

# INITIATORS FOR EFFECTIVE PROTECTION OF BASIC RIGHTS: THE INTER-AMERICAN COURT OF HUMAN RIGHTS

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## BASIC DATA

The Inter-American Court of Human Rights (hereafter: the Court) was established in 1979 on the basis of the American Convention on Human Rights (ACHR).<sup>1</sup> As an independent body of the Organization of American States (OAS), the Court based in Washington D.C., together with the Inter-American Commission for Human Rights (hereafter: the Commission), is appointed to enforce the international law obligations of the American states which arise out of the ACHR and other regional human rights contracts.<sup>2</sup>

Of the 34 member states in the OAS, currently 24 states have ratified the ACHR.<sup>3</sup> The states are not subject to the contentious jurisdiction of the Court merely by joining the ACHR, but only by virtue of a special recognition.<sup>4</sup> So far, 21 states have done this. Dominica, Grenada and Jamaica have ratified the ACHR, but not yet submitted themselves to the contentious jurisdiction. USA and Canada, but also many Caribbean states, have not ratified the ACHR at all, so that the Inter-American Human Rights System is also



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- 1 | The ACHR was signed on the 22.11.1969 in San José, Costa Rica, and came into effect on the 18.7.1978. Cf. Corte Interamericana de Derechos Humanos (ed.), Informe Anual 2009 (San José: 2009): 1.
- 2 | Cf. Art. 33 ACHR.
- 3 | These states are: Argentina, Barbados, Bolivia, Brazil, Chile, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Columbia, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay und Venezuela.
- 4 | Cf. Art. 62 ACHR.

called the Latin American System, or in the words of Antônio Augusto Cançado Trindade als “un sistema interamericano, ma non troppo...”<sup>5</sup>.

The court acts in two forms: It judges violations of the convention by a contract state and it issues reports.<sup>6</sup> This latter responsibility is extraordinarily broad in international comparison: all the bodies named in Chapter X of the OAS charter can request reports from the Court, which contributes to an alignment of the law in the area of human rights and basic freedoms in the OAS states beyond the ACHR’s area of application.<sup>7</sup> In its reports, the court can also make statements beyond the ACHR on other regulations for the protection of human rights.<sup>8</sup> With five out of twenty requests, so far Costa Rica has most often made use of the Court’s responsibility in this. Even though the reports carry a significance not to be ignored in the further development of human rights protection in Latin America, hereafter we want to draw attention to the binding dispensation of justice.

Only the Commission or the member states which have subjected themselves to its jurisdiction can bring about a disputed decision of the Court.<sup>9</sup> Unlike the European Court of Human Rights (ECHR), the ACHR has no individual complaint option: neither individuals nor organizations can call directly on the court.<sup>10</sup> Rather, complaints must first be submitted to the commission attached to it as a preliminary – as it used to be in the European Commission. The Commission then examines the content and decides at its own discretion whether to present the case to the Court.

5 | Cançado Trindade and Antônio Augusto, “Reflexiones sobre el futuro del sistema interamericano de protección de los derechos humanos”, in Juan E. Méndez and Francisco Cox (eds.), *El futuro del sistema interamericana de protección de los derechos humanos* (San José, 1998): 575.

6 | Cf. Art. 62 and 64 ACHR.

7 | Cf. Juliane Kokott, *Der Interamerikanische Gerichtshof für Menschenrechte und seine bisherige Praxis (The Inter-American Court of Human Rights and its Practice to Date)* (Heidelberg, 1984): 806 ff.

8 | Cf. Monroe Leigh, “Inter-American Court of Human Rights”, in *The American Journal of International Law*, (1983): 637.

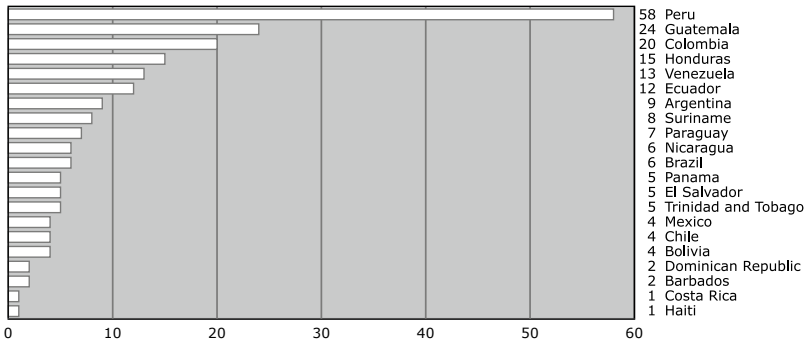
9 | Cf. Corte Interamericana de Derechos Humanos (ed.), *Denuncias y Consultas ante el Sistema Interamericano*, [www.corteidh.or.cr/denuncias\\_consultas.cfm](http://www.corteidh.or.cr/denuncias_consultas.cfm) (accessed May 18, 2010); Art. 61 ACHR.

10 | Cf. Kokott (1984): 812.

Hundreds of such complaints are received each year by the Commission.<sup>11</sup> In its history, the Court has so far decided 120 disputed cases, of which more than 65% (80 cases) have been since 2004.<sup>12</sup>

Fig. 1:

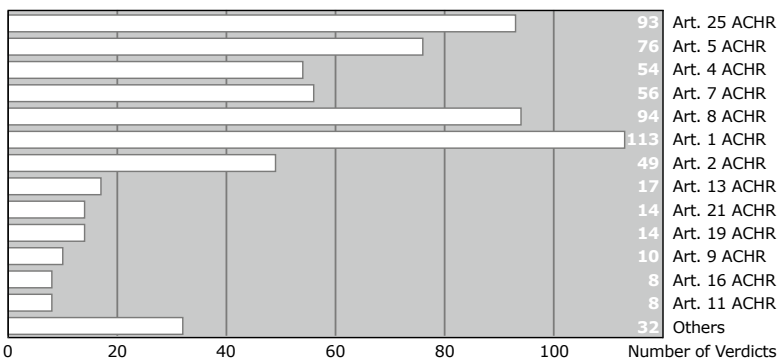
### Number of decisions according to state



In the past 30 years the Court has primarily occupied itself with violations of basic justice rights. But serious human rights violations were also decided, including those against the Inter-American Convention to Prevent and Punish Torture. In nearly all the cases (113) a violation of the general protection obligation according to Art. 1 I of the ACHR was determined.<sup>13</sup>

Fig. 2:

### Thematic weighting of verdicts



11 | Cf. Jo M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (Cambridge, 2003): 6.

12 | Cf. Corte Interamericana de Derechos Humanos (2009): 7.

13 | Cf. *ibid.*

- Art. 25 ACHR – Right to effective judicial protection
- Art. 5 ACHR – Prohibition of inhuman and debasing treatment
- Art. 4 ACHR – Respect for life
- Art. 7 ACHR – Right to personal freedom and safety
- Art. 8 ACHR – Right to a fair trial, basics of expedited proceedings and fair proceedings, and assumption of innocence
- Art. 1 ACHR – General Duty to Protect
- Art. 2 ACHR – Duty of regulation within the state
- Art. 13 ACHR – Freedom of thought and opinion
- Art. 21 ACHR – Right to ownership of property
- Art. 19 ACHR – Children's rights
- Art. 9 ACHR – Principle of due process of law and prohibition of ex post facto law
- Art. 16 ACHR – Freedom of association
- Art. 11 ACHR – Patronage

The decisions of the Court are final and cannot be appealed.<sup>14</sup> As the only body dispensing justice in the Inter-American Human Rights System, the Court has the last word in the ACHR member states in determining human rights violations.<sup>15</sup>

**The verdicts and interim orders are binding for the involved member state; however, the Court has no enforcement mechanisms which would be comparable to those of its European sister institution.**

In extremely serious and urgent cases, and to prevent irreparable damage, the Court can issue interim orders.<sup>16</sup> Due to the large number of such requests, it is often hard to monitor compliance; however, the interim legal protection has often proved effective to protect persons from immediate danger.<sup>17</sup>

The verdicts and interim orders are binding for the involved member state;<sup>18</sup> however, the Court has no enforcement mechanisms which would be comparable to those of its European sister institution. The Court does give an annual report to the general assembly of the OAS on the extent to which its verdicts were implemented.<sup>19</sup> However, unlike the ministerial committee of the European Commission, the general assembly has so far not put any pressure on the member states to force implementation.

Currently, the Court is in session only four times a year. Here too it differs fundamentally from the ECHR, which

14 | Cf. Art. 67 ACHR. There is only the option to submit an application for interpretation of the verdict within 90 days of the verdict's announcement.

15 | Cf. Pasqualucci (2003): 1.

16 | Cf. Art. 63 II ACHR.

17 | Cf. Pasqualucci (2003): 12.

18 | Cf. Art. 68 I ACHR.

19 | Cf. Art. 65 ACHR.

has been in session as a perpetual court since 1998.<sup>20</sup> The growing number of cases calls increasingly for a permanent Court. However, the extremely limited budget does not allow for this for the time being.<sup>21</sup> In 2009 the Court was only assigned 1.97% (US\$ 1,780,500) of the annual OAS budget, and the Commission was assigned 4.15% (US\$ 3,746,100). Also in 2010 the budget was only minimally increased to US\$ 1,919,500 for the Court and US\$ 4,488,600 for the Commission.<sup>22</sup>

Seven voluntary judges belong to the Court, who must each be citizens of an OAS member state, however they can only be nominated by member states of the ACHR.<sup>23</sup> If a member state without a "representative" among the regular judges is being accused before the Court, then the state concerned can name an ad hoc judge.<sup>24</sup> Due to the quorum of five judges, the small committee of judges does not meet in chambers.<sup>25</sup> The judges are elected for a six year period of office and can only be re-elected once.<sup>26</sup> The current president is Peruvian Diego García-Sayán.

### **THE SIGNIFICANCE OF THE ACHR IN INTERNAL STATE LAW**

The ACHR was created after the UN and European example, but adjusted with respect to social and political realities in Latin America.<sup>27</sup> At the time, the Court found itself even more than today in a context of unstable political systems, partly of authoritarian nature and all the way to military dictatorships, and serious internal conflicts and economic crises; grave violations of human rights were the order of the day.<sup>28</sup> Many states understood this submission to an

20 | Cf. Rosario Figari Layus, „Überblick über das interamerikanische Menschenrechtssystem: Dokumente und Kontrollmechanismen“, in: *MRM – Menschenrechtsmagazin* (1/2008): 60.

21 | Cf. Pasqualucci (2003): 10.

22 | Cf. Corte Interamericana de Derechos Humanos (2009): 20.

23 | Cf. Art. 53 ACHR.

24 | Cf. Art. 55 ACHR.

25 | Cf. Art. 56 ACHR.

26 | Cf. Art. 54 Paragraph 1 ACHR.

27 | Cf. Pasqualucci (2003): 4.

28 | Cf. Matthias Herdegen, *Derecho Internacional Público (Mexiko-Stadt, 2005)*: 369; Thomas Buergenthal, *Remembering the Early Years of the Inter-American Court of Human Rights* (New York, 2005): 4.

international jurisdiction as an attack on their sovereignty.<sup>29</sup> In spite of these unfavorable circumstances, it succeeded in creating a system which was often seen by the victims and also the officers of emergent democracies as the only hope when national bodies did not give protection or justice.<sup>30</sup>

In the 30 years since the establishment of the Court, international law has increased in significance in the national legislations of the states of Latin America. The "nationalization" of universal human rights, driven onward by the Court, is one of the most important factors for effectively protecting human rights in Latin America.<sup>31</sup>

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In the course of very recent constitutional reforms in Latin America, the rank of international human rights agreements rose in the internal state hierarchies of norms.<sup>32</sup> In

Columbia, Guatemala, Costa Rica and Argentina, these agreements stand above internal state law.<sup>33</sup> In Venezuela they have expressly been given the rank of a constitution, and according to the pro homine principle, they even stand above the constitution and can be applied directly.<sup>34</sup> In Mexico they are ranked below the constitution, but above the ordinary law.<sup>35</sup> Peru defines the agreements as part of

29 | Cf. Santiago C. Corcuera und José A. Guevara. *México ante el Sistema Interamericano de Protección de los Derechos Humanos* (Mexico City, 2003): 17.

30 | Cf. Sergio García Ramírez, *Los derechos humanos y la jurisdicción interamericana* (Mexico City, 2002): 59.

31 | Cf. Elodia Almirón Prujel, „Derechos Fundamentales y su Incidencia en el Plexo Constitucional de los Estados“, in Gisela Elstner (ed.), *Anuario de Derecho Constitucional Latinoamericano* (Montevideo, 2009): 525.

32 | Cf. *ibid.*

33 | Cf. Art. 93 Constitución Política de Colombia (in Columbia, according to dispensation of justice by the Colombian constitutional court they are even part of the *bloque de constitucionalidad*, which is the entirety of norms having the rank of a constitution); Art. 46 Constitución Política de la República de Guatemala; Art. 7 Constitución Política de Costa Rica; Art. 75.22 Constitución de la Nación Argentina.

34 | Cf. Art. 23 Constitución de la República Bolivariana de Venezuela.

35 | Cf. Mara Gómez Pérez, "La protección de los derechos humanos y la soberanía nacional", in: Gisela Elstner (ed.), *Anuario de Derecho Constitucional Latinoamérica* (Montevideo, 2002): 361. This could still change in the current year in case of the adoption of a constitutional reform now in the legislative procedure. Agreements on the protection of human rights would then also have constitutional ranking in Mexico.

internal state law.<sup>36</sup> In Paraguay international law attains the rank of ordinary law by way of a transformational law – similar to the transformational theory reigning in Germany for a long time.<sup>37</sup>

Of course, rank alone is no guarantee for effective protection of basic rights, especially if the state institutions do not want to or cannot infuse human rights with life. Legal practice in many Latin American states is marked by a deep chasm between legal rights and legal realities. Certainly a decisive role is held by the state powers in overcoming this. The lawmaker must bring ordinary law into alignment with international standards (and with constitutional norms in any case) and keep it there. The executive must act within the limits thus delineated; and in disputed cases the judiciary must ensure compliance with the norms or (in the form of constitutional jurisdiction) the compatibility of ordinary law with the constitution and the requirements of international law.<sup>38</sup>

The fulfillment of these legal state obligations is not always easy for the sovereign power on the continent. On the one hand, this may be due to a widespread culture of judiciary opportunism: norms are followed when it is convenient, and otherwise they serve only as a flexible guide. In addition, human rights are more often seen as mere state-defined goals than as effective rights of the citizen from the state for protection and participation. Sometimes they are even seen as a hindrance or danger for public or national security.<sup>39</sup> However, as well as the bearers of sovereign power, a key role also falls to the citizens – whether as individuals, in organised groups such as clubs and associations, or represented by committed

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36 | Cf. Art. 55 Constitución Política del Perú.

37 | Cf. Almirón Prujel (2009): 532 f.

38 | On this actual matter of course cf. also Almirón Prujel (2009): 532 ff.; Sergio García Ramírez, „Recepción de la jurisprudencia interamericana sobre derechos humanos en el derecho interno”, in: Gisela Elstner (ed.), *Anuario de Derecho Constitucional Latinoamericano* (Montevideo, 2008): 364 f; Diego García-Sayán, „Una viva interacción: Corte Interamericana y tribunales internos”, in: *La Corte Interamericana de Derechos Humanos. Un cuarto de siglo: 1979-2004*, (San José, 2005): 323 f.

39 | Cf. García Ramírez (2008): 364.

lawyers: as long as basic protection of rights is not postulated “from below,” it will not be granted “from above” in case of doubt. The legal state and the protection of human rights are neither state prerogatives nor exclusive obligations. They are the product of a conscientious and lively community which demands the values and rights bound up with it from the bearers of sovereign power. Also thanks to the consistent admonitions of the Court by way of its verdicts, progress has been recorded, which is presented below.

### THE COURT AS INITIATOR

The Court establishes justice in individual cases<sup>40</sup> and beyond this, it sets the tone for legal practice in the states of the region.<sup>41</sup> Due to the rigid preselection by the commission, the Court’s decisions in individual cases also have the quality of landmark rulings, whose signal effect then influences the hoped-for internal state handling of many comparable cases or entire topical areas. Internal state players take up these impulses, especially, but not only, the constitutional and supreme courts in their jurisdictions,<sup>42</sup> even if they have so far not yet done so with the necessary methodical stringency. A few examples should clarify this interplay between the Court and internal state bodies.

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40 | For example, one individual case decision establishing justice is the very recent verdict on the female homicides in Ciudad Juárez, in which the Court determined the basic protective obligation of the state towards its citizens, even from third parties. The Court’s verdict against Mexico is related to three of nearly 400 murders which had been committed against women in Ciudad Juárez since the 1990s. Due to the absolute impunity of the offenders, the court determined that the state of Mexico had not fulfilled its obligation to protect the population, and had violated the victims’ right to life (Art. 4 together with Art. 1 I and Art. 2 ACHR). The Court also found a violation of Art. 8, Art. 25 and Art. 1 I ACHR, because Mexico had not fulfilled its obligation to investigate the events surrounding the disappearance and death of the women. Cf. *Corte Interamericana de Derechos Humanos*, caso González y otras vs. México („Campo Algodonero”), Verdict dated 11/16/2009, § 109.

41 | Cf. García-Sayán (2005): 332.

42 | Cf. Diego García-Sayán, “Justicia interamericana y tribunales nacionales”, in: Gisela Elstner (ed.), *Anuario de Derecho Constitucional Latinoamericano* (Montevideo 2008), 377.



Art. 2 ACHR calls for harmonization of national law with the regulations in the Convention. Inasmuch as corresponding standards are not already contained in the state constitutions, they can be derived directly from the Convention. The firm establishment of constitutional and Convention law in ordinary (internal state) law is indispensable for effective protection of human rights.<sup>43</sup>

In this respect, a case carrying particular consequence is *Barrios Altos*,<sup>44</sup> which concerned the execution of 15 persons in the centre of Lima by the paramilitary group “Colina” in 1995.<sup>45</sup> In the reasons given for

the verdict, the Court recorded that the amnesty laws issued by President Fujimori in 1995 violate the ACHR, which means that Peru has not fulfilled its obligation to align its

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national legislation with the Convention according to Art. 2 ACHR.<sup>46</sup> In particular, the amnesty laws violate the right to a fair trial (Art. 8 I ACHR) and the right to effective judicial protection (Art. 25 ACHR); they make it impossible to investigate the incidents in Barrios Altos or prosecute and convict those responsible, which is a violation of Art. 1 I of the Convention. The amnesty laws are therefore obviously incompatible with the aims and goals of the Convention and for this reason they lack any legal validity.<sup>47</sup> This was the first time that an international court had determined that a national law was without legal validity due to violating international law.<sup>48</sup> Peru complied with the verdict and revoked the amnesty laws.

The *Suárez Rosero* case was similar:<sup>49</sup> the defendant had been detained over a long period of time on suspicion of a crime, without being given a fair trial or the processing of his case.<sup>50</sup> Ecuador’s penal code provided for such special

43 | Cf. García-Sayán (2008): 378.

44 | Cf. *Corte Interamericana de Derechos Humanos, Caso Barrios Altos vs. Perú*, Verdict dated 03/14/2001 (Fondo).

45 | Cf. García-Sayán (2005): 338.

46 | Cf. *Corte Interamericana de Derechos Humanos, Caso Barrios Altos vs. Perú*, Verdict dated 03/14/2001 (Fondo): § 42.

47 | Cf. *ibid.*, § 51.4.

48 | Cf. Antonio Cassese, *Crimes Internationaux et Jurisdictions Internationales* (Paris, 2002), 16.

49 | Cf. *Corte Interamericana de Derechos Humanos, Caso Suárez Rosero vs. Ecuador*, Verdict dated 11/12/1997 (Fondo).

50 | Cf. *ibid.*, § 34.

regulations in case of the suspicion of a drug offense.<sup>51</sup> The Court was of the opinion that the relevant regulations of the Ecuadorian penal code were incompatible with Art. 7 V and Art. 1 I ACHR, causing a violation of Art. 2 ACHR.<sup>52</sup> Without the Court even disputing the legal validity of the law, Ecuador declared the article in question in the penal code unconstitutional.<sup>53</sup>

But even without the Court determining a specific violation of Art. 2 ACHR, states have declared their laws unconstitutional or initiated law changes of their own accord. Recently the Supreme Court of the Dominican Republic declared a paragraph unconstitutional which thwarted the ACHR's guaranteed right to judicial protection (Art. 25 ACHR).<sup>54</sup>

In particular, the constitutional courts of Bolivia, Columbia, Peru and also the Supreme Court of Argentina and some Supreme Courts in Chile have set important signals for the implementation of international human rights guarantees.<sup>55</sup>

It is not without good reason that the Court emphasized in a report to the OAS that recognition by the judiciaries of the individual states is currently the most important and most stimulating progress for the Inter-American Human Rights System.<sup>56</sup>

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For example, regarding the applicability and interpretation of the ACHR, the Supreme Court of Argentina determined fundamentally that the ACHR is directly applicable in Argentina<sup>57</sup> and that the jurisdiction of the Court is the guideline for interpretation and application of the ACHR.<sup>58</sup>

51 | Cf. *ibid*, § 95.

52 | Cf. *ibid*, § 110.5.

53 | Cf. García-Sayán (2005): 343.

54 | Cf. Suprema Corte de Justicia, Cámara Civil, República Dominicana, Recurso de Casación, Interpuesto por Meej; see also verdict dated 6.5.2009, in: *Diálogo Jurisprudencial, Derecho Internacional de los Derechos Humanos, Tribunales Nacionales*, Corte Interamericana de Derechos Humanos, (Enero, 2009 (6)): 143 f.

55 | Cf. García-Sayán (2008): 379.

56 | Cf. García Ramírez (2008): 367.

57 | Cf. *Corte Suprema de Argentina*, caso Ekmedjian, A. C. Miguel und Gerardo Sofovich, et al., Verdict dated 07/07/1992.

58 | Cf. *Corte Suprema de Argentina*, caso Horacio David Giroldi y otro s/ recurso de casación, Verdict dated 04/07/1995.

Also, Bolivia's constitutional court<sup>59</sup> denoted the jurisdiction of the Inter-American Court as binding for national jurisdiction;<sup>60</sup> and the constitutional court of Peru denoted the Court in San José as "the final sentinel of rights in the region."<sup>61</sup>

But beyond these basic determinations, the reasons for the Court's verdicts are being used more and more as interpretation helps for the national courts, which brings an alignment of human rights standards in the Latin American area.

A verdict of Mexico's Supreme Court from 2009 serves as an example for the extent of the recognition given to the Court.<sup>62</sup> In an appeal, the Mexican Supreme Court had to examine the sentencing of a journalist convicted of intrusion in the private life of an officer by publishing an interview with a lower ranked state official. The Supreme Court revoked the verdicts of lower courts by referring to the jurisdiction of the Inter-American Court (but also the European Court of Human Rights), in order to develop its own guidelines for proportionality in verdicts on intrusion in the private life of a state officer.<sup>63</sup>

The increased reference to international agreements and the jurisdiction of the responsible international courts is to be welcomed. Among other things, it is a result of the Court's jurisdictive and educative activity.<sup>64</sup> However, the

59 | This court no longer exists in this form since the constitutional reform.

60 | Cf. *Tribunal Constitucional de Bolivia*, Recurso de nulidad interpuesto por Lloyd Aéreo Boliviano, S. A., Verdict 0004/2003 dated 01/20/2003.

61 | Cf. *Tribunal Constitucional del Perú*, Verdict 218-02-HC/TC, dated 08/03/2002.

62 | Cf. *Suprema Corte de Justicia de la Nación de México, Primera Sala*, Amparo Directo en Revisión 2044/2008, Verdict dated 17.06.2009, in: *Diálogo Jurisprudencial, Derecho Internacional de los Derechos Humanos, Tribunales Nacionales*, Corte Interamericana de Derechos Humanos, (Julio – Diciembre 2008 [5]): 219.

63 | Cf. *ibid*: 220.

64 | For the past two years the Court has now managed educational courses on the Inter-American Human Rights System at the Supreme Courts of the region, together with the *Rechtsstaatsprogramm Lateinamerika der Konrad-Adenauer-Stiftung (Latin American Rule of Law Program of the Konrad-Adenauer-Stiftung)*, mainly for their academic employees, and also partly with participation by judges.

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verdicts sometimes lack methodical clarity. For example, the jurisdiction of the Inter-American Court and the European Court of Human Rights are apparently being referred to as equal, while it is the former which directly defines the interpretation of the ACHR and the latter has only a comparative quality for Latin America.<sup>65</sup>

These inadequacies are, however, the lesser evil. Building on the good will and commitment of interested judges, methodical coherence can also be developed little by little.

## **DEPENDENCE ON THE GOODWILL OF THE GOVERNMENTS IN IMPLEMENTING THE VERDICTS**

### **VARIETY OF POSSIBILITIES FOR REPARATION**

If the Court determines a violation of the Convention by a member state, then it can order reparation according to Art. 63 I ACHR. In this the Court sees the codification of a basic rule of customary international law, according to which a state which violates an international obligation must end the violation and restore the state which would have existed without the violation.<sup>66</sup> The broad formulation is intended to make the widest possible spectrum of reparative orders available to the court.<sup>67</sup>

The variety and creativity of the Court's reparation orders are significant. As well as the classic monetary compensation and the obligations in terms of information, accountability and publication, symbolic redress can also be found, such as the naming of streets, squares or schools after victims, or the establishment of a memorial day.<sup>68</sup>

65 | Cf. Gabriela Rodríguez Huerta, „Derechos humanos: jurisprudencia internacional y jueces internos“, in: Sergio García Ramírez and Mireya Castañeda Hernández (eds.), *Recepción Nacional del Derecho Internacional de los Derechos Humanos y Admisión de la Competencia Contenciosa de la Corte Interamericana*, (Mexico 2009): 211 f.

66 | Cf. *Corte Interamericana de Derechos Humanos*, caso Blake vs. Guatemala, Verdict dated 01/22/1999 (Reparaciones y Costas): § 33.

67 | Cf. Pasqualucci (2003): 233.

68 | Cf. Viviana Krsticevic, „Reflexiones sobre la Ejecución de las Decisiones del Sistema Interamericano de Protección de Derechos Humanos“, in: Viviana Krsticevic und Liliana Tojo (eds.), *Implementación de las Decisiones del Sistema Interamericano de Derechos Humanos – Jurisprudencia, Normativa y Experiencias Nacionales* (San José, 2007): 15 - 26.

The concept of amends or reparation is hereafter used to represent the various types of redress orders.<sup>69</sup>

By the selection of its reparation orders, the Court pursues four central goals: victim compensation, avoiding future human rights violations, investigating and punishing those responsible, and protecting victims and witnesses.<sup>70</sup>

Fig. 3:

#### Goals of reparation orders

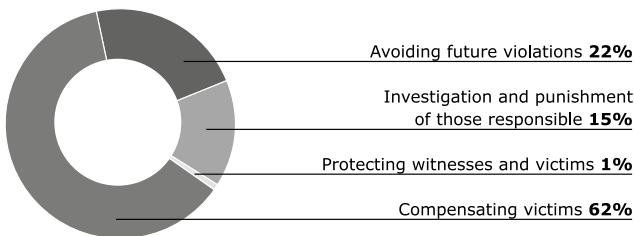
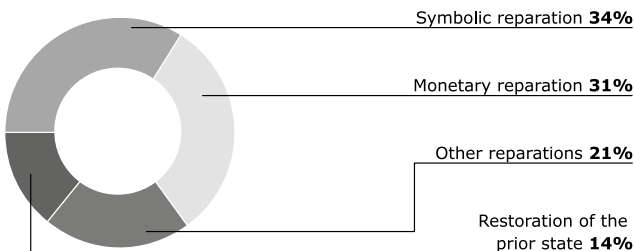


Fig. 4:

#### Types of reparation made



To reach the first goal, the Court often ordered compensation or even the provision of an educational scholarship or health insurance. The Court has also ordered the establishment of a fund for the development of social institutions or the surrender of land or buildings. In most cases a symbolic reparation is also ordered, to provide the victims with a moral redress and produce a public recognition of the sovereign responsibility. If the victim's damages are

69 | Cf. also Pasqualucci (2003): 230.

70 | For the statistics that follow, cf. also: Fernando Basch and Leonardo Filippini et al., „La Efectividad del Sistema Interamericano de Protección de Derechos Humanos“ [www.adc-sidh.org/images/files/adclaeffectividadaddelsidh.pdf](http://www.adc-sidh.org/images/files/adclaeffectividadaddelsidh.pdf) (accessed May 14, 2010), § III. 1.

not of an economic nature, then the restoration of the former state is also ordered, for example re-employment in a certain job position or release from prison.

As a preventative measure, the court can also order training for state officials in the protection of human rights, so as to create framework conditions in which further violations become less probable (so far 3% of reparation measures). But in the eyes of the Court, the general population sometimes also requires targeted sensitizing for human rights, which is why further education measures and campaigns were ordered for this target group (2%). The Court has also aimed at reparation by way of stimulating legal reforms (9%) or the establishment and reform of institutions (8%).

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An important reparation in the Court's practice is to examine the circumstances of each human rights violation and the penal prosecution of those responsible (15%). These measures make efforts for truth and responsibility and are therefore particularly appropriate for increasing the population's trust in their national legal system. Often a prerequisite for carrying out the trial is the protection of witnesses and the victims themselves (1.3%).

## **DEFICITS IN IMPLEMENTATION**

The encouraging variety in the Court's reparation possibilities is relativized by the circumstance that it has no means of its own for enforcing its verdicts. The implementation of the verdicts depends solely on the goodwill of the states being judged, even if these have obligated themselves to comply with the Court's decisions by recognizing its jurisdiction.<sup>71</sup> The Court can only monitor the implementation of the verdicts by the states, and in case of non-compliance, inform the general assembly of the OAS.<sup>72</sup> While the Court often carries out its own follow-up of the implementation, it seems that recourse to reporting it to the OAS general assembly can be avoided.

71 | Cf. Art. 68 ACHR.

72 | Cf. Art. 65 ACHR.

The analysis of 462 ordered actions between June 2001 and June 2006 showed that half of the orders determined by the court were not implemented.<sup>73</sup> Only 36% of the orders were completely fulfilled, and in 14% of cases, the states had only partially complied with the Court's orders.<sup>74</sup> The greatest degree of success is recorded in compensation orders. Even if the counting of the damage compensation is often delayed or questioned, the implementation quota still stands at 47% (full) and 13% (partial compensation).<sup>75</sup>

Obviously, the Court is not able to remedy the region's notorious impunity: investigating the circumstances of a violation and the prosecution of those responsible has so far only occurred fully in 10% and partially in 13% of the ordered cases, while 76% of orders were simply ignored or the state in question refused to fulfill it.<sup>76</sup> Most states lack the state structures and often also the will to make those responsible accountable for their deeds.<sup>77</sup> Measures ordered as prevention are complied with in more than 40% of cases, at least in terms of further education (officials, police, the public). On the other hand, legal reforms (implementation quota 14%) and institutional reforms (26%) met with more opposition. It is alarming that the ordered protection of victims and witnesses is neglected in more than 80% of cases.<sup>78</sup>

In an overview of countries, Trinidad and Tobago, Venezuela and Haiti show the least respect for the Court's orders.<sup>79</sup> All three countries have failed to comply with even one order of the Court; however, up until July 2006 only two verdicts were issued regarding Trinidad and Tobago and one each to Venezuela and Haiti.<sup>80</sup> Even Mexico's statistically good implementation quota of 83% is so far not particularly convincing (the records include the implementation of only one verdict).<sup>81</sup> Here it will depend significantly on the implementation of the relatively recent decisions.

73 | Cf. Basch and Filippini et al. (2010): § III. 3.

74 | Cf. *ibid.*

75 | Cf. Pasqualucci (2003): 8.

76 | Cf. Basch and Filippini et al. (2010): § III. 3.

77 | Cf. Pasqualucci (2003): 9.

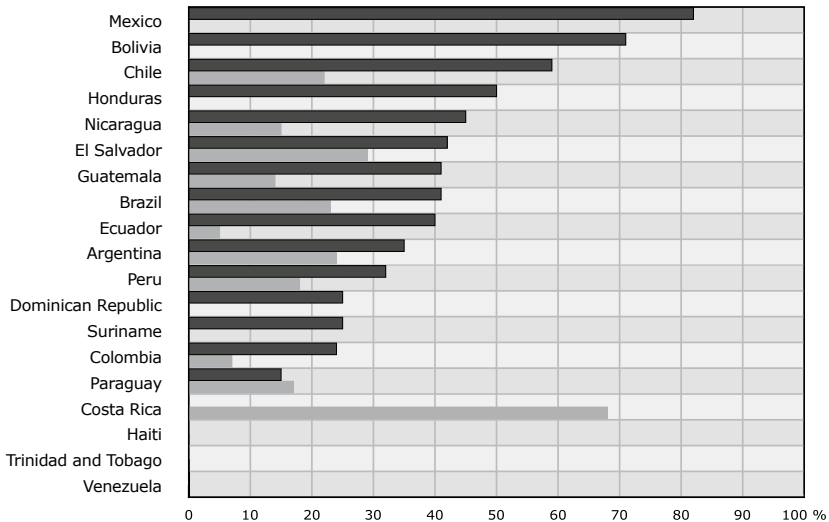
78 | Cf. Basch and Filippini et al. (2010): § III. 3.

79 | Cf. *ibid.*, § III. 6.

80 | Cf. *ibid.*

81 | Cf. *ibid.*

Fig. 5:  
**Implementation quotas according to country**



462 cases between June 2001 and June 2006, although implementation until June 30, 2009 is included.

■ full implementation ■ partial implementation

**SUMMARY**

At first glance, these implementation figures seem sobering. However, their significance is limited to the implementation of individual case verdicts by the states in question. In this respect it must be taken into account that the verdicts have only in recent times encountered complicated reform processes – such as in Mexico. The opening of states traditionally clinging to their sovereignty for correction imposed by international law on their internal state law and practice is only getting started. The effects will then far surpass the individual cases: for example, currently efforts are being made in Mexico for the implementation of the four verdicts issued so far, which range from legislative projects to implement the Court’s verdicts<sup>82</sup>

82 | In April 2010 the Mexican Ministry of External Affairs assigned a team of experts to develop a draft law which is primarily to regulate questions of the distribution of responsibility between the federation and the states in implementing the verdicts.



and reduce military jurisdiction,<sup>83</sup> to considerations for a state compensation plan and an advanced constitutional reform process.<sup>84</sup> The Court's verdicts are certainly not the only driving force behind this; but they are always given as central arguments in the public and political debate, as well as in specialist groups.

Beyond that, these statistics do not take into account the effect of the verdicts as landmark rulings for internal state court practice. The increasing attention given to the international law standards concretized by the jurisdiction of the Court in the decisions of internal state courts does not help the claimant before the Court; but the internal state bodies are thus driving a development which makes amends for human rights violations in an early stage or even prevents them from the beginning. The more the understanding of human rights is established as enforceable citizens' claims, the more positive the work of the Court in San José is to be seen.

At the same time, the step by step penetration of internal state laws with the free and democratic values of the human rights guaranteed by international law is indispensable for the consolidation of the continent's democracies. In its current form the Court can do no more than stimulate overdue developments and corrections.

There will be no attempt to replace the entire continent with seven judges who meet four times a year, not even if the Court were to attain the extent of its European sister institution. The distribution of roles between the state bodies and the Court finds itself, as is customary for constitutional and international courts, in the obligation of a claimant to first exhaust legal action.<sup>85</sup> This brings state players under obligation, but also gives them the chance to defend the rule of law and the protection of human rights, not only in 120 cases spread over 30 years, but day by day and on a broad front.

**At the same time, the step by step penetration of internal state laws with the free and democratic values of the human rights guaranteed by international law is indispensable for the consolidation of the continent's democracies.**

83 | While the reform of the controversial military jurisdiction has been postponed to September 2010, changes regarding the deployment of the military in the inland were adopted in April 2010.

84 | In April 2010 the Mexican senate agreed on a reform package which must now be adopted by the house of representatives.

85 | Cf. García-Sayán (2008): 377 - 379.