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REGIONAL HUMAN RIGHTS BODIES AS INSTRUMENTS OF INTERNATIONAL LAW

This panel was convened at 11:00 a.m., Thursday, March 28, 2019, by its moderator Christina Cerna of the Inter-American Commission on Human Rights (retired), who introduced the panelists: Elena Abrusci of the University of Essex Human Rights Centre and School of Law; Thomas Antkowiak of Seattle University School of Law; and Silvia Serrano Guzmán of the Inter-American Commission on Human Rights

Remarks by Christina Cerna*

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I am pleased and honored to be chairing this panel this morning. Regrettably, Fatsah Ouguergouz of the African Court of Human and Peoples' Rights had a death in the family and had to travel to Algeria and could not be with us today.

For years, ASIL has lumped international human rights law together with international criminal law and international refugee law, and Annual Meeting panels have usually focused on the latter two topics; rarely has there been a panel at the Annual Meeting on international human rights law. It is not only ASIL that is to blame, the UN has also lumped international human rights law with international criminal law, and in my mind, curiously, selected as the fifth,[1] sixth,[2] and seventh[3] UN high commissioners for human rights individuals whose backgrounds are in international criminal law, not international human rights law.

Most people in this country could not distinguish the UN Human Rights Council from the UN Human Rights Committee, or know how many UN human rights treaties there are.[4] Of the nine treaties (and one Optional Protocol that created the Subcommittee on the Prevention of Torture[5]), the United States is a party to only three, the International Covenant on Civil and Political Rights, the Convention on the Elimination of Racial Discrimination, and the Convention Against Torture. Famously, the UN Convention on the Rights of the Child has 196 states parties and the United

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[1] Louise Arbour was chief prosecutor for the International Criminal Court for the former Yugoslavia (ICTY) and the International Criminal Court for Rwanda (ICTR).

[2] Navi Pillay served for eight years on the ICTR.

[3] Zeid Ra'ad al Hussein was the first president of the Assembly of States Parties to the Rome Statute of the International Criminal Court. He oversaw the election of the first eighteen judges, mediated selection of the Court's first president, and led efforts to name the Court's first prosecutor.

[4] The International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention Against Torture (CAT), the Optional Protocol to the Convention Against Torture (OP-CAT), the Convention on the Rights of the Child (CRC), the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW), the Convention on the Rights of Persons with Disabilities (CRPD), and International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED).

[5] The Optional Protocol to the Convention on Torture established the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT).

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States is the only country not to have ratified, although oddly it is a party to two Protocols to this treaty. Today, each of the UN human rights treaties recognizes the importance of the individual complaint procedure and each treaty has a provision or protocol allowing for the presentation of individual complaints against the states parties to the treaty for violation of human rights.

The only body, which the United States has recognized as competent to receive individual complaints is not a UN treaty body, it is the Inter-American Commission on Human Rights of the Organization of American States (OAS). The United States is also the *only* founding member of the OAS not to have ratified the American Convention on Human Rights. By default, the Inter-American Commission applies the American Declaration of the Rights and Duties of Man to the United States, an instrument that the Commission maintains is legally binding. The United States, although it responds to requests for information and shows up at hearings, generally rejects the Commission's conclusions and recommendations on individual cases and argues, (in my view, not without merit), that the American Declaration, like the Universal Declaration, is not legally binding.

The three regional systems with human rights bodies—the Council of Europe (forty-seven), the Organization of American States (thirty-five), and the African Union (fifty-five)—together comprise 137 of the 193 member states of the UN. Given the absence of Fatsah Ouguergouz, we will be focusing mainly on the European and Inter-American systems. Each of the three regional systems has a human rights treaty and a human rights court, which distinguishes them from the UN system, which has no court.

The member states of the Council of Europe have increasingly incorporated the European Convention into their domestic legal systems, and it is directly applicable in many states. In the UK, for example, Iraqi nationals detained in Iraq by British troops can sue the UK government in British courts for arbitrary detention or ill-treatment under the European Convention. Consider for a minute the recourses available to our Guantánamo detainees. As regards the OAS, the Spanish-speaking countries and Brazil have all become parties to the American Convention and accepted the compulsory jurisdiction of the Court. Many of these countries have incorporated the treaty into their domestic legal systems, giving it constitutional status. Regrettably, Venezuela denounced the American Convention in 2012, which took effect on September 10, 2013.[6] And most of the English-speaking member states of the OAS, approximately one-third of the membership, have failed to become states parties to the American Convention.

The European system invented the individual complaint procedure and the dual mechanism of a Commission and a Court to monitor compliance with the treaty. The Commission and Court merged in 1998 and today the alleged victim of human rights violations has direct access to the European Court. In the Inter-American system, the Commission receives and processes individual complaints, pursuant to either the American Convention or the American Declaration. If the state fails to comply with the Commission's decision on the merits, the Commission can take the case to the Inter-American Court, but only if the state is a party to the American Convention and has accepted the compulsory jurisdiction of the Court.

It is important to note that both the European and Inter-American systems radically changed in 1991. During the first three decades of its existence, the European human rights system functioned as a kind of Super-Supreme Court for Europe, with the human rights violations resulting from the coup in Greece or the troubles between the UK and Northern Ireland, being the exception. Following the dissolution of the Soviet Union in 1991, the Russian Federation joined the Council of Europe (in 1996) and ratified the European Convention in 1998. In total, twenty-four countries have joined since 1991, comprising over half the Council of Europe's membership of forty-seven member states, all accepted becoming parties to the European Convention and

[6] Venezuela also proceeded to denounce the OAS Charter, which is scheduled to take effect on April 27, 2019.

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accepted the compulsory jurisdiction of the Court as a condition of membership. Today, eight countries that were not even members of the Council of Europe in 1991 account for two-thirds of the pending cases; Russia alone dominates the list with 21 percent, or 12,250 pending cases, as of the end of February 2019. When there are calls for Russia to be expelled from the Council of Europe for its partial, not full, compliance with European Court judgments, it should be remembered how enthusiastically civil society in Russia looks to the European Court of Human Rights for justice.

Similarly, in 1991, the Inter-American human rights system celebrated the fact that the governments of all its member states were the result of elections (except for Cuba which has a unique status). For a region known for its military dictatorships and a bloody legacy of thousands of forced disappearances, extrajudicial executions and torture, the prevalence of democratic governments marked a historic turning point. The 1990s ushered in calls for an end to impunity, for criminal prosecution of violators of human rights, and the prohibition of amnesties for perpetrators of crimes against humanity. This democratization euphoria led on September 11, 2001, to the OAS's adoption, in Lima, Peru, of the Inter-American Democratic Charter, which declared the right of the peoples of the Americas to "democracy" and the obligation of their governments to protect and defend it.

In addition, for the first time, the European Court of Human Rights, faced with hundreds of applications relating to forced disappearances and killings in the conflict in Chechnya, began to look at the jurisprudence of the Inter-American system. The Inter-American system has always looked to the jurisprudence of the European Court, UN treaty bodies and other UN bodies, and the International Court of Justice.

In one of the Inter-American Court's earliest cases, *Blake v. Guatemala* (1998), the concept of the "fragmentation" of international law was raised but did not refer to a norm conflict with another international or regional human rights body, but rather to the forced "fragmentation" of the elements of a "continuing" violation, namely, a forced disappearance.

The *Blake* case involved the forced disappearance of an American journalist at the hands of state agents. Guatemala argued before the Inter-American Court that the issue of the alleged violation of the right to life was inadmissible *ratione temporis* because the death occurred in 1985, that is, before 1987, the year Guatemala accepted the compulsory jurisdiction of the Court. Article 28 of the Vienna Convention on the Law of Treaties prohibits the retroactive application of treaties and when Guatemala recognized the Court's compulsory jurisdiction, it declared that it did so for cases that "shall have taken place after the date that this declaration is presented to the SG of the OAS." The Inter-American Court in the *Blake* case considered itself barred from determining state responsibility for the violation of Blake's right to life and only ruled on the state's failure to investigate the death.

The Inter-American Commission had argued in favor of the declaration of a violation of the right to life because "in a forced disappearance case—the effects extend until such time as the disappearance is entirely solved. The crime of forced disappearance is an indivisible whole inasmuch as it is a continuing or permanent crime."[7] Judge Cançado Trindade, sympathetic to the Commission's position, appended a separate opinion to the judgment in this case on the "fragmentation" of international law, but he meant something different from the International Law Commission's 2006 project on "fragmentation." Judge Cançado Trindade noted that "the application of a classic postulate of the law of treaties" (i.e., the *ratione temporis* rule), led to the "decomposition or fragmentation" of the constitutive elements of the crime of forced disappearance, retaining for the Court's consideration only the elements pertaining to judicial guarantees.

For Judge Cançado Trindade, Guatemala's responsibility began in 1978, with ratification of the American Convention. The date of acceptance of the compulsory jurisdiction of the court, he

[7] I/A Court H.R., Blake v. Guatemala, para. 55 (Jan. 24, 1998).

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submitted, refers only to the judicial means of settlement of a case under the American Convention.[8] The Inter-American Commission, which is co-equal to the Inter-American Court and not bound by the Court's jurisprudence, continued to argue before the Court for a holistic interpretation of the crime of forced disappearance, which was finally adopted by the Court in 2009.[9]

But now, let us turn to our speakers and "fragmentation" as understood in the International Law Commission project as norm conflicts among the regional human rights systems. Our first speaker is Elena Abrusci, from the University of Essex in England. She has a PhD in law from the University of Nottingham where she wrote her dissertation on convergence and fragmentation in the case law of regional and international human rights bodies. She has been publishing in leading journals on indigenous rights, sexual orientation rights, and modern slavery.

Our next speaker is Silvia Serrano, a former colleague of mine at the Inter-American Commission on Human Rights, who has probably argued more cases before the Inter-American Court than anyone else on the staff. She has an LLM in international legal studies from Georgetown University and a Master's in legal argumentation from the Universidad de Alicante. Silvia will be speaking about pretrial detention and due process guarantees in criminal cases, which have been approached differently in the case law of the Inter-American and the European systems.

Our third speaker is Thomas Antkowiak, a law professor at Seattle University School of law. He has presented numerous cases to the Inter-American and other human rights systems. Thomas is also co-author of an important recent book on the American Convention on Human Rights, published by Oxford University Press. Thomas's presentation will be on "Social Rights in International Jurisprudence."

The European Court of Human Rights and Its Contribution to Judicial Fragmentation in International Human Rights Law

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*By Elena Abrusci**

Introduction

Following the International Law Commission Report on Fragmentation in International Law (IL), scholars have started to question whether such fragmentation could also have affected its subbranches, and, especially, international human rights law (IHRL). Due to the proliferation of both IHRL norms and institutions, especially at the regional level, this appeared to be a real possibility.

Judicial fragmentation could be defined as the situation where two courts, seized of the same or similar matter, issue contrasting judgments. Adopting this definition, that focuses on the outcome of the judgments, judicial fragmentation in IHRL proved to be a limited phenomenon since convergence turned out to be predominant.[1]

Nevertheless, an interesting result emerges from this analysis; in all instances of judicial fragmentation between regional human rights bodies, the European Court of Human Rights (ECtHR) is always present. This raises questions on why the judicial behavior of the ECtHR favors

[8] *Id.*, paras. 32–33.

[9] I/A Court H.R., Radilla Pacheco v. Mexico (Nov. 23, 2009).

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[1] See, among others, Towards Convergence in International Human Rights Law: Approaches of Regional and International Systems (Carla M. Buckley, Alice Donald & Philip Leach eds., 2016).

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