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Wallflower or Essential Constituent? The Inter-American Court of Human Rights' Role in an Emerging International Judicial Human Rights System

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1. Introduction

In view of the proliferation of international courts, tribunals, arbitration panels and quasi-judicial bodies, currently two main trends are being discussed in the legal and political sciences. On the one hand, concerns are being raised with regard to the potential risk of fragmentation, forum shopping, competing jurisdictions, and conflicting rulings of international judicial bodies (e.g. Fischer-Lescano and Teubner 2006, Helfer 1999, Koskenniemi and Leino 2002, Oellers-Frahm 2001, Shany 2003, Thiele 2008). On the other hand, trends of mutual recognition, cross-fertilization and the establishment of common principles of international adjudication are being observed and the emergence of a global network or community of courts is being touted (e.g. Brown 2008, Martinez 2003, Slaughter 2003, Terris/Romano/Swigart 2008). Focusing on the second dimension, this paper aims to demonstrate the dynamics of an emerging system of international[1] adjudication by means of analyzing the relationship between two regional human rights courts: the European Court of Human Rights (ECHR) and the Inter-American Court of Human Rights (IACHR).

The European human rights system has served as a role model for the Inter-American system. Moreover, the ECHR's seminal precedents have regularly been adopted by its American counterpart and have helped to consolidate the latter's position within its own legal system. Initially, the relevance of the IACHR – within its sphere of jurisdiction and to an even greater extent beyond – was meager, mainly due to the small number of cases handled by it. The Court came to a faltering start in the first decade of its existence, deciding nearly no contentious cases.[2] In the meantime, however, the Inter-American institutions (the Court and the Commission) dispose of a remarkable caseload compared to other international courts such as the International Court of Justice (though not to the ECHR). Several decisions have attracted interest among a circle of experts and have been discussed due to their relevance for the development of international human rights law.

After leading a wallflower existence for decades, the self-confidence of the Inter-American institutions has grown. In official statements, representatives of these institutions call for consideration and try to gain acceptance in the international judicial community. But to what extent, if at all, is this aspiration accepted by the thus-far 'leading' institution, the ECHR? To what extent does an exchange of arguments actually take place? These are the main questions addressed in the framework of this paper. The aim is not to provide a theoretical contribution

[1] In the context of this paper, the term 'international' is used to cover both regional and global realms.

[2] After being installed in 1979, the Court passed its first judgment on the merits in 1988 (*Case of Velásquez-Rodríguez v. Honduras*, judgment of July 29, 1988. Series C No. 4)

to the debate on the pros and cons of the concept of a community of courts, but first and foremost to provide an exemplary empirical analysis on the extent to which an international judicial system actually exists.

After a brief presentation of the potential elements of an international judicial system (*chapter 2*) and a short introduction to the history, institutional design and practice of the two regional human rights systems (*chapter 3*), *chapter 4* presents the main findings concerning the ECHR's practice of referring to decisions of its Inter-American counterpart in order to finally assess the international judicial system's actual stage of development in the area of human rights protection (*chapter 5*).

2. An International Judicial System

In recent years, several authors have discussed the phenomenon of an increasing number of international courts and tribunals, and – in contrast to those assuming a fragmentation of international law and institutions – have addressed the question whether there is or should be an international judicial system and what it should look like (e.g. Martinez 2003, Romano 2008, Slaughter 2003, Terris/Romano/Swigart 2008).

Anne-Marie Slaughter's outline of a "global community of courts", published in an article in 2003 is one of the best known contributions to this debate. She defines such a community as consisting of fora of transnational litigation, encompassing both domestic and international tribunals and including cases between states, between individuals and states and between individuals across borders (Slaughter 2003: 192). Moreover, she implies 'communalities' between different national and international judicial institutions and their staff:

> "In other words, the institutional identity of all these courts, and the professional identity of the judges who sit on them, is forged more by their common function of resolving disputes under rules of law than by the differences in the law they apply and the parties before them. It stretches too far to describe them all as part of one global legal system, but they certainly constitute a global community of courts" (2003: 192).

Slaughter argues that this community is constituted by the *self-awareness* of the judges who play a part in it and who frequently meet in a variety of settings and read and cite each other's opinions (ibid.).

> "The result is that the participating judges *see each other not only as servants and representatives of a particular polity*, but also as fellow professionals in an endeavour that transcends national borders. They face common substantive and institutional problems; they learn form one another's experience and reasoning; and they cooperate directly to resolve specific disputes… *they are increasingly coming to recognize each other as participants in a common judicial enterprise*" (ibid.: 193, emphasis added).

According to Slaughter, *a global jurisprudence is emerging* in some issue areas due to *practices of cooperation and cross-fertilization* (ibid.).

Slaughter's vision of a global community of courts is, however, not unproblematic because she has a normative system in mind. From her point of view, a set of common principles is needed in order to actually develop a global community: "Common principles and an awareness of a common enterprise will help make simple participation in transnational litigation into an engine of *common identity* and community" (ibid.: 194, emphasis added). And even stronger: "They [the members of the global community of courts A/N] must share the common values and principles that constitute the normative understandings of a community" (ibid.: 215). It is, however, unclear to what kind of values she is referring and who will decide on these values. Her concept becomes even more problematic because she pleads for a kind of supervision among courts in order to secure the adherence to the common values: "At the same time, judges are willing to judge the performance and quality of fellow judges in judicial systems that do not measure up to minimum standards of international justice" (ibid.: 194).

In the present paper, I will leave aside the critical aspects of Slaughter's concept, in particular the quest for a common identity based on common values and mutual supervision and will therefore not speak of a 'global community of courts', preferring instead to speak of an 'international judicial system'. Crucial elements of such a system are first and foremost

- the self-awareness of the judges involved of being participants in a common endeavor to establish such a system,
- the willingness to recognize each other as equal participants in a common judicial enterprise,
- consistent jurisprudence that emerges through cooperation, cross-fertilization, and mutual recognition of each other's jurisprudence.

But how close is such a concept to reality?

Terris, Romano, and Swigart, by contrast, arrive at the conclusion that while international judges indeed share a common conception of what it means to deliver justice, this conception is still in formation (2008: 420). Moreover, they stress that a dynamic jurisprudential dialogue exists but that it is far from egalitarian:

> "There is an informal and unconscious, but tangible, pecking order among international courts and tribunals. Some courts prefer talking – or worse, lecturing – to listening. And when it comes to listening, the level of attention depends on which court is doing the talking" (ibid.: 446).

So, which model can be found in reality? A system of international courts and tribunals, consisting of equal participants whose voices are taken equally into account; or an implicit hierarchy with a few international courts (dominated by Western countries?) on top which set the agenda with their leading cases?

Following a brief overview of the institutional design and de facto functioning of the European and the Inter-American regional human rights systems, the most important findings of an empirical analysis of the references to the case-law of the IACHR made in proceedings before the ECHR will be presented in order to demonstrate the actual existence of a common judicial enterprise in the area of human rights with mutual recognition and equal value placed on each of the participating courts.

3. The Regional Human Rights Systems – A Brief Introduction

3.1 The European System

After the Council of Europe was created in May 1949 it adopted the *Convention for the Protection of Human Rights and Fundamental Freedoms* in November 1950. The Convention was drafted in the light of the atrocities that took place during the Second World War and entered into force in September 1953 as the first binding international – or more precisely, regional – human rights treaty. The Convention secures fundamental civil and political rights, such as the right to life, the right to a fair hearing, the right to respect for private and family life, freedom of expression, the protection of property etc. Moreover, it prohibits, among other things, torture, forced labor, arbitrary detention and discrimination.[3] The Convention established an international judicial system, initially consisting of three bodies, the *European Commission of Human Rights*, the *European Court of Human Rights* (ECHR), and the *Committee of Ministers*.

The Commission, installed in 1954, was a quasi-judicial body consisting of independent experts. Their number corresponded to the number of states party to the Convention and they were elected by the Committee of Ministers for a period of six years. (Art. 20 – 22 ECHR, as amended by Protocol No. 5). Complaints concerning violations of rights protected under the Convention had to be lodged either by states or by individuals before the Commission (Art.

[3] Sources: "European Court of Human Rights in brief", http://www.echr.coe.int/NR/rdonlyres/DF074FE4-96C2-4384-BFF6-404AAF5BC585/0/Brochure_EN_Portes_ouvertes.pdf, last access: 23.07.2010 and "The ECHR in 50 questions", http://www.echr.coe.int/NR/rdonlyres/5C53ADA4-80F8-42CB-B8BD-CBBB781F42C8/0/FAQ english.pdf, last access: 23.07.2010.

24 and 25 ECHR). The Commission was responsible for declaring a petition (in-)admissible,[4] and after a period of fact finding, it tried to bring about a friendly settlement. If no such settlement could be reached the Commission drew up a report, setting forth the facts and stating its conclusions concerning the merits of the case. The non-legally binding report served to prepare the decision making by either the ECHR or the Committee of Ministers (Art. 30 – 32 ECHR).

Prior to a fundamental reform of the whole system in 1998 (see below) both institutions, the Court and the Committee, acted as decision-making bodies. However, only the ECHR, instituted 1959 in Strasbourg, can be considered a judicial organ, while the Committee is a political organ, comprised of the foreign ministers of all member countries of the Council of Europe. The Court consists of a number of judges equal to the number of contracting parties to the Convention (currently 47) which are elected for a period of six years by the Parliamentary Assembly of the Council of Europe (Art. 22 and 23 ECHR as amended by Protocol 11). The judges are required to be of high moral character and must possess the qualifications required for appointment to high judicial office. They sit on the Court in their individual capacity (Art. 19 – 23 ECHR as amended by Protocol 11). Prior to the reform in 1998, the Court could only act after the Commission (or the state concerned) decided within a period of three months after submitting the report to initiate proceedings. Otherwise the Committee of Ministers was automatically responsible for deciding on the alleged violations (Art. 32 ECHR).[5] While the Court would make a decision after the trial phase and pass a legally binding judgment, the Committee would terminate the case with a resolution.

Protocol No. 11 to the Convention, which entered into force in November 1998, reformed the system fundamentally. The acceptance of the Court's jurisdiction for individual complaints became obligatory for all members of the Council of Europe. Moreover, the Court was transformed into a full-time institution and is now the Council's sole judicial body. The Commission has been eliminated and today, as a rule, a Chamber consisting of seven judges decides on the admissibility and the merits of a case.[6] Moreover, individuals now have direct access and may file their petitions directly before the Court. The Committee of Ministers has lost its quasi-judicial functions. Today it is merely responsible for overseeing compliance with

[4] In this context it had to verify, among other things, whether domestic remedies were exhausted, whether the deadline for lodging a petition was met etc. (Art. 26 and 27 ECHR).

[5] The European Convention did not lay down any criteria governing the circumstances under which the Court or the Committee should be responsible. It was the Commission's discretion to decide on this aspect (Schlette 1996: 910).

[6] Manifestly inadmissible applications are disposed of by a three-judge Committee. Source: "The ECHR in 50 questions", http://www.echr.coe.int/NR/rdonlyres/5C53ADA4-80F8-42CB-B8BD-CBBB781F42C8/0/FAQ english.pdf, last access: 23.07.2010.

the Court's judgments (Art. 46 ECHR as amended by Protocol 11). The Court decides on the alleged violations and may order just satisfaction in form of monetary compensation (Art. 41 ECHR as amended by Protocol 11).[7] After becoming final, its judgments are binding on the state concerned (Art. 46 ECHR as amended by Protocol 11). However, the parties may request referral of the case to the Grand Chamber for reconsideration.[8] The Committee of Ministers monitors the execution, particularly the payment of just satisfaction as well as the implementation of adequate general measures.

3.2 The Inter-American System

The protection of human rights at a regional level has a long tradition in the Americas, which formally commenced with the adoption of the legally non-binding *American Declaration of the Rights and Duties of Man* by the Ninth International Conference of American States in 1948 (OAS/IACommHR 2007: 4). The American Declaration was the first instrument of an evolving international system of human rights protection after World War II, promulgated even several months prior to the United Nations' *Universal Declaration of Human Rights*.

The institutional design of the system began in 1959, when the Meeting of the Ministers of Foreign Affairs of the Organization of American States (OAS) created the *Inter-American Commission on Human Rights* in order to remedy the lack of a responsible body for monitoring the observance of human rights in this region. Initially, the Commission was intended to be an interim measure until a human rights court was established.[9] However, it ultimately became an OAS Charter organ that still exists today. The Commission is situated in Washington D.C. and is an expert committee, consisting of seven members which are elected in their personal capacity for a term of four years by the General Assembly of the OAS (Art. 36 and 37 ACHR). In view of its mere quasi-judicial character, the members do not have to be judges, but should be persons of high moral character and with recognized competence in the field of human rights (Art. III Comm. RoP). The Commission's main function is to promote respect for and defense of human rights (Art. 41 ACHR). Within the framework of this task, it may conduct on-site observations (with the consent or at the invitation of the government in

[7] While the ECHR's authority is formally limited to order just satisfaction, it follows implicitly from the obligation of the states to abide by the judgment that similar violations should be prevented in the future. This obligation may, depending on the circumstances, imply a review of legislation and practice, and in some cases may even involve constitutional changes (= so-called *general measures*) (Committee of Ministers 2009: 20).

[8] The Grand Chamber is made up of 17 judges (amongst them the Court's President, the Vice-Presidents, and the Section Presidents). Source: "The ECHR in 50 questions", http://www.echr.coe.int/NR/rdonlyres/5C53ADA4-80F8-42CB-B8BD-CBBB781F42C8/0/FAQ english.pdf, last access: 23.07.2010.

[9] At the conference it was considered that in the absence of a legally binding convention the time was not ripe for the establishment of a court (Allain 2000: 98).

question), prepare case studies and reports on the human rights situation of individual countries, request governments to supply information on measures adopted in matters of human rights and, since 1966, it is formally authorized to investigate petitions lodged by individuals and make concrete recommendations in order to terminate and compensate human rights violations (OAS/IACommHR 2007: 79).[10]

The *American Convention on Human Rights (ACHR)*[11] was not adopted until November 1969 and only came into force in 1978. Currently (as of July 2010), 25 of the 35 member states of the OAS have ratified the Convention.[12] Besides several Caribbean islands such as Antigua and Barbuda, Bahamas or Saint Kitts and Nevis only the United States and Canada have so far not ratified this regional human rights treaty. The ACHR is modeled on the American Declaration, but also on the European Convention of Human Rights and the International Covenant on Civil and Political Rights (Shelton 1994: 335).[13] Comparable to other human rights treaties, the Convention was designed to protect and promote more than 20 fundamental civil and political rights and freedoms such as the right to life, the right to humane treatment, the right to a fair trial and judicial protection, freedom of religion and freedom of thought and expression.

The functions of the previously established Commission were included in the Convention (Art. 34 - 51 ACHR), but beyond this, the ACHR also established the *Inter-American Court of Human Rights (IACHR)*. As stated above, the idea of a human rights court had already been developed in the early years of the OAS, but it took until the adoption of the Convention for it to be finally created. The OAS' General Assembly finally approved the Statute of the Court in 1979 and the Court was officially installed in San José, Costa Rica (OAS/IACommHR 2007: 11). The IACHR is an autonomous judicial institution whose purpose is the application and

[10] The drafters of the Commission's Statute did not originally provide for the investigation of individual complaints, but as soon as it began to operate it was inundated with complaints from victims of human rights violations (e.g. Hansungule 2001 or Padilla 1993). By developing is own interpretation of the Statute, the Commission extended its functions bit by bit and assumed several powers not formally provided for in the original Statute. The political bodies of the OAS did not question the Commission's strategy and finally, in 1965, the 'implied powers' were formally incorporated into the Commission's Statute by the OAS member states. In this context, it is important to note that the Commission can apply its quasi-judicial functions to all member states of the OAS without any formal recognition of these competences by the states. Even the ratification of the *American Convention on Human Rights* is not a necessary requirement for the Commission to perform its functions, because the IACHR already existed prior to the Convention. Complaints against states that are not parties to the American Convention have to be based on the American Declaration of the Rights and Duties of Man (Art. 49 Comm.RoP).

[11] Also known as "Pact of San José".

[12] Source: http://www.cidh.oas.org/Basicos/English/Basic4.Amer.Conv.Ratif.htm, last access: 05.08.2010.

[13] In the pertinent literature it is frequently stressed that the Inter-American system is explicitly modeled on the European system (Padilla 1993: 108). And there "is no doubt that all of Chapter VIII of the American Convention, which deals with the Inter-American Court (Art. 52-69), is inspired by the European model, which had already been adopted and running, when the Pact of San José was opened for signatures in 1969" (Héctor Gros Espiell, cited in Allain 2000: 113). These assumptions are backed by the fact that representatives of the European system participated in the drafting conference (Pasqualucci 2003: 344).

interpretation of the ACHR (Art. 1 Statute of the Court). It consists of seven judges elected in an individual capacity for a term of six years by the states party to the ACHR in the General Assembly of the OAS (Art. 53 ACHR). These judges must be jurists of the highest moral authority with recognized competence in the field of human rights, who possess the qualifications required for the exercise of the highest judicial functions in their respective states (Art. 52 ACHR).

The complaints procedure is initiated either by a communication lodged before the Commission by a state (Art. 45 ACHR) or by an individual petition lodged by a person, group of persons or any nongovernmental entity legally recognized in one or more member states of the OAS (Article 44 ACHR).[14] Comparable to the original European procedure, the course of the procedure runs in two stages: During this first phase, the Commission verifies whether all formal requirements are fulfilled (Art. 28 Comm. RoP) and it then considers the admissibility of the complaint. In case of inadmissibility, the proceedings are terminated; otherwise the Commission tries to bring about a friendly settlement between the parties to the proceedings (Art. 48 f ACHR). If no friendly settlement can be attained, the Commission draws up a report on the merits setting forth the facts and stating its conclusions. If violations are ascertained, the report remains a preliminary, confidential report, including proposals and recommendations the Commission deems appropriate in order to terminate and repair the violations (Art. 50 ACHR). If the state concerned disagrees with the Commission's conclusions it may submit the case to the Court within a period of three months in order to clarify the facts (Art. 51 ACHR). The Commission may also refer the case to the Court if the state concerned does not comply with the recommendations, the state has accepted the Court's contentious jurisdiction.[15] Unlike state parties and the Commission, private actors do not have direct access to the Court, but must depend on the willingness of the Commission to file a suit. However, a reform of the Court's rules of procedure, which came into force in 2001, now grants private complainants the formal status of party to the proceedings (Art. 2 Court RoP). As a result, petitioners may directly participate in the proceedings and act autonomously before the Court after the Commission has initiated a proceeding (Art. 23 Court RoP).

[14] The Inter-American system's rule on standing is liberal in that it entitles NGOs to initiate proceedings without having to demonstrate that they were victims of human rights violations. By contrast, NGOs are only allowed to file complaints before the ECHR if their organization has suffered a violation such as disregard for their freedom of expression or assembly (Art. 34 ECHR).

[15] Otherwise, the Commission may only publish its report in order to put some pressure on the state to comply with the recommendations (Art. 51 III ACHR).

After carrying out the trial, the IACHR concludes whether a state has violated rights or freedoms protected under the ACHR and, where appropriate, orders adequate reparation.[16] The Court's judgments are final and binding (Art. 68 ACHR). In case of disagreement over the meaning and scope of the judgment, the parties may request that the Court interpret it (Art. 67 ACHR). The IACHR is not authorized to impose sanctions. It may only monitor governmental compliance and pass resolutions assessing the status of compliance. According to Article 65 ACHR the Court submits reports to the General Assembly of the OAS specifying the cases in which states have not complied with the orders of the judgment. In the past, however, the General Assembly has not taken any measures in order to promote compliance.

3.3 The Practice of both Systems Compared

While the institutional design and course of proceeding of the Inter-American and the (original) European system are very similar, in practice, however, they evolved very differently (see *table 1*).

The ECHR monitors respect for human rights of more than 800 million people in 47 member states of the Council of Europe. During the last fifty years it has delivered more than 10,000 judgments.[17] In about half of the judgments which found a violation, the Court found a violation of Article 6 of the European Convention (= *Right to a Fair Trial*) concerning both the fairness and length of national proceedings. Only in approximately 8 % of the cases did the Court find a serious violation of the Convention under Article 2 (= *Right to Life*) or Article 3 (= *Prohibition of Torture and Inhuman or Degrading Treatment or Punishment*).[18]

By contrast, the IACHR, while being responsible for about 550 million people, has only delivered solutions in 105 contentious cases between 1979 and 2008 (IACHR 2009: 60). In the past, the Inter-American system was frequently criticized due to its very small case-load, especially in light of the high number of gross human rights violations in the American hemisphere (e.g. Allain 2000: 105) (as *table 1* shows, besides violations of judicial rights, the fundamental rights to life and the prohibition of inhumane treatment are frequently violated).

[16] According to Article 63 ACHR, the Court may rule, firstly, that an injured party be ensured the restitution of his/her rights and freedoms that were violated, and in addition that the consequences are remedied and that fair compensation is paid. Compared to other international human rights bodies, such as the ECHR or the United Nations Human Rights Committee (UNHRC), this provision grants the Court much broader formal powers to order reparations. Moreover, the IACHR has consistently interpreted its authority as covering the full range of reparations under international law (Cassel 1999: 173).

[17] Source: "European Court of Human Rights in brief", http://www.echr.coe.int/NR/rdonlyres/DF074FE4-96C2-4384-BFF6-404AAF5BC585/0/Brochure_EN_Portes_ouvertes.pdf, last access: 23.07.2010.

[18] Source: "The ECHR in 50questions", http://www.echr.coe.int/NR/rdonlyres/5C53ADA4-80F8-42CB-B8BD-CBBB781F42C8/0/FAQenglish.pdf, last access: 23.07.2010.

In addition to the voluntary nature of the Court's jurisdiction[19], budgetary and personal constraints constitute the major obstacles to the work of the Inter-American institutions.

Table 1: ***The Regional Human Rights Systems at a Glance***[20]

System / Criteria	**European System**	**Inter-American System**
Number of Member States	47 (all of them have accepted the jurisdiction of the ECHR)	35 (21 have currently accepted the jurisdiction of the IACHR)*1
Population (million)	approx. 800	approx. 900 (the Court is responsible for approx. 550)
Budget in 2008 (million euro)	53.46*1	IACHR: 1.23*2 Commission: 2.51
Number of Staff	47 judges 626 employees*1	*Commission:* 7 Commissioners 57 employees*3 *IACHR:* 7 judges 13 lawyers*4
Number of Complaints in 2008	49,850*1	1,323*5
Number of Judgments in 2008	1,545*1	18 (+ 11 published Commission reports)*6
Most Frequently Violated Rights	- right to a proceeding within an adequate period of time*2 - right to a fair trial - protection of property - right to effective remedy - right to liberty and security	- right to a fair trial*1 - right to judicial protection - right to humane treatment - right to personal liberty - right to life

Both, the Inter-American Commission and Court, are forced to work part-time.[21] Regardless of the fact that the number of complaints received by the system annually is steadily

[19] During the first decade of its existence, only 10 of the 35 OAS member states accepted the Court's contentious jurisdiction (OAS/IACommHR 2007: 51). Consequently, a multitude of individuals who suffered human rights violations in the Americas were denied access to the Court. In the meantime, the situation has slightly improved and currently 21 of the 35 member states have accepted the Court's contentious jurisdiction (see *table 1*).

[20] **Sources ECHR:** (*1) = ECHR Annual Report (http://www.echr.coe.int/NR/rdonlyres/D5B2847D-640D-4A09-A70A-7A1BE66563BB/0/ANNUAL_REPORT_2008.pdf, last access: 09.04.2010); (*2) = ECHR, Analysis of statistics 2007, (http://www.echr.coe.int/NR/rdonlyres/C8F656AA-94C4-4A3F-A69D-0E4C6D510CA8/0/Analysis_of_statistics_2007.pdf, last access: 31.03.2010).
Sources IACHR: (*1) = IACommHR's website (http://www.cidh.oas.org/Basicos/English/Basic4.Amer.Conv.Ratif.htm, last access: 06.08.2010); (*2) = ACHR Annual Report 2008 (http://www.corteidh.or.cr/docs/informes/eng2008.pdf, last access: 09.04.2010); (*3) = Composition of the IACHR 2010 (http://www.cidh.oas.org/personal.eng.htm, last access: 12.01.2010); (*4) = Goldman 2009: 883; (*5) = IACommHR, Annual Report 2008 (http://www.cidh.oas.org/annualrep/2008eng/TOC.htm, last access: 09.04.2010); (*6) = IACommHR's website (http://www.corteidh.or.cr/casos.cfm, last access: 07.04.2010).

[21] De facto, the Commission holds two or three regular annual sessions, plus several special sessions, and the Court has held four regular sessions during the last few years plus several special sessions.

increasing,[22] neither the budget nor the staff has been augmented. According to expert opinion, it is probably impossible for the IACHR to hear more than 10-15 cases a year.[23] In view of these facts, the former president of the Commission, Robert K. Goldman, has arrived at the conclusion that

> "[w]ithout question, the single greatest obstacle to the effective functioning of the Commission and the Court is the lack of adequate human and financial resources. Simply put, the system of petitions and cases is in imminent danger of collapse" (Goldman 2009: 882).

The lack of resources, however, is not the only problem of the Inter-American system. Although the overall number of complaints has steadily increased, the complaints rate of the Inter-American system is – compared to the European system (see *table 1*) – rather low, particularly in the light of the human rights situation in the region[24] and the precarious situation of many national judiciaries (Domingo/Sieder 2001, Santiso 2003). In order to explain the low frequency of usage, one has to look at the accessibility of the system for potential victims (Byrnes 2000: 144). Factors such as a lack of knowledge or expertise play a role in this context, as well as access to legal aid (ibid.).

Regarding the accessibility of the Inter-American system, one has to take into account the "typical" victims. These were (and still are) often poor indigenous or rural people. Due to their educational background, a lack of financial resources or unawareness of the judicial alternatives they were unable to sue the state by means of an international judicial body.[25] This widespread unawareness of the possibility of using an international institution in order to enforce one's rights against the state considerably reduces the system's accessibility. Moreover, according to experts, the number of complaints also depends on the number of

[22] For example, the Commission received 435 complaints in 1997, 885 in 2001, 1,319 in 2004 and 1,456 in 2007 (IACommHR 2007: Chap. III B / Statistics).

[23] Interview with Michael Camilleri from the international human rights organization Center for Justice and International Law (CEJIL), Washington, September 2007.

[24] Frequently, human rights organisations point to the deficiencies in view of respect for human rights in the Americas, e.g. Amnesty International in its annual report 2008: "The end of military rule and the return to civilian, constitutionally elected governments have seen an end to the pattern of widespread and systematic enforced disappearances, extrajudicial executions and torture of political opponents. However, the hopes that a new era of respect for human rights had arrived have in many cases proved unfounded. (…) The legacy of the authoritarian regimes of the past lives on in the institutional weaknesses which continue to bedevil many Latin American countries, particularly in Central America, and in the Caribbean. Corruption, the absence of judicial independence, impunity for state officials, and weak governments have undermined confidence in state institutions. Equal protection may exist in law, but it is often denied in practice, particularly for those in disadvantaged communities…" (Source: Amnesty International, Annual Report 2008, http://archive.amnesty.org/report2008/regions/americas.html, last access: 06.08.2010).

[25] One telling document is the final report of the Peruvian Truth and Reconciliation Commission, entrusted to account for the internal armed conflict between the government and diverse guerrilla groups (among them the famous Sendero Luminoso) in the 1980s and 1990s, with an estimated 69,000 victims. The Commission established that 79% of the victims of this conflict lived in rural areas. 75% of the victims who died spoke Quechua or other native languages as their mother tongue. Moreover, the dead and disappeared had educational levels far inferior to the national average (TRC 2003: Chapter I, Para 6).

attorneys specialized in human rights law and their experience in litigation before international institutions. The attorney system in Central America, for instance, is far less developed than in South America – a factor that partially explains the differences in the quantity of complaints.[26]

Another crucial aspect constraining the access to the Inter-American system was, until recently, the absence of a legal aid fund. While no official fees have to be paid, all other costs arising out of the proceedings had to be covered by the victims and/or their representatives. Such costs include lawyers' salaries, travel costs (for lawyers, victims, witnesses, experts) and expenses for the production and presentation of evidence.[27] For many victims these costs were unaffordable. While one could take action electronically according to expert information

> "certainly this route is not likely to be as effective as it is if someone presents documentation and submits it not by ordinary mail but by courier and is able to travel and solicit audiences and working meetings and take recourse of jurisprudence and make direct contact with the commissioners and judges and lawyers of the commission staff and the court … the first [form of litigation] is completely free of charge, while the second one costs money but is also more effective" (emphasis added, own translation).[28]

In June 2008, however, the General Assembly of the OAS decided to install a legal aid fund.[29] Whether the new assistance fund will contribute to an increase in proceedings remains to be seen, especially in view of the fact that the first phase of the procedure before the Commission still has to be financed by the victims themselves.

However, altogether the caseload of the Court and Commission is steadily increasing and several judgments (e.g. the famous Case *Barrios Altos v. Peru*, judgment of March 14, 2001, Series C No. 75) have attracted attention among international jurists. To what extent, if at all, is this development reflected in the relationship between IACHR and ECHR?

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[26] Interview with Elisabeth Salmón Gárate from the Institute of Democracy and Human Rights at the Catholic University of Peru in Lima, Lima, August 2007. A country like Peru with a vivid civil society and many human rights organizations is confronted with a relatively high number of complaints (e.g. 304 in 2006), while at the same time countries such as Guatemala or Haiti, with a very precarious human rights situation, have only been confronted with 28 or 4 complaints respectively (IACommHR 2007: 24).

[27] The Center for Justice and International Law (Centro por la Justicia y el Derecho Internacional, CEJIL), an international non-governmental organization with a special focus on human rights protection in the Americas and with comprehensive experience concerning proceedings before the Inter-American institutions, tried to assess the cost of a prototypical case and arrived at the considerable amount of US$ 113,900 (CEJIL 2006: 23).

[28] Interview with Javier Mujica Petit, responsible for the human rights program at the Peruvian NGO *Centro de Asesoría Laboral del Perú* (CEDAL), Lima, August 2007.

[29] Article 2 of the *Rules for the Operation of the Victims' Legal Assistance Fund of the IACHR* prescribes that victims lacking the economic resources necessary to cover the cost of litigation before the Court may request access to the Fund.

4. How far has the Idea of a 'Common Endeavor' actually advanced?

4.1 Official Statements of Members of both Systems

As has already been stressed, the European human rights system served as a role model to the Inter-American system, not only in view of the institutional design and the course of the proceedings but also with regard to the case-law. This relationship has been confirmed for instance by the former President of the Inter-American Commission on Human Rights, Paolo Carozza, in a presentation given at a meeting on the occasion of the 50th anniversary of the ECHR:

> "The historical influences have, not surprisingly, flowed primarily westwards, from Europe across the Atlantic. (…) For instance, the Inter-American Commission … was consciously inspired by and modelled after the now defunct European Commission. (…) Turning to the substantive law, the influence of Europe on the norms and jurisprudence of the Inter-American human rights system are multiple" (Carozza 2009: 47 et seqq.).

The ECHR's 'leading role' is strikingly confirmed by the number of references the IACHR has made to its European counterpart. The IACHR has referred to the European system in more than half of all of its decisions. For example, a search on the IACHR's website produced 132 references to the European system from a total of 213 decisions and judgments (as of July 2010).[30] These references comprise general statements concerning the special character of international human rights treaties, as well as specific procedural aspects such as a government's objection alleging the non-exhaustion of local remedies or other inadmissibility reasons, the role of the Commission with regard to the establishment and verification of the facts, and substantial questions concerning torture or the concept of reasonable time of judicial proceedings.

Interestingly, however, the self-perception of the Inter-American system is changing. After more than 30 years of the Court's existence[31] and a steadily increasing case-load – albeit on a low level – the Inter-American institutions are trying to emancipate themselves from the dominant role of their European counterparts. Their self-confidence has grown and they are asking for equal participation in an emerging international human rights system. Moreover, they stress the advantages for the ECHR in having a close look at their decisions:

> "I believe that we have entered into a period providing even greater opportunities for cross-fertilisation, where legal and institutional experience might not only continue to flow westwards, but also where the Inter-American system might begin to find ways to repay its decades of indebtedness to Europe" (Carozza 2004: 51).

[30] The total number of cases decided is much lower (105 by 2008) because often more than one decision is passed with regard to a single dispute (e.g. decisions on preliminary objections, judgments on the merits, judgments on reparations and costs, interpretations of judgments etc.).

[31] The Inter-American Commission has already existed for 50 years.

Members of the IACHR's bench have also commented on the relationship, e.g. the former president of the IACHR, Judge Cançado Trindade, in a speech before the ECHR:

> "The fruitful dialogue which the two international human rights Courts have established in recent years, in a spirit of cooperation, mutual respect and coordination in the pursuit of common causes and ideals, constitutes an inspiring example to other international tribunals. (…) Human rights treaties, such as the European and American Conventions, have by means of such interpretative interaction, reinforced each other mutually, to the ultimate benefit of all human beings. Interpretative interaction has, in a way, contributed to the universality of the treaty law on the protection of human rights. This has paved the way for a *uniform* interpretation of the *corpus juris* of contemporary international human rights law" (Cançado Trindade 2004: 311 et seqq., emphasis in original).

However, beyond the emphasis put on the need to develop common standards, representatives of the Inter-American system also underline the legitimacy of regional differences and legal pluralism. Carozza, for instance, describes the contours of an emerging international human rights system as follows:

> "One model for understanding the network of relationships that we are building is to regard it as the development of a new sort of global ius commune of human rights – universal in its scope and its basic principles, but interacting in a symbiotic way with the ius proprium of different local jurisdictions rather than supplanting them" (Carozza 2004: 57)

From his point of view, 'harmonization' should not be confused with 'homogenization' (ibid.: 56).

But is the claim of equal pertinence and participation accepted by the ECHR? At least in official statements the need for cooperation is stressed, e.g. by the ECHR's Judge Tulkens:

> "In order to ensure that this diversification of human rights law does not result in potentially damaging fragmentation, but on the contrary reinforces the common principles on which it is based, we believe that it is necessary for the international bodies concerned to engage in a continuing and permanent dialogue on fundamental rights – *a dialogue that should contribute to the development of a true 'common law' of human rights. This can be achieved by a process of interaction as the different international courts learn from and assimilate each other's case-law*" (Tulkens 2009: 13, emphasis added)

And, moreover:

> "… international human rights law in the twenty first century is a complex network of overlapping systems of law. Although those systems have their own internal logic, they cannot remain oblivious of each other. As it enters its second half-century, the European Court of Human Rights seeks to show that it has recognized this need. Just as our Court maintains a regular dialogue with the domestic Supreme Courts, so we wish to pursue and strengthen our links with other international courts and engage with them in an open and direct exchange of views…" (Tulkens 2009: 15)

With these statements in mind, the following section will shed light on the question whether cross-fertilization is a process which actually occurs or whether the actors are merely paying

lip service to it. While the IACHR frequently refers to and adopts the ECHR's jurisprudence (see above), the question remains whether the ECHR is also prepared to take the case-law of its counterpart into consideration.[32]

4.2 References made to the Inter-American System in proceedings before the ECHR

A systematic search of references to the Inter-American system, made in proceedings before the ECHR produced the overall result of ***66 references*** which relate to a total of ***58 cases*** (including two advisory opinions) (as of June 2010).[33] In view of the fact that the ECHR has passed more than 10,000 judgments since its foundation, at first sight, this number of references seems to be miniscule. A closer look, however, reveals interesting insights.

First of all, the reference to the Inter-American system did not stem exclusively from the ECHR itself in all of these cases. In early proceedings references were often made by third parties, such as Amnesty International, to whom the Court granted leave, or by applicants, in order to present a different practice in the context of other human rights systems and to substantiate their claims (see *table 3*, appendix). Moreover, individual judges have also used the Inter-American case law to foster their arguments in dissenting opinions.[34]

As *charts 1* and *2* demonstrate, the majority of references was made in *judgments* passed by the ECHR in the 2000s. This finding is not surprising as the case-law of the Inter-American institutions, in particular of the IACHR, only increased at a slow rate.[35] Nevertheless, it points at a growing relevance awarded by the ECHR to the work of its counterpart. But how can this fact be explained?

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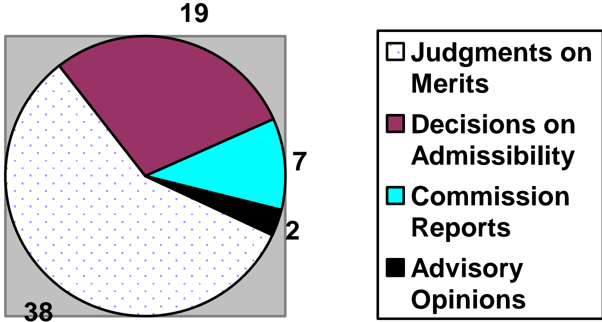
[32] The following analysis is only an exemplary one. In order to determine the actual stage of development of a "true" global judicial human rights system, the role of other judicial bodies would have to be taken into account as well, e.g. that of the United Nations Human Rights Committee (UNHCR) or that of the African Commission on Human and Peoples' Rights.

[33] This search was carried out by means of the ECHR's search portal HUDOC (http://www.echr.coe.int/ECHR/EN/Header/Case-Law/Hudoc/Hudoc+database/), using the text-search function and the keyword "inter-american". For a complete list of all judgments with references to the Inter-American system, see *table 3* in the appendix. The discrepancy between 66 references and 58 cases can be explained by the fact, that in eight of the cases two references were made in different documents (e.g. in the decision on admissibility and in the final judgment or in a chamber judgment and in the following Grand Chamber review).

[34] It has also to be stressed that often it was not only referred to the Inter-American system but to practices of different human rights bodies (e.g. the Human Rights Committee of the International Covenant of Civil and Political Rights). Due to the focus of this paper, however, it is mainly the references to the Inter-American system that have been analyzed.

[35] A first and early reference was made in the context of the *Case of Golder v. The United Kingdom* (Application No. 4451/70, Judgment of 21 February 1975). Here, Judge Fitzmaurice referred to the Inter-American system in context of his separate opinion and stressed the special character of the European Convention, comparable only with the American Convention, which was not in force at that time.

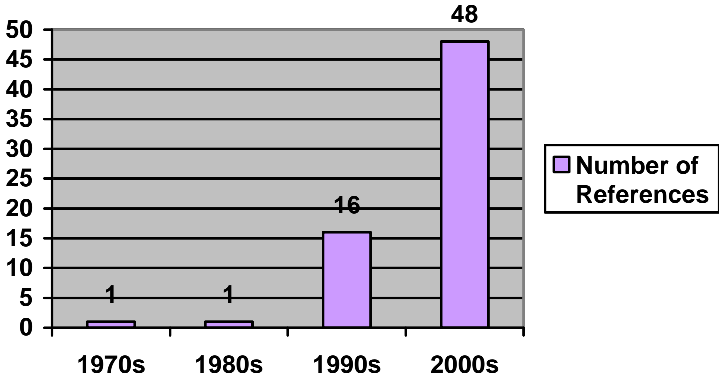
Chart 1: ***Type of Documents with Reference to IA-System***[36]



The former President of the Inter-American Commission on Human Rights, Paolo Carozza posits that

> "[a]s the membership of the Council of Europe has expanded dramatically, so has the range of and gravity of some of the human rights violations that reach the European Court – large-scale and comparatively frequent violations of the right to life, for example. (…) It is reasonable to think that our experience could be a quite helpful reference point for the European Court, and an important point of comparison in seeking common standards across the human rights systems" (Carozza 2004: 51).

Chart 2: ***Point in Time of Reference***



An overview of the countries involved in the cases with reference to the Inter-American system partially supports this assessment:

[36] The judgments on the merits comprise 23 chamber decisions, 13 grand chamber decisions and 2 plenary decisions.

Table 2: ***Frequency of References in view of Countries involved:***

Country	Frequency of References
Turkey	21
United Kingdom	10
Bulgaria	6
Russia	3
Sweden	3
Austria	2
The Netherlands	2
Bosnia-Herzegovina	1
Croatia	1
France	1
Germany	1
Italy	1
Slovakia	1
Slovenia	1
Spain	1
Switzerland	1

The argument becomes even more convincing when one takes a look at the type of rights violations dealt with in the context of the relevant cases. In 20 out of the 38 judgments with references to the Inter-American system, the ECHR had to decide on violations of Article 2 and 3 of the European Convention. These cases dealt with forced disappearances, extralegal executions, torture, lethal force used by state agents, and death sentences etc.[37] As has already been stressed, these type of violations are the exception rather than the rule in the European system (as a reminder: so far, the ECHR has found a violation of Article 2 or 3 only in approximately 8% of its cases). With regard to massive human rights violations such as forced disappearance or inhumane treatment it is the IACHR – and not its 'big brother' the ECHR – which is the expert and which has established crucial precedents and strategies that are increasingly being used by the European Court (and the parties to the proceedings) to substantiate its own reasoning or – as will be demonstrated – to justify a deviation from its established practices.

4.2.1 Standard of Proof in Cases of Forced Disappearance

An interesting development in the ECHR's case-law can be observed regarding cases dealing with forced disappearances (and extralegal executions).

Generally, human rights conventions do not establish rules of evidence or allocate burdens of proof. Therefore the respective judicial bodies have to develop practices of how to deal with

[37] Moreover, in the remaining cases with references to the Inter-American system frequently violations of fundamental rights were alleged (e.g. in the context of racial discrimination, jurisdiction of military courts over civilians, violations of the *non bis in idem* principle, or the prohibition of retroactivity of law, etc. see *table 3,* appendix).

these aspects. As a rule, a party to a proceeding alleging breaches of law has to prove these allegations. However, in proceedings concerning human rights violations committed by state agents it is frequently impossible for the victims or their relatives to produce the necessary evidence because relevant documents etc. are in the hands of the government. The crime of forced disappearance, and the probable result of death of the disappeared, is especially hard to verify by the applicants (mostly relatives of the disappeared person) due to the fact that the purpose of forced disappearance is to make people disappear without a trace. From the beginning, the Inter-American system had to deal with complaints alleging forced disappearance of persons, which was a widespread phenomenon in many of its member states. In order to deal with these complaints, the Inter-American institutions developed a particular modus operandi: they tried to prove that a general pattern or practice of forced disappearance existed in the country concerned (e.g. by referring to official reports of international organizations such as the UN etc.) and that the disappearance of a particular person fits the general pattern, arguing that if there is evidence for the existence of a systematic practice or policy, a particular violation may be proven through circumstantial or indirect evidence (Oellers-Frahm: 2002: 404 et seqq.). As a result the burden of proof is reversed: it is not the complainant who has to prove his/her allegation but the state concerned that has to demonstrate that it had not committed the particular crime. The IACHR justified this strategy with the argument that "[i]n contrast to domestic criminal law, in proceedings to determine human rights violations the State cannot rely on the defense that the complainant has failed to present evidence when it cannot be obtained without the State's cooperation" (*Velásquez Rodríguez v. Honduras*, judgment of July 29, 1988, Series C No. 4, para. 135). Moreover, with regard to the rights violations in connection with the crime of disappearance, the IACHR stated that the "phenomenon of disappearances is a complex form of human rights violation that must be understood and confronted in an integral fashion" (para. 150). This may include *the right to life* and the *right not to be subjected to ill-treatment.*

By contrast, the ECHR applies rather rigid standards concerning the burden of proof. Generally, allegations before it have to be proven *beyond reasonable doubt*, a standard known from criminal proceedings. However, since it has to deal with cases of forced disappearance and extralegal executions (e.g. concerning internal conflicts in Turkey or Russia) the ECHR faced difficulties with its own standards.

An early and famous case where the ECHR strictly adheres to the doctrine that allegations have to be proven beyond reasonable doubt is *Kurt v. Turkey* (Application No. 24276/94, Judgment of 25 May 1998). This case makes the problem clear: It originates in an application

lodged against the Republic of Turkey by Mrs. Koçeri Kurt in 1994. Her application was brought on her own behalf and on behalf of her son, Üzeyir Kurt, who, she alleged, had disappeared in circumstances engaging the responsibility of the state.[38] Amongst others, she alleged violations of Articles 2 and 3 of the European Convention. However, the facts were disputed between the parties and the Turkish government submitted that there were strong grounds for believing that Üzeyir Kurt had in fact joined or been kidnapped by the PKK. In view of the disputed facts, the European Commission of Human Rights carried out its own investigation and finally arrived that the conclusion that

> "it was the applicant's genuine and honestly held belief that her son was taken into custody by the security forces after which he "disappeared" and that there was no basis for inferring that the applicant's testimony was influenced by a reluctance to accord blame to the PKK or to acknowledge their involvement. Having regard to the assessment of the evidence before it, the Commission accepted her evidence that she saw him surrounded by soldiers and village guards outside Hasan Kılıç's house on the morning of 25 November 1993. It found that this was the last time he was seen by any member of his family or person from the village" (ECHR's judgement, para. 53).

Notwithstanding this, the Commission found that in the absence of any evidence as to the fate of Üzeyir Kurt subsequent to his detention in the village, *it would be inappropriate to draw the conclusion that he had been a victim of a violation of Article 2.* The Commission disagreed with the applicant's argument that it could be *inferred* that her son had been killed *either from the life-threatening context* she described or *from an alleged administrative practice of disappearances* in the respondent state (para. 105).

The applicant urged the ECHR not to confine its consideration – as requested by the Commission – to issues raised under Article 5 of the Convention (*Right to Liberty and Security*) but to have regard also to those raised under Articles 2 and 3 – in line with the approach adopted, among others, by the IACHR under the American Convention (para. 84).[39] Such a finding could be reached, she maintained, even though specific evidence that her son had died at the hands of the authorities of the respondent State did not exist (para. 101). She asserted that there existed a well-documented high incidence of torture, unexplained deaths in custody as well as of "disappearances" in south-east Turkey which not only gave rise to a

[38] According to the testimony of Mrs. Kurt, security forces carried out an operation in her village in November 1993, following intelligence reports that PKK members would visit the village. During two days the security members conducted a search of each house. A number of houses were burnt down during the operation, including those of the applicant. Her son, hiding in the house of his aunt, was arrested. On the morning of 25 November, the applicant found her son surrounded by about ten soldiers and five to six village guards. She saw bruises and swelling on his face as though he had been beaten. This was the last time she saw her son (ECHR's judgment, para. 8 et seqq.).

[39] The applicant's claim was supported by a statement of Amnesty International (AI), who was granted leave to submit written comments in the proceeding before the ECHR. In its statement AI stressed that "disappearance" is to be seen as constituting a violation not only of the liberty and security of the individual but also of other fundamental rights such as the right to life. In this context, AI referred to the decision of the IACHR in the *Velásquez Rodríguez v. Honduras Case* (para. 69).

reasonable presumption that the authorities were in breach of their obligation to protect her son's life but, in addition, constituted compelling evidence of a practice of "disappearances" such as to ground a claim that her son was also the victim of an aggravated violation of that provision (para. 102).

Although the ECHR took the case-law of the IACHR (among others the *Velásquez Rodríguez Case*) and the *Inter-American Convention on Forced Disappearance of Persons* into account, it arrived at the conclusion that it

> "must carefully scrutinise whether there does in fact exist concrete evidence which would lead it to conclude that her son was, beyond reasonable doubt, killed by the authorities either while in detention in the village or at some subsequent stage" (para. 107).

The Court pointed out that the applicant's case rests entirely on presumptions deduced from the circumstances of her son's initial detention bolstered by more general analyses of an alleged officially tolerated practice of disappearances and associated ill-treatment and extra-judicial killing of detainees in Turkey. It finally drew the conclusion that

> "these arguments are not in themselves sufficient to compensate for the absence of more persuasive indications that her son did in fact meet his death in custody. As to the applicant's argument that there exists a practice of violation of, *inter alia*, Article 2, the Court considers that the evidence which she has adduced does not substantiate that claim" (para. 108).

In further cases concerning extralegal executions and forced disappearances in Turkey, the applicants again relied on the IACHR's case-law with regard to these crimes and particularly the standard of proof asked for by that court.[40] While for the time being, the ECHR maintained the standard of poof *beyond reasonable doubt,* it passed a groundbreaking decision in June 2000, in the context of the *Case Timurtaş v. Turkey* (Application No. 13531/94, judgment of 13 June 2000). This case originated in an application, filed by Mr. Timurtas in February 1994 on his behalf and on behalf of his son, who had disappeared in circumstances engaging the responsibility of the respondent state.[41] As in similar cases, the

[40] See e.g. *Case of Ergi v. Turkey* (Application No. 23818/94, judgment of 28 July 1998) or *Case of Ertak v. Turkey* (Application No. 20764/92, judgment of 9 May 2000). In the *Ergi Case*, for instance, the applicant alleged that security forces had killed his sister, purportedly fighting against PKK. Before the Court, the applicant claimed for the practice of a shifted burden of proof, as used for example by the IACHR. He stressed that it was for the Turkish government to substantiate its claim that PKK combatants had been present in the village during the fight. Since the government had failed to adduce such evidence, the Court should regard the applicant's allegation as sufficient evidence (ECHR's judgment, para. 71). The ECHR, however, arrived at the conclusion that there was an insufficient factual and evidentiary basis on which to conclude that the applicant's sister was, *beyond reasonable doubt*, intentionally killed by the security forces in the circumstances alleged by the applicant.

[41] On 14 August 1993 the applicant received a telephone call that his son had been apprehended by soldiers. The applicant was worried because another son had died in custody in 1991. The applicant made various attempts to obtain news of his son's fate. He submitted petitions to the prosecutor's office which initially were not registered. At the gendarmerie headquarters he was told that his son was not in detention. However, two persons had seen

Turkish government denied that the applicant's son had been apprehended by the security forces and that he had been held in detention (ECHR's judgment, para. 22). Because the facts were disputed, the European Commission on Human Rights carried out its own investigations and finally considered that there was indeed a strong probability that the applicant's son, Abdulvahap Timurtaş, had died whilst in unacknowledged detention. Nevertheless, the Commission held *that in the absence of concrete evidence* that Abdulvahap had in fact lost his life or suffered known injury or illness, *this probability was insufficient to bring the facts of the case within the scope of Article 2* (para. 78).[42]

In the proceedings before the ECHR, the international NGO *CEJIL* was allowed to present written comments and presented an analysis of the jurisprudence of the Inter-American Commission and the IACHR concerning forced disappearances, inter alia, in relation to the right to life. The NGO stressed that the IACHR had on several occasions pronounced that forced disappearances frequently involve the violation of the right to life (e.g. in the *Velásquez Rodríguez Case* of 1988 or in *Godínez-Cruz v. Honduras* of 1989). Moreover, it explained that in the Inter-American system, a violation of the right to life as a consequence of a forced disappearance could be proved in two different ways: the *facts of an isolated incident of a forced disappearance may be proved on their own*, or it may be established *that the facts of the case are consistent with an existing pattern of disappearances in which the victim is killed*. According to CEJIL, both methods were used to establish state control over the victim's fate which, in conjunction with the passage of time, leads to the conclusion of a violation of the right to life (para. 79 and 80).

In its judgment, the ECHR stressed that it accepted the Commission's establishment of the facts (para. 81 et seqq.). However, it then deviated from the Commission's conclusion as well as from its own previous practice in a remarkable manner. It pointed to the fact that more than six and a half years had passed without information as to the victim's subsequent whereabouts or fate. Therefore, the question arose whether the authorities of the respondent state should be

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the applicant's son while being in custody. The son's fate remained unclear (ECHR's judgment, para. 15 et seqq.).

[42] In its report, the Commission arrived at the conclusion that the applicant's son, Abdulvahap Timurtaş was taken into detention. Moreover, in view of the fact that for more than five years there had been no information as to his subsequent fate, the Commission considered that there was indeed a strong probability that Abdulvahap died whilst in unacknowledged detention. However, with regard to the question, whether that strong probability was sufficient to trigger the applicability of Article 2 in the absence of concrete evidence that Abdulvahap has in fact lost his life, the Commission referred to the approach adopted by the Court in the case of *Kurt v. Turkey*, where the Court had held that it was not necessary to decide on the applicant's complaint under Article 2 since there was *no concrete evidence* capable of *proving beyond reasonable doubt* that her son had been killed by the authorities. Consequently, the Commission considered that the applicant's allegations in the *Timurtaş Case* should also be examined in the context of Article 5 only (Report of the Commission adopted on 29 October 1998, para. 271 et seqq.)

considered to have failed in their obligation to protect the applicant son's right to life. Subsequently, the Court stressed that

> "[w]hether the failure on the part of the authorities to provide a plausible explanation as to a detainee's fate, in the absence of a body, might also raise issues under Article 2 of the Convention will depend on all the circumstances of the case, and in particular on the existence of sufficient *circumstantial evidence*, based on concrete elements, from which it may be concluded to the requisite standard of proof that the detainee must be presumed to have died in custody" (para. 82, emphasis added).

From the ECHR's point of view it must be accepted that the more time goes by without any news of the detained person, the greater the likelihood that he or she has died. Contrary to the Commission, the ECHR stressed the differences of the *Kurt Case* and the present case and arrived at the following conclusion:

> "*In the general context of the situation in south-east Turkey in 1993, it can by no means be excluded that an unacknowledged detention of such a person* [= wanted by the authorities for his alleged PKK activities, A/N] *would be life-threatening.* (…) For the above reasons, the *Court is satisfied that Abdulvahap Timurtaş must be presumed dead* following an unacknowledged detention by the security forces. *Consequently, the responsibility of the respondent State for his death is engaged. Noting that the authorities have not provided any explanation as to what occurred after Abdulvahap Timurtaş's apprehension* and that they do not rely on any ground of justification in respect of any use of lethal force by their agents, *it follows that liability for his death is attributable to the respondent State* ... Accordingly, there has been a violation of Article 2 on that account" (para. 85 and 86, emphasis added).

A similar conclusion has been drawn by the Court in subsequent cases (e.g. in the *Case of Cicek v. Turkey*, Application No. 25704/94, judgment of 27 February 2001, in the *Case of Akkum and others v. Turkey*, Application No. 21894/93, judgment of 24 March 2005, or the Case of *Varnava and Others v. Turkey*, Application No. 16064/90 a.o., judgment of 18 September 2009).[43]

While in the cases presented in this section it was primarily the applicants as well as third parties who referred to the case-law and practices of the Inter-American institutions, it seems to be justified to draw the conclusion that the ECHR's gradual shift of argumentation has been influenced by the decisions of its Inter-American counterparts. In particular, the deviation from the high standard of proof beyond reasonable doubt in favor of the possibility to rely on

[43] Interestingly, in the *Case Varnava and Others v. Turkey*, the Court stressed that the standard proof generally applicable in individual applications is that of *beyond reasonable doubt* – but that the Court's case-law has identified situations in which the rigour of this rule may be mitigated: where the events lie wholly or in large part within the exclusive knowledge of the authorities, the burden of proof may then be regarded as resting on the authorities to provide a satisfactory and convincing explanation (ECHR's judgment, para. 182 et seqq.). As a logical development of this approach, in the situation where persons are found injured or dead, or who have disappeared in an area within the exclusive control of the authorities of the state and there is prima facie evidence that the state may be involved, the burden of proof may also shift to the government (para. 184).

circumstantial evidence or the drawing of inferences as to the well-foundedness of the applicant's allegations with regard to violations of Article 2 in cases of forced disappearance seems to be influenced by the practices regularly applied by the IACHR.

4.2.2 Jurisdiction Ratione Temporis

Two cases concerning the question of the ECHR's jurisdiction *ratione temporis*, demonstrate the relevance of the IACHR's case-law for the rulings of the European Court even more. In both cases (*Šilih v. Slovenia*, Application No. 71463/01, judgment of 9 April 2009 and *Varnava and others v. Turkey*, Application No. 16064/90, judgment of 18 September 2009, both Grand Chamber reviews) the Court had to decide whether its jurisdiction was invoked even though the alleged violations happened prior to the ratification of the European Convention by the respective country.

The *Šilih Case* originated in an application against the Republic of Slovenia lodged by Mr. and Ms. Šilih in May 2001, complaining that their son died in 1993 as a result of medical negligence. They alleged that their rights under Articles 2, 3, 6, 13 and 14 had been breached by the inefficiency of the Slovenian judicial system in establishing responsibility for their son's death.[44] The crucial point, however, was that Slovenia had only ratified the European Convention (and accepted the ECHR's jurisdiction) in June 1994. In June 2007 a Chamber of the ECHR delivered a judgment in which it declared the complaint partly admissible and held unanimously that there had been a violation of the *procedural* aspect of Article 2 (= the obligation to carry out an investigation into the alleged violation of the right to life) (ECHR's judgment para. 5). In September 2007 the Slovenian government requested the review of the judgment by the Grand Chamber in accordance with Article 43 of the Convention. In the subsequent proceedings, it contested the Court's jurisdiction *ratione temporis* to deal with the applicants' complaint. The government stressed that while the criminal and civil proceedings concerning the death of the applicants' son both had started after the ratification of the Convention by Slovenia in June 1994, the death had occurred before that date (para. 128). It argued that by declaring the complaint concerning the procedural aspect of Article 2 admissible, the Chamber had contravened the general principles of international law on the

[44] On 3 May 1993 the applicants' twenty-year-old son sought medical assistance in a hospital for, *inter alia*, nausea and itching skin. He was examined by a doctor and received diverse intravenous injections. Following the injections, the applicants' son's condition significantly deteriorated. This was probably a result of him being allergic to one or both of the drugs. A diagnosis of anaphylactic shock was made. Subsequently, the applicants' son was transferred to intensive care. The doctor ordered the administration of, *inter alia*, adrenaline. By the time the cardiologist arrived, the applicants' son had stopped breathing and had no pulse. Cardiopulmonary resuscitation was given. The applicants' son was connected to a respirator and his blood pressure and pulse returned to normal, but he remained in a coma; his brain was severely damaged. The next day, he was transferred to the Ljubljana Clinical Centre where he died on 19 May 1993 (ECHR's judgment, para. 11).

non-retroactivity of treaties, adding that this section of the Chamber's judgment was inconsistent with the Court's established case-law (para. 129).

In its assessment of the facts, the Grand Chamber established that dissenting opinions exist and that in the past varying approaches were taken by different Chambers of the ECHR. Therefore, it arrived at the conclusion that it had to clarify a) whether the procedural obligations arising under Article 2 could be seen as being detachable from the substantive act and capable of coming into play in respect of deaths which occurred prior to the critical date (= ratification of the Convention) or b) alternatively whether they are so inextricably linked to the substantive obligation that an issue may only arise in respect of deaths which occurred after that date (para. 152).

In order to resolve the ambiguities, the Grand Chamber comprehensively cited relevant international law and practice. Among others, it referred to the case-law of the IACHR (para. 106 et. seqq.).[45] It stressed that the IACHR has established *procedural obligations* arising in respect of killings or disappearances under several provisions of the ACHR. The ECHR noticed that in many cases, in particular those where the substantive limb of Article 4 ACHR *(= Right to Life*) had not been breached, the IACHR had examined procedural aspects *autonomously* under Article 8 ACHR (= *Right to a Fair Trial*) and Article 25 (= *Right to Judicial Protection*). The IACHR particularly followed the latter approach in cases where the killing or disappearance took place before the recognition of its jurisdiction by a respondent State (e.g. in *Serrano-Cruz Sisters v. El Salvador,* judgment of March 1, 2005, Series C No. 120,[46] and *Moiwana Village v. Suriname,* judgment of June 15, 2005, Series C No. 124).

Taking these decisions as relevant international practice into account, the Grand Chamber stressed that it had previously determined that Articles 2 and 3 contain a procedural obligation to carry out an effective investigation into alleged breaches of the substantive limb of these provisions (para. 153). It also attached weight to the fact that it has previously examined the question of procedural obligations under Article 2 separately from the question of compliance with the substantive obligation and that on several occasions a breach of a procedural

[45] Beyond this, the ECHR referred to the Vienna Convention of the Law of Treaties, the ILC's Draft Articles on the Responsibility of States, the ICJ's case law concerning *ratione temporis* jurisdiction and the HRC's case law concerning the procedural aspect of the right to life.

[46] The case concerned the disappearance of two girls that took place 13 years before El Salvador recognised the IACHR's jurisdiction. The IACHR decided that alleged 'capture' or 'taking into custody' of the girls by soldiers and their subsequent disappearance, 13 years before El Salvador recognized the contentious jurisdiction of the IACHR, were excluded owing to the limitation to the recognition of the Court's jurisdiction established by El Salvador. As regards alleged deficiencies in the domestic criminal investigations into the disappearances in this case, however, the IACHR found that the allegations concerned judicial proceedings and thus *independent facts* which had taken place after the recognition of the IACHR's jurisdiction. It therefore concluded that it had temporal jurisdiction to deal with these allegations as they constituted specific and autonomous violations concerning the denial of justice (ECHR's judgment, para. 115 et seqq.).

obligation has been alleged in the absence of any complaint as to the substantive aspect of Article 2. Against this background, the Grand Chamber concluded that *the procedural obligation to carry out an effective investigation under Article 2 has evolved into a separate and autonomous duty.* In this sense it could be considered *to be a detachable obligation arising out of Article 2* capable of binding the state even when the death took place before the critical date of ratification (para. 159). In order to buttress its finding, the Grand Chamber referred to jurisprudence of other international institutions, among others the IACHR, which likewise, though under different provisions, accepted jurisdiction *ratione temporis* over the procedural complaints relating to deaths which had taken place outside their temporal jurisdiction (para. 160).

This finding was confirmed by the Grand Chamber in the *Case Varnava and Others v. Turkey* (Application No. 16064/90 a.o., judgment of 18 September 2009). The case comprises 9 applications from 1990 concerning the disappearance of 9 persons after being detained by Turkish military forces in the context of military operations in northern Cyprus in 1974 (ECHR's judgment, para. 1 et seqq.). Most of the disappeared were seen in Turkish prisons by acquaintances soon after their disappearance, later all traces of them were lost. The Turkish government disputed, however, that the applicants had been taken into Turkish captivity. Moreover it denied the Court's jurisdiction in this case as the right of individual petition was limited to facts taking place after the date of declaration on 28 January 1987.

During the proceedings, the Grand Chamber stressed that the applicants specified that their claims related only to the situation after January 1987, namely the continuing failure to account for the fate and whereabouts of the missing men by providing an effective investigation (para. 134). In this context it cited the IACHR's ruling in a case also dealing with forced disappearance (*Blake v. Guatemala* of 1999). In that case, the IACHR had to deal with the *ratione temporis* exception raised by the government since the disappearance itself had taken place before the critical date and it considered that the effects of such human rights violations *may* be prolonged continuously or permanently until such time as the victim's fate or whereabouts are established (para. 94 et seqq.). In its judgment the *IACHR* considered the disappearance as marking the beginning of a *"continuing situation"*[47] and declared that Guatemala had violated the right of Mr. Blake's relatives to have his disappearance and death effectively investigated, to have those responsible prosecuted and punished where appropriate, and to be compensated, notwithstanding the lack of temporal competence to deal with the substantive complaints.

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[47] Interestingly, the term "continuing situation" initially was developed by the ECHR (see *De Becker v. Belgium*, Application No. 214/5, judgment of 27 March 1962), albeit not in the context of forced disappearance.

The ECHR's Grand Chamber followed this line of argumentation and finally arrived at the conclusion that the *procedural obligation to carry out an investigation* into deaths under Article 2 *had evolved into a separate and autonomous duty* and that it could be considered to be a *"detachable obligation"* capable of binding the state even when the death took place before the entry into force of the Convention (para. 138 et seqq.). The Grand Chamber quoted not only its own case-law (= *Šilih Case*) but noted that the IACHR, and to some extent the UNHRC applied the same approach to the procedural aspect of disappearances, i.e. examining allegations of denial of justice or judicial protection even where the disappearance occurred before recognition of its jurisdiction.

4.2.3 Legal Status of Interim Measures

A further impressive example of the weight attached to the rulings of the IACHR – as well as other international judicial bodies – by the ECHR is the judgment in the *Case Mamatkulov and Askarov v. Turkey* (Application No. 46827/99 and 46951/99, judgment of February 4, 2005, Grand Chamber Review) concerning the legal status of interim measures.

The case originated in applications against the Republic of Turkey lodged by two Uzbek nationals in March 1999 concerning the applicants' extradition to the Republic of Uzbekistan. The applicants relied on Articles 2, 3 and 6 of the European Convention and Rule 39[48] of the Rules of Court.[49] During the proceeding before the Grand Chamber, the Turkish government referred to a previous decision (*Cruz Varas and Others v. Sweden*, of 1991) where the ECHR had found that *the contracting states had no legal obligation to comply with interim measures* (ECHR's judgement para. 96 et seqq.). Moreover, it stressed that international courts have to operate within the scope of the powers conferred upon them by international treaties. If the treaty did not grant them power to order binding interim measures (and the European Convention is silent on this aspect), then no such power would exist. The *International*

[48] "The Chamber or, where appropriate, its President may, at the request of a party or of any other person concerned, or of its own motion, indicate to the parties any interim measure which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it (Art. 39 I Rules of the ECHR).

[49] Both applicants were arrested after there entry into Turkey due to arrest warrants suspecting them of terrorist attacks in Uzbekistan. During the extradition proceedings, the applicants' representatives argued that their clients were working for the democratisation of their country and that political dissidents in Uzbekistan were arrested by the authorities and subjected to torture in prison. On 18 March 1999 the President of the relevant Chamber of the ECHR decided to indicate to the government that it was desirable in the interest of the parties not to extradite the applicants prior to the meeting of the competent Chamber, which was to take place on 23 March 1999. On 19 March 1999 the Turkish government issued a decree ordering the applicants' extradition and informed the ECHR that it had received assurances regarding the two applicants from the Uzbek authorities. On 23 March 1999 the Chamber decided to extend the interim measure. However, on 27 March 1999 the applicants were handed over to the Uzbek authorities and taken into custody. On 28 June 1999 the Supreme Court of the Republic of Uzbekistan found the applicants guilty of diverse offences and sentenced them to twenty years' and eleven years' imprisonment respectively. Prior to the judgment, the legal representatives were unable to contact them by either letter or telephone (ECHR's judgment para. 1 et seqq.).

Commission of Jurists, however, which acted as a third party, submitted a statement and stressed that in the light of the general principles of international law, the law of treaties and international case-law, interim measures indicated under Rule 39 of the Rules of Court *have to be considered binding* on the state concerned (para. 98).

The Grand Chamber not only allowed for this submission but extensively referred to international law and practice, among others to Article 62 of the American Convention stating that in cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the IACHR shall adopt such provisional measures as it deems pertinent. It also cited the IACHR's decision on provisional measures in the *Case James et al. v. Trinidad and Tobago* of 2000 where the Court ruled that the states parties to the ACHR must fully comply in good faith with all of the provisions of the Convention, including those relative to the operation of the two supervisory organs of the American Convention (the Court and the Commission[50]), and that, in view of the Convention's fundamental objective of guaranteeing the effective protection of human rights, state parties must refrain from taking actions that may frustrate the *restitutio in integrum* of the rights of the alleged victims (para. 49 et seqq.).[51]

Based on these arguments, the Grand Chamber passed a landmark decision concerning the legal status of interim measures. It is especially remarkable that the Grand Chamber deviated from the previous decisions where it concluded that the power to order legally binding interim measures *could not* be inferred from either Article 34, or from other sources, because an express clause was missing in the European Convention (para. 109 et seqq.).[52] In the present case, however, the Grand Chamber pointed at the *law and practice of other international human rights bodies with regard to interim, provisional or precautionary measures*. It underlined that in a number of recent decisions and orders, international courts and institutions have stressed the importance and purpose of interim measures and pointed out that compliance with such measures was necessary to ensure the effectiveness of their decisions on the merits (see above). It particularly referred to the practices of the IACHR, the UNHRC, UNCAT, and the ICJ, which have confirmed that the preservation of the asserted rights of the parties in the face of the risk of irreparable damage represents an essential objective of interim measures in international law. Likewise, the Grand Chamber stressed that also under the

[50] The ACHR, however, is silent on this aspect with regard to the Commission, only the Commission's Rules of Procedure provide for this authority (= in Article 25).

[51] It also referred to the case law of the UNHRC (*Dante Piandiong, Jesus Morallos and Archie Bulan v. the Philippines* of 2000, the UN Committee on Torture (*Cecilia Rosana Núñez Chipana v. Venezuela*, of 1998) and the ICJ (La Grand Case of 1998).

[52] See e.g. *Cruz Varas and Others v. Sweden* of 1991 and *Čonka v. Belgium* of 2001.

European Convention system, interim measures would play a vital role in avoiding irreversible situations that would prevent the Court from properly examining the application and, where appropriate, securing for the applicant the practical and effective benefit of the asserted Convention rights.

Regarding the concrete case, the Grand Chamber stressed that the fact that the Turkish government failed to comply with the measures indicated by the Court under Rule 39 raised the issue of whether the respondent state was in breach of its undertaking under Article 34 not to hinder the applicants in the exercise of their right of individual application (para. 99 et seqq.). The Grand Chamber arrived at the conclusion that because of the extradition of the applicants to Uzbekistan, *the level of protection which the Court was able to afford was irreversibly reduced*. As a consequence, the Court was prevented from properly assessing whether the applicants were exposed to a real risk of ill-treatment. Finally, it concluded (by 14 votes to 3[53]) that the facts of the case clearly show *that the applicants were hindered in the effective exercise of their right of individual application which resulted in a violation of Article 34*.

4.2.4 Case law on Reparation

Not in all cases, however, has the ECHR followed the practice developed by the IACHR. The issue of reparation provides an example in this regard.

The IACHR's case law on reparations has been appreciated in pertinent literature as being innovative and having contributed to the advancement of the regulation of reparations under international human rights law in general (e.g. Oellers-Frahm 2002: 409 or Pasqualucci 2003: 289). The Court regularly not only orders states to pay compensation for pecuniary and non-pecuniary damages, but to cover, for example, victims' health care expenses or educational benefits. Beyond this it orders symbolic forms of reparation such as the construction of memorials or public apologies, it orders the state to investigate the facts and punish the persons responsible, and moreover, it orders concrete changes in law and practice of the state concerned or the ratification of international treaties such as the *Inter-American Convention on Forced Disappearance of Persons*. The ECHR, by contrast, so far has only ordered the states to pay monetary compensation (however, indirectly general measures arise as well out of the judgments, see *note 7*).

[53] In a partly dissenting opinion, Judges Caflisch, Türman and Kovler criticized that the judgment was ambiguous about the binding effect of interim measures. Moreover, they were of the opinion that Article 34 could not serve as a basis for holding that the ECHR's interim measures are binding.

In the Case of *Bersunkayeva v. Russia* (Application No. 27233/03, judgment of 5 June 2009), the applicant complained about the disappearance of her son, following unacknowledged detention and a lack of effective investigation.[54] In the proceedings before the ECHR, the applicant referred to Article 41 (= *just satisfaction*) and requested that an independent investigation which would comply with the requirements of the Convention should be conducted into her son's disappearance (ECHR's judgment, para. 155). In this connection, she relied among others on the case-law of the IACHR. With reference to the latter's practice the applicant also requested that other measures should be ordered by the ECHR. Those included a public apology, whereby the respondent government should acknowledge publicly its responsibility for the violation of the applicant's rights and those of her son, and allow the applicant to contact her son if he was alive, or indicate the place of his burial and transfer his remains to the cemetery indicated by the applicant (ibid.).

The ECHR stressed that, in the context of the execution of judgments in accordance with Article 46 of the Convention, a judgment in which it finds a breach imposes on the respondent state a legal obligation under that provision to put an end to the breach and to make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach (para. 157). However, it also stressed that its judgments are essentially declaratory in nature and, in general, *it would be primarily for the state concerned to choose the means to be used in its domestic legal order* in order to discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment (para. 159).

This example demonstrates that the ECHR does not share all of the IACHR's assessments. In the context of reparation, the ECHR strictly adheres to the wording of the European Convention and does not order measures beyond monetary compensation.

5. Conclusion

As the analysis has demonstrated, there is a perceptible growing interest in the IACHR's judgments both on the part of the ECHR and the parties to the proceedings. IACHR rulings are increasingly used in proceedings before the ECHR to back the reasoning, in particular in cases where the ECHR is deviating from previous decisions. It is not only procedural precedents that are referred to, but also to material aspects; both have to be considered a

[54] The applicant, a Chechen citizen, alleged that six men wearing camouflage uniforms and masks with machine-guns, presumably soldiers, deported her son, who has been unaccounted for ever since (ECHR's judgment, para. 1 et seqq.).

useful practice, as with regard to massive human rights violations such as forced disappearance or inhumane treatment the IACHR is the expert and has established crucial precedents which are of great use for other human rights courts. Furthermore, one can observe the convergence of jurisdiction in several areas of the European and the Inter-American regional human rights system, e.g. with regard to the burden of proof in the context of forced disappearance or to the legal status of interim measures. Further examples are the increasing ban of the death penalty (e.g. *Öcalan v. Turkey*, Application No. 46221/99, judgment of 12 May 2005, see *table 3*, appendix) or a common understanding of what kind of state action constitutes torture (e.g. *Gäfken v. Germany*, Application No. 22978/05, judgment of 1 June 2010, see *table 3*, appendix). The mutual reference and the nascent common standards indeed point to the development of a judicial human rights system – at least covering the European and the American hemisphere. The trend that different judicial bodies increasingly apply the same standards, at least with regard to fundamental rights such as the right to life and the prohibition of torture, must be considered desirable. An international judicial human rights system with widespread participation of diverse (quasi-) judicial bodies and convergence of procedural as well as material standards certainly would strengthen worldwide human rights protection. The participation in this system, should however be extended. While the UNHRC and partially other UN human rights bodies (such as UNCAT and CEDAW) as well as the Criminal Tribunals do already participate in the emerging international judicial system, the African Commission on Human and Peoples' Rights, for instance, is not yet integrated (when one takes cross-references as an indicator). That the newly established African Court on Human and Peoples' Rights will quote other human rights bodies in its initial judgments in order to back up its decisions is probable, whether the others will refer to the African Court's rulings remains to be seen. In order to facilitate the integration and participation of different judicial bodies, (regional) peculiarities should be accepted. Such a practice of 'harmonization' but not 'homogenization' as claimed for instance by Paolo Carozza, enhances the probability that further judicial human rights bodies will actively participate in the international judicial system.

Not only international but national courts as well should participate in a judicial human rights system. As Slaughter suggested, such a system should consist of *fora of transnational litigation*. Therefore, not only the ECHR's tendency of quoting the IACHR but also a growing tendency in high ranking national courts to make reference to the judgments of the IACHR is a crucial trend with regard to the development of a judicial system. More and more national courts, for instance the Peruvian Constitutional Court, but also high-level courts of other

countries, refer to the sentences of the IACHR in their own judgments, thus anchoring international orders and fostering the integration of international law into the national legal systems (e.g. Abreu Burelli 2005: 110 et seq.). Due to this practice numerous victims have benefited from the Inter-American system without having to bring their cases before the Inter-American institutions. The multiplying effect via national court rulings should not be underestimated. A comprehensive analysis of this phenomenon would require an additional study. Therefore, one example shall be given conclusively, based on an article by Diego García-Sayán, judge at the IACHR, who arrives at the conclusion that a lively interaction takes place between the IACHR and high ranking national courts (García-Sayán 2005). One impressive example is the reference of diverse national courts to the IACHR's decision that national amnesty laws are not compatible with the American Convention on Human Rights (*Case of Barrios Altos v. Peru*, judgment of March 14, 2001, Series C No. 75). García-Sayán emphasizes the immense repercussions of this judgment in the jurisprudence of the courts in the region (e.g. in Argentina, Columbia and Chile), particularly important in the context of fighting against widespread impunity (García-Sayán 2005: 360).

Summing up, when taking self-awareness of the judges involved, willingness to recognize each other as participants in a common judicial enterprise, and consistent jurisprudence in certain areas through cooperation and mutual recognition of each other's jurisprudence as indicators, an international judicial human rights system is emerging. International jurisprudence on human rights issues is no longer exclusively dominated by the ECHR. The Inter-American institutions are increasingly accepted as experts with regard to certain types of gross human rights violations – not only by the ECHR but also by high-ranking national courts in the American hemisphere.

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Table 3: ***Overview of Reference made to the IA-System in ECHR Judgments***

Number	Case	Keywords	Type of Reference
1)	***Golder v. The United Kingdom,*** Application No. 4451/70, judgment of 21 February 1975	Special character of the European Convention was stressed (comparable only to the American Convention)	Separate opinion of Judge Fitzmaurice
2)	***Cruz Varas v. Sweden***, Application No. 15576/89, judgment of 21 March 1991	Expulsion	Reference with regard to „political developments in Chile"
3)	***Akdivar a.o. v. Turkey***, Application No. 21893/93, judgment of 30 August 1996	Exhaustion of local remedies (burden of proof)	Court (in its assessment)
4)	***Aydin v. Turkey***, Application No. 23178/94, judgment of 25 September 1997	Violation of Art. 3 (Rape of a detainee constitutes torture)	Third party (Amnesty International)
5)	***Kurt v. Turkey***, Application No. 24276/94, judgment of 25 May 1998	Violation of Art. 2 and 3 in cases of disappearance	Applicant, third party (AI) and Court (relevant international law and practice)
6)	***Ergi v. Turkey***, Application No. 23818/94, judgment of 28 July 1998	Reversed burden of proof (extralegal killings)	Applicant
7)	***Ertak v. Turkey***, Application No. 20764/92, judgment of 9 May 2000	Case-law on forced disappearance	Applicant
8)	***Timurtas v. Turkey***, Application No. 23531/94, judgment of 13 June 2000	Violation of Art. 2 (forced disappearance) Whether persons must presumed dead Burden of proof (beyond reasonable doubt or inference from sufficient circumstantial evidence)	Third Party (NGO = CEJIL)
9)	***Cicek v. Turkey***, Application No. 25704/94, judgment of 27 February 2001	Violation of Art. 2 (forced disappearance) Whether persons must presumed dead	Concurring Opinion (Judge Maruste criticised to equalise death and disappearance)
10)	***Hugh Jordan v. UK***, Application No. 24746/94, judgment of 4 May 2001	International standards concerning right to life (State's obligation to carry out an effective investigation in cases were lethal force is used by state agents)	Third party (Nothern Ireland Human Rights Commission
11)	***McKerr v. UK***, Application No. 28883/95, judgment of 5 May 2001	International standards concerning right to life (State's obligation to carry out an effective investigation in cases were lethal force is used by state agents)	Third party (Nothern Ireland Human Rights Commission

12)	***Shanaghan v. UK***, Application No. 37715/97, judgment of 5 May 2001	International standards concerning right to life (State's obligation to carry out an effective investigation in cases were lethal force is used by state agents)	Third party (Nothern Ireland Human Rights Commission
13)	***Kelly a.o. v. UK***, Application No. 30054/96, judgment of 5 May 2001	International standards concerning right to life (State's obligation to carry out an effective investigation in cases were lethal force is used by state agents)	Third party (Nothern Ireland Human Rights Commission
14)	***Sarli v. Turkey***, Application No. 24490/94, judgment of 22 May 2001	Forced Disappearance (government's obligation to investigate effectively)	Applicant
15)	***Anguelova v. Bulgaria***, Application No. 38361/97, judgment of 13 June 2002	Standard of evidence "beyond reasonable doubt" in the context of racial discrimination	Partly dissenting opinion Judge Bonello suggests to apply other standards of proof (e.g. to shift the burden of proof or to infer that applicant's charges are well founded)
16)	***G.B. v. Bulgaria***, Application No. 42346/98, judgment of 11 March 2004	Death sentence Inhumane and degrading treatment	Court (relevant international law and practice)
17)	***Iorgov v. Bulgaria***, Application No. 40653/98, judgment of 11 March 2004	Death sentence Inhumane and degrading treatment	Court (relevant international law and practice)
18)	***Vo v. France***, Application No. 53924/00, judgment of 8 July 2004	Controversy on the concept of beginning of life and personhood (whose life is protected under Art. 2)	Third Party (NGO Center for Reproductive Rights); Court (assessement)
19)	***Hasan Ilhan v. Turkey***, Application No. 22494/93, judgment of 9 November 2004	Prohibition of Discrimination Standard of proof	Partly dissenting opinion According to Judge Loucaides, the standard "beyond reasonable" doubt should be used only in criminal proceedings not in hr proceedings where states are the accused
20)	***Issa a.o. v. Turkey***, Application No. 31821/96, judgment of 16 November 2004	Meaning and scope of the concept of "jurisdiction" in Art. 1 Extra-territorial acts	Court (in its assessment)
21)	***Mamatkulov and Askarov v. Turkey***, Application No. 46827/99, judgment of 4 February 2005	Legal status of interim measures	Third Party (NGO ICJ); Court (relevant international law and practice and assessment)
22)	***Akkum a.o. v. Turkey***, Application No. 21894/93, judgment of 24 March 2005	Burden of proof (in case of extralegal execution) Drawing inferences as to the well-foundedness of the applicant's allegations	Applicants

23)	***Öcalan v. Turkey***, Application No. 46221/99, judgment of 12 May 2005	Legality of death penalty after an unfair proceeding	Court (relevant international law and practice and assessment)
24)	***Ergin v. Turkey***, Application No. 47533/99, judgment of 4 May 2006	Jurisdiction of military courts for criminal proceedings against civilians	Court (relevant international law and practice and assessment)
25)	***Olaechea Cahuas v. Spain***, Application No. 24668/03, judgment of 10 August 2006	Extradition to country where human rights are threatened	In the context of the national extradition proceeding (situation in Peru)
26)	***Stoll v. Switzerland***, Application No. 69698/01, judgment of 10 December 2007	Freedom of expression (with regard to confidential governmental information)	Court (relevant international law and practice and assessment)
27)	***Bevacqu and S. v. Bulgaria***, Application No. 71127/01, judgment of 12 June 2008	State obligation to protect women against (domestic) violence	Court (relevant international law and practice and assessment)
28)	***Lexa v. Slovakia***, Application No. 54334/00, judgment of 23 September 2008	Prevention of criminal liability due to national amnesty laws	Court (relevant international law and practice and assessment)
29)	***Sergey Zolotukhin v. Russia***, Application No. 14939/ 03, judgment of 10 February 2009	Non bis in idem principle Prohibition of being prosecuted twice in connection with the same offence	Court (relevant international law and practice and assessment)
30)	***Silih v. Slovenia***, Application No. 71463/01, judgment of 9 April 2009	Distinction of substantial and procedural aspect of Art. 2 Jurisdiction ratione temporis	Court (relevant international law and practice and assessment)
31)	***Bersunkayeva v. Russia***, Application No. 27233/03, judgment of 5 June 2009	Compensation according to Art. 41 Non-pecuniary form of compensation (investigation and public apology)	Applicant; Court (only indirectly via reference to a previous case)
32)	***Opuz v. Turkey***, Application No. 33401/02, judgment of 9 June 2009	Discrimination (domestic violence against women)	Third Party (NGO Interrights); Court (relevant international law and practice and assessment)
33)	***Maresti v. Croatia***, Application No. 55759/07, judgment of 25 June 2009	Non bis in idem principle Prohibition of being prosecuted twice in connection with the same offence	Applicant; Court (relevant international law and practice)
34)	***Scoppola v. Italy***, Application No. 10249/03, judgment of 17 September 2009	Prohibition of retroactivity of law	Applicant; Court (relevant international law and practice)
35)	***Varnava a.o. v. Turkey,*** Application No. 16064/90, judgment of 18 September 2009	Distinction of substantial and procedural aspect of Art. 2 Jurisdiction ratione temporis	Third Party (NGO Redress – with regard to reparation); Court (relevant international law and practice and assessment)

36)	***Gäfken v. Germany***, Application No. 22978/05, judgment of 1 June 2010	Question whether a “mere” threat of torture constitutes torture	Third Party (NGO Redress Fund); Court (relevant international law and practice and assessment)