

Selected topics in International Human Rights Law

This academic year the course will focus on evidence, truth and power in international human rights adjudication. It will be given by Professor Marie-Benedicte Dembour who will be assisted by members of her DISSECT research team. DISSECT is a research project at the frontier of knowledge funded by the European Research Council.

Questions we will explore together in the course include:

- How is the truth of human rights violations established?
- In an international human rights case, who bears the burden of proof?
- What kind of evidence do (international) human rights courts consider to be solid?
- Who benefits the most from factual uncertainty? The alleged victim or the defendant state?
- Do the three regional -European, Inter-American and African- human rights courts apply the same evidentiary regime? If not, why not?
- Is it worth distinguishing between 'judicial truth' and 'substantive truth'?
- Can there be justice without truth?

The course will be taught through interactive methods of teaching. You will be expected to read materials in advance of each class, with the required preparation estimated to take about 3 hours of your time each week. Classes will be held online. Each session will include break-out rooms, as well as plenary discussions in which you will be invited to participate.

The assessment will consist in 3 elements as follows:

- a.) Attendance and participation: this is marked out of 3 points.
- b.) Submission of a 2,000-2,500 word text written in the form of a blog post. You choose the human rights case on which you write a case note that has an evidence and/or truth angle. This is marked out of 9 points.
- c.) Group oral presentation: You are invited to self-select your group of either 3 or 4 members. Your task will be to critically discuss an important concept/principle/norm/practice of evidence in international human rights adjudication in a presentation of 15 minutes (3 students) or 20 minutes (4 students) supported by a PowerPoint and a bibliography of at least 6 academic texts. This is marked out of 8 points (4 for the group and 4 for each individual)

Essential prior preparation:

- As general background: watch first the trailer and then the below excerpt of the film *Just the Wind*
Trailer: <https://www.youtube.com/watch?v=SbEIsireE2I>
Excerpt (police discussion scene):
<https://www.youtube.com/watch?v=dL3SIVM0IW4>
- The European Convention on Human Rights, especially Article 14
- Kristin Henrard, 'The European Court of Human Rights and the "Special" Distribution of the Burden of Proof in Racial Discrimination Cases: The Search for Fairness Continues'
- *Nachova and Others v. Bulgaria* (applications nos. 43577/98 and 43579/98), Chamber judgment (all ECHR judgments are to be found on the HUDOC database of the ECtHR: <https://hudoc.echr.coe.int/eng#%7B%22documentcollectionid2%22:%5B%22GRANDCHAMBER%22,%22CHAMBER%22%5D%7D>). Get a quick sense of the facts and the Court's assessment of the case on Article 2, and then focus on paras 147-173 (especially the last 4 paras) as well as on Judge Bonello's concurring opinion (all separate opinions are to be found at the end of the judgment).
- *Nachova and Others v. Bulgaria* (applications nos. 43577/98 and 43579/98), Grand Chamber judgment. Focus especially on paras 140-168 (and within than paras 155-159 are particularly important) as well as on the concurring opinion of Judge Bratza and the joint, partly dissenting opinion of Judges Casadevall, Hedigan, Mularoni, Fura-Sandstrom, Gyulumyan and Spielmann.

Questions to guide your preparation:

I.

1. What do you know about the Roma in Europe?
2. Who are the parties to the *Nachova* case?
3. What happened to the applicants' relatives?
4. Did the Court find in favor of the applicants?
5. What is the difference between direct and indirect discrimination?
6. Come up with a concrete example of each type of discrimination (direct and indirect).
7. Is *Nachova* a case of direct or indirect discrimination? Could it be considered to be either? Justify your answer.

II.

1. What evidentiary principles does the Court apply in respectively the Chamber and the Grand Chamber *Nachova* judgments?
2. To what extent do these two sets of principles differ? What difference does this make?
3. In his separate opinion to the Chamber judgment Judge Bonello welcomes the separation operated by the Court between the substantive and the procedural elements of Article 14. By contrast, a group of judges criticises the Court for having separated these two elements in the Grand Chamber judgement. Which line of reasoning do you favour? Why?

4. In view of the evidentiary approach adopted by the Court, would you say that the Court has worked on the assumption that *Nachova* was a direct or an indirect discrimination case?
5. Henrard invites the Court to develop its evidentiary approach further. What would the Court have done differently if it had followed her recommendations?

III.

6. What kind of materials did the applicants submit as evidence in *Nachova*? What does the Court say about them (if anything)?
7. In your view, what are the strengths and weaknesses of these materials?
8. What other evidence do you think could have been useful for the Court to consider?
9. Judge Bradza makes some remarks about various types of evidence in his concurring opinion in the Grand Chamber judgement. Do you feel he has a point?

IV.

10. How important is it for the ECtHR to have a good evidentiary regime? What does 'good' mean in this context? What would you expect the regime to be able to achieve?

If you wish to go further:

- **On the treatment of Roma by the police:**

Film by Benedek Fliegauf entitled *Just the Wind* (2012), available at a cost of EUR 2,99
<https://www.youtube.com/watch?v=eCBTLRt2Lu8>

- **On 'technical' legal evidentiary issues:**

Arnadardottir, O 'Equality and Non-discrimination under Article 14 ECHR: The Burden of Proof', (2007) *Scandinavian Studies in Law* Vol. 51 (13) 14-39.

Mackic, J 'Proving the Invisible: Addressing Evidentiary Issues in Cases of Presumed Discriminatory Abuse against Roma before the European Court of Human Rights through *V.C. v Slovakia*', in Morag Goodwin and Paul de Hert (eds) *European Roma Integration Efforts – A Snapshot* (2013, Brussels University Press) 51-75.

Varnagy, E 'Why the European Court of Human Rights Would Do Well to Start Using Stereotypes as Evidence – A Critique of the Strasbourg Approach to Anti-Roma Police Violence Cases' (2022) Available at: <https://dissect.ugent.be/why-the-european-court-of-human-rights-would-do-well-to-start-using-stereotypes-as-evidence-a-critique-of-the-strasbourg-approach-to-anti-roma-police-violence-cases/> (accessed 5 October 2022)

- **On the social significance of the ECtHR evidentiary approach:**

Dembour, M-B 'Postcolonial Denial: Why the European Court of Human Rights Finds it so Difficult to Acknowledge Racism'', in K Clarke and M Goodale (eds) *Mirrors of Justice: Law and Power in the Post-Cold War Era* (2010, Cambridge University Press) 45-66.

Rubio-Marin, R and M Moschel 'Anti-Discrimination Exceptionalism: Racist Violence before the ECtHR and the Holocaust Prism', (2015) *European Journal of International Law* Vol. 26

(4) 880-899.

Session 3

Inter-American Court of Human Rights – Forced Disappearances

Tutors: Marie-Bénédicte Dembour and Genaro Manrique

Essential prior preparation:

Read the following document, judgments and article:

- Relevant provisions of the American Convention on Human Rights
- I/A Court H.R., *Velásquez Rodríguez v. Honduras*. Merits. Judgment of July 29, 1988. Series C No. 4. Available by searching the Court's website: <https://www.corteidh.or.cr/> (switch to English and search in the contentious cases section). Pay special attention to paras 1-10, 122-139 and 140-146.
- I/A Court H.R., *Alvarado Espinoza et al. v. México*. Merits, Reparations and Costs. Judgment of November 28, 2018. Series C No. 370. Same place as above. Pay special attention to paras 1-3, 59-71 and 160-192.
- Paúl, A 'An Overview of the Inter-American Court's Evaluation of Evidence' in Y Haeck, O Ruiz-Chiriboga and C Burbano (eds) *The Inter-American Court of Human Rights: Theory and Practice, Present and Future* (2015, Intersentia) 25-50. Available at: <https://ssrn.com/abstract=2822375>.

Questions to guide your reading:

I.

1. What types of evidentiary material did the alleged victims submit in the *Velásquez Rodríguez* case?
2. Does the IACTHR reverse the burden of proof in this case? Where exactly do you (not) see that in the text of the judgment?
3. What facts does the Court find established in the case? On what basis?
4. What evidentiary principles does the Court express in the judgment?
5. Do you find the Court's reasoning regarding evidence persuasive?

II.

6. In *Alvarado Espinoza*, how does the Court approach inconsistencies in testimonies? What are the pros and cons of this approach?
7. Transposing questions 1-5 above to the *Alvarado Espinoza* case, to what extent would your answers need to be different compared to those you gave in respect to the *Velásquez Rodríguez* case?
8. Do you see an evolution in the Court's evidentiary approach between the cases of *Velásquez Rodríguez* and *Alvarado Espinoza*?
9. In which ways does the Court take an active role in the evidentiary development and assessment of the cases before it?
10. What does *sana critica* mean?

III.

11. Can you discern in the two judgments you have read manifestations of the principles of autonomy, informality and active role identified by Paúl?

12. Paúl is highly critical of the IACtHR's evidentiary approach. Make a list of the various criticisms he expresses.
13. Which of these criticisms would you tend to agree and to disagree with?

IV.

8. The Inter-American Court does not refer to the standard of 'proof beyond reasonable doubt', which by contrast is central to the ECtHR's evidentiary regime. Do you see this as a strength or as a weakness?
9. Compared to the Inter-American Court, would you imagine the ECtHR to take a more or a less proactive evidentiary approach?
10. Is there an equivalent to the concept of *sana critica* in the ECtHR's jurisprudence?
11. In his article, Paúl often compares the IACtHR's evidentiary approach to that of the ECtHR. Make a list of his implicit or explicit remarks about the European Court's approach. Assess each of them in turn.

If you wish to go further:

On one crucial element of the international human rights' evidentiary regime:

- Christopher Roberts, 'Reversing the burden of proof before human rights bodies' (2021) *The International Journal of Human Rights* Vol 25 (10), 1682-1703.

On our topic specifically:

- Bovino A 'Evidential Issues Before the Inter-American Court of Human Rights', (2005) *Sur – International Journal on Human Rights* (3) 56-79. Available at: <https://www.scielo.br/j/sur/a/nyfcLbq7D4YfzPFGfxzTTFM/?format=pdf&lang=en>
- Burgorgue-Larsen L and A Ubeda de Torres, *The Inter-American Court of Human Rights: Case Law and Commentary* (Oxford: Oxford University Press, 2011), Chapter 13 on 'Forced Disappearance' and especially pp. 312-320.
- If you understand Spanish, you may find it interesting to watch the Court's public hearing in the *Alvarado* case: <https://vimeo.com/channels/1370311/266757632>
- Even if you do not understand Spanish, you could watch some moments of the hearing listed immediately above and then go to the HUDOC website and watch the hearing of a case before the European Court of Human Rights. How different do the two hearings feel?

As legal background:

- The Inter-American Convention on Forced Disappearance of Persons and the International Convention for the Protection of All Persons from Enforced Disappearance. (Reflect upon the dates of these documents).

- For an introduction to the Inter-American Court of Human Rights, you could consult: *ABC of the Inter-American Court of Human Rights* (2019). Available at: https://www.corteidh.or.cr/sitios/libros/todos/docs/ABCCorteIDH_2019_eng.pdf

Essential reading material:

The African Charter on Human and Peoples' Rights.

Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.

(Both documents can be found online, including on the African Court's website, which we invite you to explore.)

Kennedy Owino Onyachi and Charles John Mwanini Njoka v. United Republic of Tanzania, ACtHPR, Application No. 003/2015, Judgment, 28 September 2017. Available at <https://www.african-court.org/cpmt/storage/app/uploads/public/5f5/637/595/5f5637595474d057190288.pdf>

Anudo Ochieng Anudo v. Tanzania, ACtHPR, Application No. 012/2015, Judgment, 22 March, 2018. Available at <https://www.african-court.org/cpmt/storage/app/uploads/public/5f5/646/bfc/5f5646bfc496d510939321.pdf>

Murimi, Edward Kahuthia. 'How long is (not) too long before filing an application at the African Court? Evidentiary challenges for incarcerated applicants', June 2022 blog post available at <https://dissect.ugent.be/how-long-is-not-too-long-before-filing-an-application-at-the-african-court-evidentiary-challenges-for-incarcerated-applicants/>

Wiebusch, Micha. 'African Court on Human and Peoples' Rights', iCourts Working Paper Series, No. 253, 2021. Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3907871

Questions to guide your reading

I.

1. How many African Union (AU) Member States have ratified the African Charter on Human and Peoples' Rights?
2. How many African States have ratified the Protocol that establishes the African Court?
3. Besides the African Court, which are the other two main AU human rights bodies?
4. Which countries have made the declaration in article 34(6) of the Court's Protocol allowing individuals and NGOs to file cases directly before the African Court?
5. How can individuals and NGOs from countries that have ratified the Protocol establishing the Court but have not made the article 34(6) declaration have their cases determined by the African Court?
6. Who can present evidence at the African Court?

II.

7. In the *Kennedy Owino Onyachi* case, do you think the Respondent State has a point when it objects to the African Court sitting as a first instance and/or appellate court?
8. In this case, would you say that the Court has ended up sitting as a court of facts? Justify your answer with specific examples.
9. Did the Court eventually affirm or disapprove the way domestic courts had assessed the criminal evidence against the applicants? Do you agree with the Court's approach?

10. In this case, which facts does the Court accept to be established, for lack of objection by the other party? What are the pros and cons of this way of proceeding?
11. In paragraph 91, the Applicants are reported to have submitted evidence to the effect they had never been in Tanzania before their extradition. How strong would you rate their evidence? Could it have been stronger? Does the Court accept it?
12. Was the Court ready to accept to reverse the burden of proof in respect of the allegation of *Incommunicado* detention?
13. Which standard(s) of proof has the Court required in this case?

III.

1. In the *Anudo* case, would you say that the factual issues are clearly separate from the legal issues, or do you see manifestations of the ‘mutual construction’ highlighted by Kim Lane Schippele?
2. In this case, which institutions were requested by the African Court to submit expert opinions on the subject matter of the application?
3. How did the Court deal with and/or integrate the resulting expert evidence in its reasoning?
4. How does the Court allocate the burden of proof in regard to the allegations related to the right not to be arbitrarily deprived of nationality?
5. Is its approach in this respect consistent with its pronouncements in the *Kennedy Owino Onyachi* case?
6. Would you say that the African Court acted as a court of facts in *Anudo*?

III.

7. Which conditions must be met for an application to be admissible at the African Court?
8. May any of these require evidence to be submitted and assessed?
9. What are the three issues/circumstances that Edward Murimi identifies in his blog post as presenting evidentiary challenges for applicants?
10. Do you share his views regarding the identified challenges? Why?
11. What evidentiary tools does he propose to address the said challenges? Do you agree these could be effective?

IV.

12. Identify features of the African Charter which are unique in international human rights law.
13. On the basis of what you have learnt so far, would you say the three worlds’ regional human rights courts share the same approach to the burden of proof?
14. Making the prior question wider, to what extent would you say that the three courts (do not) share a common evidentiary regime? Justify your answer.

If you wish to go further:

Centre for Human Rights, Faculty of Law, University of Pretoria (ed.), *Guide to the African human rights system: Celebrating 40 years since the adoption of the African Charter on Human and Peoples’ Rights 1981 – 2021* (Pretoria University Law Press, 2021). Available at: <https://www.pulp.up.ac.za/pulp-guides/guide-to-the-african-human-rights-system-celebrating-40-years-since-the-adoption-of-the-african-charter-on-human-and-peoples-rights-1981-2021>

Rachovitsa, Adamantia. 'On New "Judicial Animals": The Curious Case of an African Court with Material Jurisdiction of a Global Scope' (2019) 19 Human Rights Law Review, 255–289.

Viljoen, Frans. 'Understanding and Overcoming Challenges in Accessing the African Court on Human and Peoples' Rights' (2018) 67 Int'l & Comp LQ 63

For more contextual and/or critical perspectives:

Daly, Tom Gerald & Micha Wiebusch, 'The African Court on Human and Peoples' Rights: Mapping Resistance against a Young Court' (2018) 14 Int'l J L Context 294.

Sègnonna, Horace Adjolohoun. 'Jurisdictional Fiction? A Dialectical Scrutiny of the Appellate Competence of the African Court on Human and Peoples' Rights' (2019) 6 (2) Journal of Comparative Law in Africa.

Sègnonna, Horace Adjolohoun. 'A Crisis of Design and Judicial Practice? Curbing State Disengagement from the African Court on Human and Peoples' Rights' (2020) 20 Afr Hum Rts LJ 1.

Essential prior preparation:

- Watch this video: <https://parvin.forensic-architecture.org/>
- The European Convention on Human Rights, especially Article 3, Art. 5, Article 13 and Article 4 Protocol 4
- Dembour, Marie-Benedicte. *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (Oxford: Oxford University Press, 2015), Chapter 12 ‘Domestic Asylum Procedures Aside: Scrutinising Strasbourg’s ‘Scrutiny’), pp. 402-422 and 438-441.
- European Court of Human Rights, Application no. [39090/20](#), [M.A. and Z.R. against Cyprus](#), lodged on 7 September 2020, communicated on 25 April 2022.
- *M.A. and Z.R. v Cyprus*, Third Party Intervention by EuroMed Rights and KISA, the Human Rights Centre (HRC) and the European Law Institute at Ghent University, October 2022 (available on UFORA).
- Centre for Fundamental Rights at the Hertie School and Human Rights Centre of the University of Ghent, [Rule 9 Submission to the Committee of Ministers on the implementation of M.K and other v. Poland](#) (Application No [40503/17](#), [42902/17](#), [43643/17](#)).
- Council of Europe Commissioner for Human Rights, (April 2022), “Enhancing Transparency, Monitoring and Accountability” (Ch. 3), in [Pushed beyond the limits: Four areas for urgent action to end human rights violations at Europe’s borders.](#), pp. 9-13 and 33- 39.

Further reading:

- Read about the context of the *Parvin* case on the webpage of her litigators: <https://www.ecchr.eu/en/case/bringing-greek-push-backs-to-justice/>
- Special Rapporteur on the human rights of migrants, Felipe González Morales, (2021), [Report on means to address the human rights impact of pushbacks of migrants on land and at sea](#), A/HRC/47/30, p. 4.
- EuroMed Rights and KISA, (2021), [Input for the Special Rapporteur’s report on pushback practices and their impact on the human rights of migrants and refugees, with a focus on pushbacks from Cyprus to Lebanon and Turkey.](#)
- EuroMed Rights, (2021), “[Pushbacks and expulsions from Cyprus and Lebanon: The risks of \(chain\) refoulement to Syria](#),” chapter 6, in *Return Mania: Mapping policies and practices in the EuroMed region*.
- Helsinki Foundation for Human Rights, (2022), [The Lawless Zone: Polish-Belarusian Border Monitoring.](#)
- Marie-Benedicte Dembour 2021. “The Migrant Case Law of the European Court of Human Rights: Critique and Way Forward.” In *Migration and the European Convention on Human Rights*, edited by Başak Çalı, Ledi Bianku and Iulia Motoc. Oxford: Oxford University Press, pp. 19–40.

Questions to guide your preparations:

Dembour’s chapter on the M.S.S. case:

- What happened to the applicant in this case? What did the Court decide?
- Was the evidence submitted to the Court an important factor in persuading the majority of the bench to take the decisions it did?
- Where did the evidence come from? Of which type was it? Who submitted it?
- Marie's book argues that the ECtHR has been resistant to protect the human rights of migrants. What strategies could litigators use to get the Court to find violations more often? What role can/should evidence play in this respect?

Parvin's video and Art. 3, 5, 13 and Art. 4 Prot.4:

- What does it take to produce evidence for pushback litigation? What obstacles need to be overcome? Who is taking what risks? What costs are involved?
- How as a litigator would you connect Art.3, 4, 13 and Art.4 Prot.4 to Parvin's experiences in the video?

Third Party Intervention, M.A. and Z.R. against Cyprus:

- How has the ECtHR in the past considered the burden of proof in pushback cases?
- What do human rights organizations have to pay attention to when producing and presenting knowledge that seeks to find its way into judgments?

Rule 9 Submission, MK and others vs. Poland:

- How are ECtHR judgments, domestic laws and local practices connected to one another?
- What needs to happen with evidence before there is a change in domestic law and/or local practice?

Council of Europe Commissioner for Human Rights:

- Why do you think the author chose to make these recommendations, and not others?
- How would you revise the chapter on transparency, monitoring and accountability in the light of what you saw in Parvin's video?

Essential prior preparation:

A. READING

- James S. Anaya, Claudio Grossmann, “[The Case of Awas Tingni v. Nicaragua: A Step in the International Law of Indigenous Peoples](#),” 19 Ariz. J. Int'l & Comp. L. 1; skim the article to get an overview of the case
- [Hearing transcript](#) of the *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*; unofficial translation into English; please focus on the two Indigenous witness testimonies including questions to the witnesses: Jaime Castillo Felipe (pages 131=start of document -142) and Charlie McLean (pages 142 - 156).
- [Judgement](#) of the *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (2001); please focus on summaries of Indigenous testimonies at §83 and mentions of collective property rights.

B. EXERCISES

Next to the essential reading please make sure you prepare the below exercises 1 and 2 and think about question 3. During our session you will be asked to discuss them in break out rooms and then present them to the entire class.

1. In the hearing transcript - identify **two instances** where the state attorney, the IACtHR's judges or president and the Indigenous witnesses Castillo Felipe and Charlie McLean **misunderstand** each other. Which topics seems to generate talk at cross-purposes?
2. Which aspects of Indigenous community members' oral testimonies did the court include into the judgement? Look at the summaries of testimonies, at §83. Select **one indigenous witness** and systematically **compare** the hearing and the judgment to identify how their statements are used in the judgement.
3. Where do you see **potential** in looking at the hearing transcript as opposed to mainly looking at the case judgement? How are the documents different? Which perspectives and situations/ phases in the litigation do they portray? Has your close look at the hearing provided you with a different lens for reading the judgement? If so, which layers have become visible which were not before?

Further reading:

- On his role and observations as an expert witness in the *Awas Tingni* case: Charles Hale, “[Activist Research vs. Cultural Critique: Indigenous Land Rights and the Contradictions of Politically Engaged Anthropology](#),” *Cultural Anthropology*, Vol. 21, No. 1 (Feb., 2006), pp. 96-120.
- A detailed exploration of collective rights in the *Awas Tingni* case: Mariana Monteiro de Matos, *Indigenous Land Rights in the Inter-American System Substantive and Procedural Law* (Boston: Brill, 2020), [Chapter 3: First Wave: Individual Indigenous Persons as Holders of Land Rights, 2001– 2006](#).

- Listen to [audio of the public hearing](#) of the *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (in Spanish)
- On the implementation of IACtHR indigenous case judgements: Joel E. Correia Ph.D., "[Adjudication and Its Aftereffects in Three Inter-American Court Cases Brought against Paraguay: Indigenous Land Rights](#)", *Erasmus Law Review*, 1, (2018):43-56
- On Indigenous secrecy challenging the production of legal evidence, Nina Kolowratnik, "[Mapping Secrecy: Indigenous Truth in United States Courts](#)," *ARQ* (Santiago), Vol. 110, (April 2022):62-71.

Additional questions to guide your preparations:

Article of James S. Anaya and Claudio Grossmann

1. How long did the negotiation phase of the Mayagna community with the government last before they filed a petition to the Inter American Commission on Human Rights and what were the main wins and setbacks for the community? What types of evidence were produced during that phase by the Mayagna community and its collaborators?
2. What was the government's position regarding ancestral land rights of the Mayagna? What did/ would the community have had to prove to counter that position?
3. On what basis is collective property introduced by the petitioners' team? How is collective property defined and how does this position on challenge Western notions of property?
4. Explain what is referred to as an "evolutionary method of interpretation" and how this method of interpretation differs from the ECtHR approach?

Hearing transcript of the *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*

5. Which roles do Indigenous community members play in the hearing?
6. Is translation provided to all Indigenous community members on the witness stand? What can the challenges of translation in a court hearing be?
7. How important do you think evidentiary mappings are in in this case? What is the government's interrogation strategy regarding the questioning of authenticity of the map material?
8. Why is land titling of such importance to the Mayagna community? What might be the downsides of land titling for indigenous communities?
9. What is the Mayagna position on overlapping territories and shared use? Does the definition of collective property include simultaneous use of territory by multiple tribes and practices of nomadism?

Judgement of the *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*

10. What definition does the court give of Indigenous concept of property? See the passage in the judgement on collective property §142-155.

Session 7

The ECtHR – and human rights adjudication more generally

Tutors: Marie-Benedicte Dembour and Anne-Katrin Speck

Essential preparation:

- Watch [this film on the European Court of Human Rights](#) (14:29 mins)
- Read Michael O'Boyle, '[Proof: European Court of Human Rights \(ECtHR\)](#)', *Max Planck Encyclopaedia of International Procedural Law* (Oxford University Press 2018), available for free when you are logged into the UGent wifi

Questions to guide your preparation:

On the ECtHR film

1. Note three points you have learnt from watching the film, three points you approve and three points you are not sure about.
2. How would you describe the reach of the European Convention?
3. How controversial are human rights decisions?
4. How different or similar are inter-state cases compared to individual cases?
5. What does it take in practice for an individual to secure a finding of violation by the ECtHR?
6. What attention does the film give to evidence?
7. How important do you think it is for a human rights law student to understand procedural matters?

On Michael O'Boyle's text

1. What are the most important concepts pertaining to the ECtHR's regime?
2. What are the most important principles pertaining to the ECtHR's regime?
3. Does the regime contain fast rules? If so, which are these?
4. To what extent do our course on the one hand and O'Boyle's text on the other mirror each other?
5. What does the text highlight which the course has not yet touched upon?
6. Are there elements the course has highlighted which the text does not allude to?

On developing an institutional comparative sensibility between the three regional systems of human rights protection

1. What features of the ECtHR's evidentiary regime are also found in the Inter-American and African systems of human rights protection?
2. What features of the ECtHR's evidentiary regime are peculiar to the European system of human rights protection?

On developing a holistic perspective about evidence in international human rights adjudication

1. To what extent would you say the course has been addressing the questions which it set itself the task to explore?

As a reminder, these questions are phrased as follows:

- How is the truth of human rights violations established?
- In an international human rights case, who bears the burden of proof?

- What kind of evidence do (international) human rights courts consider to be solid?
 - Who benefits the most from factual uncertainty? The alleged victim or the defendant state?
 - Do the three regional -European, Inter-American and African- human rights courts apply the same evidentiary regime? If not, why not?
 - Is it worth distinguishing between ‘judicial truth’ and ‘substantive truth’?
 - Can there be justice without truth?
2. Would you now understand or approach the questions above in a slightly different way than you would have done before starting the course?
 3. Do you feel the list above would gain from including more questions? If so, which?

Session 8

Evidentiary Considerations- New Technologies, Digital Open-Source Evidence and Human Rights Accountability

Tutors: Prof Marie-Benedicte Dembour and Ruwadzano Makumbe

Essential prior preparation:

-As general background, please listen to the podcast on Digital Witness:

- Podcast: <https://anchor.fm/rightscast/episodes/Digital-Witness-Using-Open-Source-Info-for-Human-Rights-Investigations-with-Alexa-Koenig-and-Sam-Dubberley-eb4171/a-a1jkfje>

-Then go on to read the following materials:

- Alexa Koenig and Lindsay Freeman, 'Strengthening Atrocity Cases with Digital Open Source Investigations.' Available [here](#).
- Berkeley Protocol on Digital Open Source Investigations A Practical Guide on the Effective Use of Digital Open Source Information in Investigating Violations of International Criminal, Human Rights and Humanitarian Law. Available [here](#).
- Ruwadzano Makumbe, 'The Use of Digital Open-Source Information as Evidence in Human Rights Adjudication: A Reality-Check.' Available [here](#).

Questions to guide your preparation:

I.

8. What do you know about the documentation of human rights violations using new technologies?
9. Can you give one example of a recent violation that was documented using a camera-enabled smart phone?
10. Do you presume that when such evidence is collected there is clear intention on how it will be used?
11. In what ways can the evidence be used?
12. In the event that (your example in 2) is brought before the courts, which two elements relating to evidence would you consider to be important to prove its authenticity?
13. Identify two challenges that may arise when one wants to use the evidence for the purpose you have identified.

II.

14. What two evidentiary principles are raised in the Berkeley Protocol?
15. To what extent do these principles correspond with evidentiary principles of admissibility, relevance and probative value of evidence?
16. How would you determine the weight of the evidence if the standards set in the Berkeley Protocols are to be applied to the recent violation you gave in (2)?

III.

17. With digital open source evidence, is it possible for the truth to be attained?
18. How can the truth be attained? Come up with one example on how you would use digital open source evidence to establish certainty of what happened in a given circumstance.

19. In your view, what are the inherent challenges of establishing truth or certainty using digital open source evidence?

IV.

20. How important is it for courts to have evidentiary guidelines that are cognizant of the new evidentiary issues presented by digital open source evidence?
21. What should the guidelines include and why?

If you wish to go further, you may like to consult

- Witness, ‘Centering the “source” in open source investigation.’ Available [here](#).
- Dearbhla Minogue and Ruwadzano Makumbe, ‘Digital Accountability Symposium: Harnessing User-Generated Content in Accountability Efforts for International Law Violations in Yemen.’ Available [here](#).
- Federica D’Alessandra and Kirsty Sutherland, ‘The Promise and Challenges of New Actors and New Technologies in International Justice.’ *Journal of International Criminal Justice*, Volume 19, Issue 1, March 2021, Pages 9–34 Available [here](#).
- Yvonne McDermott, Alexa Koenig and Daragh Murray, ‘Open Source Information’s Blind Spot: Human and Machine Bias in International Criminal Investigations.’ *Journal of International Criminal Justice*, Volume 19, Issue 1, March 2021, Pages 85–105. Available [here](#).
- Leiden Guidelines on the Use of Digitally Derived Evidence, 2022.

Session 9

Evidence in Climate Litigation before the European Court of Human Rights and the Inter-American Court of Human Rights

Tutors: Marie-Bénédicte Dembour and Nele Schuldt

Essential prior preparation:

- Revise your notes from Session 8 and keep in mind all that you have learnt this term
- Joana Setzer and Catherine Higham: 'Global trends in climate change litigation: 2022 snapshot' (2022): <https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2022/08/Global-trends-in-climate-change-litigation-2022-snapshot.pdf>
 - Part I (pgs. 9-17)
 - Part II The role of human rights: understanding the complexity (pgs. 33-38)
- Juan Auz, 'Human Rights-Based Climate Litigation: A Latin American Cartography' (2022): https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4037490
- Nele Schuldt, *Pavlov v Russia*: Welcoming the Court's Proactive shift in its handling of environmental complaints, including their evidentiary challenges (2022): <https://strasbourgobservers.com/2022/11/15/pavlov-v-russia-welcoming-the-courts-proactive-shift-in-its-handling-of-environmental-complaints-including-their-evidentiary-challenges/>
- Rupert Stuart-Smith et al: 'Filling the evidentiary gap in climate litigation' (2021): <https://www.nature.com/articles/s41558-021-01086-7.pdf?origin=ppub>

Further (optional) reading:

Case law:

- European Court of Human Rights: *Tatar c Roumanie* (2009) (French judgment) <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-90909%22%5D%7D>
- European Court of Human Rights: *Pavlov v Russia* (2022): <https://hudoc.echr.coe.int/fre#%7B%22tabview%22:%5B%22document%22%5D%2C%22itemid%22:%5B%22001-219640%22%5D%7D>
- Inter-American Court of Human Rights: *Lhaka Honhat (Our Land) Association v Argentina* (2020) https://www.corteidh.or.cr/docs/casos/articulos/seriec_400_ing.pdf
- Inter-American Court of Human Rights: *Advisory Opinion OC-23/17 of November 15, 2017 Requested by the Republic of Colombia: The Environment and Human Rights* (2017): https://www.corteidh.or.cr/docs/opiniones/seriea_23_ing.pdf
- ECLI:NL:HR:2019:2007, URGENDA judgment before the Dutch Supreme Court: <https://www.urgenda.nl/wp-content/uploads/ENG-Dutch-Supreme-Court-Urgenda-v-Netherlands-20-12-2019.pdf>

(Quasi-) Legal Documents:

- Resolution No. 3/2021 Climate Emergency: Scope of Inter-American Human Rights Obligations (Adopted by the IACHR on December 31st, 2021): https://www.oas.org/en/iachr/decisions/pdf/2021/resolucion_3-21_ENG.pdf
- Paris Agreement 2015: https://unfccc.int/sites/default/files/english_paris_agreement.pdf
- CDDH-ENV (2022) R4Addendum 20/04/2022 Council of Europe Draft Recommendation on human rights and the protection of the environment:

<https://rm.coe.int/draft-recommendation-on-human-rights-and-the-protection-of-the-environ/1680a63eb8>

Literature:

- Jacqueline Peel and Harry Osofsky, 'Climate Change Litigation' (2020): <https://www.annualreviews.org/doi/pdf/10.1146/annurev-lawsocsci-022420-122936>
- Helen Keller & Corina Heri: The Future is Now: Climate Cases before the ECtHR (2022): <https://www.tandfonline.com/doi/full/10.1080/18918131.2022.2064074>
- Riccardo Luporini: 'The Role of human rights bodies in climate litigation' (2021): <https://cadmus.eui.eu/handle/1814/72765>
- Otto et al, 'Causality and the fate of climate litigation: The Role of the social Superstructure Narrative (2022): <https://spiral.imperial.ac.uk/handle/10044/1/97898>
- Lloyd et al, 'Climate scientists set the bar of proof too high' (2021): <https://link.springer.com/article/10.1007/s10584-021-03061-9>
- Monica Feria-Tinta, Simon C Milnes: 'The rise of Environmental Law in International Dispute Resolution: The Inter-American Court of Human Rights Issues a Landmark Advisory Opinion on the Environment and Human Rights' (2018): <https://academic.oup.com/yielaw/article-abstract/doi/10.1093/yiel/yvy004/5126874?login=false>

Guiding Questions:

General questions

1. How would you define 'human rights-based climate litigation'?
2. In which region of the world have most climate litigation cases been filed? Do you see a discrepancy given the climate vulnerability of the Global South and the number of cases filed in these regions?
3. Compare the Inter-American Human Rights System with the European Human Rights System: what major difference(s) do you see regarding the right to a healthy environment, including the approaches taken by the respective Courts to evidence?
4. Which treaties and international obligations are drawn upon in human rights-based climate litigation?

Inter-American specific questions

5. Why was the Inter American Court of Human Rights' Advisory Opinion on the relationship between human rights and the environment of 2017 a milestone in human rights-based climate litigation?
6. Which Inter-American Court of Human Rights' case considerably expanded the scope of the right to a healthy environment?
7. Is the right to a healthy environment a self-standing justiciable right under the ACHR? And if so, under which right does it fall?
8. Which threshold of harm to the environment must be met to fall within the scope of Convention violations? How does this link to evidence?

European specific questions

9. Briefly summarize which issues are raised in the pending climate cases before the Strasbourg Court.
10. Given that the European Convention on Human Rights does not enshrine the right to a healthy environment, which rights could be relied upon in climate litigation?

11. What did the separate opinions in *Pavlov v Russia* argue and how does this pave the way for future climate litigation before the European Court of Human Rights?
12. Discuss whether a European Protocol on Human rights and the Environment may be useful for future human-rights based climate litigation

Evidentiary issues

13. What could fall under the scope of the European Court of Human Rights' "free assessment of evidence"?
14. Based on your previous knowledge of the Inter-American Court of Human Rights' system: how would you envision the Inter-American Court of Human Rights' approach towards evidence in climate litigation to be different when comparing it to the European Court of Human Rights?
15. Summarize Stuart et al.'s argument on scientific evidence in climate litigation: What could litigators and courts do better to rely on relevant scientific evidence?

Essential preparation related to the course overall

Please think about and write down the following lists in advance of our session:

- 3 things you have learnt which you had never considered before;
- 3 things you kind of knew but now understand much better;
- 3 pairs/trios of things which you tended to think of as separate elements but now see as deeply inter-connected;
- 3 ways in which the course has fulfilled your expectations;
- 3 ways in which the course has gone beyond your expectations;
- What you have found most interesting about the course;
- Something you would have liked the course to go more in-depth in.