

INTERNATIONAL RELATIONS AND THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS PROMOTION AND PROTECTION. STRATEGIC EXPLOITATION OF WINDOWS OF OPPORTUNITY

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Given the asymmetrical nature of international relations in the western hemisphere throughout the history of the OAS, we postulate that the dynamic of those relations explains major developments within the Inter-American human rights system, whereas the reverse is not the case. In other words, the system, its norms and constraints, have influenced little the direction of relations amongst states in the Americas. An historical overview reveals however that the system has consistently shown itself able to exploit “windows of opportunity” to push back the frontiers of its institutional limits, but this ability to impose more stringent human rights norms is never entirely unquestioned and remains highly contested by the member states. The article uses a periodisation of relations in the hemisphere on the one hand, and those within the inter-American system, on the other. It then analyses the periods that show strong correlation between international relations and innovations within the system in order to identify trends and perspectives for the future. It concludes with three possible scenarios for the immediate future of the system, based on emerging trends in international relations.

Etant donné l'asymétrie des relations internationales à l'ouest durant la période d'existence de l'OAS, nous postulons que la dynamique de ces relations permet d'expliquer des développements majeurs au sein du système inter-américain des droits humains, alors qu'il en est tout autrement dans le cas inverse. En d'autres termes, le système, ses normes, et ses contraintes ont peu influencé la voie des relations inter-étatiques dans les Amériques. Un aperçu historique révèle cependant que le système s'est constamment montré capable de tirer profit « des fenêtres d'opportunité » pour repousser les frontières de ses limites institutionnelles, mais cette capacité à imposer des règles plus strictes de respect des droits humains n'est jamais entièrement acceptée, et demeure largement contestée par les États membres. L'article utilise une double périodisation des relations dans l'hémisphère et des relations au sein du système inter-américain. Il analyse ensuite les périodes qui révèlent un lien fort entre les relations internationales et les innovations au sein du système dans le but d'identifier les tendances et les perspectives d'avenir. Il se conclue par une description de trois scénarios possibles concernant le futur immédiat du système, fondés sur les tendances émergentes en relations internationales.

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International relations in the western hemisphere have been strongly asymmetric throughout the history of the OAS, and it will therefore come as little surprise to most readers that, as a result, our initial postulate is that an examination of international relations within the hemisphere provides an explanation of the major developments within the Inter-American human rights (IAHR) system, whereas the reverse is virtually never the case. That is to say that—despite the efforts of human rights experts and organisations—the system itself, its norms and constraints, have held little sway in the ultimate direction of the relations amongst states in the hemisphere. This is not to say that specific initiatives at certain moments have not had an impact on the behaviour and policies of specific states, but these impacts have been on the whole circumscribed and of a conjunctural nature. An historical overview of developments in the hemisphere and of the system itself within that context reveals that the system has developed on the basis of and in reaction to the power relations amongst states in the hemisphere, and has consistently shown itself able to exploit occasional “windows of opportunity” to push back the frontiers of its institutional limits, but that international relations—including non-state international relations—have not themselves evolved in reaction to events within the IAHR system. In addition, it would appear that this ability to impose more stringent human rights norms is never entirely unquestioned and remains highly contested by the member states.

In order to illustrate these affirmations, we will briefly set out the various periods that characterise international relations in the hemisphere, on the one hand, and those that can be observed within the inter-American system, on the other. We will then analyse in more detail the periods that show a strong correlation between international relations and innovations within the IAHR system in order to identify trends and perspectives for the future. The periods are defined on the basis of the major policies and events that are manifest since 1945 in the international sphere, the Americas, the Organization of American States (OAS), the Inter-American Commission on Human Rights (IAHR Commission) and the Inter-American Court on Human Rights (IAHR Court). The examination will perforce be restricted to the broad strokes of the past 60 years and will not look at specific events in detail, however important.

A perspective such as this, taking international relations as its point of reference, will look at the main trends in ideologies and policies that have strongly influenced discourse, conflict, cooperation and norm-setting on a world scale and on the continental level. It does not examine foreign policy as such, a substantially different approach which would require an examination of the policies of individual countries in the hemisphere and an assessment of to what extent they have actually been implemented, the tensions they have generated, and so on. Such an approach would most probably unearth some interesting cases whereby specific policies have generated certain types of impact on the system, and the system has also influenced specific policy paradigms of specific countries. A perspective rooted in international relations will, on the other hand, allow us to gain an understanding of the broader dynamics of a changing configuration of power relations internationally and within

the hemisphere and their impact within the inter-American human rights system as such.

Clearly, the approach we propose here can be contested on many counts and we do not wish to argue that it is the only possible reading of the dynamics of the interrelationship between the system and the states of the hemisphere. We do maintain, though, that it provides a view that is both necessary and distinct from the majority of analyses that have been produced in relation to this theme. The influential analyses of the system have in general been produced from the perspective of the system itself.¹ The aim of this article is rather to look at the IAHR system from the perspective of the discipline of international relations. In so doing, it will attempt to take into account the role of non-state as well as state actors in the dynamics that constitute international relations.

I. The Evolution of International Relations and the Inter-American Human Rights System: a Periodization

In order to verify whether or not there has been a mutual influence between international relations and the inter-American system and, if so, in what ways and to what extent, we have developed a deliberately “rough” periodization of dominant trends—ideological and political—since the beginning of the present cycle of institutionalisation of the inter-American system in 1948, focussed on five concentric scales: international, continental (the Americas), the OAS as an inter-governmental institution, the IAHR Commission and the Court (see Table 1). We have kept the periodization “deliberately rough” because we postulate that in order to identify the relevant correlations, one must keep an eye on broad trends rather than attempting to explain specific events or actions that may or may not contribute to these trends. Some specific events may contradict or conflict with the overall trends, but without necessarily setting a new one. A brief outline of the major phases in each category follows.

¹ See Thomas Buergenthal, “The Inter-American Court of Human Rights” (1982) 76 A.J.I.L. 231; David Forsythe, “Human Rights, The United States and the Organization of American States” (1991) 13 Hum. Rts. Q. 66; Tom Farer, “The Rise of the Inter-American Human Rights Regime: No. Longer a Unicorn, Not Yet an Ox” (1997) 19:3 Hum. Rts. Q. 510; Jean-Philippe Thérien, Michel Fortmann & Guy Gosselin, “The Organization of American States: Restructuring Inter-American Multilateralism” (1996) 2 Global Governance 215 [Thérien, Fortmann & Gosselin]; James S. Anaya & Claudio Grossman, “The Case of *Awas Tingni v. Nicaragua*: A New Step in the International Law of Indigenous Peoples” (2002) 19:1 Ariz. J. Int’l & Comp. L. 1; Jean-Philippe Thérien, Patrick Hunault & Myriam Roberge, “Le régime interaméricain de citoyenneté: acquis et défis” (2002) 33 Études internationales 421. David Forsythe’s 1991 article is an exception in that it analyses the system in terms of its place within the relations of hegemony in the hemisphere, but it is distinct from the approach we propose here in that it centres on the role of the United States.

A. International Trends

Looking at the major ideological and political trends evidenced on the international level, the following phases can be identified (they are not necessarily mutually exclusive: as a result, some of them overlap with one another).

1. 1945-1980: THE ERA OF LIBERAL HUMANISM

The post-war international community is strongly coloured by the ideology of *liberal humanism*, incarnated in the logic and principles of the major international institutions (United Nations), norms (*Universal Declaration of Human Rights*²), economic policy (Keynesianism), etc. This ideology legitimates, stimulates and survives decolonisation movements (mainly in Asia and Africa) and initiatives in favour of third world autonomy (Bandung, the Non-Aligned Movement, the proposal for a new international economic order, etc.), but eventually is undermined by the world economic crises of the 1970s (brought on by the two oil crises of 1973 and 1979) and the ideological offensive by neo-liberal forces. Liberal humanism also provides the context and rationale for the design of the major institutions and norms of the inter-American human rights system, developed as was the UN system, in the immediate post-War years.

2. 1948-1989: BIPOLARITY

The Cold War with its increasingly bipolar international power configuration is characterised by virulent confrontations between “communist” and “capitalist” forces and their allies and surrogates, accompanied by aggressive diplomatic and military interventions by the two super-powers, especially in their respective zones of influence and in the “third” world. Anti-communism on the part of capitalist countries coexists until the late 1970s with the hegemony of their liberal humanist ideology.

3. 1976-1980: US HUMAN RIGHTS DIPLOMACY

The election of the Carter administration in the United States introduces a brief scaling down of the Cold War logic in favour of an aggressive promotion of human rights internationally by the United States and its allies.

4. 1980-2010: FULL-SCALE NEO-LIBERALISM

Neo-liberal economic and political ideology rapidly gains currency throughout the capitalist world, starting in Great Britain under Margaret Thatcher and in the United States under Ronald Reagan and is relayed by multilateral institutions,

² *Universal Declaration of Human Rights*, GA Res. 217(III), UNGAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948).

particularly the international financial institutions (International Monetary Fund, World Bank, Organisation for Economic Cooperation and Development and, from its creation in 1994, the World Trade Organisation), into the economies and politics of southern countries. Concerted attacks by neo-liberal protagonists against multilateral organizations that strive to maintain their liberal humanist principles (e.g. UNESCO in particular and the UN system in general, International Court of Justice, IAHR Commission) progressively overcome their initial resistance and the neo-liberal principles of market hegemony become enshrined in the majority of international organizations.

5. 1989-2001: NEO-LIBERAL UNIPOLARITY

The fall of the Berlin Wall and the implosion of the Soviet Union hail the advent of a unipolar world under the hegemony of the United States and characterised by unfettered neo-liberalism and accelerated globalisation of economies and societies.

6. 1994-2001: SECURITY REFRAMED

Issues of security reappear on the international agenda, this time framed increasingly in terms of problems or threats posed on the margins of President Bush Sr.'s "New World Order". In the wake of humanitarian tragedies such as the 1994 genocide in Rwanda and civil war in the Balkans, human security and humanitarian intervention occupy an important place in international relations.

7. 2001-2010: NEO-LIBERAL SECURITY POLITICS

The terrorist attacks of September 11, 2001, profoundly transform international relations by super-imposing security logics as an overall lens for policy and international initiatives, and as a justification for numerous forms of military intrusion by strong states into the affairs of weaker ones.

B. Continental Trends in the Americas

The *Cold War period* is characterised by the coming to power of repressive regimes—often with the support of the United States—and a resort to armed struggle and guerrilla movements to combat such regimes, often with the support of the other super-power, the Soviet Union. The Cuban Revolution in 1959 rapidly leads to greater polarisation within the hemisphere and to an accentuation of US attempts to ensure that left-wing movements do not succeed elsewhere in the Americas. At the same time, other states in the region react on the basis of their traditional defence of national sovereignty,³ thus hindering to some extent US attempts to control events.

³ Forsythe, *supra* note 1 at 74; Farer, *supra* note 1 at 528.

Economic crisis in the late 1970s, combined with the major policy change in the US under Carter, contribute to undermining those regimes and strengthening opposition movements that open a window for democratic regime change.

The advent of *neoliberalism* is accompanied in Latin America (and elsewhere) by the third wave of democratic transitions or, as some analysts more accurately label this phenomenon: the double transitions, simultaneously to liberal democracy and to liberalised market economies. The economic policies that were applied resulted in severe economic hardship in Latin America, particularly during the “lost decade” of the 1980s, and durably skewed the type of economic growth achieved, resulting in accentuated inequality throughout the region.⁴ While this liberalization trend sweeps through the Americas, various forms of economic integration are negotiated (*North American Free Trade Agreement*, Mercosur, Free Trade Area of the Americas, and various sub-regional arrangements).

Finally, the period since 2001, with its overriding emphasis on *security logics*, has seen a widespread sea-change in the nature of democratic regimes in the Americas, with left-of-centre governments being elected in a majority of countries since 2002.⁵ The fact that the attention and resources of the US are focussed on the Middle East and central Asia and the ensuing domestic issues that its involvement there raises, has created a space for autonomous action which the new Latin American regimes have been prompt to exploit, both individually and collectively.⁶ Even the outstanding exceptions (Mexico, Peru and Colombia spring to mind), participate in many aspects of the new continental consensus characterized by a united front on many regional issues with respect, for example, to Cuba and the legitimacy of its regime, economic integration, continental security arrangements, etc.

C. The Organization of American States

Taking a broad glance at the inter-American system as a multilateral organization, one can distinguish various phases in its process of development. The first period, which essentially corresponds to the Cold War epoch (1948-1980), is one of slow structuring of the system as a whole, with its various components being defined and put in place. The slowness of the process is undoubtedly at least partially due to the fact that the system is perceived by its members as well as internationally,

⁴ See Pierre Salama, “La pauvreté prise dans les turbulences macroéconomiques en Amérique latine” (2002) 45 *Problèmes d’Amérique latine* 89; Judith Teichman, “Redistributive Conflict and Social Policy in Latin America” (2008) 36 *World Development* 446.

⁵ The durability of this trend is unclear, however, and is called into question by recent electoral results in various countries: in Chile and Honduras, where left-leaning governments have been replaced by right-wing ones, and in Mexico, where the Partido de la Revolución Democrática (PRD) presidential candidate was narrowly defeated by the right-wing Partido Acción Nacional (PAN).

⁶ The relative retreat of the US from the region is not the only factor contributing to the emergence of more autonomous regimes in Latin America. Clearly, an extremely important factor is the failure of neoliberalism to deliver on its economic promises and the resulting popular dissatisfaction and in some cases, widespread mobilisation, in their regard. The purpose of this article, however, is to explore in particular the impact of the new policy space that has appeared in the wake of the US “retreat” from Latin America.

as a sluggish vehicle for US hegemony and national security in the Americas.⁷ The notion of “moral interdependence among the elites of the hemispheric states” developed by Forsythe as a description of the process engendering the system refers essentially to the same phenomenon as that which we designate as the influence of the predominant liberal humanist values in the post-War period, which strongly informed the construction and normative basis of international organizations.⁸

The decade of the 1980s sees an intense period of *development of new instruments* within the system, ranging from the adoption of the *Statute of the Inter-American Court of Human Rights*⁹ (1979) through the creation of the Inter-American Institute for Human Rights (1980) to the *Inter-American Convention to Prevent and Punish Torture*¹⁰ (1985), involvement in the peace process in Central America and the adoption of the *Additional Protocol to the Inter-American Convention on Human Rights in the Area of Economic, Social and Cultural Rights*¹¹ (*Protocol of San Salvador*). A large number of new members (14 Caribbean states joined the OAS in the period between 1970 and 1980) increased the scope and legitimacy of the organization, while at the same time influencing its vision and priorities.

The post Cold War period (1989-2001) infuses a new vitality into the OAS in the guise of a key new member (Canada) and its adjustment to the new issues (democracy, human rights, economic integration, etc.) transforming the hemisphere: the OAS creates new bodies and instruments to deal with these (Unit for the Promotion of Democracy, involvement in the Summit of the Americas process). Following the Secretary General’s evaluation at the 1989 General Assembly in Santiago, Chile, a concerted effort is made to concretely apply instruments and principles developed during the previous phase. This leads to a crescendo of new measures and ultimately to the consecration of democratic principles (the *Protocol of Amendment to the Charter of the Organization of American States* or *Protocol of Cartagena de Indias*¹² of 1985, giving a more political role to the Secretary General by allowing him to bring to the General Assembly (AG) any issue that might endanger peace and security in the hemisphere; resolution 1080¹³ of 1991 on interruptions of the democratic process in member states; the *Protocol of Amendments to the Charter of the Organization of American States*, “*Protocol of Washington*”¹⁴ of 1992 which grows out of the former; the framework agreement on

⁷ This does not imply that we subscribe to a vision of unilateral design and imposition of the OAS by the United States, similar to the position proposed in Jack Donnelly, “International Human Rights: A Regime Analysis” (1986) 40 *International Organization* 599.

⁸ Forsythe, *supra* note 1 at 75.

⁹ OAS, General Assembly, 9th Sess., *Statute of the Inter-American Court of Human Rights*, OR OEA/Ser.P/IX.0.2/80 vol. 1(1979).

¹⁰ *Inter-American Convention to Prevent and Punish Torture*, 9 December 1985, O.A.S.T.S. No. 67 (entered into force 28 February 1987).

¹¹ *Additional Protocol to the Inter-American Convention on Human Rights in the Area of Economic, Social and Cultural Rights*, 17 November 1988, O.A.S.T.S. No. 69 (entered into force 16 November 1999) [*Protocol of San Salvador*].

¹² *Protocol of Amendment to the Charter of the Organization of American States*, 5 December 1985, O.A.S.T.S. No. 66 (entered into force 16 November 1988) [*Protocol of Cartagena de Indias*].

¹³ OAS, General Assembly, 21st Sess., *Representative Democracy*, OR OEA/Ser.P/XXI.O.2 (1991) at 4.

civil society participation in 1999 followed by Resolution 1753¹⁵ in 2000, ultimately culminating in the *Inter-American Democratic Charter*¹⁶ of September 11, 2001).

The period since 2001 can be characterised as one of diplomatic activism and increasing relative autonomy on the part of the Secretariat. Its activism is concentrated in the period 2001-2002, when the organization is very involved in resolving the Peruvian electoral crisis and in negotiating the *Inter-American Convention Against Terrorism*.¹⁷ The election of José Miguel Insulza as Secretary General in 2005, not a candidate supported by the US, is a daring affirmation of the growing autonomy of the Organization, and a manifestation that the states of the region have come to perceive the OAS as a vehicle for structuring their own international relations. OAS involvement in key diplomatic mediations and crises (Bolivia 2008, FARC 2008, Venezuela, Honduras 2009, Haiti 2010) underlines its growing (but not yet entirely complete) credibility amongst its members.¹⁸

II. The Evolution of the Inter-American Human Rights System

A. The Inter-American Commission on Human Rights

Created by the OAS in 1959, the Commission begins to function in 1960. The years 1960 to 1976 correspond to the phase during which the organization puts in place its basic norms and structures, in particular with the adoption of the *Protocol of Amendment to the Charter of the Organization of American States (Protocol of Buenos Aires)*¹⁹ (1965) setting out the role and powers of the Commission. Born in the midst of a divisive regional political crisis with strong human rights consequences (the Cuban revolution, the Trujillo regime manoeuvres in the Dominican Republic), Forsythe argues that the Commission was never intended by the States members to deal with specific human rights cases or situations.²⁰ The relative lethargy of the Commission during this period is also imputable to its composition (which, in turn, is probably linked to Forsythe's observation concerning the lack of political will to create a strong Commission): many of the state representatives were conservative, closely tied to the ruling parties in their country of origin, and served concurrently as

¹⁴ OAS, General Assembly, *Protocol of Amendments to the Charter of the Organization of American States*, OR OEA/Ser.A/2 Add. 3, rev. 1-E (1997) (entered into force 25 September 1997) [*Protocol of Washington*].

¹⁵ OAS, General Assembly, 30th Sess., *Mission of the Chair of the General Assembly and of the OAS Secretary General to Peru*, OR OEA/Ser. P/XXX-O.2 (2000) at 187.

¹⁶ OAS, General Assembly, *Inter-American Democratic Charter*, 28th Spec. Sess., OR OEA/AG/Res.1 (XXVIII-E/01) (2001) (entered into force 11 September 2011).

¹⁷ *Inter-American Convention Against Terrorism*, 3 June 2002, 42 I.L.M. 19 (entered into force 10 July 2003).

¹⁸ The credibility of the system must be measured, in our view, by the extent to which it has become a key forum for diplomacy and policy-making. This does not imply that there are no tensions, debate and criticism by member states, but that the OAS today has become an international organization increasingly perceived by its members as relevant and not to be ignored.

¹⁹ *Protocol of Amendment to the Charter of the Organization of American States*, 27 February 1967, O.A.S.T.S. No. 1-A (entered into force 27 February 1970) [*Protocol of Buenos Aires*].

²⁰ Forsythe, *supra* note 1 at 82.

ambassador to the OAS. Those who had legal backgrounds were mostly specialists in administrative or corporate law, with little specific knowledge of human rights *per se*.²¹

In stark contrast with this initial period, the years from 1977 to 1985 are strongly marked by the activism of the Commission. During this period, its members begin to systematically organize visits *in situ* and to issue reports highly critical of the human rights conduct of member governments. This activism appears to have been facilitated by two factors, that is: a) the entry into force of the *American Convention on Human Rights*²² (*American Convention*), which clarified the mandate of the Commission and which garnered the required number of ratifications in 1978, owing in large part to the persuasive diplomacy of the Carter administration,²³ and b) the rapid degeneration of the human rights situation under highly repressive military dictatorships, especially in the southern cone and in Central America.

In such a context, the Commissioners adopted a conscious strategy of focusing on countries where generalized and systemic violations of human rights were occurring. The resulting country reports aimed to capitalize on the “naming and shaming effect” that their publication would presumably engender, in order to oblige the most recalcitrant States to change their behaviour.²⁴ These reports were based on the findings of field visits to assess the overall human rights situation in specific countries: although the presentation of individual complaints was not officially cited as a reason to visit a given country, the number of such complaints against a state was taken into account in the choice of focus countries.²⁵ Thus, during this period, the Commission issued a number of reports concerning countries where States were responsible for serious human rights violations.²⁶

This period is often described as being one of the first true successes of the Commission and one during which it first established its credibility and prestige. The most often cited successes of this period are the fact-finding visits to Colombia, Nicaragua and Argentina. The visit to Colombia propelled the Commission into the realm of diplomacy when it successfully mediated an agreement between the M-19 guerrilla and the government involving a hostage-taking incident.²⁷ This success greatly increased the Commission’s legitimacy and lent greater teeth to the

²¹ This affirmation is based on our exhaustive review of the biographies of all Commissioners since 1959.

²² *American Convention on Human Rights*, 22 November 1969, O.A.S.T.S. No. 36 (entered into force 18 July 1978) [*American Convention*].

²³ Forsythe, *supra* note 1; Farer, *supra* note 1 at 520-521.

²⁴ Farer, *supra* note 1 at 530.

²⁵ Cecilia Medina, “The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights: Reflections on a Joint Venture” (1990) 12 Hum. Rts. Q. 439 at 442; Farer *supra* note 1 at 530; Bernard Duhaime, “Le système interaméricain et la protection des droits économiques, sociaux et culturels des personnes et des groupes vivant dans des conditions particulières de vulnérabilité” (2006) 44 Can. Y.B. Int’l Law. 95 at 112.

²⁶ See e.g. OAS, Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in Colombia*, OR OEA/Ser.L/V/II.53/doc. 22 (1981) [*Report on Colombia*]; OAS, Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in Panama*, OR OAS/Ser.L/V/II.44/doc. 38, rev. 1 (1978); OAS, Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in El Salvador*, OR OAS/Ser.L/V/II.46/doc. 23, rev. 1 (1978).

²⁷ Farer, *supra* note 1 at 538; Forsythe *supra* note 1 at 91.

publication, the following year, of its *Report on Colombia*.²⁸

The *Report on the Situation of Human Rights in Nicaragua*²⁹ (1978), highly critical of the repressive practices of the Somoza dictatorship in a context of civil war, was widely distributed within the local political elite and contributed to undermining whatever credibility remained to the regime, internationally as well as nationally. Somoza himself reportedly cited it as one of the factors that led him to flee the country in the face of the imminent Sandinista victory.³⁰

The results of the mission to Argentina are more controversial and took some time to make themselves felt. The government's reaction to the *Report on the Situation of Human Rights in Argentina*³¹ (1980), by attempting to block its adoption by the OAS General Assembly, put the Commission in a delicate position and endangered its strategy of focusing on the regimes with poor human rights records. Indeed, the reaction of the military regime and the harshness of the conclusions of the report exacerbated the reluctance of some governments—mostly those already distrustful of the Commission—to its fact-finding visits,³² ostensibly perceived by them as a violation of national sovereignty. Nevertheless, the *Report on Argentina* is often cited as a rare example of institutional opposition to the military regime. In addition, the report raised the profile of the issue of forced disappearances, little recognized at the time but which would later become a key issue driving the democratization process in Argentina.³³

The Commission saw a *relative decline in its activities during the following years until the middle of the 1990s*. Two factors help explain its relative inactivity during this period: first, its greater emphasis on individual cases (following the establishment of the Court), and second, the reinforcement of the powers of the Secretary General in 1985, with a concomitant decrease in the political initiatives and budget of the Commission.

This period was especially marked by a lesser emphasis on the Commission's strategy of addressing human rights mainly through country reports and a relative increase in its jurisdiction over individual complaints. This represents a conscious change of strategy on the part of the Commission, due to its assessment that in this new context it is no longer the only organ that can trigger the "name and shame policy",³⁴ but it is still the only instance mandated to examine and investigate

²⁸ OAS, *Report on Colombia*, *supra* note 26.

²⁹ OAS, Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in Nicaragua*, OR OAS/Ser.L/V/II.45/doc. 18, rev. 1 (1978).

³⁰ Farer, *supra* note 1 at 538; Duhaime, *supra* note 25 at 111; Forsythe, *supra* note 1 at 90; Yves Salkin, "Sommeil ou réveil de l'Organisation des États Américains?" (1992) 48:4 *Revue Défense Nationale* 109 at 117.

³¹ OAS, Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in Argentina*, OR OAS/Ser.L/V/II.49/doc. 19 corr. 1 (1980) [*Report on Argentina*].

³² Farer, *supra* note 1 at 540.

³³ *Ibid* at 538-541; Duhaime, *supra* note 25 at 112.

³⁴ The increasing level of organization by civil society in general and the creation of numerous NGOs defending human rights obliged the Commission to work in a context in which it was no longer the sole player, nor the most powerful and visible one. Some human rights NGOs overshadowed the

individual complaints.³⁵ This new direction led the Commission to invest significant time and effort towards perfecting the procedural dimension for individual cases: in fact, pressure was strong from human rights defenders to attain a level of predictability, independence and methodological consistency expected of a judicial body.³⁶

It was during this period as well, with the entry into operation of the Court, that the mutual interaction and the division of roles between the two bodies began to slowly develop. During the early years of the Court's existence it appears that the Commission was somewhat reluctant to present cases to the Court, despite the fact that it was clear that the latter would only be able to develop and mature into a useful body on the basis of the Commission soliciting it.³⁷

The year 1985 also marked a turning point in that it saw a significant decrease in the diplomatic activities of the Commission. Indeed, the newly appointed Secretary-General was eager to bolster the credibility of his own position by undertaking new initiatives on the diplomatic front, thereby sidelining the Commission.³⁸ This rendered increasingly impossible a repetition of the success of the Colombia mission, even should another such opportunity emerge. Additionally, the prospects were further dimmed by the reduction of the Commission's budget, making it difficult to even maintain normal activities and on-site visits, let alone politically ambitious new initiatives.³⁹ The funding shortfall is in large part due to the Reagan administration's "withholding of funds to the OAS [which] greatly damaged the organization in general and its human rights program in particular".⁴⁰

During the years from *1994 to 2001*, the Commission entered a new phase of intense activity characterized mainly by expansion into new areas of rights that had previously been marginal to its preoccupations: women's rights, children's rights, the rights of indigenous peoples, immigrants' rights and freedom of expression. It is during this period as well that the profile of the Commissioners appointed moved markedly towards the more progressive end of the political spectrum. Candidates were in general less directly linked to the governments of their countries of origin (a number of them had personally been victims of repression under military regimes), they tended to be specialists in humanitarian or human rights law, and their sole mandate became the Commission (that is, they no longer simultaneously held the position of official country representative to the OAS).

Mace and Bélanger interestingly refer to the second half of the 1990s as

Commission with their media visibility and their capacity (backed by significant budgets) to attract public attention to human rights abuse in individual countries where violations were still occurring.

³⁵ Farer, *supra* note 1 at 543.

³⁶ *Ibid* at 543-546.

³⁷ Buergenthal, *supra* note 1 at 245. We will come back to the difficulty of this articulation between the Commission and the Court in the section concerning the Court in the section B below.

³⁸ Farer, *supra* note 1 at 42

³⁹ Medina, *supra* note 25 at 448; Farer *supra* note 1 at 542.

⁴⁰ Forsythe, *supra* note 1 at 86.

being a “period of more basic groundwork of policymaking and institution building”⁴¹ for the inter-American system. The Commission’s work during this period reflects a similar tendency, in that these years are marked by the continuing preparation of the *Draft of the Inter-American Declaration of the Rights of Indigenous Peoples*.⁴² It is said that Cesar Gaviria, elected Secretary General in 1994, infused new dynamism into this initiative, since he had decided to make the promotion of indigenous peoples’ rights one of his priorities.⁴³

This phase can be characterized as one of consolidation of the Commission’s transition from a political role to a juridical one. On the other hand, this shift should not be read as a complete retreat from the political field, but rather as a change of strategy with respect to the political mandate of the Commission, hereinafter putting less emphasis on the “shaming effect” and more on selected thematic issues.⁴⁴ The issues thus retained a strong bias towards improving the situation of most vulnerable groups and individuals and are addressed in a broad, hemispheric perspective rather than a “country-based” one. It must be remembered here that this change coincides with the launch of the Clinton initiative of the Summits of the Americas in 1994 and the discussions around the constitution of a Free Trade Area of the Americas. This is evidenced by the creation of new thematic rapporteurships by the Commission.⁴⁵ From these rapporteurs emanated a series of reports that have tended to be more political in scope, making recommendations to member states on improving the condition of the most vulnerable groups and individuals.⁴⁶

The period was also strongly marked by the constant increase in numbers of individual cases submitted to the Commission. The return to democracy in most

⁴¹ Gordon Mace & Louis Bélanger, “Building Role and Region: Middle States and Regionalism in the Americas”, in Gordon Mace & Louis Bélanger, eds., *The Americas in Translation: The Contours of Regionalism* (Boulder: Lynne Rienner Publishers, 1999) 153 at 163.

⁴² In 1987, the Commission was tasked with the elaboration of a declaration on the rights of indigenous peoples. The preparation of this instrument started in 1989 in collaboration with representatives of indigenous peoples. Even though the drafting of this declaration took five more years than originally planned, it was finally presented to the General Assembly in 1997. At time of writing (December 2010), a working group is still trying to attain a consensus regarding the final wording. See OAS, Inter-American Commission on Human Rights, *Draft Declaration on the Rights of Indigenous Peoples*, OR OEA/Ser.L/V/II.90/doc.9, rev. 1 (1995).

⁴³ Donna Lee Van Cott, “Prospects for Self-Determination of Indigenous Peoples in Latin America: Questions of Law and Practice” (1996) 2 *Global Governance* 43 at 55.

⁴⁴ This statement should be put into perspective. We are arguing here that the “shaming effect” ceased to be the Commission’s principal political strategy. However, this strategy—based on individual country reports—saw a period of renewed effervescence from the mid 1990s on. Countries that were especially targeted by this strategy as a means to highlight their poor human rights records were Cuba (1996-2006), Colombia (1996, 2000-2006), Haiti (1997-1998, 2002-2006), Guatemala (1996-1997, 2003), Venezuela (2002-2004), Peru (1996-1997), Ecuador (1999, 2005) and Paraguay (1999). See Duhaime, *supra* note 25 at 113.

⁴⁵ For example, a Rapporteurship on the Rights of Women and a Rapporteurship on the Rights of Migrant Workers and Their Families were created in 1994; a Special Rapporteurship for Freedom of Expression was also created in 1997.

⁴⁶ See e.g. OAS, Inter-American Commission on Human Rights, *Report on the Status of Women in the Americas*, OR OEA/Ser.L/V/II.100/doc.17 (1998); OAS, Inter-American Commission on Human Rights, *The Human Rights Situation of the Indigenous People in the Americas*, OR OEA/Ser.L/V/II.108/doc.62 (2000).

countries in the region opened space for denunciation of human rights abuses and demands for reparation, including the establishment of national Truth Commissions, and hence contributed to bolstering the number of submissions to the Commission. Also, complaints denouncing States' violations of human rights are seen today as a legitimate form of political pressure by their populations.⁴⁷ As a result, the Commission issued numerous reports concerning individual cases during this period, as their proportion climbed to 75 % of the Commission's activities, in contrast with the situation in the late 1970s, when country reports accounted for some 90 % of the Commission's activities.

The Commission's subordination to the decisions and interpretations of the Court can undoubtedly be seen as a clarification of the structural relationship between the two organs. This is evidenced by the controversy over the application of humanitarian law by the Commission in some of its decisions.⁴⁸ The Court's decision in the *Las Palmeras Case*⁴⁹ finally brought an end to this practice by the Commission, as the Court overruled the Commission's interpretation by stating that neither institution could apply other international treaties. In fact, dispositions of other international instruments, such as the *Geneva Conventions*,⁵⁰ on humanitarian law, could only be used to interpret dispositions of the inter-American body of law under their direct jurisdiction, but could not be applied directly by them. Even though the Commission seemed to strongly believe it could apply such dispositions of international law (evidenced in its previous practice⁵¹) the Commission did adopt the Court's view shortly afterwards,⁵² thus accepting the authority of the Court in the field of interpretation of inter-American law.

⁴⁷ Thérien, Fortmann & Gosselin, *supra* note 1 at 220.

⁴⁸ On this controversy and the practice of the Commission related to the application of humanitarian law, see Lindsay Moir, "Law and the Inter-American Human Rights System" (2003) 25 Hum. Rts. Q. 182.

⁴⁹ *Las Palmeras Case (Colombia)* (2001), Inter-Am. Ct. H.R. (Ser. C) No. 90.

⁵⁰ See e.g. *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, 32 U.N.T.S. 1950 (entered into force 21 October 1950); *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 12 August 1949, 86 U.N.T.S. 1950 (entered into force 21 October 1950); *Geneva Convention Relative to the Treatment of Prisoners of War*, 12 August 1949, 136 U.N.T.S. 1950 (entered into force 21 October 1950); *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 288 U.N.T.S. 1950 (entered into force 21 October 1950) [collectively, *Geneva Conventions*].

⁵¹ In some cases, the Commission applied humanitarian law. See e.g. OAS, Inter-American Commission on Human Rights, *Report No. 26/97, Arturo Ribón Avilán, Case 11.142 (Colombia)*, OR OEA/Ser.L/V/II.98/doc.6 rev. (1998); OAS, Inter-American Commission on Human Rights, *Report No. 55/97, Juan Carlos Abella, Case 11.137 (Argentina)*, OR OEA/Ser.L/V/II.98/doc.6 rev. (1998); OAS, Inter-American Commission on Human Rights, *Report No. 61/99, José Alexis Fuentes Guerrero et al., Case 11.519 (Colombia)*, OR OEA/Ser.L/V/II.102/doc.6 rev. (1998); OAS, Inter-American Commission on Human Rights, *Report No. 109/99, Coard et al., Case 10.951 (United States)*, OR OEA/Ser.L/V/II.106/doc.6 rev. (1999); OAS, Inter-American Commission on Human Rights, *Report No. 136/99, Ignacio Ellacuría, S.J. et al., Case 10.488 (El Salvador)*, OR OEA/Ser.L/V/II.106/doc.6 (1999).

⁵² For the first case where dispositions of humanitarian law were invoked and in which the Commission did not apply humanitarian law, thus respecting the view expressed by the Court, see OAS, Inter-American Commission on Human Rights, *Report No. 62/01, Riofrio Massacre, Case 11.654 (Colombia)*, OR OEA/Ser.L/V/II.111/doc.20 rev. (2001). On this subject, see Moir, *supra* note 48 at 210-211.

A procedural and structural reform was also to contribute to defining the relationship between the Court and the Commission. Simultaneously to the adoption of the procedural rules of the Court in the year 2000, the Commission adopted its own rules. These established that the Commission was to systematically refer to the Court cases involving states that recognized the jurisdiction of the latter and which did not comply with the Commission's recommendations in its report. This apparently minor reform brought an important increase in the number of cases presented by the Commission to the Court, which in turn led to an increase in the Court's activities.⁵³

The most recent period, from 2002 to 2010, represents in certain respects a confirmation of the trends evidenced in the preceding phases: it is one of *engagement by the Commission with major international political issues* from a perspective highly critical of official member state positions, including those of the United States. It begins with its report on terrorism⁵⁴ (2002) and continues with reports on Venezuela⁵⁵ (2003 and another one concerning democracy and Human Rights in 2009⁵⁶), Colombia (2004,⁵⁷ 2007⁵⁸), Honduras (concerning the recent coup, 2009⁵⁹) and Haiti (2005,⁶⁰ 2008⁶¹). Also important are thematic reports on such issues as access to

⁵³ Tara J. Melish, "The Inter-American Court of Human Rights: Beyond Progressivity" in Malcom Langford, ed, *Social Rights Jurisprudence: Emerging Trends in Comparative and International Law* (New York: Cambridge University Press, 2008) 372 at 373 ["Beyond Progressivity"].

⁵⁴ OAS, Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OR OEA/Ser.L/V/II.116/doc. 5 rev. 1 corr. (2002).

⁵⁵ OAS, Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in Venezuela*, OR OEA/Ser.L/V/II.118/doc. 4 rev. 2 (2003).

⁵⁶ OAS, Inter-American Commission on Human Rights, *Democracy and Human Rights in Venezuela*, OR OEA/Ser.L/V/II./doc. 54 (2009).

⁵⁷ OAS, Inter-American Commission on Human Rights, *Report on the Demobilization Process in Colombia*, OR OEA/Ser.L/V/II.120/doc. 60 (2004).

⁵⁸ OAS, Inter-American Commission on Human Rights, *Report on the Implementation of the Justice and Peace Law: Initial Stages in the Demobilization of the AUC and First Judicial Proceedings*, OR OEA/Ser.L/V/II./doc. 3 (2007).

⁵⁹ OAS, Inter-American Commission on Human Rights, *Honduras: Human Rights and the Coup d'État*, OR OEA/Ser.L/V/II./doc. 55 (2009).

⁶⁰ OAS, Inter-American Commission on Human Rights, *Haiti: Failed Justice or the Rule of Law? Challenges Ahead for Haiti and the International Community*, OR OEA/Ser.L/V/II.123/doc. 6 rev. 1 (2005).

⁶¹ OAS, Inter-American Commission on Human Rights, *Observations of the Inter-American Commission on Human Rights upon Conclusion of its April 2007 Visit to Haiti*, OR OEA/Ser.L/V/II.131/doc. 36 (2008).

justice,⁶² women's rights,⁶³ children's rights,⁶⁴ and indicators for economic, social and cultural rights.⁶⁵ In addition, the Commission is still highly productive in issuing decisions and recommendations emerging from investigations related to individual petitions, submissions that are still on the rise. And, when the State does not comply with its recommendations related to these petitions, the Commission quite consistently submits the case to the Court (if the State in question has recognized the Court's jurisdiction), in order to ensure follow-up and to guarantee State compliance given the binding nature of Court decisions. In fact, cases submitted by the Commission constitute the vast majority of the Court's work in recent years, demonstrating the constructive institutional relation that has emerged.

The Commission's country reports are now seen as establishing a *de facto* black list of the "worst" country offenders in human rights terms,⁶⁶ marking its intensive recourse to the "shaming effect" strategy.⁶⁷ The Commission's thematic rapporteurs appear to be opting for the same strategy.⁶⁸ But, in terms of its juridical mandate, the Commission continues to devote major energies to examining individual complaints, which are still on the rise.

This period can also be seen as one of consolidation of the Court's progressive interpretation of the content of certain civil and political rights, which indirectly permitted the enforcement of some social, economic and cultural rights. Again illustrating this tendency of the inter-American human rights system to put more emphasis on this "category" of human rights was the development by the

⁶² See OAS, Inter-American Commission on Human Rights, *Access to Justice as a Guarantee of Economic, Social and Cultural Rights. A Review of the Standards Adopted by the Inter-American System of Human Rights*, OR OEA/Ser.L/V/II.129/doc. 4 (2007); OAS, Inter-American Commission on Human Rights, *Access to Justice for Women Victims of Violence in the Americas*, OR OEA/Ser.L/V/II/doc. 68 (2007) [*Access to Justice*].

⁶³ See OAS, Inter-American Commission on Human Rights, *Access to Maternal Health Services from a Human Rights Perspective*, OR OEA/Ser.L/V/II/doc. 69 (2010); OAS, Inter-American Commission on Human Rights, *Report on the Rights of Women in Chile: Equality in the Family, Labor, and Political Spheres*, OR OEA/Ser.L/V/II.134/doc. 63 (2009); OAS, Inter-American Commission on Human Rights, *The Right of Women in Haiti to be Free from Violence and Discrimination*, OR OEA/Ser.L/V/II/doc. 64 (2009); OAS, Inter-American Commission on Human Rights, *The Situation of the Rights of Women in Ciudad Juárez, Mexico: The Right to be Free from Violence and Discrimination*, OR OEA/Ser.L/V/II.117/doc. 44 (2003) [*Women in Ciudad Juárez*]; OAS, Inter-American Commission on Human Rights, *Violence and Discrimination Against Women in the Armed Conflict in Colombia*, OR OEA/Ser.L/V/II/doc. 67 (2006) [*Violence and Discrimination*]; *Access to Justice*, *supra* note 62.

⁶⁴ See OAS, Inter-American Commission on Human Rights, *Report on Corporal Punishment and Human Rights of Children and Adolescents*, OR OEA/Ser.L/V/II.135/doc. 14 (2009).

⁶⁵ See OAS, Inter-American Commission on Human Rights, *Guidelines for Preparation of Progress Indicators in the Area of Economic, Social and Cultural Rights*, OR OEA/Ser.L/V/II.132/Doc.14 (2008) [*ESCR Guidelines*]. On the development by the Commission of indicators for economic, social and cultural rights, see below at 10.

⁶⁶ Duhaime, *supra* note 25 at 112-113.

⁶⁷ As noted earlier, this strategy came back into force in the mid 1990s and is still a common practice of the Commission. See above at 7.

⁶⁸ Although reports addressing issues on a general hemispheric level are still produced, others were also published by the rapporteurs concerning specific issues, targeting the situation of a particular vulnerable group in a particular country. See e.g. *Women in Ciudad Juárez*, *supra* note 63; *Violence and Discrimination*, *supra* note 63; *Access to Justice*, *supra* note 62.

Commission of indicators for economic, social and cultural rights.⁶⁹ The development of these indicators by the Commission is an important step in the direction of closer monitoring of the progress of economic, social and cultural rights and this will perhaps emerge as a future direction of its activities.⁷⁰ This same trend towards economic, social and cultural rights is reflected in the treatment of individual cases, where “the vast bulk of the Commission’s Convention-based social rights jurisprudence has been issued post-2001”,⁷¹ although some roots of this jurisprudence can be traced back as early as 1978.⁷² It is also after 2001 that the Commission became less reluctant to enforce article 26 of the *American Convention on states’* obligation to implement progressive measures in order to improve the situation of economic, social and cultural human rights in individual cases.⁷³ This body of jurisprudence especially enforced social rights such as the rights to health, to education, to housing and land, labour rights, right to culture and the right to social security.

B. The Inter-American Court of Human Rights

The Court, although it had been formally created in 1969, began functioning in 1978, following the entry into force of the *American Convention on Human Rights*. This delay was due to the difficulty in garnering the necessary number of ratifications for its entry into force, with only six members having adhered to it between 1969 and 1978. The Carter administration’s commitment to the promotion of human rights as well as its strategy of emphasizing multilateral actions and institutions translated into a “crusade” in the hemisphere to convince more countries to adhere to the Convention; this was finally achieved in 1978.⁷⁴ The period from 1978 to 1987 is principally one of the gradual structuring of the Court. During this period, the Court

⁶⁹ *ESCR Guidelines*, *supra* note 65.

⁷⁰ Duhaime, *supra* note 25 at 153-159.

⁷¹ Tara J. Melish, “The Inter-American Commission on Human Rights: Defending Social Rights through Case-Based Petitions” in Malcom Langford, ed, *Social Rights Jurisprudence: Emerging Trends in Comparative and International Law* (New York: Cambridge University Press, 2008) at 344 [“Defending Social Rights”]. For cases in which the Commission recognized states’ responsibility for not respecting article 26, see e.g. OAS, Inter-American Commission on Human Rights, *Report No. 100/01, Milton García Fajardo et al., Case 11.381 (Nicaragua)*, OR OEA/Ser.L/V/II.114/doc.5 rev. (2002); OAS, Inter-American Commission on Human Rights, *Report No. 29/01, Jorge Odir Miranda Cortez et al., Case 12.249 (El Salvador)*, OR OEA/Ser.L/V/II.111/doc. 20 rev. (2001).

⁷² The Commission’s first decision concerning the right to education was seen in 1978 in OAS, Inter-American Commission on Human Rights, *Jehovah’s Witnesses (Argentina)* (1978), Inter-Am. Ct. H.R. Case 2137 OR OEA/Ser.L/V/II.47/doc. 13 rev. (1979) 43. For other decisions concerning economic, social and cultural rights before 2001, see e.g. on right to health, OAS, Inter-American Commission on Human Rights, *Aché People, Case 1802 (Paraguay)*, OR OEA/Ser.L/V/II.43/doc. 21 corr. 1 (1978), and OAS, Inter-American Commission on Human Rights, *Report No. 63/99, Victor Rosario Congo, Case 11.427 (Ecuador)*, OR OEA/Ser.L/V/II.102/doc. 16 rev. (1999); on violations of right to health, work, life, family and movement based on same state conduct: OAS, Inter-American Commission on Human Rights, *Report No. 12/85, Case 7615 (Brazil)*, OR OEA/Ser.L/V/II.66/doc 10 rev. 1 (1985); on right to social security, OAS, Inter-American Commission on Human Rights, *Report No. 90/90, National Vanguard Movement of Retirees and Pensioners, Case 9893 (Uruguay)*, OR OEA/Ser.L/V/II.79.rev.1/doc. 12 (1991).

⁷³ Melish, “Defending Social Rights”, *supra* note 71 at 348-350.

issued ten advisory opinions on issues submitted to its consideration either by states or by the Commission.⁷⁵

From the outset in these early opinions, the Court demonstrated its capacity for innovation. For example, the advisory opinion on other treaties, issued in 1982, established the principle that the Court could refer to other international legal instruments to enable it to interpret dispositions of the inter-American instruments it has the jurisdiction to enforce.⁷⁶ The advisory opinion on freedom of expression for journalists in 1985 was widely covered by the media.⁷⁷ Such visibility helped bring this important issue to public attention in the hemisphere and raised awareness of the role of a free press in democratic regimes. The advisory opinion on the death penalty⁷⁸ in 1983 was also an important development for the inter-American system since the Court's acceptance of the Commission's request despite Guatemala's objection paved the way for joint efforts between the Commission and the Court to address serious and systematic violations of human rights even if the concerned state was not a party to the Convention.⁷⁹

The process of effective institutionalization of the relationship between the Court and the Commission, which strongly marked this period, was long and somewhat conflictive. For example, the first litigious case submitted by the Commission to the Court was found inadmissible and therefore rejected on the basis

⁷⁴ Ironically though, Carter was not able to convince his own country's legislative branch to adopt the *American Convention*. Farer, *supra* note 1 at 520-521.

⁷⁵ The Commission sought three advisory opinions. See *The Effect of Reservations on the Entry into Force of the American Convention (Arts. 74 and 75) (Inter-American Commission on Human Rights)* (1982), Advisory Opinion OC-2/82, Inter-Am. Ct. H.R. (Ser. A) No. 2; *Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights) (Inter-American Commission on Human Rights)* (1983), Advisory Opinion OC-3/83, Inter-Am. Ct. H.R. Ser. A) No. 3 [*Advisory Opinion on the Death Penalty*]; and *Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights)* (1987), Advisory Opinion OC-8/87, Inter-Am. Ct. H.R. (Ser. A) No. 8. Costa Rica sought three advisory opinions. See *Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica (Costa Rica)* (1984), Advisory Opinion OC-4/84, Inter-Am. Ct. H.R. (Ser. A) No. 4; *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights) (Costa Rica)* (1985), Advisory Opinion OC-5/85, Inter-Am. Ct. H.R. (Ser. A) No. 5 [*Advisory Opinion on Freedom of Expression for Journalists*]; and *Enforceability of the Right to Reply or Correction (Arts. 14(1), 1(1) and 2 American Convention on Human Rights) (Costa Rica)* (1986), Advisory Opinion OC-7/85, Inter-Am. Ct. H.R. (Ser. A) No. 7. Uruguay sought two advisory opinions. See *The Word "Laws" in Article 30 of the American Convention on Human Rights (Uruguay)* (1986), Advisory Opinion OC-6/86, Inter-Am. Ct. H.R. (Ser. A) No. 6; *Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 American Convention on Human Rights) (Uruguay)* (1987), Advisory Opinion OC-9/87, Inter-Am. Ct. H.R. (Ser. A) No. 9. Peru and Colombia respectively sought one advisory opinion. See *"Other Treaties" Subject to the Consultative Jurisdiction of the Court (Art. 64 American Convention of Human Rights) (Peru)* (1982), Advisory Opinion OC-1/82, Inter-Am. Ct. H.R. (Ser. A) No. 1 [*Advisory Opinion on Other Treaties*]; *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights) (Colombia)* (1989), Advisory Opinion OC-10/89, Inter-Am. Ct. H.R. (Ser. A) No. 10.

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ Medina, *supra* note 25 at 452.

that it fell under the Commission's own jurisdiction and mandate.⁸⁰ Also, after the important precedent set by the Commission in submitting its request for an advisory opinion concerning the death penalty even when faced with the opposition of a member state, the Commission then contradicted itself when it ruled the following year in favour of Costa Rica, deciding not to submit a case to the Court concerning the interpretation of the *American Convention's* article 13 on freedom of expression. It was finally Costa Rica that requested the Court to interpret this article, an advisory opinion in which the Court adopted a position contrary to that of the Commission, not only ruling against Costa Rica but also explicitly commenting on the Commission's decision not to refer the case to the Court.⁸¹

A brief period from 1988 to 1994 saw the first litigation presented before the Court in the *Velásquez Rodríguez Case*,⁸² and continues with two important advisory opinions and six further decisions in cases under litigation. This period therefore witnessed rapid development of the Court's jurisdiction over contentious cases.

The *Velásquez Rodríguez Case* is still considered a landmark event in the inter-American human rights system because, in its decision, the Court stipulated the obligation of the states to respect every right contained in the *American Convention* rather than only those that the Court has the power to enforce. The Court was thus, from the very outset of its binding decisions, seen as advocating for the indivisibility of human rights and the obligation to respect and protect all human rights.⁸³

Litigation before the Court continued to intensify in the following years, further institutionalizing the reputation and the reach of the Court. Between 1994 and 1997 the Court issued twenty decisions on cases litigated before it.⁸⁴ As a result, this period also saw a consolidation of the relationship between the Court and the Commission and further clarification and institutionalization of their separate roles. During this period, the Court issued only two advisory opinions, illustrating and confirming the shift in emphasis from the exercise of its advisory jurisdiction towards litigation and binding decisions. Although none of these cases led the Court to issue groundbreaking decisions that charted new territory, they did contribute significantly to constructing a body of case law for Court jurisdiction.

The most recent period, from 1998 to the present, is one of continuing innovation and intense development of its corpus of decisions⁸⁵ and of renewal of the

⁸⁰ *Ibid* at 450.

⁸¹ *Ibid* at 453.

⁸² *Velásquez Rodríguez Case (Honduras)* (1988), Inter-Am. Ct. H.R. (Ser. C) No. 4 [*Velásquez Rodríguez Case*].

⁸³ Melish, "Beyond Progressivity", *supra* note 53 at 381-382.

⁸⁴ Number of judgments and decisions issued by the Court each year during this period: two in 1994; five in 1995; seven in 1996; eight in 1997.

⁸⁵ Number of judgments and decisions issued by the Court each year during this period: nine in 1998; seventeen in 1999; seven in 2000; twenty in 2001; seven in 2002; seven in 2003; fifteen in 2004; twenty in 2005; twenty-three in 2006; twelve in 2007; eighteen in 2008; seventeen in 2009. Five advisory opinions were issued during this period. The Court has progressively developed systematic reference to its prior decisions. This will have an important impact on future decisions, as it widens the array of secondary sources from which the Court—and the Commission—will be able to draw in the future.

authority of the Court.

The legitimacy of the Court as the central judicial body overseeing human rights in the inter-American system was bolstered by the recognition of its jurisdiction by five additional state parties between 1998 and 2000 (Brazil, Mexico and Haiti in 1998, Dominican Republic in 1999, and Barbados in 2000).⁸⁶ Also contributing to its increased legitimacy is the reform, as a result of the adoption of the rules of procedure of the Court, enabling victims and their legal representatives to participate directly in every procedural phase of the trial.⁸⁷ This reinforced the Court's legitimacy in the eyes of civil society organizations, since the impossibility for victims to participate had been a bone of contention and a subject of criticism from victims' representatives in general.

Collective rights made their entry into the decisions of the Court mainly through cases related to indigenous communities, with the Court taking the position that the relationship of such communities with their territories is intimately linked to the very survival of the community. The Court thus raised the collective dimension of certain human rights as applicable to indigenous communities. The *Awás Tingni Case* decision by the Court represented an international landmark as the first instance in which any international judicial judgment explicitly incorporated the collective aspect of indigenous rights.⁸⁸ In its decision, the Court adopted a dynamic interpretation of human rights recognizing the collective character of land ownership and the inherent link between cultural identity and land for indigenous communities. This decision is often seen as a milestone and the basis for subsequent international case law in this connection. The Court later issued other decisions in cases involving indigenous communities⁸⁹ confirming its direction of positive interpretation of communities' rights.⁹⁰ This body of case law relating to indigenous communities ultimately led to the recognition by the Court of a collective right to life, a right which includes a series of related economic, social and cultural obligations on the part of states.⁹¹ Another

⁸⁶ Thérien, Hunault & Roberge, *supra* note 1 at 430.

⁸⁷ Melish, "Beyond Progressivity", *supra* note 53 at 373, 379.

⁸⁸ *Case of the Mayagna (Sumo) Awás Tingni Community (Nicaragua), Preliminary Objections, Merits, Reparations, and Costs* (2001), Inter-Am. Ct. H.R. (Ser. C) No. 79 [*Awás Tingni Case*]. For an exhaustive analysis of the case, see Anaya & Grossman, *supra* note 1.

⁸⁹ For other cases involving indigenous communities, see e.g. *Case of the Saramaka People (Suriname)* (2007), Inter-Am. Ct. H.R. (Ser. C) No. 172; *Matter of Pueblos Indígenas de Sarayaku Regarding Ecuador (Ecuador), Provisional Measures* (2005), Inter-Am. Ct. H.R. (Ser. E); *Case of the Plan de Sánchez Massacre (Guatemala), Reparations and Costs* (2004), Inter-Am. Ct. H.R. (Ser. C) No. 116 [*Plan de Sánchez Massacre Case*]. For examples of the Commission following the same line of reasoning, see e.g. *Maya Indigenous Communities of the Toledo District (Belize)* (2004), Inter-Am. Ct. H.R. Case No. 12.053, *Annual Report of the Inter-American Commission on Human Rights: 2005*, OEA/Ser.L/V/II.122/doc. 5 rev. 1 (2005); *Mary and Carrie Dann (United States)* (2002), Inter-Am. Ct. H.R. No. 11.140, *Annual Report of the Inter-American Commission on Human Rights: 2003*, OEA/Ser.L/V/II.117/doc.1 rev. 1.

⁹⁰ This reading of the collective dimension of certain human rights was also expressed in another case that did not involve indigenous communities. The Court stated that the extrajudicial execution of a union leader in Peru violated the right of Peruvian workers in general to organize collectively because of the state of fear prevailing after the execution. See *Case of Huilca-Tecse (Peru)*, (2005), Inter-Am. Ct. H.R. (Ser. C) No. 121.

⁹¹ Melish, "Beyond Progressivity", *supra* note 53 at 393.

innovation that emanated from this case law is the exception permitted by the Court from the usually rigidly applied procedural rule of individualization of victims. The Court has now made a regular practice of derogating from this procedural rule for cases involving indigenous communities.⁹²

Economic, social and cultural rights, although rarely applied directly, are clearly of greater concern for the Court now than was the case earlier. This category of human rights has been advanced rather indirectly, with the Court enforcing them through a progressive, broad and dynamic interpretation of political and civil rights.⁹³ For example, the Court came to enforce the right to education by seeing it as being implicitly contained in the concept of the right to have a “life project” inferred from the right to life, rather than by directly enforcing the right to education itself.⁹⁴ Another example of the indirect application of economic, social and cultural rights can be seen in the enforcement of the right to social security through the right to property in cases concerning the reduction or the removal of pensions.⁹⁵ Similarly, the right to health was enforced indirectly through the right to dignity and humane treatment in cases involving persons with mental or physical disabilities, using the obligation of the state to adopt measures and engaging its responsibility for not doing so.⁹⁶ The Court’s increased concern for economic, social and cultural rights is also evidenced in reparations it awarded, as it has on occasion taken these rights into account in imposing measures to guarantee their respect by states.⁹⁷

The Court has to date, however, not issued a decision directly concerning the enforcement of an economic, social and cultural human right. In fact, it has only three possibilities of doing so: under article 26 of the *American Convention* (which is quite vague, since this article concerns the general obligation of states to seek to constantly

⁹² This practice started with the *Awás Tingni Case*, in which “victims [were] identified as ‘all members’ of the Awás Tingni Community, without provision of the precise names of every individual”. However, in the following cases concerning indigenous communities, the Court began to request a list of names of all members of the community. See Melish, “Beyond Progressivity”, *supra* note 53 at 380, note 50.

⁹³ The Court explained this notion of “dynamic interpretation” in 1999 in an advisory opinion in which it stated that it sees the *American Convention* as a “living” instrument that needs to be interpreted in the light of actual judicial and factual circumstances rather than only by referring to the context in which it was adopted. See *The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law*, Advisory Opinion OC-16/99, Inter-Am. Ct. H.R. (Ser. A) No. 16. See also Melish, “Beyond Progressivity”, *supra* note 53 at 378.

⁹⁴ The concept of the “right to a life project” was first defined in the *Case of Loayza Tomayo (Peru)*, *Merits* (1997), Inter-Am. Ct. H.R. (Ser. C) No. 33. The Court came back to this concept on a number of occasions in order to indirectly enforce economic, social and cultural rights. See e.g. *Case of the “Street Children” (Villagrán Morales et al.) (Guatemala)* (1999), Inter-Am. Ct. H.R. (Ser. C) No. 63; *Case of the “Juvenile Reeducation Institute” (Paraguay)* (2004), Inter-Am. Ct. H.R. (Ser. C) No. 112 [*Panchito López Case*]; *Case of Loayza Tomayo (Peru)* (1998), Inter-Am. Ct. H.R. (Ser. C) No. 42.

⁹⁵ *Case of the “Five Pensioners” (Peru)*, *Merits, Reparations and Costs* (2003), Inter-Am. Ct. H.R. (Ser. C) No. 98 [*Five Pensioners’ Case*].

⁹⁶ *Case of Albán-Cornejo et al. (Ecuador)* (2007), Inter-Am. Ct. H.R. No. 171; *Case of Ximenes Lopes (Brazil)* (2006), Inter-Am. Ct. H.R. (Ser. C) No. 149.

⁹⁷ For example, in the *Plan de Sánchez Massacre Case*, the Court imposed a series of measures obliging Guatemala to implement programs which would ensure and protect the respect of the victims’ right to housing, education, health, water and culture (language). See *Plan de Sánchez Massacre Case*, *supra* note 89. See also Melish, “Beyond Progressivity”, *supra* note 53 at 402.

improve economic, social and cultural rights),⁹⁸ or under article 13 (right to education) or article 8 (trade union rights) of the *Protocol of San Salvador*,⁹⁹ which are the only dispositions relating to economic, social and cultural rights which can be directly applied by the Court. The indirect enforcement of these rights through a progressive and non-restrictive interpretation of the content of other civil and political rights which are enforceable by the Court enables the Court to enforce some rights (like the right to social security or to health for example) that could not be enforced otherwise. Every time article 26 of the *American Convention* was invoked, as well as every time one of the two enforceable rights of the *Protocol of San Salvador* was invoked, the Court has systematically refused to base its decision on these articles, always preferring to enforce these rights through indirect application.¹⁰⁰

In summary, this overview of the evolution of the bodies of the inter-American human rights system in the context of international relations has identified three clear trends. First, as re-democratization in the hemisphere came into play, and as civil society pressure grew to deal with human rights abuses, the profile of the candidates nominated and elected by the member states to positions of responsibility in the Commission and the Court changed, becoming more independent from government, specialized in human rights issues and in many cases personally engaged in human rights struggles. This change in the profile of the Commissioners and Judges strongly influenced their penchant towards strategically pushing the limits of the norms and practices of the system.

Second, the scope of influence and operations of the system has progressively broadened, both as a result of the incorporation of fifteen new states parties into the OAS since 1970, thus effectively doubling its size, and as a result of judicious choices on the part of the system bodies to chart new territory by testing the applicability of its instruments and enlarging interpretations.

A third trend relates to the nature of the decisions rendered by the bodies: they manifest an ever-greater concern with expanding protection, particularly towards rights that were previously poorly defined and institutionalized, and demonstrate a marked concern with the interdependence of rights. This trend is valid as well as concerns an attention to internal violations within the democratic states, for example

⁹⁸ Article 26 stipulates: “The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.”

⁹⁹ *Protocol of San Salvador*, *supra* note 11 — an addition to the *American Convention* — came into force in 1999 and is ratified by 14 countries to date (December 2010). Due to its relatively recent entry into force, the small number of countries subjected to its jurisdiction and other jurisdictional requirements, complaint referring to a violation of article 8 or 13 has yet been presented to the Court.

¹⁰⁰ In the *Five Pensioners’ Case*, the Court refused to rule over the responsibility of the state according to article 26 of the *American Convention*, preferring to claim state responsibility for the violation of other dispositions of the *American Convention*. It explained that this article was quite difficult to enforce in a juridical manner on the merits because these rights have both a collective and an individual dimension. It also stated that the obligation of states to improve the situation of these rights should be measured nationally and not as a function of the circumstances of a very limited group (in this case, a small group of pensioners). See *Five Pensioners’ Case*, *supra* note 95.

concerning freedom of expression in Venezuela,¹⁰¹ the murder of MST activists in Brazil,¹⁰² and union rights in Honduras.¹⁰³

Clearly, these trends broadly reflect changes in the balance of forces internationally and in the evolving constellation of forces within the hemisphere, but there is no clear indication that they have in turn influenced the course of events regionally or on a world level. The representatives of the system have been ingenious and conscientious in exploiting new opportunities provided by the political moment: expanding when the majority of the member states are in a progressive or liberalizing mode, and developing protective or defensive niches when the dominant mood tends toward closure. In this sense, it can be considered that the system has institutionalized more demanding benchmarks for human rights protection in the hemisphere. These higher criteria have not on the whole changed the nature or the basis of international relations within the region or beyond it.¹⁰⁴

Will emerging issues dealt with by the system in the future lead to a significant change in this situation? The bodies seem at present to be turning their attention to the problem of the quality and depth of democracy in particular by tackling the problem of the elimination of all forms of discrimination. A multi-pronged strategy is emerging with the preparation of a draft convention against racism, discrimination and intolerance; the creation by the Commission in 2005 of the position of Rapporteur on the rights of Afro-Descendants and against racial discrimination; and the substantial number of recent decisions by the Court dealing with different types of discrimination (persons suffering from mental illness, indigenous peoples, trade unions; gender,¹⁰⁵ racial and ethnic discrimination, etc.).

III. International Relations and the System: Key Periods

On the basis of the comparison highlighted in the preceding periodization, three moments of strong positive correlation between trends on the world and hemispheric scales and those within the system stand out. These are the phase of human rights diplomacy under the Carter administration in the United States (1976-1980), the period characterized by aggressive neoliberalism (1980-2000), and the recent phase of return to national security logics and the “war against terror” (2001-2010).

¹⁰¹ *Case of Riós et al. (Venezuela)* (2009), Inter-Am. Ct. H.R. (Ser. C) No. 194.

¹⁰² *Case of Escher et al. (Brazil)* (2009), Inter-Am. Ct. H.R. (Ser. C) No. 200; *Case of Garibaldi (Brazil)* (2009), Inter-Am. Ct. H.R. (Ser. C) No. 203.

¹⁰³ *Case of Kawas-Fernández (Honduras)* (2009), Inter-Am. Ct. H.R. (Ser. C) No. 196.

¹⁰⁴ It is worthy of note in this connection that although the system provides for the possibility of a state party to bring a complaint against another state party through the Court, no state has ever had recourse to that mechanism. Inter-state suits within the region have rather been taken to the International Court of Justice.

¹⁰⁵ For a recent Court decision regarding systemic violence against women on the basis of gender, in which it recognizes such violence as gender discrimination and obliges the state to adopt measures that would seek to eradicate this systemic discrimination, see *Case of González et al. (“Cotton Field”) (Mexico)*, (2009), Inter-Am. Ct. H.R. (Ser. C) No. 205.

1. 1976-1980: HUMAN RIGHTS DIPLOMACY UNDER THE CARTER ADMINISTRATION

The strong policy of diplomatic promotion of human rights under the Carter presidency, in a context of deteriorating respect for civil and political rights and increasing repression in Central America and the southern Cone, lent greater political backing and legitimacy to human rights within the system. In particular, at the level of the Commission, this new support led to a hitherto unprecedented period of activism, which appears to have been to a large extent dependent on the Carter policies, because the activism quickly peters out with the change of administration in the United States.

The Court also reflects this policy window in that these are the years that see the institutionalization of the Court, thanks to the entry into force of the *American Convention on Human Rights*. The additional ratifications necessary to ensure this development were gained thanks to the diplomatic insistence of the US administration under President Carter. The Court's initial activity also slows down significantly after Carter's defeat.

2. 1980-2000: AGGRESSIVE NEOLIBERALISM AND THE DOUBLE TRANSITIONS

Events during this period occur in a cascading fashion, with a delay evident as the effects of changes at the international level filter through to the regional level and into the OAS itself. Although economic liberalization and political liberalization can be conceived to be coherent on a theoretical level, in fact in Latin America the tandem also generated paradoxical, if not contradictory, effects. This paradox is illustrated by the actions observed within the IAHR system.

The democratic transitions which gained momentum in Latin America and elsewhere during the early 1980s opened space for greater human rights activism, and thus obliged many of the early transition governments—a significant number of which were lukewarm in their support for reparations to human rights abuse under the previous dictatorships—to not actively throw up obstacles to human rights protection. The amnesty laws for the former governments responsible for massive human rights violations, while perceived by these new governments as necessary to ensure smooth transitions although they restricted their ability to address past human rights violations, remained an issue of political contention for pro-democracy citizens' movements. At the same time, the OAS and other multilateral institutions came under attack by the neo-liberal Reagan administration, which slashed its overall contribution to the system, resulting in important financial constraints for the IAHR Commission in particular. The renewed anti-communism of the United States under Reagan also aggravated pressure on the governments of the member states.

Within the regional system, this paradoxical conjuncture (political opening in Latin American states and a trend to closure by the United States) was accompanied, from the mid-1980s onwards, by an intense activity of treaty development and ratification, and expansion of the activities of the OAS into new areas (conflict mediation, democracy promotion, anti-corruption, etc.). This strategy of resistance is

mirrored in the political profiles of the Commission members, increasingly personally committed to advancing human rights in the hemisphere. Following on this, from the mid-1990s onwards, the Commission successfully undertook to expand its involvement into issues that it had for numerous reasons been unable to address previously, issues that might be characterized in their majority as “post-transition” issues (e.g. women’s rights, indigenous peoples’ rights, freedom of expression, etc.).

The economic aspect of liberalization policies, on the other hand, had somewhat less felicitous effects for the majority of the Latin American population, to such an extent in fact that the 1980s have been widely labelled “the lost decade” for human development in Latin America. Although growth recovered in the 1990s, it was characterized by significantly increased inequality, with Latin America rated the most unequal region of the world as concerns income distribution. This set the stage for a later trend (starting in 1998), in which the Court (also thanks to regime transition in various countries) moved into a proactive mode, developing jurisprudence related to economic and social rights especially, thus attempting to directly address the problem of poverty and inequality.

3. 2001-2010: SECURITY AND THE LEFTWARD TREND IN LATIN AMERICA

Strange bedfellows indeed, these two phenomena, but clearly both have been influential in the recent new trends discernible within the system. The international security obsession since 2001 has diverted attention and resources—financial, political and military—on the part of the United States towards the mid-East and central Asia and has thus left Latin America to a large extent to its own devices. During the same period, the markedly left-of-centre nature of most of the governments elected since 2002 in the region has brought to power leaders predisposed to take maximum advantage of their new room to manoeuvre on the diplomatic and economic fronts. The conjugation of the two trends has given rise to a new era of regional autonomy, although it cannot be said that unanimity exists amongst the Latin American governments. But the new flexibility permitted by the loosening of ties with the United States—or perhaps more accurately, the decreased control of the US over its traditional “back yard”—has opened space for invigorated regional diplomacy by Latin American powers.

This new generation of diplomacy has coloured the initiatives of the various levels of authority within the inter-American system. The General Assembly and General Secretariat have marked the diminished influence of the United States through such spectacular events as the election of Secretary General Insulza without backing from the US, the gradual abandonment or shelving of the FTAA project, and active engagement with regional partners not perceived by the Bush administration as its allies. As for the Commission, it has actively addressed issues central to US policy in a highly critical manner (the human rights impact of the war on terror, the drug war and the US presence in Colombia, etc.). The Court, for its part, has continued the trend initiated in the late 1990s of giving emphasis to economic, social and cultural rights as well as collective rights in general. The recent initiative to streamline the

system through a revision of its procedures has seen greater proactive involvement by states, while at the same time giving rise to concerns that the latter will as a result be unduly advantaged with respect to the victims and that access to justice will consequently be weakened.¹⁰⁶ Such greater active involvement of states in the workings of the system may be an indication of their increased concern for their international image as democratic regimes able to address human rights issues through their national systems, and thus herald an era of less political commitment, even on the part of progressive regimes, to ensure effectiveness of the inter-American system.

IV. Perspectives: Whither the inter-American System in the Obama Era?

This overview of the interaction between international relations at the world and hemispheric levels on the one hand, and the inter-American system of human rights, on the other, indicates that key actors within the system have been adept at exploiting “windows of opportunity” in the international context as expressed in international relations. In addition, as the system has developed over time and become more structured and institutionalized, it has increased its capacity to react critically to negative trends in international relations by strategically protecting the niches carved out in recent decades. Overall, though, it would appear that the system is dependent on international relations and has evolved in reaction to them, but itself has little capacity to actively influence the nature and direction of those relations.

A. Reversals or Roll-Backs?

The fact that the system has been able to creatively inhabit and push the limits of its constraints at moments when international relations allow either for greater autonomy or demonstrate a higher priority to human rights issues raises as well however the opposite possibility, that is: is there a potential for reversal of the progress made within the system should a particularly unfavourable conjuncture arise?

In such matters, of course, all eyes have been turned to the attitude of the Obama administration in the United States. Its announced intentions are probably good news for international cooperation and multilateralism in general. Is it good news for regional autonomy in the Americas? Three possible future scenarios come to mind. An additional important factor will be the durability of the leftward trend in the region: should it suffer a reversal (early 2010 election results in Honduras and Chile indicate that this may occur), will more conservative Latin American governments

¹⁰⁶ Center for Justice and International Law (CEJIL), “*Aportes para la reflexión sobre posibles reformas al funcionamiento de la Comisión y la Corte Interamericana de Derechos Humanos*” (Buenos Aires: CEJIL 2008), online: CEJIL <<http://cejil.org/en/publicaciones/position-paper-no-5-contributions-debate-possible-reforms-function-commission-and-inte>>.

maintain a commitment to human rights in general and to supporting the inter-American system in particular?

1. SCENARIO 1: COLLABORATIVE MULTILATERALISM

In practice as well as on the level of discourse, the United States under President Obama clearly has a “favourable prejudice” towards multilateral approaches and appears to be striving to implement them in moments of crisis (the early moments of the aftermath of the coup in Honduras, the earthquake in Haiti). Moreover, given the rapid institutional development of the system in the years since the late 1990s, the Commission and the Court have perhaps themselves become sufficiently consolidated so as to be able to sustain relatively autonomous activity despite changes in the constellation of forces in the region. This scenario would confirm that set out already in 1991 by Forsythe, who predicted that the system would develop greater protective capacity for human rights in the post-cold War era.¹⁰⁷ As long as the states of the region remain under liberal democratic regimes, whether left or right-leaning in fact, continued compliance with the presently instituted norms of the system may be expected. Indeed, if the movement towards “re-foundation” and the institutionalization of, for example, the rights of indigenous peoples in new constitutions gains momentum, we may as well see pressure coming from member states aimed at expanding the system’s protection of a larger spectrum of rights thereby reinforcing the role and the credibility of the inter-American human rights system within the region.

2. SCENARIO 2: BENIGN NEGLECT

US foreign policy under President Obama may entirely sideline Latin America, as would seem to be indicated in the Phoenix Initiative report, instigated by one of his senior campaign advisors and founder of the Phoenix Initiative, Susan Rice, and titled *Strategic Leadership: Framework for a 21st Century National Security Strategy*,¹⁰⁸ drafted prior to Obama’s election in 2008. Dr. Rice was appointed US Ambassador to the UN by President Obama immediately following his election in December 2008. The Report can therefore reasonably be taken as providing the major guidelines of the Obama administration approach to foreign policy. This document sets out the Middle East and East Asia as the key strategic policy priorities for the United States. It may be that the authors of the strategy consider Latin America an ally and assume that the new multilateralism apparent in this document may be taken for granted in the Americas, with the US seeing itself as a model hemispheric citizen,

¹⁰⁷ Forsythe, *supra* note 1 at 97. The basis for Forsythe’s prediction is somewhat different than ours, however, as his is based on the idea that the end of East-West confrontation would generate this situation. In contrast, in our view such a situation would be tributary to the change from a neo-conservative to a liberal administration in the United States itself.

¹⁰⁸ Anne-Marie Slaughter et al., *Strategic Leadership: Framework for a 21st Century National Security Strategy* (Washington, D.C.: Center for a New American Security, July 2008), online: Center for a New American Security <<http://www.cnas.org/phoenixinitiative>>.

but this is not clearly set out. In either case, a certain degree of autonomy in the region can be expected to continue as a result of the conjugation of these two factors, i.e. the low security threat posed to US interests by Latin America relative to other regions of the world, and the relatively cordial relations between the United States and the majority of Latin American governments. In this scenario, Latin America would be left mainly to its own initiative, and we could expect to see therefore a continued reinforcement of the autonomy of the inter-American system.

3. SCENARIO 3: ASYMMETRIC MULTILATERALISM AND TRADITION

At time of writing nearly two years into the Obama administration, certain characteristics of its policy towards Latin America seem to be emerging which partially contradict the multilateralist discourse favoured by the President. The President himself initially set a positive tone for his relationships with other leaders in the hemisphere—notably at the OAS General Assembly in June 2009—demonstrating a will to find a constructive solution to the Cuban situation and de-escalating the verbal confrontation with Hugo Chavez.

These initial advances seem to be contradicted though by more recent developments, particularly since the Honduran coup. At the outset manifesting a desire to work with regional powers and the OAS to operate a return of the legitimate government, the United States gradually moved towards a more ambivalent position and finally broke ranks with the OAS in accepting a *de facto* solution in concert with several conservative regimes (Colombia, Peru, Costa Rica and Canada). As a result, it may be that traditional concerns of sovereignty and hegemony are taking their toll on President Obama's multilateralist intentions, and that we are seeing the (re)emergence of a pattern of alliances in the hemisphere similar to that which has prevailed since the Munroe Doctrine. This pattern of asymmetric multilateralism (or attenuated hegemony) will see the United States heading a group of conservative or right-wing regimes in the hemisphere, thus putting an end to the hemispheric consensus amongst Latin American countries that seemed to be emerging prior to the Honduras watershed. A similar constellation of forces can be argued to exist with respect to the Haiti rescue and reconstruction emergency. Indeed, some observers even go so far as to assert that Obama policy in Latin America is following the exact same pattern as that of George W. Bush.¹⁰⁹

Others do not endorse such an extreme interpretation, but do affirm that there is an ever-wider gap between Obama's principles and the evolution of US policy in Latin America, ascribing this turn of events to the primacy of domestic political concerns over foreign policy issues.¹¹⁰ It also seems apparent that Secretary of State

¹⁰⁹ See Michael T. Klare, "En politique extérieure, Washington veut faire plus avec moins", *Le Monde diplomatique* 57:670 (January 2010) 8.

¹¹⁰ This is the contention of Juan Gabriel Tokatlian in "Obama and Latin America: curse of the 'local'" (16 February 2010) online: Open Democracy Net <<http://www.opendemocracy.net>>. He writes, amongst other things, that "the US position towards the military *coup d'état* in Honduras in June 2009 cannot be explained in terms of the promotion of democratic values in the region or the containment of

Hillary Clinton is imposing her own views on many international issues, thus highlighting tensions within the Democratic Party itself.

Additionally, given the importance of certain other developments in Latin America for US security (exploitation of new oil and gas reserves, development of regional alliances excluding the United States such as Unasur, *Banco del Sur* and the proposed South America military force, Latin America will not simply disappear from the list of foreign policy priorities of its northern neighbour. Some sources cite increasing pressure from the US South Command to reinvest in military presence in the region,¹¹¹ and point to the growing influence of the military in US foreign policy in general.

Such factors clearly influence the space for political manoeuvre and consensual policy development in the region. As the United States moves towards alliances with conservative regimes in the region under the influence of domestic tensions and in defence of its immediate interests, those Latin American governments not closely tied to those interests are developing their own diplomatic stances and alliances often explicitly critical of US policy choices. This tension is likely to be reflected in the activities of the inter-American system. If its capacity to push the envelope is indeed tributary to the political autonomy of the regimes in the region with respect to the United States, these new fault lines within the region may generate the political backing the systems has consistently required in order to continue to innovate. But the lack of clear support from the major player is likely to limit the reach of those innovations.

Although it is tempting to conclude that a system of human rights norms is now well in place and can function despite changes in the international relations context internationally and within the hemisphere, an examination of the history of the system indicates rather that its defence of human rights is dependent at best on the benevolence of the member states, and that it is constrained by the policies of its hegemonic member.

a (non-existent) communist threat. Its main rationale was domestic: to facilitate the confirmation of the assistant secretary of state, Arturo Valenzuela, whose nomination had been blocked by the Republican senator, Jim DeMint.”

¹¹¹ *Ibid.*

Table 1:
Periodization of the Main Trends in International Relations and the Inter-American System of Human Rights

Dates	International	Hemispheric	OAS system	Commission	Court
1945	Humanist internationalism		Structuring		
1948	Cold War				
		Military regimes and armed struggles		Structuring	
1976	Carter administration – priority to human rights			Activism	Structuring
	Neoliberalism				
1980	Unipolarity	Double transitions			
1989	Globalisation		Application		
	Security/terrorism	Economic integration		Expansion into new fields	
2001		Leftward trend			Innovations in interpretations
2010	Global financial crisis	Autonomisation	Autonomisation	Critical approaches	

Table 2:
Periods of Strong Correlation between IR and the Inter-American System of Human Rights

Dates	International	Hemispheric	OAS system	Commission	Court
1945	Humanist internationalism		Structuring		
1948	Cold War				
		Military regimes and armed struggles		Structuring	
1976	Carter administration – priority to human rights			Activism	Structuring

1980	Neoliberalism	Double transitions			
1989	Unipolarity Globalisation	Economic integration	Application		
2001	Security/terrorism	Leftward trend Autonomisation		Expansion into new fields	
			Autonomisation	Critical approaches	Innovations in interpretations
2010	Global financial crisis				