PANEL III.
DESAFÍOS GLOBALES CONTEMPORÁNEOS PARA LOS SISTEMAS DE PROTECCIÓN DE DERECHOS HUMANOS

Authority and legitimacy of the regional courts: Impact, resistance, difficulties and challenges

*Manfred Nowak**

Introduction

On the occasion of the 40th Anniversary of the entry into force of the American Convention on Human Rights and the creation of the Inter-American Court of Human Rights, the Inter-American Court, with the support of the German Development Cooperation Agency GIZ, invited the Presidents and judges from the three regional human rights courts in the Americas, Africa and Europe and organized a remarkable high-level conference that took place in San José from 16 to 19 July 2018. Part of this conference was a dialogue between the three regional human rights courts and invited experts, which took place on 17 July at the seat of the Inter-American Court. The experts were requested to address certain questions in a comparative perspective.

The following contribution addresses the authority and legitimacy of the three regional courts by assessing their impact, but also existing resistances, difficulties and challenges. It will first provide a short overview of the legal basis and foundations of the three courts, followed by a comparative statistical analysis, the major challenges to the authority and legitimacy of the courts and the way these challenges have been addressed by the respective courts and the regional organizations concerned. In the final conclusions,

* Professor at the University of Vienna.

the specific challenges will be put into the context of the current global crisis of human rights, democracy and the rule of law. This article will close by assessing the remarkable achievements of the three regional human rights courts.

Legal basis and foundation of the three regional courts

The oldest of the three regional courts is the European Court of Human Rights (ECtHR). It was established in the framework of the Council of Europe (CoE) by the European Convention of Human Rights (ECHR) in 1950, which entered into force in 1953. At that time, access to the Court was severely restricted. Individual applications were optional, i.e. dependent on a special declaration by the respective States parties, and only inter-State complaints were compulsory. Both types of applications needed first to be submitted to the European Commission of Human Rights, which decided on the admissibility and, in fact, declared most individual applications inadmissible. If declared admissible, the Commission adopted an opinion which was submitted to the Committee of Ministers, the highest political body of the Council of Europe, consisting of the Ministers of Foreign Affairs of the member States of the CoE or their diplomatic representatives, in Strasbourg, the seat of the CoE and the Court. Only the States concerned, or the Commission, could refer an application to the Court, on the condition that the respective State party had made another optional declaration accepting its jurisdiction. If the case was not or could not be referred to the Court, the Committee of Ministers decided by a two-thirds majority whether or not the respective State party had violated the ECHR. Even if 60% of the CoE member States were in favour of a violation, the official decision was "non-violation"!

In other words, States could become a party to the ECHR without accepting the right to individual application and/or the jurisdiction of the Court. Turkey, for example, became a State party in the early 1950s without making either of the two optional declarations. The only possibility of subjecting the human rights situation in Turkey to supervision by the Strasbourg monitoring bodies was an inter-State complaint, which, in fact, was

lodged by Denmark, France, the Netherlands, Norway and Sweden in 1982 at the time of a military dictatorship involving gross and systematic human rights violations. It was only as a result of a friendly settlement before the Commission that Turkey finally accepted the right to individual applications and the jurisdiction of the Court.

The "European model", which illustrated the fear of States to lose sovereignty if their domestic human rights situation was subjected to scrutiny by independent monitoring bodies or even to a legally binding judgment of a regional human rights court, was later followed by other regions. In 1969, the American Convention on Human Rights (ACHR) was adopted by the Organization of American States (OAS), and entered into force in 1978.

It followed the "two track system" of the ECHR and entrusted the already existing Inter-American Commission on Human Rights with dealing with mandatory individual complaints and optional inter-State complaints. As with the European model, cases can only be referred to the Inter-American Court of Human Rights (IACtHR) by the respective States or by the Commission on condition that the State concerned has submitted a declaration accepting its jurisdiction under Article 62 of the ACHR. There is thus no direct access by individuals to the Inter-American Court.

The African Charter on Human and Peoples' Rights (AfChHPR or Banjul Charter), which was adopted in 1981 by the Organization of African Unity (OAU), the predecessor of the African Union (AU), and entered into force in 1986, was even weaker, as it did not establish an African Court. In addition to inter-State communications, the African Commission on Human and Peoples' Rights may deal, however, with a variety of "other communications" under Article 55, which may be lodged by individuals or NGOs.

The Protocol to the Banjul Charter was adopted in 1998 and entered into force in 2004. It established the African Court on Human and Peoples' Rights (AfCtHPR) and provides that cases can be submitted to the Court by the Commission, the respective States and African intergovernmental organizations. In addition, Articles 5(3) and 34(6) of the Protocol entitle States to make an

optional declaration to the effect that individuals and NGOs have direct access to the Court. In 2008, the AU adopted another Protocol which foresees the merger of the AfCtHPR and the African Court of Justice, but this Protocol has not yet entered into force.

With the entry into force of the 11th Additional Protocol (AP) to the ECHR in 1998, the "two track system" was abolished in Europe in favour of a permanent and full-time European Court of Human Rights. The former European Commission of Human Rights was abolished, as were all optional clauses and the role of the Committee of Ministers to decide on complaints. This meant that the new European Court decides on both the admissibility and merits of inter-State and individual complaints, and the Committee of Ministers supervises the execution of the Court's judgments. Usually, the Court hears cases in Chambers of seven judges, only highly important cases are dealt with in the Grand Chamber of 17 judges. Clear inadmissibility decisions can also be decided by a committee of three judges. With the entry into force of the 14th AP, the procedure was streamlined and the competence of single judges was introduced.[1] So far, this "new European model" has not yet been followed in any other region.

In practice, the (part-time) European Court of Human Rights was established in 1959 in Strasbourg, the full-time European Court in 1998, while the Inter-American Court was established in 1979 in San José and the African Court in 2006 in Arusha. Of the three regional organizations, the AU is the largest one and currently has 55 Member States, followed by the CoE with 47 and the OAS with 35 Member States. 54 of the 55 AU Member States (all but Morocco) have ratified the African Charter, but only 30 ratified the Protocol establishing the African Court, and only 8 States have accepted the direct access of individuals and NGOs to the Court (Burkina Faso, Malawi, Mali, Tanzania, Ghana, Côte d'Ivoire, Benin and Tunisia). Rwanda even withdrew its earlier acceptance of this possibility in 2016. Of the 35 member States of the OAS, only 23 are currently parties to the ACHR. The United States, Canada and a number of Caribbean States never ratified the ACHR, while Trinidad and Tobago and Venezuela later with-

[1] See below under 6.

drew. Of these 23 States parties, only 20 have accepted the binding jurisdiction of the Court under Article 62 of the ACHR. On the other hand, all 47 member States of the CoE, including Turkey and the Russian Federation, are parties to the ECHR, and the CoE even requests new member States to ratify the ECHR as an entry requirement. This means that roughly 800 million human beings living in the 47 member States of the CoE have a right to submit individual applications directly to the ECtHR.

While the Inter-American Court consists of only 7 and the African Court of 11 judges, each of the currently 47 member States of the CoE is "represented" by one judge in the full-time European Court. As a matter of principle, Article 26(4) of the ECHR requires the national judge elected in respect of a State against which an application has been lodged to sit *ex officio* in the respective Chamber which deals with this case, as well as in the Grand Chamber. On the contrary, Article 22 of the Protocol to the AfChHPR explicitly prevents judges from hearing a case against a State of which they are nationals. Article 55 of the ACHR is somewhat ambiguous on this controversial question, but in 2009 the Inter-American Court, in an Advisory Opi nion, interpreted this provision in the sense that national judges shall also be prevented from participating in the deliberation of cases against a State of which they are nationals.[2]

Jurisdiction of the three regional courts

The main task of regional human rights courts is their contentious jurisdiction, i.e. to decide in a final and legally binding manner on individual and inter-State applications, in the case of the African Court also on communications submitted by NGOs as a kind of *actio popularis*.

This is what distinguishes regional human rights courts from non-judicial or quasi-judicial bodies, such as all the treaty monitoring bodies of the United Nations or the Inter-American and

[2] See IACtHR, Advisory Opinion 20/09 of 29 September 2009. For an assessment of the different solutions to this question, see below under 7.

African Commissions on Human Rights. While Articles 32 of the ECHR and 62 of the ACHR restrict the contentious jurisdiction of these two Courts to all matters relating to the interpretation or application of the respective conventions (ECHR and ACHR), Article 3 of the Protocol to the Banjul Charter is broader and empowers the African Court to decide on "all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant human rights instrument ratified by the States concerned".

In addition, all three regional courts have advisory jurisdiction. According to Article 64 of the ACHR, all OAS Member States and certain OAS organs may consult the Inter-American Court regarding the interpretation of the ACHR "or of other treaties concerning the protection of human rights in the American States". In addition, the Court may provide OAS Member States with advisory opinions regarding the compatibility of any of their domestic laws with the ACHR and "other treaties".[3] Similarly, Article 4 of the Protocol to the Banjul Charter empowers the African Court to provide an advisory opinion relating to the Charter or any other relevant human rights instruments at the request of an AU member State, any AU organ or any African organization recognized by the AU. By comparison, Article 47 of the ECHR is much more restrictive: only the Committee of Ministers of the CoE may request the European Court to give advisory opinions on legal questions concerning the interpretation of the ECHR and its Additional Protocols, but not of "other treaties". However, Article 1 of the 16th AP to the ECHR, of 2013, which entered into force on 1 August 2018, empowers the highest courts and tribunals of States parties, in the context of a case pending before them, to request the European Court to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the ECHR and its Additional Protocols.

While the supervision of execution of judgments of the European and African Court is entrusted to the highest political

[3] On the meaning of "other treaties", see IACtHR, Advisory Opinion OC-1/82 of 24 September, 1982.

bodies, namely the Committee of Ministers of the CoE and the Assembly and Council of Ministers of the AU, the Inter-American Court must itself supervise the execution of its judgments by the OAS Member States.

Statistics on cases, judgments and violations found

The following comparative statistical table is based on the most recent figures provided by the three regional courts on their respective websites and, in addition, by representatives of the three courts to the author during the San José Conference in July 2018.

	Inter-American Court of Human Rights	African Court on Human and Peoples´Rights	European Court of Human Rights
Total number of applications	276 (1979 - July 2018)	178 (2006 - June 2018)	816,150 (1959 - June 2018)
Total number of cases decided	237 cases decided with 354 judgments (1979 - July 2018)	58 (2006 - June 2018)	780,151 (1959 - June 2018)
Total number of cases decided on the merits	233	19 (2006 - June 2018), of which 17 on the basis of direct access	21,662 judgments (1959 - June 2018)
Total number of judgments where at least 1 violation was found	229 (96,5% of all cases)	18 (2006 - June 2018) 95% of all judgments	17,304 judgments (1959 - 2017) 80% of all jugments
Total number of advisory opinions	25	12	3 (16th AP foresees the possibility of highest domestic courts to request advisory opinions)

These statistics show considerable discrepancies. During the roughly 60 years of its existence, more than 800,000 applications have been submitted to the European Court, which has decided over 780,000 of them and delivered more than 21,000 judgements. In more than 17,000 of these judgements (roughly 80%) the European Court found at least one violation of the ECHR. Some 40% of all judgments concerned three States parties, namely Turkey (3,386 judgments until the end of 2017), Italy (2,382

judgments) and the Russian Federation (2,253 judgments). In 2017, most judgments concerned the Russian Federation (305), followed by Turkey (116), the Ukraine (87) and Romania (69).

While the "old" European Court delivered a total of 837 judgments during the 40 years of its existence until 1998, the "new" European Court delivers more than 1,000 judgments annually, which in fact deal with thousands of individual applications. More than 50% of all judgments of the European Court found violations of Articles 6 (right to a fair trial) and 5 (right to personal liberty), followed by the right to property in Article 1 of the 1st AP (almost 12%), the prohibition of torture, inhuman or degrading treatment or punishment in Article 3 (more than 11%) and the right to an effective domestic remedy in Article 13 (almost 9%). In recent years, serious violations of the rights to life (Article 2) and personal integrity (Article 3) have increased significantly, above all in relation to the Russian Federation and Turkey.

In 2016, more than a quarter of all judgments concerned violations of these two important provisions! A large number of judgements against countries like Croatia, Greece, Hungary, Poland, Russia or Ukraine deal with deplorable prison conditions. More than half the currently pending cases have been brought against four States, namely Ukraine, Turkey, Hungary and the Russian Federation, followed by Romania and Italy. In recent years, a growing number of individual and inter-State applications have related to armed conflicts (e.g. between Russia and Georgia and between Russia and Ukraine), and to terrorism and human rights violations in the context of states of emergency in Europe. Finally, the economic crisis and the current crisis of the European migration and refugee policies has led to an influx of individual applications.[4]

In comparison to these impressive figures, the relevant statistics of the two other regional courts look very modest. In the

[4] See, for a more detailed analysis of these trends, Binder, Christina, "Challenges to Access to Justice before the European and the Inter-American Courts of Human Rights", in Ahrens, Helen, Fischer, Horst, Gomez, Veronica, Nowak, Manfred, Equal Access to Justice for All and Goal 16 of the Sustainable Development Goals: Challenges for Latin American and Europe, Münster, LIT Verlag, 2019.

roughly 40 years of its existence, the Inter-American Court has received a total of 276 applications and decided 237 cases with 354 judgments (on preliminary objections, on the merits, and in relation to reparations). Of the 233 cases decided on the merits, in 229 cases (96,5%) at least one violation of the ACHR was found. In recent years, the number of applications received per year amounted to between 9 in 2008 and 23 in 2011.

Until the end of 2017, the highest number of cases decided by the Inter-American Court concerned Peru (42), followed by Guatemala (24), Ecuador (21), Venezuela (20), Colombia (18), Argentina (17) and Honduras (13). Many of these judgments established gross and systematic violations of human rights during the Latin American military dictatorships, such as enforced disappearances, torture and arbitrary executions. Other important judgments have dealt with amnesty laws and with the rights of indigenous peoples.[5]

During the 12 years of its existence, a total of 178 applications were submitted to the African Court, which has so far decided 58 cases. Of these, 19 cases were decided on the merits, and of these only 2 were referred by the African Commission whereas 17 were directly submitted by the applicants; 3 cases were declared inadmissible, all other decisions were based on the lack of jurisdiction of the Court.[6] The clear majority of all cases have been submitted directly by death row prisoners against Tanzania.

Statistics on the number of advisory opinions provide the opposite picture. While the Inter-American Court has so far rendered 25 advisory opinions, many of which were of high importance for the interpretation of the ACHR, and the African Court has already published 12 advisory opinions within 12 years, the European Court has only rendered 3 advisory opinions in the 60 years of its practice! This situation will, however, change as the highest domestic courts in the European States will soon start to

5 *Ibidem*, 13 ff. See also IACourtHR/GIZ, "40 years protecting rights — Some facts and figures", San José, 2018.

6 See Viljoen, Frans, "Understanding and Overcoming Challenges in Accessing the African Court on Human and Peoples' Rights", in 67 ICLQ 2018, 63 (67 ff).

request advisory opinions from the Strasbourg Court in accordance with the 16th AP to the ECHR.

Challenges to the authority and legitimacy of the three courts

The above statistics show already that the major challenge to the European Court is the high number of applications which results in a considerable backlog of currently some 80,000 cases[7] and pressure on the Court to be more effective. There are various reasons for this impressive number of more than 800,000 applications and more than 20,000 judgments.

First, all roughly 800 million inhabitants of the 47 member States of the CoE, including the Russian Federation and Turkey, have the right to directly submit applications to the Court after having exhausted all relevant domestic remedies. Secondly, during the roughly 60 years of its existence, the European Court has built up a reputation of being a highly professional court which provides an effective remedy to individual victims of human rights violations with judgments that are usually complied with by the respective States parties. Often, the European Court is seen, therefore, as a "victim of its own success". Thirdly, the ECHR is directly applicable in most CoE member States, well known by victims and lawyers and rightly regarded as the "Magna Carta of Europe". At the same time, domestic remedies in many member States, above all the Russian Federation, Turkey, Ukraine, Moldova, Romania, Hungary and other Central and Eastern European States, are not functioning effectively and are, therefore, not providing an effective remedy to many victims of human rights violations. Finally, with the recent backlash to human rights, the actual human rights situation in Europe is deteriorating and even gross and systematic violations of human rights seem to be on the rise.

Although the human rights situation in the Americas and Africa is certainly not better than in Europe, the total number of applications submitted to the other two regional courts is still

[7] Binder, Christina, *op. cit.*, 5.

very low and certainly not representative of the actual situation. Again, there are various reasons for this low turn-out.

First of all, only little more than half of all OAS and AU member States have ratified the respective treaties and accepted the jurisdiction of the Inter-American and African Courts. Secondly, there is no direct access of victims to the Inter-American Court, and even after it amended its Rules of Procedure in 2001,[8] the Inter-American Commission is very reluctant to refer cases to the Court.[9] In Africa, the situation is not much better: the African Commission has submitted very few cases to the Court and only 8 of the 30 States parties to the Protocol to the Banjul Charter (Burkina Faso, Malawi, Mali, Tanzania, Ghana, Cote d'Ivoire, Benin and Tunisia) have accepted the right of direct access to the Court in accordance with Article 34(6) of the Protocol. Rwanda even withdrew its respective declaration in 2016.

While the number of applications shows significant discrepancies between the European Court on the one hand, and the other two courts on the other hand, there are other challenges which apply similarly to all three courts. One is the limited State compliance with judgments. The Inter-American Court is well-known for its detailed and far-reaching reparation orders, which, in principle, is one of the assets of the Court, as they have a strong impact even with only partial compliance. It is, therefore, fairly difficult to provide reliable statistics on State compliance. Nevertheless, full compliance is reported in only about 10% of all cases, and partial compliance in 83% of cases. With respect to specific remedies, the compliance rate is about 34%.[10] Looking at the African Court, the number of judgments is still so small that the compliance rate is not very conclusive. Of the 19 judgments delivered so far, full compliance is only reported with respect to two cases against Burkina Faso, while Tanzania com-

8 The amended Rules of Procedure of the Inter-American Commission state that, in principle, cases should be referred to the Court if the State concerned has accepted its jurisdiction and does not comply with the recommendations of the Commission.

9 Binder, Christina, *op cit*. (at 17), speaks in this respect of a "certain rivalry between Commission and Court".

10 See *ibidem*, 18 with further references.

plied partially in one case. As regards the other 16 judgments (84%), there is still no compliance. While the European Court has long been famous for its highly satisfactory compliance rate, this is unfortunately on the decrease. While States paid compensation to the victims in some 65% of all cases (2016 statistics), compliance with more specific orders by the Court have only been reported in 37% of all cases.[11] More than 10,000 cases are still awaiting supervision by the Committee of Ministers.

Another challenge, above all for the Inter-American Court, is its limited budget. While the European Court had a budget of US$71,670,500 (in 2018) and the African Court had US$10,386,101 (in 2016), the Inter-American Court had no more than US$4,412,793 (in 2017) as its disposal. Only 62,4% of this overall budget is provided by the OAS, the remaining part of more than one third is made available by voluntary contributions from States and international donors.

This extremely limited funding shows a significant lack of respect by American States for the work of the Inter-American Court.[12] This situation is exacerbated by a growing political opposition of certain States to the practice of the Court, which is regarded as unduly restricting State sovereignty. For example, Trinidad and Tobago and Venezuela, in reaction to certain judgments of the Court, even withdrew from the ACHR. Peru and Dominican Republic have also contested the jurisdiction of the Court. However, the situation is not much better in the two other regions. Tanzania, for instance, openly refused to implement orders for provisional measures, namely not to execute prisoners on death row while their cases are pending before the African Court, and Rwanda recently withdrew its declaration, which had provided victims direct access to the Court.[13]

Even in Europe, certain governments are openly refusing to implement judgments of the European Court they disagree with. For example, the United Kingdom and Russia strongly criticised

11 *Ibidem*, 7 with further references.

12 *Ibidem*, 17 ff.

13 For a detailed discussion of the cases before the African Court and the compliance of African States with the Court's judgments see Viljoen, Frans, *op. cit.*, 65 ff.

judgments which had found violations of the right to vote (Article 3 of the 1st AP to the ECHR) of convicted prisoners. The British Government even threatened to withdraw from the ECHR, while the Russian Federation has recently decided to stop paying its financial contributions to the CoE,[14] which also has serious consequences for the Court. However, political opposition to the "dynamic interpretation" of the ECHR by the Court has also been voiced by some of the "old" member States of the CoE. During their respective years of chairing the CoE, the United Kingdom and Denmark have shown a strong opposition to the Court and pushed for significant restrictions of its freedom and competences.[15] One result of these initiatives was the adoption of the 15th AP to the ECHR in 2013 which explicitly added the "margin of appreciation" doctrine, which had been developed by the jurisprudence of the Court over decades, as a "right" of States parties.

Finally, the three regional courts are also confronted with a certain competition with sub-regional courts. In Africa, certain sub-regional courts, such as the ECOWAS Court, the SADC Tribunal and the EA Court of Justice, have been entrusted with a specific human rights mandate, which might prompt certain AU member States not to ratify the Protocol to the Banjul Charter or at least not to accept direct access of victims to the African Court. Together, these three sub-regional courts have dealt in recent years with 56 human rights cases resulting in 25 judgments finding human rights violations.[16]

Although there are also a number of sub-regional courts in the American hemisphere, such as the Mercosur Court, the Andean Community Court, the Central American Court or the Caribbean Court, they do not seem to have a specific human rights jurisdiction. Although the Court of Justice of the European Union has the power to apply the ECHR and the EU Charter of Fun-

14 See Engel, Norbert Paul, "Russland testet das Rückgrat des Europarates / Einstellung der Beitragszahlungen zum Haushalt des Europarates als politisches Druckmittel", Europaeische Grundrechte Zeitschrift (EuGRZ), 2017, 720-722.

15 See Binder, Christina, *op. cit.*, 8 ff.

16 See the detailed analysis by Abebe, Daniel, "Does International Human Rights Law in African Courts Make a Difference?", 56 Virginia Journal of International Law, 2017, 527-555.

damental Rights which, to a large extent, is modelled after the ECHR, there does not seem to be much competition between the Strasbourg and Luxembourg Courts.[17] However, in its recent Advisory Opinion on the access of the EU to the ECHR, the EU Court has blocked the EU's accession, which was seen partly as an attempt to avoid a situation where the Strasbourg Court might be in a position to overrule a respective judgment of the Luxembourg Court.[18]

Reactions to these challenges

In Europe, much has been done to address the problem of the huge caseload and backlog of cases before the Strasbourg Court. Most importantly, the 14th AP to the ECHR was adopted in 2004 but, due to Russian obstruction, only entered into force in 2010. It introduced the possibility of single judges to declare inadmissible or strike out individual applications in accordance with Article 27 of the ECHR "where such a decision can be taken without further examination". Today, the clear majority of all applications

[17] See, e.g., Lehtinen, Emma, "The European Court of Justice and European Court of Human Rights: A complex interaction and coexistence between the two courts", Blog post Workshop on the ECtHR Tampere 2015 of 7 March 2016, *https://blogs.uta.fi/ecthrworkshop/2016/03/07/lehtinen/* (last visited 27 August 2018); Fabbrini, Federico and Larik, Joris, "The Past, Present and Future of the Relation between the European Court of Justice and the European Court of Human Rights", Yearbook of European Law, Volume 35, Issue 1, 1 December 2016, 145-179; De Vries, Sybe A., "EU and ECHR: Conflict or Harmony?", Utrecht Law Review, Volume 9, Issue 1 (January) 2013, 78-79; Spielmann, Dean, "The Judicial Dialogue between the European Court of Justice and the European Court of Human Rights Or how to remain good neighbours after the Opinion 2/13", FRAME Lecture, Brussels, 27 March 2017, *http://www.fp7-frame.eu/wp-content/uploads/2017/03 /ECHRCJUEdialog.BRUSSELS.final_.pdf* (last visited 27 August 2018).

[18] Court of Justice of the European Union, Advisory opinion 2/13 of December 18, 2014; Steiner, Elisabeth and Ratescu, Ioana, "The Long Way to Strasbourg — The Impact of the CJEU's Opinion on the EU's Accession to the ECHR", 15 European Yearbook on Human Rights, 51-60; Berger, Maria and Rauchegger, Clara, "Opinion 2/13: Multiple Obstacles to the Accession of the EU to the ECHR", 15 European Yearbook on Human Rights, 61-76.

is dealt with by single judges in this streamlined procedure. According to Article 26(3) of the ECHR, national judges are excluded from dealing with applications against their own State as single judges. Secondly, the Committees of three judges, which were originally only competent to declare cases inadmissible, also gained competence under Article 28(1)(b) of the ECHR to render, by a unanimous vote, a judgment on the merits if the underlying question in the case was already the "subject of well-established case-law by the Court". Thirdly, a new inadmissibility ground was added in Article 35(3)(b) of the ECHR to the effect that applications can be declared inadmissible if the applicant has not suffered a "significant disadvantage". Finally, the procedure for the supervision of the execution of judgments has been improved by strengthening the interaction between the Committee of Ministers and the Court. According to Article 46 of the ECHR, the Committee of Ministers, by a two thirds majority, may refer problems of interpretation of a judgment back to the Court for a ruling on this question of interpretation, and may bring infringement proceedings before the Court against States which do not abide by the Court's judgments. Such infringement proceedings have, e.g., been lodged against Azerbaijan.[19]

In addition to the 14th AP, the Strasbourg Court itself has initiated in 2004 a highly successful pilot judgment procedure in case of structural problems in a particular country. The Court indicates to the respective States what measures it should take to address such structural problems, and at the same time it puts all similar cases on hold. Pilot judgments are prioritized by the Committee of Ministers together with other leading cases in the supervision of the execution of judgments, and this enhanced supervision procedure seems to lead to a better compliance rate.[20] The pilot judgment procedure and the increased attention paid to the domestic execution of judgments aims at addressing the root causes of the high number of applications, i.e. the non-functioning of the domestic systems for the protection of human rights. This is also illustrated by the growing number of cases in which the European Court found a violation of the

[19] See Binder, Christina, *op. cit*., 23.

[20] *Ibidem,* 21.

right to an effective domestic remedy in Article 13 ECHR. The Court, therefore, engages in increased dialogues with domestic courts.[21] This positive trend will certainly be strengthened by the possibility of the highest domestic courts to request advisory opinions from the Strasbourg Court in accordance with the 16th AP to the ECHR, which entered into force on 1 August 2018.

This increased interaction between regional and domestic courts can also be observed in the two other regions. Most importantly, the Inter-American Court has developed since 2001 two procedures which require domestic courts to directly apply the ACHR and its own binding jurisprudence.[22] In a number of leading cases against Peru and Chile it declared that domestic amnesty laws violated the ACHR and were, therefore, null and void. By giving direct effect to these judgments, the Court forced the domestic courts no longer to apply such amnesty laws. This jurisprudence was accepted by the domestic courts and triggered a new wave of criminal prosecutions against some of the main perpetrators of gross and systematic human rights violations during the period of the military dictatorships. In addition, the San José Court asked domestic courts to exercise a "conventionality control" in situations where the domestic legislator failed to amend deficient national laws violating the ACHR.

Both forms of norm control entrust the domestic courts and judges to give direct effect to the ACHR and to exercise a kind of constitutional control over domestic laws. In addition, by requesting States to report about compliance and by conducting private hearings with domestic courts and other national stakeholders, the Inter-American Court has increased its interaction with domestic courts and strengthened its role in the supervision of the execution of its judgments and far-reaching reparation orders in accordance with Article 63 ACHR.[23] The African Court has started a similar dialogue with domestic and sub-regional courts every two years aimed at delegating the implementation of its judgments at the domestic and regional levels.

21 *Ibidem,* 23.

22 *Ibidem,* 29 ff.

23 *Ibidem,* 28.

The other structural problems and challenges outlined above, such as the low number of cases before the Inter-American and African Courts, the severe budgetary constraints and the growing opposition by States against supervision by regional human rights courts are much more difficult to address as they are symptoms of a more general backlash against democracy, the rule of law and human rights in all world regions.

Conclusions

The current crisis of multilateralism and the growing opposition of authoritarian and populist governments in all world regions to the fundamental and interrelated values of pluralist democracy, the rule of law and human rights have a profound impact on the authority, legitimacy, acceptance, funding and well- functioning of regional human rights courts in the Americas, Africa and Europe. In order to deal effectively with these alarming problems, difficulties and challenges, world leaders would have to address the root causes of the current global and financial crises, climate change, armed conflicts, failed and fragile States, rising economic inequality, poverty, global migration and refugee flows, organized crime, terrorism, radicalisation, extremism, populism and new authoritarianism.

In my opinion, there is no doubt that globalisation driven by neoliberal economic policies and its effects on an extremely unjust economic and social world order is one of the major root causes for all these interrelated crises symptoms.[24] However, political leaders seem to be more concerned to provide a vigorous response to the symptoms of these crises, such as terrorism and global migration and refugee flows, rather than addressing the root causes. This leads to a dangerous vicious cycle that strengthens nationalistic tendencies and bilateral power politics, although

[24] Cfr., e.g. Nowak, Manfred, Menschenrechte - Eine Antwort auf die wachsende ökonomische Ungleichheit (Human Rights — An Answer to the Growing Economic Inequality), Hamburg/Wien 2015; Nowak, Manfred, Human Rights or Global Capitalism — The Limits of Privatization, Philadelphia, 2017.

it should be evident that these global crises can only be solved by strengthening, rather than weakening, international organizations and multilateralism in general. As long as these short-sighted and dangerous policies are not reversed and joint efforts are not undertaken at the international level to address the root causes of such multiple crises, human rights, democracy and the rule of law will remain under attack.

Needless to say, under these conditions, it is extremely difficult to improve the functioning of regional human rights protection systems and regional human rights courts. If nationalist leaders in the United Kingdom have forced the Brexit from the European Union on the British people and threaten to withdraw from the ECHR, it is difficult to enhance the acceptance of judgments of the European Court by the people and nationalist media in this country, which was once the cradle of democracy and human rights in the world. The same holds true if nationalist leaders in the Russian Federation, Turkey, Hungary or Poland openly attack the Strasbourg Court and Russia suspends its financial contributions to the CoE. In the face of "America First" policies in another country that was once seen as a pioneer of democracy and human rights in the world, it will be difficult to advocate for a quick ratification of the ACHR and recognition of the jurisdiction of the Inter-American Court. After nationalistic leaders in Venezuela decided to withdraw from the ACHR, little can be done to strengthen the impact of the San José Court on the deplorable human rights situation in that country. The same applies for Rwanda after nationalistic policies led to the withdrawal of the right of victims of human rights violations to directly access the African Court.

Despite this general backlash, we can also observe certain positive developments and actions that were undertaken to address some of the other challenges to the well-functioning of regional human rights courts. In Europe, the biggest challenge remains the huge caseload and backlog of cases. However, as was described in the last chapter, much has been achieved by streamlining the procedure in accordance with the reforms introduced by the 14th AP to the ECHR in 2010, by introducing the pilot judgments procedure and by enhancing the dialogue with

national courts in order to strengthen the domestic execution of the judgments of the European Court. Similar positive trends have been developed by the jurisprudence of the Inter-American Court regarding "conventionality control" and declaring domestic amnesty laws null and void. On the same lines of delegating the implementation of its judgments, the African Court has started regular dialogues with sub-regional and domestic courts.

Less has been achieved by addressing the comparatively low number of cases that have reached the Inter-American and African Court so far. One would need to launch a campaign in both regions to convince governments to ratify the respective human rights treaties, to accept the jurisdiction of the regional courts as well as direct access by individuals. The policy of the CoE to require ratification of the ECHR as a condition for entry into the organization might be seen as a model to be followed in other regions. In this respect, the Inter-American system is the most restrictive, as individuals still lack any direct access to the Court.

Experience shows that the "two track system" with a Commission as a first instance and the power to decide whether cases are referred to the Court simply does not work and leads to a certain rivalry between the two bodies. The solution would either be to abolish the "two track system", as was the case in Europe with the entry into force of the 11th AP to the ECHR in 1998, or to permit direct access to the Court in addition to referrals by the Commission, as provided for in the Protocol to the Banjul Charter. Of course, more States will have to make this optional declaration under Article 34(6) of the Protocol in order to significantly increase the number of cases.

One controversial, though not necessarily the most important, question that I was explicitly asked to address, is whether judges, who are nationals of a State against which a case is brought, should be involved in the respective decisions by regional courts. Although judges are, by definition, independent from the governments that have nominated them, such involvement may lead to a conflict of interest which might put the impartiality of the respective national judge in question. This is the reason why all relevant UN human rights treaties and Article 22 of the Protocol to the Banjul Charter explicitly exclude national judges from

hearing a case against their "own" government. Article 55 of the ACHR is more ambiguous in this respect but the Inter-American Court, in an Advisory Opinion of 2009, ruled that national judges shall be excluded.

The ECHR and the European Court, which consists of a number of judges equal to the number of States parties to the ECHR, follow a different philosophy. According to Article 26(4), in cases before a Chamber or the Grand Chamber, the judge elected in respect of a State against which a case has been lodged, shall sit as an *ex officio* member. This provision goes back to the early days of the European Court and has always been defended by the argument that the national judge is needed as only he or she knows the domestic legal situation well enough to explain it to the other judges.

With the introduction of committees of three judges by the 11th AP and, even more, by single judges in accordance with the 14th AP, this philosophy is difficult to maintain. Article 28(3) provides for a "compromise solution" to the effect that if the national judge is not a member of the committee (in other words, the national judge is no longer required to participate), the committee may at any stage of the proceedings invite that judge to replace another committee member. However, for single judges, Article 26(3) opted for the opposite philosophy, namely, to exclude the national judge. Even for the member States of the CoE it obviously would have been odd to entrust all decisions of single judges to nationals of States against which these applications were directed! In my opinion, the argument that national judges are needed for their specific knowledge of the domestic legal situation is not very strong, as there are enough highly skilled members of the staff in the Registry of the European Court who are very familiar with the legal system in their countries of origin. On the other hand, even in Europe, where the judges are highly independent as they are elected for a period of nine years without the possibility of re-election according to Article 23(1) as amended by the 14th AP, and where every State is "represented" by a national judge, participation in cases against one's "own" government may raise a conflict of interest, feelings of loyalty or a certain bias (in favour or against

one's "own" government) which should be avoided in order to guarantee the impartiality of decisions. However, as I said at the outset, this is not one of the most important questions as, in practice, this European philosophy of involving national judges seems not to have led to major problems with respect to the impartiality of judges.

Despite the fact that, in times of a global crisis of human rights, democracy and the rule of law, the three regional courts of human rights are, of course, affected by such crisis in their acceptance, legitimacy, authority and well-functioning, as the many problems and challenges I have outlined above illustrate, I wish to conclude this short comparative analysis with a positive note. All three courts have made a remarkable contribution to the development, awareness, implementation and enjoyment of human rights in their respective regions.

The European Court, as the oldest one, has dealt with almost a million cases during its 60 years of existence, has provided justice to many thousands of victims of human rights violations, has contributed by its dynamic interpretation and application of the ECHR to many constitutional, legal and policy changes in Europe, has raised the awareness of Europeans about the importance of human rights tremendously, and can rightly be considered a "victim of its own success" by attracting tens of thousands of individual applications from its 47 States parties each year. It has also shown a remarkable flexibility by successfully addressing its enormous caseload and backlog in difficult times, when under attack from different quarters and for different reasons. The Inter-American Court, which was established at a time when many Latin American countries were ruled by ruthless military dictatorships, gained a remarkable reputation by fearlessly ruling on gross and systematic human rights violations, such as enforced disappearances, torture, arbitrary detention and extrajudicial executions and by ordering far-reaching and innovative measures of reparation to the governments concerned. Although the total number of its judgments during its 40 years' practice is very limited, many decisions, such as on the rights of indigenous peoples, have a strong impact which goes far beyond the individual cases in question. Its recent tendency to force domestic courts to directly

apply the ACHR and to ignore or invalidate domestic laws, which were found to violate the ACHR, is a remarkable achievement. Although the African Court is still in its early stage of developing its jurisprudence and its proper place in the legal landscape of Africa, having to compete with a number of sub-regional courts, it has already built a solid reputation and authority as the most important human rights court in a continent where massive human rights violations take place on a daily basis. This positive experience with the three regional human rights courts certainly justifies repeating the long-standing call upon the United Nations to establish a World Court of Human Rights.[25]

The *Declaration of San José*, which was adopted by the three regional courts on the occasion of the celebration of the 40th Anniversary of the creation of the Inter-American Court of Human Rights in July 2018, is a welcome initiative to enhance the dialogue and cooperation between the three regional courts and to join forces in standing up to defend human rights in difficult times.

[25] See, e.g., Nowak, Manfred, "It´s Time for a World Court of Human Rights", in Bassiouni, M. Cherif and Schabas, William (eds.), New Challenges to the UN Human Rights Machinery. What Future for the UN Treaty Body System and the Human Rights Council Procedures? Mortsel (Belgium) 2012, 17-34; Kozma, Julia, Nowak, Manfred, Scheinin, Martin, A World Court of Human Rights — Consolidated Statute and Commentary, BIM Studienreihe Bd.2, Wien/Graz, 2011.