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## CONFERENCE

### ADVOCACY BEFORE REGIONAL HUMAN RIGHTS BODIES: A CROSS-REGIONAL AGENDA\*

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\* This event, held on Oct. 20, 2008, was a part of the MacArthur International Justice Lecture Series and was presented by the John D. and Catherine T. MacArthur Foundation, the *American University, Washington College of Law*, and the Inter-American Commission and Court on Human Rights. This transcript has been edited.

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#### OPENING REMARKS

##### A. *Claudio Grossman*<sup>1</sup>

Dear friends, on behalf of the *American University Washington College of Law*, good morning and welcome to the MacArthur International Justice Lecture Series Conference on “Advocacy Before Regional Human Rights Bodies: A Cross-Regional Agenda.” We are honored to host this important conference, which will examine a vital subject. I am sure this joint initiative will contribute significantly to the strengthening of human dignity.

We receive you today in an institution deeply committed to human rights and advocacy. Our law school was the first law school in this country to be founded by women in a moment when women were not admitted into law schools or into the practice of the profession. Our founding mothers believed that in order to achieve gender equality, it was essential that we educate men and women alike within the legal profession. Their imagination and commitment transformed the profession and opened possibilities to achieve justice without discrimination.

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1. Claudio Grossman is a Professor of Law and, since 1995, Dean of the *American University Washington College of Law*, where he is also the Raymond Geraldson Scholar for International and Humanitarian Law. Dean Grossman serves as the Chair of the United Nations Committee against Torture, and as a member of the Commission for the Control of Interpol’s Files. Additionally, he is a member of the Governing Board of the International Association of Law Schools and Chair of the Association of American Law Schools Committee on International Cooperation. Dean Grossman is currently a member of the Board of the College of the Americas, where he served as President from 2003–2007. He was a member of the Inter-American Commission on Human Rights from 1993–2001, where he served in numerous capacities including two terms as President, two terms as First Vice President, Second Vice President, Special Rapporteur on the Rights of Women, Special Rapporteur on the Rights of Indigenous Populations, and Observer of the AMIA Trial. Dean Grossman has authored numerous publications regarding international law and human rights and has received numerous awards for his work in those fields.

Following their example, our students, faculty, and administrators have developed numerous initiatives to promote and protect human rights. As one example, our Academy on Human Rights and Humanitarian Law attracts leading scholars and activists in the universal and regional systems as well as hundreds of students interested in international law every year.

Another example includes our Center for Human Rights and Humanitarian Law, which has spearheaded major human rights initiatives to fight injustice. The Center recently launched a new institute in collaboration with the International Committee of the Red Cross to train law school professors on the substance and importance of international humanitarian law and, in particular, the teaching of the Geneva Conventions.

Our renowned clinical program includes nine in-house clinics in areas such as international human rights, disability rights, domestic violence, intellectual property, and community economic development. Our clinics took the first case in the United States involving female genital mutilation; by changing the jurisprudence on this matter to allow such mutilation to be grounds for asylum, the clinics broadened the scope of the law with respect to this issue. Our clinics also represent clients in the United States, Africa, and Latin America, offering pro bono assistance to incorporate international law into the domestic realm. The *Washington College of Law* has also created the United Nations Committee Against Torture Project, which works to reinforce and strengthen the notion that there is no justification for torture whatsoever, and that it is essential to comply with the provisions of the Convention Against Torture in all its dimensions.

Our Impact Litigation Project, another initiative in the law school, stresses accountability, freedom of expression, rights of women, and rights of indigenous populations. Our school also founded the first war crimes research institution in the United States to support research and fight impunity for international crimes. Since it was founded, the institution has understood that accountability is an essential requirement for the rule of law.

As we develop our numerous programs and activities, we have seen that we learn as much, or even more than what we contribute. In the past, law schools would do research, store the products of such research in libraries, train people, and thereafter claim certain exclusivity over the particular substantive areas. Now we see numerous institutions, non-governmental organizations (NGOs), international bodies, and think tanks that engage in similar pursuits,

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thereby diversifying knowledge and its sources. In our strategic vision, partnering with different actors provides ways to learn from each other and to multiply our outreach.

In that spirit, we have envisioned this conference as a space for the exchange of experiences and cross-culture communication between regional organizations that supervise compliance with human rights treaties. During this conference, we seek to discuss approaches and experiences in combating impunity, the scope of reparations, difficulties and accomplishments in guaranteeing the enforcement of reparations, and the overall challenges facing regional systems for the protection of human rights. Although we will be referring to different treaty-based regional supervisory organs, the fact that a similar language is used by all three constituent treaties opens up space for comparisons and identification of good practices. After all, the narrative of human rights is that of human dignity—that unites us all.

Before we begin, I would like to take this opportunity to welcome our distinguished participants, especially those who have come from afar, and to thank them in advance for sharing their unique insights. We are joined by participants from Africa, Europe, and the Americas, each representing different international organizations, law courts, civil societies, and academic institutions.

Let me thank, above all, the MacArthur Foundation whose support and commitment made this conference possible. We give special thanks to Mary Page, Director of the Human Rights and International Justice Area within the Program on Global Security and Sustainability.

I would also like to thank the Inter-American Commission on Human Rights (“Inter-American Commission”) and the Inter-American Court of Human Rights (“Inter-American Court”) for their co-sponsorship. In spite of their limited resources, both supervisory organs reach out to civil society through the personal commitment of their members.

Our special thanks also go to the Inter-American Commission and Inter-American Court’s secretariat and to Mr. Jose Miguel Insulza, Secretary General of the Organization of American States (OAS).

I also want to thank the *American University Law Review* and its editors-in-chief, Karen Williams (Volume 58) and David Courchaine (Volume 59). The *Law Review* will be publishing the proceedings of this conference. It bodes well for the legal profession to have students like those on our Law Review attracted to the legal field. In

spite of their regular pressures as law students, they have volunteered to do this important job.

Let me also thank my colleague, Professor Diane Orentlicher, renowned international law expert. Diane came up with the idea of this conference and put the law school in touch with the MacArthur Foundation.

Our gratitude also goes to Agustina Del Campo, the coordinator of our Impact litigation Project, who helped organize and shape this event.

It is my pleasure now to introduce Mr. Jonathan Fanton who has served as the President of the John D. and Catherine T. MacArthur Foundation since 1999. Mr. Fanton oversees one of the nation's largest foundations—a foundation which makes grants and runs programs related to the investment of more than one quarter of a billion dollars annually and works in more than sixty countries. Domestically, the Foundation's programs encompass community development, housing, juvenile justice, and education with a focus on digital media and learning. Internationally, the Foundation works in the fields of human rights and international justice, biodiversity conservation, population and reproductive health, international peace and security, as well as migration and human mobility. The Foundation is also well known for its support of exceptionally creative individuals through the MacArthur Fellows Program.

In addition to outstanding leadership and management of the MacArthur Foundation, Mr. Fanton is a board member and former board chairperson of Human Rights Watch, the largest U.S.-based human rights organization, which operates in seventy countries. He is also an advisory trustee of the Rockefeller Brothers Fund, a member of the Board of Trustees of the Chicago History Museum, the founding Board Chair of the Security Council Report, and Co-Chair of Chicago's Partnership for New Communities. Mr. Fanton is also a distinguished author and editor, having written *The University and Civil Society*, Volumes I and II,<sup>2</sup> and being co-editor of *John Brown: Great Lives Observed*<sup>3</sup> and *The Manhattan Project: A Documentary Introduction to the Atomic Age*.<sup>4</sup>

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2. JONATHAN F. FANTON, *THE UNIVERSITY AND CIVIL SOCIETY* (New School for Social Research 1995).

3. JOHN BROWN: *GREAT LIVES OBSERVED* (Richard Warch & Jonathan Fanton eds., 1973).

4. *THE MANHATTAN PROJECT: A DOCUMENTARY INTRODUCTION TO THE ATOMIC AGE* (Michael B. Stoff, Jonathan F. Fanton & R. Hal Williams eds., Temple University Press 1991).

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We are fortunate to have him at the helm of the MacArthur Foundation, contributing greatly to the promotion of important values. Thank you very much.

B. *Jonathan Fanton*<sup>5</sup>

Thank you, Dean Grossman, for those kind words and for sponsoring this important colloquium. It has been a great pleasure working with your faculty and staff. They have done a superb job, and we are really privileged to be here.

There is a little known part of my biography not mentioned, which is that in the 1990s, I chaired the Middle States Accreditation Review for *American University*. So this is a university that I know extremely well. And I have great respect for all parts of it, but particularly for the law school that stood out in that accreditation in the 1990s.

This is one of four convocations MacArthur is sponsoring to mark its 30th anniversary and to remind us that human rights and international justice have been at the core of MacArthur's work since its founding. We began with the first conference at DePaul to assess the progress and prospects of the International Criminal Court (ICC). Early next year there will be a symposium at the *Yale Law School* on building political will to advance the system of international justice followed by an event at *University of California, Berkeley* that will explore how witnesses and victims participate in international courts and tribunals.

The *Washington College of Law*, distinguished by its long commitment to human rights and international law, is an appropriate venue for the second convocation in our series. MacArthur is deeply impressed with the work of this institution, your Center for Human Rights and Humanitarian Law, the International Human Rights Law Clinic, and the War Crimes Research Office are among many programs here that advance human rights and international law. Monitoring and reporting on the international Inter-American Court, analyzing defense procedures for those indicted by the ICC, training both scholars and activists in human rights law, and more—the *Washington College of Law* has established *American University* as a leading venue for research, debate, and action in our quest for an effective system of international justice.

The contributions of your faculty members are far-reaching: your Dean, as past president of the Inter-American Commission and now Chair of the United Nations Committee Against Torture; my friend,

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5. President, John D. and Catherine T. MacArthur Foundation.

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Herman Schwartz, advising new governments in east and central Europe on constitutional reform; Robert Goldman, another former Inter-American Commission President, now serving on the International Commission of Eminent Jurists Panel on Terrorism, Counter-Terrorism, and Human Rights; and Diane Orentlicher, working with the UN as an independent expert on combating impunity. I know that is not everybody, but any law school in the world would be proud of this faculty and its contributions.

Your work resonates profoundly with MacArthur's aspiration to advance the rights of *all* to seek redress when national courts fail to produce justice. Over the years, MacArthur has supported 600 institutions, working on the frontlines in ninety countries, to expose abuses and strengthen the rule of law. We have a deep interest in helping to fashion an integrated system of international justice that includes the ICC, regional human rights courts and commissions, and special tribunals impaneled by the UN as well as the UN Human Rights Council.

MacArthur supported the Coalition for the ICC that helped bring the ICC into existence more quickly than expected; global rights, among others, to gather evidence useful in the ICC's first cases; the Institute of War and Peace reporting to train local jurists to train local ICC trials; redress to help engage victims and witnesses; and the International Bar Association to conduct independent analysis of the ICC's proceedings. We hope that stronger accountability will deter those who would commit mass atrocities but we know there will be situations that require prompt action to prevent future situations like the one in Rwanda.

MacArthur was privileged to support the International Commission on Intervention and State Sovereignty, which articulated the doctrine of Responsibility to Protect adopted by the UN in 2005. It affirms that when states fail to protect, or worse, commit abuses against their own citizens, the international community has the responsibility to step in to protect citizens.

The world has a stronger arsenal for justice now than ever before. While each element had quite separate origins, we are on the cusp of forging an integrated system of international justice from the disparate parts—and that is what these convocations are meant to say and to illustrate.

The age of impunity is about to give way to an age of accountability. The high profile cases of Slobodan Milosovic, Radovan Karadzic, Charles Taylor, Augusto Pinochet, Alberto Fujimori, and Omar Al-Bashir show that leaders can no longer

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commit genocide and crimes against humanity without consequences. And the tribunal for the former Yugoslavia, Rwanda, Sierra Leone, and Cambodia are trying hundreds of other top-level perpetrators.

But the story of the regional courts and commissions is just as impressive, and it needs to be told. Their activity and influence are on the rise. What we want to do through this colloquium is to underscore that it is not just the high profile cases that you read about—it is the everyday work on thousands of cases by the regional courts and commissions that is helping to build the system of international justice.

The European Court of Human Rights (“European Court” or “Strasbourg Court”) in 1989 registered only 400 cases, but last year, some 40,000 cases were registered. The Inter-American Court, twenty years younger, has some 150 active cases but the level of applications is rising: 1500 petitions were received just last year. And the African Court on Human and Peoples’ Rights (“African Court”), which is only four years old, is preparing to try its first cases. While there is yet no human rights mechanism on a regional basis in Asia, the recently adopted ASEAN Charter includes a provision for a human rights body and talks are now underway on its design. So Europe, Inter-America, Africa, and eventually Asia are all coming together.

Regional courts and commissions provide ordinary people with the opportunity to appeal cases of police abuse, discrimination, or abridgement of free expression and assembly when they have exhausted remedies within national justice systems. Regional courts can raise the quality of justice in national courts, and a stronger culture for the rule of law may well prevent everyday abuses from aggregating into the worst crimes imaginable.

MacArthur has a deep interest in strengthening these regional bodies. We have funded NGOs such as Access to Justice in Nigeria, and the Black Soil Center for the Protection of Media Rights in Russia to bring precedent-setting cases to these courts and commissions. We are also interested in helping the regional courts and commissions directly and will, I hope, early in 2009, announce a major new initiative aimed at helping the new African Court take root.

Now, for all of this encouraging news, we know there are challenges to realizing the full potential of regional and sub-regional mechanisms—which we should also talk about—and that is the topic of this conference. How do we make the recommendations of regional human rights bodies more effective? How do we choose



cases that will set influential precedents? How do we strengthen the network of NGOs to build strong cases and bring them forward, especially in Africa. How do we share experience and expertise most effectively and strengthen cooperation across regions and countries? These are the critical questions that our eminent panelists will be addressing today. You have put together just an extraordinary group of panelists. They collectively have moved the international justice system forward to where it is today.

To recognize the contributions of the people in this room and on these panels and the many others who have labored to build this system, the MacArthur Foundation last year created an award for advancing international justice. The award honors an individual or organization that advances the cause of international justice—it could be a world leader, a courageous judge, or an ordinary citizen working through a human rights group. The first recipient was former UN Secretary General Kofi Annan in recognition of his contribution to building the ICC and encouraging the development of the responsibility to protect.

We have chosen this venue to announce the second winner of the MacArthur International Justice Award. We have chosen someone present at the creation of the modern era of international justice, a distinguished jurist and legal scholar, a person whose clarity of purpose, fairness, and credibility is a force that inspires all who labor in the special tribunals, regional human rights courts, and the ICC itself. And so it is with great pleasure, great honor, that I announce that the second recipient of the MacArthur Award for International Justice will be Richard J. Goldstone.

Justice Goldstone, already a prominent judge, came to international attention as the Chair of the Commission of Inquiry regarding public violence and intimidation in the aftermath of apartheid in his native South Africa. His wise and even-handed direction of the Commission proved invaluable to the democratic transition in that country where he also served as an inaugural member of the Constitutional Court.

In 1994, Justice Goldstone was appointed Chief Prosecutor of the UN International Criminal Tribunals for the former Yugoslavia and for Rwanda, the first of their kind since Nuremberg. His mature, meticulous, and measured exercise of that mandate reanimated the enterprise of international justice, bringing both a degree of resolution to victims and a new model for the prosecution of crimes against humanity.

Insisting on the independence of the counsel and judges, a transparent establishment of the facts in each case, due process protections for the accused, and the centrality of first-hand testimony from witnesses and surviving victims, Judge Goldstone gave the tribunals moral authority and legal credibility. It is a testament to the quality of his work that the international community accepted the Rome Statute and established the ICC with confidence. Justice Goldstone stood guarantor for the responsibility, probity, and value of international justice: his unquestioned competence and integrity won the faith of the world. At the close of his recent memoir, *For Humanity: Reflections of a War Crimes Investigator*, Justice Goldstone had these words:

No longer will dictators or oppressive governments be able to violate the fundamental rights of citizens with impunity. We are moving into a new and different world. I have no doubt that the 21st Century will witness the growth of an International Criminal Justice System and that the victims of war crimes will no longer be ignored.<sup>6</sup>

Sharing that goal, and in tribute to all Richard Goldstone has accomplished, the MacArthur Foundation is indeed privileged to name him the second recipient of our award which will be conferred, appropriately, in the Hague in May 2009.

So, in closing, I want to thank all of you for your kind attention. I want to applaud your efforts to ensure that all members of the human family are treated with fairness and respect. We look forward to making common cause with you in pursuit of a more just, humane, and peaceful world. Have a great conference.

I. PANEL I: PERSPECTIVES, APPROACHES, AND EXPERIENCES IN  
COMBATING IMPUNITY

A. *Diane Orentlicher*<sup>7</sup>

Along with Claudio, I would like to begin by thanking the MacArthur Foundation for supporting this colloquium. The MacArthur Foundation has long been one of the crucial supporters of the institutions that ensure meaningful protection of human rights in difficult circumstances around the globe as well as individuals who have been in the forefront and in the frontlines and trenches in

6. RICHARD J. GOLDSTONE, *FOR HUMANITY: REFLECTIONS OF A WAR CRIMES INVESTIGATOR* 138 (2000).

7. Co-director, Center for Human Rights and Humanitarian Law, *American University, Washington College of Law*, and Professor of International Law.

defending human rights against incredible challenges. Under the leadership of Jonathan Fanton, the Foundation has very often been the wind behind the sails of those who are indeed facing these challenges and working to defend human rights around the world, and to strengthen the institutions that we are going to be talking about today, that help ensure protection in a systemic way.

I also want to thank Mary Page of the MacArthur Foundation for being a friend and for allowing us to tap her wisdom as we planned this session, as well as Agustina and Jennifer from the *Washington College of Law*, who have really knocked themselves out to pull this together. And finally, I want to thank the Inter-American Court and Commission for co-hosting this event.

Turning to the subject of this panel, the Inter-American human rights bodies have been leaders in the subject matter of this panel, that is, in developing both legal tools and institutional mechanisms to combat impunity. The law and institutions of human rights developed to combat impunity are truly global and increasingly interrelated, even as they continue to operate in largely separate and distinct spheres.

I have had a number of occasions to be impressed by the interconnectedness of these institutions and developments. Let me mention just one, however, that brought home to me how important it is to foster a cross-regional dialogue among institutions committed to promoting human rights. Several years ago, the Secretary-General of the UN asked me to undertake a study assessing recent developments globally in combating impunity. As my research progressed, I was struck to see how much, when one institution—such as the Inter-American Court, the UN Commission on Human Rights, or the UN Human Rights Committee—took the lead in establishing a new benchmark of protection for human rights, their decisions tended to have an inspirational effect across regions and across institutions. For example, when one treaty body adopted a decision declaring amnesties impermissible to the extent that they cover atrocious crimes, other human rights bodies were inspired to be more courageous than they otherwise might have been in establishing similar protections in their own case law.

Significantly too, I was struck by the fact that it was not just that regional human rights bodies and international bodies, like the UN Human Rights Committee, that were following each other's lead in interpreting key human rights treaties—there has also been a new synergy between these human rights bodies and international criminal tribunals, which have been an important feature of the

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international landscape in combating impunity for the past fifteen years since the creation of the International Criminal Tribunal for the former Yugoslavia (ICTY), followed by several other tribunals including a permanent international criminal court.

To offer one example, ten years ago the ICTY explicitly recognized something we had all thought to be the case—that rape is a form of torture. In support of its conclusion, it cited an important decision several years earlier from the Inter-American Commission on Human Rights recognizing that rape is a form of torture, as well as an important decision from the European Court—decided one year before the ICTY’s judgment—similarly recognizing that rape is a form of torture. And so we do, as Jonathan Fanton said, have an increasingly interconnected architecture of protection, and the disparate parts influence each other in important ways. Major breakthroughs in one system have often resounded across the system of disparate bodies.

In today’s panel we are going to look at some of the achievements in one particular and especially important area of protection: responses of human rights bodies to the challenge of impunity.

The first speaker this morning is Felipe González, a member of the Inter-American Commission. He also serves as Rapporteur on Migrant Workers and their Families and as a full-time professor of constitutional law at Diego Portales University.

*B. Felipe González<sup>8</sup>*

Thank you very much Diane, and thank you for the invitation to participate at this conference. I will try to do my best to speak in the ten minutes assigned to me. I will speak mostly about the evolution of the treatment of gross violations of human rights in the Inter-American system and discuss its influence on other systems.

Over the last fifteen or twenty years there has been a dramatic evolution in the international approach to gross human rights violations and confrontation with these violations. This is a dynamic process in changing contexts. While he was in office, former President Aylwin of Chile pointed out that what had to be achieved was as much justice as possible. But in fact, what has happened is that what has become possible has notably expanded, not only in Chile, but in many other countries, in part or to a larger extent as a result of developments in international law.

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8. Felipe González is a Commissioner at the Inter-American Human Rights Commission. He is also a Professor of International Law and Constitutional Law at Diego Portales University, Santiago de Chile.

In a nutshell, what changed? The situation used to be that the confrontation of these violations was subordinated to politics. Take Spain, for instance, which in 1977 issued a broad amnesty law. The international community did not complain at all about it. The same happened with respect to many countries at that time. It was a situation where the demands of the victims were mostly perceived by society as testimonial in character, without a strong legal basis. Therefore, at the best, their demands would be partially considered to be balanced with the political constraints, including the demands from the perpetrators themselves, who were usually part of or otherwise linked in some ways to the armed forces. In that context in the mid-1980s, the Inter-American Commission made a distinction between those amnesty laws for gross violations issued by dictatorships—such was the case of Chile for instance—and those that were the result of democratic decisions.

The former, the Inter-American Commission said at that time in the mid-80s, were incompatible with international standards. The latter, the Commission said, was a matter for domestic decision. But over the last fifteen years, the situation experienced a significant change. The confrontation of gross violations is not seen any longer at the discretion of governments, but something that is required by international law. And in this regard, the Inter-American Commission itself and the Inter-American Court have played a very important role. So, since the late 1980s, jurisprudence from the Inter-American Court and Commission started to address this issue, sometimes in an explicit manner and sometimes in an implicit manner, in a broader perspective.

This started with the judgment of the Inter-American Court in the late 1980s in *Velásquez Rodríguez v. Honduras*<sup>9</sup> in which the Court stated that it was a duty for the state to fully guarantee the protection of human rights and that this included the investigation—full investigation—of human rights crimes, prosecution of prosecutors, and sanctioning the perpetrators. The case however, did not address explicitly an amnesty law as such. This kind of case, instead, came to the Inter-American Commission in the early 1990s and that showed a dramatic change in the jurisprudence of the Commission compared to the decision in the mid 1980s that I just spoke about. These were the cases regarding Argentina and Uruguay, and their respective amnesty laws. The Commission found that those amnesties while enacted by democratic regimes in Argentina and Uruguay, were

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9. Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988).

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nonetheless contrary to the American Convention on Human Rights (“American Convention”).

At that time, I remember I was living here in Washington, D.C., and there were very strong reactions, not only from the Uruguayan and Argentinean governments at the time, but also from many other countries. That the Inter-American Commission interpreted the American Convention in this way seemed like something new. However, over time, and during the 1990s, this started to be a very significant development at the Inter-American system.

In fact, I remember that when the Inter-American Commission issued these decisions in 1992, Louis Joinet, who was the UN expert in charge of the topic of impunity, circulated some drafts regarding this matter. Those drafts—one from 1993, for instance—were much softer in their approach than the Commission’s approach at the time. In that draft that was publicly circulated by Mr. Joinet, it was not said in a peremptory way that states should always prosecute and sanction the victims. However, over time, you can see how that approach evolved, and in its final report in 1997, Mr. Joinet basically agreed with the position of the Commission on the interpretation of international law. Later on, the Commission issued several decisions in 1996 and 1998 about the amnesty law in Chile, which were not hard cases because it was a self-amnesty by the dictatorship, unlike those amnesties from Argentina and Uruguay.

In the current decade, the Inter-American Court addressed the issue in several cases. These cases include *Barrios Altos v. Perú*,<sup>10</sup> concerning two amnesty laws issued by the Fujimori regime in Peru; *Goiburú v. Paraguay*,<sup>11</sup> where there was not an amnesty law, but in some cases a lack of a thorough investigation that the Court said was required according to international standards; and *Almonacid-Arellano v. Chile*<sup>12</sup> against Chile, in which the Court developed the doctrine that the crimes against humanity had to be fully prosecuted and sanctioned by states.

This evolution has made clear that according to the American Convention on Human Rights, there is a state duty to investigate gross violations and to prosecute and sanction the perpetrators. This evolution does not mean that in practice today states are automatically following these standards. They have followed them to different extents. However, the crucial difference is that today the issue of confronting the past is at the center of any process of

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10. Inter-Am. Ct. H.R. (ser. C) No. 75 (Mar. 14, 2001).

11. Inter-Am. Ct. H.R. (ser. C) No. 153 (Sept. 22, 2006).

12. Inter-Am. Ct. H.R. (ser. C) No. 154 (Sept. 26, 2006).

transition from an internal armed conflict to democracy. This was not the case fifteen or twenty years ago. It is not any more an issue that can simply be avoided by governments invoking political constraints.

In the end, this solution has also, as a consequence, significantly enhanced the position of the victims and their relatives, making stronger their demands. I said at the beginning of my presentation that fifteen or twenty years ago, the victims did not have such a strong legal basis in international law, and most of their demands were seen as testimonial in nature. Now that is not the case. It is a significant step forward for the protection of their rights. Thank you very much.

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*Diane Orentlicher.* Thank you so much for that wonderfully lucid overview of the evolution of the work of the Inter-American system in combating impunity. Felipe ended by talking about how this jurisprudence, which initially came like a bolt out of the blue for leaders in Latin America, began to take root over time, and gradually expectations regarding how states would confront a legacy of abuse has begun to change. This provides a nice foundation for other panelists' remarks, as one of the points I am sure we will address in this panel is how those judgments eventually took root against resistance and addressed challenges in implementation.

I would like to call on Judge Leonardo Franco next. Judge Franco is an extraordinarily distinguished member of the Inter-American Court. He has had a distinguished record of service in numerous capacities, including at high levels of government in Argentina and as Special Rapporteur for Human Rights for Sudan on behalf of the Commission of Human Rights at the UN. I would like to welcome Judge Franco.

*C. Leonardo Franco*<sup>13</sup>

Thank you. First of all, I would like to say that it is with great satisfaction and pride that I participate in this important panel at this University, a University that has contributed so much to the development of international human rights law and humanitarian law in Latin America. Today's topic—how to deal with the past—has

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13. Judge, Inter-American Court of Human Rights, Organization of American States. The views expressed are those of the speaker and do not necessarily reflect those of the Commission or the OAS.

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great significance, and is central to the transition of totalitarian regimes to democratic systems.

In many cases, our pasts are laden with systematic violations. Impunity is really a system, one that has been built up through regulations and practices. It will take time and much effort to dismantle such a system. It is also being fought through legal reforms, but more importantly, through the human rights movements taking place in academic and political circles. This dynamic process has taken place in Argentina, among other places, and I would like to refer to the specific ways in which Argentina was able to come to terms with its burdensome past.

Before its withdrawal, the military left a law of impunity as a parting gift, which is a common practice among totalitarian governments. This law of impunity was relatively easy to abolish by the newly established administration headed by Mr. Alfonsín, who was elected president on a human rights agenda.

Shortly after, the Government focused on the task of prosecuting the military commanders who had directed the military process of repression. Five high ranking military generals were given long prison terms and four were acquitted. We thought that this would be the end of the problem, but we were wrong.

A period of intense pressure then followed, as it usually does, which threatened the stability of the democratic system. Consequently, the system was compelled—and this created much controversy—to adopt measures that strengthened impunity. For example, two laws, the Law of Due Obedience and the “Punto Final” Law, severely limited the investigation of other actions perpetrated against other people.

Moreover, with the change of administration and after Dr. Menem was installed as constitutional President, there was also a need to take other measures, which were pardon laws, or pardons for individual cases. Argentina was therefore caught in a vise, and there was a huge reaction against these measures, both from the domestic and international communities. Fortunately, the Inter-American system played an important role in ensuring Argentina’s transition towards the rule of law through which the responsibility of those who committed violations could be examined.

This process was facilitated by a judgment by the Argentina Supreme Court in the 1990s, which established that the status of international human rights treaties was similar to the status of the Constitution. This judgment was later strengthened by the 1994



constitutional reform which placed human rights treaties in first place.

In the mean time, the Argentina Supreme Court issued decisions that established the constitutionality of measures of impunity adopted by previous administrations. These decisions were criticized, as Felipe had just mentioned, by the Inter-American Commission. The Commission's criticisms had nothing to do with Argentina, but instead had to do with a neighboring country, Peru, which provided the legal basis for an in-depth analysis of the self-amnesty measures that Argentina had adopted. This was the case of *Barrios Altos*,<sup>14</sup> which Felipe has also mentioned, and which is considered fundamental vis-à-vis those measures through which a regime declares itself to be unaccountable.

I would like to comment on the amnesty laws. There was a period during which amnesty laws were viewed as a positive aspect of human rights. I remember that in my work with refugees in the 1970s in various parts of the world—Africa, Latin America—governments and states were asked to grant amnesty in order to allow for the safe return of refugees. In Brazil there was a huge movement in the 1970s in favor of amnesty. But this was amnesty that the victims requested from the authorities. The amnesty laws that we are referring to now are measures passed by the same governments, the same authorities that systematically violated human rights.

In *Barrios Altos*, the Inter-American Court held that whenever irrevocable rights (recognized as such by international human rights law) are violated, all amnesty provisions, provisions on statutory limitations, and measures designed to eliminate responsibility are inadmissible.<sup>15</sup> This is because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations including: torture; extrajudicial, summary, or arbitrary execution; and enforced disappearances. These actions are prohibited because they violate fundamental rights recognized by international human rights law. Moreover, an interpretive judgment by the same Court held that the *Barrios Altos* decision had general application; it went beyond that particular case.<sup>16</sup>

Most importantly, Argentina, which was not directly linked to the judgment, was receptive to the Inter-American Court's case law. In

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14. Inter-Am. Ct. H.R. (ser. C) No. 75 (Mar. 14, 2001).

15. *Id.*

16. Case of *Barrios Altos* (Interpretive Judgment), Inter-Am. Ct. H.R. (ser. C) No. 83 (Sept. 3, 2001).

*Simón*,<sup>17</sup> an extremely important case, the Argentina Supreme Court stated that the Laws of Due Obedience and “Punto Final” were null and void.<sup>18</sup> In this way, the period in Argentine history characterized by the lack of search for the truth and the lack of accountability of the perpetrators of violations finally came to an end.

This made possible the indictment of many others. Very recently, two military generals—the governor of Tucumán and the chief commander of the military—notoriously involved in the repression in Argentina were given life terms, and the *Barrios Altos* case was cited.

I would like to comment briefly on four concepts articulated in the *Simón* case, which concerns us all. First, the standard established by the Inter-American Court in the case of *Barrios Altos* “cannot be satisfied, and it would be insufficient to repeal the Due Obedience and Punto Final Laws if at the same time measures were not taken to make it impossible to invoke the most lenient penal law.”<sup>19</sup> Second, “if the decisions of the international tribunal are interpreted in good faith as legal precedent, it is imperative that the findings of the Inter-American Court in the case of *Barrios Altos* apply to the case of Argentina.”<sup>20</sup> Third, international treaties on human rights should be interpreted according to international law. In other words, they should not be interpreted according to national law, but according to international law. Lastly, the jurisprudence of the Inter-American Court and the directives of the Commission constitute essential guides for the interpretation of the duties and obligations emanating from the Inter-American Convention of Human Rights. In other words, national judges must also interpret and apply the Inter-American Convention.

Previously, there was another case that I will refer to briefly, the *Arancibia Clavel*<sup>21</sup> case. This was a case that involved (repressive) actions against Chilean activists; there was a web of informants that provided information on persons persecuted in Buenos Aires.<sup>22</sup> This case, in which *Arancibia Clavel* was indicted, is considered a leading case on the subject, because not only did it mean the recognition but also the application of this principle to those actions that occurred

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17. Corte Suprema de Justicia [CSJN], 14/6/2005, “Simón, Julio Héctor y otros,” Colección Oficial de Fallos de la Corte Suprema de la Nación [Fallos] (2005-328-2056) (Arg.).

18. *Id.*

19. *Id.*

20. *Id.*

21. Corte Suprema de Justicia [CSJN], 24/8/2004, “Arancibia Clavel, Enrique Lautaro y otros,” Colección Oficial de Fallos de la Corte Suprema de la Nación [Fallos] (2004-327-3294) (Arg.).

22. *Id.*

before the ratification of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity throughout Argentina.

Finally, a brief reference to a previous case in which the Inter-American Court addressed the topic of pardons, which was the key element needed to put an end to impunity. The Court in this case, also invoking the *Barrios Altos* decision, held that the pardons were measures that breached the Inter-American Convention of Human Rights. However, I should also note that this opened up a new controversy, because two judges in the minority dissented, maintaining that it affected constitutional rights such as *res judicata*. Which means that this is not the end of the story.

Thank you.

#### *D. Discussion*

*Diane Orentlicher:* Thank you so much. I want to underscore one of the points that came out of Judge Franco's remarks because it is so terribly important. In countries where really notable advances have been made in confronting amnesty laws and other obstacles to accountability, the legal status of international treaties and domestic law often seems to be critical. An important example is highlighted in Judge Franco's remarks about Argentina, where the constitutional status of human rights treaties made a big difference. So perhaps, as we start to accumulate "lessons learned," we may want to work into our agenda the importance of working to enhance the domestic status of human rights treaties.

I think we have a few minutes for questions. Let me first begin, though, by asking our panelists if any of them either wants to ask a question of another panelist or has further comments that he or she would like to make.

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*Felipe González:* I would like to add a point about the reciprocal influences of the Inter-American system or the UN system regarding impunity, which I just briefly mentioned before. Because, in fact, in the recent decisions by the Inter-American Commission and Court regarding amnesty laws, or—more generally—impunity, they rely a lot on the developments of the ICC and the International Criminal Courts for the former Yugoslavia and Rwanda. So there is a strong link between the jurisprudence of the Inter-American system and that of these UN established tribunals.

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In addition, on the issue of forced disappearance of persons, there was strong feedback on that matter. For instance, there was a famous visit of the Inter-American Commission to Argentina in 1979 where the Commission discovered the clandestine prisoners who were about to be disappeared and killed at some point. That prompted the UN to establish a working group on this matter. And later, the Commission, in the mid to late 1980s, drafted a project for an Inter-American Convention on Forced Disappearances<sup>23</sup> that prompted the UN to move forward toward a UN declaration on this matter.

In the end, the UN declaration was adopted before the Inter-American Convention, so it was really a feedback on that matter. In the end, the developments of the Inter-American system led also to the adoption of UN Convention of Forced Disappearances at the UN.<sup>24</sup> These are only a few examples of this feedback among the systems.

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*Diane Orentlicher:* One question that I wanted to ask is prompted in part by Felipe's last observation. I would be interested in hearing your thoughts on how the ICC might complement the work of the Inter-American human rights system in situations where both systems are involved in a particular country. There are a number of ways where questions might arise or where there might be helpful synergies in terms of questions arising.

For instance, when the ICC is looking at the situation in Colombia at a time when the Inter-American Commission and Court are also looking at it, does the ICC step aside and wait until the case has worked its way through the Inter-American system in the hope that there may be an effective remedy or an increasingly effective response to the decisions of the Inter-American body? Or is that an inappropriate approach? Should there be synergies? Also, if anybody wants to address this question, perhaps there are other ways the ICC, in addition to those Felipe mentioned, might benefit from the jurisprudence of the Inter-American system, and other systems as well, in applying its complementarity analysis. For example, would the ICC find something useful in the analysis of these bodies about whether domestic systems have satisfied the exhaustion requirement

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23. Organization of American States, Inter-American Convention on Forced Disappearance of Persons, June 9, 1994, 33 ILM 1529.

24. International Convention for the Protection of All Persons from Enforced Disappearance, G.A. Res. 61/177, 20 Dec. 2006, A/Res/61/177; 14 IHRR 582 (2007).

or provided an adequate remedy domestically when it considers whether its own complementarity standard has been satisfied?

I ask these questions in part because of the experience that Felipe and a few others have noted where human rights bodies were at risk of going wobbly on certain issues. These bodies were made aware of the fact that other bodies, other experts, and other human rights mechanisms were looking at the same issue and perhaps about to come out with an opinion that was more progressive than the one they were thinking of adopting. This inspired perhaps greater courage and boldness that we might not otherwise have seen from the bodies that were looking to see what their neighbors were doing. So with that in mind, is that a dynamic that can be exploited in the African system, now that we see a dynamic of increasing options?

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*Leonardo Franco:* With regard to the question of the competence of the ICC, allow me to make reference to the more general question of the relationship between human rights and humanitarian law. It is an important question for the Court since, quite often, situations that lead to petitions before the Court via the Commission in fact are related to humanitarian problems. The question then turns into the role of the Court in those cases.

The Inter-American Court, as an organ of supervision of the Convention and other Inter-American treaties, has not declared violations of international humanitarian law treaties, *strictu sensu* speaking. This was particularly established in the case of *Las Palmeras v. Colombia*,<sup>25</sup> in which the Inter-American Commission requested that the Tribunal declare the violation of the right to life as recognized under Article 4 of the Convention and Article 3 common of the Geneva Conventions. The ICC decided that the Inter-American system organs cannot declare such violations, as they had no competence to do it. However, and this is the most important feature, the Tribunal established that relevant provisions of the Geneva treaties may be taken into account as criteria of interpretation of the Convention. This idea has since been reiterated in several cases. So the Court has served itself of International Humanitarian Law (“IHL”) in order to analyze and conceptualize the state obligations to protect and guarantee the exercise of several rights.

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25. Inter-Am. Ct. H.R. (ser. C) No. 96 (Nov. 26, 2002).

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The Court has observed the existence of general and special state obligations to protect civilian populations and vulnerable groups—internally displaced persons, children, etc.—in situations of internal or international armed conflict, as well as in cases related to the use of force and suspension of guarantees, regarding internal violence and conflicts, states of emergency, actions against terrorism, social protest, and other exceptional situations, even in times of peace. The Court recognized certain non-derogable provisions in such cases. The Court has even considered IHL provisions when it has ordered provisional measures of protection of certain communities in armed conflict situation, and when it has directed the states to adapt domestic law to IHL or to conduct programs of education in IHL for their public servants.

All those cases show that, nowadays, we see a convergence and complementarity between international law of human rights and international humanitarian law. Therefore, the two value systems coexist. How can the coexistence of these systems lead to justice? The two systems are necessary, fundamental, and a very good road to peace-building. The question that has been posed in the past and the present, in Latin America as well as in Africa—let me remind you of Sudan—is the relation between the search for peace and the promotion and protection of human rights violations committed in the past. Perhaps in Central America, there are many cases of the two objectives complementing each other. In my experience regarding Sudan, where it was very difficult—not with Sudanese people but with the UN in New York—the answer was, “First we will have peace; then we will see.” I think this solution does not help. Those processes are necessarily complementary and simultaneous.

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*Felipe González:* Regarding the first question that Diane posed, I think that the role of the ICC and the role of the Inter-American system are fully complementary. The nature of these bodies is completely different, so they complement each other. The very name of the ICC says it is a criminal tribunal, which is not the case for the Inter-American Court or the Commission, which is a semi-judicial body and only establishes the responsibilities that states may have in some situations.

In addition to that, I would say that, in addition to the work on the specific cases, the Inter-American Commission has a broad mandate which includes the possibility of preparing reports—country reports, thematic reports—based on in-country visits. So that is also a role

different from that of the ICC. And as for the options, I think it is a difference as well because there is no way for a citizen as such to go to the ICC, but instead they can go to the Commission directly.

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*Andrew Drzemczewski:* I have a question to the panelists on the issue of “impunity.” Reference has been made to “state responsibility” for impunity. But what is the responsibility of international actors in this respect? Permit me to explain. The European Court refused to deal with cases brought by individual applicants against states’ parties to the European Convention on Human Rights (ECHR), in a situation where—within the scope of military action—member states of NATO and the UN had allegedly committed serious human rights violations (*Bankovic v. Belgium*,<sup>26</sup> *Behrami v. France*<sup>27</sup> cases). This meant that the individuals were, in effect, prevented from arguing the merits of their claims before the Strasbourg Court. Does this not suggest that, when major human rights violations have allegedly been committed by international actors—say, in a hypothetical case, by KFOR or UNMIK in Kosovo—the said actors cannot be held responsible for their action before an international human rights body? This concerns the issue of impunity/immunity of international actors who may circumvent responsibility for human rights violations. Should not the reasoning developed with respect to state responsibility—concerning the eradication of impunity—not be extended to that of international organizations and actors?

And I ask this question accidentally-on-purpose, knowing that one of the persons on the panel is preparing a report on “impunity” for the UN right now. Thank you.

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*Diane Orentlicher:* I have just one comment. I believe that there was a decision about a month or so ago in the Netherlands in which a court concluded that members of the Dutch battalion at Srebrenica could not be prosecuted at all, whether or not a prosecution would lead to a conviction. The court ruled that as soldiers serving under the UN banner, members of the Dutch battalion enjoyed the immunity conferred on them under the applicable status of forces agreement or other UN principles of immunity. So either way, they

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26. 2001-XII Eur. Ct. H.R. 333.

27. 45 Eur. Ct. H.R. 85 (2007).

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were immune, but both doctrines pointed to some other theory in which they could be held accountable.

And so perhaps I can react by drawing on a point made earlier about how we begin to tackle situations where the challenge of impunity is so great it is hard to even find your way in. There does seem to be now growing publicity and public concern about this practice which, as you have noted, has prompted the UN itself to study the problem and try to find a handle on it. Perhaps that is the first stage toward finding a more effective way to crack the impunity that leads to serious abuses by UN forces and others, which is a horrible shame that has to be addressed.

I want to close with two related conclusions that emerged from this panel, which are perhaps a foundation for further development of work in this area.

First, a point that was forcefully brought home by this panel is that these battles against impunity take a long time. Something that I thought was quite heartening from the presentations by those involved in the Inter-American system is to see the progress over decades since the disheartening situation in which the positive decisions by the Inter-American Commission, as Felipe noted at the start of this panel, seemed at the time to be just words, and people thought that they were not going to take root. Then we heard from other speakers about the Argentine courts, where the Argentina Supreme Court has used the case law of the Inter-American system, including a case involving another country, not Argentina itself, to annul amnesties with retroactive effect. This shows an enormous amount of progress. So the struggle against impunity is one that will take a long time, and it is an ongoing challenge. Even when you think you have won some victories, you have to take the struggle to the next step.

This brings me to a final observation relating to perhaps the foundation for renewed efforts in various arenas. I was also struck by the profound importance of domesticating the victories one achieves before regional human rights bodies. I think this point leads us to the subject of the next panel: When you win a victory in one of these regional or international courts, it by no means translates automatically into effective action at the national level. Concerted efforts are needed to do that.

One of the significant lessons learned is that if treaties have constitutional status, or somehow in domestic law are more readily translated into effective incorporation, it makes a big difference to



their enforcement by domestic courts. Related to that point, there has been an enormous amount of sharing of jurisprudence across regional and international bodies, which has had a really important influence in advancing the jurisprudence of these bodies. But those of us who work in this area recognize that in many ways a lot of the key action is now occurring in the national courts. And again, to cite examples from this panel, the decisions of the Argentine courts, some decisions of the courts in Colombia, and those of other national courts have been really important precedents that have inspired countries in other areas, other regions, as well as in neighboring countries, to do better than they might otherwise have done. But we have more of a language barrier in sharing that jurisprudence than we have in sharing jurisprudence among human rights treaty bodies, and I am aware of some efforts to try to overcome this.

I do not want to extend this any longer because we are already well over time, but I do want to thank an extraordinary panel for bringing rich insights and expertise to this discussion. Thank you.

## II. PANEL 2: THE SCOPE OF REPARATIONS: CHALLENGES IN DEFINING THEIR SCOPE AND GUARANTEEING THEIR ENFORCEMENT

*Claudio Grossman:* First of all, I want to welcome the panelists and thank them for their presence. They are a unique body of scholars and experts, and we look forward to an exchange of views on the three different systems. We have agreed that we are going to first discuss the Inter-American system, then the African system, and, finally, the European system.

### A. *Sergio García Ramírez*<sup>28</sup>

Ten minutes is not a lot of time for such a big issue. But I want to take a few minutes to say thank you for the generous invitation by the *Washington College of Law*, the Dean, who is my friend, and those who made this discussion possible. The topic of my brief speech and the topic of the panel is reparations—which is certainly a fundamental and crucial issue. Obviously, if there are no reparations as a consequence of illicit conduct, there is no judicial security, no justice; and impunity will prevail. Also, demonstrating the lack and inefficacy of reparations will push the protection of rights in general into a

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28. Judge, Inter-American Court of Human Rights, Organization of American States. The views expressed are those of the speaker and do not necessarily reflect those of the Commission or the OAS.

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crisis. It is worth noting that the lack of penal prosecution is not the only form of impunity. We often say that impunity occurs when the individual who committed the crime is not sanctioned. But impunity can also come in the form of avoiding an order for reparations, causing reparations to become an illusory remedy.

The enormous burden and enormous importance of reparations as a way to restore rights—the objective of judicial order—is to create conditions that allow for the creation and development of human relations, and to compensate the victim for the violation he suffered. Reparations are the natural expectation of the victim, the natural expectation of society, and the natural expectation of the state because they involve not only a judicial duty, but also an ethical and political duty.

In the case of the Inter-American system, we need to study the core questions of reparations in order to understand fully the trebled expectation and the trebled context. First, we should study the international development of reparations and how reparations developed in the Inter-American system vis-à-vis this international development. Although the Inter-American system is based on European examples, the American result is certainly different from the European result. Second, we should study the application of the system of reparations and the reality of how it operates—particularly given the circumstances and conditions of the Latin American political, historical, and cultural context. And, lastly, we should focus on the formation of the rule. I believe this element is very important because it follows the path of the rule from the past to the present and into the future. We should study the famous brief precursor to Article 63 of the American Convention from before, during, and after the conference that gave rise to the American Convention. This tiny fertile precursor, born in the first version of Article 63, was closely tied to the European system. It looked very much toward Europe in its development, but it finally reached a conclusion of its own on a different path from the European system of reparations. I am not saying it is worse; I am not saying it is better; I am saying that it is simply different.

When the San Jose Conference arrived, projects were presented to the Inter-American Commission such as the project of judicial-consulting and the Chile-Uruguay project involving a version of a reparations system very similar to that of the European Convention of 1950 (“European Convention”). The proposed Chile-Uruguay reparations system was more or less a profoundly modified version of the text of the European Convention. The Guatemalan proposal at

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the Conference introduced the language that would later become Article 63. Article 63 laid out the framework for compensation as well as actual and future guarantees of reparations. For this reason, in my work, I refer to the broad horizon of the Inter-American system, while the European system is narrower. The European system puts its trust in national laws. When the European Court verifies the existence or lack of a violation, it refers the case back to the national system, unless the national system cannot fully repair the consequences of the violation. In contrast, the Inter-American system, for various reasons, did not trust the national systems. The Inter-American system put more trust in the international system and gave the Inter-American Court the opportunity, necessity, and mandate to dictate the reparations rather than merely referring the issue back to national jurisdictions. That is how the Court has worked. There are only a handful of cases—which could be summarized on the fingers of two hands—that the Court has referred back to national jurisdictions, sometimes with good results and sometimes with results that were not as good.

I would highlight the following fact: the Inter-American Court's interpretation of the reparations system was created in a short amount of time. The Court has been around for less than three decades, and the number of decisions it has issued has been relatively small. I am not saying that the number of decisions has been insufficient; rather, I am saying they have been relatively limited. The Court arrived at decisions in a very short amount of time from the date of its inception, and the Court always decided cases within its authority but without a pro-person, *pro hominem* slant. The Court decided cases without allowing imagination to run too wild, but at the same time opening up possibilities of interpretation in order to avoid the complete immobility of the rules. With an awareness—which I would consider reasonable—of the circumstances of the Inter-American system, decisions were made with a strong emphasis on the source of the violation, the individual act, the concrete individual, the agent or the state, and on the law. The decision, or the process of arriving at the decision, allowed for an attack on the violation by way of its source. As a result, the reparation generally has a reach that goes much further than you would expect if you were to restrict the case to the particular victim. This approach lends itself to consistency, or an aspiration of idealism and consistency. I am not trying to say, however, that this will always be the scope of the reparations ordered by the Court, which are varied and involve quite creative jurisprudence.

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This leads me to another characteristic of the Inter-American system as a whole—the renovation of the Inter-American system through a decisive turn, which occurred in the third decision issued by the Inter-American Court. This decision spoke to compensation and reparation, and it opened up the space to move forward toward reparations in general. Of course there have been many obstacles in the path of moving towards a system of reparations: reticence, or political or judicial resistance (which is political at its root), such as high costs, problems of proof, complexities, and delays. In the face of these obstacles, the Court modified its regulations and, above all, its policies to better impart justice. The Court’s ability of “self-compensation” also played an important role with regard to reparations, because it allowed for alternative solutions or results to the traditional remedies. Compensation is malleable, and the foundation of reparations is also malleable to a certain point, but only to the point permissible in each situation. But it is a guarantee for the system and for the people to never remove knowledge of the case—what is going on and what should occur—from the Inter-American community, which is aware and alert.

In addition to emphasizing compensation for damages, I would like to note that there are at least thirty varieties of different reparations that the Inter-American Court can order. These reparations are perfectly reasonable given Articles 1.1, 2, and 73.1, which require or order states to fulfill obligations that are unfulfilled. By failing to do so, states are also in violation of the Convention, which also requires further reparations. These varieties and other disciplinary actions or instruments of reparations are those that make up the doctrine of reparations of the Court. Generally, states, which are sometimes bellicose with regard to the amount of compensation required, have peacefully accepted the general idea, nature, and existence of reparations over the last thirty years.

The Inter-American Court can directly mandate constitutional modifications, and although they are not directly enforced, reparations are available for the Court to impose. The Court can even impose housing programs, relocation programs for the displaced, education and health projects, revision of trial processes, suppression, and more. In other words, this has been the most constructive and most realistic aspect of the Court. I consider it the most realistic because, step-by-step, the Court’s policies have soaked through to the underlying national systems and policies.

*B. Manuel Ventura Robles*<sup>29</sup>

I am very honored to be here with you this morning. I want to thank Claudio Grossman for having me here today. In a decision that was issued a few years ago in the case of *Caesar v. Trinidad and Tobago*,<sup>30</sup> one of the Court's findings stated that Article 75 of the American Convention has a gap. The gap arose because, although the Court is required to inform the General Assembly of the OAS of non-compliance with decisions, there was no institutional process established within the same organization to do so. It has been established that the General Assembly, the highest political body in the organization, does not deal with or consider non-compliance of decisions issued by the Court. Do you believe that it is right, given the level of evolution that the Inter-American system has achieved, that when the Court informs the General Assembly of the OAS of non-compliance, the General Assembly's resolution does not mention such non-compliance? Is this right, considering that Article 68 of the American Convention stipulates that states that are parties to a case have the obligation to comply with the decisions? Do you believe that it is right that no mention is made of the Court's report identifying that a specific state did not comply with the decision of the Tribunal? And there is no debate about this?

This is the main issue that will, at some point, have to be addressed in the OAS because there is an entire process that has brought us to this point. The first stage of the process was no more than issuing the first decisions by the Inter-American Court. One example is the case against Honduras for forced disappearances in which there was a devaluation of the Honduran currency at the moment the decision and the resulting reparations and compensatory damages were announced. Honduras alleged that they were to pay in their domestic currency, and the victims wanted their award revalued. Consequently, they asked for an interpretation of the decision, and Honduras complied a few years later. But in the meantime, the Tribunal went to the General Assembly of the OAS in Santiago, Chile to ask that the General Assembly put pressure on Honduras to report regarding non-compliance with the decision. Not one state—neither the states that are parties to the Convention nor any state member of the OAS—backed this request from the Court.

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29. Judge, Inter-American Court of Human Rights, Organization of American States. The views expressed are those of the speaker and do not necessarily reflect those of the Commission or the OAS.

30. Inter-Am. Ct. H.R. (ser. C) No. 123 (Mar. 11, 2005).

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That was in 1991. In 1995, the complete opposite occurred. The Committee on Juridical and Political Affairs of the OAS (“CJPA”) urged Suriname to report to the Court regarding the non-compliance of a decision in the case of *Gangaram Panday*.<sup>31</sup> Once the General Assembly approved the resolution, the state reported immediately regarding compliance with the decision.

The real crisis of this system occurred at the beginning of the current century, when the Court issued the decision regarding the death penalty against Trinidad and Tobago. Trinidad and Tobago refused to report to the Court regarding compliance with the decision and with the provisional measures of the Court. The Court turned to the General Assembly again and informed them of the non-compliance. Absolutely nothing happened. The CJPA, the Permanent Council, and the General Assembly did nothing.

What the CJPA approved was a general text, as I mentioned earlier, stating that the states have the general obligation to comply with the decisions of the cases to which they are parties. The general text does not mention the state, nor does it mention the case. This situation—which has not fundamentally evolved—arrived at a second stage when Panama, interpreting the decision in the case of *Baena Ricardo et al. v. Panamá*,<sup>32</sup> asserted to the Tribunal that the Court did not have jurisdiction to request information from the states in the oversight stages of compliance with the decision. The Court, in a well-known decision, asserted its jurisdiction and determined that the Court has the ability to request information from the state regarding the implementation of the decision, precisely in order to inform the General Assembly in the Court’s annual report as to whether there has been compliance with its decisions.

With this clarification at the beginning of the current decade, the Inter-American Court began an extremely important stage by deciding to not make categorical decisions as to whether there was compliance once the deadline for the state to comply had passed. Instead, the Court will proceed gradually to determine whether the state has complied with the decision and will partially close the case as the state complies with each obligation. There are a great number of partially closed cases—those in which the state has only partially complied with the decision—that can be viewed in the annual report. Generally, the states quickly and satisfactorily comply with the payment of reparation sums and, when it is possible, the restoration

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31. Inter-Am. Ct. H.R. (ser. C) No. 12 (Jan. 21, 1994).

32. Inter-Am. Ct. H.R. (ser. C) No. 72 (Feb. 2, 2001).

of rights, etc. But where the Inter-American system has not advanced with regard to human rights is in the investigation and indictment of those responsible for violations by domestic jurisdictions. This is the reason, possibly, why things do not always advance when a case gets to the CJPA, or when a report of non-compliance is written. Some reasons, such as a lack of political will, do not allow a state to carry out an investigation further than it has already been brought. In my opinion, this is something that should be determined precisely in the political sphere once the case leaves the hands of the Court and once non-compliance has been declared.

I hope that someday the CJPA or a working group will look into the state of the victims of the Inter-American Commission and of the Court and make a determination or recommendation to the General Assembly that allows the Court to definitively close the case from the list of pending cases. Thank you.

*C. Elizabeth Abi-Mershed*<sup>33</sup>

Thank you very much. It is really a pleasure to be here with you today. I am going to speak a little bit about reparations, compliance, and the Inter-American Commission.<sup>34</sup> As you have heard, in the Inter-American system, we often highlight the case system as being very important because it provides a means to concretize what otherwise abstract rights mean in practice. Through the cases, a person can understand what their rights mean, and states can understand what actions they have to prioritize to be in compliance with their human rights obligations. Reparations, in turn, serve to crystallize what is required of the state. Reparations, when implemented, show the difference that international human rights law makes in the lives of individuals.

What do reparations look like in cases resolved by the Inter-American Commission? As I mentioned, I am going to focus on the case system as the most concrete way of seeing the relationship between state obligation, a breach of that obligation, and the measures necessary to remedy the breach. Without going too much into the procedural aspects, as you know, the individual case system before the Commission produces two possible results. One is the resolution of a case through a friendly settlement, in which the

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33. Assistant Executive Secretary, Inter-American Commission on Human Rights, Organization of American States. The views expressed are those of the speaker and do not necessarily reflect those of the Commission or the OAS.

34. Comprehensive information about the Commission may be found through its web page, <http://www.cidh.org/>, including all published reports in English and Spanish.

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parties reach an agreement and the state undertakes to carry out a series of measures to implement that agreement. Alternatively, if such a settlement is not reached, the Commission will issue a merits report that, if a violation has been established, will include a series of recommendations directed to the state in question. In both of those situations, the Commission will then initiate a follow-up process to monitor compliance with what the state is required to do to discharge its obligations.

I want to differentiate between the Inter-American Commission and the Inter-American Court. The Court has Convention-based authority to issue orders, including those for the payment of compensation as well as for other forms of reparation, and member states that have accepted the Court's contentious jurisdiction expressly commit themselves to implement its decisions. The Commission, on the other hand, issues recommendations derived from its more general Charter and Convention-based mandate. I want to make it clear that, as a matter of international treaty law, states are obliged to use good faith to comply with those recommendations. Accordingly, in the final resolution of a case through a merits report, the Commission will have issued a series of recommendations that the state concerned is required to implement.

The recommendations would usually include the investigation, prosecution, and punishment of those responsible for actually perpetrating the violation. They would probably include fair compensation for the victims and might very well include legislative policy or other measures aimed at ensuring the non-repetition of the violations, as well as the correction of structural problems. The state then has to report back on the measures it has taken to comply. If the state has fully complied with all of the recommendations, then the Inter-American Commission may deem the matter resolved. Full compliance remains disturbingly rare. If there has not been full compliance, then the Commission decides to either publish the report or send the case to the Inter-American Court. Given that you have heard today from several judges of the Court, I am going to speak about those final friendly settlements or merits reports that the Commission publishes and thereafter supervises through its follow-up procedures.

One of the points that I want to make today as part of this cross-regional dialogue is that the Inter-American Commission now has a defined follow-up procedure, and this was not always the case. When the Commission adopted significant changes to its Rules of



Procedure in 2001, it included an express follow-up procedure.<sup>35</sup> The idea, from the Commission's point of view, was that it would be sending more cases to the Inter-American Court, but for those cases that remained before it for final resolution, the Commission had to find more and better ways of moving forward on compliance with its recommendations. As from 2001, the Commission publishes a table in its annual report that deals with compliance with friendly settlement agreements and merits reports. The table is divided into three categories: full compliance, partial compliance, and pending compliance.

This categorization reflects some of the ideas underlying the follow-up process as a whole—ideas that include patience and persistence. Experience within the system indicates that a state may be required to take many actions in order to fully implement recommendations, and that such actions may require time and imply a dynamic process that evolves. There may need to be some space to see that those actions come to full fruition, so the Inter-American Commission continues to monitor the state over the years. In fact, all of the cases that the Commission started monitoring in 2001—cases from 2000 and forward—we are monitoring now.

What do we do in the follow-up process? The Inter-American Commission asks for information from the parties, from the state and the petitioner, to be able to contrast and compare the perspectives on what has been done to implement the recommendations and what remains to be done. We transmit information between the parties. The Commission also has the ability to hold working meetings or hearings. In fact, we are having a hearing during this upcoming period of sessions on compliance with the recommendations in an individual case. In some cases, the issue of compliance can be incorporated into the agenda of working visits to enable the Commission to converse with the authorities of the state about what is being done or what needs to be done.

The point I want to emphasize is that having a defined procedure has made a difference in making the compliance phase—which, at the end of the day, is the most important phase—more visible and concrete. The procedure makes the issue of compliance more present in the agenda of the system and its users, and this has produced some positive results.

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35. Rules of Procedure of the Inter-American Commission on Human Rights, Art. 46, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/ser.C/V/I4 Rev. 12 (2007).

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The results of the follow-up procedure can also tell us some things about how we are doing with compliance in general. If we look at the cases that the Inter-American Commission has reported on in this follow-up process—covering reports adopted between 2000 until 2006, and leaving aside the cases that went to the Inter-American Court—these would include sixty merits reports and fifty-three friendly settlement reports, or a total of 113 cases in the follow-up process to date.<sup>36</sup> Of that total, there has been full compliance with reparations in twelve cases, partial compliance in seventy-four, and compliance is pending in twenty-seven. Picking up on the theme that Judge Ventura Robles mentioned, partial compliance is the name of the game, being the more common result. Fifteen years ago or so, there would have been very little compliance to discuss in terms of the cases decided by the Commission. At present, we have partial compliance in a great many cases, and that partial compliance has had a tremendous impact in those cases.

I think it is relevant to mention that in terms of tendencies, one can see that compliance with friendly settlement agreements is much higher than compliance with merits reports issued by the Inter-American Commission. That may be a natural consequence of the process of negotiation and confidence building and the taking of steps toward a friendly settlement.

I want to move on to a few observations about what the process shows in terms of the concrete results of the cases resolved by the Inter-American Commission. The first point has to do with compensation. While the individual case process is not about the money for most people, money can be extremely important for both practical and symbolic reasons. It is important for transmitting the question of state liability to the citizenry through the taxing power. If the citizens have to pay for violations of human rights, the idea is that they will be more aware, and they will require more accountability from their officials. So it may have an impact structurally as well.

What we can see from the follow-up process before the Inter-American Commission, in terms of both merits and friendly settlement reports, is that victims have received over six million dollars in compensation during the five or six years that we have been engaged in this form of reporting. Compensation has also been given in the form of homes, scholarships, annuities, health care, and pensions. Following up on a point that was made by the judges of the

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36. This information is based on a review of material published in the Annual Report of the IACHR 2007, chapter III, follow up, and is available at <http://www.cidh.org/>.

Inter-American Court, the highest rate of state compliance is with measures related to compensation. In just about half of the Commission cases in follow-up, the victims have received full or partial monetary compensation.

The next point concerns legislation, as the Inter-American Commission frequently recommends reforms in this area. In more than half of its merits reports, the Commission recommended some kind of change in legislation. The rate of compliance with these recommendations is much lower than it is with compensation. While the absolute number of changes adopted is lower, the impact of the measures adopted has in some cases been dramatic. For example, we could mention the case of *Maria da Penha v. Brazil*,<sup>37</sup> which was the first case about the state responsibility vis-à-vis domestic violence. One of the recommendations had to do with legislative reforms. Through the follow-up process, the case remained visible, and it took a number of years before the state finally adopted the legislative changes. Finally, in 2006, Brazil adopted a new law against domestic violence called the “Maria da Penha” law—named after the victim in this case. The new law represents a tremendous advance in terms of the legislative framework and protection.

We could also look at the dialogue, if you will, between the system and several countries in the Caribbean about the mandatory imposition of the death penalty for certain classes of crimes. Through the cases and the recommendations, and through the dialogue between the national courts and the Inter-American Court as well as with courts beyond the Inter-American system, one can see a very important change over time whereby a number of countries have modified the legislative framework applicable to the death penalty. We can also see a change in the juvenile death penalty vis-à-vis a series of cases with respect to the United States, subsequent to which the U.S. Supreme Court overturned the imposition of the penalty in cases involving persons who were juveniles when they committed their crimes.<sup>38</sup> In terms of investigation, prosecution, and punishment, it is a very frequent recommendation and it is very infrequently complied with. Judge Ventura Robles already spoke

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37. Case 12.051, Inter-Am. C.H.R., Report No. 54/01, OEA/ser.L/V/II.111, doc.20 rev. (2001), available at <http://www.cidh.oas.org/annualrep/2000eng/TOC.htm/> (follow hyperlink under Chapter III(c)(5)).

38. The Inter-American Commission reports issued just prior to the U.S. Supreme Court ruling are Report 62/02, merits, case 12.285, Michael Domingues, United States, October 22, 2002, in Annual Report of the IACHR 2002; Report 101/03, case 12.412, Napoleon Beazley, United States, December 29, 2003, in Annual Report of the IACHR 2003. Both annual reports may be found at <http://www.cidh.org/>.

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about that insofar as the work of the Court is concerned. In terms of symbolic reparations or guarantees of non-repetition, the kinds of recommendations and actions we see through Commission cases would include recognition of responsibility, dedication of streets, parks, or monuments, and the passage of measures such as increased training for officials.

There are a number of other things that we could discuss about reparations and compliance in the Inter-American system, but there are two points on which I want to close. One is to follow up on the point that the engagement of member states in the process is clearly crucial, not only individually vis-à-vis their own cases, but also collectively through their participation in the political organs of the OAS. The idea is raised every once in a while that there should be some kind of mechanism through the political organs to supervise compliance, but up until now that has not assumed a concrete form.

The final theme would be that we have seen a number of really important advances in the systems: the sending of more cases to the Inter-American Court and the further incorporation of the voice of the victim in the process. I really think that the next thing we need to see for a major advance in the system is a legal aid system. If you look at who has access to reparations, you are looking at who has access to the system. And until the Inter-American system has a functioning legal aid system and a fully funded set of organs—Commission and Court—it will be difficult to advance further with the question of access to the system and the resolution of past human rights violations. Thank you.

*D. Claudio Grossman*

As we move into the African system, different issues become relevant for comparison—for example, the concept of victim. In addition, the issue of reparations—their scope and elements—is crucial for human rights law. The Inter-American system offers a very broad system of reparations that include material and moral damages, measures of non-repetition, changes in legislation, and symbolic reparations. Because of the scope of these measures, the Inter-American system has developed the most comprehensive system of reparations currently in force in international human rights law. Needless to say, it would be interesting to hear about the African experience in this area and to see whether there is a different emphasis as a result of the specific regional conditions—for example, group rights as well as economic, social, and cultural rights, etc.

As Elizabeth was mentioning, it is important to note that there is a high degree of participation by both victims and states in the Inter-American system. However, there is a higher level of compliance with friendly settlements than with Inter-American Court decisions. This is not surprising given the high involvement of the parties in the negotiations that lead to a settlement. Court decisions are mostly complied with in matters of payment. It becomes important to study the Inter-American experience when ensuring compliance with other components of integral reparation, particularly investigation and punishment of those responsible for human rights violations. Again, the African experience would be extremely relevant for comparative purposes.

In recent years, the Inter-American system—the Commission and the Court—has developed a system to follow up on its past decisions, commitments, and friendly settlements. Pursuant to this new system, past decisions now remain on the docket of the Commission and the Court until they are fully complied with. The Commission and Court schedule hearings on compliance allowing both the petitioners and the states to express their views. Then, the supervisory organs report on the status of compliance to the OAS. Unfortunately, the political organs have not fully exercised their role as guarantors of the system. In fact, the General Assembly does little more than acknowledge the Reports from the Commission and Court. Further development of the system would require these organs to stop standing idle in the face of non-compliance. In order to move in that direction, steps we should consider include, for example, individualized discussions concerning states that fail to comply with Commission and Court decisions. Sharing experiences with other regional systems enriches our analysis of the political and legal issues involved.

With these brief remarks, let us now hear from the African system. I give the floor to Commissioner Nyanduga from the African Commission on Human and Peoples' Rights ("African Commission").

*E. Bahame Tom Mukiry Nyanduga*<sup>39</sup>

Let me first of all thank the *Washington College of Law*, the MacArthur Foundation, and the Inter-American human rights system for extending an invitation to me and to the African Commission to participate in this conference on regional human rights systems. At this juncture, let me also extend the apologies of my colleagues who could not make it here today. Looking at the issue of remedies and the challenges to implementation, and listening to the presentations this morning, I thought I would change my presentation to first describe the challenges that the African system has been facing in terms of effecting remedies and implementing recommendations.

The African regional system is currently in evolution. This is a system whose centerpiece is the African Charter on Human and Peoples' Rights ("African Charter"), which established the African Commission in 1987. The African Commission has now been in existence for the last twenty-one years; in fact, tomorrow, the twenty-first of October, we begin the twenty-second anniversary of the formation of African Commission. That day is marked by the African Commission as African Human Rights day. All fifty-three member states of the African Union have ratified the African Charter. The African Charter was developed and adopted by African states during the era of the Organization of African Unity (OAU). However, at that time, we saw in Africa that the existence of the OAU was also marked by many human rights challenges, particularly in term of governance issues—mainly lack of respect for human rights and democratic principles.

Around the year 2001, upon the entry into force of the Constitutive Act of the African Union, we see the establishment of a new organization on the continent: the African Union. Within the

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39. Commissioner Bahame Tom Mukiry Nyanduga, a Tanzania lawyer, studied law at the University of Dar es Salaam, Tanzania, and graduate studies at ISS, The Hague, The Netherlands, and LSE London, UK. He was elected to the African Commission on Human and Peoples' Rights in July 2003, by the African Union Assembly of Heads of State and Government, in Maputo Mozambique, for a six-year term ending in November 2009. He served as the African Commission's Special Rapporteur for Refugees, Asylum Seekers, IDPs, and Migrants in Africa. He was appointed a member of the Steering Committee of Experts established by the Representative of the United Nations Secretary General on the Human Rights of IDPs, which developed a Manual for Law and Policymakers on the Protection of IDPs, and served as a Consultant to the African Union Commission on the drafting of the African Union Convention on the Prevention of Internal Displacement in Africa. He has also served as president of the Tanganyika Law Society (2000) and East African Law Society, (2004–06), the national and regional bar associations respectively.

Constitutive Act itself, which is the legal instrument establishing the African Union, there are key principles that introduce on the continent a new human rights architecture and a new disposition towards respect for human rights. And this is what we say: henceforth, the African Union and its member states have taken on board the issue of ensuring respect for democratic principles and respect for the rule of law, human rights, and good governance. Africa is reconstructing a continent respectful of the human rights of its people. And we believe, in so doing, in the long run it will enhance the demonstration of a human rights culture on the continent.

This legal construction is broadly reflected in two key articles, namely Articles 3 and 4 of the Constitutive Act, which outline the objectives and principles of the African Union. Of these articles, one states that the African Union itself and its members shall respect human rights on the continent in accordance with the terms of the African Charter. The Act provides for different organs and institutions to guide the Union in carrying out its functions. It includes a number of new principles to mark a paradigm shift from the previous organization—for instance, issues such as establishing the principle of interference in a member state in a situation of serious, grave, or massive violations of human rights on the continent. And this is distinct from the principle of absolute sovereignty, which previously led to the glorification of the principle of non-interference in the internal affairs of African states during the era of the OAU.

A few other concepts have been introduced into the Constitutive Act. For instance, the principle of elimination of gender inequality has actually brought the issue of ensuring that the rights of women are protected in Africa to the forefront. Another concept that will have an impact is the principle of condemnation and the rejection of access to power through unconstitutional means. Now, another aspect that is central to the establishment of a culture of human rights on the continent has been the move towards the adoption of a number of human rights instruments. For instance, the protocol on the establishment of the African Court on Human Rights, which entered into force in early 2005, led to the establishment of the African Human Rights Court in 2006 and the election of judges. I am pleased to say one of the judges is here today.

There is now a body that will complement the mandate of the African Commission in protecting human rights on the continent. Other mechanisms or instruments that have been adopted on the

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continent include the Protocol on the Rights of Women in Africa and the African Charter on the Rights and Welfare of Children. In addition to the court that was mentioned earlier, there is a protocol that merges two African courts. The other court is the Court of Justice of the African Union that is now merged to become the Court of Justice and Human Rights; the merger protocol was adopted in July of this year by the Assembly of the African Union. This description explains the legal instruments and institutional mechanisms in place which aim to ensure the implementation of remedies, if any, on the continent.

The experience of the African Commission has shown that one of the many challenges to implementing remedies on the continent, as mentioned by one of the speakers on the Inter-American system, has been that the recommendations of the African Commission are not binding. The African Commission has not undertaken a study on the problem of non-implementation to establish the extent to which remedies or recommendations have been put into effect where violations have been discovered—to what extent have these recommendations been implemented. Other studies, particularly those by academic institutions, tend to show that the majority of these recommendations have not been implemented. A study carried out by the Center for Human Rights of the University of Pretoria in South Africa gave a rough indication of fourteen percent full implementation by African states, twenty-six percent partial implementation, and about sixty percent of the recommendations remaining unimplemented.

Now this is notwithstanding the general commitment that a state party to the African Charter undertakes when it ratifies the African Charter. Article 1 of the Charter obliges a state party to undertake various measures—administrative, legislative, and other measures—to ensure that the obligations under the African Charter, which they assume voluntarily, are implemented. In terms of follow-up, the African Commission, as I see it, has not undertaken any effective measures to examine the extent to which its recommendations have been implemented. However, the African Commission has two opportunities. First, when we undertake promotional missions to member states to ensure that each member state with an issue pending against it has an opportunity to inquire and to examine the extent to which that state has complied with the recommendations issued by the Commission. Second, when the states have submitted their periodic reports, there is an opportunity for the Commission to



examine the state and the extent to which it has implemented previous recommendations.

As I mentioned earlier, the establishment of the African Human Rights Court has provided a mechanism for the effective implementation of recommendations. Both the Commission and the Court are in the process of harmonizing their new procedures through which recommendations are likely to be implemented if the Commission brings cases to the court. The Commission is one of those parties, under the protocol that established the Court, which is entitled to bring cases to the Court. However, there are a number of constraints on the Commission in spite of the entry into force of the protocol establishing the Court. For example, only one or two states so far have ratified the protocol and given the Court the power to entertain cases brought by individuals and NGOs.

This is important because the jurisprudence of the African Commission, developed over the past twenty-one years of its existence, has developed as result of cases predominantly brought by individuals before the Commission. So, unless many of the states that are parties to the protocol give power to the Court, then we are not likely to see the court effectively implementing remedies against violations on the continent, let alone developing human rights jurisprudence on the continent.

There are some other recommendations, but due to the lack of time, I will not be able to go through them. Nevertheless, it is important to emphasize the role of the national human rights institutions in the continent which might assist the Commission, because within the roughly thirty-six states where they have been established, they are likely to be patronized by the African Commission to ensure that these recommendations are implemented. Thank you.

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*F. Charlotte de Broutelles*<sup>40</sup>

The European Convention system is a quite original one because it entrusts its executive body, the Committee of Ministers, with

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40. Directorate General of Human Rights and Legal Affairs, Department for the Execution of the European Court of Human Rights Judgments. The opinions expressed in this publication are those of the author and do not engage the responsibility of the Council of Europe. They should not be regarded as placing upon the legal instruments mentioned in it any official interpretation capable of binding the governments of member states, the Council of Europe's statutory organs or any organ set up by virtue of the European Convention on Human Rights.

supervising the implementation of the decisions of its judicial body, the European Court. This is provided for in Article 46, paragraph 2 of the Convention, which states that “[t]he final judgment of the European Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.”<sup>41</sup> But to date, there is nothing more in the ECHR regarding the implementation of the European Court judgments in order to apply the first paragraph of Article 46, which states “[c]ontracting [p]arties undertake to abide by the final judgment of the European Court in any case to which they are parties.”<sup>42</sup>

On the basis of this sole article, the Committee of Ministers, assisted by the Department for the Execution of the European Court judgments,<sup>43</sup> which is a department of the Council of Europe Secretariat, has drawn up an effective—although perfectible—system of implementation of the European Court’s judgments. To have an idea of the scope of control of implementation by the Committee of Ministers, I suggest that you refer to the outline I prepared for this meeting. I would prefer to share with you some of the means we have developed to improve the execution process in the challenging period we are facing now because, while there are more and more cases to supervise, the time we have to solve them is the same.

Time, in the context of implementation of a European Court judgment, is a crucial parameter. It is a crucial parameter when it comes to taking individual measures<sup>44</sup> in favor of the applicant after the European Court found a violation of the Convention in its judgment. Individual measures are taken in order to put the applicant as far as possible into the situation that he or she would have been in had the violation not occurred in an effort to achieve *restitutio in integrum*. In some cases, these measures start with putting an end to the continuing violation of the Convention, and in some cases, they include trying to avoid time passing by. In some cases, however, there is no possibility left to adopt any individual measures. I am thinking in particular of cases where the European Court found a procedural violation of Article 2, on right to life, or Article 3, prohibition of torture, and where the Committee of Ministers considered that there is a continuing obligation to conduct an

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41. Convention for the Protection of Human Rights and Fundamental Freedoms art. 46(2), Nov. 4, 1950, 213 U.N.T.S. 221.

42. *Id.* art. 46(1).

43. For more information, see the website of the Department for the Execution of the Court’s Judgments, [http://www.coe.int/T/E/Human\\_rights/execution/](http://www.coe.int/T/E/Human_rights/execution/).

44. For an overview of *individual* measures adopted by member states, see [http://www.coe.int/t/e/human\\_rights/execution/H-Exec\(2006\)2\\_IM\\_960e.doc](http://www.coe.int/t/e/human_rights/execution/H-Exec(2006)2_IM_960e.doc).

effective investigation. I am also thinking of cases concerning custody rights.

Time is also an important parameter when it comes to general measures,<sup>45</sup> the aim of which is for the European Court to avoid the repetition of that kind of violation. This is first and foremost important for the individuals themselves. But I also have to mention that now it is also important for the Convention system itself, as the system could collapse if the number of new applications keeps on increasing at the rate it has been increasing for years. In this context, the Committee of Ministers adopted a resolution on judgments, leaving an underlying systemic problem. The European Court is thus invited to identify in each judgment what it considers to be an underlying systemic problem, and to identify the source of this problem if possible. These are what we now call the “pilot judgments.”

Another requirement we have in mind in supervising execution is quality. The judgment has to be implemented; not only the judgment itself, but the whole judgment. This supposes that the reason the violation occurred is correctly identified and that pertinent measures are taken. There is a fundamental principle in the Convention system—the principle of subsidiarity. It is enshrined in several articles of the Convention, and it has some consequences on the supervision of execution: respondent states remain free to choose the means by which they will implement the European Court judgments. The European Court, itself, has held in several judgments that “subject to monitoring by the Committee of Ministers, the respondent state remains free to choose the means by which it will discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the European Court’s judgment.”<sup>46</sup> Nevertheless, the European Court tends to indicate in some judgments the type of measure that the respondent states might take, either when the nature of the violation found leaves no choice about the measure required to remedy it, or when the European Court found that a system situation or problem exists.

Of course, it helps to have the European Court indicate or suggest the measures to be taken in the judgment itself. But it does not prevent the Committee of Ministers from performing its supervisory role. Furthermore, it should be noted that the domestic problems

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45. For an overview of *general* measures adopted by member states, see [http://www.coe.int/t/e/human\\_rights/execution/H-Exec\(2006\)1\\_GM\\_960e.doc](http://www.coe.int/t/e/human_rights/execution/H-Exec(2006)1_GM_960e.doc).

46. *Scozzari and Giunta v. Italy*, 2000-VIII Eur. Ct. H.R. 249.

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underlying a violation are sometimes not obvious at the first examination, and they start to appear clearly only after long discussion with the authorities of the respondent state. Sometimes, the execution of the judgments requires very complex measures. Perhaps the danger of expanding this method is that a respondent state may conclude that they have no measures to adopt because the European Court judgment does not indicate a measure in a specific case. And, perhaps, this method is only really efficient for simple cases.

As for now, with or without indication by the European Court, member states have undertaken an impressive number of reforms. Just one example: it is almost obvious to every member state today that when the European Court finds a violation of the right to a fair trial in a criminal proceeding, the proceeding has to be reopened. It is almost obvious to date, but it was not at all obvious eight or ten years ago. This common understanding results from long discussions during the meetings of the Committee of Ministers, and also from the work of experts, who drafted recommendations to all member states on the reexamination or reopening of certain cases of domestic level following a judgment of the European Court. Several member states have adopted legislation to allow for the reopening of proceedings. For example, Belgium recently adopted a new law to this end on April 1, 2007. France adopted such a law in 2000; this possibility also exists in Ukrainian law. To me, this is clearly a success that can be attributed to the collective aspect of the execution of the European Court judgments.

The collective aspect of the execution of the European Court judgments is fundamental in the European system; therefore, the selection of the twenty-five to thirty cases that can be discussed during a meeting of the Committee of Ministers out of the 6,000 cases pending before the Committee of Ministers is of great importance. There are four meetings a year specifically devoted to the supervision of execution, each extending over three days during which measures envisioned or adopted by respondent states are debated. And there are real debates during the meetings of the Committee of Ministers. Delegations are more and more involved in cases against other countries, both to learn from their experiences, and, if necessary, to put pressure on their peers.

In recent years, the Committee of Ministers modified its rules and its working methods in order to be more efficient and to be more transparent. For example, although an applicant cannot take part in the Committee meetings, he or she can take part in the proceeding

by sending communications. Non-governmental organizations, as well as national institutions for the promotion and protection of human rights, can also send communications to the Committee of Ministers. Furthermore, since 2007, reports on all cases pending before the Committee are published online on the website of the Department for the Execution of the European Court judgments. The annotated agenda of the meetings of the Committee of Ministers and the decisions taken at the end of the meetings are also made public. All of these measures contribute to a better execution of judgments.

In 2004, the Committee of Ministers also adopted a package of recommendations to member states concerning mainly education and professional training on the Convention and the improvement of domestic remedies. These recommendations draw practical consequences of the principle of subsidiarity that I mentioned earlier. Systematic publication of the European Courts' judgments in the respondent states concerned and, in some cases, specific dissemination to judges or categories of civil servants affected by the judgment is required when the Committee deals with general measures. As a result, the Convention and the case law of the European Court are directly applied at a domestic level. It is hoped that publication of the European Courts' judgments in all member states will enhance the direct effect of the Convention and, at the same time, start developing the *erga omnes* effect.

In conclusion, I would like to come back to the starting point of my presentation. It must appear awkward to entrust an executive body with supervising the implementation of decisions of a judicial body. But it works, and it works quite well. All the recent measures taken regarding transparency of the work of the Committee of Ministers, and the aim of developing civil society participation, can be regarded as a guarantee of a full, if not a prompt implementation. I wish I had the time to mention the cooperation with the other bodies of the Council of Europe, such as the Parliamentary Assembly or the Commissioner of Human Rights, which may play an important role in facilitating the execution of the European Court judgments. We are in a continuous process of improving our proceedings, and I am therefore looking forward to hearing from your experience. Thank you for your attention.

#### G. Discussion

*Claudio Grossman:* Thank you very much. I want to thank the speakers for presenting their views within the margins that we have

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here. It is difficult to be between the lunch and the comments that we have here, but I would like to give the opportunity for a couple of questions. Are there questions or comments?

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*Andrew Drzemczewski:* Since we are talking about advocacy before international human rights organs, please permit me three quick comments.

My first point: even if the case of your client has been declared inadmissible, say by the European Court or the Inter-American Commission, you may still have “won” the case. How come? Simply because your client—a person who was about to be deported—may in the meantime have been given the right to stay in the country for humanitarian purposes. The application is declared inadmissible, so you lost the case, but in reality, your client got what he or she wanted! As far as he or she is concerned, the case was won.

My second point: legal advocacy can entail pursuing matters outside the classic structures of international human rights “legal” litigation. Here I refer to, *inter alia*, political monitoring procedures, such as those carried out by the Monitoring Committee of the Parliamentary Assembly, and the so-called confidential “compliance with commitments” procedures setup by the Committee of Ministers, the executive organ of the Council of Europe.

And last but not least: the question of “compliance.” Insofar as the supervision of Strasbourg Court judgments by the Committee of Ministers is concerned, I believe that the compliance rate is within the region of ninety-six to ninety-seven percent. But such raw statistics must be taken with a pinch of salt, as, for example, it took Belgium eight years following the Strasbourg Court’s finding in the *Marckx v. Belgium*<sup>47</sup> to bring its legal system fully into conformity with the requirements of the European Human Rights Convention.

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*Audience:* We all know that reparations should include public apology, public acknowledgement of responsibility, etc. Do you think that there is a conflict between that form of reparation and existing measures in different human rights systems in trying to save the face of the concerned nations? For example: by holding private or closed sessions, by not publishing reports in case of full compliance, or by

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47. 31 Eur. Ct. H.R. (ser. A) 330 (1979).

any other ways that may help to save the face of nation. Thank you very much.

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*Audience.* Just two quick questions to the Inter-American Court and to the European Court representatives. To the Inter-American Court, is there any consideration given to doing pilot judgments in the Inter-American system? And to the European Court representative, it seems that both systems are like an elephant in a China shop—you have Russia, we have the United States. There seems to be little will on the part of either super- or almost-superpower to comply with our systems. What is the thinking in the European system now as to what do with Russia?

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*Audience.* In my country, they have not accomplished the public apology to the victims. Maybe the moral sanction is harder than to say “I am sorry” to the victims or to publish in the newspaper the decision of the Inter-American Court.

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*Audience.* I want to touch on something Ms. Abi-Mershed said earlier, that using these reparations and passing the cost on to the tax payers in these countries is a way to influence political will, but also we need to make sure that the information is passed onto them—that if the cost is passed on but the information is never disseminated to these people, that this what they are paying for. I was just wondering if you could possibly touch upon how much information is passed on, how much is reported in the press, and what NGOs or other organizations can do to make sure that this information is known by people in these countries?

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*Audience.* Thank you to my brother, the Commissioner from Tanzania. I would like him to evaluate of the impact of the African Commission. Does he think that the Commission, since its inception, has made a difference in the cause and process of opening up political space in Africa, democratization in the respects of human rights on the continent?

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*Claudio Grossman:* Would anyone care to comment on the questions asked, and if someone also wants to discuss what can be learned from each other?

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*Sergio García Ramírez:* Just quickly, I believe that from what has been said, there are many things that we can learn. Based upon my understanding of the characteristics of each system, it is not necessary to impose on each system the rules and regulations of the other, because each works within circumstances and conditions that are sometimes profoundly different. We see what the achievements of each system are within the circumstances of each.

Second, there was a question about “pilot” decisions. Currently, in the Inter-American Court, there are no “pilot” decisions—or said another way, they are all “pilot” decisions. There are relatively few decisions, and I would say that they are all relevant. I would even dare to say that each one of them is another step toward a regime of reparations, and there is a certain track. Whether this is a glass-half-full or a glass-half-empty approach depends on who is looking at it. I believe that the progress has been very great in the last ten years. Things have been achieved, not necessarily in the persecution of those responsible, but there have been achievements that before seemed impossible within the near future. In a relatively short timeframe, there have been various achievements regarding reparations.

Third, there was talk as well of the issue of public apologies and whether they are satisfactory for the victim. The Inter-American Court always asks for public apologies and orders the publication of the relevant parts of the decision—the resolutions. This is not done out of a concept of apology, but rather, this is done under the concept that the Court recognizes the responsibility of the state in the matter. The issue of the imposition of apologies or the recognition by the state is another issue that the Court has dealt with. Now, let me say that I am cautious regarding the issue of public apologies because normally the one apologizing is not the government that was in power when the violations occurred. And the person who seeks the apology is someone who does not have anything to do with the violations committed. However, it is a symbolic gesture that contributes to the respect of human rights and will continue.



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*Elizabeth Abi-Mershed:* Three things. The first point is that this opportunity today really shows what situation we are in, in the different regions and between the regions, and that is a situation of dialogue, evolution, and dynamism. And the question of reparations and compliance is really a question of shared responsibility in looking for ways to advance, and we can learn so much from each other in this regard. I want to mention something else about the patterns of compliance that we can see before the Inter-American Commission, and they are very obvious conclusions. One is that there is higher compliance in simple situations, there is higher compliance in high profile cases. There is higher compliance when civil society uses cases as part of a larger strategy at the national level. And so when civil society creates resonance at the national level, you see a definite increase in the level and the quality of compliance. There is higher compliance when friendly settlement is used as part of a larger state policy, and you can see patterns of friendly settlements coming in blocks when there is a convergence of state policy to engage with the Inter-American system. So that ends up being quite effective.

And the other point that I wanted to make is that the friendly settlement process poses a series of very legitimate legal questions for states, and they are legal questions that require a solution. And one of the things that we are seeing in the system right now is that states are dialoguing with each other about how to solve some of these problems. So we see things such as, in Argentina, the utilization of ad hoc tribunals to establish monetary compensation, which is so difficult to negotiate in some cases. It is just so difficult for the government to arrive at from a unilateral position. And the ad hoc tribunals have actually had a great deal of efficacy. The other example I would mention is that in Colombia, in the administrative contentious jurisdiction, there has been an effort to incorporate the principles and the standard of criteria of the Inter-American system so that the judgments that come through that system are consistent with the Inter-American norms, and also so that there is a mechanism to comply with Inter-American Commission and Court decisions through the administrative contentious jurisdiction. I will leave it there, thank you.

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*Judge Ventura Robles:* Very briefly. The comment of our colleague from the European Council was extremely interesting because it

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precisely brought to light the importance of having a council of ministers monitoring compliance with the decisions. This, I believe, is a fundamental problem in the Inter-American system because we lack this oversight. After Elizabeth's comments, it appears that the Inter-American Court and Commission are following the same path of participation and partial non-compliance of decisions and I believe that ministerial oversight is the only way to lead the way to a better system of monitoring which would result in ultimate compliance with decisions. Thank you.

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*Bahame Tom Mukiryia Nyanduga:* I would like to respond to the comments regarding an evaluation of the impact of the African Commission in terms of democratization and opening space on the continents. If I may say, first of all, with respect to the transition in the Commission over the first ten years and the second half of the twenty years of its existence, I think there has been a marked improvement in terms of the output of the work that is coming out of the Commission at different levels. I think we have concentrated mostly on the decisions which have led to remedies when addressing the communication issues. However, the Commission has also undertaken a considerable weight in terms of their reporting on certain key issues. There is a very major report on issues of indigenous populations which has come out of the Commission, as well resolutions we each have addressed issues of governance on the continent. And they have all been used for advocacy on human rights issues on the continent.

On the issue of democratization, in November of 2005, the Commission adopted a number of resolutions addressing key democratization issues on the continent. For example, after the elections in Ethiopia in May and June of 2005—and we know the outcome of those elections and the balance that ensued—the Commission adopted resolutions condemning the same. There was an attack on the judiciary in Uganda, and the Commission adopted a resolution condemning the same. So what I am saying is that, as much as we might not be able to measure the extent in terms of influencing the democratic space on the continent, the Commission has been able to highlight some of these issues.

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*Charlotte de Broutelles:* I will try to reply to the difficult questions put to me regarding Russian cases. I do not think we can speak of non-

compliance actually. Our problem is to have the judgment executed or implemented within a reasonable time, and there is no provision in the Convention to this end. The only thing which is provided in the Council of Europe statute is that a member state may be suspended from its right of representation or may be requested to withdraw from the organization, or the Committee of Ministers may decide that a member state has ceased to be a member of the Council of Europe. But this would not be a good reply to a delayed compliance. Therefore, experts are thinking of other measures which could be taken in cases of delayed compliance.

I would like to draw your attention to the huge amount of reform which has been undertaken in Turkey. Ten years ago, people were asking the same question about Turkey that you are asking today about Russia. Of course, there are still reforms to be undertaken in member states, but a lot has been done already. Some cases have been on the Agenda of the Committee of Ministers for several years. But things are moving on, and they move on in every member state, therefore, in Russia, too.

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*Claudio Grossman:* Allow me to thank the panelists for their important contributions. I believe they have enhanced our understanding on the overall situation affecting of the regional systems and their experiences on concrete matters, such as reparations. We have also witnessed that supervisory organs have performed a creative function in this area. In the Inter-American system, for example, the Court and Commission, within the parameters of the Convention, developed the content of reparations as well as the procedural role of petitioners. They thus contributed, *inter alia*, to confront impunity by giving a voice to the victims themselves.

### III. WORKING LUNCH

#### A. *Paolo Carozza*,<sup>48</sup> *Victor Abramovich* & *Felipe González*

*Paolo Carozza:* I am very grateful to Dean Grossman for giving us the opportunity to be here at lunchtime. As I think you know, the Inter-American Commission is in session today and in these weeks, and therefore it is difficult for us to be here for a length of time

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48. President (2008-09), Inter-American Commission on Human Rights and Associate Professor, Notre Dame Law School.

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throughout the day—as much as we would love to because all the themes being treated are of great importance and utility to us at the Commission. But unfortunately, we also have to have our sessions and working meetings.

So we envisioned having a very informal lunch with you where we could have a lot of open conversation and exchange about the themes that you have been dealing with and how they relate to the Commission's work, as well as other things that may be of interest to you.

I have to say that my own interest in participating in this conference and in this discussion has only been amplified in the last months because of meetings that I myself have had as President of the Inter-American Commission, both with representatives of the African system who came to visit us in Washington, and during visits that I have made to the institutions of the European system. In both cases, I found the meetings extremely useful to open up horizons of discussion, analysis, and reflection about the strengths, weaknesses, problems, and convergences of the different systems. And so I think the whole enterprise here is an extremely useful exercise.

On the one hand, I am a great believer and advocate of the need for and the importance of regional systems in the global system of human rights precisely because I think they have proved to be as they were first intended; in many ways, they are able to be more effective, deeper, and more solid than the global system. They are closer to the states and citizens they affect. They are parts of communities of nations and peoples that often are bound by certain political or historical or legal and cultural/linguistic ties, and that helps to construct more solid systems. So normatively, that is where there has often been greater development, and in terms of implementation and effectiveness, it is often where we see the highest degrees of compliance and integration of systems.

But that whole structure, I believe, has its costs, too. The cost is that the regional systems, when they operate on their own, carry with them, necessarily, the risk of a certain degree of insularity from one another. Certain kinds of problems are intractable in that region, and it is difficult to see them from the outside and to imagine different kinds of solutions for them. Certain of the vices of the system may not be apparent to us until we see them through the eyes of other systems and other experience.

I think the comparison between the systems that we are doing today and that needs to be done more constantly is valuable as a way of generating dynamism, bringing consistency across the systems, and

helping to fashion norms and practices and processes that have some consistency but that arise from the bottom up, so that they can also be more effective. But I think it is also important to realize that the comparison and confrontation between the systems does not necessarily need to be with the aim of bringing them closer together or making them more alike. In some cases, it might be useful to have the comparison precisely in order to delineate and justify what would be the proper differences between them; the way the different systems address different kinds of needs in their regions and different kinds of dynamics among varying peoples and states. Being able to make us more critically aware of the way in which our jurisprudence or our procedural practices and so forth do justifiably differ from European ones or African ones is good; it makes us more aware and more conscious of the peculiarities and strengths as well as the weaknesses of our practices.

I think the kinds of issues on which that kind of comparison is really fruitful are very evident in the conversation today. Diane and the other organizers have identified three areas in which it is very evident that the comparison and confrontation between the systems can lead to a lot of self-reflection about ways to improve and ways in which the different dynamics lend to different results and different kinds of solutions. I will not say more about those, because you are having such a rich discussion, unless people have specific questions for us. But I thought that my colleagues, Victor Abramovich and Felipe González, and I might reflect a little bit, and provoke further conversation on some of the other areas in which comparison, exchange, dialogue, and confrontation could be useful to expand the discussion.

One of the areas that seems most evident to me has to do simply with the structural aspects of advocacy in the systems. One of the principal problems and challenges of advocacy before the systems, at least in the Inter-American and European systems, is that there is a great tension going on right now that I imagine was quite evident in the conversation this morning and will be this afternoon: the tension between the demands of a system that seeks to do justice and provide redress in every single individual case—and that therefore generates the kinds of administrative problems that we have been dealing with on an increasing basis—and a system that instead seeks to supervise and promote human rights through more large-scale, structural, pilot cases, certiorari type of review, impact litigation, and those kinds of advocacy efforts that seek to solve large-scale or structural or systemic problems through certain individual cases. How this tension is

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resolved leads to differences in basic rules of procedure, in how opinions and decisions are made and drafted, what kind of implementation is necessary, and administrative questions about how to handle backlogs of cases, and the standing of petitioners and so forth. So, that it is a major area that needs to be dealt with.

But I would also like to stress that I think it is really critical that the comparison between the systems not be limited to procedural, institutional, and structural questions; that comparisons really go to the normative, substantive content of different human rights problems and areas and thus help us understand, as deeply as possible, what the proper reach and content of the norms should be—for example, freedom of expression, the protection of minorities—whether indigenous groups or religious minorities—or the standards for assessing the independence of tribunals and procedural protections like due process and delay. Those kinds of substantive applications of human rights norms are just a few examples of ones with which our system has struggled, and is struggling, or ones in which we have already developed some kind of norms and processes. By that kind of exchange, I think the deepening of the substantive understanding of the content of human rights is really essential as well.

Again, I want to leave time primarily for question-and-answer and discussion, so I will stop there and let Victor and Felipe add some of the thoughts that they might have and, otherwise, simply take questions and open it up to conversation.

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*Victor Abramovich:* Simply, I would like to give my thanks to Dean Grossman and the *Washington College of Law* for the invitation to be here today. Due to time and because many issues have been raised in previous panel discussions this morning, I know it would be interesting to open the floor for discussion. That being said, I think Paolo's opening is sufficient and we should go straight to questions.

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*Paolo Carozza:* Yes, I should have noted early on, in fact, that although Victor and I can stay, as scheduled, until 2:30 p.m., precisely because of the demands of our working meetings and so forth at the Inter-American Commission, that Felipe, who has been here all morning with you, is going to have to leave in just ten minutes.

*B. Discussion*

*Bahame Tom Mukirya Nyanduga:* I am a member of the African Commission which has followed closely the working relationship between the Inter-American Commission and the Inter-American courts. I have a colleague, a judge of the African Court, who is also attending. I think he will be one of the panelists this afternoon. Currently, both the African Commission and the Court are in the process of harmonizing our rules of procedure. We know the systems are slightly different and this is the point I wanted to make; particularly, when you mentioned the importance of looking at not only the institutional relationship but also to try to see what we learn in terms of the principles which are evolving in the two systems.

Here, I can say that from the African Commission perspective, and as was mentioned earlier, our Charter provides for a possibility of being inspired by the principles and instruments which have been adopted universally all throughout the system. We always look to the Inter-American system to see the kind of principles or the kind of mechanisms that are being developed. And of the number of issues which came up during the panel discussions this morning, the issue of follow-up on implementation of recommendations is particularly important in terms of understanding how the Inter-American system has developed and how it is evolving to ensure that those recommendations are implemented.

The point I want to raise or even to reiterate on what you have said is the need for the two systems, notwithstanding the differences in culture and background, to continue the exchange so that we are able to see how we can work closely together and also to develop the principles because, as we all know, we are interdependent and the principles are universal.

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*Paolo Carozza:* One of the things that struck me about that comment is that the two particular areas that you have raised—the question of institutional relations between the Inter-American Court and the Commission and the procedures that flow from that, and the question of how we follow up on recommendations or decisions, are both very good examples of areas in which there is not a fixed problem that is static in time. The way that the challenge has arisen for us, I think, is precisely out of the fact that there is a dynamic relationship between the institutions, for example, and it is very different today than it was before the reforms of 2001 or when the

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Court was first established and the Commission first began to send some of the cases to the Court. The existence of different kinds of advocacy groups within civil society has changed the relationship. The past rules of the Court that give greater access, direct access, to the Court by the representatives of the victims has also changed that relationship. The Commission's own practices regarding when and how and under what circumstances to send cases to the Court has changed that relationship as well.

It is exactly out of the dynamism—the fact that it is changing all the time—that we need to be constantly reevaluating it. That is why we are engaged now with the members of the Inter-American Court in an ongoing discussion about what the next stage of changes demands and how we need to adapt again.

The same is true of questions of follow-up, and this is why it is critical to be asking these questions across systems, because the kind of follow-up that was necessary in the European system before the great expansion to forty-seven states of the Council of Europe was very different than it is today. The same is true, in a certain sense, in the opposite direction with respect to the Inter-American institutions where follow-up has a slightly different character and dynamic when we are talking about doing so with respect to governments that, in differing degrees, are democratically accountable as opposed to ones that are simply criminal dictatorships. And so we need to learn from you as well as you from us precisely because things are fluid all the time.

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*Felipe González:* There is a point I would like to raise that was discussed at the prior panel, that it is important to consider the issue of legal aid for victims. In fact, until a few years ago, the victims did not have autonomy to litigate a case before the Inter-American Court, so the representatives acted as advisors to the Inter-American Commission. So it was the Commission which was financing the litigation before the Court. Then the victims became autonomous to litigate the cases. They cannot lodge a case but can act autonomously once the cases have been lodged at the Court and, since then, there has been this whole debate about establishing some system of legal aid or a trust fund that would allow all victims to be adequately represented at the litigation at the Court. And I think that it would be important to learn about the ways that the other systems are dealing with this and we have for years been trying to move forward with this without much success.



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*Victor Abramovich:* I just want to add that I think the question about the relationship between the Inter-American Commission and the Court and how it works is an important question. I remember that ten years ago, there was debate within the Inter-American system about moving towards the European system—a judicialization of the system. In other words, to leave the Court as the only protective body. I think the recognition in this debate of the role of the Inter-American Commission as a monitoring body above and beyond its management of the cases, was important. It is important to the system to have a judicial body accompanied by a quasi-judicial body that can monitor the cases and at the same time oversee the situation of human rights within the countries. The Commission is able to act as a line of communication between the disputes and the structural situation on the ground in the countries.

I think it is important to link the Inter-American system with the African system in particular. At the time this discussion occurred at the end of the 1990s there was a certain expectation about the process of the transition to democracy in Latin America. There was an expectation that democracy would alter the human rights problems in the region. And I believe that there have been some very important improvements in the region in terms of respect for human rights, improvements in electoral systems, improvements in the justice system, etc. However, the end of the democratic transition did not bring with it stronger democracies, meaning that there continued to be violations of human rights and structural problems which led to violations of human rights. I believe that the function of the Inter-American Commission to articulate its work with disputes to the Court, as well as its monitoring work, continues to be key. I believe that there are certain similarities with the functions carried out by the African Commission.

What we are seeing in this process is a much greater role being played by the victims. As Felipe González said, the Inter-American Commission continues to carry out its work as before, while at the same time adjusting to a greater participation of victims in the cases before the Inter-American Court. But I do believe that it is important to show this relationship between the disputes and the monitoring work, and there are many examples of this. For example, with regard to amnesty laws and countries going through the process of judicial transitions, it is clear how the individual disputes and subsequent jurisprudence created a foundation for the Commission's monitoring work. The disputes and the monitoring role of the Commission are

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intimately interconnected and the Commission carries out the function of being the link between the two. I believe that is an important historical precedent to the discussion we are having here today.

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*Claudio Grossman:* I was a member of the Inter-American Commission from 1994 to 2003. In my view, there are three historical moments for the Inter-American system. The first was the fight against dictators. The most important technique that the supervisory system used in this period was not the individual petition or the case system. When there are more than 20,000 disappeared persons in Argentina, you cannot open an individual file for each and go through all the procedures of submission, hearings, and so forth. The sheer numbers make this task extremely difficult. In addition, a case does not pre-judge its result. At that time, it was very important to expose disappearances and other mass and gross violations of human rights immediately, issuing country reports that would authoritatively describe those international crimes. Accordingly, the Commission attempted to visit countries and, whether it was allowed or not, issue reports that became very important for the purposes of delegitimizing dictatorships.

The second historical moment was marked by the legacy of dictatorship, which included dealing with amnesty laws and freedom of expression restrictions. During this period, the supervisory organs resorted to a combination of means, utilizing country or situation reports together with individual petitions. For the most part, member states with elected governments made this possible because they started to cooperate with the system by participating in the different proceedings.

I remember when I was the President of the Inter-American Commission in 1995, I reported that we had adopted—and were very proud of—nine decisions. In 2001, there were over fifty decisions issued. This shows important growth in handling petitions, bringing about a transition from country reports to petitions, which became the most important supervisory technique employed by the system.

The third historical moment was brought about by the need to achieve social inclusion in the face of vulnerable groups in the region such as indigenous populations, women, children, refugees, and the poor. The existence of severe inequalities and deprivation constitute a threat to democracy and open possibilities for demagogic reactions that ultimately go against the human rights tradition. At this stage,

the case system was supplemented by the expansion of rapporteurships focusing on matters such as indigenous groups, women, migrant workers, etc.

It is worth noting that these historical moments are not entirely separated and, depending on the country, we see how components of these moments overlap and we see the role that organ can play in establishing priorities required to promote and defend human rights in a given context. Taking into account the creative, committed, and—allow me to say—unavoidable role that the organs play, I believe that it would be desirable to increase the interaction between the different systems so that they can learn from each other in matters of jurisprudence as well as in the development of techniques designed to enhance their contribution in a dynamic reality.

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*Paolo Carozza:* Yes, that would be extremely helpful and, as one indication of it, I think we have been benefited at the Inter-American Commission and I like to think that my colleagues from the Inter-American Court have been benefited at the Court by exactly that exchange between Commission and Court.

And we have, in the secretariats of both, individuals who have transferred from one of the institutions to the other and provide invaluable experience as a result of that. You can only augment by doing it across systems as well.

The only thing I wanted to come back to, without taking time from whatever other questions there might be, is that I think Dean Grossman's tripartite analysis of the history is extremely useful and important. I want to mention, arising out of that, the thought that there may be a fourth period that is beginning now that has a lot to do with what Victor was pointing out about the increasing awareness of the structural and endemic weaknesses of the democracies in the system. Even those countries that now have had democracies for a period of time in the Americas are increasingly being faced with the kinds of large-scale and intractable human rights problems that arise out of widespread social exclusion in the region. And so, it can come up in anything from systematic discrimination of certain segments of the population to prison conditions, where you cannot just take one case, two cases, two individuals and say, "Now we are going to solve the entire problem of conditions of detention in the country."

I think we are struggling with the need to adapt, once again, to a new stage where we are combining some of the elements of the previous stages and fashioning new hybrids, and it is very much an

open struggle, I think, among us as to how we are going to do that and we really need help.

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*Andrew Drzemczewski:* On the cross-pollination point. Yes, indeed this should be pursued more often, as we can learn a lot from one another. I understand that, not so long ago, a senior staff member of the Inter-American Commission's secretariat spent a number of months working in the registry of the European Court in Strasbourg. I do not think there exist any intractable difficulties in accommodating staff members in the respective institutions.

There is also, as you pointed out earlier, Paolo, the utility of organizing regular formal or less formal meetings between courts. Members of the European Court of Justice (the EU court based in Luxembourg) regularly hold meetings with judges from the Court in Strasbourg, and the President of the Strasbourg Court, Jean-Paul Costa, has recently had meetings with representatives from the Inter-American Commission, as well as the President of the International Court of Justice, Rosalyn Higgins.

And please let me add a comment while we are on the topic of learning from each other. With respect to this, we in Europe were in a comfortable situation—in so far as the regional human rights mechanism was concerned in the 1950s, 60s, and 70s. The basic premise of the ECHR was that we are all mature democracies with human rights and when there are difficulties, the fine-tuning of legal norms with respect to, for example, the freedom of expression, would be carried out in Strasbourg. Rarely would issues of fact be disputed in Strasbourg. But the situation has drastically changed with the fall of the Berlin Wall, and the dissolution of the former Yugoslavia and the ex-Soviet Union. We now have, in the Council of Europe, major human rights violations to deal with. Take, for example, the case law before the European Court with respect to Chechnya. Problems encountered are akin to those which confronted the Inter-American Commission and Court in the 1970s and 1980s. You have a rich experience of knowing how best to handle major human rights violations, a case law from which we in Europe can learn. Was it not, for example, the experience of the Inter-American human rights bodies which inspired the Strasbourg Court to develop its important case law on substantive and procedural violations of non-derogable human rights? I am sure that we, in the so-called mature democracies of Western Europe and, in particular, the human rights

monitoring bodies based in Strasbourg, still have a lot to learn from you.

My next point is about the parliamentary dimension of the work of the organization I work for. This is a unique feature of the Council of Europe which, since its creation in 1949 has, as one of its statutory bodies, the Parliamentary Assembly composed of parliamentarians who have two hats: one, as parliamentarians who work in their own, national parliament; and another one, as parliamentarians in our Parliamentary Assembly. This Assembly of parliamentarians can play a significant role in the human rights field. I will just give you one example.

My chairperson of the Legal Affairs and Human Rights Committee is Mrs. Däubler-Gmelin. That name may not mean much to you, unless you are conversant in German political life. But the position she holds, and the potential influence she has in her country, can be considerable. This is a person who was Minister of Justice of Germany for over four years, and is also a professor of law, presently the president of the Bundestag's Human Rights Committee in Germany—not a small country. She, and persons like her, have several former ministers of justice and interior in the Legal Affairs Committee composed of eighty-four members that can have an important say on the domestic political scene, and not least in the manner in which human rights issues are dealt with in their respective national legislatures. The parliamentary dimension is missing in most, if not all of other regional human rights mechanisms. One should not forget that state responsibility for human rights violations is not the sole responsibility of a government, the executive, coupled with that of actions taken by the administration and the state apparatus, including the judicial branch. There is also an important dimension of responsibility, often overlooked by human rights activists, which has to be shouldered by the state's legislative organs. Just look at the influence that the report on extraordinary rendition and secret CIA prisons in Europe has had in the world—hitting the front pages of many newspapers—which was prepared by Swiss Senator Dick Marty, the predecessor of Mrs. Däubler-Gmelin as chair of the Legal Affairs and Human Rights Committee.<sup>49</sup>

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49. For more information regarding the work of the Committee on Legal Affairs and Human Rights, see the Committee's website at [http://assembly.coe.int/Main.asp?link=/Committee/JUR/role\\_E.htm](http://assembly.coe.int/Main.asp?link=/Committee/JUR/role_E.htm). The website describes, for example, the work undertaken by the Committee on the subject of respect for human rights in the fight against terrorism. In the new international climate that has emerged since the terrorist attacks of September 11, 2001, the Committee has been at the forefront

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A final point. In the Committee of Ministers, which supervises the execution of Strasbourg Court judgments, as explained by my colleague Charlotte de Broutelles, if a case is blocked for more than five years or if there is a major structural problem, our Parliamentary Assembly's Legal Affairs Committee—with the dual hat of parliamentarians working in Strasbourg and in their own parliaments—decided about seven or eight years ago—*ex officio*—to seize itself of such cases and to help in the implementation process.

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*Victor Abramovich:* I am not in any position to analyze the European system, but it seems important to return to what Dean Grossman was saying about different forms of judicialization and the process of judicialization. If one looks at the decisions of the Inter-American Court, even the very first decisions, I believe it has historically been a tribunal that always made decisions and looked beyond the specific case. And in the decisions, there are distinct ways to have an impact regarding structural changes, such as in the cases of massive and systemic violations. For example, the issue of measures calling for institutional reparation that requires changes of regulations or policies that go beyond the situation of reparations for the individual in the case. There are many examples of this, such as the case *The Last Temptation of Christ v. Chile*,<sup>50</sup> where Chile was required to revise its constitution to establish the prevention of prior censorship. Beyond the individual case the reparations have a collective effect and scope. Another way of saying it is, and the decision was very strong, is the impact the decision has on the jurisprudence of domestic courts. This impact is very clear, for example, regarding the freedom of expression, procedural guarantees, amnesty laws, etc. The *Barrios Altos* case had a direct impact, for example, on the decisions regarding amnesty laws issued by the Argentina Supreme Court. Another example of the collective impact that a decision in a discrete case can have is the discussion regarding peace and justice in Colombia.

Lately, I believe, as Paolo noted as well, there is a tendency in the system to make progress regarding the treatment of collective cases that have many victims. At times, there are many victims named on the case and sometimes the victims are the communities, as in the

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of the Assembly's condemnation of all forms of terrorism. In its reports, the Committee has insisted that terrorism can and must be combated effectively by means that fully respect human rights and the rule of law.

50. Inter-Am. Ct. H.R. (ser. C) No. 73 (Feb. 5, 2001).

cases of indigenous communities. I believe that it is important because, beyond the role of the Inter-American Court as a tribunal, the impact of the decisions go beyond the case and function also as pressure in a way for the states to revise their regulations, practices, and policies. And I believe this is important.

Now, the other question that I think is important to put into the discussion is the issue of the 2001 reform. Was it a greater judicialization or not? This is what I believe is part of the debate. Without a doubt, the number of cases that the Inter-American Commission began to send to the Inter-American Court as of 2001 is greater. Before, between 1997 and 2001, there was an average of four cases per year sent to the Court. From 2001 to 2007, there was an average of twelve cases sent to the Court per year. One looks at those numbers and could think that there is an increase in the quantity of cases that are sent to the Court and a tendency for greater judicialization of the cases. However, if one looks at the relationship between the quantity of the cases that go to the Court and the quantity of the petitions received by the Commission, the spread remains the same. Between 1997 and 2001, one percent of the cases were sent to the Court. The quantity of the petitions received by the Commission during that timeframe were 450 to 500 petitions per year and four of those per year were sent to the Court. That is less than one percent. Between 2001 and 2007, the Commission received around 1,200 petitions per year, and twelve of those were sent to the Court on average per year. That is to say that even after the 2001 reforms, the percentage of the cases that were sent to the Court is one percent of the cases that the system processes—which is to say that I do not believe that there has been a movement towards the judicialization of the system.

However, I do believe that it is very important for the Inter-American Court, by way of collective reparations or collective cases, to focus on the structural situation within the country aside from the individual case. I believe that the function of the Court goes beyond the victims of the individual cases. This would have a very significant impact on the structural problems that we are seeing in the region at this time.

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*Paolo Carozza:* Both of the themes that Andrew raises I think are really helpful points of comparison. When I came to the Inter-American Commission, I came as a professor, as a scholar, not as primarily an advocate or activist, although I had done some litigation

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in the Inter-American system. I was a teacher and my area of specialty was much more the European system than the Inter-American system, and most of my scholarly work has been on Europe not on the Americas. And so when I came to the Inter-American system, as a Commissioner, I came, really, in a certain implicit way with the mental model of Europe dominant in my mind. My way of perceiving the possible direction of the Inter-American system was by reference to the European one, including Protocol 11 and the elimination of the European Commission, which I had never really questioned until that point as being the natural evolution of the way that regional systems would move. And it was only after having experienced, in a serious way, for a period of time, the additional non-judicial roles of the Commission that I realized exactly what was now missing in the European system.

So I think it is a decision that has had consequences today that I do not imagine you, who are involved intimately in it, did not foresee in the mid-1990s. And it has principally to do with the need to accompany the judicial and legalistic protection of human rights with other mechanisms that are primarily focused on politics, on promotion, on what I think of, in the broadest sense, as pedagogical approaches to human rights; the kinds of engagements with political and legal and social actors that help to increase a knowledge and acceptance and internalization of the norms and so forth. I think that is critically missing now in the European countries. It is being done by some institutions but there is not a center of gravity for those things the way that there is in the Inter-American system.

That realization, I think, has certain implications for our own system too. Because of the dual nature of the Inter-American Commission, this quasi-judicial one that treats individual cases, and also the more political and pedagogical and sort of larger role that it plays through the other kind of supervisory tools, there is always a question of how to maintain the proper balance between those two things, especially in light of the fact that we are chronically and critically short of resources. The fact that we are so short of resources within the Inter-American system means that every decision to allocate a certain number of resources towards the processing of cases or away from the processing of cases and towards preparation of other reports means, really, that you are sort of critically depriving the other kinds of exercises from the same sorts of resources.

So right now we are facing a massive backlog of cases and a huge delay, and it creates all sorts of problems: problems of equity, problems of political relations, and so forth. And so there is a



massive amount of pressure and incentive to devote more and more resources towards the processing of cases, the elimination of the backlog and so forth. And the experience of Europe should be sort of a warning to us that if we proceed in that direction without sufficient attention to maintaining the strength of the other kinds of tools that we have and that we need to maintain, the Inter-American system could find itself in a serious imbalance as well over time.

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*Claudio Grossman:* I do not think that simply the proportion of cases being referred to a court tells the story.

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*Victor Abramovich:* No, you are right. It is a little like what Paolo was saying. Beyond the actual number of cases that are sent to the Inter-American Court, the time the Inter-American Commission spends working is very much concentrated in the dispute aspect of the cases. Even as such, however, you can see in the last few years a series of reports monitoring structural situations in the countries. I believe that the key issue is how to coordinate the judicial work of the Commission with the monitoring role of the Commission. I believe that this is the main point. And a possible initial conclusion is that the cases, and the quantity of cases that the Commission receives, act as a sounding board for the problems in the region. It is not the only diagnostic monitoring method, but it works as a sounding board for these problems. And without a doubt, one of the main issues that appears in all of the cases is the deficiency of the administration of justice systems on the national level. If one looks back at the Commission's reports regarding the issue of access to justice, it is clearly a central theme in the monitoring work of the Commission.

I believe that therein lies the strategic aspect of the work of the system. How do we ensure that the jurisprudence of the Inter-American Court and the human rights treaties are implemented at the domestic level? At the internal level? How do we achieve coordination and dialogue between the international system and national judicial systems at the same time? I believe that the Court is doing a great job with the higher courts of the countries in the region. There are good improvements in several countries in the region regarding the domestic application of international laws. Not only regarding issues of amnesty laws, but in other respects as well. I believe that this is a strategic aspect of the work of the system. Figuring out how to strengthen the protection at the national level

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and the role of the national tribunals is key. This is why if one were to look back into history, one would say that this is the central axis of the monitoring work of the Inter-American Commission, which has everything to do with the access to justice and the administration of justice. In my opinion this is the underlying issue when you look at the docket of cases and the majority of the states request an exception due to insufficient domestic resources. The problem is not a lack of resources, but rather the ineffectiveness of the judicial systems. International protection will come with greater domestic guidance.

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*Paolo Carozza:* Just to pick up on the second part of Andrew's comment in relation to what was said about the treaties—although I think it is a great achievement that the treaty has succeeded in not being treated like a constitution within the tradition of this hemisphere, one of the costs, of course, is that it means that you do have to find other mechanisms of adaptation of the system to the needs. And the fact that we have a system that, unlike the European system, does not have a strong political supervisory mechanism and set of institutions and integration of regional parliaments with national politicians and so forth is one of the things that we are critically lacking. And so, in the absence of a protocol that would add it but also carry the risk of opening up everything else, I think one of the challenges that we face is figuring out what might be functional equivalents, functional parallels to what exists in Europe that could be developed without refashioning the whole structure of the American convention and the institutions.

So now I am going to leave and let you struggle with these questions all afternoon with one another because we do have to get back to our sessions. But maybe, just by way of closing, I will say this: I think it is worth reminding ourselves, periodically, that what all of this enterprise is about, that we are all committed to, that we are all here because we are interested in it and engaged in it is, at the end of the day, the value—the inestimable value—of every human person. That is what the whole premise of the human rights enterprise is. And if it is not about that, then the whole thing collapses like a house of cards at the end of the day. It just becomes one political ideological project to be opposed by another one. So that does not necessarily mean that the international system does have to proceed through taking every single individual case and exploring it to its end. Maybe it does but not necessarily. But I think we have to realize

that the attraction of the individual cases in large part stems from that, from this idea and this fundamental principle and desire to do right by the person, every person; that one person's injustice is already too much.

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*Victor Abramovich:* As has been raised here in this discussion, there is a change regarding the issues—from massive violations to structural problems that are related to violations of human rights. And I think that therein lies the challenge that still exists for the system—how to work with structural cases. I believe that there are improvements in terms of thinking about collective reparations that go beyond the case. I believe that there is an improvement in processing cases that affect groups. Many times, states complain about the processing of cases implicating groups of people, but these cases allow the system to tackle structural problems—for example, cases regarding prisons or indigenous communities. And I believe that another key issue regarding structural issues of human rights violations is maintaining the monitoring role of the Inter-American Commission such as the visits it conducts, the coordination between monitoring, and the actual cases themselves. I believe that this is an essential issue because we leave the massive violations behind, but there continue to be structural problems that affect the validity of human rights. Above all, it affects groups or entire sectors of the population. Thank you.

#### IV. PANEL 3: INSTITUTIONAL CHALLENGES FACING REGIONAL SYSTEMS FOR THE PROTECTION OF HUMAN RIGHTS

##### A. *Diego Rodríguez-Pinzón*<sup>51</sup>

We will begin now with the final panel here at the *Washington College of Law*. We are delighted to have here a very interesting panel to discuss mainly what we have envisioned as the challenges of the regional systems. You have heard a lot of information discussed in the previous panels that I think is going to serve also as a basis for some of the discussions that we are going to be holding in this panel.

So without saying anything else, I will present the first panelist, Pablo Saavedra. Pablo Saavedra is the Secretary of the Inter-American Court in San Jose, Costa Rica. More importantly, from my

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51. Professorial Lecturer in Residence and Co-Director of the Academy on Human Rights and Humanitarian Law, *American University, Washington College of Law*. Professor Rodríguez-Pinzón teaches courses in the fields of international law and human rights law.

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perspective, he is a very good friend of our institution and a very good friend of the human rights cause. He has been a very creative force on the Inter-American Court, fostering many of the latest improvements in that tribunal with the support of very dynamic judges. He will present some of the challenges the Court has been facing, and hopefully at the end, we will have enough time for questions for him and his colleagues.

*B. Pablo Saavedra*<sup>52</sup>

Thank you, Diego. First, I want to thank the *Washington College of Law* and the MacArthur Foundation for the invitation. I think that one of the challenges that we have for the future is that of achieving a dialogue about the problems and the strengths of the three most permanent regional systems for the protection of human rights. From the perspective of the Inter-American Court, I want to point out certain strengths and, on the other hand, certain problems that exist. I first want to highlight the system of reparations of the Court. I believe that one of the greatest contributions that the Court has made to the case system is within the sphere of reparations. In each specific case, the Court orders individual reparations, but also takes a broad view by ordering structural reparations in order to address underlying problems so that particular kinds of violations will not reoccur. Accordingly, it is important that we ask whether the Court's judgments are being complied with, and that we address the challenges that it is facing.

Specifically, regarding indemnifications, at the beginning of this year we presented data that showed that eighty-one percent of damage awards ordered by the Inter-American Court were paid by the states, and some states are currently in the process of paying. I believe that this figure reflects positively on the level of implementation of the orders of the Court in that respect. The states also comply with implementing reparations ordered by the Court in which positive obligations are imposed, such as the construction of monuments, the naming of streets, etc. Compliance has been somewhat delayed, as can be seen from the Court's supervisory data, but the completion of these projects as guarantees of non-repetition and measures of satisfaction is important. It should be noted that when the Court has ordered public apologies or acts of public reconciliation in a particular case, generally the act is officiated by

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52. Registrar, Inter-American Court of Human Rights, Organization of American States. The views expressed are those of the speaker and do not necessarily reflect those of the Commission or the OAS.

high-level authorities of the State in question. We have seen some very significant examples of this, such as the public apology of the President or Vice President of Guatemala.

I believe that the Court has made great advances and contributions in ordering reparations that address structural problems with the aim of avoiding future violations of the Convention. I would like to briefly refer to some examples. One of them was mentioned this morning: limitations on amnesty. Developments in the jurisprudence of the Inter-American Court on this matter have been influential. Since the case of *Barrios Altos*,<sup>53</sup> amnesty laws have been left without legal effect in that state. And this is not only in Peru. The outcome of this case has served as a guide to the Argentine Supreme Court and to the high courts of other states in the region.

Another example can be found in the case of *The Last Temptation of Christ v. Chile*,<sup>54</sup> in which the Court ordered the state to reform its political constitution to remove censorship of cinematography, and the state complied.<sup>55</sup> Through cases like this, the Court has prevented similar cases from arising. Similarly, a law was recently passed in Chile in compliance with another judgment of the Court regarding access to public information.<sup>56</sup> The President of Chile asked legislators to pass a law that was in accord with international standards in order to comply with the Court's orders, since previously no such law existed in Chile.<sup>57</sup>

We also have many examples of cases involving indigenous communities. For instance, a case arrived at the Inter-American Court due to a structural problem in Nicaragua, specifically, that there was no law that permitted the demarcation of the ancestral territories of an indigenous community.<sup>58</sup> The Court ordered, as a measure of reparation, the enactment of a law setting forth specific guidelines for this purpose, and this has allowed the implementation of various processes of demarcation in Nicaragua.<sup>59</sup> Additionally, there is a case against Costa Rica concerning freedom of expression and the right to appeal a judgment to a higher court. Under Costa Rican law, the only remedy available to challenge a criminal conviction was the writ of cassation, and this remedy only allowed a

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53. Inter-Am. Ct. H.R. (ser. C) No. 75 (Mar. 14, 2001).

54. Inter-Am. Ct. H.R. (ser. C) No. 73 (Feb. 5, 2001).

55. *Id.*

56. Case of Claude-Reyes *et al.* v. Chile, Inter-Am. Ct. H.R. (ser. C) No. 151 (Sept. 19, 2006).

57. *Id.*

58. Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Inter-Am. Ct. H.R. (ser. C) No. 136 (Aug. 31, 2001).

59. *Id.*

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limited review of the proceedings of courts of first instance.<sup>60</sup> Thus, the Inter-American Court ordered the government to adapt the laws of Costa Rica to the standards of the American Convention on Human Rights (American Convention).<sup>61</sup> Costa Rica has since passed a new law intended to bring its domestic legislation in line with international standards.

There are many other examples where the Court's jurisprudence has had a great impact. For instance, the Court has had an impact on the functioning of military tribunals, attempting to restrict the scope of their jurisdiction so that it may be exercised only over members of a state's military for offenses that affect the military's legal interests.<sup>62</sup> Here, I believe that we encounter the greatest challenge that the Inter-American system faces: achieving a "jurisprudential dialogue" between national and international tribunals. It is important, in particular, that national tribunals engage in this dialogue and ensure "conventionality" (*convencionalidad*) in their decisions. In other words, when national courts are applying the law in a particular case, they should not do so only from the perspective of domestic law, but should also take into account the international treaties that their own States have ratified. This, I believe, is one of the most interesting processes taking place in Latin America in the last decade. We are seeing very positive results, such as the incorporation of international treaties and the jurisprudence of the Inter-American Court into the decisions of the high courts of several states. National courts are engaging in the trans-nationalization of the decisions of the Inter-American Court of Human Rights.

Actors within the Inter-American system face another important challenge: strengthening the exigibility of "conventionality." I believe that the work of creating a dialogue between national and international courts does not lie within these institutions alone, but should be taken up by litigants within the system. They must demand that national courts apply international standards and persuade domestic judges to do so. I believe that, in this respect, the Inter-American Court is working to fortify civil society and other actors so that they may present these demands to domestic authorities.

I would also like to mention, as a side note, another challenge that I believe is very important: how to incorporate public defenders, as

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60. *Id.*

61. *Id.*

62. Case of Gómez-Palomino v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 136 (Nov. 22, 2005); Case of the Mapiripán Massacre v. Colombia, Inter-Am. Ct. H.R. (ser. C) No. 134 (Sept. 15, 2005).

emerging actors, into the system of Inter-American litigation. I use the term “public defenders” to mean lawyers provided free of charge by the state to anyone who does not have access to legal assistance. In Latin America, eighty to ninety percent of all criminal defendants are represented by public defenders who often serve to reveal the problems with due process that exist in the region. We are currently seeing the first cases brought by public defenders to the system. I am referring specifically to cases in Guatemala and Argentina and other countries, where state-employed attorneys have identified structural problems and brought them before the Inter-American Court. For example, death penalty cases against Guatemala were brought by public defenders, and as a result of these cases, hundreds of other cases involving citizens in the same situation have been resolved.<sup>63</sup> I believe that this work is crucial, particularly because it allows those with few economic resources to access Inter-American justice. Thus, providing public defenders with better training and greater access to the Inter-American system is important. I also believe that ombudsmen need to play a fundamental role in the future of the Inter-American system. We are seeing many cases in which ombudsmen use the jurisprudence of the Inter-American Court in order to resolve disputes. This has occurred, for example, in the Federal District of Mexico and in other states.

These are some of the important challenges that the Inter-American system is facing, but there are other significant problems that must be confronted as well. One is the problem of universality: not all of the countries in this hemisphere have ratified the American Convention. Of the thirty-four states that are part of the OAS, the Inter-American Court only has jurisdiction over twenty-one. In the panel this morning, another participant said that it was necessary to follow the European system’s example in creating a political body to supervise compliance with the decisions of the Inter-American Court. In my opinion, it will be impossible to do so within the CJPA until all of the American states have ratified the American Convention. Currently, if such a body were created, a group of states that have not ratified the American Convention would be able to supervise the compliance of those states that have ratified the Convention and recognized the jurisdiction of the Inter-American Court. Furthermore, I believe that universality is a fundamental challenge for the Inter-American system because the current situation of

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63. Case of Raxcacó-Reyes v. Guatemala, Inter-Am. Ct. H.R. (ser. C) No. 133 (Sept. 15, 2005); Case of Fermín Ramírez v. Guatemala, Inter-Am. Ct. H.R. (ser. C) No. 126 (June 20, 2005).

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inequality between the states creates inequality among the citizens of the Americas, barring many from accessing Inter-American justice. Finally, as long as some states do not ratify the American Convention, the resources committed to the development of the system will be inadequate.

The budgetary problem of the Inter-American system, which includes both the Court and the Commission, is one that I always mention at the forums that I attend. Only to present the issue, because I believe Santiago Canton will talk about this problem from the perspective of the Inter-American Commission, the Inter-American Court today has the fewest resources of any international tribunal in the world. The recently created African Court has a budget that is twenty percent greater than that of the Inter-American Court. This reflects somewhat the political priorities within the OAS, where the discourse on the importance of the system is not translating into contributions for its financing. Only after five or six years of struggle were judges on the Inter-American Court able to receive a monthly salary of \$1,000 dollars. The budget of the Court is \$1,700,000 dollars, but this amount is not sufficient to fund all of its undertakings. Today the Court subsists thanks to the support of Spain and Norway and the voluntary contributions of some individual member states of the OAS. Without this financial support, the Court would be forced to severely cut the number of cases it hears and its activities of supervision, education, and promotion. However, these resources are not guaranteed in the future. I believe that many of the problems of the Inter-American system stem from this issue. As long as the system does not receive adequate resources in a consistent manner, it will not be able to plan for the long term.

However, despite these challenges, the Inter-American Court has become a well-respected institution among the states of the Americas and among civil society after thirty years. It has achieved very positive results in terms of states' compliance with its judgments. And through the reparations that it has ordered, it has been able to provide victims with redress and has impacted both the jurisprudence of national courts and domestic legislation. Thank you very much.

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*Diego Rodríguez-Pinzón:* I think these remarks present us with some issues that we will hopefully be able to discuss for our work regarding the dialogue between the systems: issues such as the Fourth Instance Formula of the Inter-American Commission versus the margin of appreciation used by the European Court, which could also be very



relevant to what is happening in the African system. This is a brief reference seeking to provoke you in this regard.

We have the pleasure of having Santiago Canton, Executive Secretary of the Inter-American Commission here with us today. Santiago has also been a Special Rapporteur on Freedom of Expression of the OAS. Working in several capacities with the system, he has made tremendous contributions to our region. Santiago has been a big supporter of the Inter-American Human Rights Moot Court Competition that we host at the *Washington College of Law*, among many other human rights initiatives.

### C. *Santiago Canton*<sup>64</sup>

I would like to thank the organizers for the invitation, and I would like to congratulate them for providing me with the opportunity to discuss the different regional systems for the protection of human rights with scholars, activists, and practitioners from all the regions. There is a large vacuum at the international level concerning the coordination among international human rights organizations. In many aspects, international civil society organizations are more coordinated than international institutions with supervisory authority. This vacuum must be filled if we are to strengthen the protective capabilities of these organizations. I believe that such coordination should be under the umbrella of the UN High Commissioner's Office. However, in the absence of such coordination these exchanges are more than welcome and needed.

In the short time I have, I will refer to what I consider to be among the main challenges of the Inter-American system. In so doing, I will refer also to what I consider to be the backbone of the system. Only then can we understand the challenges we are facing.

In the Americas, the system for the protection of human rights is sustained by four fundamental pillars. The first pillar is the international instruments for the protection of human rights. The American Declaration of the Rights and Duties of Man—approved in 1948 just a few months before the Universal Declaration of Human Rights—jump-started a process of developing international human rights instruments that still runs today. Seven instruments have been approved in the region and two more are in the working stages.<sup>65</sup>

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64. Executive Secretary, Inter-American Commission on Human Rights, Organization of American States. Previously, Mr. Canton was the OAS Special Rapporteur for Freedom of Expression.

65. The American Convention on Human Rights (1969); the Protocol on Economic, Social and Cultural Rights or "Protocol of San Salvador" (1988); the Protocol to Abolish the Death Penalty (1990); the Inter-American Convention to

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A second pillar is the international bodies created to supervise the rights recognized in the international legal instruments. The Inter-American system, modeled after the European system and similar to the African model, is composed of two bodies: the Commission and the Court. The Commission was created in 1959 and the Court in 1979. Today, the combined and complementary efforts of both bodies have reached a level of development that has become essential for protecting the rights of individuals all over the Americas and for strengthening the rule of law in many countries in the region.

A third pillar is civil society. In the Inter-American system, civil society has been the main engine that keeps the system active and responsive to the needs of the people. Latin America's civil society became actively engaged with the Commission during the years of the dictatorships in the Southern Cone.

Civil society found, in the Inter-American Commission, the last and only recourse available to denounce the grave and massive violations that were taking place. While all the doors in its countries had closed, the Commission provided civil society its only opportunity. And the Commission played a decisive role by visiting the countries and preparing reports denouncing the violations to the international community. Since those days, a mutually beneficial relationship between the Commission and civil society has been critical in shaping the Inter-American system as it is today. None of the progress and results achieved in the protection of human rights in the Americas can be understood without taking into consideration this fertile relationship.

The fourth pillar is the states of the Americas. The states have created the system, have drafted and approved the international legal instruments, and have created the supervisory organs. Clearly, the creation of the system comes together with the responsibility to ensure that it works efficiently. The responsibilities of the states are many, but I will focus mainly on four that I believe are critical.

First, the states have the responsibility of nominating the best possible candidates for Commissioners and Judges. The importance

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Prevent and Punish Torture (1985); the Inter-American Convention to Prevent and Punish Torture (1985); the Inter-American Convention on Forced Disappearance of Persons (1994); the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women or "Convention of Belem do Para" (1994); and the Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities (1999). Complete texts are available at <http://www.cidh.org/Basicos/English/Basic.TOC.htm>. The two instruments discussed in these remarks are an American Declaration on the Rights of Indigenous Peoples and a Convention against Racism and all Forms of Discrimination and Intolerance.

of this is obvious, but I would like to highlight that the independence and autonomy of the Commission and the Court have been the main reason behind the success of the system, and this depends a great deal on the composition of the organs. Throughout the history of the system, we have been, in general, very fortunate to have a good composition in both institutions. However, it is also true that, many times, the nomination of and voting for members of the Commission and the Court are based on political considerations rather than on a selection of the best possible human rights experts.

A second responsibility of the states is to ensure that the Inter-American Commission and the Court have the resources needed to efficiently fulfill the mandates given to them by the same states that created them. Today, that is far from a reality. Approximately only five percent of the OAS budget is allocated for the Commission and the Court. It is shameful that the Inter-American system of human rights functions principally with the financial support it receives from external benefactors. Today, more than fifty percent of the resources come from external donors, but those resources are still not sufficient to comply adequately with all of our mandates. If the need for resources is not resolved soon, it will be very difficult to maintain a stable and efficient system.

The allocation of the OAS budget is a political decision. The political will to strengthen the Inter-American system, expressed consistently by the member states, should be followed by the concrete action of redrafting a budget that has previously kept the percent allocated to the human rights system at about five percent for more than a decade even though the mandates and the number of complaints it receives have more than tripled.

A third responsibility of the states is to ratify all the Inter-American human rights instruments. Only eight countries have ratified all of them.<sup>66</sup> The need for ratification is particularly critical when it comes to the Inter-American Convention. Without full ratification by all member states, it will not be possible to have a system that equally protects all people in the Americas. This means effectively denying access to international justice to millions of people.

A fourth responsibility of the states is to comply with the decisions of the Inter-American Commission and the Court. It simply does not

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66. Argentina, Costa Rica, Ecuador, México, Paraguay, Peru, Panamá and Venezuela have ratified the seven Inter-American instruments of Human Rights. On the other hand, there are ten countries that, after signing the American Declaration, have not ratified any of the instruments: Antigua and Barbuda, Bahamas, Belize, Canada, Cuba, Guyana, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, and the United States.

make sense to create a human rights system where the system is given a mandate to receive and process complaints, given a mandate to make recommendations and pass judgments, and given a mandate to supervise compliance with the international legal instruments, yet the states are not going to comply.

Compliance in the Inter-American system is moving in the right direction, but it is still far from been fully realized. Let me first mention some good examples of compliance.

Many Inter-American Commission cases have helped bring about structural reforms within the states, enabling the defense and protection of human rights for millions of people. A few examples give a sense as to the magnitude of the Commission's contributions.

In 1992, the Inter-American Commission was the first international human rights body to determine that amnesty laws are a violation of international human rights law. Specifically, the Commission ruled that amnesty laws were a violation of the American Convention and of the Declaration and should be left without effect.<sup>67</sup> These decisions helped trigger a process that ended with similar Inter-American Court decisions<sup>68</sup> and eventually led to the derogation of amnesty laws in Peru and Argentina, paving the way to end impunity for rights violations of the past. This significantly contributed to the process of strengthening the rule of law in the region.

Another essential contribution of the Inter-American Commission has to do with the so-called *leyes de desacato*, or contempt laws, that penalize the criticism of public officials. The Commission declared these laws to be in violation of the American Convention on Human Rights and recommended that all states repeal them. Today, at least ten countries in the region have done so.<sup>69</sup> I could mention many other examples of significant advances, such as the repeal of an article of the Constitution in Chile that allowed prior censorship; the sanction of a new law against domestic violence in Brazil; the significant reform of the military justice code in Argentina; and many others.

Regardless of these examples that show the effectiveness of the system, the numbers regarding full compliance show a different story.

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67. IACHR, Report No. 28/92, Cases 10.147, 10.181, 10.240, 10.262, 10.309 and 10.311, Argentina, Oct. 2, 1992, available at <http://www.cidh.org/annualrep/92eng/Argentina10.147.htm>; IACHR, Report No. 29/92, Cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374 and 10.375, Uruguay, Oct. 2, 1992, available at <http://www.cidh.org/annualrep/92eng/Uruguay10.029.htm>.

68. See Case of Barrios Altos, Inter-Am. Ct. H.R. (ser. C) No. 75 (Mar. 14, 2001).

69. Belize, Chile, Colombia, Costa Rica, Guatemala, Honduras, Mexico, Panama, Paraguay, and Peru.

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For instance, I believe that the Inter-American Court has been able to close no more than ten cases out of 110 that have been decided. This is less than ten percent of compliance. The situation is very similar to the Inter-American Commission. However, it is very important to keep in mind that while full compliance is very rare, partial compliance is becoming more and more the norm. For instance, Pablo Saavedra, the Executive Secretary of the Court, said that eighty-one percent of the monetary compensations have been complied with. That is obviously an excellent figure. In addition, other forms of reparations, like the recognition of responsibility, are also on the rise. However, a central aspect of the decisions and recommendations has always been the realization of justice in each individual case. This aspect is very far from being complied with. Unfortunately, in this arena we have a long way to go.

I believe that compliance with the decisions is the principal challenge down the road for the Inter-American system. Unfortunately, compliance relies too heavily on the political will of the governments to fulfill their human rights obligations. When there is political will, compliance is easier to achieve. Without that will, it is very difficult to obtain good results. That should not be the case. We will be able to say that we have reached a good degree of maturity in the Inter-American system when governments that do not want to comply do so anyway—when they feel obliged to, either by international or national law.

This is one of the areas in the field of international human rights law, at least in the Inter-American system, where there is very little development: national legislation to comply with international decisions. Today, only three countries in the Americas have specific regulations to comply with the decisions of the Inter-American human rights bodies: Costa Rica, Peru, and Colombia. And even in those three cases, the laws are far from ideal. I strongly believe that this legal vacuum must be filled in order to ensure that political will no longer is needed to fulfill the human rights obligations.

There are many other issues that I would like to share with you, but my time has run out. I am very grateful, once again, to be here to share with you some ideas and to discuss them openly with other international institutions. These discussions can only strengthen our work and make the ideals of human rights truly universal. Thank you very much.

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*Diego Rodríguez-Pinzón:* Santiago, thank you very much. You mentioned the importance of interaction between the national and the international levels. I just want to call your attention to the Inter-American experience regarding that subject. Civil society has played a very important role in this hemisphere.

Now I invite to the floor Judge Fatsah Ouguergouz. We are delighted to have you here. Mr. Ouguergouz is a judge of the African Court of Human and Peoples' Rights in Arusha, Tanzania. He is also a member of the African Foundation of International Law. He has worked as Secretariat of the International Court of Justice for twelve years in The Hague. He has extensive experience in international public law, and he is currently the Father Robert Drinan Professor of Human Rights at George Washington University Law School. Additionally, he has written extensively. One of his most recent publications is the book, *The African Charter on Human and People's Rights, A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa*.<sup>70</sup>

*D. Fatsah Ouguergouz*<sup>71</sup>

Dear Dean Grossman, dear Mr. Fanton, dear commissioners and judges, dear colleagues, dear ladies and gentleman, Mr. Chairman of the panel. I first wish to say that I am very pleased and honored to be here today sitting on this panel and participating in this conference. If I am not mistaken, the African Court of Human and Peoples' Rights is the youngest of the institutions and bodies which are represented here today. It is also the lesser known of those institutions and bodies. I would even say that it is unknown, both inside and outside the African continent.

The African Court, therefore, never misses a chance to enhance its visibility. Visibility of the Court is actually one of the current major changes that the Court is facing, and invitations to participate in such events are greatly contributing to popularizing the existence and the activities of the Court, which is the first judicial body ever established on the African continent. I wish, on behalf of the Court and also in my personal capacity, to thank the organizers of this conference, in

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70. FATSAH OUGUERGOUZ, *THE AFRICA CHARTER OF HUMAN & PEOPLE'S RIGHTS: A COMPREHENSIVE AGENDA FOR HUMAN DIGNITY AND SUSTAINABLE DEMOCRACY IN AFRICA* (2003).

71. Judge, African Court of Human and Peoples' Rights. The views expressed are those of the speaker and do not necessarily reflect those of the African Court of Human and Peoples' Rights.

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particular Dean Grossman from American University, as well as Mr. Jonathan Fanton from the MacArthur Foundation, as well as the other participating organizations and sponsoring organizations.

I have listened very carefully to all the previous speakers, the learned speakers, either this morning or this afternoon, and they were all dwelling about the issue of compliance and implementation and decisions of their respective bodies. I am afraid that I cannot do the same thing. The African Court has so far not completed the examination of one single case, so I decided to give you a brief overview of the challenges that the African system is facing and, of course, the African Court itself, which is a part of the African system. Before turning to the challenges, I should say some words about the Court and its achievements. Most of you might indeed not be very familiar with the African Court.

So briefly speaking, the African Court is composed of eleven members. The judges are working on a part-time basis, as in the Inter-American system. However, in the African system, the President is working full-time, unlike the Inter-American system. The first members of the bench had been elected in January 2006 and we were sworn in July 2006. The Court has now existed for a little bit more than two years. In two years, we have already held eleven sessions—ten ordinary sessions and one extraordinary session—but I must say that all the sessions were extraordinary because of the interest and challenge of launching a new body. The seat of the Court is in Arusha, Tanzania.

One thing that I should stress, one main feature of the African Court, is that the Court has been given a very broad jurisdiction both in its contentious function and advisory function; very broad jurisdiction. The jurisdiction of the Court actually extends far beyond the control of the implementation and the application of the sole African Charter to embrace all other relevant international human rights instruments. It is Article 3 of the Protocol which provides for this very broad jurisdiction.

Turning now to the achievements of the African Court during the last two years, I will be very brief. The main achievements are the following: the Court has prepared its budget for the year 2007 and 2008. And I should mention that the budget of the Court is rather consistent, rather high. It is about \$8 million dollars for 2008. By the way, the budget of the African Commission was raised at the same time. One of the first major tasks of the Court was to negotiate the budget with the African Union's political bodies. This negotiation was rather successful.

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The second main achievement is the drawing-up of a registry structure. We had to build up a registry, so we had to fight also with the African Union political bodies in order to get the structure of the Registry approved. We got an authorization to hire about forty-six staff members, which is high. We asked for seventy-six staff members, and we got more than half, which is rather good. The process of recruitment of this staff is already completed. However, we do not have office space to accommodate them. That is why we have only about half a dozen staff members within the premises of the African Court so far.

The other important issue is the drafting and the negotiation of a headquarter agreement with the government of Tanzania. This was also a very complex exercise, and it has been successfully completed.

Last, but not least, the Court has achieved the drafting of its rules of procedure—of its Rules of Court. I would say that the drafting of the Rules of Court was the most time consuming and difficult activity conducted by the Court so far during its first years of existence. I should also underline that this drafting exercise has not been fully completed. The rules that we have adopted this last June have, indeed, an interim character. They have been adopted on a provisional basis only. We are waiting to hold some talks with the African Commission on Human and People's Rights in order to harmonize our rules with theirs.

Talking about the Rules of Court, I think it is a very good transition to shift to the issue of challenges. There are three major challenges that the African system is facing. In dealing with these three challenges, the ability of the Court varies. As far as the first challenge is concerned, the Court can do a lot. As far as the second challenge is concerned, the Court cannot do much. But as far as the third challenge is concerned, the Court can do nothing.

I turn now to the first challenge. The first challenge, and I would say the most crucial and important one, is to make the African Court and the Commission work together. Now that the African Court has been launched, it indeed needs to be fastened, to be linked in an efficient and coordinated way with the one-tier existing system so far. That is, essentially, the African Commission. This is a rather sensitive operation which needs to be carried out very carefully. I would compare this operation with the docking of an American or Russian spacecraft to the International Space Station, which never goes without any technical complications. Why is the docking of the Court to the Commission a sensitive operation? Because contrary to the establishment of the other regional conventions—the Inter-American



system as it exists now and the European system before the convention—the protocol establishing the Court does not provide for detailed provisions concerning the relationship between the African Commission, on the one hand, and the African Court, on the other hand. The Inter-American Convention provides for very specific provisions for the interaction between the two bodies, and so did the ECHR before its amendment by its Protocol No. 11.

The protocol establishing the African Court does not provide for a precise articulation between the two bodies. It contains one single provision which is entitled, “Relationship Between the Court and the Commission.” But the provision is hollow; it just says that the Court complements the protective activities of the African Commission. Later on, I can dwell on those relationships, but what I should say right now is that contrary to the European and Inter-American systems, where the relationship between the Court and Commission is a one-way relationship—from the Commission to the Court mainly, except maybe for provisional measures—the relationship between the African Court and the African Commission as it is now provided for by the protocol, is a two-way relationship: from the Commission to the Court and from the Court to the Commission. So it is a very interesting and synergetic kind of relationship. There is a lot of potential for the relationship between the Court and the Commission. A meeting with the African Commission has been planned for the discussion and harmonization of the Rules of the Court and of the Commission.

The second challenge the African system is facing is that of access to the Court. Now that the African Court is one of the two important organs of the African system, the main issue is access to the Court. To be more specific, I would say access to the court by NGOs and individuals. There are indeed four kinds of entities which can access the court: the African Commission itself, the state parties to the protocol, African intergovernmental organizations, and—on an optional basis—individuals and NGOs. So out of fifty-three member states of the African Union which are also parties to the African Charter, only twenty-four states have so far ratified and are parties to the protocol. But out of these twenty-four states, only two states have accepted the optional jurisdiction of the Court to entertain claims from individuals or NGOs. Two states only: Burkina Faso and Mali.

So the challenge now is for the Court to open up access to its jurisdiction. But the Court cannot do much in this field. It is a matter of campaigning, of promotional work, and the Court is not really equipped to conduct these kinds of activities. This is more the

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role of the civil society through the NGOs or such organizations like the African Commission, which are very keen on promotional work. Maybe the Commission can help us to publicize and to lobby civil societies and governments in order to ratify the protocol more extensively and open up the access to the individuals by filing the special declaration under Article 34, paragraph 6, of the Protocol.

The third challenge that the African system is facing is the most difficult one, and for which the African Court cannot do much. This challenge relates to the merger of the African Court of Human and Peoples' Rights with the Court of Justice of the African Union.

In a nutshell, in 2004, African heads of state decided to merge two different courts: the African Court of Human and Peoples' Rights, whose protocol already entered into force, and the Court of Justice of the African Union, which was a court established by a 2003 protocol that did not enter into force at that time and which is still not in force today. The Court of Justice of the African Union has more or less the same jurisdiction as the Luxembourg European Court of Justice. During the last summit held in Sharm El-Sheikh, Egypt in July 2008, the protocol on the merger of the two courts was adopted by the Assembly of Heads of State of the African Union. It needs about fifteen ratifications in order to enter into force, which might take a couple of years or more.

So this new merged African Court would consist of sixteen judges working part-time, and of two sections: one dealing with general legal matters and the other dealing with human rights issues. This court will also have a very, very broad jurisdiction, and this is where the problem lies. This Court will indeed have the combined jurisdiction of the European Court, of the Court of Justice of Luxembourg, of the International Court of Justice, and of the UN Administrative Tribunal. In other words, the new merged African Court will have jurisdiction for human rights issues, general international law issues, constitutional issues within the African Union, and it will also be authorized to entertain appeals from the staff of the African Union. All this would be taken care of by sixteen judges working part-time.

So the challenge would be to dock this merged court with the existing system when the protocol will enter into force. So remember the spacecraft and the International Space Station, with the difference that the spacecraft is twice as big as before—twice bigger than the existing African Court. And there are, of course, many concerns as far as this docking is concerned, since the judges of the current African Court, the bench of the current Court, including

myself, will be “resigned”—or, in other words, will be dismissed. So there will be a totally new court which is going to be established, creating some very important and crucial issues of judicial legacy.

The European Court, as I understand it, has a docket of about 100,000 applications so far. I do not have a precise figure for the Inter-American Court, but I gave you already the sharp figure for the African Court: zero cases, none. My main concern for the next few months or years is that the Court will be seen as doing nothing. This might undermine the credibility of the African Court and the expectation of the African populations in this matter. Let me remind you, and I speak here under the control of my friend, Commissioner Bahame Nyanduga, that the African Commission during its first years of existence has been very harshly criticized because it was *apparently* regarded as doing nothing. Actually, the Commission was also struggling with a lot of organizational issues. It was doing many things underground. It was, in a way, fertilizing the soil. One question from this morning asked, “What did the African Commission do during these last twenty years?” I would say, even if you do not see any flowers or any trees, the Commission has played a very important role. It has fertilized the African soil. It has created, or tried to create, a human rights culture on the African continent.

For my part, I was very sympathetic with the African Commission, and I used to compare this body to the character from the Greek mythology: Sisyphus and his famous rock. And I used to say that, like Sisyphus, the Commission was not rolling for nothing, but was in fact, flexing her muscles. I hope that this will prove true as well for the African Court, and that even though we do not have any cases so far, we might be able to do lots of work which will prepare and pave the way for future cases to be brought before the Court. Thank you very much for your kind attention.

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*Diego Rodríguez-Pinzón:* Finally, we are inviting to the floor an expert on the European system, Mr. Andrew Drzemczewski. Interestingly enough, I remember fifteen years ago when I was studying for my master’s degree and working with a group of young colleagues, including my friend Claudia Martin, in a human rights interest group. We were publishing one of the first issues of the Human Rights Brief, a *Washington College of Law* publication. My colleagues researching the European system found that one of your papers was one of the most interesting and challenging essays regarding Protocol 11 of the European Convention. Therefore, Mr.

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Drzemczewski has been for me and my colleagues a very important reference, regarding the practice of the European human rights system. So we are institutionally and personally delighted to have you here.

*E. Andrew Drzemczewski*<sup>72</sup>

My title in this pamphlet is, Andrew Drzemczewski, Head of Secretariat, Committee on Legal Affairs and Human Rights of the Council of Europe. An introductory remark and then three points.

The introductory remark is that, in effect, I am the head of the Secretariat of the Committee of Legal Affairs & Human Rights of the Parliamentary Assembly of the Council. During the break, I explained we have the Council of Europe, created in 1949 by statute. That statute describes two organs. On the one hand, there are the committee ministers—foreign ministers represented by ambassadors in Strasbourg. On the other hand, there is the Parliamentary Assembly of the Council of Europe, which is much more important than initially meets the eye because of the dual role of parliamentarians and their possible influence on the domestic plane. In this respect, they are unlike, for example, the European Parliament, which is in a different category.

It is worth pointing out that the Legal Affairs Committee has eighty-four parliamentarians. But what is probably more important, is that the parliamentary assembly played a key role and was the political motor in creating the European Convention on Human Rights and the European Convention for the Prevention of Torture. It has an enormously important political role to play. And tied to this, the assembly also has an important role because the assembly parliamentarians elect judges to the European Court of Human Rights. And before they are elected, they are interviewed—in confidence, in-camera discussions—by a subcommittee of the Legal Affairs Committee. Over the last two years, the parliamentary assembly has rejected, six times, lists of three candidates provided by the government. There is an element of political credibility and status—a judge must have the required professional qualifications and experience to be elected to the Strasbourg Court. The Assembly will reject lists when candidatures are considered not to be up-to-standard, not providing the Assembly with a real choice.<sup>73</sup>

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72. Head of the Secretariat of the Legal Affairs & Human Rights Committee of the Parliamentary Assembly of the Council of Europe, Strasbourg, France.

73. For recent developments, see Eur. Consult. Ass., Nomination of Candidates and Election of Judges to the European Court of Human Rights, Doc. No. 11767

My first of the three points. The European Court of Human Rights is a victim of its own success. We tend to say that in Strasbourg. Perhaps, if you bear in mind the subsidiary element of what is meant to be at Strasbourg, it is the member states which have not sufficiently put their house into order in order to prevent potential applicants from coming to Strasbourg. The situation within Strasbourg, at the European Court, is obviously serious.

A few statistics. In the first nine months of this year, after September 30, the European Court has nearly 95,000 cases pending. In the first nine months of this year, the Court registered approximately 37,500 applications. During the same period, the Court has rendered around 22,000 judgments or decisions; in effect, a rhythm of 30,000 per year. The backlog is growing. In the last nine months, the backlog has grown to 15,500. That is about 1,700 per month. To aggravate the situation, over the last two months, the Court has received more than 2,800 applications from South Ossetia in Georgia. And, I must not forget the interstate case of Georgia against Russia.

The European Court has done extraordinary work here. The number of judges has grown from forty-two, forty-three, to now forty-seven. What is probably more important is that, with respect to the number of judgments and decisions in the ten years since Protocol 11 has come into effect, the Court has multiplied its work eight-fold. At the same time, the Court has tripled its Secretariat, which now stands at just over 620 staff members. And here again, forget about the Court for a moment. If one talks about execution of judgments, there is a judgment of the court that needs to be executed. What Charlotte de Broutelles mentioned, which many of you possibly have not noticed, there is a section of people who help in the execution of court judgments within the Secretariat. They have nearly 7,000 cases pending with respect to execution before the Committee of Ministers—implementation if you like, rather than execution. And the staff members, if I am not mistaken, are twenty-three, six of whom are temporary.

My second point: the Court's future. I can pose this as a question: the European Court, as was mentioned by Paola Carozza in our lunch discussion, is really sitting between two stools, is it not? Will the

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(2008), *available at* <http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc08/EDOC11767.htm>, and Eur. Consult. Ass., Nomination of Candidates and Election of Judges to the European Court of Human Rights, Res. No. 1646 (2008), *available at* <http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta09/ERES1646.htm>.

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Court actually collapse? By sitting between two stools, will it fall apart and not succeed, having in mind the statistics I just provided you with? Now, the balancing act, as was discussed at the lunch break, is self-evident. On the one hand, you have the right of individual petition. The right of individual petition—the individual’s procedural and substantive right on the international plane—is an achievement which we cannot give up. To give this up would be unacceptable. On the other hand, it is a quasi-constitutional court, whereby it has to maintain constitutional European standards on the international plane.

The question is, should it do both? Should it not? We have had ideas whether or not we should have the system of the U.S. Supreme Court, the docket-choosing, the certiorari system, the German constitutional court (a system, basically, of the right of individual complaint and norm control). We are now brainstorming as to how to get out of this difficult situation. We do not have any miracle solution. We have to maintain, on the one hand, the right of individual petition and, on the other hand, the constitutional role that the Court plays. It is a function which is hybrid and, as far as I am concerned, and I hope my colleague agrees with me, is tough but needs to be somehow maintained. But this is what has made the success story of the Council of Europe, and it is not for us to jump onto one bandwagon forgetting about the important need for a judicial determination with respect to individual applications, because this is what it is all about: an individual’s human rights.

One word about the problem of Protocol 14. Protocol 14 was introduced a few years back to speed up the system—a single judge would replace a committee of three judges in determining obviously inadmissible applications, and a committee of three judges to take the place of seven when cases were obviously “manifestly well-founded” and concerned well-established case-law. The Russians are blocking it because the Russian State Duma has not allowed for the ratification of the Protocol 14. It has been blocked. The system would have allowed the Court to accelerate its work between twenty and twenty-five percent had Protocol 14 already gone into effect a couple of years ago. We are in a difficult situation. Some would say this is the make or break situation concerning Protocol 14. Our legal committee’s next meeting will be in Moscow on the 10th and 11th of November, in a few weeks’ time. During that meeting, we will be speaking with the Legal Committee of the Russian State Duma, and we will see to what extent the State Duma is prepared to reconsider its view as to whether or not Protocol 14 should be ratified.

My third point: international challenges in the wider context. There are many, but I will focus on two or three of them. The first one is the European Union and the protection of human rights. You have the European Union of twenty-seven member states as opposed to the forty-seven Council of Europe member states. It has an enormous bureaucracy. It has exceptional, in effect, state powers which are not subject to any international judicial human rights control mechanism. The Lisbon Treaty envisaged accession of the European Union to the European Convention of Human Rights. This should still be very much a priority so that we have a constitutional system which is covered by a human rights regional mechanism in Europe.

Regarding innovations, especially with respect to the Strasbourg Court case law and the impact of the Court's leading judgments in the domestic law of member states, I will mention two which have been discussed today: pilot judgments and ensuring the execution of the Court's own judgments.

Pilot judgments. This procedure has, in effect, indirectly extended the benefits of the findings of the Court to all the persons in similar situations. We say, "Great. Why not copy it? Why not move on?" Let me introduce a few complications.

These are significant developments, but we must beware of certain things about this procedure. It needs fine tuning. For example, who determines whether there exists a systemic problem? The Grand Chamber, surely. But the Grand Chamber is at the end of the line; there is also the Chamber. The Grand Chamber must determine whether or not to come out with a pilot judgment. There may be other cases which deserve similar treatment. Obviously, this procedure deals with complex issues based on a single case and does not necessarily reveal other related aspects in similar, but not identical cases. Hence, pilot judgments may only, in certain instances, partially identify systemic problems. In the mean time, other related types of cases will be frozen and not looked into, further delaying the determination by the Strasbourg Court of their cases. So yes, pilot judgments may well be considered as a partial answer to the Court's workload, but, in reality, the situation is not so simple.

A word about the execution of Strasbourg Court judgments. In effect, it is the committee ministers who supervise the execution of the Strasbourg Court judgments. To a certain extent, our European Court of Human Rights is always known to make declaratory determinations, and it is up to the committee ministers to supervise

the execution of Court judgments. In the case *Assanidze v. Georgia*,<sup>74</sup> the Court in effect gave the state no discretion—you have to let the person out of prison, there is no issue here. In effect, is this judgment not usurping or going into areas strictly within the competence of the committee ministers?

The impact of the court judgments case law, sometimes termed as Grand Chamber Judgments of Principle of precedential value, not to say, *erga omnes* effect. Article 46, paragraph 2 specifies that only the state with respect to which there is a judgment by the Court is bound by that judgment. But to what extent are all state parties bound by such judgments of principle? Let me refer you to the cases *Golder v. United Kingdom*,<sup>75</sup> regarding right of access to the Court, and *Mamatkulov and Askarov v. Turkey*,<sup>76</sup> regarding the binding nature of interim measures. It is in the Rules of Procedure of the Court, not in the actual Convention. Let me also refer you to the cases *Marckx v. Belgium*,<sup>77</sup> regarding children born out of wedlock, and *Hirst v. United Kingdom*,<sup>78</sup> regarding prisoners' rights to vote in elections. These cases and their holdings provide food for thought. It is *de facto erga omnes*. *De jure*, it cannot be. Very strange situation. And we had some interesting comparative elements on this with respect to case law. You may recall the Argentina Supreme Court taking into account the *Barrios Altos* case from the Inter-American Court.

And last, but not least, I want to comment on the Reform Package which was mentioned by my colleague, Charlotte de Broutelles. It is too easy, in a nutshell, to say it is for Strasburg to deal with this matter itself. Surely, let us throw the ball back into the court of the countries concerned. It is for their judiciary to take into account the case law of the Strasbourg Court. It is for the countries themselves to help out. And if you look to the new aspect of Strasbourg case law, there is a small handful of countries with massive systemic problems generating a large proportion of total applications, you have a situation where twenty-six percent of all applications are brought against Russia. Nearly sixty percent of all cases pending before the Court of Strasbourg relate to Russia, Romania, Ukraine, and Turkey. Should we not concentrate on those rather than try to reinvent the wheel and create a protocol 16, 17, or 18 in Strasbourg? Is it not really

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74. App. No. 71503/01, 39 Eur. H.R. Rep. 32 (2004).

75. 18 Eur. Ct. H.R. (ser. A) at 17 (1975).

76. App. Nos. 46827/99 & 46951/99, 41 Eur. H.R. Rep. 25 (2005).

77. 31 Eur. Ct. H.R. (ser. A) 330 (1979).

78. (No. 2), 681 Eur. Ct. H.R. (2005).



the duty of the member states to deal with those cases? That would clear up a substantial backlog straight away.

One problem is that the human rights instruments, on the one hand, are the common denominator in the European context, while at the same time, the Convention is a living instrument. To what extent does one take into account the Court's case law and a merging consensus in Europe on certain matters. For example: rights of homosexuals. This had tremendous impact in that context.

A few more examples. In the United Kingdom, there is the Human Rights Act of 1998, which says that the domestic court must take into account the case law of the Court. The German Constitutional Court has in effect said that the case law must be taken into account. The Russian Constitutional Court has recently decided to set up a special ECHR case law research team in its own registry. The UK Parliament has the UK Parliamentary Joint Committee on Human Rights, which verifies draft legislation and legislation and its compatibility with the Convention and Strasbourg case law. Over the last few years, it has taken into account all cases where the UK has been found in violation and every year methodologically looks through these cases in a way in which a parliamentary body should. Similarly, in the Netherlands, the government agent before the Court makes a report to the government. Our parliamentarians in the Legal Affairs Committee from the Netherlands insisted that that report go public. And now, the justice committees of both houses of Parliament in the Netherlands are actually provided on an annual basis information concerning where the Netherlands has found violations. More importantly, the committees are provided with case law of court, which may have legal importance with respect to the Netherlands, with respect to case law from other Contracting State Parties. As a result, these bodies can short circuit and put right things, not waiting for the next ten years when applicants seek justice before the court. Thank you.

#### *F. Discussion*

*Diego Rodríguez-Pinzón:* Now we are going to open the floor for questions and comments from all of you.

Let me begin by making a couple of comments and by asking questions for all of you. It was mentioned that there have been very interesting practical measures adopted by some of the organs in the human rights regional systems. For example, it was mentioned that the African Court has permanent judges. Is that desirable? Would that be an interesting feature for the Inter-American system to adopt?

Another question. Some international organs use the Internet to stream video to broadcast public hearings live around the world. Would that be a desirable practice for the Inter-American Court? What are the limitations for the use of this type of technology? I simply ask about your reactions to these very specific features of several regional systems that could help other systems improve their proceedings and disseminate their work with relatively low budget technology.

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*Pablo Saavedra:* Thank you, Diego. With respect to the first question of whether it is necessary to have permanent judges, like a permanent court, I think it is a bit of what we discussed earlier. It is first important to consider the sort of resources necessary for the Inter-American Court and the Commission and then decide priorities based on that. This can be one of the priorities. After having listened to the questions of the two panelists from Europe and Africa, I come out a bit more depressed because the African court started with \$2.2 million three years ago, and today they have \$8 million. We have been in existence thirty years and recently reached \$1.7 million. The European system is very interesting. As we just saw, they have twenty-five percent of the budget of the European Council. We just saw the Court and the Commission together have four percent of the budget of OAS. That is, in total, \$5 million. The European Court has, more or less, €50 million. We can see the difference that exists, I think, and we need to look at the priorities and necessities that are most urgent for the system. It could be the judges, but we can look to see if other necessities might be more urgent. For example, the court, after thirty years, has twelve lawyers, and we have seen that the African system has forty-six lawyers and the European system has hundreds of lawyers. They, therefore, are two different realities and that is why I think it has to be prioritized after an analysis of resources.

With respect to technology, I think we need to celebrate the success the Court has had in the last several years. In the last several years, I think we have had success in promoting the activities of the Court that have been most important. We should celebrate these periods of success for the Court with public hearings, especially in San Jose and Costa Rica. I think this has had a great impact because it has allowed the Inter-American system of human rights to get closer to the citizens of the countries and especially to the authorities of the states. It has created a new dynamic of dialogue, and there is

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now greater knowledge. With technology, I think we are on the right path, but from the point of view of the Court, we have to be careful with witnesses so that they are not too exposed, for themselves, but also for reasons of security. The new reality of these cases is that access may be gained through technological means, like television and the Internet, etc.

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*Santiago Canton:* Two things I want to talk about in light of Diego's comments. One is the decision made approximately one year ago to transmit live the hearings of the Inter-American Commission. They are all public and transmitted via the web. We have been receiving very positive feedback regarding this new experience. The webcasting of the hearings are being utilized by universities and NGOs for training lawyers and human rights activists all over the region and the world.

Another comment I would like to highlight again in light of something Andrew said is the great importance of the independence and autonomy of the Inter-American Commission. As I said before, the independence and autonomy of the Commission has been crucial in the development of the organization. Over the last few years, two Commissioners resigned from the Commission due to their involvement in politics in their countries. One case involved the acceptance of a ministry position, and, in the other, the participation in a political campaign helping a presidential candidate. These decisions have only reinforced the importance that the Commission gives to its independence from any government activity. And with that, I am very sorry, but I am going to have to leave to go back to the sessions of the Commission.

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*Audience:* My first question is directed to the Treasurer of the African Court. What impact do you think the future Court of Justice and Human Rights will have on the protection of human rights in the region? I mean, is this a step forward or a step in terms of giving access to the victims in terms of improving the effectiveness of the regional system human rights protection? My second question is actually an observation. I have heard comparisons between the Inter-American system and the European system on whether there should be a commission acting as a filtering mechanism to reduce case load, and suggestions that perhaps the Inter-American system is facing less serious case law problems thanks to the fact that it has a commission.

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I have a problem in understanding that because I think that with or without a Human Rights Commission, the European system is still facing a similar and not such a different amount of cases than it is receiving now. Secondly, if that is the case, why has the European system been so hesitant in creating a separate filtering body within the court itself to solve the problem?

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*Fatsah Ouguerouz:* It is a very difficult question actually. The establishment of the African Court of Justice and Human Rights: is it a step forward or a step backward? I would say yes, that it is definitely a step forward. It is indeed a judicial body which has the potential to back the African Commission and strengthen the whole African system. Its decisions are binding, but it is too early to predict what would be their impact on the African states.

With respect to the merged court, I would not say that it is a step forward for sure. I only hope that it is not a step backward. This merger, if it were done properly, could have been—I would not say, a success—but not such a bad thing for the continental judicial system of Africa. The African continent is a continent which now has the greatest numbers of international courts. There are about seven regional (or sub-continental) courts on the African continent, plus the existing African Court of Human and Peoples' Rights and the African Court of Justice, which is not yet established.

Seven years ago, the African states were already talking about a merger of the two courts, but the idea was rejected. The idea was re-introduced only three years ago, in July 2005, with no preparation—out of the blue, I would say. So now my concern is that this future, merged court, which has four kinds of jurisdiction, might not be able to deal efficiently with all the cases that involve issues ranging from border delimitation, use of force, issues of sovereignty, to African Union constitutional issues—I mean, interpretation, application, and implementation of the Constitutive Act of the African Union, staff appeals, and human rights.

The African Court, which exists now and on the bench of which I am sitting, has already a very broad jurisdiction in the field of human rights, and there are already very complex being raised. The Court is at its early stage of existence. But there are very serious risks of forum shopping and possible fragmentation of the case law that could be raised in the near future. The future court will also have to deal with this issue of forum shopping both in Africa and outside of Africa. Indeed, in Africa, the states have the choice. They can go to

the African Court, but they can also choose to go to other forums in their regions—the various regional courts. They can also decide to go to the Human Rights Committee, for example, or other UN treaty bodies.

Forum shopping and fragmentation of the case law are thus important issues. But I would not dwell too much on the importance of the African Court. The Court is indeed just a part of the whole system. For sure, one should not underestimate the role of the Court for sure, but one should not over-estimate this role either. The Court has to work hand-in-hand with the African Commission. The African Commission still has a very important role to play, and it will have a very important role to play in the future. What the Court can do and what the Court is trying to do so far is to create what is missing now in Africa's judicial culture. Commissioner Bahame Nyanduga this morning talked about the creation of a "human rights culture" within the African continent by the political bodies of the African Union. But what is missing is a "judicial" culture, both at the continental level and at the grassroots, municipal level. There is no respect for judges at the national level. Most of the African states do not really consider the decisions or the rulings of the judges. So this is the first challenge actually. The first challenge is to create this "judicial culture" and together with the human rights culture, which is underway. This is what I wanted to say in response to your question concerning the potential role of the future merged court: do not expect too much from both courts.

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*Andrew Drzemczewski:* I have to answer you in a historical context. Unlike the Inter-American system, the European Convention created both the European Commission and the Court. As you know, it had jurisdiction contingent on acceptance of its possibility of taking a case to the court. And Protocol 11 was, at the time, negotiated for a variety of reasons. Amongst those reasons was the fact that the European Commission dealt with cases, admissibility hearings, and the merits, and then it went to the Court. And the Court repeated the same procedure. There was, to a certain extent, already a certain competition between both organs. The length of cases was enormous and the whole system was falling apart in the way of somebody getting justice ten to fifteen years after having brought his or her case before the Commission. So Protocol 11, rightly or wrongly, hopefully rightly, brought together everything under the jurisdiction of one single court. Within that Court we have committees of three judges

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to deal with admissibility, chambers of seven judges, and a grand chamber of seventeen judges with a hybrid creation to accommodate those who wanted two levels of jurisdiction (with a possibility of relinquishment or referral from a chamber to the grand chamber).

I suspect, politically and logically, we are not going to go back on that decision. We have moved forward to a purely judicial system. The Group of Wise Persons have come out with the idea of having a judicial committee within the Court which would, in effect, do what is envisioned under Protocol 14. A single judge would deal with patently inadmissible cases; for example, six-month rule brought against the wrong state or a non-exhaustion of local remedies which are obvious. A committee of three would look into manifestly well-founded cases. Although it looks on the face of it interesting, my understanding of discussions within the Legal Affairs Committee, which I am trying to reflect honestly to you, is that the Legal Affairs Committee has strong reservations as to this idea. It is very easy to become a judge on a grand chamber dealing with 100 cases. Do we really need forty-seven judges to deal with 100 cases a year and to deal with constitutional cases while doing the real work of inadmissibility—the boring, difficult grind, the daily bread and butter work—left to the Judicial Committee? How many people here, if you were judges of a high court or a supreme court, would be willing to take on the role of an inferior court to do the boring work, and anything interesting, you pass on to a higher court? There are difficulties regarding how the system would work as it is proposed by the Wise Persons. But, in a nutshell, this provision of having a junior element of functioning within the present full-time single court is presently on the table.<sup>79</sup>

#### CLOSING REMARKS

##### A. *Diane Orentlicher*

I just want to do the obvious, which is to thank this extraordinarily distinguished group of panelists for a very rich discussion. I think the discussion all day has underscored the value of fostering this type of exchange. It has also probably underscored the value of continuing to do this. I was trying to remember the expression, “victim of your own success,” that characterizes the dilemma that the European

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79. For more information about the report of the Group of Wise Persons, see Comm. Of Ministers, Interim Report of the Group of Wise Persons to the Committee of Ministers, 116th Sess., Doc. No. CM(2006) 88 (May 19, 2006).

system faces. I think in some ways this conference was a victim of its own success. We had so many fabulous speakers that it was hard to do justice to all of the issues that they raised. So I do hope that this will inspire further exchanges of this sort, perhaps on an institutional basis.

I know that I have come away from this with many ideas about ways that the organizations I am affiliated with might be able to bolster the work. We have talked, in passing, about the importance of civil society in making these institutions work. Any of us who have seen these institutions work over a long period have seen how important it is to have effective civil society demand that these institutions operate better than they already do and take them seriously. And I think we have seen today some new agenda items that we need to pay attention to ourselves. I found quite sobering—in the last panel in particular—the degree to which states are not embarrassed by their non-compliance. That is another agenda item among many that came to my mind.

I want to end by thanking the MacArthur Foundation, the Inter-American Court and Commission, Agustina Del Campo, the MacArthur Foundation, and Claudio Grossman for providing the opportunity for us to have this dialogue. I think a lot of really valuable ideas have come out of it. So thank you.

*B. Claudio Grossman*

Allow me to join Diane in thanking the MacArthur Foundation, the Inter-American Court and Commission, and Agustina Del Campo as well as all of you who participated as panelists and attendees. Finally, I want to extend our gratitude to Diane for creating this opportunity for us. As you may already know, no good deed goes unpunished in this institution. Because of the success of this program and the nature of the problems that we confront in the human rights field, I am sure that we will have further opportunities to exchange our views in the future.