

**Fifty Years of the European Court of Human Rights
viewed by Its Fellow International Courts**

Remarks by Paolo Carozza

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It is an honor to be not only among such notable representatives of international tribunals here on the podium, but even more among the many distinguished jurists in the audience today. That presence itself gives some of the most significant testimony to the achievement of the European Court of Human Rights. It is also particularly gratifying for me to be here on behalf of the Inter-American Commission on Human Rights to celebrate and reflect on 50 years of the Court's work, because this year also marks the 50th anniversary of our Commission. Although the American Convention on Human Rights and the Inter-American Court of Human Rights came later, of course, when we look at the European and Inter-American regional systems as a whole, we can see a history that has in fact been parallel, and in important ways intertwined, since the adoption of the American Declaration in 1948.

In the half-century of both of our respective institutions, however, it was largely the case that the human rights issues we confronted were very distinct, dramatically so in fact. While the Member States of the Council of Europe largely consolidated a common constitutional space, the Americas – tragically – were fraught with the perennial crisis and collapse of democracy and the rule of law, and in some places and periods witnessed the systematic repression by criminal regimes.

And yet, despite the dramatic differences in the real experiences of the states and peoples of our systems since 1959, there have been a large number of interconnections between the two, some well known well and others much less so. There is not the time now to

present a comprehensive catalogue of those relationships, but I would like to highlight just a few of them, not only to look retrospectively at what has been achieved together but in order to then speculate about the possible avenues of rapprochement of our regional systems in the coming decades, and how our collaboration might fruitfully continue and grow.

The historical influences have, not surprisingly, flowed primarily from Europe to the west, from Europe and across the Atlantic. Some of the most evident ones have had to do with the structural aspects of the Inter-American human rights system. For instance, the Inter-American Commission – although originally established by resolution of the General Assembly of the Organization of American States and not by treaty – was consciously inspired by and modeled after the now-defunct European Commission, even if in the subsequent years it evolved to acquire its own distinctive mandates and methods.¹ Similarly, in the drafting of the American Convention on Human Rights in 1967, the Inter-American Juridical Committee fashioned their proposed structures and procedures for the Inter-American institutions in large part on the model of the American Convention's elder sister in Europe.²

Interestingly, one notable actor in the special Inter-American conference responsible for drawing up the draft treaty was Rene Cassin, who was present as an invited expert (and who worked alongside others who had familiarity with the European human rights system as well). Cassin made several interventions comparing the proposals to the European system and suggesting parallels, although he also saw the opportunity as an occasion to correct, or avoid, some of the minor difficulties that had arisen in Europe and sometimes proposed different approaches as a result.³ He exemplified the methods and virtues of a genuine comparison of the systems, not only sharing the accumulated wisdom of his own

¹ See Jo M. Pasqualucci, *The Inter-American Human Rights System: Establishing Precedents and Procedure in Human Rights Law*, 26 U. MIAMI INTER-AM. L. REV. 297, 309.

² See Inter-Am. C.H.R., *Report on the Work Accomplished during its Fifteenth Session (Special): 9 to 20 January, 1967*, OEA/Ser.L/V/II.16, Doc.20 (July 26, 1967) (hereinafter *IACHR 15th Session Report*).

³ Conferencia Especializada Interamericana sobre Derechos Humanos, San José, Costa Rica, 7-22 de noviembre de 1969, Actas y Documentos, OEA/Ser.K/XVI/1.2, Secretaría General de la Organización de los Estados Americanos, Washington, D.C. 1973 repr. 1978, at 341, 433-34.

experience but also engaging in a self-reflective criticism based on his encounter with a different reality as well.

Thus, in certain respects through the benefit of comparison and contrast with the European experience, the Inter-American system was able to take some small steps beyond what was then the European framework. For instance, while the right of individual petition was still optional in the European system at the time, the Inter-American system incorporated individual access to the system as a necessary feature for the protection of human rights, overcoming the objections based on the ideas of state sovereignty that had held sway in Europe in 1950.⁴ Going even further, the American Convention broadened *locus standi* to bring a petition beyond the idea of victims, to any person or group.⁵ Similarly, the American Convention codified many of the practical achievements and developments of the Inter-American Commission, especially regarding working methods and tools, thus confirming its substantial difference from its European counterpart.⁶

Such structural and procedural interplay between the systems has continued to be a source of fruitful reflection and comparison, not only at the Convention level but also in the rules of procedure of the Inter-American Commission and Court. The major reforms in 2001, which sought to give greater participation rights to representatives of the victims before the Court, were clearly adopted with an eye toward European experience, and the current discussions about further reforms are also being carried out in the light of comparative experience and reflection.⁷

Turning toward the substantive law, instead, the influence of Europe on the norms and jurisprudence of the Inter-American human rights system are multiple. In the drafting of the American Convention, for example, the protection of the right to rights was

⁴ American Convention on Human Rights art. 44, Nov. 22, 1969, 1144 U.N.T.S. 123 (hereinafter American Convention); European Convention for the Protection of Human Rights and Fundamental Freedoms art. 25(1), Nov. 4, 1950, 213 U.N.T.S. 221 (hereinafter European Convention).

⁵ American Convention, art. 44; European Convention, art. 25(1).

⁶ American Convention, art. 41.

⁷ See, e.g., A.A. Cancado Trindade, *Current State and Perspectives of the Inter-American System of Human Rights Protection at the Dawn of the New Century*, 8 TUL. J. INT'L & COMP. L. 5, 40-46 (2000).

advocated by direct reference to Protocol 1 of the European Convention.⁸ Even more significant, however, has been the ongoing influence of the jurisprudence of the European Court in many areas of Inter-American human rights law. Let me mention two particularly lucid examples, among many others.

First, we can see it with regard to due process and the reasonable length of time for legal proceedings. For instance, in *Genie Lacayo*, the Inter-American Court established its first interpretation of the concept of reasonable length of proceedings included in Article 8 of the American Convention.⁹ The Court's analysis took its point of departure, entirely, in the method of analysis utilized by the European Court to interpret Article 6 of the European Convention. European analysis of this question, a particularly vexing one for the Americas, remains a vital point of reference for us.

Second, in the area of freedom of expression, European human rights decisions have greatly influenced the evolution of the Inter-American jurisprudence. In Advisory Opinion OC-5, the Inter-American Court took its concept and discussion of "public order" from early European jurisprudence.¹⁰ Later, the Inter-American Court similarly turned to its European counterpart in interpreting the requirement of "necessity" pertaining to restrictions on freedom of expression.¹¹ In "The Last Temptation of Christ" case, in relation to the "democratic standard", the Inter-American Court relied directly on European precedents.¹²

Other jurisprudential examples abound, and establish a consistent regard from the Americas for the ongoing work of the European Court, and esteem for its decisions. With

⁸ *IACHR 15th Session Report*, *supra* note 2, at 56 - 57.

⁹ See *Genie-Lacayo v. Nicaragua Case*, Inter-Am. Ct. H.R. (ser. C) No. 30, paras. 77, 81 (Jan. 29, 1997) (citing, *inter alia*, *Motta v. Italy*, Eur. Ct. H.R. 17, paras. 24, 30 (1991)).

¹⁰ See Advisory Opinion OC-5/85, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights)*, Inter-Am. Ct. H.R. (ser. A), para. 69 (Nov. 13, 1985) (citing *Austria vs. Italy*, App. No. 788/60, 4 Y.B. Eur. Conv. on H.R. 116, 138 (1961) (Eur. Comm'n on H.R.)).

¹¹ *Herrera Ulloa v. Costa Rica Case*, Inter-Am. Ct. H.R. (ser. C) No. 107, para. 122 (July 2, 2004) (citing *Sunday Times v. United Kingdom*, 2 Eur. H.R. Rep. 245, para. 59 (1979)).

¹² Case of "The Last Temptation of Christ" (*Olmedo-Bustos et al.*) v. Chile, Inter-Am. Ct. H.R. (ser. C) No. 73, para. 69 (Feb. 5, 2001) (citing, *inter alia*, *Sunday Times v. United Kingdom*, 2 Eur. H.R. Rep. at paras. 59, 65).

the limited time that remains, however, rather than catalogue other examples I prefer to turn toward the future. What are the likely contours of future interchange between our two systems? In the most recent phase of development of both the European and the Inter-American systems, I believe that we have entered into a period providing even greater opportunities for cross-fertilization, where the flow of legal and institutional experience might not only continue to flow to the west, but also where the Inter-American system might begin to find ways to repay its decades of indebtedness to Europe.

First, we are facing dauntingly similar structural and procedural challenges – especially when the Inter-American system is seen as a functional whole and one does not only focus on the Court. Case backlogs and delays, as we all know, threaten to undermine the credibility of the regional institutions. On each side of the Atlantic, we are pressing for and experimenting with ways to address these problems, and have much to learn from one another.¹³

Even more interesting avenues for mutual interchange arise out of the evolution of the substantive human rights issues that each of our systems has begun to face in its current stage of development.

As membership in the Council of Europe expanded dramatically, so has the range and gravity of some of the human rights violations that reach the European Court – large and comparatively frequent violations of the right to life, for example.¹⁴ And as is well

¹³ See, e.g., Committee on Juridical and Political Affairs of the Permanent Council of the Organization of American States, *Work Plan to Continue the Process of Reflection on the Inter-American System for the Promotion and Protection of Human Rights (2008-2009)*, OEA/Ser.G, CP/CAJP-2665/08 rev. 6 (Feb. 4, 2009); Steering Committee for Human Rights, *Guaranteeing the long-term effectiveness of the ECtHR, Final report containing proposals of the CDDH*, CDDH(2003)006 Addendum final (April 2003), available at http://www.coe.int/t/e/human_rights/cddh/3._committees/01.%20steering%20committee%20for%20human%20rights%20%28cddh%29/04.%20working%20documents/2003/2003_006add_en.asp#TopOfPage (last visited Feb. 16, 2008).

¹⁴ See, e.g., Ed Bates, *Supervising the Execution of Judgments Delivered by the European Court of Human Rights: The Challenges Facing the Committee of Ministers*, in EUROPEAN COURT OF HUMAN RIGHTS: REMEDIES AND EXECUTION OF JUDGMENTS 49, 84-86 (Theodora A. Christou & Juan Pablo Raymond eds., 2005) (discussing cases of gross human rights violations in Turkey and Russia) (internal citations omitted).

known, our institutions have a well-developed body of jurisprudence addressing such violations, examining such questions as standards of evidence and proof, the reach of state responsibility for nongovernmental or para-governmental actors, and the definitions of victims entitled to reparations, for instance.¹⁵ It is reasonable to think that our experience could be a quite helpful reference point for the European Court, and an important point of comparison in seeking common standards across the human rights systems. In parallel, the European system today is facing challenges to compliance that are notably more acute than at any other time in its history¹⁶; again, this phenomenon is lamentably familiar to the Inter-American system. In response, the Inter-American bodies, and especially the Court, have made great and important advances in the law of remedies, ones that should be of great interest not only to the European Court but also to those other organs of the Council of Europe that are involved in the supervision and enforcement of judgments.¹⁷ I note in particular that some of the most interesting Inter-American innovations regarding remedies seem to revive a somewhat old-fashioned view of law – at least as old as Plato – as being a tool for the education of a population.¹⁸ This expressive and pedagogical emphasis has much to offer to Europe as well, in particular dealing with states where the rule of law is chronically weak.

Turning to developments in the Americas, instead, we find that in contrast to much of the first half-century of the Inter-American Commission, we are now much less engaged with massive and systematic violations of the rights to life and physical integrity. To be sure, disappearances, torture and extrajudicial executions still occur, and massacres are not

¹⁵ For landmark decisions on standards of evidence and proof, see *Case of Velázquez-Rodríguez v. Honduras*, Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988). On the reach of state responsibility for nongovernmental or para-governmental actors, see *Case of the Pueblo Bello Massacre v. Colombia*, Inter-Am. Ct. H.R. (ser. C) No. 30 (Jan. 31, 2006); *Case of Ximenes-Lopes v. Brasil*, Inter-Am. Ct. H.R. (ser. C) No. 139 (Nov. 30, 2005). On the definitions of victims entitled to reparation, see *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Case, Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001); *Case of Blake v. Guatemala*, Inter-Am. Ct. H.R. (ser. C) No. 36 (Jan. 24, 1998).

e.g., *Ximenes Lopez, Maria da Penha Pueblo Bello*; definitions of victims=e.g., *Blake, Awas Tingni*)

¹⁶ See, e.g., Ed Bates, *supra* note 14, at 104.

¹⁷ Dina Shelton, *REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW* 285-89, 299-301, 314-16 (2005).

¹⁸ See generally PLATO, *THE LAWS* (Trevor J. Saunders trans., Penguin Books 1970); see also NIKLAS LUHMANN, *A SOCIOLOGICAL THEORY OF LAW* 172 (Elizabeth King & Martin Albrow trans., Taylor & Francis 1985) (1972). Such theories are proving to be of continued, or perhaps revived, influence in various expressive theories of law. See, e.g., Alex Geisinger & Michael Ashley Stein, *A Theory of Expressive International Law*, 60 *VAND. L. REV.* 77 (2007).

unknown – no one can pretend that we have left such violations all in the past.¹⁹ But much more than in the past we are now presented with more complex questions of constitutional dimensions in democratic societies. Many of the democracies are weak – as they are in many of the newer Member States of the Council of Europe as well – and widespread social exclusion is an endemic problem throughout the region.²⁰ In this context, we have a great deal to learn from the way that the European Court has engaged questions of the permissible limitations on rights in democratic societies. This environment also begins to raise questions for the Americas about the boundaries of legitimate pluralism in the realization of human rights. That is, no one could reasonably ask about whether torture, for instance, might be more or less tolerable in one State or another under the Convention; but if we ask, instead, about the right balance between, say, the Convention’s protection of freedom of expression²¹ and its protection of a person’s honor and reputation,²² the possibility for reasonable variations becomes real.²³ The Inter-American institutions have (deliberately) never imported the European notion of the margin of appreciation,²⁴ but nevertheless I believe that we will increasingly find

¹⁹ See, e.g., Case of Servellón-García *et al.* v. Honduras, Inter-Am. Ct. H.R. (ser. C) No. 152 (Sept. 21, 2006) (involving the 1995 arrest, torture, and extrajudicial killing of four at-risk youth by state agents); Case of the Mapiripán Massacre v. Colombia, Inter-Am. Ct. H.R. (ser. C) No. 134 (Sept. 15, 2005) (involving the 1997 massacre of at least 49 civilians by paramilitary forces); Martín Pelicó Coxic *et al.* v. Guatemala, Case 11.658, Inter-Am. C.H.R., Report No. 80/07 (2007), at <https://www.cidh.oas.org/annualrep/2007eng/Guatemala11658eng.htm> (involving the 1995 torture and extrajudicial execution of a human rights advocate by members of a Self-Defense Patrol); Franz Britton v. Guyana, Case 12.264, Inter-Am. C.H.R., Report No. 1/06 (2006), at <https://www.cidh.oas.org/annualrep/2006eng/GUYANA.12264eng.htm> (involving the 1999 forced disappearance of an individual by state agents).

²⁰ See, e.g., Inter-Am. C.H.R., *Observations of the Inter-American Commission on Human Rights upon Conclusion of its April 2007 Visit to Haiti*, OEA/Ser.L/V/II.131, Doc.36 (March 2, 2008); Inter-Am. C.H.R., *Access to Justice and Social inclusion: The Road Towards Strengthening Democracy in Bolivia*, OEA/Ser.L/V/II., Doc.34 (June 28, 2007).

²¹ American Convention, art. 13.

²² American Convention, art. 11;.

²³ See, e.g., Case of Kimel v. Argentina, Inter-Am. Ct. H.R. (ser. C) No. 177 (May 2, 2008) (addressing the balance of these rights).

²⁴ See Eyal Benvenisti, *Margin Of Appreciation, Consensus, And Universal Standards*, 31 N.Y.U. J. INT’L L. & POL. 843, 844 (1999) (noting that “[i]nternational human rights organs, other than the ECHR, have largely succeeded in avoiding a systematic recourse to the margin of appreciation doctrine”); cf. Fionnuala Ni Aolain, *The Emergence Of Diversity: Differences In Human Rights Jurisprudence*, 19 FORDHAM INT’L L.J. 101 (1995) (contrasting the European Court’s use of the margin of appreciation doctrine with the Inter-American Court’s close examination of governmental practices in relation to emergency situations). Indeed, the Inter-American Court has referenced the doctrine only in approving “the margin of appreciation which is reserved to States when it comes to the establishment of requirements for the acquisition of nationality and the determination whether they have been complied with.” Advisory Opinion OC-4184,

ourselves in need of some functional equivalents to it, in order to manage diversity with the same measured skill that has characterized the European Court of Human Rights in its best moments. The ultimate aim of both systems is to give genuine effect to the principle of subsidiarity – not subsidiarity in the reductive sense of pure devolution of authority, but rather in the fuller and more authentic sense of providing assistance (a *subsidium*) to local political communities and their institutions that enhances their capacity to achieve their ends on their own.²⁵

To give one example of where these several different factors of convergence come together from both directions, I would cite the growing case law in both systems regarding state obligations to criminalize human rights violations and punish their perpetrators by criminal sanction. Although an important innovation to try to rein in impunity in the Americas, the push to criminalize is also threatening now to become a form of neo-punitivism that fails to take into account the complex and divergent ways in which criminal law relates to political communities, the power of the state, and the realization of human rights.²⁶ Similarly, in Europe there has been an ever-growing tendency to require the criminalization of certain behavior affecting human rights, especially in response to the structural weaknesses in accountability found in the younger and more tenuously democratic states.²⁷ Both regional systems therefore have a great deal to learn in this area not only from one another but also from national legal systems and their long and varied experience with the relationship between criminal sanctions and human rights.

This question of recognizing and managing the boundaries of a legitimate diversity of approaches to human rights problems brings me to a more general observation regarding

Proposed Amendments to the Naturalizations Provisions of the Constitution of Costa Rica, Inter-Am. Ct. H.R. (ser. A) no. 4, para. 62 (Jan. 9, 1984).

²⁵ See Paolo G. Carozza, *Subsidiarity as a Structural Principle in International Human Rights Law*, 97 AM. J. INT'L L. 38 (2003).

²⁶ On the original impetus regarding accountability, see, e.g., YVES BEIGBEDER, *INTERNATIONAL JUSTICE AGAINST IMPUNITY: PROGRESS AND NEW CHALLENGES* (2005). On the new punitivism, see *THE NEW PUNITIVENESS: TRENDS, THEORIES, PERSPECTIVES* (John Pratt, David Brown, Mark Brown, Simon Hallsworth & Wayne Morrison eds., 2005).

²⁷ See, e.g., *Osman v. United Kingdom*, 1998-VIII Eur. Ct. H.R.; *M.C. v. Bulgaria*, 2003-XII Eur. Ct. H.R.; *Siliadin v. France*, Eur. Ct. H.R. (2005).

our designated theme of fragmentation in international human rights law. Several of the other participants in this seminar have expressed their views that the danger of fragmentation has been overstated and exaggerated in much recent discussion of international law. I agree, but propose to take the point even one step further: under certain circumstances, I am convinced that normative pluralism within human rights can be a good and necessary thing. The history of regional systems in general (vis-à-vis the universal human rights institutions and processes), and the history of the European Court within its own area, demonstrate that a degree of diversity and pluralism, within the limits of the requirements of human dignity, is not only compatible with the idea of human rights but even important to their realization.²⁸ As we contemplate the problem of fragmentation in international law, including human rights law, it may be important to remember that pluralism can in some circumstances also bring the benefits of dynamism, flexibility, healthy experimentation, and responsiveness of the law to society²⁹ – exactly as the comments made by Judge Tulkens in her introduction to our seminar this afternoon confirm. Harmonization does not need to be homogenization. Or to put it a different way, we can borrow the famous metaphor that United States Supreme Court Justice Louis Brandeis regarding the American federal system, referring to the fifty states as “laboratories of democracy.”³⁰ No less, may we hope for our regional systems and the democracies within them to be such laboratories for the realization of human rights.

This would of course require a substantial dialogue not only among international tribunals as we are having today, but a fertile and constant dialogue between the transnational and national courts as well. One model for understanding the network of relationships that we are building is to regard it as the development of a new sort of global *ius commune* of human rights – universal its scope and its basic principles, but interacting in a symbiotic way with the *ius proprium* of different local jurisdictions rather than supplanting them.³¹

²⁸ See, e.g., Carozza, *supra* note 25.

²⁹ See, e.g., *id.*

³⁰ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may . . . serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

³¹ See Paolo G. Carozza, “*My Friend Is a Stranger*”: *The Death Penalty and the Global Ius Commune of*

In conclusion, and in a very different vein, I would like to recall that all of the interactions and fruitful borrowings and cross-fertilizations that have taken place between the regional systems have not been the result merely of formal rules and practices, or bureaucratic mechanisms. Their vitality has come from *human* relations and encounters. Reviewing the history of the Inter-American Commission and Court and their relationship to Europe, one cannot help but be struck by Cassin, Buergenthal, and many others, whose personal presence, commitments, and openness generated rich interchange and consequent growth on both sides of the Atlantic. The links among persons have been the motor of links between institutions.

It is my great hope that our encounter today will be, in the same way, such an occasion for lasting and fruitful friendships.

Thank you, and congratulations to the Court for its fifty years.