlash or pushback

The Court is also increasingly facing resistance and backlash or push back from States that feel that it is overexerting itself and, for some, interfering with their sovereignty. This resistance or backlash which has put a cloud on the Court's institutional legitimacy manifests itself in different ways including outright refusal to implement Court decisions and attacks on the Court during meetings of the AU policy organs.² A case in point, is Rwanda's withdrawal of its declaration, which was allegedly prompted by the fact that the Court accepted cases from individuals who the respondent State considered 'genocide convicts' and, therefore, subsequently withdrew its Declaration and its defence of the pending cases. The Court was also accused of concerting with NGOs (including partner organizations) to give a platform to genocide convicts. Rwanda's withdrawal and its actions

2 For a more detailed discussion on this issue, see TG Daly and M Wiebusch "The African Court on Human and Peoples' Rights: mapping resistance against a young court" (2018) 14/2 *International Journal of Law in Context*, 14, 294–313 doi:10.1017/S1744552318000083.

as Chair of the Union has no doubt discouraged some other States from making and depositing declarations.

Ensuring human rights in the contexts of cultural and religious societal values

Another challenge to the African Court's legitimacy relates to the clash between human rights values and the traditional cultural or religious beliefs of African society. In this connection, the Court is aware of the constraints that result from underpinning its foundation on an instrument that seeks to preserve traditional values in a diverse and rapidly changing world. Navigating between tradition and modernity is not an easy task for the Court.

In certain matters, rooted in the traditions and religious beliefs of certain peoples and countries, the Court may find itself on the threshold of putting the States between a rock and a hard place; between peace and social upheaval. In a recent case, *APDF v. the Republic of Mali*, the Court had to examine the issue of child marriage, including age of consent and the manner of giving one's consent. The case involved a tussle between traditional and religious values on the one hand and human rights norms on the other. Although the Court, unsurprisingly chose to underline the supremacy of human rights standards over traditional and religious values, the judgment is understandably difficult for the State to enforce and may have the effect of undermining the Court's legitimacy in the eyes of some sections of Malian society.

Accordingly, when litigation concerning some instruments, such as the Maputo Protocol on the Rights of Women and the African Charter on the Rights and Welfare of the Child, becomes more widespread, the difficulties of arbitrating between tradition and modernity will become evident and, to the same extent, the legitimacy of the Court will face a testing time. This is even more evident considering that the African human rights system has no legal basis for implementing the doctrine of 'margin of appreciation'.

Conclusion

Looking into my crystal ball, I see testing times ahead indicating that things may get worse before they can get better. Previously, we used to have a core group of States that would push for and defend the core values of the African Union: democracy, respect for human rights, good governance, fighting impunity, etc. These voices are now getting weaker and weaker. Intuitively, the Court's forthright approach in dealing with especially politically sensitive matters that directly affect state sovereignty, such as elections and electoral laws, could be met with resistance from States, considering the diversity of the electoral systems on the continent and the fledgling status of democracy in the continent.

Evidently, the African continent is already witnessing what the AU Commission has characterized as democratic retrogression. There are now admittedly a number of States that, in my view, were by and large doing very well based on all the indicators for good governance, respect for human rights, transparency and accountability according to the African Peer Review Mechanism (APRM) and the Ibrahim Index of African Governance (IIAG), etc., but that now appear to have missed the right turn on the road. This development is likely to have an adverse impact on the Court. Indeed, all AU organs with a mandate on human rights and people participation in the work of the Union are increasingly facing challenges in their dealings with member States and the African Union policy organs.

Furthermore, considering that the Court is a continental human rights court with competence in human rights issues, one may anticipate that its current tendency of acting as a sort of 'regional constitutional court' will continue to make some States parties uneasy and to draw criticisms and even possible backlash from States.³ Interestingly, in cases where the Court ordered concerned States to amend their national legislation to conform to human rights standards, although

3 *Supra* note 2.

the Court's orders have not been fully complied with as yet,⁴ neither those States, nor any other State has questioned the Court's power to issue such orders. There is no doubt that backlash or pushback against the Court is likely to increase in the future as the Court receives more and more politically sensitive cases that could raise emotions such as LGBT cases.

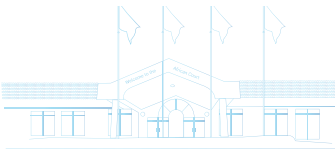
In the midst of the existing challenges and those hovering on the horizon, it is important to take note that challenges will always be there and that what is required is to be aware of them and to address them speedily and effectively, while drawing solace from the living words of Professor Wangari Mathai, a Nobel Peace Laureate, that "human rights are not things that are put on the table for people to enjoy. These are things you fight for and then you protect."

4 Following the judgment of the Court, Burkina Faso reported to the Court that it had amended its domestic legislation on defamation. Tanzania's new draft constitution adopted by the Constituent assembly in 2016 is compliant with the Court's judgment but has not yet been enacted. Côte d'Ivoire publicly announced its intention to comply but is yet to amend its laws.



Abel Campos

Section Registrar of the European Court of Human Rights



SESSION 2

Authority and legitimacy of the regional courts:
Impact, resistance, difficulties and challenges



CORTE IDH
Protegiendo Derechos

As long as courts and tribunals have existed, their authority and legitimacy have been discussed, contested or challenged. This is not a new issue or even a recent one. In these notes, I present a perspective of the regional human rights courts and in particular my court, the European Court of Human Rights (ECHR).

The legitimacy of the ECHR is drawn from an international treaty. The States have expressed their wish to be bound by the provisions of the European Convention. Indirectly, one could even say that international tribunals, in this particular sense, adjudicate justice in the name of the people (through their elected representatives), as any domestic tribunal in a democratic society.

The authority of the ECHR is also drawn from an international treaty. But, more importantly, the authority of any tribunal will be in the quality and strength of its decisions. If the decisions are clear, well-grounded and easy to understand, the court's authority and legitimacy will increase as this will be acknowledged by the stakeholders and in particular –and this is very important – by civil society.

It is worth including a reference to the authority and legitimacy of those who compose the tribunal, the judges. Their authority draws to start with from the very demanding criteria to hold judicial office: Article 21 of the European Convention requires them to be of high moral character, possess the qualifications required for appointment to high judicial office or be jurisconsults of recognized competence. Their legitimacy draws from the manner in which they are chosen: elected by the Parliamentary Assembly of the Council of Europe (PACE), composed itself by members of the national parliaments of the member States.

The impact of the ECHR is a history of coming of age. Turning 60 in a few months (January 2019), it is hoped that the ECHR has acquired the wisdom that comes with age. One cannot dissociate the impact of the ECHR with the changes in history, which have had a huge influence in the impact of the ECHR on the life of millions of Europeans. The decisive turning point is of course the expansion of its membership in the late 1990s and early 2000s when the new

democracies in Central and Eastern Europe joined the Council of Europe and ratified the European Convention, thereby accepting the jurisdiction of the European Court.

The difficulties are linked to the impact of a huge explosion in the number of cases, reaching 160,000 in 2011 and, since then, steadily decreasing to the current number of 55,000, thanks in particular to new working methods. But also new types of cases, which one can say the European Convention was not devised to deal with. Since the founding fathers had imagined the text of the Convention in the 1950s as a tool to overcome the horrors of a global war which almost destroyed Europe, they never thought that member States, having ratified the European Convention, could enter into war with each other. Yet this, or something very close to this, did happen and was followed by inter-State applications and by individual applications related to the conflicts arising in Europe: Russia/Georgia, Russia/Ukraine of course but also, to a certain extent, Armenia/Azerbaijan (concerning the Nagorno-Karabakh region). How should the European Court deal with this, knowing of course that examining allegations of very serious violations of the most fundamental human rights is, undeniably, a job for the European Court. But how to do it properly?

Which leads us to the resistances and challenges. For new democracies, adapting legal structures to consolidated standards of the – let us call them for the sake of simplicity – “old” democracies, can be a very difficult task. So, there are often difficulties, in particular, as far as implementation of the judgments is concerned. Some States have real difficulties in adapting their legal order to the European standards, very often set many years before in cases concerning “old” member States. A different problem – and one of greatest concern, I would say – is the lack of implementation due to lack of political will to implement: an obvious example is the reluctance of the United Kingdom to implement the Court’s judgement concerning voting rights of detained persons; or reluctance of Russia to recognize the European Court’s judgments as setting an international binding obligation (I am speaking of course of the law that gives the Russian Constitutional Court the power to say that implementation of a given judgment of the European Court is impossible because it would be contrary to Russian legal order). How to solve this problem? Discussions such

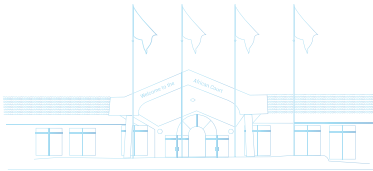
as this one help to devise possible solutions but, in the end, it is up to civil society to put pressure on governments. Parliamentary control of implementation of judgments (put in place in some member States) has a great potential. But here again: only very convincing decisions and judgments will demonstrate the advantage of implementing versus not implementing.

There is a more general challenge: the current political context, in which mistrust towards multilateral and international organisations fueled by populist speech, determined by immediate political gains at the domestic level, represents a huge challenge for international courts and for the European Court in particular. Fact-checking, the strength of the arguments, and coherent and well-reasoned decisions are, again, the few ways we have to combat this mistrust.

Let me nevertheless finish on an optimistic note. All over Europe, millions of persons have already benefited, and continue to do so, from the Court's human rights protective approach. Important legislation concerning safeguards in cases of massive surveillance, free speech or the legal status of transsexuals – to name just a few – have changed the life of many persons while, at the same time, limiting the illegitimate interference of the State in the life of the individual. There is still much work to be done. Thank you.



Humberto Antonio Sierra Porto
Judge of the Inter-American Court of Human Rights



SESSION 2

Authority and legitimacy of the regional courts:
Impact, resistance, difficulties and challenges



CORTE IDH
Protegiendo Derechos

The thoughts I wish to share with you refer, above all, to the concept of legitimacy and to the different expressions or alternatives that the inter-American system is proposing in order to achieve this goal of legitimacy, understanding legitimacy as the authority, credibility, and acceptance of the Court's decisions and also, let it be said, their relevance. The search for authority in the work of the Inter-American Court is expressed in three major concepts that are the focus of my intervention, which will be brief owing to the limited time.

First, I wish to reflect on the search for legitimacy from the two classical perspectives of legitimacy – legitimacy of origin and legitimacy of result – which are present in the work of the Inter-American Court. Then, I will describe the mechanisms for legitimacy that the Court is testing at this time, different alternatives in the working logic with the aim of achieving greater acceptance, relevance and authority in our States and among their populations, and with the agents of justice of the inter-American system. Then, in a third section regarding more traditional issues, I will refer to the problems and possible solutions that the Court is proposing from the perspective of legitimacy in institutional matters and legitimacy as regards the Court's case law.

Regarding legitimacy of origin, the Inter-American Court and, in general, the inter-American system is undertaking a series of efforts addressed at giving greater authority to those who are elected to the Inter-American Court. Recently, we held a process for the re-election of some of the judges of the Inter-American Court and mechanisms are being explored within the Organization of American States and civil society. These mechanisms are aimed at holding hearings where the candidates to become judges of the Court introduce themselves, their *curricula vitae* are examined, and there is even a possibility that the ambassadors who represent their countries before the Organization of American States would be able to inquire about the opinions, and the philosophical and ideological perception of rights of those whose names are put forward to become judges. In this regard, the election procedure has evolved spontaneously, because it was not established

in any norm; moreover, civil society is developing greater control over the political authorities and can investigate the record and resumés of the judges. It is important to note that, currently, three-quarters of the members of the Inter-American Court come from national or international courts, which reveals how the attitude of the States has changed with regard to the work of the Court. In the past, the Court was not always composed of individuals with judicial backgrounds; rather, at times, members were ambassadors, politicians or human rights activists without judicial experience.

Regarding legitimacy of results, it is essential that judgments are just and fair, that they truly result in changes that promote the effective exercise and enjoyment of human rights, and that the Inter-American Court's decisions contribute to achieving greater clarity and strength in the enforcement of the victims' rights to truth, justice and reparation. The Court also acquires legitimacy with the development of a *corpus juris* that is common to all the States and that results in a basic minimum understanding of the scope of the rights established in the Convention. This objective is particularly important owing to the limited number of judgments we are able to produce each year.

In addition, the Court has tested a logic of legitimacy of results by means of its decisions that is innovative and regarding which a great deal of controversy exists. The crucial subject of discussion within the Inter-American Court is the clarification, through its case law, of the rights that must be complied with and enforced effectively before the Inter-American Court. To the traditional rights to freedom established in the Convention, other rights must be added based on an interpretation of Article 26 of the American Convention, and this means that, now, the Inter-American Court is also a judge of economic, social and cultural rights. This is, perhaps, a significant turning point that is presently being debated within the Court and it is also the subject of a major debate at the level of inter-American legal opinion.

The second thematic cluster that I wish to refer to relates to the innovative methods or mechanisms of legitimacy that our Court is testing. First, our Court is constitutionalizing itself; it is using the logic of constitutional law in a very particular way and this means that statements are made during the exercise of the Inter-American

Court's work that could be classified as "anti-majority," similar to those that could possibly occur in the sphere of domestic courts.

Second, there is great concern about the legitimacy of the judicial status; about the characteristics of the internal rules of procedure, the conditions of the judges, the regime of impediments, incompatibilities, access and departure of judges. This issue is also the subject of much discussion.

The third aspect is conventionality control. But what is conventionality control? Simply put, for those who are not part of the system, conventionality control consists of seeking to incorporate sources of international law when deciding specific cases in each of our countries. This is an important matter in all the countries of Latin America. Conventionality control signifies that it is compulsory for every judicial agent to use the case law of the Inter-American Court in every case. And, what does compulsory mean? This is a complex issue but, without doubt, the sources of international law must be used; this is an element of legitimation, of legitimacy and strength not only for us, but also for the domestic authorities when applying the law.

Fourth, the issue of the more frequent use of advisory opinions. This has resulted in the Inter-American Court receiving cases with a more significant political impact than that which usually corresponds to the decisions adopted by the Court.

On the issue of the Court as an "anti-majority" tribunal; essentially, this is revealed not only in the language: conventionality control and conventionality by omission; also, techniques inherent in constitutional justice are used frequently at the level of conventionality. And this leads to non-conventionality by omission, appeals to the States at the same level as in domestic law, judgments interpreting the Convention; all these types of techniques are being used. This has meant that there is a very fluid dialogue because, today, the language to understand the scope of the Inter-American Court's jurisprudence is that of constitutional law and, for domestic judges, this has been very easy; it is not the same as when the categories of international law are used. Therefore, trying to interpret the Convention as if it were constitutional law is part of the phenomenon that is occurring in our system.

The process of incorporating international law into domestic law is reflected, for example, in the mechanism of the “block of constitutionality.” In many States, the Convention is part of the Constitution, so it is relatively easy to apply this type of criteria.

The aspect of an “anti-majority” tribunal is revealed with greater clarity in the Court’s line of case law in the judgment in the case of *Lagos del Campos v. Peru*. With this decision, the Court became not only an international court of rights, but the fact of having the capacity to examine, challenge and adjudicate the public policy of a State, for example in the area of health, meant that the Court acquired very interesting and complex characteristics and perspectives for development, which involve a significant challenge. This is just part of the job.

Another aspect relates to the status of the judges and the legitimacy produced by their status. The ethical conditions of public and private life that, previously, were not considered relevant and, in our system, were not regulated in the norms governing us, are now being required by public opinion: rules to manage any situation that may arise and that result in greater credibility and authority for the judges. We should not forget the context of the system within which the Court – and, in particular, the States that are part of our countries – are inserted. The various corruption-related scandals mean that it is necessary to be very attentive to avoid this type of occurrence within the Inter-American Court.

Regarding conventionality control – the incorporation of international law into domestic law – the point is where does the main strength lie. This is the groundbreaking element that has meant that, today, the inter-American system is successful, and has an influence and effectiveness that is not easily seen, unless it is by the way in which judges incorporate and apply these sources in each specific case. The case law and standards developed by the Inter-American Court are so important because most of the judges of the Court have been justices of supreme courts or constitutional courts and a major part of the doctrine and standards that are applied in our countries have been established on the basis of the case law of the Inter-American Court.

I would like to refer to the issue of advisory opinions. Over the last four years, requests from the States have increased and the

mechanism of advisory opinions is being used much more frequently. Initially, Uruguay submitted a request asking us to rule on the validity, pursuant to the Convention, of reducing the age to establish criminal sanctions for minors.

But how could it be sought to transfer political responsibilities for a decision of this type to an advisory opinion? This trend has continued and other requests of this sort have been submitted, such as an Ecuadorian case of provisional measures where the Court had one day to decide on the validity of a referendum that the State was going to hold. The issue of migrant children and adolescents, which is causing a major social problem with child migrants in Central America on their way to the United States, was also submitted to the Inter-American Court. Also, the issue of the rules of due process that should be followed when Congress impeaches political officials; what are the minimum rules, the judicial guarantees that should be respected in this regard? We have received questions on all these issues; requests for advisory opinions.

On this issue of advisory opinions, the problem resides, essentially, in the exercise of self-limitation by the Court. In the exercise of this competence, we have the ability to adapt the questions so that they have a more pedagogical and general value, rather than deciding specific cases. In this situation, there is an important element of appropriateness and discretionality when shaping the way in which we express ourselves in the exercise of this function.

I have no time left to refer to other aspects, but I will mention them: essentially, they relate to the institutional challenges and the jurisprudential challenges that also support legitimacy, because, after all, they refer to case law and work.

In the area of universality, we still have work to do with some countries of the Caribbean, because the Court is essentially a Latin American tribunal. The Court's intention is to expand its range of action, its authority and its jurisdiction; basically, this involves the task of awareness-raising and education in the countries of the Caribbean. Significant difficulties exist because they are ruled by common law, and also serious problems with regard to certain rights such as the right to life and the issue of the death penalty in some of these countries, but particularly the rights of the LGBTI population,

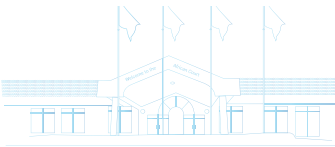
because they have a totally different perspective from that traditionally held by the inter-American system.

The issue of funding, which I will not refer to, but which has caused us a great many headaches; execution of judgments, which is, without doubt, one of the aspects on which most progress has been made by the Court in recent years. And also the always complex relationship with the Inter-American Commission, trying to coordinate a common, harmonious action regarding the rights and issues on which the Court should rule.

In the area of case law development, legitimacy involves trying to be relevant and to deliver pertinent judgments on important matters, for example the criteria to use on issues concerning mass compensation. In that regard, a great deal has been said in several of the Court's judgments, but there are many aspects on which something must be said with regard to this type of reparation. Also, for example, what has been mentioned regarding the scope of the judicial guarantees in proceedings involving the political control of senior State officials. Matters such as these are also very important for the legitimacy of the Court and I wanted to mention them. Thank you for allowing me a few extra minutes for this presentation.



Michelo Hansungule
Professor at the University of Pretoria



SESSION 2

Authority and legitimacy of the regional courts:
Impact, resistance, difficulties and challenges



CORTE IDH
Protegiendo Derechos

Conclusions

A few remarks on the authority and legitimacy of the regional human rights courts: Impact, resistance, difficulties and challenges.

In his keynote address, Manfred Nowak gave a comprehensive account of the issues surrounding the authority and legitimacy of the regional human rights courts. In particular, he stated that the regional system finds its legitimacy in the law that established it.

Acknowledging that these courts are different, Professor Nowak has nevertheless not only identified the differences but also the similarities. Besides looking at the structure of each of the three regional courts, he took time to look at the jurisprudence of the three courts, indicating that the three courts have started using each other's jurisprudence.

While on this point, it should be clarified that learning about each other's jurisprudence has been one-way; thus far, Europe, in particular, has not developed the habit of using the jurisprudence of the African Court and Commission in its work.

This point was taken up in the presentation made by Judge Humberto Sierra Porto of the Inter-American Court. However, Judge Sierra Porto, Judge Ben Kioko of the African Court on Human and Peoples' Rights, and Abel Campos, Registrar of the European Court of Human Rights, focused their presentations on issues relating to the three courts.

During Judge Kioko's presentation, a question arose from the floor on the *William Campbell versus Zimbabwe* case before the disbanded SADC Tribunal. The question sought to know whether it was advisable for the SADC Tribunal to admit this case given what it has led to i.e. the abolition of the Tribunal's human rights mandate. In response, it was explained that it was not wrong for the Tribunal to hear this case as long as it complied with admissibility rules, which it did; the issue was the situation in Zimbabwe which, under the government of long-time President Robert Mugabe, simply did not want to comply with the SADC Tribunal judgment. The constitution of Zimbabwe, as amended in Section 16, had removed the jurisdiction of local courts

for hearing complaints from victims of land expropriations and, it was based on this, that William Campbell and his colleagues, on exhausting local remedies, had brought the complaint to the SADC Tribunal. Based on the SADC Treaty, the Tribunal ruled against Zimbabwe but the Zimbabwe government would have none of this and refused to comply. It was on the basis of this that, again on the advice of Zimbabwe and in particular President Mugabe, SADC Heads of State and Government took the drastic step of terminating the human rights mandate of the Tribunal and disbanded the judges from the Tribunal, while refusing to appoint new ones in order to make it inoperative, and effectively closed the sub-regional court.

The issue of the SADC tribunal dovetails with Professor Nowak's assertion that the regional system finds its legitimacy in the law which established it, which is not quite true. Were this the case, then the SADC Tribunal would have its authority from the SADC treaty which would have compelled members to comply with it regardless. The thrust of my argument during the panel held on the issue of the SADC tribunal was that law in itself is not enough to ensure compliance with decisions of treaty bodies in totalitarian States.



SESSION 3

Strengthening cooperation between
the three regional human rights courts

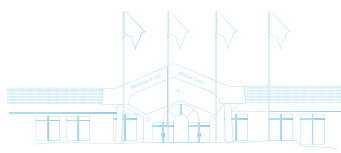
30 SEPTEMBER 2014





Anja Seibert-Fohr

Professor at the University of Heidelberg



SESSION 3

Strengthening cooperation between the three regional human rights courts



CORTE IDH
Protegiendo Derechos

Judicial dialogue from an inter-regional perspective

When I received the invitation to speak at this historic event and to respond to the question of whether cooperation between the regional human rights courts reinforces the protection of human rights, it appeared to me like “bringing owls to Athens”. After all, there is an increasing trend in international human rights jurisprudence to refer to the case law of other institutions. This applies to international and regional systems in relation to each other as well as to the interaction between regional jurisdictions.¹ The Inter-American Court of Human Rights has been at the forefront of this development. It held already in its first advisory opinion that “it would be improper to make distinctions based on the regional or non-regional character of the international obligations assumed by States, and thus deny the existence of the *common core* of basic human rights standards”.² While the opinion concerned the relationship to universal human rights instruments, the *corpus juris*³

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- 1 See e.g. A. Seibert-Fohr, Judicial Engagement in International Human Rights Comparativism”, in: A. Reinisch, M.E. Footer, C. Binder (eds.), *International Law and ... – Boundaries of International Law and Bridges to Other Fields and Disciplines*, Selected Proceedings of the European Society of International Law, 5th Vol., London 2016, pp. 7-24; L.-A. Sicilianos, “Le précédent et le dialogue des juges: l’exemple de la Cour européenne des droits de l’homme”, in *Société française pour le droit international, Le précédent en droit international*, Paris, Pedone 2016, pp. 89-104.
 - 2 I/A Court H.R. “Other Treaties” Subject to the Advisory Jurisdiction of the Court (Art. 64 of the American Convention on Human Rights), Advisory Opinion OC-1/82 of September 24, 1982. Series A No 1, para 40.
 - 3 For the notion of *corpus juris*, see I/A Court H.R., *Case of the “Street Children” (Villagrán Morales et al.) v. Guatemala*. Merits. Judgment of November 19, 1999. Series C No. 63, para 194; I/A Court H.R., *Case of the Ituango Massacres v. Colombia*. Preliminary objection, merits, reparations and costs. Judgment of July 1, 2006. Series C No. 148, para 157 (Fn. 177). For a detailed and critical analysis of the I/A Court H.R.’s approach to comparativism see G. L. Neuman, *Import, Export, and Regional Consent in the Inter-American Court of Human Rights*, EJIL (2008), Vol. 19, No. 1, pp. 101-123.

idea later led the Court to make multiple references to other jurisdictions including regional court decisions.⁴

The two other regional human rights courts have followed suit. The European Court of Human Rights has referred to regional jurisprudence, for example in *Marguš v. Croatia*,⁵ where the Court had to consider the issue of amnesties in post-conflict settings. In the section on relevant international law materials, the Court quoted extensively from the judgment in *Gelman v. Uruguay* in which the Inter-American Court had declared a law that prevented the prosecution of serious human rights

4 I/A Court H.R. Juridical Status and Rights of Undocumented Migrants, Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 120. See also G. L. Neuman, Import, Export, and Regional Consent in the Inter-American Court of Human Rights, EJIL (2008), Vol. 19, No. 1, 101 (109) with reference to: I/A Court H.R., *Case of "The Last Temptation of Christ" (Olmedo Bustos et al.) v. Chile. Merits, reparations and costs*. Judgment of February 5, 2001. Series C No. 73, para. 69 and footnote 18 (re freedom of expression,) (citing ECHR, *Handyside v. The United Kingdom*, Series A, No. 24 (1976), and later cases); I/A Court H.R., *Case of the "Five Pensioners" v. Peru. Merits, reparations and costs*. Judgment of February 28, 2003. Series C No. 98, para. 103 and footnote 50 (re pension benefits as property) (citing ECHR, *Gaygusuz v. Austria*, 39/1995/545/631, 1996-IV, 1129); I/A Court H.R. Juridical Condition and Human Rights of the Child. Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17. For a reference to the ECtHR, see, e.g., I/A Court H.R., *Case of Lori Berenson Mejía v. Peru. Merits, reparations and costs*. Judgment of November 25, 2004. Series C No. 119, at paras 159–161 (quoting the European Court for the proposition that the presumption of innocence can be violated by statements made by the police to the media asserting a defendant's guilt before trial). In the *Herrera Ulloa Case*, the Court summarized the jurisprudence of the European Court on the subject of defamation. I/A Court H.R., *Case of Herrera Ulloa v. Costa Rica. Preliminary objections, merits, reparations and costs*. Judgment of July 2, 2004. Series C No. 107, at para 170. In the *Ricardo Canese case* the Court drew on European jurisprudence in emphasizing that political candidates must be subject to a higher degree of public scrutiny and criticism in the course of an electoral campaign, see *Case of Ricardo Canese*, IACtHR, Series C, No. 111 (2004), at paras. 83 ff. See also M. Killander, African Human Rights Law in Theory and Practice, in S. Joseph and A. McBeth (eds), *Research Handbook on International Human Rights Law*, Cheltenham 2010, 388 (401 et seq.).

5 ECHR, *Marguš v. Croatia* (27 May 2014), no. 44455/10, 2014-II.

violations to be incompatible with the American Convention on Human Rights.⁶

Further cross-references can be found not only with respect to substantive issues; they are also relevant for procedural matters. The African Court on Human Rights already in its first merits judgment in 2013, *Rev. Christopher R. Mtikila v. Republic of Tanzania*, referred to and quoted from Inter-American and European Court judgements in relation to the exhaustion of local remedies.⁷

These are only selected examples of a plurality of judgements that included cross-references amongst the regional courts. Since this is not the place for a conclusive enumeration, I find it more fruitful in the essay that follows to inquire about the normative basis on which these cross-references are grounded. In other words, what is the underlying rationale for this comparative engagement? This is not a purely academic issue. As will be seen in what follows it is indeed practically relevant in order to determine the scope of inter-regionalism and to defend the courts from the sometimes-voiced accusation of being selective in their references to other material.

Rationality, legitimacy and coordination as the underlying rationales for inter-regionalism

My proposal consists of a threefold objective for inter-regionalism: Cross-referencing helps (1) to rationalize, (2) to legitimize and (3) to coordinate human rights jurisprudence. I will deal with these rationales in turn.

6 *Ibid.* para 63. For the European Court of Human Rights' practice, see e.g. L.-A. Sicilianos, "Le précédent et le dialogue des juges: l'exemple de la Cour européenne des droits de l'homme", in Société française pour le droit international, *Le précédent en droit international*, Paris, Pedone 2016, pp. 89-104.

7 AfCtHR, *Rev. Christopher R. Mtikila v. United Republic of Tanzania* (14 June 2013), No. 011/2011, para 82.1. The Court quoted from: I/A Court H.R., *Case of Velásquez Rodríguez v. Honduras*. Merits. Judgment of July 29, 1988. Series C No. 4 and from ECHR, *Akdivar and Others v. Turkey* (16 September 1996), no. 21893/93, 1996-IV.

First and foremost, human rights comparativism serves a *rationalizing function*. Courts engage with other jurisdictions as part of their legal reasoning in which different possible interpretations are duly taken into account. At least this rationale informed largely my engagement with other jurisdictions while I served as a member of the UN Human Rights Committee. Some jurisdictions may have already gained substantial experience in certain matters which can be valuable to other jurisdictions. This is why the African Court in the above-mentioned *Tanzanian Case* referred to both other regional jurisdictions in determining that only remedies that are available, effective and sufficient need to be exhausted before bringing a case to the Court.

Also in this vein, when the European Court of Human Rights had to deal with enforced disappearances in the former Yugoslavia⁸ and Turkey,⁹ the Inter-American Court had already dealt with these abuses extensively.¹⁰ On this backdrop, it would have been irrational to disregard the American Court's judicial experience. It thus did not

8 For references to the Inter-American Court of Human Rights regarding admissibility *ratione temporis* in enforced disappearance cases, see e.g. ECHR [GC], *Šilih v. Slovenia* (9 April 2009), no. 71463/01, paras. 111-118, 160.

9 ECHR [GC], *Case of Varnava and Others v. Turkey* (18 September 2009), no. 16064/90-16073/90, 2009-V, paras 93-97, 138. For the Court's jurisprudence on enforced disappearances, see e.g., ECHR, *Çakıcı v. Turkey* (8 July 1999), no. 23657/94; ECHR, *Tanrikulu v. Turkey* (8 July 1999) no. 23763/94; ECHR, *Oğur v. Turkey* (20 May 1999), no. 21594/93; ECHR, *Aslakhanova and Others v. Russia* (29 April 2013), no. 2944/06; 8300/07 et al; ECHR [GC], *Cyprus v. Turkey* (10 May 2001), no. 25781/94; ECHR [GC], *Case of Varnava and Others v. Turkey* (18 September 2009), no. 16064/90-16073/90; ECHR, *Palić v. Bosnia and Herzegovina* (15 February 2011), no. 4704/04; ECHR, *Skendžić and Krznarić v. Croatia* (20 January 2011) no. 16212/08; ECHR [GC], *El-Masri v. The former Yugoslav Republic of Macedonia* (13 December 2012), no. 39630/09.

10 I/A Court H.R., *Case of Velásquez Rodríguez v. Honduras*. Merits. Judgment of July 29, 1988. Series C No. 4, paras. 147-148; I/A Court H.R., *Case of the Moiwana Community v. Suriname. Preliminary objections, merits, reparations and costs*. Judgment of June 15, 2005. Series C No. 124; I/A Court H.R., *Case of the "Mapiripán" Massacre v. Colombia. Merits, reparations and costs*. Judgment of September 15, 2005. Series C No. 134; I/A Court H.R., *Case of the Pueblo Bello Massacre v. Colombia. Merits, reparations and costs*. Judgment of January 31, 2006. Series C No. 140; I/A Court H.R., *Case of Anzualdo Castro v. Peru*.

come as a surprise that the European Court repeatedly referred to the Inter-American jurisprudence in disappearance cases.

Both examples – the African and the European cases – show that consideration of the other institution’s case law can substantively inform a court’s deliberation. As such, it becomes relevant for the textual and teleological interpretation of the respective treaties. To the extent that the latter is guided by the treaties’ object and purpose¹¹ – which is the international protection of human rights – the interpretation of other judicial bodies becomes relevant. Nevertheless, it does not predetermine the outcome of this reflection.

Secondly, human rights comparativism serves a *legitimizing function*. References to other jurisdictions often seek to strengthen the normative acceptability of a Court’s holding. In contentious cases, such cross-references may be useful to be persuasive and mutually reinforcing. For this reason, references are most likely to be made in those instances in which a Court goes beyond its prior jurisprudence.¹² An example is *Bayatyan v. Armenia*, where the European Court of Human Rights for the first time acknowledged a right to conscientious objection. In its reasoning it relied specifically on the jurisprudence of the UN Human Rights Committee to substantiate its own evolutive interpretation.¹³

The third rationale for comparative engagement with other human rights jurisdictions is *coordination*.¹⁴ By taking due account of other bodies’ interpretations of similar rights, the notion of universality can be enhanced. Coordination can help to foster the notion of universal human rights protection by addressing common legal issues. However, this does not prevent a court from taking a different approach if it is persuaded that it has better reasons for

Preliminary objections, merits, reparations and costs. Judgment of September 22, 2009. Series C No. 202.

11 Art. 31(1) Vienna Convention on the Law of Treaties (adopted on 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT), Art 31(1).

12 See e.g. ECHR [GC], *Bayatyan v. Armenia* (7 July 2011), no. 23459/03.

13 *Ibid.* para 105.

14 G. L. Neuman, Import, Export, and Regional Consent in the Inter-American Court of Human Rights, EJIL (2008), Vol. 19, No. 1, 101 (112).

its own conclusions. Coordination does not call for uniformity. The already mentioned judgement in *Marguš v. Croatia* provides a suitable example. The Court tried to coordinate its jurisprudence with other jurisdictions with respect to amnesties granted for grave breaches of fundamental human rights, most notably war crimes, but it did not rule out amnesties for human rights violations more generally. Neither did it invalidate the respective national amnesty law, even though the Inter-American Court had gone a step further in its jurisprudence.

The scope of inter-regionalism

Turning now to the interplay of these three rationales for cross-referencing, one can retain the following. All three objectives together, rationality, legitimacy and coordination, inform the decision of whether and to what extent a court engages with other human rights jurisdictions. The decision depends on the particularities of each case. In some instances, the need for coordination may be stronger than in others.

Rationality, legitimacy and coordination do not only inform the extent to which a Court engages in human rights comparativism. They also determine the limits of this engagement. Evidently, in order to be relevant from a rational point of view, the interpretation by other human rights bodies must be based on substantially similar wording.¹⁵ Furthermore, comparison with other cases requires similar facts. Finally, the respective legal context is to be considered.¹⁶

Considerations of *legitimacy* and *coordination* inform the degree of engagement, too. References to other jurisdictions may not always be apt to strengthen the normative acceptability of a particular holding and the effectiveness (that is the implementation) of a judgement. For

15 ECHR [GC], *Janowiec v. Russia* (21 October 2013) no. 55508/07 and 29520/09, para 166.

16 R. Higgins, *A Babel of Judicial Voices? Ruminations from the Bench*, 2006 *International and Comparative Law Quarterly*, 791 (795, 804).

example, there may be cases in which reference to another region is less persuasive due to regional specifics.

One example is capital punishment, which originally was not outlawed *per se* when the European Convention on Human Rights was adopted, but only later by virtue of Protocols Nos. 6 and 13. The almost European-wide abolition of the death penalty,¹⁷ which subsequently led the European Court to question the death penalty's compatibility with the European Convention in the first place, is to my great regret not equally shared in all other regions. Few African countries have ratified the Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty. A number of OAU countries retain the death penalty not only in law but also in practice. It is for this reason that a certain dynamic interpretation widely shared in one region and supported by regional state consensus may not be equally applicable to other parts of the world.¹⁸ I can only speculate, but this may be a reason for the African Commission and Court not having ruled out the death penalty in general terms so far.¹⁹

To be clear, this does not question the fundamental principle of the universality of basic human rights. Nevertheless, it is a relevant aspect when we consider the pace and acceptance of progressive interpretation. There may be varying velocities at work here. While a particular context may have led to a regional consensus that justifies a dynamic interpretation of the respective regional human rights instrument the same may not hold true for other jurisdictions yet. However, there is always reason to hope and room for progress.

Considerations of legitimacy which seek to enhance the normative acceptability of court judgements counsel a careful context-oriented

17 The Russian Federation still retains a memorandum.

18 G. L. Neuman, Import, Export, and Regional Consent in the Inter-American Court of Human Rights, EJIL (2008), Vol. 19, No. 1, pp. 101-123.

19 See also G. Collin, J. Corredor, The death penalty at the heart of the debates of the 62nd Ordinary Session of the African Commission on Human and Peoples' Rights (15 May 2018) available at: http://www.worldcoalition.org/The_death_penalty_at_the_heart_of_the_debates_of_the_62nd_Ordinary_Session_of_the_African_Commission-on_Human_and_Peoples_Rights.html.

approach towards comparativism. This approach is not necessarily to the detriment of international human rights protection. A regional consensus may spread to other regions to the effect that it provides a proper basis for similar jurisprudential developments there. Furthermore, a higher standard in one region does not put at risk the protection of human rights in other parts of the world. Though there are good reasons to coordinate regional human rights protection in order to avoid contradictions, they do not require rigorous uniformity.

Cross fertilization as a matter of process rather than result

Coming back to the question of whether and to what extent cooperation between the regional courts reinforces the protection of human rights, I submit that mutual references can help the courts to legitimize their jurisprudence. As a matter of rationality, comparison plays an essential role in the examination of legal issues. It forms part of the legal consideration of human rights norms because a comparison to other human rights systems helps to better understand the legal issues at stake, it helps to identify competing legal considerations and to shape our own considerations. In this vein, mutual exchanges can lead to significant cross-fertilization. Whether such exchanges also have a real practical effect and thus actually reinforce the protection of human rights ultimately depends on persuasion. It is therefore necessary to recognize that the persuasive force of cross-referencing may vary and depends on the respective context.

Understood this way, comparativism makes room for convergence but at the same time leaves room for plurality and dynamics as long as the common core of basic human rights standards is protected. Cross-fertilization is not to be equated with uniformity. After all, different levels of protection do not necessarily lead to contradiction or denial, but they can contribute to a continuous advancement of human rights in the long run. Ultimately, the advancement of human rights protection is a continuous process, anyway. It can be driven by different dynamics.

As principal stakeholders in this process, the judges of the Inter-American Court of Human Rights, the European Court of Human Rights and the African Court on Human Rights, are in the driving seat when they interpret their respective conventions. Evidently, their control over the velocity of this undertaking determines to what extent that they will be able to take other stakeholders onboard. An interregional dialogue can serve a valuable purpose in this respect, if guided by the principles of rationality, legitimacy and coordination.

Conclusion

As stipulated by the Inter-American Court of Human Rights in its first advisory opinion transregionalism is essential for the *common core of basic human rights standards*. Considering the blunt denial and disregard of basic human rights by State representatives on the domestic and international plan, this is now as true as ever before. In these difficult times, it will be essential for the regional human rights courts to defend basic human rights' standards rigorously, to uphold the normativity of international human rights as a fundamental basis for any international, regional and domestic dialogue, and to preserve the *acquis*. A solid cooperation between the regional human rights courts will provide a strong and valuable basis for this undertaking.

Unfortunately, there have been several denunciations and threats of withdrawal from the regional conventions or protocols in recent years, such as Venezuela's denunciation from the American Convention in 2013,²⁰ recent threats by Russian officials to withdraw from the European Convention on Human Rights,²¹ and the Rwexit

20 X. Soley, S. Steininger, Parting ways or lashing back? Withdrawals, backlash and the Inter-American Court of Human Rights, 14 *International Journal of Law in Context* 2018, pp. 237-257.

21 A. Griffin, Russia could withdraw from European Convention on Human Rights, state news agency RIA reports (1 March 2018) available at: <https://www.independent.co.uk/news/world/europe/russia-echr-human-rights-european-convention-putin-kremlin-eu-a8234086.html>. See also for Hungary, European Parliament, Parliamentary questions (29 March 2017), Subject: Hungary's withdrawal from the European Convention on Human Rights, available at: <http://>

(Rwanda's withdrawal of its declaration²² accepting direct individual petitions under the African Court's Protocol²³). In an era of increasing nationalism, it will be a fundamental task for the regional human rights courts to defend multilateralism in order to uphold the international rule of law. A concerted approach to such threats in the form of transregionalism will strengthen their individual position in these difficult times. Apart from denunciation, there are many other issues of common concern, such as migration, which counsel an inter-regional dialogue and will engage regional human rights courts for the years to come. It is therefore very timely that the Courts have decided to create a platform for such cooperation. I hope that the principles of rationality, legitimacy and coordination can provide a valuable starting point for this inter-regional collaboration.

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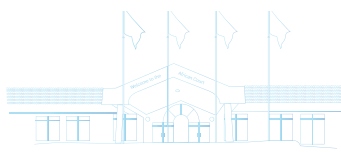
22 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (adopted on 10 June 1998, entered into force 25 January 2004), Article 34(6).

23 O. Windridge, One Month to Go: Use it Before You Lose it, the Rwexit Decision in Detail (31 January 2017), available at: <http://www.acthprmonitor.org/one-month-to-go-use-it-before-you-lose-it-the-rwexit-decision-in-detail/>



Suzanne Mengue Ntyam Ondo

Judge of the African Court on Human and Peoples' Rights



SESSION 3

Strengthening cooperation between the three regional human rights courts



CORTE IDH
Protegiendo Derechos

Introduction

On December 10, 1948, for the first time in history, the international community adopted a Universal Declaration of Human Rights, “as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance.” In this seminal document, the United Nations Member States recognized that “the equal and inalienable rights of all members of the human family [are] the foundation of freedom, justice and peace in the world.” The signatories of the Declaration also underlined the universal nature of the rights of man and the inviolability of the human person.

Twenty years later, the International Conference on Human Rights held in Tehran, Iran, from April 22 to May 13, 1968, affirmed the ideas and values defended in the Universal Declaration and emphasized that human rights are universal, indivisible and interdependent. On June 25, 1993, the Vienna Declaration and Programme of Action also reaffirmed this during the World Conference on Human Rights held in Vienna.

The universal character of human rights means precisely that all human beings on the planet should be able to enjoy the rights and freedoms inherent in human nature without any distinction based on nationality, color, sex, social or economic status, or any other condition. Efforts need to be made on several fronts to attain the goals of the enjoyment, protection, promotion and respect for the human rights of every individual.

In this regard, the primary responsible falls to national institutions; however, the role of the regional organs and other international human rights organs is not only crucial, but multi-faceted cooperation between these institutions is essential. In this perspective, it should be recalled that the Vienna Declaration and Programme of Action “endorsed efforts to establish regional and sub-regional arrangements,

to strengthen them and to increase their effectiveness, while at the same time stressing the importance of cooperation for the promotion and protection of human rights.”

In this regard, the African Court is aware of the importance of cooperation between and with its fellow courts in Europe and in the Americas. The African Court, as the youngest jurisdiction, recognizes and appreciates the benefits it has gained from the assistance of the Inter-American and European Courts of Human Rights since its creation, as well as the positive impact of this assistance in strengthening its institutional capacities and the development of its case law. The experiences that these jurisdictions have shared with the African Court have been invaluable and have contributed to the attainment of its main goal of protecting the human rights of the peoples of the African continent.

The importance of cooperation can never be overestimated. This is why the Court has made visits to jurisdictions such as the Inter-American Court of Human Rights in 2009, and the European Court of Human Rights on several occasions. It has maintained close ties with these jurisdictions and, in 2009, signed a memorandum of understanding with the Inter-American Court, which was revised in 2014. Most of the Court’s judges and officials have also visited the European Court and the last visit took place only two months ago.

Potential areas for future cooperation

Having benefited from the cooperation with the two other jurisdictions, the African Court understands the importance of a continued institutional collaboration between the three organs. A sustained collaboration between all these institutions will reinforce the universal character of human rights and also contribute to the elaboration of common international legal rules and procedures with regard to the inherent rights and freedoms of everyone, as human beings. In this regard, we propose the three following activities that seek to reinforce the collaboration between the three institutions.

Establishment of an exchange program for court staff

Staff exchanges is one of the areas of cooperation that the three courts could undertake to strengthen their cooperation. Exchange programs allow members of the staff employed by one or other of the institutions to be provisionally released from their regular employment and temporarily seconded to another institution, based on terms and conditions to be agreed by all the institutions. This exchange would allow staff to acquire practical experience of the work of the host institution and to use this to improve the work of their own institution.

Although the detailed terms and conditions of the exchange program must be drawn up at a later stage, the duration of the exchange for each staff member at the host institution should be between one and three months. The three institutions, based on the availability of resources and taking other factors into consideration, could, exceptionally, agree to shorten or prolong this period. In order to make this initiative operational, the three institutions could combine resources to create a special fund.

Exchange of information systems

The three institutions could also envisage a systematic sharing of information, particularly information on judgments and events. Similar initiatives have been implemented between the three jurisdictions on a bilateral basis. However, an institutionalized and more coordinated tripartite exchange of information, as well as the representation of each institution in the activities organized by the others would be important to strengthen the existing cooperation.

In this regard, the practice of inviting representatives of each institution to take part in the activities and events organized by another should be encouraged and reinforced.

Creation of a common online training platform

An online training platform would facilitate the exchange of knowledge between the judges and staff of the three jurisdictions. The online training platform could be similar to a blog that would be administered by focal points of the three jurisdictions and staff would have a login account to ask questions and share ideas.

Establishment of an annual international human rights forum

To facilitate the exchange of experiences and knowledge between the three institutions, we also propose the creation of an international human rights forum. The forum could be in the form of a conference where staff of the three jurisdictions would meet once a year to discuss the chosen academic topics. The staff and the judges of the three institutions would exchange their points of view on matters of mutual interest. The forum would help judges and staff to upgrade their knowledge of current trends in international normative standards in the area of human rights and learn about best practice with regard to the protection of rights within and outside their respective systems.

Even if the forum were organized under the sponsorship of the three institutions, it could become an international human rights platform and, as such, bring in other interested parties, especially the human rights mechanisms and civil society. Furthermore, for each annual meeting, external experts in certain areas could be invited to make presentations to facilitate discussions.

To make the initiatives proposed above and other similar activities operational, I propose that the three institutions sign a memorandum of understanding.

Conclusion

In conclusion, it is important to stress once again that the protection of human rights calls for the efforts of everyone at the national, regional and international levels. The regional human rights

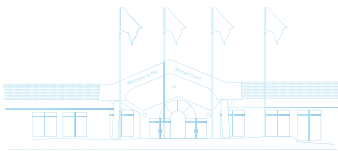
jurisdictions play a very important role in the process of creating a peaceful world where each human race lives with dignity. Even though, to date, some steps have been taken, they need to be strengthened by sustained cooperation between these organs by jointly initiating and implementing activities of mutual interest.

We have embarked on our journeys separately and at different times, but our mission and the goals that we seek are the same. Therefore, I urge everyone to combine our efforts to ensure that the protection of human rights becomes a global reality.



Ganna Yudkivska

Judge of the European Court of Human Rights



SESSION 3

Strengthening cooperation between the three regional human rights courts



CORTE IDH
Protegiendo Derechos

This present discussion on strengthening cooperation between the three regional human rights courts is at the heart of our meeting these days. I would like to thank my colleague and friend Dr. Anja Seibert-Fohr for the very inspiring introduction to our discussion.

There are many things to discuss on the topic of cooperation between the different human rights courts. Dr. Seibert-Fohr mentioned the term which I very much like in the context – “cross-fertilisation” – to express the advantages of the references made by each court to the case law and jurisprudence of another court, in order to further develop their own analysis of cases with similar legal issues at stake.

A simple research shows that the ECtHR has referred to the case-law of the Inter-American Court of Human Rights in more than 30 judgments so far and in at least 35 more judgments individual judges have used the Inter-American Court’s jurisprudence in their respective separate opinions. The legal issues at stake varied from forced disappearances to domestic violence, from the concept of dignity to access to information, from the *ne bis in idem* principle to freedom of expression of trade unions, and so on. President Raimondi mentioned several cases this morning; I won’t repeat them. Around 60% of IACtHR judgments since 2000 have made reference to judgments of the ECtHR and it is not unusual for a judgment of the IACtHR to cite a dozen or more ECtHR judgments with an extensive analysis of them.

In the 1980s and 1990s, the IACtHR seemed to refer to the work of the ECtHR much more than the ECtHR considered judgments of the IACtHR. Today this is much more even. With the IACtHR regularly citing the most recent case law of the ECtHR, it appears that the judges are much more aware of the work of the European Court and follow the work of their European colleagues closely.

The African Court, as confirmed by Dr. Seibert-Fohr, has also made reference to the case law of the other jurisdictions. Whilst there is no reference by the European Court to the jurisprudence of the African Court so far, I believe this situation will change with time.

This is exactly what Anne-Marie Slaughter, the well-known American international lawyer, called ‘judicial globalization’ – the “process of judicial interaction across, above and below borders, exchanging ideas and cooperating in cases involving national as much as international law”.

We face similar challenges: new technologies, terrorism, environmental problems. Other challenges and big trends transcend national boundaries and so too do legal ideas. It is important to develop and apply human rights’ principles coherently and consistently with a global vision and based on international experience. Dr. Seibert-Fohr has addressed the objectives of this cross-referencing perfectly; I have nothing to add here, but the general idea being that each time one of our courts deals with a new concept that has already been examined by another court, it is important – to the extent possible – not to reinvent the wheel.

I would like to bring your attention to another aspect of cross-fertilization which appears to be omitted from our discussion today, relating to the procedural aspect – the way in which the institutions work and how cases are handled and processed. While, again, it is easy to find examples of when the courts have referenced each other’s case law, the mutual influence in relation to how the mechanisms of the courts work and how each jurisdiction has influenced or learned lessons from the others is much more subtle.

There is no research yet – to the best of my knowledge – that makes a comparative analysis of methods used by international human rights courts in relatively similar contexts. In my view it is essential to exchange not only legal ideas and jurisprudential innovations, but also to identify the best practices in the work of our respective courts that can be used by other jurisdictions.

To give a specific example, quite often we deal with potential victims in a desperate situation needing an urgent reaction. The practice of the IACtHR of granting interim measures *proprio motu* in critical situations is the only plausible way to respond. This obviously should also be implemented by other courts when dealing with similar situations. The ECtHR, although such a possibility is envisaged by the rules, is very reluctant to use it.

Another example is the wide range of individual measures that the IACtHR orders to remedy human rights violations. The ECtHR is much more restrained in this respect, which is criticized both inside and outside the Court.

When it comes to doctrines used by the courts it is interesting to note the ECtHR's use of the margin of appreciation that allows the Court to give a degree of discretion to the States' implementation of the ECHR; the IACtHR does not have this doctrine or approach at all. Each member State is held to the same standards, regardless of their political, religious, cultural and other differentiating factors. Criticism has been aimed at both of these approaches. While some have stated that the IACtHR's approach has been too strict and needs to be more flexible, others claim that the ECtHR's approach is far too lenient and weakens the protection of certain rights. Can this be the point for cross-fertilisation?

Regarding procedural aspects, one of the biggest issues which all three of our courts have had to deal with and continue to struggle with on a constant basis is the issue of a case backlog and how the internal processes of the courts are aimed at minimizing the backlog while maintaining a high standard of review in each case.

The ECtHR has implemented a number of procedural changes to greatly reduce the case backlog and increase its efficiency in handling such a large volume of cases. In the discussion surrounding cooperation between the courts, I believe that these practical ways of learning from each other and implementing similar procedures so that each institution can better refine their practice based on what has worked for the others – in the appropriate circumstances, of course – should not be disregarded. The measures developed and implemented by the ECtHR have led to a massive decrease in the Court's cases, from over 160,000 in 2011 to 60,000 in 2018.

Cooperation in relation to best practices is of vital importance and this is an area where the three Courts can learn from each other.

To sum up, cross-fertilization is not limited to its rather passive form of case-law references, but includes active cooperation – the permanent forum we are discussing these days is exactly this active cooperation – examining different procedural mechanisms and encouraging relevant actors to implement what has worked in other

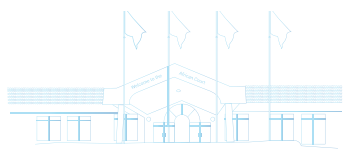
jurisdictions if this is considered to be useful. In my view this should be a matter for the forum we are discussing.

We should see each other not only as representatives of a particular region and jurisdiction, but as fellow professionals in an area that exceeds regional borders and allows us to live in one human rights community.



Eduardo Vio Grossi

*Vice President of the Inter-American Court of
Human Rights*



SESSION 3

Strengthening cooperation between the three
regional human rights courts



CORTE IDH
Protegiendo Derechos

I would like to thank Dr. Seibert-Fohr for her presentation. It has truly motivated me to reflect on the issue of cooperation between the three courts, taking into account rationality, legitimacy and coordination, the three essential elements of her presentation that I will not repeat. What I do wish to underscore is that these three principles coalesce and are based on a consensus without which persuasion would not be possible. Persuasion and consensus become two additional elements that go hand in hand to achieve rationality, legitimacy and coordination. Having said this, I would like to recall a distinction that President Oré made this morning between jurisprudential cooperation and institutional cooperation among the three courts.

The relevant point of jurisprudential cooperation, but true for both, is something that exists in the sphere of international law – my special field – which is that we are operating in an international society that is different from a national society; it is a society of States that still consider themselves sovereign. This is the reality and we have to act on the basis that it is not a pyramidal society, like the national society; it is not a society in which one court is higher than the others; it is not a society where there is a power that enforces what the courts order, there is no executive. There was a Spaniard, who was the first president of Spain's Constitutional Court and also a professor at the Universidad Central de Venezuela from whom I learned that law must be looked at as a system under which there are two types of system: the organization, which is the reality that is consistent with what one thought; what one thought is what is necessary – the State imposes a system; and the construction, which is the system that arises from the reality. The international society is a construction because it emerges from the existing reality; no one says which is the most important State, no one says which is the main organ, it is society that determines this. In this society, therefore, the element of recognition is of capital importance. States recognize each other, they recognize governments; now, to some extent they recognize human rights. Thus, cooperation between international human rights courts is, in my opinion, an act of mutual recognition: we are giving

ourselves legitimacy, we are recognizing each other as equals, and this has immense value from an international perspective. We are not only recognized by some States that are a party to the Convention, or by a few of them that recognize the jurisdiction. We are also recognized by our peers, our equals, and that is the most important recognition and indicates that, in the international community, it is not only the States that are active; there are also other entities, such as the courts, and they act independently. I would like to underline this, because it has effects on both jurisprudential cooperation and institutional cooperation.

In the case of jurisprudential cooperation, I would like to highlight something that we have been elaborating and refining in the Inter-American Court of Human Rights, and this is the value of jurisprudence. For the Inter-American Court, jurisprudence is not only its own jurisprudence but it is also all the jurisprudence of its peers. The jurisprudence that emerges in Europe or that arises in Africa also helps to define rules of law; we cannot disregard this; it is essential. We would not be acting as jurists if we overlooked or omitted what other jurisprudence has established on similar issues. Jurisprudence helps us; we are giving it the value it truly merits, not restricting it merely to regional matters.

Furthermore, through jurisprudence we are giving value to another two autonomous sources of law. On the one hand, customary international law and, on the other, the general principles of law. Jurisprudence uses these two other sources and this allows us to rule pursuant to the law; it allows us to be jurists, seeking justice through law, and we do this in a comprehensive, generous, evolutive and creative way.

Third, I would like to point out that the Court, when citing the case law of the other courts, is indicating and strengthening the universality of human rights. It is saying what everyone has been repeating; it is not necessary to say it again here. But, at the same time, it is also saying that just as globalization is accepted in economic terms, globalization must be accepted in legal terms. Globalization is not one-way, it is two-way or even three-way, and it cannot have a free-trade approach without also having a free-judicial approach.

Nevertheless, we must be careful about globalization, especially in recent times, because it is being perceived – and probably is, although I would rather not say this – as an imposition by the major powers. Indeed, there are people of good faith who say that globalization is merely something imposed on smaller States by the major powers. This assertion is reinforced when they note that powerful States demand that the States of Latin America fully respect human rights while they have not accepted the obligations of the Convention, and in particular the jurisdiction of the Court. I do not wish to get involved in politics, but many people in our societies perceive globalization as the tool of the great powers and we have to deal with this reality. This is why it is important to be careful when we cite each other. I am being totally frank: at times we are criticized for citing the European Court a great deal, as if the European Court were imposing standards on us. We have to keep that reality in mind and explain why we are citing it; we are citing it for its jurisprudence, because the law compels us to cite it.

I believe that this globalization, this universality must be balanced; this is what we try to do with regionalism. Regionalism appears to have a law that is nearer to the people, closer to them; the universal is far away in terms of its public image and also in terms of reality. I have already indicated the difficulties faced, for example, by someone in Port Williams in southern Chile – almost in the Antarctic – to travel first to Washington and then here to San José. It is very difficult; there is no fast access. Thus, they see this as something “international,” bureaucratic, that also takes long years, and sometimes does not achieve results. On the contrary, regionalism tells them “look, we are close to you,” not as close as we would like, but we try to ensure that the law is adapted to the peculiarities of the region, its reality, to what is close.

The judgment in the case of *Gelman*, which has been cited frequently, is very dear to us. This ruling indicated something that is very important in the Americas. It was delivered at a time when democracy had been consolidated and it was thought that only the dictatorships were to be condemned, that the democracies were not to be condemned. And, above all, we were faced with an amnesty law that had been submitted to a referendum or public consultation on

three occasions and the population, democratically, had rejected the derogation of that law. However, the Court said “this is illegitimate” from the perspective of international law. In other words, even though the law had been approved democratically, human rights can also be violated under a democracy. That judgment had an impact and told all the States of Latin America “democrats can also violate human rights.” This gave rise to a major challenge: rights can be violated, but this should not cause a catastrophe; it should lead to amendment or enlightenment, reparation, justice, but not a catastrophe. The courts should never be a catastrophe, they should be part of life. As I said this morning, the people want justice, together with health, education and other necessities.

Regionalism indicates the peculiarity of, shall we say, “lowering” human rights, it brings them nearer to the people, and this should be reinforced and stressed. And, it is a good thing if the regionalisms overlap, because this helps universality.

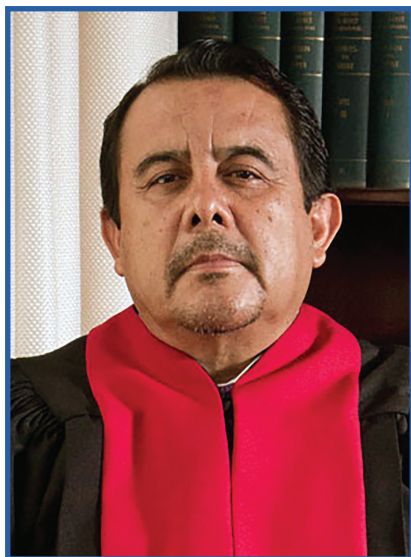
With regard to institutional cooperation, this is more difficult because it always involves money, political decision, and neither of these is up to us, at least not entirely. Above all, everything related to funding is complicated. However, I would like to say that I absolutely agree with the proposal to exchange staff, jurisprudence, information, and with the global forum. I also believe in education, and I say this from a personal perspective, not in representation of the Court. A great deal of what one learns when young, comes to fruition when one is older. When one is young, one has a more open mind. We could consider that one court, or the three, should organize an international human rights course, in which the three courts take part or that the court organizing it invites the other two. A course for young jurists, because this is where the seeds will be sown for the future human rights judicature. I believe that the contribution made by education is vital in these institutions. I had occasion to participate several times – especially when I was a member and president of the OAS Inter-American Juridical Committee – in a course on international law in Rio de Janeiro, which has been offered for many years. Thirty or forty people took part in the course, many of them professionals from the foreign service of the Ministries of Foreign Affairs of the Americas, and there they made contacts that would blossom into alliances with

the passage of time. I believe that we should include this in the plan we are elaborating. I would also like to propose that, during our biennial meetings, we study more effective mechanisms for proceedings. We must gradually develop common procedural standards, bearing in mind that, at times, delayed justice is not justice; and, probably not for any fault of ours, we take a long time. We need to expedite proceedings, make them more efficient and effective; this calls for a detailed and thorough technical effort. It is not enough to say that we are going to reduce the duration, that we are going to do a series of things; we have to give examples and examine the mechanisms; there is ample room for cooperation between us all in this regard.

In addition, I propose an issue that is urgent at this time, which is to have a shared code of ethics. I maintain that it would be excellent that we imposed on ourselves, as judges, certain rules on how to act in all aspects of life. We could work on this together.

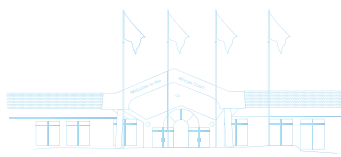
I would like to end with two additional observations. One is to consider the way we, as regional courts, can be an efficient link between the domestic courts of our member States and the international human rights jurisdictions, so that the domestic courts realize that the international human rights courts speak the same language and act inspired by the same principles. A program in this regard should be developed because, ultimately, as we are seeing, the domestic courts are our most important partners, especially in democracies.

Lastly, I believe that institutional cooperation faces a challenge. This relates to the issue described by my colleague, Humberto Sierra Porto, when he spoke of rights and lefts. The Inter-American Court of Human Rights and all courts should be home to everyone. We must be perceived as the home to which presumed victims of human rights violations and also States can come, safely and confidently, because the courts operate in conformity with the rigorous justice of the law, prudently, objectively and impartially; in brief, with all the guarantees granted by the process, especially *vis-à-vis* any crisis they tackle and do not try to avoid. Consequently – perhaps we are facing a crisis – we should obtain something good from this, take advantage of this opportunity without letting it pass us by. We must head the reflection to achieve a more efficient, more effective system for the protection of human rights that is closer to the people, and more just for everyone.



Patricio Pazmiño Freire

Judge of the Inter-American Court of Human Rights



SESSION 3

Strengthening cooperation between the three regional human rights courts



CORTE IDH
Protegiendo Derechos

Conclusions

We have now concluded the third panel session. I believe that everyone present understands that the coordination between courts and systems for the protection of rights is a highly complex issue, providing much room for discussion. Therefore, I am not going to make an individual summary of each presentation.

The scenario proposed by one of the speakers regarding the three elements that allow us to understand or to tackle the process of linking the regional systems – rationality, legitimacy and coordination – is important, in order to reflect on the process of strengthening the ties between the different regional courts.

The discussion has revealed that, in this process of rapprochement, the sphere of coordination is the one on which most people are in agreement. Specific proposals and initiatives have been put forward to organize events, to share the decisions of the regional courts, and also to organize professional visits of judges and lawyers. This element of integration has been stressed as the most feasible to implement; indeed, it is the one that is already being implemented, although this should be on a more regular basis.

In addition, another element was revealed that needs to be addressed as a substantial component of this coordination between systems for the protection of human rights: that is rationality, understood as conceptual coordination, the development of legal concepts and content.

However, concerns not only about jurisprudence, in the abstract, have been voiced, but also about its development from a perspective that takes into account multi-faceted considerations – based on the identification and incorporation of local, cultural, political, social, economic and environmental particularities, identities and processes – whether of Africa, Latin America or Europe, and how these identities and particularities find connecting points, both in the legal research that precedes the rulings, and in the judicial decisions produced. This is a major challenge. Even though it is not a problem that can be resolved in a conference, it is an issue that should also be part of

the rapprochement between the courts. We can take steps towards a sort of human rights *jus commune* in the sphere of the coordinated development of jurisdictional contents in our regional systems.

On the issue of legitimacy, I would like to refer to another equally interesting presentation that referred to the characterization of case law in the context of international law. Here, I noted that considerations are being developed with regard to case law, understanding it not only as a compendium of cases, but as the identity of the legal principle that it protects, and that this legal principle determines a continuity in the defense and guarantee of rights.

Analyzed in this way, rationality and legitimacy are elements of a medium-to long-term process in which we must discuss important topics such as those relating to regional and global issues. And, in this regard, we must consider the capacity of what is local and regional to survive the global hegemonies and to what extent the global economic and political problems condition and impact the regional systems for the protection of rights.

The closeness of Latin American to the United States, and the distance from Africa and Europe, for example, establish a framework of differentiated priorities for the guarantee and defense of rights which is not the same as the one within which the European or the African systems are situated. Consequently, this debate on regionalization and globalization should lead us to an agenda that pays attention to the resolution of legal problems based on the principles of universality, comprehensiveness and interdependence that give equal importance to the protection, guarantee and judicialization of environmental, individual, social and collective rights. These discussions are also substantive when developing a dialogue between the regional systems.

To conclude, the issues put before us demonstrate that the relationship between our courts is both productive and challenging. There appears to be consensus that these meetings are the ideal scenario for sharing initiatives; therefore, the signature of a declaration is extremely important and emblematic.

Mr. President, I end here a brief summary that, evidently, does not do justice to the productive discussion that we have had during this session, and any omissions are exclusively my responsibility.



Declaration of San José
National Theater of Costa Rica
July 18, 2018





DECLARATION OF SAN JOSÉ

Joint Declaration of the Presidents of the African Court on Human and Peoples' Rights, the European Court of Human Rights and the Inter-American Court of Human Rights on the occasion of the 40th Anniversary of the entry into force of the American Convention on Human Rights and the creation of the Inter-American Court of Human Rights

The Presidents of the African Court on Human and Peoples' Rights, the European Court of Human Rights and the Inter-American Court of Human Rights, gathered in San José, Costa Rica, on July 18, 2018 on the occasion of the 40th anniversary of the entry into force of the American Convention on Human Rights and the creation of the Inter-American Court of Human Rights;

Considering the antecedents of institutional and jurisprudential dialogue, the previous shared work and efforts between the African Court on Human and Peoples' Rights, the European Court of Human Rights and the Inter-American Court of Human Rights that allowed the sharing of the conceptual and jurisprudential standards of each Court for the common benefit;

Celebrating and recognizing the 40th anniversary of the entry into force of the American Convention on Human Rights and the creation of the Inter-American Court of Human Rights as an exceptional opportunity to strengthen the dialogue, cooperation and institutional ties between the three human rights courts of the world;

Have agreed upon the following:

- I. To establish a Permanent Forum of Institutional Dialogue between the African Court on Human and Peoples' Rights, the European Court of Human Rights and the Inter-American Court of Human Rights;

2. The Permanent Forum to strengthen the protection of human rights and access to international justice of the people under the jurisdiction of the three courts, to contribute to state efforts to strengthen their democratic institutions and human rights protection mechanisms, and to overcome the common challenges and threats to the effective validity of human rights by working together.

3. The Permanent Forum will meet in private and public sessions at the headquarters of each Court on a rotating basis, as often as the participating Courts deem necessary. The private work meetings will be sessions in which the three Courts will engage in dialogue on: a) the principal institutional, normative and jurisprudential developments of each Court; b) the impact, difficulties and challenges of the work undertaken by each Court, and c) mechanisms to strengthen cooperation between the Courts, among other issues. The public sessions will be events directed at disseminating and sharing the jurisprudential dialogue between the three Courts. The forum can conclude its session with the subscription of a joint declaration on the principal advances and consensus reached in each meeting, as well as the concrete measures to be adopted to strengthen the dialogue and shared work.

Signed in San José, Costa Rica, on the 18th of July 2018



Sylvain Oré
President
African Court on Human and
Peoples' Rights



Guido Raimondi
President
European Court of
Human Rights



Eduardo Ferrer Mac-Gregor Poisot
President
Inter-American Court of
Human Rights

