This book provides an innovative analysis of the complex issue of judicial convergence and fragmentation in international human rights law, moving the conversation forward from the assessment of the two phenomena and investigating their triggering factors. With a wide geographical focus that includes the most up-to-date case-law from the three main regional systems (the African, European and Inter-American) and the United Nations Human Rights Committee, the book confirms the predominant judicial convergence across international human rights law. On this basis, the book engages with an interdisciplinary investigation into the legal and non-legal factors that could explain both convergence and fragmentation, ranging from the use of judicial dialogue and the notions of necessity and proportionality, to the composition of the courts and the role of NGOs. The aim of this book is to provide the tools to understand the dynamics between human rights adjudicatory bodies and possibly foresee future instances of judicial fragmentation.

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Judicial Convergence and Fragmentation in International Human Rights Law

THE REGIONAL SYSTEMS AND THE UNITED NATIONS HUMAN RIGHTS COMMITTEE

ELENA ABRUSCI
Brunel University London
Contents

List of Figures page xi
List of Tables xiii
Foreword xv
Acknowledgements xix
Table of Cases xx
List of Abbreviations xxxi

Introduction 1
Methodology 7
Structure 9

PART I INTRODUCING AND ASSESSING FRAGMENTATION AND CONVERGENCE IN INTERNATIONAL HUMAN RIGHTS LAW

1 Fragmentation and Convergence: Context and Definitions 13
   Introduction 13
   1.1 Fragmentation in International Law 14
   1.2 Normative Fragmentation and Convergence in IHRL 18
      1.2.1 Defining Normative Fragmentation and Convergence 18
      1.2.2 The Proliferation of Human Rights Normative Frameworks 21
         1.2.2.1 International Instruments 21
         1.2.2.2 Regional Instruments 23
      1.2.3 Actual and Potential Normative Fragmentation in IHRL 23
      1.3 Judicial Fragmentation and Convergence in IHRL 26
Contents

1.3.1 Defining Judicial Fragmentation and Convergence 27
1.3.2 The Proliferation of Human Rights Institutions 29
  1.3.2.1 International Human Rights Institutions 30
  1.3.2.2 European Human Rights Institutions 32
  1.3.2.3 American Human Rights Institutions 34
  1.3.2.4 African Human Rights Institutions 35
  1.3.2.5 Other Regional and Sub-regional Human Rights Institutions 36
1.4 Fragmentation and Convergence versus Relativism and Universality: A Reconciling Understanding 37
  1.4.1 The Debate on Universality and Relativism of Human Rights 37
  1.4.2 What Is the Relationship between Convergence and Fragmentation and Universalisms and Relativism? 40
Conclusion 41

2 Assessing and Exploring Judicial Fragmentation in International Human Rights Law 42
Introduction 42
2.1 Assessing Judicial Fragmentation in IHRL 42
  2.1.1 The Right to Life 45
  2.1.2 The Prohibition of Torture, Cruel, Inhuman and Degrading Treatments 49
  2.1.3 The Right to Liberty and Security 51
  2.1.4 The Freedom of Expression 53
  2.1.5 The Freedom of Assembly 57
  2.1.6 Discrimination Based on Sexual Orientation 58
  2.1.7 The Absence of Fragmentation Explained by the Difference in the Cases 60
  2.1.8 Concluding Observations 64
2.2 Analysing Judicial Fragmentation in IHRL 64
  2.2.1 Freedom to Manifest Religion 65
  2.2.2 Indigenous Property Rights 77
  2.2.3 The Right to Marry for Same-Sex Couples and the Recognition of the Change of Gender Identity 87
Conclusion 92
PART II FACTORS EXPLAINING JUDICIAL CONVERGENCE
AND FRAGMENTATION

3 The Theory of Treaty Interpretation and Judicial Dialogue 97
Introduction 97
3.1 The Theory of Treaty Interpretation: Substantial Convergence of Interpretation Methods 97
  3.1.1 Interpretation Clauses 101
3.2 Judicial Dialogue 103
  3.2.1 Definition, Features and Challenges 104
    3.2.1.1 Why Engage in Judicial Dialogue? 105
    3.2.1.2 Why Not Engage in Judicial Dialogue? 107
    3.2.1.3 Concluding Observations 108
  3.2.2 Judicial Dialogue in the Practice of Human Rights Bodies: Fostering Convergence 110
    3.2.2.1 The Inter-American Court of Human Rights 110
    3.2.2.2 The African Bodies 114
    3.2.2.3 The European Court of Human Rights 121
    3.2.2.4 The Human Rights Committee 124
  3.2.3 The Lack of Judicial Dialogue between Human Rights Bodies: Triggering Fragmentation 126
    3.2.3.1 Indigenous Peoples’ Rights 126
    3.2.3.2 Freedom of Religion 128
  3.2.4 When Judicial Dialogue Is Not Enough for Ensuring Convergence 130
    3.2.4.1 Enforced Disappearances 130
    3.2.4.2 Right to Marry for Same-Sex Couples 132
Conclusion 134

4 The Composition of the Courts and Other Adjudicative Bodies and the Role of Their Secretariats 135
Introduction 135
4.1 The Composition of the Bodies 136
  4.1.1 Rules and Procedures on the Composition of the Bodies 137
  4.1.2 Who Are the Judges? 140
    4.1.2.1 The Educational Background 141
    4.1.2.2 The Professional Background 144
Contents

4.1.2.3 Assessing the Impact of Personal Background on Separate Opinions 149
4.1.3 Concluding Observations 158
4.2 The Role of the Secretariat 160
4.3 The Role of Meetings between the Members of Human Rights Bodies 165
Conclusion 167

5 Calibrating Judicial Scrutiny: The Notions of Necessity and Proportionality 169
Introduction 169
5.1 The Principle of Necessity: A Tale of Convergence 170
5.1.1 The Principle of Necessity in International and Regional Instruments: A Fertile Ground for Fragmentation? 171
5.1.2 The Principle of ‘Necessity’ at the Adjudicatory Level: Towards Convergence 175
5.1.2.1 The Meaning of Necessity in IHRL 175
5.1.2.2 ‘Necessary’ versus ‘Necessary in a Democratic Society’ 178
5.1.2.3 The Restriction of the Right to Life When ‘Absolutely Necessary’ 182
5.2 The Principle of Proportionality in the Case-Law of Regional Courts and the HRC 184
5.2.1 The European Court of Human Rights 185
5.2.2 The Human Rights Committee 188
5.2.3 The Inter-American Court of Human Rights 190
5.2.4 The African Commission and Court on Human and Peoples’ Rights 192
Conclusion 193

6 Deference, Subsidiarity and Regional Consensus: The Margin of Appreciation Doctrine 196
Introduction 196
6.1 The Margin of Appreciation Doctrine before the ECHR 199
6.1.1 Origins and Evolution 199
6.1.2 The Features of the MoA before the ECHR 201
6.2 The IACtHR and the Conventionality Control Doctrine: Is There Room for Subsidiarity and Deference? 203
6.2.1 The IACtHR and the MoA 204
Contents

6.2.2 The IACtHR and the Conventionality Control Doctrine: The Rejection of the MoA 205
6.3 The Human Rights Committee: What Space for the MoA Doctrine? 208
6.4 The African Commission and Court: In Search of a MoA? 211
6.5 Explaining Deference and Subsidiarity Differences: The Politics of the Courts and Committee and Their Relationship with Member States 213
6.6 What Impact May the MoA Have on Fragmentation and Convergence? 216
6.6.1 Fostering Convergence 216

6.6.1.1 The ECtHR and HRC on the Restriction to Freedom of Expression for the Protection of Public Morals 217
6.6.1.2 The MoA in Defamation Cases 218
6.6.2 Triggering Fragmentation 221

6.6.2.1 The ECtHR and HRC on the Restriction to Freedom of Wearing Religious Attire 221
6.6.2.2 The ECtHR and IACtHR on the Restriction to Freedom of Expression for the Protection of Public Morals and Religion 224

Conclusion 225

7 Outside the Courtroom: The Role of NGOs and the Obstacles to Litigation 228

Introduction 228
7.1 The Role of Non-governmental Organisations 228

7.1.1 Litigation 230

7.1.1.1 Amicus Curiae 232
7.1.2 Lobbying and Other Ways of Participation 235
7.2 When the Case Does Not Reach the Courts 236

7.2.1 Use and Abuse of Friendly Settlements and Unilateral Declarations 238
7.2.2 When the Human Rights Bodies Induce the Applicant to Withdraw the Case 240
7.2.3 Availability of NGOs in Bringing a Specific Case in Front of the Court 241

Conclusion 243
Contents

Conclusions 244

Appendix 1 International and Regional Human Rights Instruments 255

Appendix 2 Comparative Table of Leading Cases 263

Index 269
Figures

1. Current members who received university education outside their continent (percentage).  
2. Current and total members with previous work experience in international organisations and courts, 2021 data (percentage).  
3. Current and total members previously working in UNTBs or SPs, 2021 data (percentage).  
4. Current members currently or previously working in academia with specialisation subjects (percentage).
## Tables

<p>| | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Members’ education</td>
<td>page 142</td>
</tr>
<tr>
<td>2</td>
<td>Members’ work experience (international organisations/courts)</td>
<td>145</td>
</tr>
<tr>
<td>3</td>
<td>Members’ work experience (academia)</td>
<td>148</td>
</tr>
</tbody>
</table>
Foreword

It is a lapalissade that judicial fragmentation poses a serious threat to international law. This threat is particularly acute in the field of international human rights law. By undermining the universality of international law, judicial fragmentation encourages states not to comply with human rights judgments and recommendations, weakens the authority of human rights courts and bodies and ultimately decreases the level of protection of human rights worldwide.

In spite of this, we keep seeing contrasting judgments from international human rights courts and bodies on old and new issues. For example, the freedom to wear religious attire, and in particular the hijab or niqab, or the right to self-representation of lawyers in criminal procedure are still controversial matters on which the European Court of Human Rights and the United Nations Human Rights Committee seem not to be able to agree. All this shows that judicial convergence, when and where it happens, is limited in scope and, more importantly, precarious in nature. To make things even more complicated, the picture of international human rights law adjudication is continuously evolving and changing, with the African and the Inter-American human rights courts and commissions getting more and diversified cases and distancing themselves from their European older brother, which could ultimately lead to more cases of contrasting interpretations.

Considering the above, it is essential not to limit academic research to the analytical assessment of judicial convergence and fragmentation, but to reflect further on why they happen and how we could control them. And this is exactly what this book urges us to do. It investigates what could be the factors that contribute to these phenomena with the belief that only this critical methodology will provide us with the tools to monitor and promote the development of judicial convergence and anticipate and avoid future instances of fragmentation.
Several factors have contributed to fragmentation, but one surely stands out. The heavy use of the margin of appreciation doctrine by the European Court of Human Rights is damaging the predictability of case-law and thus tarnishing the reputation of the institution and the credibility of the entire European human rights protection system. When compared to the emerging conventionality control of the Inter-American Court of Human Rights, the doctrine of the margin of appreciation leaves much to be desired, leading to stark contrasting outcomes depending on the respondent state. Distorted by the margin of appreciation doctrine, the discretionary application of the necessity and proportionality tests only aggravates this intolerable situation, which at the end of the day gives the impression of a judicial practice with double or even triple standards. My separate opinion in *Hutchinson v. The United Kingdom* testifies to this evaluation.

To counter this unfortunate practice, judges, lawyers and scholars must be attentive and resolute. Judicial dialogue between human rights courts and bodies appears to be one of the strongest safeguards for convergence. During my time in Strasbourg, I tried to encourage the European Court to build a two-way street with other international, constitutional and supreme courts, conveying to them our own adjudicatory standards, but also profiting from their judicial best practices. I still remember vividly the exciting discussions held in Strasbourg on hot topics with fellow judges from all over the world, like the judges of the South African Constitutional Court, the Japanese Supreme Court or the Indian Supreme Court. By bringing to the same table African, American, Asian and European judges, my purpose was to achieve a solid common ground upon which a universal understanding of fundamental legal principles could be built. The Strasbourg Court should not be an isolated ivory tower, but an open platform of dialogue with other courts and bodies tasked with the protection of human rights.

As this book so well demonstrates, there is another preponderant element to consider in this context: the identity of the judges, commissioners and committee members who decide the cases and the role of the registry and secretariats. I met Elena Abrusci during an interview for her PhD thesis, on which this book is based, and I was captured by her intellectual curiosity into understanding how my professional background and personal beliefs could influence my adjudication and, consequently, the dynamics of the court to which I belonged. This is a fascinating and much needed take on a longstanding and unresolved issue, the independence of international judges, to which I have devoted my attention in an article published in the *Liber amicorum* to Vincent De Gaetano (Springer, 2019). As human rights judges, we are frequently called to the difficult task of interpreting broad and vague
norms, and we need to acknowledge what the biases are that we bring with ourselves and consider whether and, and if yes, how they may factor into the decision. By so doing, these extrajudicial factors can be rationalised and ultimately utilised for the improvement of human rights adjudication.

With her bright insights and persuasive argumentation, Elena provides us with a magnificent book which is a very timely and extremely important study that fills an important gap in literature, encouraging the reader, the academic community and the human rights practitioner to go deeper into the study of judicial convergence and fragmentation. Being the fruit of a serious intellectual reflection on delicate legal problems and politically charged issues, the book benefits from a laborious, objective research that questions the personal, structural and systemic reasons behind human rights adjudication, offering a rigorous analysis and innovative perspective. My only hope is that the example of Elena will inspire other young researchers to devote themselves to scientific research on the role of people, and particularly judges, serving in international human rights courts and bodies. Ultimately this research will contribute to a better output of their work, which means providing victims of human rights violations with a better response from the international justice system.

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xxi
## Table of Cases

<table>
<thead>
<tr>
<th>Case Description</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sudan Human Rights Organisation &amp; Centre on Housing Rights and Evictions (COHRE) v. Sudan</td>
<td>Communication nos 279/03–296/05, 27 May 2009</td>
</tr>
<tr>
<td>Zimbabwe Lawyers for Human Rights &amp; Associated Newspapers of Zimbabwe v. Zimbabwe</td>
<td>Communication no 284/03, 2009</td>
</tr>
<tr>
<td></td>
<td><strong>AFRICAN COURT ON HUMAN AND PEOPLES’ RIGHTS</strong></td>
</tr>
<tr>
<td>Ally Rajabu and Others v. Tanzania, Application no 007/2015</td>
<td>(ACHPR, 28 November 2019)</td>
</tr>
<tr>
<td>Boubacar Sissoko and 74 Others v. Mali, Application no 037/2017</td>
<td>(ACHPR, 25 September 2020)</td>
</tr>
<tr>
<td>Evodius Rutechura v. Tanzania, Application no 004/2016</td>
<td>(ACHPR, 25 June 2021)</td>
</tr>
<tr>
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<td>(ACHPR, 26 June 2020)</td>
</tr>
<tr>
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<td>(ACHPR, 4 December 2020)</td>
</tr>
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<td>Jebra Kambole v. Tanzania, Application no 018/2018</td>
<td>(ACtHPR, 15 July 2020)</td>
</tr>
<tr>
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<td>(ACtHPR, 25 June 2020)</td>
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<td>(ACtHPR, 25 June 2020)</td>
</tr>
<tr>
<td></td>
<td><strong>EUROPEAN COMMISSION OF HUMAN RIGHTS</strong></td>
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</tbody>
</table>
### Table of Cases

**EUROPEAN COURT OF HUMAN RIGHTS**

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<table>
<thead>
<tr>
<th>Case Title</th>
<th>Application No</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>Handölsdalen Sami Village and Others v. Sweden</td>
<td>39013/04</td>
<td>30 March 2010</td>
</tr>
<tr>
<td>Handyside v. UK</td>
<td>5493/72</td>
<td>7 December 1976</td>
</tr>
<tr>
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<td>29750/09</td>
<td>16 September 2014</td>
</tr>
<tr>
<td>Hingitaq 53 and Others v. Denmark</td>
<td>18584/04</td>
<td>12 January 2006</td>
</tr>
<tr>
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<td>48787/99</td>
<td>8 July 2004</td>
</tr>
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<td>5310/71</td>
<td>18 January 1978</td>
</tr>
<tr>
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<td>57050/00</td>
<td>24 February 2005</td>
</tr>
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<td>nos 25119/09, 57715/09</td>
<td>18 September 2012</td>
</tr>
<tr>
<td>Jasvir Singh v. France</td>
<td>25467/08</td>
<td>30 June 2009</td>
</tr>
<tr>
<td>Karaduman v. Turkey</td>
<td>16278/90</td>
<td>3 May 1993</td>
</tr>
<tr>
<td>Karner v. Austria</td>
<td>4006/08</td>
<td>24 July 2013</td>
</tr>
<tr>
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<td>31645/04</td>
<td>4 December 2008</td>
</tr>
<tr>
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<td>30209/71</td>
<td>6 September 1978</td>
</tr>
<tr>
<td>Kokkinakis v. Greece</td>
<td>14307/88</td>
<td>25 May 1993</td>
</tr>
<tr>
<td>Kudla v. Poland</td>
<td>30210/96</td>
<td>26 October 2000</td>
</tr>
<tr>
<td>L. v. Lithuania</td>
<td>27527/03</td>
<td>11 September 2007</td>
</tr>
<tr>
<td>Lautsi v. Italy</td>
<td>30814/06</td>
<td>18 March 2011</td>
</tr>
<tr>
<td>Leyla Şahin v. Turkey</td>
<td>44774/98</td>
<td>10 November 2005</td>
</tr>
<tr>
<td>Ligens v. Austria</td>
<td>9851/82</td>
<td>8 July 1986</td>
</tr>
<tr>
<td>Mannakulov and Askarov v. Turkey</td>
<td>nos 46827/99, 46951/99</td>
<td>4 February 2005</td>
</tr>
<tr>
<td>Mann Singh v. France</td>
<td>24479/07</td>
<td>11 June 2007</td>
</tr>
<tr>
<td>Mareks v. Belgium</td>
<td>6853/74</td>
<td>13 June 1979</td>
</tr>
<tr>
<td>Mata Estevez v. Spain</td>
<td>56501/00</td>
<td>10 May 2001</td>
</tr>
<tr>
<td>McCann and Others v. United Kingdom</td>
<td>18984/91</td>
<td>27 September 1995</td>
</tr>
<tr>
<td>Morice v. France</td>
<td>29369/10</td>
<td>23 April 2015</td>
</tr>
<tr>
<td>Müller and Others v. Switzerland</td>
<td>10737/84</td>
<td>10 January 1988</td>
</tr>
<tr>
<td>Mussikhanova and Others v. Russia</td>
<td>27243/03</td>
<td>4 December 2008</td>
</tr>
<tr>
<td>Nachova and Others v. Bulgaria</td>
<td>nos 43577/98</td>
<td>24 May 1988</td>
</tr>
<tr>
<td>and 43579/98, 6 July 2005</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Niedbata v. Poland</td>
<td>27915/95</td>
<td>4 July 2000</td>
</tr>
<tr>
<td>Oliari and Others v. Italy</td>
<td>nos 18766/11 and 36030/11</td>
<td>21 July 2015</td>
</tr>
<tr>
<td>Otto-Preminger-Institut v. Austria</td>
<td>13470/87</td>
<td>20 September 1994</td>
</tr>
<tr>
<td>Oya Ataman v. Turkey</td>
<td>74552/01</td>
<td>5 December 2006</td>
</tr>
<tr>
<td>P. and S. v. Poland</td>
<td>57375/08</td>
<td>30 October 2012</td>
</tr>
<tr>
<td>Peruzzi v. Italy</td>
<td>39294/09</td>
<td>30 June 2015</td>
</tr>
<tr>
<td>Phull v. France</td>
<td>35753/03</td>
<td>11 January 2005</td>
</tr>
</tbody>
</table>
Table of Cases

Piermont v. France, Application nos 15773/89 and 15774/89, 27 April 1995

R.R. v. Poland, Application no 27617/04, 26 May 2011

Rees v. United Kingdom, Application no 9532/81, 17 October 1986

Ricci v. Italy, Application no 30210/06, 8 October 2013

S.A.S. v. France, Application no 43835/11, 1 July 2014

Saadi v. the United Kingdom, Application no 13229/03, 29 January 2008

Salguiero da Silva Mouta v. Portugal, Application no 33290/96, 21 March 2000

Schalk and Kopf v. Austria, Application no 30141/04, 22 November 2010

Schlumpf v. Switzerland, Application no 29002/06, 8 January 2009


Selmouni v. France, Application no 25803/94, 28 July 1999

Silverand Others v. United Kingdom, Application nos 5947/72, 205/73, 7107/75, 7113/75 and 7136/75, 24 September 1982

Sitaraopoulos and Giakoumopolous v. Greece, Application no 42202/07, 15 March 2012

Smith Kline and French Laboratories v. the Netherlands, Application no 12633/87, 1990

Soering v. United Kingdom, Application no 14038/88, 7 July 1989

Stran Greek Refineries and Stratis Andreadis v. Greece (Merits), Application no 13427/87, 1994

Sunday Times v. United Kingdom, Application no 6538/74, 16 April 1979

Togcu v. Turkey, Application no 27601/95, 31 May 2005

Tolstoy Miloslavsky v. United Kingdom, Application no 18139/91, 18 February 2008

Tyrer v. United Kingdom, Application no 5856/72, 25 April 1978

Tyszac v. Poland, Application no 5410/03, 20 March 2007

VO v. France, Application no 53924/00, 8 July 2004

Witzsch v. Germany, Application no 7485/03, 30 September 1999

X and Others v. Austria, Application no 19010/07, 19 February 2013

X v. Federal Republic of Germany, Application no 8410/78, 1979

X v. United Kingdom, Application no 7902/77, 12 July 1978

Z. v. Finland, Application no 627/811, 25 February 1999

Zaurbekova and Zaurberkova v. Russia, Application no 27183/03, 22 January 2009

UN HUMAN RIGHTS COMMITTEE

Alphen v. The Netherlands, Communication no 305/1988, 23 July 1990

Arhuaco v. Colombia, Communication no 612/1995, 29 July 1997

Bautista v. Colombia, Communication no 563/1993, 27 October 1995
## Table of Cases

Bikramjit Singh v. France, Communication no 1852/2008, 4 February 2013  
Castañeda v. Mexico, Communication no 2022/2012, 18 July 2013  
Guerrero v. Colombia, Communication no 45/1979, 31 March 1982  
Hertzberg and Others v. Finland, Communication no 61/1979, 2 April 1982  
Jarvinen v. Finland, Communication no 295/1988, 15 August 1990  
K.L. v. Peru, Communication no 1153/03, 24 October 2005  
Kivimaa v. Finland, Communication no 422/1990, 31 March 1994  
Laureano v. Peru, Communication no 540/1993, 16 April 1996  
Lloyd Reece v. Jamaica, Communication no 796/98, 14 July 2003  
LMR v. Argentina, Communication no 1608/07, 28 April 2011  
Marquez de Morais v. Angola, Communication no 1125/02, 29 March 2005  
Massera v. Uruguay, Communication no 5/1977, 15 August 1979  
Mellet v. Ireland, Communication no 2324/13, 31 March 2016  
Raihon Hudoybergenova v. Uzbekistan, Communication no 931/2000, 8 December 2004  
Singh Bhinder v. Canada, Communication no 208/1986, 9 November 1989  
Unn and Ben Leirvag and Others v. Norway, Communication no 1155/2003, 23 November 2004  
Taright v. Algeria, Communication no 1085/02, 15 March 2006  
Van Alphen v. The Netherlands, Communication no 305/88, 23 July 1990
Table of Cases

Weiss v. Austria, Communication no 1086/2002, 2002
Y.L. v. Canada, Communication no 112/1981, 8 April 1986
Young v. Australia, Communication no 941/2000, 2004
Lansman et al. v. Finland, Communication no 511/1992, 11 June 1992
Paez v. Colombia, Communication no 195/1985, 12 July 1990

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

Baby Boy v. United States, 6 March 1981
Maya indigenous communities of the Toledo District v. Belize, 12 October 2004
Ecuador v. Colombia, 21 October 2011

INTER-AMERICAN COURT OF HUMAN RIGHTS

Almonacid-Arellano v. Chile, 26 September 2006
Angel Alberto Duque v. Colombia, 26 February 2016
Artavia Murillo et al. (“in vitro fertilization”) v. Costa Rica, 28 November 2012
Atala Riffo and Daughters v. Chile, 24 February 2012
Bámaca Velásquez v. Guatemala, 25 November 2000
Benavides-Cevallos v. Ecuador, 19 June 1998
Caesar v. Trinidad and Tobago, 11 March 2005
Canese v. Paraguay, 31 August 2004
Castillo Paz v. Peru, 3 November 1997
Chaparro Álvarez and Lapo Íñiguez v. Ecuador, 8 September 1998
Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, Advisory Opinion OC-5/85, 13 November 1985
Dacosta Cadogan v. Barbados, 24 September 2009
Escher et al. v. Brazil, 6 July 2009
Gangaram-Panday v. Suriname, 21 January 1994
Gelman v. Uruguay, 24 February 2011
Gomes Lund et al. v. Brazil, 24 November 2010
Gómez-Palomino v. Peru, 22 November 2005
Herrera Uloa v. Costa Rica, 2004
Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago, 21 June 2002
Identidad de género, e igualdad y no discriminación a parejas del mismo sexo, Opinión consultiva OC-24/17, 9 January 2018
## Table of Cases

<table>
<thead>
<tr>
<th>Case</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>Kichwa Indigenous People of Sarayaku v. Ecuador</td>
<td>27 June 2012</td>
</tr>
<tr>
<td>Las Palmas v. Colombia</td>
<td>6 December 2001</td>
</tr>
<tr>
<td>Loyaza-Tamayo v. Peru</td>
<td>17 September 1997</td>
</tr>
<tr>
<td>Mapiripan Massacre v. Colombia</td>
<td>15 September 2005</td>
</tr>
<tr>
<td>Mayagna (Sumo) Awas Tingni Community v. Nicaragua</td>
<td>31 August 2001</td>
</tr>
<tr>
<td>Memoli v. Argentina</td>
<td>22 August 2013</td>
</tr>
<tr>
<td>Montero Aranguren et al. (Detention Center of Catia) v. Venezuela</td>
<td>5 July 2006</td>
</tr>
<tr>
<td>Myrna Mack Chang v. Guatemala, Merits</td>
<td>25 November 2003</td>
</tr>
<tr>
<td>Olmedo-Bustos et al. v. Chile (The Last Temptation of Christ case)</td>
<td>5 February 2001</td>
</tr>
<tr>
<td>Panigua Morales v. Guatemala</td>
<td>8 March 1998</td>
</tr>
<tr>
<td>Saramaka People v. Suriname</td>
<td>28 November 2007</td>
</tr>
<tr>
<td>Sawhoyamaxa Indigenous Community v. Paraguay</td>
<td>29 March 2006</td>
</tr>
<tr>
<td>The Interpretation of the American Declaration of the Rights and Duties of Man within the framework of Article 64 of the American Convention on Human Rights, Advisory Opinion</td>
<td>14 July 1989</td>
</tr>
<tr>
<td>Tibi v. Ecuador</td>
<td>7 September 2004</td>
</tr>
<tr>
<td>Tristan Donoso v. Panama</td>
<td>27 January 2009</td>
</tr>
<tr>
<td>Velasquez Rodriguez v. Honduras</td>
<td>29 July 1988</td>
</tr>
<tr>
<td>Xákımok Kásek v. Paraguay</td>
<td>24 August 2010</td>
</tr>
<tr>
<td>Yake Axa Indigenous Community v. Paraguay</td>
<td>17 June 2005</td>
</tr>
</tbody>
</table>

### International Court of Justice

**Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America),** 27 June 1986


### International Criminal Tribunal for the Former Yugoslavia (ICTY)

**The Prosecutor v. Duško Tadić,** IT-94-1-A, 15 July 1999
**Table of Cases**

**UNITED KINGDOM COURTS**

- R (on the application of Daly) v. Secretary of State for the Home Department [2001] 2 AC 532

**UNITED STATES OF AMERICA COURTS**

- Craig v. Boren, 429 US 190 210–211
- US v. Carolene Products Co., 304 US 144, 152 (1938)
Abbreviations

ACHPR African Charter on Human and Peoples’ Rights
ACHR American Convention on Human Rights
ACommHPR African Commission on Human and Peoples’ Rights
ACHPR African Court on Human and Peoples’ Rights
ASEAN Association of Southeast Asian Nations
AU African Union
CAT UN Committee against Torture
CEDAW UN Committee on the Elimination of Discrimination against Women
CERD UN Committee on the Elimination of Racial Discrimination
CESCR UN Committee on Economic, Social and Cultural Rights
CoE Council of Europe
CRC UN Committee on the Rights of the Child
EACJ East African Court of Justice
ECHR European Convention on Human Rights
ECJ European Court of Justice
ECommHR European Commission of Human Rights
ECSR European Committee of Social Rights
ECHR European Court of Human Rights
EU European Union
GC general comment
HRC UN Human Rights Committee
IACommHR Inter-American Commission on Human Rights
IACHR Inter-American Court of Human Rights
ICCPR International Covenant on Civil and Political Rights
ICESCR International Covenant on Economic, Social and Cultural Rights
### List of Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>ICJ</td>
<td>International Court of Justice</td>
</tr>
<tr>
<td>ICTY</td>
<td>International Criminal Tribunal for the Former Yugoslavia</td>
</tr>
<tr>
<td>IHRL</td>
<td>international human rights law</td>
</tr>
<tr>
<td>IL</td>
<td>international law</td>
</tr>
<tr>
<td>ILC</td>
<td>International Law Commission</td>
</tr>
<tr>
<td>ILO</td>
<td>International Labour Organization</td>
</tr>
<tr>
<td>MoA</td>
<td>margin of appreciation</td>
</tr>
<tr>
<td>OAS</td>
<td>Organization of American States</td>
</tr>
<tr>
<td>OHCHR</td>
<td>Office of the High Commissioner for Human Rights</td>
</tr>
<tr>
<td>SADC</td>
<td>Southern African Development Community</td>
</tr>
<tr>
<td>TB</td>
<td>UN Treaty Body</td>
</tr>
<tr>
<td>UDHR</td>
<td>Universal Declaration of Human Rights</td>
</tr>
<tr>
<td>UNDRIP</td>
<td>UN Declaration on the Rights of Indigenous Peoples</td>
</tr>
<tr>
<td>VCLT</td>
<td>Vienna Convention on the Law of Treaties</td>
</tr>
</tbody>
</table>