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Thomas Buergenthal and the Americas: A Comprehensive Contribution to Human Rights Protection

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Thomas Buergenthal and the Americas: A Comprehensive Contribution to Human Rights Protection

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Abstract

While Thomas Buergenthal's contribution to the field of human rights is certainly of global importance, it had a particular impact in the Americas, especially during the crucial initial phase of the Inter-American Human Rights System (IAHRS) with the Court as its core institution on which Buergenthal served as one of the first group of judges from 1979 to 1991. In a nutshell, Buergenthal's contribution may be characterized as a comprehensive and decisive effort to the regional protection of human rights in a threefold way: prudent proactivity (A.), active promotion and optimization (B.), interaction and critical follow-up (C.). At the same time, Buergenthal pursued a strategic-progressive approach which offers valuable lessons for the protection of human rights going well beyond the Americas. Buergenthal's contribution to human rights and to international law in general cannot be overestimated. His principled and at the same time prudent strategic approach will be greatly missed, especially in our challenging times where international law is under attack at various fronts.

A. By Way of Introduction: Prudent Proactivity

Against the background of his tragic past, touchingly recounted in his book *A Lucky Child*,[1] Buergenthal saw his destiny in contributing to the protection of human rights.[2] His proactive involvement in the establishment of a human rights system in the Americas,[3] which led him to advise the establishment of the Inter-American Court of Human Rights (IACtHR) in 1979 and become part of the first group of judges there the same year and a member of the Truth Commission for El Salvador (TCES) in 1992,[4] can be traced back to a paper published in

1 T. Buergenthal, *A Lucky Child*: *A Memoir of Surviving Auschwitz as a Young Boy* (2015) [Buergenthal, *Lucky Child*]; see also the long interview with C. Kreß & D. Stahl, 'Lebensgeschichtliches Interview mit Thomas Buergenthal' (4 March 2015), available at https://www.geschichte-menschenrechte.de/personen/thomas-buergenthal (last visited 14 March 2024) [Kreß & Stahl, 'Interview with Thomas Buergenthal'].

2 Buergenthal, *Lucky Child*, *supra* note 1, 215-216: "[…] my camp experience has certainly shaped my later professional life. Unlike most of my law-school classmates, I was never much interested in the traditional practice of law, that is, in doing what lawyers usually do […]. Instead, I was drawn to international law, and to international human rights law in particular, because I believed, somewhat naively at first, that these areas of the law, if developed and strengthened, could spare future generations the type of terrible human tragedies that Nazi Germany had visited on the world. Over time I also gradually concluded that I had an *obligation* to devote my professional activities to the international *protection of human rights*. This *sense of obligation* had its source in the belief, which grew stronger as the years passed that those of us who survived the Holocaust owe it to those who perished in it to try to improve, each in our own way, the lives of others. To me that meant working towards a world in which the rights and dignity of human beings everywhere would be protected. I also convinced myself that international human rights was the branch of the law to which I, as a lawyer and because of my Holocaust experience, would be able to make the *most significant contribution*. After all, I knew what it meant to be a victim of human rights violations." (emphasis added).

3 While Buergenthal did not in any official position participate in the drafting of the ACHR, he closely followed the process and had some direct influence, cf. T. Buergenthal, 'Remembering the Early Years of the Inter-American Court of Human Rights', 37 *New York University Journal of International Law and Politics* (2005) 2, 259, 261, fn. 2: "I had by then written a number of articles on the European and inter-American systems and *had had some input* in the drafting of the American Convention" [Buergenthal, 'Remembering'] and Kreß & Stahl, 'Interview with Thomas Buergenthal', *supra* note 1, 15: "I followed the drafting […]. And so I suggested some revisions, which found their way into the American Convention, see Article 8(1) of the Convention."

4 See United Nations, 'Secretary-General Appoints 3 Member Commission on Truth to Investigate Acts of Violence in El Salvador' (10 December 1991), available at https://digitallibrary.un.org/record/1311672?ln=en (last visited 14 March 2024).

the *Buffalo Law Review* in 1971.[5] In this paper, Buergenthal, considering the regional political context at the time, expressed concerns about a too broad and ambitious regional human rights instrument, arguably even broader than that of the *European Convention on Human Rights* (ECHR).[6] Buergenthal's practical concern was to ensure that the *American Convention of Human Rights* (ACHR) obtained the necessary number of ratifications to quickly enter into force given the widespread authoritarianism in the region.[7]

Buergenthal's skepticism regarding the feasibility of the ACHR project points to two important aspects of his thinking that deserve to be highlighted: On the one hand, Buergenthal has always been a realist in being fully aware of the divergence between a normative aspiration and the political realities. He saw this divergence with regard to a political environment which may produce unintended consequences detrimental to a certain regulatory goal, especially one striving for a better human rights protection. While Buergenthal's worst fears did not materialize since the ACHR eventually entered into force, his cautious and humble approach was certainly prudent given that there is always a risk of rejection of an overambitious project whose normative overexpectations may cause skeptical political forces to increase their pressure and resistance.

On the other hand, Buergenthal's political acumen and practical sense proved to be valuable qualities in the field of international law, especially if a

5 T. Buergenthal, 'The American Convention on Human Rights: Illusions and Hopes', 21 *Buffalo Law Review* (1971) 1, 121-136 [Buergenthal, 'American Convention'].

6 *Ibid.*, 123: "The American Convention on Human Rights guarantees 23 broad categories of rights and freedoms. By contrast, the European Convention of Human Rights, as originally adopted proclaimed merely 13 rights." Comparing the American and European systems and advocating a regional approach see T. Buergenthal, 'The American and European Conventions on Human Rights: Similarities and Differences', 30 *American University Law Review* (1980) 1, 155, 155 [Buergenthal, 'American and European Conventions'].

7 Buergenthal, 'American Convention', *supra* note 5, 124: "But the very fact that such an extensive catalog of rights is needed, suggests that it was *most unwise* to include all of them in the Convention. Elementary common sense should have told the proponents of the American Convention that the more burdensome the obligations imposed by the treaty, the less likely it becomes that eleven American states will be willing or able in the foreseeable future to ratify that instrument." (emphasis added), and p. 122: "Of the eleven ratifications that are necessary to bring this instrument into force, only one – by Costa Rica – has been deposited thus far. Political realities being what they are in the Western Hemisphere, it would probably take a long time to obtain eleven ratifications for any human rights convention. It will take much more time in the case of the American Convention on Human Rights, for it seems to have been drafted in a form calculated to discourage its ratification."

new international instrument is to be created.[8] He expressly lamented the lack of political skill on the part of the promoters of the ACHR in setting overly high demands:

> "[…] many of the true proponents of human rights attending the Conference succumbed to the intoxicating effect of the dream world created by their own rhetoric and urged the inclusion of more and more rights, while the opponents of human rights must have been gloating at their lack of political sophistication."[9]

However, one should not misread Buergenthal's realism as a complete surrender to *Realpolitik*.[10] In fact, Buergenthal always aimed for a comprehensive human rights system for the Americas, guided by a strategic-progressive way of thinking and one which was highly perceptive to the change of political realities. While he was more cautious during the drafting of the ACHR and the first years of the Court given the authoritarian political landscape, he became more forthcoming and proactive once the political climate started to change. In that sense, the reduction of the ACHR project to a kind of minimum standard in the form of basic political and civil rights was only the first step, the starting point so to say, of a long road of human rights expansion reaching out to other, more controversial rights:

> "One obvious approach is to limit the number of rights to be guaranteed to those that are most basic and to avoid being too innovative by introducing juridical conceptions that have not found

8 I have already highlighted this with regard to the International Criminal Court in K. Ambos, 'Interests of Justice? The ICC Urgently Needs Reforms' (11 June 2019), EJIL: Talk, available at https://www.ejiltalk.org/interests-of-justice-the-icc-urgently-needs-reforms/ (last visited 14 March 2024) [Ambos, 'Interests of Justice?'].

9 Buergenthal, 'American Convention', *supra* note 5, 125-6. Providing alternative hypotheses regarding the difference between the AHRC and the EHRC, namely, that the drafters of the EHRC were more realistic or that the inhabitants of the American Continents needed international protection for more rights (*ibid*., 123).

10 T. Buergenthal, 'The Human Rights Revolution', 23 *St. Mary's Law Journal* (1991) 1, 3-10, *passim* (arguing in favor of a progressive approach, specifically advocating for the internationalization of human rights) [Buergenthal, 'HR Revolution']. See also *ibid*., 10, where he criticizes an approach solely based on political realism: "That [human rights] revolution is proving ever more convincingly that so-called political realism, which discounts all but military and economic power, has no monopoly on political wisdom nor is it all that realistic."

> even theoretical acceptance among the majority of states in the particular region. A regional convention for regions facing problems similar to those found in Latin America, for example, should initially merely recognize the right to juridical personality, the right to life, the right not to be tortured, freedom from *ex post facto* laws, the right to a fair trial, the right not to be deprived of one's liberty arbitrarily, freedom from slavery, freedom of speech, conscience and religion. It should contain a sweeping nondiscrimination clause of the type found in the American Convention as well as soundly drawn reservation and derogation clauses. […] Once such a rudimentary human rights charter has been accepted and tied to an enforcement machinery which individuals may effectively invoke – and that obviously should be one indispensable prerequisite of any regional system for the protection of human rights – it will become much easier as time goes on to engraft additional rights onto the original instrument.
>
> I would be the first to advocate more advanced and comprehensive conventions […] As long as present conditions exist, we must resist the temptation to build castles in the sky. Instead, we should concentrate our efforts on establishing either universal or regional systems for the protection of human rights capable of saving human lives, emptying the concentration camps, and removing the torture chambers and the sadists from jails, from police stations and from military interrogation centers. That, after all, is still the first and most important item on the human rights agenda."[11]

Buergenthal was fully aware of the fragility and uncertainty of a human rights mechanism, even a basic one, at the time. Thus, he took a pragmatic, a kind of 'better something than nothing' approach: "And even if that should prove to be a much slower process than one might wish for, it is plainly better to have some protection rather than none at all." [12]

I note in passing that Buergenthal himself used to joke about his ability to anticipate certain events:

> "During one of many periods of high tension in the Middle East, his mother called from Italy to ask if he thought that there would be a

11 Buergenthal, 'American Convention', *supra* note 5, 135-136.
12 *Ibid.*, 136.

war. He assured her that it would not happen this time. His mother then told all her friends that "her son, the international lawyer," said not to worry. Two days later a full scale war broke out."[13]

B. Inter-American Court of Human Rights: Active Promotion and Optimization

I. Appointment and Beginning

Perhaps the unusual luck that accompanied Buergenthal, according to his own judgment, in his life could have also contributed to paving the path of becoming a judge at the IACtHR in 1979. This at least seems to follow from the somewhat anecdotal story preceding the appointment to the position. Buergenthal was an US national but the US, not being a State party to the ACHR, could not propose him as a candidate. Buergenthal, regularly noted this circumstance – and perhaps with some frustration – in his seminar on international human rights law at the University of Texas at Austin. He also noted that any State party could nominate US citizens but never thought that this would ever happen in his case. As it turned out, he "could not have been more wrong": All of a sudden Buergenthal received an unexpected phone call from the Costa Rican ambassador – which he initially took as a joke from one of his students – where he was informed that Costa Rica would nominate him.[14]

Being a pioneer Judge at the IACtHR, Buergenthal had to face most basic challenges, well-known from the initial stages of such institutions but perhaps more extreme in the Caribbean-like informality of the Americas.[15] After a

13 Cf. J. M. Pasqualucci, 'Thomas Buergenthal: Holocaust Survivor to Human Rights Advocate', 18 *Human Rights Quarterly* (1996) 4, 877, 883 (quoting Buergenthal, 'Address at George Washington University Law School to a Human Rights Class' (22 September 1995)) [Pasqualucci, 'Buergenthal: Holocaust Survivor'].

14 Buergenthal, 'Remembering', *supra* note 3, 260: "I was teaching at the University of Texas Law School in Austin at the time. One of the courses I taught was a seminar on international human rights law in which I also dealt with the inter-American human rights system and would regularly point out that, since the United States had not ratified the Convention, the U.S. would not be able to nominate candidates for the Court. Although I would explain that U.S. citizens could nevertheless be nominated by any other State that had ratified the Convention, I seriously doubted that this would ever happen and never missed a chance to say so. As it turned out, I could not have been more wrong."

15 *Ibid.*, 259: "In the Americas of that time, the Cold War permitted the military regimes and civilian dictators to torture and disappear anyone who they labeled as subversive.

pompous inauguration by Costa Rica as the host country the Judges faced the "sad reality" that the government has not even provided for office space:

> "As a result, we held our first working session in the bathhouse of the Costa Rican bar association. Here the voices of children swimming and jumping into the association's pool often drowned out our early drafting efforts, hardly an auspicious beginning for those of us who thought of ourselves as modern-day John Marshalls."[16]

Apart from that, South America was well in the hands authoritarian regimes, if not outright military dictatorships, which all, despite not being State parties to the ACHR, "had a vote in deciding on the contents of our Statute and our budget".[17]

Often, too, the mere public discussion of human rights could land a person in jail or worse. This was the political climate in which the Inter-American Court opened shop, so to speak. But apart from obstacles to human rights inherent in the political climate, we also faced many practical administrative challenges, for we started at the very beginning. Statutes, rules of procedure, and headquarters agreements had to be negotiated and drafted. Internal judicial procedures had to be promulgated. Personnel had to be hired. Even judicial robes had to be purchased. We did all this and more without a budget and with judges serving only part-time, none of whom had prior judicial experience."

16 *Ibid.*, 261.

17 *Ibid.*, 262: "In 1979, most of South America-including Brazil, Argentina, Paraguay, Bolivia, Chile, and Uruguay-was either in the hands of military regimes or controlled by them. With the exception of democratic Costa Rica, the situation in Central America was not much better, nor in neighboring Panama, Haiti, or the Dominican Republic. Mexico's then so called "democracy" was also not favorably disposed to human rights or international human rights institutions. Yet, all of these countries had a vote in deciding on the contents of our Statute and our budget, despite the fact they had not even ratified the Convention."

II. The Court's Case Law

1. Advisory Opinions

In terms of the Court's case law, the first five years were dominated by (only) four advisory opinions[18] without any decision in contentious cases.[19] Yet, despite their non-binding character, these advisory opinions had an important impact in the region and thus proved to be an early indication of the Court's (future) effectiveness. For instance, an advisory opinion of 1983 regarding Guatemala led to the suspension of the death penalty in that country.[20] This was highly remarkable given that Pope John Paul II did not achieve this result a year earlier during a visit to Central America. Thus this impact was, in Buergenthal's own words, "quite a morale booster for the Court".[21] Another advisory opinion of 1985,[22] related to the Costa Rican *Schmidt Case* – where the IACtHR affirmed that a Costa Rican law requiring a compulsory membership of journalists in an association to practice their profession violated the freedom of expression –

18 See American Convention on Human Rights, 22 November 1969, Art. 64 [ACHR]. Up to now (March 2024) the Court delivered 29 advisory opinions, see here https://www.corteidh.or.cr/opiniones_consultivas.cfm?lang=en (last visited 14 March 2024). The ECtHR can only issue advisory opinions since 1 August 2018 pursuant to the entry into force of Protocol 16 to the ECHR, cf. https://www.echr.coe.int/advisory-opinions (last visited 14 March 2024).

19 T. Buergenthal, 'The Advisory Practice of the Inter-American Human Rights Court', 79 *The American Journal of International Law* (1985) 1, 1, 2: "Although the Court's contentious jurisdiction has been resorted to in only one case in the first 5 years of its existence, it has in that same period rendered four advisory opinions." The contentious cases of the IACtHR are listed here: https://www.corteidh.or.cr/casos_sentencias.cfm?lang=en (last visited 14 March 2024) [Buergenthal, 'The Advisory Practice'].

20 See *Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights*), Advisory Opinion OC-3/83 of 8 September 1983, IACtHR Series A, No. 3; see in this regard Buergenthal, 'Remembering', *supra* note 3, 266.

21 *Ibid.*, 266: "A year earlier, Pope John Paul II on a visit to Central America had appealed, without success, to the Guatemalan authorities to stop the executions. And we had succeeded with a mere advisory opinion. It was quite a morale booster for the Court."

22 This opinion had been requested by Costa Rica itself after its President had been challenged on it at a meeting of the Inter-American Press Society in Miami, held a few months after the pronouncement of the IAComHR. First, the IAComHR did not establish a violation and did not refer the case to the Court within the requisite period (3 months), nor did Costa Rica nor could the complainant (Schmidt) do so. See Buergenthal, 'Remembering', *supra* note 3, 268.

strengthened this right well beyond Costa Rica[23] and proved to be a standard setter regarding freedom of expression in the IAHRS.[24] In addition, this opinion enhanced the autonomy of the Court *vis-a-vis* the Inter-American Commission on Human Rights (IAComHR) for it allowed it to adjudicate a case not referred to by the Commission[25] thus revealing its questionably non referral practice.[26]

23 *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights)*, Advisory Opinion OC-5/85 of 13 November 1985, IACtHR, Series A, No. 5, para. 25 [*Compulsory Membership Case*]: "matter of special importance to the hemisphere because several states have adopted laws similar to that of Costa Rica".

24 T. Causanilhas & S. Legale, 'O Caso Schmidt, a Liberdade de Expressão e a Rivalidade Entre a Comissão e Corte Interamericana de Direitos Humanos nos Anos 1980', 1 *Revista de Direito Internacional e Direitos Humanos da UFRJ* (2018) 1 (without page numbers), quoting other cases in fn 29 [Causanilhas & Legale, 'O Caso Schmidt']; see also M. Silva Abott, 'El Incierto Futuro de la Libertad de Expresión en el Sistema Interamericano de Derechos Humanos', 42 *Revista Chilena de Derecho* (2015) 3, 1063 (1070-1071.); see also S. Cantón, 'El Legado Democrático de la OC-5/85', in Comisión Interamericana de Derechos Humanos (ed.), *Libertad de Expresión: A 30 Años de la Opinión Consultiva Sobre la Colegiación Obligatoria de Periodistas*, 21, 23: "El camino iniciado por la Corte permitió que con posterioridad a la OC-5/85, en otras tres ocasiones, la CIDH haya tenido la oportunidad de resaltar la importancia del derecho a la libertad de expresión: el Informe sobre Desacato, la creación de la Relatoría Especial de Libertad de Expresión y la Declaración de Principios de Libertad de Expresión. Estas cuatro instancias de defensa, […] configuran los pilares que sostienen una red de defensa hemisférica, que a lo largo de las décadas ha contribuido significativamente al fortalecimiento de nuestras democracias." ("The path initiated by the Court allowed the Inter-American Commission for Human Rights to highlight the importance of the right to freedom of expression on three other occasions after OC-5/85: the Report on Contempt, the creation of the Office of the Special Rapporteur for Freedom of Expression, and the Declaration of Principles on Freedom of Expression. These four instances of defense […] form the pillars that support a hemispheric defense network, which over the decades has contributed significantly to the strengthening of our democracies."). See also *Álvarez Ramos v. Venezuela*, Judgment of 30 August 2019, IACtHR, Series C, No. 380, para. 94.

25 See *supra* note 22.

26 The Court quite explicitly criticized the Commission: "Although the Convention does not specify under what circumstances a case should be referred to the Court by the Commission, it is implicit in the functions that the Convention assigns to the Commission and to the Court that certain cases should be referred by the former to the Court, provided they have not been the subject of a friendly settlement, notwithstanding the fact that there is no legal obligation to do so. The Schmidt case clearly falls into this category. The controversial legal issues it raised had not been previously considered by the Court; the domestic proceedings in Costa Rica produced conflicting judicial decisions; the Commission itself was not able to arrive at a unanimous decision on the relevant legal issues; and its subject is a matter of special importance to the hemisphere because several

As a consequence, this referral practice improved.[27] In another advisory opinion it was held, in a pioneering way, that States participating in international human rights treaties assume obligations directly towards individuals and not only reciprocal rights towards other State Parties.[28] In sum, it is fair to say then that the Court's advisory opinions contributed to the substantive development of human rights protection in the region.

Buergenthal himself took a very nuanced approach regarding advisory opinions. On the one hand, he provided a positive account in a paper in the American Journal of International Law published in 1985:

> "They have enabled the Court to clarify the scope of its advisory jurisdiction and the role it performs in human rights matters within the inter-American system. These opinions are important also for the contributions they make to the development of international human rights law.
> More important, however, is the fact that […] [they] have enabled it [the Court] to define the scope of its advisory jurisdiction to a significant extent and to give judicial expression to certain principles that are basic to the development of the international law of human rights. In delineating the scope of its advisory jurisdiction and specifying the rules applicable to it, the Court has sought to avoid burdening the advisory process with formalistic and time-consuming obstacles. Instead, its practice reflects the view that, to be useful and effective, the advisory process has to be expeditious and capable of providing OAS organs and member states with

states have adopted laws similar to that of Costa Rica" (*Compulsory Membership Case*, *supra* note 23, para. 25). See also Causanilhas & Legale, 'O Caso Schmidt', *supra* note 24: "A OC-5/85 foi […] duplamente emblemática, porque fixou o […] direito de liberdade de expressão e por fixar o espaço de atuação da Corte IDH em relação à CIDH." ("OC-5/85 was […] emblematic in a double way, because it established the […] right to freedom of expression and because it established the scope of action of the Inter-American Court in relation to the IACHR."); see also Buergenthal, 'Remembering', *supra* note 3, 269.

27 Cf. *ibid*., 270: "A year later, the Commission referred not just one but three contentious cases to the Court."

28 *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts. 74 and 75)*, Advisory Opinion OC-2/82 of 24 September 1982, IACtHR, Series A, No. 2. See also Pasqualucci, 'Buergenthal: Holocaust Survivor', *supra* note 13, 888.

> legally sound judicial rulings conceived in an atmosphere that inspires trust in the deliberative and interpretative processes."[29]

In a similar positive vein Buergenthal stressed the paradoxical effectiveness of advisory opinions which despite their non-binding nature facilitated compliance by States given their lower stigmatizing effect than that of a contentious decision labeling the convicted State as a human rights violator:

> "[…] the advisory process has the advantage, and this is particularly so in the human rights context, of making it politically easier for a government to comply with advisory opinions: […] they do not stigmatize the state as a lawbreaker and permit a delinquent government to make its compliance appear to be a voluntary act."[30]

29 Buergenthal, 'The Advisory Practice', *supra* note 19, 2, 25.

30 *Ibid.*, 26; see also T. Buergenthal, 'Address by Judge Thomas Buergenthal, President, Inter-American Court of Human Rights Before a Special Session of the OAS Permanent Council' (3 December 1986), 130-131, available at http://historico.juridicas.unam.mx/publica/librev/rev/iidh/cont/4/pr/pr8.pdf (last visited 14 March 2024) [Buergenthal, 'Address']: "The sole legal effect of the opinion is that it constitutes an authoritative interpretation by a judicial body whose value derives from the institutional legitimacy the Court enjoys as an independent, impartial and non-political judicial body.

It is obvious, and I do not need to belabor this point in a room full of experienced diplomats and lawyers, that the mere fact that an opinion is not legally binding in a formal sense does not mean that it is necessarily less effective than a legally binding opinion. Politically, moreover, an advisory opinion has the great advantage that it does not stigmatize a government as a violator of human rights, it does not accuse the government and it does not determine its guilt. At the same time, however it makes the abstract legal issue perfectly clear for any government wishing to avoid being held in violation of its international legal obligations. By resolving the legal issue, it can also change the tenor and character of the political debate in the body that asked for the opinion. The advisory opinion route can therefore provide a politically and diplomatically useful technique for OAS organs wishing to avoid over-politicizing an issue and giving governments a graceful way to comply with their obligations.

As you know, much of the Court's jurisprudence up to now has consisted of advisory opinions, and some of these have had a *beneficial impact.* Here I should note that all OAS Member States have the *right to submit* their written and oral observations in any advisory proceeding pending before the Court. Unfortunately, very few states have thus far availed themselves of this opportunity, which is an opportunity to affect the interpretation of the international human rights law of our hemisphere. Here each permanent representative could help. You have no doubt seen the various notices for observations by governments that the Court sends out whenever it receives an advisory opinion request. A note from you to your foreign ministries in appropriate cases suggesting that someone consider

Buergenthal also pointed to the special legitimizing potential of advisory opinions in the Americas[31] given that they apply to all States of the Organization of American States (OAS)[32] while the Court's *contentious jurisdiction* only applies to the States parties of the Convention.[33]

On the other hand, Buergenthal argued that the viability of the advisory opinions and that of the IAHRS as a whole depended largely on the Court's contentious jurisdiction. In his intervention before the OAS Permanent Council on 3 December 1986, while promoting the advisory jurisdiction, Buergenthal also stressed the importance of the Court's contentious jurisdiction, by highlighting the interdependence between the two:

> "[…] the Court's advisory role will only perform its function if the contentious jurisdiction is also utilized. The mere existence of a contentious system provides states with the incentive to comply with the Court's advisory rulings. In short, it does not help much to tell a state what the law is, if it knows that it can go on violating it with impunity, that is, if there is no risk that it will be called to account in a contentious proceeding. It is clear, therefore, that the Court's two jurisdictions are intertwined and that one cannot function without the other also being operational."[34]

the advisability of a written or oral comment would have an impact and would, I am sure, enable the Court to have a better understanding of the legal considerations deemed significant by individual governments." (emphasis added).

31 Buergenthal, 'The Advisory Practice', *supra* note 19, 2: "The role of the Court as a judicial institution of the OAS is grounded in its advisory jurisdiction. It may be invoked by all OAS organs and all OAS member states, whether or not they have ratified the Convention. In the exercise of this jurisdiction, the Court has the power to interpret the Convention and any other human rights treaty applicable in the Americas." See also J. Nascimento, 'Os Juízes da CIJ: Thomas Buergenthal', available at https://neiarcadas.wordpress.com/2010/07/20/thomas-buergenthal/ (last visited 14 March 2024).

32 Cf. ACHR, Art. 64(1): "member states of the Organization may consult".

33 Cf. ACHR, Art. 61(1) ("Only the States Parties") and Art. 62(1) (recognition of Court's jurisdiction).

34 Buergenthal, 'Address', *supra* note 30, 131. See previously Buergenthal, 'The Advisory Practice', *supra* note 19, 26: "It should be kept in mind, in this connection, that the effectiveness of an advisory process such as the one provided for by the Convention depends to some extent -whether to a greater or lesser extent is difficult to say- upon a working contentious judicial system that can be invoked to give teeth to the advisory process." See also T. Buergenthal, 'The OAS and the Protection of Rights', 3 *Emory Journal of International Dispute Resolution* (1988) 1, 1, 22-23: "It would be a mistake not to recognize, however, that the inter-American human rights system will in the long

In other words, the paradoxical performance capacity of advisory opinions is essentially the result of their *interaction with the contentious jurisdiction*. Advisory opinions can only appear as the more benevolent option since there is the alternative of binding decision in contentious cases.

Here again we see Buergenthal's strategic-progressive approach which was always motivated by the ultimate goal of an overall strengthening of human rights protection. Now, after the establishment of the IACtHR, he could operate within the framework of an existing human rights mechanism being one of its most prominent actors and trying to capitalize on a less hostile political environment in the region:

> "Let me say too, Mr. Chairman, that your invitation that I address this special session of the Permanent Council also marks an important and most encouraging development. It would probably not have been possible all that many years ago, when a significant number of government representatives on this Council were not great friends of human rights. The fact that this is no longer true today, that we have in this regard witnessed a dramatic change in our region, is good reason for rejoicing and offers hope for the future.
> […] The machinery exists, the normative basis exists, the institutions exist to grasp this opportunity. What is needed is the political will and imagination to make the promotion and protection of human rights a high priority policy of the Organization."[35]

run lose its effectiveness unless the Court's contentious jurisdiction is also routinely invoked. If governments come to believe that the Court will only be resorted to by the Commission for advisory opinions, they are less likely to pay much attention to these rulings as time goes on. An effective contentious system therefore also serves to give muscle to the advisory opinions."

35 Buergenthal, 'Address', *supra* note 30, 131-132. See also Buergenthal, 'Remembering', *supra* note 3, 276: "The Court's position was significantly strengthened by the political transformation of the Americas in the early 1980's, which resulted in the fall of many oppressive regimes. The newly elected governments rapidly ratified the American Convention and gradually recognized the jurisdiction of the Court. Today, all Latin American OAS Member States have accepted the Court's jurisdiction. This is a sea change compared to the situation that existed in 1979."

2. Contentious Cases

In its early contentious case law, the IACtHR had to deal with so-called enforced disappearances,[36] especially in the *Velásquez Rodríguez* case against Honduras.[37] These cases posed complex evidentiary issues with a view to the attribution of responsibility to the respective State for the "mere" disappearance of a person. To overcome these difficulties the Court opted for a reversal of the burden of proof, placing it on the State concerned if the findings of the Commission and information/evidence presented by the complainant point to the former's responsibility.[38] In such a situation this State has to prove that it was not involved in the disappearance of the respective person.[39] In *Velásquez*

36 On the concept of enforced disappearances see K. Ambos, *Treatise on International Criminal Law*, Vol. II, 2nd ed. (2022), 126-130 [Ambos, *Treatise II*]; L. van den Herik & R. Braga da Silva, 'Enforced disappearance of persons', in K. Ambos (ed.), *Rome Statute of the International Criminal Court*, 4th ed. (2022), 305; K. Ambos & M. L. Böhm, 'La Desaparición Forzada de Personas Como Tipo Penal Autónomo. Análisis Comparativo-Internacional y Propuesta Legislativa', in K. Ambos (ed.) *Desaparición Forzada de Personas* (2009), 195, 198 [Ambos & Böhm, 'Desaparición Forzada'].

37 *Velásquez Rodríguez v. Honduras*, Judgment of 29 July 1988, IACtHR, Series C, No. 4, para. 123 ("Because the Commission is accusing the Government of the disappearance of Manfredo Velásquez, it, in principle, should *bear the burden of proving the facts* underlying its petition."), para. 126 ("The Court finds no reason to consider the Commission's argument inadmissible. *If it can be shown that there was an official practice of disappearances* in Honduras, carried out by the Government or at least tolerated by it*, and if the disappearance of Manfredo Velásquez can be linked to that practice, the Commission's allegations will have been proven to the Court's satisfaction,* so long as the evidence presented on both points meets the standard of proof required in cases such as this."), para. 135 ("In contrast to domestic criminal law, in proceedings to determine human rights violations the *State cannot rely on the defense that the complainant has failed to present evidence when it cannot be obtained without the State's cooperation*."), para. 136 ("*The State controls the means to verify acts occurring within its territory.* Although the Commission has investigatory powers, it cannot exercise them within a State's jurisdiction unless it has the cooperation of that State.") [*Velásquez Rodríguez Case*]. All emphasis added.

38 *Velásquez Rodríguez Case*, *supra* note 37, para. 135: "In contrast to domestic criminal law, in proceedings to determine human rights violations the State cannot rely on the defense that the complainant has failed to present evidence when it cannot be obtained without the State's cooperation" and 136: "The State controls the means to verify acts occurring within its territory. Although the Commission has investigatory powers, it cannot exercise them within a State's jurisdiction unless it has the cooperation of that State."

39 That solution was offered by the Human Rights Committee in *Bleier v. Uruguay*, Communication No. R.7/30, UN Doc. Supp. No. 40 (A/37/40) at 130 (1982), 29 March 1982, para. 13.3: "With regard to the *burden of proof*, this *cannot rest alone on the author of the communication*, especially considering that the author and the State party do not

Rodríguez this led to the following finding of the Court holding Honduras responsible for the relevant disappearances:

> "The testimony and other evidence […] leads to the conclusion that, during the period under consideration, although there may have been legal remedies in Honduras that theoretically allowed a person detained by the authorities to be found, those remedies were ineffective in cases of disappearances because the imprisonment was clandestine; formal requirements made them inapplicable in practice; the authorities against whom they were brought simply ignored them, or because attorneys and judges were threatened and intimidated by those authorities."[40]

This case law had an impact well beyond the Americas, not so much for the nature of the human rights violation dealt with, but because of the establishment of a duty to investigate, prosecute and adjudicate serious human rights violations.[41] For this reason it has also been referred to by the European

always have equal access to the evidence and that frequently the State party alone has access to relevant information. It is implicit in article 4 (2) of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violation of the Covenant made against it and its authorities, especially when such allegations are corroborated by evidence submitted by the author of the communication, and to furnish to the Committee the information available to it. In cases where the *author has submitted to the Committee allegations supported by substantial witness testimony,* as in this case*, and where further clarification of the case depends on information exclusively in the hands of the State party, the Committee may consider such allegations as substantiated in the absence of satisfactory evidence and explanations to the contrary submitted by the State party.*" (emphasis added), available at http://hrlibrary.umn.edu/undocs/session37/7-30.htm (last visited 14 March 2024).

40 *Velásquez Rodríguez Case*, *supra* note 37, para. 80; see *Godínez Cruz v. Honduras*, Judgment of 20 January 1989, IACtHR, Series C, No. 5, para. 87; see also *Fairén Garbi and Solís Corrales v. Honduras, Merits*, Judgment of 15 March 1989, IACtHR, Series C, No. 6, para. 102; see also Ambos *&* Böhm, 'Desaparición Forzada', *supra* note 36, 243.

41 *Velásquez Rodríguez Case*, *supra* note 37, para. 174: "The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation." See on this principle K. Ambos, *Impunidad y DPI*, 2nd ed. (1999), 65-121 [Ambos, *Impunidad]*; K. Ambos, 'Principle 19. Duties of States With Regard to the Administration of Justice', in F. Haldemann & T. Unger (eds), *The United Nations Principles to Combat Impunity* (2018), 205, 205-216 [Ambos, 'Principle 19'].

Court of Human Rights (ECtHR)[42] and thus constituted the beginning of a long relationship between these two regional human rights courts.[43] We will return to Buergenthal's efforts to strengthen the IACtHR's relationship with the ECtHR below.

Buergenthal was a judge at the Court during these challenging times, from 1979 to 1991.[44] His important contribution to the Court's case law during that period follows from his involvement in significant decisions and opinions, as the aforementioned *Velásquez Rodríguez*[45] and *Schmidt Cases*,[46] as well as other

42 Namely in *Akdivar and Others v. Turkey*, Judgment of 16 September 1996, ECtHR, para. 68, where the Court referred to the IACtHR with regard to the exhaustion of domestic remedies: "In the area of the exhaustion of domestic remedies there is a distribution of the burden of proof. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, was one which was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success. However, once this burden of proof has been satisfied it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted or was for some reason inadequate and ineffective in the particular circumstances of the case or that there existed special circumstances absolving him or her from the requirement (see, inter alia, […] the judgment of 26 June 1987 of the Inter-American Court of Human Rights in the Velásquez Rodríguez case, Preliminary Objections, Series C no. 1, para. 88, and that Court's Advisory Opinion of 10 August 1990 on "Exceptions to the Exhaustion of Domestic Remedies" (Article 46 (1), 46 (2) (a) and 46 (2) (b) of the American Convention on Human Rights), Series A no. 11, p. 32, para. 41). One such reason may be constituted by the national authorities remaining totally passive in the face of serious allegations of misconduct or infliction of harm by State agents, for example where they have failed to undertake investigations or offer assistance. In such circumstances it can be said that the burden of proof shifts once again, so that it becomes incumbent on the respondent Government to show what they have done in response to the scale and seriousness of the matters complained of." See also in this regard M. Díaz Crego, 'El Impacto de la Jurisprudencia de la Corte Interamericana Sobre el Tribunal Europeo de Derechos Humanos', 75 *Derecho PUCP* (2015), 31, 32. [Díaz Crego, 'Impacto de la Jurisprudencia de la Corte Interamericana'].

43 See B. Rodríguez Reveggino, 'Espacios de Diálogo entre la Corte Interamericana de Derechos Humanos y el Tribunal Europeo de Derechos Humanos', *Revista Internacional de Derechos Humanos* (2017), 15, 23-28, focusing on "Amnesties and the duty to investigate serious human rights violations" and "military jurisdiction" as emblematic topics; 21, mentioning the forced disappearances; see also Díaz Crego, 'Impacto de la Jurisprudencia de la Corte Interamericana', *supra* note 42, 31, *passim*.

44 See https://www.corteidh.or.cr/tablas/jueces/TBU.pdf (last visited 14 March 2024).

45 To which he attributed special relevance, see Kreß & Stahl, 'Interview with Thomas Buergenthal', *supra* note 1, 31.

46 Where fundamental argumentation regarding the connection between freedom of expression and democracy is also provided, see *Compulsory Membership Case*, *supra* note

important matters.[47] However, Buergenthal also dissented with the majority twice, most importantly perhaps in the context of Advisory Opinion OC-4/84. In this case the Court had to decide on the compatibility of a proposed amendment of the Constitution of Costa Rica related to naturalization with the ACHR.[48] The amendment aimed to extend the minimum residency requirement for Central Americans, Ibero-Americans, and Spaniards to obtain Costa Rican nationality, requiring a two year longer period for those who obtained their original nationality by naturalization (7 years) as opposed to birth (5 years), thus privileging – insofar in line with the original provision[49] – the latter group.[50]

23, para. 70: "Freedom of expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion. It is also a conditio sine qua non for the development of political parties, trade unions, scientific and cultural societies and, in general, those who wish to influence the public. It represents, in short, the means that enable the community, when exercising its options, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free."

47 See for instance *"Other Treaties" Subject to the Consultative Jurisdiction of the Court (Art. 64 American Convention on Human Rights),* Advisory Opinion OC-1/82 of 24 September 1982, IACtHR, Series A, No. 1, in which the Court clarified its advisory jurisdiction in the sense that it "can be exercised, in general, with regard to any provision dealing with the protection of human rights set forth in any international treaty applicable in the American States" (see first conclusion), see also *Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 American Convention on Human Rights)*, Advisory Opinion OC-9/87 of 6 October 1987, IACtHR, Series A, No. 9, where the Court stated (see para. 41.1) *inter alia* that "the 'essential' judicial guarantees which are not subject to derogation […] include habeas corpus […] amparo, and any other effective remedy before judges or competent tribunals […], which is designed to guarantee the respect of the rights and freedoms whose suspension is not authorized by the Convention."

48 *Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica*, Advisory Opinion OC-4/84 of 19 January 1984, IACtHR, Series A, No. 4 [*Proposed Amendments Case*].

49 Former Art. 14 Constitution Costa Rica reads:
"The following are Costa Ricans by naturalization:
3. Native-born Spaniards and Ibero-Americans who obtain the appropriate certificate from the civil registrar, provided they have been domiciled in the country during the two years prior to application;
4. Central Americans, Spaniards and Ibero-Americans who are not native-born, and other foreigners who have been domiciled in Costa Rica for a minimum period of five years immediately preceding their application for naturalization, in accordance with the requirements of the law." (translation taken from *Proposed Amendments Case*, *supra* note 48, para. 7).

50 *Amendments Proposed by the Special Committee of the Legislative Assembly in its Report of 22 June 1983*:

While the majority of the judges did not find a relevant discrimination in the preferential treatment based on birth,[51] Buergenthal argued that the distinction between nationality *by birth* or *by naturalization* was unjustified.[52]

While it is not possible to recount in more detail Buergenthal's contribution to the Court's case law during his tenure, it should have already become clear from the above that this contribution must have been decisive in steering the Court through the muddy waters of external political pressure by predominantly hostile States. The Court could only overcome the ensuing challenges by optimizing its performance and producing solid jurisprudence. Indeed, the adverse political context that characterized those early years and the IACtHR's performance, aimed at ensuring the protection of human rights notwithstanding, might allow us to speak of a true boldness of the Court during

"Art. 14: The following are Costa Ricans by naturalization:
2) Native-born nationals of the other countries of Central America, Spaniards and Ibero-Americans with five years official residence in the country and who fulfill the other requirements of the law;
3) Central Americans, Spaniards and Ibero-Americans, who are not native-born, and other foreigners who have held official residence for a minimum period of seven years and who fulfill the other requirements of the law." (translation taken from *Proposed Amendments Case*, *supra* note 48, para. 7).

51 *Proposed Amendments Case*, *supra* note 48, Dissenting Opinion of Judge Thomas Buergenthal, para. 3.

52 *Ibid.*, paras 5-6 (6: "What legitimate governmental end will be accomplished by requiring these naturalized Central Americans, Spaniards and Ibero-Americans to wait two years longer than their co-nationals? It can be argued that these individuals might have acquired their earlier nationality by fraud. True, but under international law, Costa Rica is not required to recognize any nationality that is not based on real and effective ties between the individual and the state granting the nationality. Moreover, the likelihood that a very small percentage of individuals might act dishonestly is hardly a legitimate reason for punishing the vast majority of honest foreigners. It can also be argued that the additional two years are required to permit these people to speak better Spanish or to acquire a more profound knowledge of Costa Rican history, culture and life. True, but Article 15 of the same proposed constitutional amendment already addresses that issue; it would require the Government of Costa Rica to accomplish that objective in a much more rational and disproportionately less harmful manner by examinations designed to test what each individual knows about Costa Rica, rather than by assuming ignorance on the part of all"). See also the Dissenting and Concurring Opinion of Buergenthal in *Enforceability of the Right to Reply or Correction (Arts. 14(1), 1(1) and 2 American Convention on Human Rights)*, Advisory Opinion OC-7/85 of 29 August 1986, IACtHR, Series A, No. 7, para. 1, where he defends the inadmissibility of the advisory opinion in that case.

that phase.[53] And Buergenthal has been considered as one of the most influential judges, if not the most influential one, of that Court, in a way being *primus inter pares*, among fellow judges, some of whom had also been victims of human rights violations.[54] Thus, according to Pasqualucci, an emeritus professor at the University of Dakota: "[E]ven among those renowned personages, Buergenthal is generally considered to have been the Court's most influential and creative member."[55] For Buergenthal's fellow judge Pedro Nikken, of Venezuelan nationality, Buergenthal's contribution to the Court "has been […] invaluable. […] The respectability earned by the Court is the mark of his efforts."[56] The

53 See in this regard K. Ambos & M. L. Böhm, 'Tribunal Europeo de Derechos Humanos y Corte Interamericana de Derechos Humanos. ¿Tribunal Tímido vs. Tribunal Audaz?', in K. Ambos *&* E. Malarino (eds), *Sistema Interamericano de Protección de los Derechos Humanos y Derecho Penal Internacional – Vol. II* (2011), 43, 67 (updated in: E. Ferrer Mac-Gregor *&* A. Herrera García (eds), *Diálogo Jurisprudencial en Derechos Humanos* (2013), 1057, 1057-1088) [Ambos & Böhm, 'Tribunal Europeo y Corte Interamericana'].

54 Pasqualucci, 'Buergenthal: Holocaust Survivor', *supra* note 13, 885: "Moreover, the members of the Court had themselves had practical experience in the area of human rights: four of the judges had been jailed for political reasons at different times of their lives."

55 *Ibid*., 885; see also S. Picado Sotela, 'Thomas Buergenthal', in Â. Cançado Trindade (ed.), *The Modern World of Human Rights. Essays in Honour of Thomas Buergenthal* (1996), 19, 24 [Cançado Trindade (ed.), *Essays in Honour of Thomas Buergenthal*].

56 P. Nikken, 'Presentation', in Cançado Trindade (ed.), *Essays in Honour of Thomas Buergenthal*, *supra* note 55, XIII, XIV: "Capítulo aparte merece el aporte del Juez Buergenthal a la Corte Interamericana de Derechos Humanos, donde tuve la oportunidad de compartir con él casi diez años de actividades judiciales. Ese aporte ha sido – permítaseme subrayarlo con pleno conocimiento de causa – invalorable. Como jurista y como hombre justo; como intelectual y como hombre recto; como académico y como hombre de trabajo; como profesor y como hombre de virtud; como magistrado y como hombre de la calle consustanciado con lo que pasa en nuestro mundo convulsionado y cambiante, el juez Buergenthal marcó los doce primeros anos de existencia de la Corte. En la respetabilidad que el Tribunal ganó, está presente su impronta y su obra." ("Judge Buergenthal's contribution to the Inter-American Court of Human Rights, where I had the opportunity to share with him almost ten years of judicial activities, deserves a separate chapter. That contribution has been – let me emphasize it with full knowledge of the facts – invaluable. As a jurist and as a just man; as an intellectual and as an upright man; as an academic and as a man of work; as a professor and as a man of virtue; as a magistrate and as a man of the street attuned to what is happening in our convulsed and changing world, Judge Buergenthal marked the first twelve years of the Court's existence. His imprint and his work are present in the respectability that the Court has earned.") (quoted translation in main text taken from Pasqualucci, 'Buergenthal: Holocaust Survivor', *supra* note 13, 890)] [Nikken, 'Presentation']. See also E. Abad, 'Recensión a J.E. Mendez y F. Cox, (eds), *El futuro del Sistema Interamericano de Protección de los Derechos Humanos*, San José,

Court itself issued a press release at the occasion of Buergenthal's death stressing his "essential role in the Court's consolidation during its initial years and his legacy", as "one of the founding fathers of the Inter-American Court".[57]

C. European Court of Human Rights (ECtHR) and Inter-American Institute of Human Rights (IIHR): Interaction and Critical Support/Follow-Up

Two additional aspects deserve further emphasis to fully capture Buergenthal's contribution to the IAHRS: on the one hand, the proactive pursuit of a fruitful, productive relationship with the ECtHR and the critical support and monitoring of the IAHRS by way of the IIHR.

I. ECtHR

As to the ECtHR, Buergenthal acknowledged early on how important this relationship would be for the IACtHR and, in general, how important the cooperation of regional human rights systems would be for the future of human rights protection.[58] This was not so much for the jurisprudential influence by the (older) ECtHR[59] but rather for institutional reasons and the accumulated experience of the ECtHR.[60] As recounted by Buergenthal himself:

Instituto Interamericano de Derechos Humanos, 609 pp.', 39 *Persona y Derecho* (1998), 378, 380: "Thomas Buergenthal y […] Antônio Cançado Trindade [son] (probablemente los jueces que más doctrina han sentado en la Corte Interamericana, y verdaderos motores de todo el sistema)." ("Thomas Buergenthal and […] Antônio Cançado Trindade [are] (probably the judges who have established the most doctrine in the Inter-American Court, and true motors of the entire system)."

57 See the press release here https://www.corteidh.or.cr/docs/comunicados/cp_34_2023_eng.pdf [last visited 14 March 2024]. The latter part of the quote is from Judge Ricardo Pérez Manrique, current president of the Court.

58 He made the same point for the still in the making African Court of Human Rights (AfCHR), cf. Buergenthal, 'Remembering', *supra* note 3, 275, fn. 35.

59 Buergenthal, 'American and European Conventions', *supra* note 6, 156: "Although the American Convention is modelled on the European Convention, it departs from or improves upon the latter in a number of important respects."

60 T. Buergenthal, 'International and Regional Human Rights Law and Institutions: Some Examples of Their Interaction', 12 *Texas International Law Journal* (1977) 2-3, 321, 324 [Buergenthal, 'Institutions'].

> "As soon as the Court was established, we decided to cultivate special contacts with the European Court of Human Rights. This effort began with the inauguration of our Court in San José, which was attended by the Vice-President of the European Court of Human Rights. There followed an informal agreement between the Inter-American Court and the European Court, providing for periodic meetings between judges of the two courts, alternating between Strasbourg and San José. Apart from our need to have the benefit of the European Court's prior judicial experience, it was also important for us to be seen by the governments in the Americas to have international support outside our region."[61]

Yet, Buergenthal did not see this relationship as one-sided; rather he expected that the time would come where the IACtHR's case law on (more) serious human rights violations would also become relevant for the ECtHR.[62]

At the same time, Buergenthal's thinking was never limited to the region but he always aspired and pursued the global protection of human rights. To achieve such a global reach, he pursued a twofold strategy. On the one hand, considering the relative political and cultural homogeneity of the countries in the Americas (albeit acknowledging the socioeconomic differences between the North and the South),[63] Buergenthal argued that the effectiveness of human rights protection primarily depended on the strengthening of regional systems.[64]

61 Buergenthal, 'Remembering', *supra* note 3, 275-276.

62 *Ibid.*, 276: "The precedents established by the Inter-American Court concerning disappearances, states of siege, the meaning of the rule of law, and so forth-which at one time seemed of no relevance to the European system-may well prove of interest to the enlarged and transformed European human rights system."

63 Buergenthal, 'American Convention', *supra* note 5, 123-124. However, he expressed doubts regarding homogeneity in the case of Asia, see T. Buergenthal, 'Keynote Lecture: International Human Rights: Need for Further Institutional Development', 50 *Case Western Reserve Journal of International Law* (2018) 1, 9, 16: "Asia might make a good candidate for one or more sub-regional systems, consisting of no more than a dozen member states. The Asian continent is too large, and politically and culturally too diverse for just one system. A single regional system would better suit other parts of the world." [Buergenthal, 'Keynote Lecture'].

64 Buergenthal, 'American and European Conventions', *supra* note 6, 156: "It thus would appear that the regional approach holds, at least for the time being, a greater promise of effectiveness. Why should this be so? For one thing, political and cultural homogeneity are basic prerequisites for an effective human rights system, and these are more likely to be found on the regional plane. Other preconditions for such a system include reasonably well-developed legal systems as well as shared juridical traditions and institutions. Here

On the other hand, Buergenthal was aware that this *intra*regional homogeneity is the flip side of *inter*regional heterogeneity. Consequently, he highlighted the cultural differences between regional human rights protection systems.[65] These differences, however, speak in favor of a true dialogue at the same level instead of an impoverishing, lecturing-kind-of-monologue.

With the foregoing in mind, Buergenthal's stance on the connection between regional systems and global human rights protection can be set out more clearly. Given the interregional socio-cultural diversity, the protection of human rights did, in his view, not require a centralized strategy, that is, implementation through a *top-down* structure with a global institution at its peak. Instead, he advocated for approaching human rights protection as a decentralized endeavor, supported by a *bottom-up* structure – sustained through the involvement of various regional and local institutions. Hence, when speaking of global human rights protection, the idea that should be evoked is not that of a system of protection projected from a centralized world institution *to* every corner of the world but rather protection *from* every corner of the world trough regional/local institutions covering the whole world. In a way Buergenthal was a regionalist with a universalist aspiration:

> "It thus would appear that the regional approach holds, at least for the time being, a greater promise of effectiveness. Why should this be so? For one thing, political and cultural homogeneity are basic prerequisites for an effective human rights system, and these are more likely to be found on the regional plane. Other preconditions for such a system include reasonably well-developed legal systems as well as shared juridical traditions and institutions. Here again, smaller regional groupings of states are more likely to meet these requirements than the human rights systems that are open to the entire international community."[66]

> "I've always been a great supporter of regional human rights tribunals. I don't believe in having a world human rights court. I wouldn't be opposed to it, but the regional human rights tribunals, if they are honest, are much closer to the people, to the region. And they socialize the governments in the region to human rights, to

again, smaller regional groupings of states are more likely to meet these requirements than the human rights systems that are open to the entire international community."

65 *Ibid.*, 156, 166.

66 *Ibid.*, 156.

> their obligations in human rights. Much easier than something that is far away."[67]

Of course, the success of this approach depends on the success of each regional human rights system, which in turn depends on a variety of different factors. In general, it depends on its *implementation*, *promotion*, *interconnection*, and *critical follow-up*. So far, we have seen how Buergenthal's approach covered the first three factors, we will now turn to the fourth.

II. Inter-American Institute of Human Rights

The need of a critical follow-up did not escape Buergenthal's attention. In fact, he was behind the establishment of the IIHR in 1980 (by means of an agreement between the Court and Costa Rica),[68] was president of its board since its foundation and its honorary president since 1992,[69] and, perhaps

67 Kreß & Stahl, 'Interview with Thomas Buergenthal', *supra* note 1, 47, where Buergenthal also refers in a similar vein to international criminal justice: "I think the same thing, that if we really want to develop a truly effective international criminal law system. We would need, in addition to the International Criminal Court, regional international criminal courts that deal with slavery issues, certain types of drug gangs, and some things that are within the jurisdiction of the ICC, but important on a lower level of importance. For example, this whole criticism by Africa of the ICC would probably be less if you had an African court of criminal justice. Maybe they would have been smarter in choosing which countries to go after. The ICC is immediately identified as a foreign court, not their own. *So, I believe that we need two things in the world today: We need regional human rights courts and regional criminal courts.*" (emphasis added).

68 See https://www.iidh.ed.cr/en/ (last visited 14 March 2024); the agreement was approved by the Law No. 6528, 28 October 1980, available here https://www.pgrweb.go.cr/scij/Busqueda/Normativa/Normas/nrm_texto_completo.aspx?param1=NRTC&nValor1=1&nValor2=1545&nValor3=1654&strTipM=TC (last visited 14 March 2024). Buergenthal and his colleagues from the El Salvador Truth Commission were also involved in the establishment of the Due Process of Law Foundation (DPLF), which is based in Washington D.C. The DPLF is "a regional organization comprised of professionals with a variety of nationalities, that promotes the Rule of Law in Latin America through the use of analysis and recommendations, cooperation with private and public organizations and institutions, exchanges of experiences, and advocacy efforts", cf. https://www.dplf.org/en/who-we-are (last visited 14 March 2024).

69 P. Nikken, 'Sobre la Autonomía y Naturaleza del Instituto Interamericano de Derechos Humanos', in Cançado Trindade (ed.), *Essays in Honour of Thomas Buergenthal*, *supra* note 55, 3 [Nikken, 'Autonomía y Naturaleza del IIDH'].

most importantly, actively supported it until before his death.[70] The IIHR, modeled after the René Cassin International Institute of Human Rights based in Strasbourg,[71] is an independent and autonomous institution, dedicated to teaching, research, and promotion of human rights.[72] For Buergenthal its main purpose was to promote and strengthen the IAHRS with the Court as its centerpiece:

70 The significance and comprehensiveness of his contribution to the establishment of the IIHR have been expressed by the Institute itself at the occasion of his death, IIDH, 'Sensible Fallecimiento del Sr. Thomas Buergenthal, Fundador y Presidente Honorario del Instituto Interamericano de Derechos Humanos' (2023), available at: https://www.iidh.ed.cr/en/component/content/article/sensible-fallecimiento-del-sr-thomas-buergenthal-fundador-y-presidente-honorario-del-instituto-interamericano-de-derechos-humanos?catid=15:novedades&Itemid=101 (last visited 14 March 2024): "La creación de nuestro Instituto se debe a la visión y esfuerzo de Thomas Buergenthal. Fue él quien, en enero de 1980, convocó figuras prominentes en el campo de derechos humanos de todos los países del hemisferio a una reunión en San José para hablar de la necesidad y posibilidad de una institución de este tipo, con autonomía y legitimidad para encabezar los esfuerzos de enseñanza, investigación y promoción de los derechos humanos. Fue el que consiguió los fondos que permitió el IIDH de lanzar importantes proyectos desde su inicio. Pensar que fuera posible la consolidación de una entidad con dicha naturaleza al inicio de la década de los ochentas, cuando gran parte de los Estados latinoamericanos se encontraban bajo dictaduras militares no solo era necesario, sino profundamente valeroso." ("The creation of our Institute is due to the vision and efforts of Thomas Buergenthal. It was he who, in January 1980, summoned prominent figures in the field of human rights from all the countries of the hemisphere to a meeting in San José to discuss the need and possibility of such an institution, with autonomy and legitimacy to spearhead efforts in teaching, research and promotion of human rights. He was the one who obtained the funds that allowed the IIDH to launch important projects since its inception. To think that it was possible to consolidate such an entity at the beginning of the 1980s, when most Latin American States were under military dictatorships, was not only necessary, but profoundly courageous.") See also Nikken, 'Autonomía y Naturaleza del IIDH', *supra* note 69, 3: "Quien concibió la idea de crear el Instituto y su impulsor determinante y más vigoroso fue Thomas Buergenthal." ("Thomas Buergenthal was the one who conceived the idea of creating the Institute and its most vigorous and decisive driving force.").

71 See https://iidh.org/en/ (last visited 14 March 2024); see in this regard Kreß & Stahl, 'Interview with Thomas Buergenthal', *supra* note 1, 30, where Buergenthal states: "In many ways when I founded the Inter-American Institute of Human Rights, which was my baby, it was based on the Cassin Institute."

72 See https://www.iidh.ed.cr/es/acerca-del-iidh (last visited 14 March 2024): "una entidad internacional autónoma, académica, dedicada a la enseñanza, investigación y promoción de los derechos humanos".

> "When I arrived at the court, I went to the library of the university in Costa Rica, which is very close to where we were sitting. And I realized that they had only one shelf of books on international law. I thought: »Not only do we need an institute to teach. We need an institute that will help us get the books, and that will help us raise money for travel and other purposes. The OAS is not going to give us ever enough money, not as long as you have all of these dictatorial regimes in power. So, we have to have our own independent nongovernmental way to raise money.« That led to the establishment of the Institute. The court at the first session voted for the establishment of the Institute, and empowered me to bring it about it."[73]

The Institute has certainly played an essential role in promoting human rights within the Americas, by supporting the Court, as an independent think tank[74] and resource centre for numerous Latin American legal practitioners and scholars.[75] This becomes particularly relevant when considering the challenging and heterogeneous conditions of Latin American academia, even more challenging before the existence of the internet with the access to academic and other material it facilitates. Interestingly, for Buergenthal the Institute was even more important than the Court in terms of human rights impact:

> "During my period on the Court, I don't think we had very much of an impact at all. […] a decision of the Inter-American Court would not be something that would get wide attention in the region […] we had a minimal effect. […] *But I think the Institute in many*

73 See Kreß & Stahl, 'Interview with Thomas Buergenthal', *supra* note 1, 30.

74 Note that Buergenthal actively defended the Institute's independence, especially regarding the various donors, cf. *ibid.*, 34, where it is recounted how Sonia Picado, Executive Director of the IIHR, resisted different types of pressure stating regarding Buergenthal: "*Tom envió un tremendo telegrama en contestación a un fax que nos enviaron diciéndonos qué teníamos que hacer. Tom dijo: 'nosotros no vamos a aceptar ningún donante que nos venga a decir lo que tenemos que hacer, de manera que ya ustedes no están invitados.'*" (emphasis in the original) ("Tom sent a tremendous telegram in response to a fax that was sent to us telling us what to do. Tom said, 'We are not going to accept any donor who comes to us and tells us what to do, so you are no longer invited.'").

75 See Buergenthal, 'Remembering', *supra* note 3, 273-274; see also 'Encuentros en el IIDH, N° 1, Memoria de la Conmemoración del Convenio de Sede del Instituto Interamericano de Derechos Humanos. Homenaje a Thomas Buergenthal', 30 and 31 October 2000, 37-40, available at https://www.corteidh.or.cr/tablas/14751.pdf (last visited 14 March 2024).

> *ways played a more important role, because it played an educational role*. Costa Rica was the one place where you could come and talk human rights. You couldn't do that in Argentina, you couldn't do that in many other places, because you were immediately identified as a leftist, communist, or whatever they wanted to call it."[76]

Against this background it is fair to say that the IIHR turned out to be a critical but constructive companion of the IAHRS and the IACtHR. Still, Buergenthal complained of a lack of interest in and knowledge of the IAHRS in general (including in the mass media)[77] and in particular in the USA, as part of "American provincialism and sheer ignorance when it comes to Latin America",[78] and of a lack of an institutional support structure similar to the one existing in Europe.[79] He also questioned whether the IACtHR's size was appropriate, considering the weak impact of the Court's decisions on domestic law.[80] Yet, at the same time Buergenthal acknowledged the impact of the Court's case law, recounting an anecdote from his work at the Salvadoran Truth Commission involving a simple peasant:

> "We were interviewing some *campesinos* in a small village where serious human rights violations had taken place. During El Salvador's long civil war. One of the witnesses, an old farmer, reported on what had happened in his village. He concluded with the demand that the government comply fully with the "Velásquez Rodriguez Law." Our chairman responded, 'you mean the Velásquez Rodriguez Case?'

76 Kreß & Stahl, 'Interview with Thomas Buergenthal', *supra* note 1, 32 (emphasis added).
77 Buergenthal, 'Remembering', *supra* note 3, 279.
78 T. Buergenthal, 'Human Rights in the Americas: View From the Inter-American Court', 2 *Connecticut Journal of International Law* (1987) 2, 301, 305: "American international lawyers and human rights experts know a great deal about the European system and very little about the inter-American system" [Buergenthal, 'Human Rights in the Americas'].
79 American Society of International Law, *Proceedings of the Annual Meeting*, Vol. 82, 20-23 April 1988, 101, 117: "On one level, the lack of progress is related to the serious political, economic and social problems that have confronted the region and continue to do so. But there are other reasons as well. One of the major systemic weaknesses of the inter-American human rights system, when it is compared with the European, for example, is that the former lacks an institutional human rights lobby whose function is performed in the Council of Europe by its Parliamentary Assembly. The inter-American system does not have a comparable institution."
80 Buergenthal, 'Remembering', *supra* note 3, 278: "I have also frequently wondered whether the Court's small size contributes to the limited domestic effect of its judgments?".

> 'Yes,' the old man replied, 'the law that does away with impunity and makes governments pay for their human rights violations.'"[81]

This brings us to Buergenthal's work in dealing with the civil war in El Salvador.

D. Truth Commission for El Salvador (TCES)

Shortly after concluding his work at the IACtHR, Buergenthal assumed another prominent role to further contribute to human rights, again via a telephone call invitation:

> "In November 1991, while attending a human rights conference in Norway, I received a call from the office of the UN Secretary-General in New York. The caller explained that the Secretary-General wished to name me to the United Nations Truth Commission for El Salvador that would be established shortly. Would I accept the appointment? As I listened to the caller, I looked out of the window of the Oslo conference center where we were meeting; the icy rain continued to fall and the cold I had been nursing in Oslo for the past few days was getting worse. All I could think of at that moment was the tropical climate of El Salvador. I immediately accepted the appointment without so much as asking all the right questions one is supposed to ask on such occasions."[82]

The TCES was established in 1992 to address the conflict between the Army and the guerrillas that took place in the country during Buergenthal's tenure as a judge at the IACtHR.[83] The TCES was entirely composed of foreigners, including two politicians and Buergenthal as the only trained jurist.[84]

81 *Ibid*., 280.

82 T. Buergenthal, 'Truth Commisions: Between Impunity and Prosecution', 38 *Case Western Reserve Journal of International Law* (2006) 2, 217, 217 [Buergenthal, 'Truth Commisions'].

83 On political background see C. Collins & P. Cuellar, 'Truth Commission/Comisión de la Verdad (El Salvador)', in L. Stan & N. Nedelsky (eds), *Encyclopedia of Transitional Justice,* Vol. 3, 2nd ed. (2023), 586, 586 [Collins & Cuellar, 'CV El Salvador'].

84 The other members of the TCES were the Colombian politician Belisario Betancur (former President from 1982 to 1986) and the former Venezuelan Foreign Minister Reinaldo Figueredo. See also Buergenthal, 'Truth Commisions', *supra* note 82, 218:

Perhaps the most important challenge of the TCES was to find witnesses willing to speak out given the high risks this entailed.[85] The TCES made great efforts to overcome this challenge, although at times this created risks for the commissioners themselves:[86]

> "I was often scared in El Salvador […]. We couldn't bring our wives because it was considered too dangerous, because the government that had committed all of these things was still in power. The generals were still in office. We were sitting in the restaurant cafeteria one evening, and suddenly the lights went out. Our bodyguards didn't have flashlights and they're sitting there with matches, trying to see what was going on. We thought we were under attack. That was one of the scariest moments there".[87]

> "We also had to find ways to protect those who were willing to talk and realized that to get witnesses to come forward, we had to guarantee them full confidentiality. As a result, clandestine meetings with witnesses had to be arranged outside our offices, particularly when military officers or insurgents agreed to testify against their superiors. Some of these meetings were scary cloak and dagger operations. Specialists from the UN periodically swept our offices for hidden microphones, and our radio was always on when we received sensitive testimony that we did not want to be overheard."[88]

This strategy yielded the expected results, allowing the Commission to obtain the necessary testimonies and publish their final report, expressively named "From Madness to Hope" (*De la Locura a la Esperanza*) within

"Some people who knew of my prior service as judge and president of the Inter-American Court of Human Rights, joked that the Commission was composed of two politicians and a judge to keep them honest."

85 *Ibid.*, 218-219: "During the first three months of our investigation, we had very little success in getting much information. People were afraid to testify, particularly against the military and security forces because the government which had conducted the war was still in power, with its military and police infrastructure intact."

86 See *Acuerdo de Chapultepec*, 16 January 1992, ch. 1, para. 5, available at https://peacemaker.un.org/sites/peacemaker.un.org/files/SV_920116_ChapultepecAgreement.pdf (last visited 14 March 2024).

87 Kreß & Stahl, 'Interview with Thomas Buergenthal', *supra* note 1, 40.

88 Buergenthal, 'Truth Commisions', *supra* note 82, 219.

approximately eight months.[89] Through this final report, the TCES contributed to the dissemination of various events, including the infamous massacres of the Jesuit priests[90] and of "El Mozote"[91], events whose cruelty deeply affected Buergenthal himself:

> "Until then I had always believed that my Holocaust experience had hardened me to even the most egregious violations of human rights. In El Salvador I found this not to be true. To see the skeleton of a baby still in the womb of a mother killed in the El Mozote massacre, where around five hundred women, children and old men had been murdered, was more than I could take without being deeply affected by the utter depravity of those who committed such crimes".[92]

> "I always find, I learn something from all of these terrible things, like the El Mozote Massacre. About 500 or 600 women, children and old men were killed. One survivor, a woman, started to talk, and within a few minutes I could tell her what happened, because it was what I remembered happened in the evacuation of the Ghetto of Kielce. It was the same thing, the killings, you know, people running. And I suddenly realized how we humans are so good at repeating the same cruelty, every time. We don't have any creative imagination when it comes to cruelty. We always do the same thing to each other, which is a frightening discovery to make. Whether I want them to be original, I don't know, but I was struck by the fact that it's always the same."[93]

89 *Ibid*. The Final Report TCES is available here: TCES, 'De la Locura a la Esperanza: La Guerra de 12 Años en El Salvador: Informe de la Comisión de la Verdad Para El Salvador' (1992), available at https://digitallibrary.un.org/record/183599?ln=es (last visited 14 March 2024) [Final Report TCES].

90 See in this regard: The Center for Justice & Accountability, 'Murder of Jesuit Priests and Civilians in El Salvador', available at https://cja.org/what-we-do/litigation/the-jesuits-massacre-case/ (last visited 14 March 2024).

91 See M. Uetricht & B. Marcetic, 'Remember El Mozote' (11 December 2022), available at https://inthesetimes.com/article/remember-el-mozote (last visited 14 March 2024).

92 Buergenthal, *Lucky Child*, *supra* note 1, 219.

93 Kreß & Stahl, 'Interview with Thomas Buergenthal', *supra* note 1, 39.

The TCES offered also a series of recommendations aimed at facilitating national reconciliation in El Salvador.[94] A particular noteworthy aspect of the TCES's final report is the identification ("naming") of concrete suspects of serious human rights violations.[95] Unfortunately, this bold step was not followed-up by subsequent criminal investigations or prosecutions. To the contrary, a few days after the TCES's final report, an amnesty law was enacted, creating a full-fledged impunity and impeding the prosecution of possible perpetrators.[96] Even though this law was declared unconstitutional by the country's Supreme Court in 2016,[97] an adequate judicialization of the horrendous crimes committed during the civil law is still outstanding until today.[98]

Against this background, one may think that the TCES underestimated the harmful, unintended consequences of a report "naming names".[99] But this was not the case.[100] The TCES was well aware of the country's political situation

94 See Final Report TCES, *supra* note 89, 185-198; see also T. Buergenthal, 'The United Nations Truth Commission for El Salvador', 27 *Vanderbilt Journal of Transnational Law* (1994) 3, 497, 533-537 [Buergenthal, Truth Commission El Salvador].

95 Pasqualucci, 'Buergenthal: Holocaust Survivor', *supra* note 13, 893. See also Buergenthal, 'Truth Commission El Salvador', *supra* note 94, 519-522; Collins & Cuellar, 'CV El Salvador', *supra* note 83, 586.

96 See El Salvador, 'Decreto No. 486 de 1993 - Ley de Amnistía General Para la Consolidación de la Paz' (20 March 1993), available at https://www.refworld.org/docid/3e50fd334.html (last visited 14 March 2024); see also Collins & Cuellar, 'CV El Salvador', *supra* note 83, 588.

97 El Salvador Supreme Court, 'Sentencia de Inconstitucionalidad 44-2013/145-2013' (13 July 2016), available at https://www.refworld.org.es/type,CASELAW,,,59d276aa4,0.html (last visited 14 March 2024).

98 See DW, 'El Salvador: Exigen Ley Para las Víctimas de la Guerra Civil' (21 March 2023), available at https://www.dw.com/es/exigen-al-congreso-de-el-salvador-una-ley-para-las-v%C3%ADctimas-de-la-guerra-civil/a-65054710 (last visited 14 March 2024); see also Office of the High Commissioner for Human Rights, 'Justice Delayed but not Denied: Transitional Justice in El Salvador' (2 April 2020), available at https://www.ohchr.org/en/stories/2020/04/justice-delayed-not-denied-transitional-justice-el-salvador (last visited 14 March 2024).

99 For instance: J. Ávalos, 'El Salvador: La Comisión que no Calculó la Resistencia de las Èlites, available at https://www.dejusticia.org/especiales/la-verdad-en-el-espejo-retrovisor-de-america-latina/el-salvador-la-comision-que-no-calculo-la-resistencia-de-las-elites/ (last visited 14 March 2024). Regarding the reception of the final report see Collins & Cuellar, 'CV El Salvador', *supra* note 83, 588.

100 Buergenthal, 'Truth Commission El Salvador', *supra* note 94, 522: "In our view, national reconciliation would be harmed rather than helped by a Commission report that told only part of the truth. If there had been an effective justice system in El Salvador at the time of the publication of our Report, it could have used the Report as a basis for an

and anticipated the limited judicial action that the final report might ensue.[101] In fact, the publication of the names of concrete suspects was motivated by the expectation that the above mentioned amnesty law would be adopted.[102] Thus, the idea was to compensate the potential and anticipated justice deficit by maximizing truth:

> "We named people who we believed had committed these offences. […] We did it, for one very simple reason. We knew that as soon as our report was adopted, the government would declare an amnesty for everybody, which they did. We figured if they do that, our report is useless. The people of Salvador will not get the truth that they needed. We wanted to make sure that the people of El Salvador knew who the people were that we accused. If that's a violation of due process, we will take our punishment for that. But we thought that this was important enough to do and we had safeguards. We named names only if we felt 95 percent sure about the guilty party. We would not mention names if we were not 95% sure."[103]

This represents another example of Buergenthal's approach, here in a transitional justice context: faced with the risk of an unlikely realization of justice (i.e., the prosecution and adjudication of the responsible perpetrators), some degree of individualization – as a form of truth – was better than nothing. Of course, the question remains whether Commission could in fact be reasonably

independent investigation of those guilty of the violations. In these circumstances, it might have made some sense for the Commission not to publish the names and, instead, to transmit the relevant information to the police or courts for appropriate action. But one reason for establishing the Commission was that the Parties to the Peace Accords knew, and the Truth Commission had ample evidence to confirm, that the Salvadoran justice system was corrupt, ineffective, and incapable of rendering impartial judgments in so-called 'political' cases."

101 *Ibid*. Indeed, this was the reason behind the establishment of a fully internationally constituted Truth Commission, composed entirely of foreign members, *ibid*., 221: "The establishment of an international commission will frequently make sense for a small country, where the population continues to be politically polarized. Here it may be difficult to find even a small group of nationals of the country the population would trust to be impartial. This was the situation in El Salvador and explains why the parties to the Salvadoran peace agreement preferred to have only foreigners comprise their truth commission."

102 Kreß & Stahl, 'Interview with Thomas Buergenthal', *supra* note 1, 38.

103 *Ibid*.

certain to have "named" the right persons and how this concrete identification played out with regard to the presumption of innocence. At any rate, Buergenthal, was well aware of the problem but was ready to pay the consequences: "If that's a violation of due process, we will take our punishment for that."[104]

E. Conclusion

Thomas Buergenthal's comprehensive and decisive contribution to human rights in the Americas and, indeed, beyond cannot be overestimated. Buergenthal played a central role for the protection of human rights in the region because of his unwavering commitment to the viability of the IAHRS before, during, and after its implementation. As a judge of the IACtHR he made a decisive contribution not only to the Court's case law but to its institutional embedding in the Americas and its reach beyond the region. As an academic and activist Buergenthal was key in founding the IIHR which turned out to be a major force in the strengthening of the IAHRS. In a nutshell, Buergenthal's contribution can be summarized in a threefold way by the notions of prudent proactivity, promotion/optimization, interaction/critical follow-up. He thus was one of the architects of the IAHRS thereby reinforcing the global protection of human rights from a regional basis.[105]

The reflections he shared during this path also reveal his remarkable realism and a bold, pragmatic approach, which he also had the opportunity to apply while serving at the TCES. This approach offers valuable lessons for the global protection of human rights which may be summarized in three key phrases:

- *some* protection rather than *none*;
- maximizing the performance of an institution rather than fostering a mere illusion of protection;
- setting ambitious goals, but taking modest steps.

What factors converged to make Buergenthal's contribution so significant? Apart from his undeniable academic abilities, his political acumen and a

104 *Ibid*.

105 Buergenthal, 'American and European Conventions', *supra* note 6, 156: "With the entry into force of the American Convention and the establishment of the Commission and Court, we have a significant opportunity to make our own distinctive inter-American contribution to the protection of human rights."

profound understanding of the reality of the Americas surely played crucial roles.[106] Additionally, his acute awareness of human rights violations as a latent risk in any society and of the struggle against them as a constant task, requiring institutionalization and a pragmatic approach.[107] As shown by his appointment to the IACtHR, perhaps some of his extraordinary fortune, reflected in his personal account in a "Lucky Child", favored paving his way to his contribution. But the *Lucky Child* was just the seed of the *Human Rights Lawyer*. The enormity of Buergenthal's contribution undoubtedly goes beyond luck and is the result of his undeniable talent and tireless work. Life had reserved two monumental challenges for him: the struggle for *his* most basic rights in Europe, and for the rights of *others* in the Americas. He dedicated himself with equal fervor to both missions, showcasing the significance he attributed to the rights of all. He is one of those iconic figures in the history of international law and human rights who are irreplaceable and so needed in these challenging times.

106 Even demonstrating his own identification with the continent, Buergenthal, 'American and European Conventions', *supra* note 6, 166: "I should emphazise, however, that while *we* in the Americas can learn a great deal from the European experience, it would be a mistake to rely on it excessively. For better or for worse, the problems of *our* Hemisphere are more unique to the Americas than they are universal or European. They can only be solved within the framework of *our own* legal, cultural, political, and social traditions." (emphasis added).

107 Buergenthal, *Lucky Child*, *supra* note 1, 226: "The terrible crimes and cruelties inflicted in many parts of the world since the Holocaust have not weakened my commitment to human rights one jot; instead, they have reinforced my belief in the need to work ever harder to promote human rights education on all levels and to build an international and national legal and political framework that will make governmental violation of human rights increasingly difficult"; see also T. Buergenthal, 'Acceptance Speech and Lecture', in Juristische Fakultät der Universität Heidelberg, *Laudationes et Gratiae, Verleihung der Ehrendoktorwürde an Thomas Buergenthal und Andre Colomer zum 600 Jahrigen der Jahrigenbestehend der Juristenfakultät der Universität Heidelberg* (1986), 39, 40: "no nation or people has a monopoly on evil or on goodness and that, consequently, mankind everywhere has to be perennially on guard against the Hitlers, the Stalins and the Pol Pots of this world." [Buergenthal, 'Acceptance Speech'].