Inter-American Human Rights Network

Leverhulme Inter-American Human Rights Network

Moving Beyond the Good, the Bad and the Ugly: What to Learn from International Human Rights Systems?

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WORKSHOP SUMMARY

This document provides a summary of the third workshop of the Inter-American Human Rights Network, held between 29th and 30th January 2016 at the Human Rights Centre at Ghent University, Belgium. The workshop entailed a comparative discussion of positive and negative developments within the main regional human rights systems worldwide (Inter-American, European, African), as well as the United Nations. The summary below is not intended as an exhaustive record of the discussions, but rather as a concise presentation of the key findings and main areas of debate as they developed during the workshop.

Session 1: International Human Rights Decisions and Their Implementation at the National Level

***Jo-Marie Burt*,** George Mason University (US): The Inter-American Court of Human Rights and the Creation of Domestic Prosecution Policies for Grave Human Rights Violations in Latin America: The Case of Peru

Peru is an important case study when examining accountability for human rights violations in Latin America given that the country has been the region's most active in terms of domestic prosecutions (approx. 260 cases) and in its use of the Inter-American Human Rights System (IAHRS). The IACtHR and IAComHR have played an important role in promoting domestic accountability in two ways: (1) through specific individual judgments that establish duties to prosecute, and which are then used by local organisations as an advocacy tool; and (2) through reports and judgments compelling Peru to develop a broader policy framework to revisit amnesty legislation and to obtain justice for victims of serious violations. In Peru's relationship with the IAHRS, the ruling in the Barrios Altos case was a key development. This was the first time since the democratic transition that Peruvian judges felt empowered to indict for human rights crimes (domestic prosecutions were resumed very shortly after the IAHRS ruling). The decision also impacted upon the contemporaneous debate in Peru on whether there should be a Truth and Reconciliation Commission (TRC) and what its nature would be. As a result, the TRC that eventually emerged had a broader mandate and featured more empowered commissioners than might otherwise have been the case. The IAHRS also played an important role in individual cases, for example, by encouraging Chile to extradite Fujimori so that he could be prosecuted for his crimes in Peru. Similarly, its intervention was decisive in achieving the imprisonment of Montesinos and Colina Group members; it ruled that an earlier judgement by Peru's Supreme Court, which absolved these individuals, represented a violation of the American

Convention. Despite such advances, progress with domestic prosecutions has slowed dramatically of late. Recent domestic judgements have ignored IAHRS jurisprudence and produced some highly questionable acquittals. A particularly worrying trend is the emergence of court decisions overturning some of the previous human rights convictions. Such reversals reflect the reality that 'pro-violation' constituencies in post-Fujimori Peru have regrouped since the transitional period.

***Bruno Boti Bernardi*,** Universidade Federal da Grande Dourados (Brazil): 'Ganhei na loteria! Mas e o prêmio? [I have won the lottery! What about the prize?]': empowerment, obstacles and overjudicialization in the relationship between the IAHRS and the victims of the Gomes Lund case

The Gomes Lund case dealt with abuses committed by Brazil's former military dictatorship against a small guerrilla group formed in opposition to the regime in the 1970s. After many years of unsuccessful attempts to uncover the truth about the disappeared, the victims' families, together with CEJIL, filed a petition before the IAHRS in 1995. In 2010, the Inter-American Human Rights Court issued a ruling condemning Brazil. Interviews with those involved in the case have revealed both positive and negative effects of the experience of taking their case to the IAHRS. The positive effects identified include: personal and political empowerment of the victims as a result of endorsement of their claims by an international tribunal; improvement in political opportunity structures at the domestic level, especially within the Public Ministry; that it spurred new alliances and mobilisation of other groups affected by violations during the dictatorship; and created a new political instrument with which social movements can confront contemporary abuses of the state. The negative aspects of the petitioners' experience before the IAHRS included the following: highly legalistic and technical nature of proceedings left victims unable to access the IAHRS without assistance of NGOs like CEJIL; that the litigation process was long and costly, and placed a heavy burden on the victims; there was a lack of effective means for ensuring state's compliance; and a need for victims to abandon their politically militant discourse, in favour of the language of human rights law, in order to secure a positive outcome. Overall though, the positive aspects outweigh the negative ones. Given the closed environment in Brazil, mobilisation through the IAHRS is one of the few channels left for relatives, CEJIL and the Public Ministry to confront the Brazilian state. However, the system should take into account victims' views in the Gomes Lund case in trying to improve its handling of cases in future.

Sabrina Ragone, Max Planck Institute (Germany): IAHRS and Domestic Institutions: Reflections in Light of the *Ius Constitutionale Commune* in the Field of Human Rights

The role of international courts is no longer limited to the classical function of being a means to resolve a dispute between parties. As their tasks have expanded to include other areas – such as normative creation – it is important to study the relationship of these judicial bodies to a number of other local actors which are often overlooked by lawyers (e.g. CSOs, victims, scholars). A co-operative relationship with each of these is essential if the system is to achieve maximum impact. Of the various relationships with local actors, it is the interaction with domestic judicial organs that has proved to be one of the most important; it is these institutions that need to draw on Inter-American jurisprudence in order to apply its human rights standards at the national level. Generally speaking, the impact of the IAHRS on national parliaments tends to be strongest where constitutional amendments are required. In *Reyes v. Chile* the national parliament modified the way in which access to information was regulated as a result of the IACtHR judgment. These types of rulings imply the supra-constitutional authority of the American Convention on Human Rights. Relationships with national governments tend to be the most delicate, mainly because it is national governments that have committed the violations. This has led to some tensions as a number of states still claim supremacy of national standards over Inter-American ones. Although some say that the main challenge for the system today relates to the lack of resources and lack of implementation of a Latin

American *ius constitutionale commune*, a greater issue is how the system can strike the right balance between its most revolutionary decisions and the daily routine of an international tribunal.

Discussion:

The implementation of regional Court rulings has proved difficult in a variety of contexts, not least because of the resistance from pro-violation constituencies. Discussion of such issues normally focuses on the obstacles to implementation, but the case of Peru shows that implementation may actually be not only blocked, but reversed in some cases (e.g. through the overturning of previous convictions for human rights offences).

Part of the reason that pro-violation constituencies have regrouped and regained some of their former strength is that human rights issues are seen only as the discourse of the political left. In other words, the effects and impact of important IAHRS rulings has not permeated widely throughout Latin American societies. Their implications are mainly a concern for the human rights community and academics, rather than for the common citizen.

Brazil demonstrates a different discursive problem. Here, former militants who were victims of the military repression have had to frame their complaints in the language of legal terminology and human rights in order to gain redress via the IAHRS. In this process, they have had to minimise their own preference for discussing their views regarding broader political, economic and social problems in Brazil. As a result, it may be questioned how far the resolutions obtained from the IAHRS meet their needs/goals.

Session 2: International Human Rights Decisions in the Context of Persons in Situation of Vulnerability

***Thomas Antkowiak*,** Seattle University (US): A Dark Side of Virtue: The Inter-American Court and Reparations for Indigenous Peoples

Indigenous rights cases are challenging for courts because they involve a mixture of claims at the individual and group level. This should be reflected in the reparations awarded. International and national courts need to adopt a victim-centred approach and find the reparations that matter most to them. This is onerous and requires courts to first understand victims' priorities, but failing to do so could serve to undermine individual and/or collective rights. The IACtHR's efforts in terms of non-monetary reparations is to be credited. In the indigenous context, reparations have taken the form of demarcation and restitution of ancestral land, conservation programmes for community territories, and the provision of medical and psychological treatment for indigenous women who have been victims of violence. These reparations take into account the needs of the victims and address individuals and communal rights violations. A more problematic area is that of monetary reparations. The Court's compensation orders frequently do not respond to the kind of violation identified; personalised harm (material or moral) damage, even if proven, is not compensated. The degree of harm is also often not reflected adequately in the monetary compensation awarded. In a case in which the Saramaka community had seen some USD 10 million of timber extracted from their territory, the Court only awarded damages of USD 75,000 (without explaining the basis for this valuation). Generally, the Court has preferred to grant 'community development funds' as a compensatory mechanism as it does not then have to make extended technical calculations of the actual damages involved. The Court should show more willingness to presume material damages, individual and collective. When these damages are requested, the Court has to respond, even if the awards are low. This would make a greater contribution to the full restitution of rights to victims.

***Lucy Claridge*,** Head of Law at Minority Rights Group International (UK): Implementing Minority and Indigenous Peoples' Rights

In December 2009 the ECtHR found that Bosnia's constitution violated the European convention in relation to lack of access of minorities to political participation. The country's constitution - developed to put an end to the 1990s war – provides that the House of Peoples (a branch of parliament) can only include 5 Bosniaks, 5 Croats and 5 Serbs with each given veto powers over legislative proposals; whilst the tripartite rotating Presidency can only include a Bosniak, a Croat and a Serb. This arrangement effectively excluded all minorities who were ineligible to stand for these political offices. In the *Seijdic and Finci* case, which challenged this arrangement, the ECtHR found violations of Articles 14 and Protocol No. 12 of the European Convention. This was the first ruling under Protocol 12 (regarding discrimination) and it was widely hoped that it might kick start political reform in the country. Despite various local and international efforts to get Bosnia to comply with the judgement (including a marked reduction in EU accession funding), there has been no substantive move toward implementation. There has been a political impasse as those in power do not want to give it up. Other implementation difficulties have been evident in the African system with regards to the *Endorois* case. The Endorois are an indigenous community of about 60,000 which formerly lived in Kenya's rift valley and had a strong spiritual and economic connection to their ancestral land. In order to promote tourism in the rift valley, the government evicted the group in the 1970s without adequate consultation or proper compensation. Minority Rights Group took the case to the African Commission of Human and Peoples' Rights in 2003 and eventually secured a ruling in 2010 that the Kenyan state should restore them their land and provide compensation. The government has declared its intention to comply with the ruling on several occasions, but has also made moves which violate the judgement (for example, allowing some of Endorois territory to be declared a UNESCO world heritage site). The major problem is that there isn't really a proper implementation mechanism in Africa, but rather just a very loose framework for this. The African system needs some further refinement and can learn from the European and Inter-American systems here. Nevertheless, there will still be serious difficulties in cases where there is no domestic political will to implement rulings – little can be done to force governments to do so.

Kinga Janik, Member of the Hans&Tamar Oppenheimer Chair in Public International McGill University (Canada): Unity into the Interpretation of Human Rights: Promoting Best Welcoming Practices for Smuggled Migrants

Chronic poverty, violent conflicts, and terrorism have driven unprecedented flows of refugees into Europe. The International Organisation for Migration estimates that 972,500 migrants came by sea in 2015, with the vast majority going on to claim asylum. These flows have facilitated the expansion and strengthening of transnational migrant smuggling networks. In 2003, the EU implemented the Palermo Protocols to try and prevent involvement of organised crime in human smuggling activities. The protocols treated the issues of human trafficking and smuggling as if they were one problem, but in reality they are different. There is obviously some intersection between the two, but generally speaking smuggling is a consensual service which ends when the 'client' (the migrant) reaches their final destination. Human trafficking, by contrast, usually is a long-term problem in which the victim is forced into indentured work, often in prostitution. Whether they are trafficked or smuggled, migrants remain a vulnerable group. There is a lack of coherence on human rights law on this issue because of 1) inconsistencies inherent in the Palermo Protocol; 2) problem of fragmentation – there is a huge divergence in the reasons and experiences of migrants, which are shaped by where they come from and their particular economic circumstances; 3) Securitisation of migration. Many risk their lives in travelling to EU and this can only make logical sense if their situation in their home country is so dire as to make the risk worthwhile. Migration is often viewed as a security issue which

encourages a police and security response (e.g. use of detention centres). Asylum seekers' rights have been undermined in this process and this has limited their ability to seek protection.

Discussion:

Community cases for indigenous communities are increasingly reaching regional mechanisms, and judgments are being diffused to national courts and other international bodies; in community cases, individual rights are being forgotten. Collective rights are being undercompensated in indigenous peoples' rights cases, no matter what is happening within the domestic system. This is a contextual situation, and any court has to look into what the victims want and see what is reasonable in the light of all available evidence.

One key outcome of the Endorois decision was that it led other indigenous groups to approach CSOs to take forward their cases. This is an important development in terms of indigenous mobilisation, even if compliance with the actual ruling was fairly limited.

An additional problem of the Palermo Protocols is that they are very state-orientated, meaning that those being smuggled into the EU are viewed as committing crimes against the state. This makes vulnerable groups even more vulnerable. Ensuring adequate protections for migrants is entirely possible within the current legislation framework. The problem is mainly one of a lack of political will; the Government does not recognise migrants as holders of human rights.

Session 3: International Human Rights Decisions in the Context of Persons in Situation of Vulnerability (cont'd)

Laura Clerico *and* ***Celeste Novelli*****,** Erlangen-Nürnberg University (Germany) and Consejo Nacional de Investigaciones Científicas y Técnicas (CONICET) (Argentina): The Inclusion of the Social Question within the Gender Perspective: Notes to Rewrite 'Cotton Fields'

The Cotton Fields judgement needs to be revisited to include important additional contextual factors that were not sufficiently examined in the original judgment. These issues were that the disappeared women in this case were young, workers (often at *maquilas*), generally migrants and underprivileged, who worked in conditions that were almost exploitative in nature. Consideration of their socioeconomic situation would have had an impact on the framing of a) the issues of the case; b) the extension of the argumentation justifying the judgment; and c) on the reparations. The Cotton Fields case is a leading case, because: (a) it established the justiciability of the Belem do Pará Convention; (b) declared that the state had failed to prevent the disappearances and murders of women in the context of a gender-related pattern of violence and a culture of structural inequality; (c) led to new discussion on the concept of femicide; (d) in its use of the methodology of stereotyping; and (e) ordered measures of reparations from a gender perspective. The Court identified a pattern of gender-related violence and notes an admission by the government that these mechanisms were strongly linked to a 'culture deeply rooted in stereotypes'. This paper's working hypothesis is that there is something missing from the judgment: that of economic equality. Strikingly, this was part of the context of the case and formed part of the Government's submission to the Court. The state declared expressly that the *maquilas* preferred to employ women, but the Court did not address the question of why this was so. The Court did not pay due attention to the broader context of the case. By that time, there were reports from third parties that showed the effects of discrimination towards migrant, poor, young women and girls working in the *maquilas*. Thus, gender inequality was not only a question of cultural discrimination, but also one of economic and social discrimination. The Inter-American Commission seems to be a step ahead of the Court

with regard to gender violence issues. According the latest thematic reports issued by the Commission, there is a close interrelationship between gender violence and the lack of access to social, economic and cultural rights.

***Enzamaria Tramontana*,** University of Palermo (Italy): Implementing the Right to a 'Dignified Life': Potential, Constraints and Challenges

The right to a dignified life in the jurisprudence of the IACtHR includes rights of social nature (housing, water, etc.). The IACtHR has established strict limits on the scope of state liability for violations of the right to a dignified existence. It must be shown that individuals lacked the most basic necessities of life and that the State knew or ought to have known about this, but did not adopt all reasonable measures to counteract it. The rationale behind this approach is well-known and derives from the Court's reluctance to rely on Article 26 of the American Convention on Human Rights (ACHR). Generally, there has been some reluctance to find violations of Article 26 ACHR, with the IAHRS instead adopting an indirect approach. Those supporting a dignified life approach argue that this would lead to better implementation; right to life violations would bring additional gravitas to the case. They argue that rulings finding violations of Article 26 will stand in the way of implementation because states would perceive them as overarching, and unlikely to be linked to any form of social pressure. An empirical review shows, however, that States' compliance with Court judgements in the jurisprudence on 'right to a dignified life' violations follow what scholars consider to be the 'familiar pattern' of domestic compliance with the IACtHR's orders. The argument that right to life violations may have a greater advocacy value than ESCR claims seems a little old fashioned in that it overlooks the important work of CSOs over recent years on ESCR. Accordingly, the time is now right for the Court to move forwards and to address ESCR directly instead of relying on right to life violations. The indirect approach is good for those rights that are not justiciable, but for those that are, a direct approach is preferable.

***Carlos Zelada*,** Pacifico University (Peru): Is International Law the Best Way to Gain Recognition of Equal Marriage?

International human rights law has not yet firmly declared in favour of same sex marriage. Globally, there has been a trend towards proliferation of equal marriage in different countries, with three distinct periods of change. The first wave of advances came in 1989 – 2000, where there was an initial flurry of mainly European countries granting civil unions to gay couples. The second period began with the first legislation allowing the use of the term 'marriage' between gay couples in the Netherlands in 2001. Several other countries later follow suited, though in this period (2001 to 2010) the predominant type of legislative change was that of civil unions for same sex couples. From 2011 onwards, legislation for gay marriage, rather than just civil unions, has become the dominant type of change. The question of gay marriage has been addressed three times in international human rights law, though never at a particularly opportune moment. The first petition on this topic was sent to the Human Rights Committee in 1998, before the first country had approved gay marriage. The Committee said that marriage protections do not apply for gay marriages. The second time the question was posed was within the ECHR and was submitted in 2004. The EU ruled in 2010, again deciding against gay marriage rights. There was also a case in the UK in the interim where a similar verdict was reached. Later cases before the human rights committee e.g. Young v Australia and X v Colombia, did not re-examine the issue of gay marriage explicitly, but rather examined the pension rights of gay couples. The European Court, in Schalk and Kopf, gave a wide margin of appreciation to member states, saying that each was responsible for deciding on this issue. In Valliantos and others V Greece, the ECHR (in 2013) went further, by saying that there is increasing recognition of equal rights for same sex couples. However, in Hämäläinen v. Finland (2014), the same body notes that though there is a trend towards legal recognition, there is still no worldwide consensus in favour of

gay marriage. The incremental steps towards recognition of equal marriage rights mean that it could be that one of the upcoming cases in the EU and Inter-American systems which ends with a new international precedent upholding gay marriage rights. At the very least, the political context in which such questions may be asked is today much more favourable than that of previous periods.

Discussion:

Further analysis of the application of the margin of appreciation in the European system (applied here in the case of gay rights) would be useful for the Inter-American context. Historically, this is not something which the IAHRS has used much, but some judges are today saying that they are in favour of its application. Advocates of the margin of appreciation argue that it might help minimise the backlash of states against the system, by allowing some flexibility in implementation of rulings.

It is no coincidence that we see the progress of gender identity cases as having an impact on sexual orientation jurisprudence. The idea of sex as a biological entity, which is increasingly challenged by feminist theorists who feel this is a social construct, is being addressed. The IACtHR has been good at identifying and unveiling gender stereotypes.

It seems unlikely that the IACtHR will begin to adopt a direct approach in the dignified life/ESCR cases over the next few years. The arguments raised by those judges who back the direct approach are based on a view that this would help conceptualise the matter, rather than because it would be preferable in terms of implementation or practical impact.

Session 4: Implementation of Decisions of Human Rights Bodies in the Context of Women's Rights

***Lorena Sosa*,** Utrecht University (The Netherlands): Case Law on Violence against Women: New Grounds, New Challenges

The IACtHR has defined femicide, gender stereotyping etc. and these are great achievements; but to what extent does the Court take 'intersectionality' into account? Intersectionality is a theoretical and analytical approach to the study of the interconnections between gender, race and other categories of distinction. It comes from black feminism and different movements challenging that 'women' are a universal category. They wanted to highlight how gender inequality related to other categories of inequality – this concept accordingly moves away from a one-dimensional view of discrimination. At the UN level, we see a trend towards taking greater note of intersectionality and the different experiences of different women. In a 2006 UN report about violence against women there was an explicit reference to this issue. Similarly, there has been some acknowledgement of the concept within the IAHRS, by the Rapporteur on Women's Rights, for example. In the case law of the IACtHR on femicides (*Gonzales et al v. Mexico*; *Escobar Ledezma v. Mexico*; *Veliz Franco v. Guatemala*; and *Velásquez Paiz v.Guatemala*) there are several areas in which intersectionality is discussed. The discussion of gender discrimination is an entry point for intersectionality, as it allows for the unveiling of gender stereotypes. The cases point to class stereotypes, which are particularly visible in the last case: the victim's body was found in a poor area. No thorough investigation was conducted because the victim was perceived to be a prostitute. The applicant's representatives argued that this was a case of double discrimination, but the Court did not pick up on this. Finally, the Court is engaging in a discussion of the 'special vulnerability' of women (socio-economic class) and looking at the 'girl-child', instead of looking at how age impacts on the perception of gender and vice versa. Violence against women is the result of multiple forms of discrimination, connected to structural inequalities, that take place in different domains. The IACtHR has focused mainly on

gender inequality but misses out discussions of social inequality. This means it fails to address all the inequalities affecting women, which in turn prevents it from issuing truly transformative reparations.

***Ciara O'Connell*,** University of Sussex (UK): Women's Reproductive Rights and Reparations: Lessons from the Inter-American System of Human Rights

One of the most pervasive and harmful stereotypes is the stereotyping of women exclusively as mothers and housewives in a way that limits their opportunities to participate in public life. The stereotype is that women are attuned to the roles of mothers and caregivers. The Inter-American Court has on several occasions relied on gender stereotypes of women in order to determine violations of women's rights. In the Miguel Castro Castro Prison case, the Court declared that solitary confinement had especially detrimental effects on inmates that were mothers (not 'parents') because they were unable to communicate with their children. In *Artavia Murillo v Chile*, the first reproductive rights case, stereotypes are denounced by the Court, but then used by it. Problematically, the two male attorneys representing the victims did not seek help from reproductive rights NGOs and did not frame the case as a reproductive rights case. In its judgment, the Court said that motherhood is an essential part of the free development of a woman's personality. Reparations that do justice to women need to look for ways that avoid formal gender discrimination in their design and implementation; they should look to ensure that patriarchal norms and sexist standards do not influence reparations; and they should seek to optimise the (admittedly modest) transformative potential of reparations to contribute to a society free of gender subordination. In the Artavia case, one attorney claimed more money for the women victims than the male victims; but the Court did not elaborate on this. The educational reparations ordered, moreover, did not require status reports to be submitted and no time limits were set. In short, the Court should have found a violation of Article 7(e) and used Article 8 to interpret this provision. The Artavia case was a safe one to progress the reparations issue further.

Carlos Herrera Vacaflor, University of Toronto (Canada): Framing of Rights and the Transformational Power of International Law: a Study from Reproductive Rights Litigation

An analysis of two reproductive rights cases (*B v. El Salvador* and *R.R. v. Poland*) shows that reproductive rights are no longer perceived as a private or personal issue. The European framework focuses on unborn life while, at the international level, the question is more about making the 'right to abortion' effective. A comparison between El Salvador and Poland is instructive as both have comparatively strict abortion regimes within their respective regions and have powerful churches. El Salvador allows abortions in some very limited circumstances. The Supreme Court interprets the health of the woman in terms of the well-being of her body, not as including her well-being as a personality. The ECtHR, in *R.R. v. Poland*, argued there was a failure to guarantee a pregnant woman's rights to participate in the decision-making process and to be heard on matters relating to her health. The IACtHR focuses on personal integrity and highlights mental health issues. This may be viewed as a missed opportunity to highlight the concepts of autonomy. The ECtHR also focuses on personal integrity, which relates to providing the woman with sufficient information to take a decision on matters affecting her body, and to know the state of her health. This is a valuable conceptualisation, but is problematic from an implementation point of view and could increase the influence of the Polish church. As a result of the case, Poland had to reform its abortion regime, but despite this the country has continued to breach rights of women to safe abortion. There have been no substantial changes to the abortion framework. In El Salvador, there are still problems of how to allow abortions where the pregnancy is threatening the woman's life/health.

Discussion:

It is difficult to argue that the IACtHR uses a reproductive rights framework when it comes to ordering provisional measures, given that there have been no amicus curie briefs. The provisional measures ordered in B followed decision taken in two days by the IAHRS without a ruling on the merits. As a result, it is difficult to argue that the IAHRS is creating a jurisprudential line in this area.

The composition of the Court, and whether or not all male judges are presiding over a case, can have an impact on these cases. Female judges may give greater attention to gender stereotyping issues, but not always. Judges who have given dissenting opinions in these cases, such as in R.R., have provided an important advocacy tool which can be used by domestic actors who oppose abortion.

Session 5: Human Rights Decisions from a Comparative Perspective

***Stephanie Law*,** Max Planck Institute (Luxembourg): Interlegality Within and Beyond Europe, Human Rights Protections and the Promise of Judicial Dialogue

Human rights mechanisms in Europe involve a plurality of systems and institutions, of national and supranational courts (national, EU, ECHR and international legal order). This context of inter-legality represents an environment ripe for dialogue. There are courts operating at different levels, dealing with the same or similar norms, and the mechanisms of interaction shape the possibilities for impact within and between the various regimes. Real dialogue between judicial bodies must consist of something more than just referencing other mechanisms' jurisprudence; rather, it must involve interactions of a more sustained and consistent nature. There is evidence that dialogue occurs both vertically and horizontally. The ECtHR, as yet, has no institutionalised reference procedure, but there is a compliance mechanism. From the ECtHR to the EU there is a presumption of 'equivalent protection'. Dialogue shapes the context in which courts operate, with the Court giving priority to EU law. Preliminary conclusions of the research presented in this paper are that additional effort should be made by the European Court of Justice (CJEU) to re-establish a relationship with the ECtHR. While the CJEU's Opinion does not necessarily entirely undermine the scope for dialogue, it leaves little space for the ECtHR in terms of looking into, consulting the CJEU or interviewing rights violations in the EU regime. This undermines the scope for a more coherent regime of human rights protection.

Oscar Parra, Oxford University (UK): Some Procedural and Substantive aspects of the Recent Dialogue between the Inter-American Court and the European Court of Human Rights

In spite of the differences in historical terms and in matters of institutional design between the European and Inter-American systems, much can be gained from communication between the two. There have been some of exchanges and visits between the various different human rights mechanisms e.g. the IACtHR visit to Strasbourg two years ago and the African Court's visit. But how have such inter-institutional dialogues manifested themselves in the jurisprudence? There was some evidence of influence in Campeanu v. Romania: the ECtHR took into account the structure and functioning of the IAComHR and IACtHR on taking cases on behalf of individuals (and constructed its procedural practice in line with that used by the IAHRS). In *Margus v. Croatia*, the ECtHR addressed amnesties and armed conflicts and looked at the growing tendency in international law to regard amnesties for gross human rights violations as unacceptable. In *Mocanu and Others v. Romania*, the ECtHR considered cases like *Rio Negro* concerning victims of mass violations. The judgment reflected this dialogue by stating that torture cases should not be time-barred in the context of criminal proceedings. Differences in approach in terms of implementation are more evident. The ECtHR is increasingly involved in the implementation process, rejecting the traditional approach to Article 46

ECHR. In recent cases, the Court has sometimes used Article 46 not only in pilot judgments, but also in individual (lead) cases. Discussions regarding subsidiarity have also come to the fore in both systems.

Caroline de Lima e Silva and Solomon Ebobrah, iCourts, University of Copenhagen (Denmark):
Exploring Socio-political factors in Latin America and Africa: Challenges for Developing Human Rights Systems and International Courts

International human rights mechanisms are expected to learn from their counterparts in other regions. Generally speaking, the transfer of compliance skills goes from more effective courts to less effective ones. Although there has been some transfer of knowledge from Latin America to Africa, the IAHRS has also learned from other courts. Courts are more likely to achieve compliance with their rulings if they take into account various domestic socio-political factors when drawing up their decisions. Compliance levels are also anticipated to improve as time goes on as the Courts gain more experience and are able to attract more qualified individuals. An empirical study of African and Inter-American compliance confirms that levels of compliance vary in accordance with the complexity of the reparation orders. While the African and ECOWAS courts have processed a total of 200 cases, they do not have mechanisms to monitor compliance. Between the two regions, some transcontinental peer-learning can be observed in mechanisms to improve implementation e.g. checklist orders in the ECOWAS court rulings. However, more peer-learning is not likely to increase compliance because compliance is largely depending on whether the country is a democracy and how receptive the political actors are. In Latin America, CSOs are maturing and this helps improve compliance, although a general culture of non-compliance still persists. Instead of focusing on expanding these inter-regional mechanisms, human rights courts would do better to concentrate on region-specific factors. In any event, international human rights litigation should not look for immediate compliance, but broader impact.

Discussion:

The African system does draw on judgements and rulings from Strasburg court, but generally it does this only when it has already decided on a particular line of legal argument and uses international jurisprudence just to back it up. European case law does not necessarily have much influence over their decisions. Indeed, some African states accused of such violations may seek to dismiss the legal arguments from Strasburg as “neo-colonialism”.

At national courts in Africa, there is sometimes active resistance to international mechanisms, but sometimes the response is more ‘protectionist’. Such national judges do not recognise international courts. These regional dynamics need to be properly understood in order to identify reasons for non-compliance. Things are more difficult in the African context as it is trickier to hold the executives to account. Civil society is less strong and there is no connection between compliance with international rulings and election outcomes, for instance.

The use of the term ‘dialogue’ is problematic. Some argue that we can only speak about dialogue when there is a framework that makes dialogue mandatory (in terms of communication between judges). In the IACtHR, more attention is given to what the ends such dialogue should have, rather than just engaging in dialogue for its own sake.

Some rulings appear to be influenced by dialogue with different systems, but this is not in actual fact the case. In Campaneu v. Romania, for example, the case was argued from an (Inter-American) access to justice perspective, but this was not as a result of dialogue led by the ECtHR. Rather, it was

the lawyers who sought and found information from another regional human rights system which could be used to support their case.

Session 6: International Human Rights Decisions: Suggestions to improve implementation

***Aysegul Uzun Marinkovic and Kresimir Kamber*,** Legal Officers, European Court of Human Rights: Fostering implementation of human rights adjudications at the domestic level by strengthening and clarifying the rules on exhaustion of domestic remedies: A lesson learned from the ECtHR leading and pilot judgment procedures

The idea of international courts is not to make national courts ineffective; it is to complement something that already exists at the domestic level and to provide an additional safeguard. Numerous factors influence the implementation of human rights standards and international courts should contribute to this implementation. They should robustly engage in dialogue, based on the notion of subsidiarity. Subsidiarity should start with an international court adopting an inclusive decision and providing practical indications on substantive and procedural measures that should be adopted at the domestic level. A certain margin of discretion should be left to the states to implement the ruling in a manner that fits the domestic legal order. When remedies are introduced on the basis of indications from international human rights courts, the latter should strictly require the exhaustion of these domestic remedies. This has been done at the European level, allowing states greater opportunity to address the violation of human rights domestically. This, in turn, increases the chances that international courts ultimately serve to enhance the operation of national level bodies. In 2004, the Council of Ministers invited the ECtHR to identify, in its judgments, underlying structural problems and the legal origin of the violations found. This led to the introduction of the pilot judgment procedure (first pilot judgment: *Broniowski v. Poland*, which led to a friendly settlement). A new Act on compensation was adopted and the ECtHR started striking out similar cases. The pilot judgement procedure has proved to be a useful tool which, while it doesn't work in every case, has helped implementation. It is innovative in that it seeks to identify the underlying causes and mechanisms of the violation, and identifies solutions to address these. In *Finger v. Bulgaria* and two other pilot judgments against Bulgaria, the Court said that Bulgaria needed to introduce a compensatory remedy with particular characteristics. Subsequently, the authorities adopted a number of legislative amendments and created a Convention-compliant remedy, as acknowledged by the Court. The Court referred the pending cases back to the domestic level. The pilot judgement procedure is a good measure as it means that the Court clearly sets out what it is that domestic courts need to do to comply with their treaty obligations.

***Christian de Vos*,** Open Society Foundation (US): Ensuring effective interaction between actors and institutions at the national-level—the site where implementation occurs—and the international and regional human rights bodies that monitor those decisions

There have been some troubling efforts by states to clampdown on the power of international courts (both in Europe and the IAHRS) and this put NGOs on the back foot for several years. Now that the immediate threat has lessened, NGOs are focusing on implementation issues and looking to marry national level advocacy with work to strengthen human rights institutions. Overall, implementation is a national level process, but regional mechanisms can provide rigorous monitoring and (hopefully) positive judgements. One striking difference about the European system is the existence of the Committee of Ministers to monitor compliance with judgements – this doesn't happen in the African or Inter-American systems. In Strasburg, there is very little CSO activity and this is reflected in the limited nature of formal communication between civil society and the

court for much of its history. The Committee of Ministers remains fairly non-transparent. To counteract this, the Open Justice Initiative has started to speak directly to the deputies, prior to their human rights meetings. Twelve states participated in the beginning, but now there is an average of 25. The insights gained from this is that there is real power to naming and shaming work, and advantage can be gained from seizing the political spaces in which this can occur. States care about how they are perceived and have asked to speak at NGO meetings on certain cases. The briefing processes in Strasbourg have also led, in some cases, to improved communication between NGOs and executives at the domestic level. One challenge is that certain NGOs have now taken on a pseudo gate-keeper role; an implementation network is needed to make such opportunities available more broadly.

Discussion:

The trend in the ECHR over the past 10 years has been that it has become more accessible both to the NGOs and to the states – the reform process which led to more dialogue and attempts to find settlements to cases was driven by the huge backlog in caseload. There are now varied spaces in which the court dialogues with the states e.g. national level courts come and stay within the ECHR and learn the convention. They stay for four years and it has been effective in helping roll out implementation at the domestic level.

The ECHR accords a huge amount of weight to the academic community and to well-argued external criticisms. NGOs have also got NHRIs, e.g. the Ombudsman's Office from the Czech Republic, to come and brief the committee of ministers. Such organisations are held in greater esteem by the committee of ministers (as a pseudo state entity) than CSOs and can thus have a larger impact on their internal thinking.

Pilot judgements do not work in all thematic contexts, but it is an interesting mechanism to reduce the backlog of cases. The IAComHR has some similar mechanisms. Article 29 of the new Rules of Procedure allow for the prioritization of cases dealing with structural problems. However, there are bad precedents, especially in Peru: when the Commission decided to join a number of cases, the implementation was terrible and the cases were all but forgotten.

Session 7: Human Rights Decisions and Political Context

Jorge Contesse, Rutgers School of Law-Newark (US): The Politics of Compliance in Inter-American Human Rights Law

The Commission has a friendly settlement procedure which is regulated a bit by the Convention and in more detail within the rules of procedure. However, the role of the Commission in this process is contested. Is it to negotiate? Or to assist the victim in facing a stronger actor, namely the state? In March 2006, the Commission held an admissibility and merits hearing in *Atala and Daughters v. Chile* (a case regarding discrimination on the grounds of sexual orientation in the context of custody of children). A panel of five Commissioners were doubtful about finding a violation and so a friendly settlement procedure was initiated, which lasted two years. The petitioner in this case (who was herself a lawyer) realised that hers was a lead case, and was therefore much more patient with the extended nature of the settlement proceedings. During this time, the composition of the Commission changed, and there had been broader moves towards approval of same sex partnerships in the region, increasing the chances of a favourable outcome for the victim. The case became a group cause as the broader civil society mobilised around it and submitted amicus curiae briefings in support. Friendly settlements in such cases cannot therefore be thought of simply as a

process involving only the state, the victim and the petitioner. For example, a friendly settlement in this case may have impacts on same sex marriage in the country. Some have criticised such decisions as ones which should involve a wider variety of groups and inputs, and debated more broadly, than just those involved in the case in question. This is particularly the case where friendly settlements require changes to be made to national constitutions, for example.

John Wadham, Human Rights Consultant, prev. Executive Director, INTERIGHTS (UK): Bending the jurisprudence and UK threats to leave the ECHR

The UK has violated a few ECHR rulings since 2011, especially regarding prisoner voting rights. The UK government is now talking about redefining its relationship with the European Convention on Human Rights and of wanting to have its own human rights solution. It is very difficult to prove whether or not these threats have had an impact on the jurisprudence of the ECtHR. However, a number of recent judgements suggest that this may be the case. The first related to hearsay evidence, which the ECHR says cannot be admitted but the UK courts had deemed admissible. A chamber judgement by the EU in 2009 said the UK decision constituted a violation of the convention; the UK Supreme Court disagreed with this; leading the case to be taken to the Grand Chamber in 2011. The Strasburg tribunal paid heed to the judgement of the UK Supreme Court and decided that the ban on hearsay evidence was not necessarily categorical. It was interesting that in two dissenting opinions the judges noted (and criticised) how exceptional it was that the judgement on the issue had changed so much within two years without any substantial new evidence or arguments being introduced. Another example was the Austin case, where the ECtHR ruled that the detention of passers-by at a protest in London was not illegal because it was carried out for reasons of public security. If such rulings collectively amount to a bending of European jurisprudence in order to keep the UK in the European System, this has troubling implications. The main such complication is that these decisions are not only binding for the UK but all the 46 other parties to the convention. This means now, for example, that anywhere in Europe you can now detain people for several hours without necessarily having just cause.

Discussion:

A point of contention with the UK and the European Court has been around voting rights for prisoners. The UK has a blanket ban on all voting for any person in the prison system, even if they are just held in pre-trial detention. The Court ruled that *some* voting rights must be given to some prisoners, but left a very wide margin of appreciation as to what precisely these should be. Complying with this would be a small price to pay in order for the country to stay within the European system. Even so, this became a big political and media issue, with the UK Prime Minister using it is an example of 'nonsensical' rulings of the ECtHR.

In Latin American contexts, political threats from Venezuela and Alba countries have also led to some bending of the jurisprudence. There is perhaps some concern about how much the IAHRS takes from Europe as it has views the European human rights system as a superior one. If the ECtHR jurisprudence is being bent for the UK, maybe the IAHRS will seek to do more of the same.

Session 8: Policy and Practitioner Panel - Concluding Reflections and Regional Comparisons

There are very significant differences between the Inter-American, African and European human rights systems, not least because the three systems evolved at different times in very different political contexts. Despite these differences, the systems are facing similar challenges in many areas, meaning that comparisons between the three are becoming increasingly important. From the experiences of the other systems, we can identify common challenges and possible solutions to current and future issues. However, processes and best practices cannot be imported wholesale from one system to another. Instead, we need a 'smart' process whereby techniques are adapted to the specificities and regional context of each human rights mechanism.

One way in which we might approach identifying inter-system learning is through judicial dialogue. Both the European and Inter-American systems have already engaged in information sharing and dialogue and this has had significant impacts on individual cases. This has proved of particular importance when looking at issues such as same sex marriage, amnesties etc., where dialogue is key in order to reach nuanced decisions based on inter-regional currents. However, there is still contention around the form and meaning of 'judicial dialogues' and what exactly this involves. Perhaps a better term would be 'interchange' which can include formal mechanisms, but also informal ones, e.g. recent visits by the South Africa Constitutional Court to Strasbourg. This can take place at four different levels:

1) **National-regional exchange**. Legal interchange would ensure that the domestic system fully guarantees international standards. The African Court for example, has made little reference to the decisions of Africa's national courts in its rulings, though it has referenced those from other countries, like the UK.
2) **Intra-regional exchange** between several institutions within one (sub-)region.
3) **Inter-regional or cross-regional exchange**, including the three main regional systems but also the emerging mechanisms within ASEAN, the Arab League etc.
4) **Regional-global exchange**. The various Commissions and Courts have obligations to make reference to international treaties. This allows for a conversation between regional human rights mechanisms and the UN system.

One issue common to all systems is the failure to develop a coherent body of case law. This is a result of the proper judicial process within each regional system which allows different judges to exercise different interpretations of laws. This can lead to some incoherence in the jurisprudence of a particular regional system. The community of legal scholars must be aware of the shortcomings, and they must alert the judges and institutions of these shortcomings. When such criticisms lead to constructive proposals, this can be very helpful.

The Inter-American and African systems have faced the same state defiance of regional organisations (the OAS and the AU, respectively). States are not always willing to accept rulings and work with courts to implement these. Even in Europe (e.g. UK) there have has been a revival of sovereign claims, producing resistance to regional mechanisms. Yet the level of defiance in Africa is of a different order, involving a much more wholesale rejection of rulings and the institution which produced it.

This issue does not exist in Europe to the same extent as there is an institutional dialogue with all the various stakeholders involved (including the Committee of Ministers). Yet even in Europe, some of the institutional bodies may bend to the rejection of local states. Though the institutional framework in the IAHRS is not as strong, Latin American civil society is much more active and

mobilised around these issues than are their European counterparts. These groups play an important role in bringing about compliance with rulings, but without political will and cooperation with all the relevant domestic stakeholders implementation is unlikely to progress. The importance of the domestic judiciary in achieving implementation must also be highlighted. Domestic judges must be knowledgeable on the Convention and capable of accepting a judgement, even if this involves criticism of their own previous decisions.

In some senses, the ECtHR has moved away from the role played by regional Courts in the Americas and Africa. Today, it is essentially acting as the constitutional court of Europe. This idea is not new, but the novelty is what the Court is doing with this idea e.g. by exercising conventionality control in the case of Zamakov v Russia even when domestic remedies had not yet been exhausted. In a recent Greek case, the applicant went straight to the ECHR without recurring to domestic systems first, exactly as if the court was a constitutional one.

The rhetoric of some states against regional systems can be very dangerous. European states that assert their own sovereignty as a basis to oppose the court essentially uses concepts of democracy as an argument against the application of the law. This runs the risk of tainting the whole human rights project as a fundamentally undemocratic enterprise. Italy, for example, has now rejected much of the European Court's rulings and say they will only follow EU judgements once they have been confirmed by the Grand Chamber. This was a very concerning judgement not least because until then Italy had historically been well disposed towards the ECHR. The Russian Constitutional Court did the same three months after, drawing on the Italian decision as its justification.

Such moves have been rejected by the ECHR. They nevertheless represent a troubling trend – if established countries reject ECHR rulings, then other member states are more likely to do likewise. To combat such opposition, human rights institutions across the world need to stand together and cooperate in their resistance. Otherwise we risk losing the regional systems which have been one of the major achievements of the world's human rights movement.

Discussion:

NGOs in Europe are facing difficult challenges. In Latin America there are strong regional organisations focused on the IAHRS, like CEJIL, that don't exist in the European system. Similarly, the OAS, unlike the EU, puts civil society in a primary place in many of its structures and processes. It is also very common in Latin America to find activist academics, but in Europe less so. Another issue in Europe is the rise of nationalism and a backlash against any supranational authority, not just those relating to human rights. Collectively, such issues complicate the construction of compliance coalitions and undermine implementation of ECtHR rulings.

At the core of regional human rights mechanisms is the idea that we are bound by a common understanding of what human rights are and how these may be enjoyed. If these values are contested, and there is no acceptance of human rights beyond those explicitly recognised in national constitutions, the system will fall apart. The idea of states restricting themselves to their national legal systems and 'protecting' themselves from any external oversight undermines the purpose of the entire system. There appears to be some new elements in the constitutional challenges to the European system which are brought forward by states. All partners are now taking different positions, using arguments that play on democracy and 'sovereign powers of national parliaments'. That is worrying, especially when democracy is advanced as a reason no to comply with one's obligations. The European Court is expected to reply to these challenges in the upcoming judgements in *Hutchinson v. UK* (GC) and in *G.M. v. Italy*. These will define the exact circumstances in which national courts may depart from ECtHR case law.