

# SIXTY YEARS OF PROTECTING HUMAN RIGHTS IN THE AMERICAS

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The years 2008 and 2009 having marked important anniversaries for the Inter-American Human Rights System, among them the 60<sup>th</sup> anniversary of the *American Declaration on the Rights and Duties of Man*, it seemed a particularly appropriate moment to reflect on the evolution of the system, its successes and failures. In proposing this special edition of the *Quebec Journal of International Law*, the editors seek to offer a critical assessment of the human rights regime in the Americas with the help of contributions by expert scholars. Papers included in the special issue are centered around three main themes: the evolution of the human rights regime and its singularities, the impact of the regime, both inside and outside the region, and the challenges that the regime is now facing.

## I. Evolution of the Inter-American Human Rights System and its Singularities

Although the issue of human rights came up for discussion during the Inter-American Conferences of the 1920s<sup>1</sup>, it is only at the end of the 1940s that the human rights regime in the Americas started to take shape. It did so as part of a renewal of Inter-American institutions that was itself linked in some ways to the reordering of the international system during the period 1944-48. It was during the Ninth International Conference of American States, which met in Bogota in the Spring of 1948, that the member countries adopted the *Charter of the Organization of American States*<sup>2</sup> establishing the Organization of American States (OAS) as the main diplomatic forum in the Hemisphere and formalizing the basic principles of Inter-American cooperation. The Conference also adopted the Pact of Bogota on pacific settlement of disputes and the Economic Agreement of Bogota, both documents never ratified by the necessary number of signatories.

Representatives of the American States also adopted in 1948 the *American Declaration of the Rights and Duties of Man* that was not a legally binding document<sup>3</sup> but which would nevertheless serve as the cornerstone of the human rights regime in

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<sup>1</sup> Monica Serrano, "The Human Rights Regime in the Americas: Theory and Reality", in Monica Serrano and Vesselin Popovski, eds., *Human Rights Regimes in the Americas* (Tokyo, Paris, New York: United Nations University Press, 2010) at 14 [Serrano].

<sup>2</sup> Gordon Connell Smith, *The United States & Latin America. An Historical Analysis of Inter-American Relations* (London: Heinemann Educational Books, 1974) at 200-2002.

<sup>3</sup> Serrano, *supra* note 1 at 14.

the Americas<sup>4</sup>. A regime based on two central institutions, the Inter-American Commission on Human Rights established in 1959 and the Inter-American Court of Human Rights created in 1969, and a series of norms adopted over the years on the prohibition of torture, on violence against women and so on.

One of the interesting things concerning the evolution of the human rights regime in the Americas is that although the question became an important one afterwards it was not a main priority in the discussions leading to the redesigning of the Inter-American system in 1947-8. Issues such as security, development, democracy and economic relations clearly had the priority at the time. In the subsequent decades, however, the institutionalization of the human rights regime was more successful than institutionalization in other issue-areas except maybe the promotion of democracy after 1985.

Another interesting observation, as underlined adequately by Thede and Brisson in this volume, concerns the relationship between the construction of the human rights regime and the evolution of the international and regional systems. It is clear that the regime has benefited from “windows of opportunity” offered by periods of lessening tensions during the Cold War Years and periods of democratization and re-democratization in the Hemisphere. Periods of high-level of tension during the Cold War severely handicapped the progress of the human rights regime in the Americas as a majority of governments of the region aligned themselves with Washington in the fight against communism.

On the contrary, periods of *détente* during the second half of the 1960s, 1970s, and 1980s were more favorable to the idea of protection of human rights because member States felt less threatened. It is during these periods that we can witness the institutionalization of the regime and its expansion. It is also during these periods, but more so during the post-Cold War period that the regime became more open to non-State actors. As well illustrated in the Lessard contribution, participation of civil society in the OAS and in the human rights system did occur in a spontaneous fashion prior to the 1990s but that participation became more organized and regular starting at the end of that decade as the OAS put in place a formal institutional framework for such participation. There were some notable successes as a result of the action of the International Coalition of Organizations for Human Rights in the Americas and the mobilization of indigenous peoples during the negotiations on the *Draft American Declaration on the Rights of Indigenous Peoples* but participatory mechanisms in the Inter-American system must be improved significantly for full participation of civil society in Inter-American institutions.

Nevertheless, the Inter-American human rights regime has managed over the years to develop a singular personality as we are reminded by Hennebel’s contribution. This “Inter-American distinctiveness” of the human rights doctrine is characterized by elements such as the individualization, criminalization,

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<sup>4</sup> Bernard Duhaime, “Protecting Human Rights : Recent Achievements and Challenges“, in Gordon Mace, Jean-Philippe Thérien and Paul Haslam, eds., *Governing the Americas. Assessing Multilateral Institutions*, (Boulder: Lynne Rienner, 2007) at 131 [Duhaime].

“constitutionalization” and humanization of Inter-American law. These atypical features of the Inter-American human rights law do not preclude, however, a form of universalism as the Court will often use international law to interpret the American Convention on Human Rights. Consequently, the “exceptionalism” of the Inter-American doctrine does not prevent an opening of the system to the outside world.

## II. Impact of the Regime

Mônica Herz is not alone in believing that one of the major contributions of the human rights regime in the Americas is its role in the fight to end dictatorships and to advance democratization in the region.<sup>5</sup> The regime was able to do this because it managed, over the years, to achieve a certain number of successes. One of them is the development of the Commission itself and its role with regard to the individual petition procedure that, among other things, provided the regime with “considerable credibility”.<sup>6</sup> Another success is the establishment of jurisprudential bases extremely useful in the fight against impunity. And finally, a major achievement of the human rights regime is the development of jurisprudential standards to protect human rights in the context of armed conflicts, particularly domestic ones, and in the context of regular democratic life.<sup>7</sup>

It is because of these significant achievements that the inter-American human rights regime was able to have an impact both inside and outside of the region. With regard to the region itself, Anaya’s contribution to this volume uses the case of Mexico to illustrate the role of the regime in putting pressure on a national government and working to modify state behavior. In situations where governments are seen as part of the problem as illustrated, for example, by a refusal to work with the regional or international human rights bodies as was the case with Mexico up to 1998, the strategy used by human rights institutions has been one of shaming. By acting themselves as transnational actors or by providing information to third parties, human rights institutions initiate a process of shaming against which a government may have some difficulty to defend itself. In situations where States are trying to reform policies and are seen as part of the solution as was the case with the Mexican government after 2000, Inter-American Human Rights Institutions will develop a strategy of cooperation by interacting with State authorities and by providing resources to civil society actors.

As to external influence, Neuman’s contribution to this volume demonstrate that even if the Inter-American Human Rights System borrowed more from the European and international systems it nevertheless managed to influence other systems in a significant manner. The strongest contribution of the Inter-American Human Rights System concerns forced disappearance where the European Court of Human Rights adopted the methodology and the fact-finding method developed in the

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<sup>5</sup> Mônica Herz, *The Organization of American States (OAS)* (New York, Routledge, 2011) at 28.

<sup>6</sup> Duhaime, *supra* note 4 at 134.

<sup>7</sup> *Ibid.* at 135-140.

Americas. Other contributions to other human rights systems were the non-derogability of habeas corpus adopted by the United Nations Human Rights Committee, the barriers to impunity adopted internationally, and the norms concerning the rights of indigenous peoples adopted by the UN CERD Committee. There were other contributions but also some failures concerning for example the diffusion of *jus cogens*. All in all, however, one can observe that the Inter-American Human Rights System did make significant contributions to both hard law and soft law.

### III. Challenges

Although the Inter-American Human Rights regime does have notable achievements that it can be proud of, it is also plagued by a certain number of flaws as aptly identified in Dulitzky's contribution to the volume. Among them is an unequal protection system as the *amparo* applies only to a few countries. There is also the problem of lack of funds given that less than 10 % of the budget of the OAS, the organization itself being under-funded in relation to the mandates given to it<sup>8</sup>, finances human rights institutions. A related problem is the limited capacity of a system burdened with a backlog of cases and the duplication of processes. Finally, one cannot dismiss the important problem related to the low level of compliance by member States.

Solutions that have been proposed often deal with procedure rather than with substance. Thinking more in terms of substantive issues, Dulitzky proposes interesting ideas to improve the overall performance of the human rights regime in the Americas. Among these is the proposal to centralize human rights within the OAS by, among other things, incorporating the notion of human rights in the mandates of OAS' agencies and creating a stronger link between promotion of democracy and protection of human rights. The independence of the Commission and of the Court must be strengthened and a clearer division of labor must be established between them. Finally, Inter-American Human Rights Institutions must establish a closer relationship with the member States of the OAS.

It is somewhat surprising to find a book recently published on the OAS with almost no mention of the human rights regime<sup>9</sup> given the importance of the issue-area not only for the OAS but also for the Americas as a whole. Looking at the progress made in the various dimensions of inter-American cooperation over the past sixty years, one can easily recognize that the human rights regime has been a crown jewel of the Inter-American system despite its many handicaps. For some, progress has clearly been too slow.

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<sup>8</sup> On this see Richard E. Feinberg, *Unfunded Mandates in the Western Hemisphere : The OAS, IDB and Summitry in the Americas*, Ottawa, FOCAL, Summit of the Americas Follow-up Series No.3, January 2004. See also Gordon Mace & Jean-Philippe Thérien, "Conclusion: The Fragile Legitimacy of Inter-American Institutions", in Gordon Mace, Andrew F. Cooper and Timothy M. Shaw, eds, *Inter-American Cooperation at a Crossroads*, (Basingstoke, Palgrave Macmillan, 2011) at 269.

<sup>9</sup> Betty Horowitz, *The Transformation of the Organization of American States. A Multilateral Framework for Regional Governance* (London: Anthem Press, 2010).

But the Inter-American human rights regime still matters very much in a region where democratization is far from being complete. As Engstrom and Hurrell have quite aptly remarked<sup>10</sup>, the consolidation of democracy in the Americas during the past thirty years can create the false impression that democratic values, including the protection of human rights, are now profoundly imbedded in the region. Too much attention, by the OAS and others, on procedural democracy as opposed to substantive democracy brings many to forget that basic norms and values of representative democracy are still threatened in many countries of the region for various reasons, notable among them are limited State capacities in many of the smaller countries. Some of the governments of the region do not even support the concept of representative democracy itself. Because of this, the problem of protecting human rights is still immensely present in the Americas and the Inter-American Human Rights regime is more than ever a fundamental instrument to reach the goal of full democratic participation by all the citizens of the region, North and South.

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<sup>10</sup> Par Engstrom and Andrew Hurrell, "Why the Human Rights regime in the Americas matters", in Monica Serrano and Vesselin Popovski, eds, *Human Rights Regimes in the Americas* (Tokyo, Paris, New York: United Nations University Press, 2010) at 45-48.