

CONCLUDING THOUGHTS: CHANGING TIMES, POLICIES AND INSTITUTIONS

BERNARD DUHAIME*

Glancing at the Americas' past sixty years, one has to recognize that the situation of human rights of the region has changed for the better, in great part due to the development and consolidation of the Inter-American Human Rights System. While the end result is far from perfect, the Regime has certainly provided for noticeable long lasting political and legal changes both regionally and within OAS Member States. The System's recent celebrations (2008 marking the 60th anniversary of the *American Declaration on the Rights and Duties of Man* and 2009 marking the 50th anniversary of the establishment of the Inter-American Commission on Human Rights, the 40th anniversary of the *American Convention on Human Rights* and 30th anniversary of the establishment of the Inter-American Court of Human Rights), constituted a timely opportunity to step back and take a critical look at its achievements, failures and future challenges.

The authors, who contributed to this special edition of the *Quebec Journal of International Law*, have provided us with a unique, multidisciplinary analysis of some of these key issues, in particular regarding International Relations and the Inter-American System of Human Rights, regarding the impact of the Regime at the national level, regarding Inter-American Human Rights Law and the Development of International Law more broadly, regarding the role played by Civil Society, and regarding possible reforms which could broaden the Regime's capacity to strengthen the protection of human rights regionally.

First, Thede and Brisson examined whether and how the nature of international relations within the Hemisphere could explain the major developments within the Inter-American System of Human Rights. They explained that the System itself, however, holds little sway in the ultimate direction of the relations amongst states in the hemisphere. Their historical overview reveals that the System has developed on the basis of and in reaction to the power relations amongst states in the hemisphere, but has been able to exploit occasional "windows of opportunity" to push back the frontiers of its institutional limits. To illustrate this, they have set out the periods that characterise international relations in the hemisphere, and those that can be observed within the Inter-American System. They then analysed the periods that show strong correlation between International Relations and innovations within the Inter-American Human Rights System in order to identify trends and perspectives for the future.

* Professor of Law (University of Quebec in Montreal). Pr. Duhaime is also a Canada-US Fulbright Visiting Chair in Public Diplomacy at the University of Southern California and a Visiting Fellow at Harvard Law School's Human Rights Program. He is the former director and founder of UQAM's International Clinic for the Defense of Human Rights. Before joining UQAM's Law Faculty, Mr Duhaime was staff attorney at the Secretariat of the Inter-American Commission on Human Rights of the Organization of American States. The editors would like to thank all the authors who have contributed to this publication and who have participated in the 2008 conference held on the topic in Quebec City.

Anaya's chapter focuses on the influence of the human rights bodies and procedures of the United Nations and the Organization of American States over Mexico's domestic human rights processes in the 1994 – 2006 period. He has observed that international human rights bodies and procedures have played an important role both as generators of "shame" and as key channels for "shaming" by other actors. In this sense, these entities have made an important contribution to recent developments in Mexico's human rights policies. A direct impact over practices, however, still has to take place. Anaya also identified some of the challenges that international human rights bodies and procedures will still face in order to have an impact in this latter respect.

On his part, Hennebel suggested an innovative look at the avant-garde or "legally non-conformist" jurisprudence of the Inter-American System. The author suggested that the Inter-American Court takes certain liberties with regards to the way in which it interprets the American Convention, treating national voluntarism with disdain and consequently risking displeasing Member States and numerous internationalists. He explained, however, that the Court adopts this attitude intentionally and asserts the Inter-American distinctiveness through its notion of legal universalism. This distinctiveness may be perceived in the Inter-American Court's contentious and consultative jurisprudence. In order to analyze them, Hennebel described the jurisprudential mechanisms operated by the Court through the prism of a number of problems, emphasizing what he argued are the most salient characteristics of this 'Inter-American doctrine.'

Neuman examined the ways in which Inter-American Human Rights Law has been received and employed outside its own sphere. The African and European regional tribunals have openly engaged with Inter-American precedents on procedure and substance from both Court and Commission, although less extensively than the Inter-American Court's methodology leads it to draw from Europe. The International Court of Justice and the UN Human Rights Committee have generally avoided open reference to regional precedent, while arguably some tacit influences can be traced. The Inter-American Court has had less success, however, in exporting its views on *jus cogens*.

Lessard reviewed the formal Inter-American structure for civil society participation at the OAS, then described two concrete participation experiences specifically oriented towards the better enforcement of Inter-American human rights norms : the ongoing process carried out by the *International Coalition of Organizations for Human Rights in the Americas*, and the actions undertaken by *indigenous peoples* within the framework of the negotiations of the *American Declaration on the Rights of Indigenous Peoples*. The author concluded by discussing the mitigated assessment that can be made of participatory mechanisms, and suggested that concrete impacts of participatory initiatives still greatly depend upon both political will from Member States and the ability of participants to articulate unified strategies.

Finally, Dulitzky analyzed some of the System's latest reforms of rules and regulations reflected on the strengths and weaknesses of the *judicialization* of the Inter-American *amparo*. He suggested measures that could allow the Inter-American System to play a more prominent role in the promotion and protection of human rights in the region, including strengthening the successful areas of the work of the Commission and the Court, identifying those situations or groups that are not adequately attended to, and improving those aspects that do not effectively advance the goal of protecting human rights. Dulitzky suggested that the Inter-American Commission should modify its participation in the individual petition system (making it an organ of admissibility that negotiates friendly settlements) and concentrate more on political and promotional activities. He also argued that the Court should act as a tribunal that carries out findings of fact and makes juridical decisions on the merits of complaints.

All of the authors' contributions highlight how some of the Inter-American Human Rights System's features have contributed significantly to its successes. At this stage, we would like to reflect on the broader nature of some of these characteristics and see how they can feed the debate regarding the System's future and the challenges it faces.

To begin with, the preceding texts illustrate well how part of the Regime's successes are due to its *considerable capacity to adapt to the needs of the region* at different levels. Indeed, the System evolved in a flexible manner institutionally and procedurally. As Thede and Brission eloquently demonstrated, it has allowed for the creation of dynamic institutions which have permuted in their nature and actions. The Commission, for example, has grown to become an agency mostly composed of genuine human rights experts, taking concrete actions beyond the mere promotion of human rights. For example, it has progressively undertaken on-site visits and produced significant country and thematic reports in difficult political times and contexts (including during the Cold War - when equivalent UN agencies were more hesitant to act). It did so, in response to massive and systematic human rights violations committed in countries where dictatorial regimes were implementing severe repressive policies. More significantly, as described by Dulitzky, the Commission has contributed actively to the establishment of the individual petition procedure, which, in and of itself is probably the Regime's most important success. To a significant extent, this innovation has allowed greater access to justice for victims who could not obtain remedies nationally, either because domestic remedies were dysfunctional or because local authorities were not willing to address such issues. The petition procedure also allowed the Commission (as well as the victims and civil society organizations more broadly) to address human rights concerns in a more neutral, depoliticized environment. This was probably a prerequisite for results, at times when many governments of the region were not particularly cooperative on such matters...

The Regime progressed in other respects also. For instance, Thede and Brisson showed how, at the *normative and substantive level*, the System's institutions extended the use of international human rights instruments and broadened their scope. Moreover, additional human rights instruments were subsequently adopted by OAS Member States, tailored specifically to address some of the particular human rights problems facing the Continent. As far as the jurisprudence of the System is concerned, Neuman and Hennebel illustrated well how both the Commission and the Court also managed to address thematic concerns specific to the region. Finally, Dulitzky and Lessard demonstrated how the Regime's institutions have adapted to the broader *political changes* that the Hemisphere has faced, for example by tackling delicate issues related to the consolidation of democracy in certain countries during the 1990s or issues related to security and the struggle against terrorism in the early 2000s. Thede and Brisson argued successfully that the System has been able to take advantage of the continental or universal trends of international relations, as well as of the United States' fluctuating interest for human rights.

Another important factor which has contributed to the Regime's success, has been its *capacity to generate change*. Lessard has demonstrated how civil society, using the System's channels, has been able to open political spaces *within the OAS* to engage the organisation's institutions and Member States to address certain areas of concern. Of course the results are incomplete, but the System's capacity to evolve and follow some world trends regarding transparency (in the nomination of officers for example) and participative consultations of interested actors (indigenous peoples for example) is clearly a step in the right direction.

More importantly, the Inter-American Human Rights System has been able to generate significant changes at the national level, *within OAS Member States*. Thede and Brisson have described how strong critical positions adopted by the Commission have put to light massive and systematic human rights violations committed by authoritarian regimes and triggered or at least contributed to democratic transitions.¹ Anaya's piece illustrates the different levels of domestic change generated by the Regime, analyzing its impact in Mexico.

In a broader sense, his study demonstrated how the human rights institutions, including civil society organisations, have generated *changes in the political culture of Latin American governance*. This has been done by providing standards, legitimizing progressive policies, by shaming, etc. It has definitively contributed to the reorientation of certain OAS Member States internal and foreign policies, as shown by Anaya in the case of Mexico (where greater space was provided for civil society in the political debate, where the national sovereignty discourse was abandoned in favour of more transparent collaborative human rights policies, etc.): changing the image of the State, as well as its political language. In many cases, as in that of Mexico, these positive changes have been locked in the institutionalized benefits of democracy.

However, the Inter-American Human Rights System has apparently *not*

¹ In Nicaragua, Argentina, or the Dominican Republic for example.

managed to generate significant changes within the broader realm of international relations, as demonstrated by Thede and Brisson's analysis.

Finally, a third important characteristic of the Regime that attests of its success is its **high level of sophistication**. As argued before, the Inter-American institutions have created and modernized their methods of promoting and protecting human rights. This has been characterized by *the legalization and judicialization of the institutions' interventions*, by the establishment of what Dulitzky called the Inter-American *amparo*. In turn, the System's jurisprudence has developed to a level of density and complexity that illustrates the different human rights needs of the Hemisphere. Hennebel has analyzed its major trend, arguing that it presents a *tendency to the individualization, the criminalization, the constitutionalization, the humanization and to the moralization of Inter-American law*. The author successfully demonstrates that both the Commission and the Court often address human rights problems from the stand point of victims, that they tend to set standards of behaviour, severely condemning State-sponsored abuses and scrutinizing internal legislative and judicial processes.

Neuman has shown that while the Regime's jurisprudence has certainly been influenced by that of other regimes, in particular the European Human Rights case law, it has successfully developed its own *Inter-American approaches to human rights problems particular to the region*. These approaches have had *some level of impact on the development of human rights law* outside of the Regime, and on international law more broadly. It has been the case in some specific instances, for example with regards to forced disappearances, to the non-derogability of habeas corpus, to the issue of barriers to impunity, to the rights of indigenous peoples, to rape, to consular protection, etc.

In turn, as illustrated by Dulitzky, this sophistication, in particular through the process of judicialization -the System's main area of intervention-, has also *limited the System's capacity to protect fully human rights* in the region. This is in part due to the accumulation of cases and the consequent obstacles that it has occasioned to victims' access to justice.

One can hope that the Regime's capacity to evolve and to generate change will permit it to continue to provide some solutions to the Continent's human rights problems, but Dulitzky's article highlights several important challenges that the Inter-American Human Rights System still faces and which beg the question: how could it function better?

Institutionally, there is no doubt that the petition backlog and the Commission's difficulty to process all cases in a timely manner continues to be one of

the System's main caveats. Several solutions have been envisaged,² and Dulitzky's proposal of changing the Commission's role in the petition process (to focus on admissibility of petitions only) is certainly an interesting one. For the moment, while the Commission has made significant technical and institutional changes to the way that it processes cases and while the situation is somewhat better than it used to be at the beginning of the decade, one could very well argue that the core problem remains: many human rights victims are unable to remedy domestically violations to their human rights and have to rely on the Inter-American *amparo*... It is suggested that part of the solution into making the Inter-American Human Rights System work better, lies in remedying violations *at the domestic level*, since that would considerably reduce the number of petitions submitted and of cases admitted.

In the recent past, many victims resolved to use the Inter-American *amparo* in great part because they were facing States which directly violated their human rights through repressive policies, and which had no visible intention of resolving such issues. The exceptions to the rule requiring the exhaustion of domestic remedies, more specifically those dealing with the lack of access to the remedies (including because of threats or intimidation) or dealing with the lack of efficiency of the remedy (including because of the lack of independence or impartiality of the authorities) were particularly useful for rendering the petition system more accessible to victims. This avenue was especially *à propos* considering that several States led by repressive regimes basically ignored most complaints filed by human rights victims and were not particularly eager to protect their rights...

Today, it is probably safe to say that most OAS Member States have evolved and adopted a much more positive, constructive posture regarding human rights generally, as illustrated by Anaya's piece describing the recent 2000-2008 Mexican experience. Of course this cannot be said of all OAS Member States, but still much fewer States refuse blatantly to address human rights violations. While significant research would be required to further this argument, it is also probably safe to say that the great majority of contemporary petitions declared admissible by the Commission are cases which could not be resolved domestically, not principally because of the State's bad faith, but rather most probably because of the *inefficiency of the judicial or administrative domestic remedies* (because of undue delay in rendering decisions, because of lack of implementation of such decisions, etc.).

Justice related human rights concerns are present in most areas of the Inter-American System's interventions to protect human rights, including within the petition process. Indeed, it is also probably safe to say that most of the cases decided on the merits by the Commission and by the Court imply violations of the right to judicial guarantees and/or to judicial protection. Similarly, issues related to the administration of justice and to adequate judicial protection mechanisms are at the core of most of the Commission's recommendations in country or thematic reports. Accordingly, it would certainly seem useful for the Regime to explore avenues

² On this issue see Bernard Duhaime, "Strengthening the protection of human rights in the Americas: a role for Canada?" in Monica Serrano ed., *Human Rights Regimes in the Americas* (Tokyo, Paris, New-York: United Nations University Press, 2010) at 84-113.

seeking to engage States to solve systemic problems regarding the administration of justice and the right to judicial protection more broadly.

Of course this is easier said than done... If solutions to these problems were easy to find, they would have been implemented long ago. However, one can think of several initiatives that could be explored. For instance, the Commission could very well name a Special Rapporteur on the administration of justice,³ who could formulate carefully tailored recommendations to Member States, undertake on-site visits, and participate in friendly settlement processes, in hearings and other working meetings. In addition, the Inter-American institutions, most probably the Inter-American Institute for Human Rights and the Commission, could very well set up technical assistance interventions similar to those put forward by other international agencies, namely the International Labour Organizations, to assist Member States in reforming their justice systems. Ultimately these actions could take the form of Convention art. 41-type-recommendations. This would of course require significant funding, and could be done in close collaboration with the OAS Inter-American Juridical Committee, other regional and international agencies, as well as with the help of experts and civil society. Other actions could involve the systematisation of the region's best practices regarding the administration of justice, and encourage the importation of successful technical and legislative reforms.

Tackling more pro-actively problems related to the administration of justice would not only reduce significantly the number of human rights violations in OAS Member States, but would definitively reduce the number of cases submitted to the Commission, reduce the petition backlog, and consequently limit the exacerbation of the victims' human rights violations caused by additional delays during the processing of cases at the international level.

Most importantly, this would ensure that most cases dealt with by the System would be cases that have in fact been reviewed by all levels of domestic remedies, as is more commonly the case in the European System. This would hopefully limit the number of identical cases related to basic judicial problems such as undue delays or lack of implementation of decisions. Accordingly, -again as is the case in the European System- the majority of cases processed by the Inter-American Commission and eventually by the Court, would deal with complex or controversial substantive issues or society debates, related to thematic problems such as economic, social and cultural rights, or indigenous peoples' rights and the exploitation of natural resources, or issues dealing with the consolidation of democracy (the fight against terrorism, corruption, freedom of expression, governance, etc). When given the chance, the Commission and the Court have provided, including through the case system, for innovative approaches to substantive issues which have had profound impact in the region and, in some cases, outside of it, as demonstrated by Neuman.

This capacity to focus principally on such substantive issues is greatly needed. While the types of governments of OAS Member States have changed, and

³ As is the case in the UN System with its Special Rapporteur on the independence of judges and lawyers.

their attitude towards human rights could be said -generally speaking- to be more positive or constructive than thirty years ago, this is certainly not to say that the region's governments all enthusiastically promote and protect human rights at the domestic level, and fully collaborate with the System's institutions or comply with its procedures, including regarding individual petitions.

Indeed, several governments may perceive human rights protection and corresponding OAS human rights agencies and procedures, as limitations to their capacity to push forward what they consider as measures fundamental to their national interest, for example in the context of implementing tough security-based policies. This is certainly the case in Colombia, for example, where the State security forces are fighting a civil war. The same could be said of the United States, implementing controversial security measures in its fight against terrorism. To some extent this could also be considered the case in Mexico, where the struggle against organized crime and drug trafficking has taken war-like proportions.

Similarly, some governments may perceive human rights protection and corresponding OAS human rights agencies as hostile to their political programs or broader policy agenda. This has had disastrous consequences on human rights defenders and on certain sectors of civil society using the System, publicly labelled as enemies of the State or of the Nation, as it has been reported in Colombia, Venezuela, the Dominican Republic and Cuba for example.

In both scenarios, history has shown how the Inter-American Human Rights Regime, and most importantly its petition system, is all the more relevant and important. The Inter-American *amparo* cannot be set aside, as it constitutes, in many States facing major human rights challenges, an essential instrument of human rights protection. This seems to be confirmed by the list of OAS Member States raising the most human rights concern in the region, as formulated by the Inter-American Commission in its Annual Report since 1996.⁴

Similarly, many OAS Member States are extremely fragile institutionally or are still facing major dead ends with regards to their capacity to put forward policies to ensure their people's human rights, including via domestic remedies. This is again confirmed by the IACHR's above-mentioned list and by numerous country reports prepared by the Commission, concerning States which have undergone severe constitutional crisis (Peru, Paraguay, Bolivia) or continue to do so (Honduras). Similarly, some of the list's "usual suspects" can be said to have extremely weak institutions (Ecuador, Guatemala) or close to none at all (Haiti), rendering domestic efforts to protect human rights a real challenge, to say the least.

Finally, many States are now facing important pressures from private actors or outside factors, which can, in some respect, limit their capacity to protect human rights adequately. This is certainly the case in countries where organized criminal

⁴ In the last fifteen years (1996-2010), the IACHR's Annual Report has *systematically* considered Cuba as a country of major human rights concern. It has done the same twelve times regarding Colombia (1996, 2000-2010 inclusively) and eight times regarding Venezuela (2002, 2003, 2005-2010 inclusively).

organizations, including drug cartels and paramilitary organisations, function in parallel to the State, with means often comparable. Similarly, several OAS Members are now facing major human rights challenges related to major development projects and to the exploitation of natural resources by powerful multinationals. Environmental concerns, indigenous peoples' rights or issues related to the right to health, food and water are often put in a complex equation officially seeking to ensure economic development and the fight against poverty...

Accordingly, the System definitively continues to have its *raison d'être* today. While the petition system is still vital nowadays, it needs to be accompanied by systemic measures, in particular measures seeking to strengthen the administration of justice domestically. The protection of human rights would certainly require the System to help States consolidate their culture for human rights and democracy, and accompany them as they face considerable challenges stemming from dysfunctional internal structures or from outside pressures and third parties.

As repeated by many commentators, there are still important concerns regarding the OAS Member States' lack of strong political will towards an efficient Human Rights Regime within the Organization. While official discourses reiterate the importance of such a System, significant structural problems attest of the Member States schizophrenia, such as the absence of true universalization of the Regime, the inadequate funding of the relevant agencies –including the problem of the multiplication of unfunded mandates–, the lack of coordination of such agencies with other OAS bodies, and the titanic issue of State compliance –or lack of compliance rather- with Commission and Court decisions.

Nevertheless, as indicated previously,⁵ a paramount concern gains in importance today while the System has faced strong criticism by certain OAS Member States. In our view, the *independence and autonomy* of the Commission and of the Court need to be protected nowadays more than ever. In recent years, some governments have challenged –in a more or less subtle manner– the institutions' decisions, morality or even their very existence. In some instances attacks were less subtle...⁶ In this context, such political aggressions need, in our view, to be

⁵ See Bernard Duhaime, "Protecting Human Rights in the Americas: recent achievements and challenges", in Gordon Mace, Jean-Philippe Thérien & Paul Haslam, eds., *Governing the Americas : Regional Institutions at the Crossroads* (Boulder: Lynne Rienner Publishers, 2007) at 131-149. See also Bernard Duhaime, "Commission interaméricaine des droits de l'homme en 2005: enjeu" (2005) 1 *Asymétries, analyses de l'actualité internationale* 138.

⁶ For example, during an on-site visit, the Commission has been the object of illegal intelligence operations sponsored by State agencies. See Inter-American Commission on Human Rights, News release, 59/09, "Expresses concern over intelligence operations related to Inter-American Commission activities" (13 August 2009) online :<<http://www.cidh.oas.org/Comunicados/English/2009/59-09eng.htm>> ; In addition, in at least one recent instance, a Commissioner patently violated his obligation of neutrality in support of a State publicly attacking the IACHR. See IACHR, *Resolution N° 3/07*, IACHR (2007) online :<<http://www.cidh.oas.org/resolution3.07.htm>>. In other instances, some Commissioners have strongly decried having been pressured by States representatives during important

immediately and unequivocally condemned by OAS Member States and OAS officials. In addition, transparency in nomination processes as well as an increase of the institutions' regular –more politically neutral- budget are vital ingredients to ensure not only the autonomy and independence of the Commission and the Court, but also their appearance of autonomy and independence.

As illustrated in this special edition, recent history has shown what these institutions can do, provided they remain independent and autonomous. Strong civil societies, motivated human rights defenders and visionary civil servants should definitively cherish their System and continue to build on it for the years to come, as OAS Members and the inhabitants of the Americas have engaged in an irreversible journey towards a full protection of human rights.

institutional decisions. See Pablo Bachelet, "OAS chief, rights panel in rift" *Miami Herald* (31 October 2007) online: <http://espanol.groups.yahoo.com/group/UPLA-VEN_USA/message/11883>.