HUMAN RIGHTS REGIMES IN THE AMERICAS

EDITED BY
MÓNICA SERRANO · VESSELIN POPOVSKI

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The human rights regime in the Americas: Theory and reality

Mónica Serrano

Introduction

The idea of human rights has long been part of the political and social landscape in the Americas. The language of human rights has featured in the Americas since the sixteenth century, from the Thomist and Aristotelian accounts of the nature and origins of natural law, to the heated Salamanca and Valladolid debates over the rights of non-European peoples and the status of American Indians under natural law, to the "natural" rights invoked by European powers to legitimate their overseas empires.

From early on the Spaniards, in particular the religious orders, saw their mission in America as one of "reducing the savage people to Christianity and civility".[1] At the same time, as early as 1512 the Junta de Burgos established that the Indians of America should be treated as a free people, one clearly entitled to hold property. This was followed by the New Laws of 1542, which, if implemented, would have paved the way for the "tutelary Kingship" advocated by Fray Bartolomé de Las Casas, in which all forms of personal service would have been abolished and Indians would have been considered direct vassals of the crown. Although in the impassioned Valladolid debate Bartolomé de Las Casas failed to firmly establish his defence of the Indians, his arguments were sufficiently powerful to prompt the crown to restate its obligations towards the Indian population. Moreover, both Francisco de Vitoria and Francisco Suarez invoked the Roman principle of *vicinage* to argue that the Spanish were obliged to come to the assistance of their barbarian neighbours and to rescue an

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"offendable humanity" from the acts of "warfare" perpetrated by their rulers and to defend it against such acts of aggression as human sacrifice.[2]

The Americas provided in turn the impetus for a "new kind of universalism" that by expanding the reach of the concept of a natural right to distant peoples – whether in its godly or earthly variants – extended the "legal claims of one particular culture" to all the peoples of the world. As Anthony Padgen reminds us, conceptually those rights which were to become human not only developed from the antique conception of natural rights, but were closely associated with European imperial expansion in the New World.[3]

By the late eighteenth century, the confluence of the French Revolution and the rising tide of nationalism marked the end of this universal, cosmopolitan and imperially driven notion of natural rights. Dominant ideas of natural law and natural right (understood as something akin to righteousness or rectitude) gave way to natural or human rights, now "in the sense of equal and inalienable individual entitlements".[4] Although the replacement of the "promise of God" by the promise of the Rights of Man did not remove the aspirations for universality – that is, the principle of the universality of man and the equality of each to each – the idea of the Rights of Man took more specific root: it contained the "constitutive abstraction" for the foundation of a society composed of free and equal individuals, that is of modern democracy.[5] Thus in 1789 the *Déclaration des droits de 1'homme et du citoyen* not only catalysed the conversion of natural rights into still inalienable and inviolable yet chiefly civil and political citizen rights; it also circumscribed them within a specific political order, to the boundaries established by a "society constituted as a nation".[6] Likewise, although it still described human rights as "natural" and "sacred", the philosophical tradition established by the Declaration would rely on these ideas to erect new political orders while encircling and bounding them into the destiny of the nation state.

Well known as it is, the transformative significance of the shift is hard to overstate. In the preceding centuries, the duty of rulers to advance the common good had originated in a divine mandate or natural law, not in the rights or entitlements of individuals. Since the great shift, the concept of human rights has been widely understood as concerning the relationship between the individual and the state – as a notion that encompasses the status, claims and duties of the individual in the jurisdiction of the state. "Rights are entitlements that ground claims with a special force" and, as such, they constitute a "particular type of social practice".[7]

Although the contradictions and political conflicts that accompanied the diffusion of the "philosophical message" of the French Revolution would all too soon expose the tensions between the principles of equality and liberty, the power of the 1789 principles to capture the imagination

of millions around the world is beyond doubt. Over time, the political centralization of states and the rapid advance and market penetration of capitalism dislocated the prevailing social order, generating in turn an unprecedented demand for rights. The mobilization of such demands was a historically arduous process of chipping away at closed political rock-faces. Its legacy is the human rights machinery that is familiar to us today.

Thus, in the Americas as elsewhere, the protection of individual human rights was carried on as a matter to be confined within the boundaries of the political society in question. The status of "human rights law" remained a rather loose mix of diffuse and unrelated legal principles and institutional arrangements that were mostly designed to protect certain categories or groups of human beings beyond state borders. Included in this category were: state responsibility for injuries to aliens, the protection of minorities, and international humanitarian law.[8] With a few exceptions – slavery and labour rights – up until the Second World War, for the most part human rights remained a matter of sovereign national jurisdiction.[9]

The United Nations' human rights regime

The chain of events leading to the Second World War and the shatteringly definitive tragedy of the Holocaust turned human rights into a pressing issue of international politics. The tangible outcome was the UN human rights regime, and in discussions of its origins a number of key factors have been widely identified: widespread support for the human rights cause, the commitment of key dominant powers to human rights, and the vibrant contribution of private actors and civil society organizations.[10] The start-up and evolution of this regime – as with those that emerged in the areas of arms control and non-proliferation and illicit drugs – entailed complex processes in which the preferences and interests of dominant powers were clearly major factors.[11] However, in this regime as in those others, not only did moral considerations operating at both the domestic and international levels prove to be decisive, but so too did the committed and devoted contribution of "moral entrepreneurs".

Undoubtedly, the leadership provided by both dominant and small powers was fundamental in the process of laying the foundations of the regime. In the immediate post-war period, human rights were identified among official circles in Washington, London or Paris as useful mechanisms to help stabilize emerging and unstable democracies and as an insurance against a resurgence of what was then termed fanatical nationalism; soon after, they were seen as a means to bolster defences against

communism. Alternatively, in the capitals of what we now call the South, and most clearly in Latin America, human rights were perceived as an important platform from which to press demands for equality.

So, while the sympathy of government officials towards human rights was instrumental in setting the foundations of the regime, the development of the regime as a "law-making framework" owes a great deal to the active and constant involvement of both leading individual figures and civil society organizations. The norms and rules that would emerge within the framework of this regime certainly reflected the preferences and interests of leading powers, but they have also been closely connected to the normative aspirations of smaller states and – equally important – to social mobilization on the ground.

Long before the drafting of the UN Charter, the efforts of non-governmental actors, including the Commission to Study the Organization of Peace (CSOP), provided ample evidence of the vital role that civil society and non-governmental initiatives would play in the creation and evolution of the UN human rights regime. Through the combination of thorough research, active engagement with the US government and an outstanding readiness to embark on assertive and strategically deployed advocacy campaigns, the CSOP not only succeeded in placing human rights on the international agenda; it also would play a key role in the process by which human rights commitments and standards were firmly imprinted in the UN Charter.[12]

This organization helped frame a new international discourse of rights that included ideas not only for an international bill of rights, but also for the setting up of a human rights commission. In the first press release of the CSOP, published in 1940, the authors called for a new framework allowing the individual and not just states to become a subject of international law; the protection of human rights had already been identified as a key function of the future world organization. But there are strong indications that the current of thinking informing the views of this Commission was in no way limited to idealist considerations. Its reflections (specifically those emanating from Quincy Wright) also incorporated into the analysis the potential and significant contribution that international human rights mechanisms could make to the global security agenda and to the prevention of war. Indeed, the protection of individual human rights, and in particular of civil liberties, was soon identified as an essential component of strategies aimed at curbing and containing the international repercussions of "fanatical nationalism".[13]

The work produced on sovereignty by the Commission also anticipated the more recent and dramatic emphases upon conditioned and contingent sovereignty and sovereignty as responsibility. The CSOP's first report identified five areas in which some limits to the "exaggerated develop-

ments of the idea of sovereignty" should be considered: the submission of disputes to international arbitration; the renunciation of the use of force; the control of armaments; the coordination of economic activity; and, after noting that the "destruction of civil liberties anywhere creates danger of war", the expectation that states would accept "certain human and cultural rights in their constitutions and in international covenants".[14]

The intellectual work and the intense rhythm of activities deployed by the CSOP appeared to have influenced not only the discourse but also the commitment of the Roosevelt administration in the United States to universal freedom and human rights. More than anywhere else, the views of the CSOP left an indelible mark in Roosevelt's 1941 annual message to Congress and in the President's commitment to "four essential human freedoms" – freedom of thought and expression, freedom of religion, freedom from fear, and freedom from want – and in his determination to pursue those freedoms not only at home but also "everywhere in the world".[15]

Equally significant was the return of the language of rights, a theme that still attracts the attention of diplomatic historians. Some point to Roosevelt's personal involvement, others to the fortuitous coincidence provided by the celebration of the 150th anniversary of the US Bill of Rights on 15 December 1942. Taken together, these developments would help secure the semantic shift to rights in the Declaration by the United Nations.

As works for a possible permanent international organization started and progressed through 1943, the CSOP advisory role in the drafting of a preliminary constitution for the new international organization and of an international bill of rights intensified. Then in 1944, when US Secretary of State Cordell Hull decided abruptly to end participation by outside groups and congressional representatives in the post-war planning process, the efforts from human rights groups ran into difficulties. However, the still embryonic but unyielding determination of human rights activists, along with their public and vocal reaction against the Dumbarton Oaks Proposals, soon forced the State Department to step back and to seek their assistance after all to guarantee the much-needed public support for the envisaged international organization. This allowed the CSOP and other groups to come back with a forceful lobbying campaign for the inclusion of more progressive and human rights provisions in the final UN Charter. A key component in this crusade, which involved the mobilization of major figures, the 48 state governors in the United States and the mass media (radio), was the creation of a human rights commission as a pillar of the new international architecture. Roosevelt, impressed by the energy and mobilizing power of these groups, soon decided to designate a number of organizations as "consultants" to the US delegation.[16]

Clearly, the inclusion and official recognition of these groups and the unprecedented status granted to them at the San Francisco Conference were a prescient decision, one that offers valuable insights into the contribution and future role to be played by private and civil society groups within the United Nations.[17] This logic can best be captured by the way in which the need to campaign on behalf of the human rights cause expanded from the US government to a wider circle that included the more reluctant UK and Soviet governments. Although a four-point plan – which included the new and decisive general principle stating that human rights are "a matter of international concern" – enabled this constituency effectively to influence the US position, an improvised but passionately effective speech delivered by Isaiah Bowman, US adviser and President of Johns Hopkins University, at a meeting of the four leading delegations may also have helped win over the reticent UK and Soviet representatives.

The persistent efforts by civil society groups – representing churches, trade unions, ethnic groups and peace movements – and the commitment of leading powers including the United States and the United Kingdom, as well as smaller states such as Brazil, Colombia, Cuba, the Dominican Republic, Mexico, Panama and South Africa, to the human rights cause made possible the articulation of human rights and the inclusion of fundamental references to them in the UN Charter. Although at San Francisco the big powers entrusted the United Nations with the promotion rather than the active protection of human rights, one can easily forget the continued important role played by smaller states in enhancing and consolidating the principle of international concern for human rights within the new organization.[18] As we have seen, the Latin American perspectives of international order not only considered human rights as a fundamental and constitutive feature, but also saw in the promotion of human rights and in particular of social and economic rights an entry point that could help them in their efforts to address the inequalities of the international order. Some of the Latin American views expressed at the time in regional debates were clearly in line with notions of conditioned and contingent sovereignty. In the words of the Uruguayan Foreign Minister, Eduardo Rodríguez Larreta, "'non intervention' is not a shield behind which crime may be perpetrated, laws may be violated".[19] For Latin American countries, whose representation in the early days of the newly established organization would far outweigh that of other regions – 20 out of 50 state members – the promotion of human rights, and in particular of social and economic rights, was also seen as a way to address and tackle the long neglected inequalities of the international order. Thus at these negotiations Latin American representatives were soon identified as ardent advocates of the indivisibility of rights.[20]

In contrast with its predecessor, the League of Nations, in its Preamble and Article 1 the UN Charter explicitly acknowledged the promotion of human rights and fundamental freedoms among its main purposes. True, in the Charter human rights were proclaimed to be central purposes of the new organization. Yet it is hard to avoid the conclusion that the strong prohibitions on intervention inserted in Article 2 had turned the Charter into a fundamentally non-interventionist text. The recognition of human rights as a matter of legitimate international concern had thus been coupled with a firm commitment to the ostensibly contradictory principle of absolute national sovereignty. Ironically, some of the wording of the strongest and often-cited prohibition on intervention in Article 2(7) originated in British imperial concerns over the powers and authority of the new organization and the potential implications for the permanence of the British empire.[21] Not only was the weight of non-intervention clearly imprinted in the Charter, but over the years UN practice would also help foster the culture of non-intervention, propagating the perception of an organization clearly associated with the principle of non-intervention in the internal affairs of states.[22]

Yet the Charter's references to human rights and the body of human rights law that would emanate from them would also eventually shift the scales. There is a good deal of evidence to suggest that, once the foundations of the regime had been laid down, a framework for continued negotiation and law-making was also set into operation.[23] In the period from 1945, disagreement over both the origins and the boundaries of human rights ideas remained as familiar as always but, as the impetus of human rights law gathered force, the "radical statist logic" that had for centuries underpinned human rights practices gradually disintegrated.[24]

The first landmark was the Universal Declaration of Human Rights adopted by the General Assembly in 1948, which helped establish the foundations of the modern human rights doctrine.[25] The Universal Declaration not only advanced the view that the way in which states treat their own citizens is a legitimate international concern, but sought to subject the actions of governments to international standards. By and large a non-binding document, the Declaration nevertheless soon emerged as an authoritative point of reference establishing the meaning and significance of the general references to human rights enshrined by the Charter.[26] In contrast with previous traditions, the Universal Declaration did not invoke any "justifying theory", but instead just declared certain values to be human rights. Beyond the Declaration's silence about its theoretical foundations lay the belief in "a common standard of achievement for all peoples and all nations".[27]

Similarly, and despite their contamination by the reality of "victors' justice", the Nuremberg and Tokyo war crime trials lent substance to

the idea of internationally punishable extreme crimes. The Nuremberg and Tokyo judgments of 1946 and 1948 not only played a key role in the codification of crimes against humanity but helped advance the cause of international consequences for gross human rights crimes. Under this charge, state soldiers and officials "were liable for offences against individual citizens, not states", and against victims who often were nationals and not foreigners. Undoubtedly, these processes, together with the decisive 1948 Convention on the Prevention and Punishment of the Crime of Genocide, brought the actions of governments against their own citizens into the province of international concern and action.[28]

Nowhere was the impact of these foundational instruments more evident than in their role as catalysts for the revolution in international human rights. Although in the immediate post-war period the idea of internationally protected human rights had been clearly placed on the international agenda, at the time doubts remained as to whether it could be translated into practice. Both state and non-state actors soon learned what an uncertain and erratic process this would prove to be.[29] Yet the main thrust of the emerging human rights norms was to provide a framework in which general principles were first negotiated and formalized and an arena for negotiation and lobbying "from which more specific 'harder' rules" would subsequently emerge. The contribution of the United Nations to this process has been widely acknowledged. Indeed, the consolidation of human rights as a standard subject of international relations owes a great deal to this organization.[30]

In the early post-war period the United Nations acted swiftly and assumed a leading role in the codification of human rights, as well as in fostering a "global human rights culture".[31] In the period after 1948 the rights enshrined by the Universal Declaration would be further elaborated in a constellation of treaties and conventions. Thus, over the years, not only did human rights emerge as a new reality in international relations, and as a specific branch of international law, but the post-war era also ushered in a new reality, that of internationally codified human rights.

On the other hand, although in the period between 1945 and 1953 the United States – under the outstanding leadership of Eleanor Roosevelt, US representative, president and chair of the United Nations Commission on Human Rights – played a leading role in laying down the foundations of the UN human rights regime, its medium- and long-term prospects looked increasingly fragile as the Cold War settled in.[32] With the exception of Europe, where a Convention for the Protection of Human Rights and Fundamental Freedoms had been adopted in 1950 under the auspices of the Council of Europe, progress on the human rights front was slow and erratic. As Cold War dynamics developed in Eastern Europe and other regions, the reach of human rights ideas and norms was clearly

severed. In the Western camp, what once was seen as a clear commitment to human rights was increasingly subordinated to strategic and security considerations. If the United States and other Western states had played a major role in the creation of the post-war human rights regime, the ascendancy of security priorities implied a serious erosion of their commitment to upholding the regime. In the United States, the compounded effect of the unfolding of the Cold War and the rise of a powerful conservative group – the Bricker coalition, which was determined to thwart efforts against racial discrimination and to prevent further adherence to human rights instruments – soon forced Washington to back away from its leading role as a promoter of internationally recognized human rights.[33] Thus, unsurprisingly, through the Cold War period the leadership once provided by the United States and other Western powers remained in retreat.

The Cold War not only sapped the leadership so far provided by a number of governments, but was also to have a profound impact on the voices of political entrepreneurs and civil society groups that had so powerfully propelled the human rights cause in the early post-war period. Two points are worth stressing here. First, in the mid-1940s an external favourable setting had helped magnify the voices of these actors, but in the new context this was no longer the case. Secondly, well into the 1960s these groups remained few and loosely connected and had clearly not yet developed the density and intensity of contacts and exchanges of information and resources that would later characterize their activity.[34]

By the second half of the 1970s, however, a number of regional and international events helped swing the balance again in favour of a new wave of international human rights activism. Through the 1970s a number of important decisions and actions would all contribute to the renewed normative salience of the idea of human rights – including the first World Conference on Human Rights held in Teheran in 1968; the activation in the second half of the 1960s of the protection function of the United Nations through the creation of a procedure that enabled the Commission on Human Rights to investigate, on an annual basis, allegations of gross violations of human rights;[35] the decision taken in 1973 by the US Congress to explicitly link US foreign aid to the human rights performance of recipients; the negotiation of the 1975 Helsinki Final Act, which brought human rights to the fore of East–West relations and detente; and the new prominence gained by non-governmental organizations (NGOs), symbolized by the Nobel Peace Prize granted to Amnesty International in 1977.[36]

But the incremental institutional deepening of the regime can be finally understood and explained only in the light of the confluence of a number of important developments that were taking place at global level.[37] These

included: the presence of newly independent states pressing the United Nations to pay attention to gross human rights violations in countries including South Africa and Israel, and the gradual shift of the United Nations from standard-setting towards protection and implementation.[38] Equally pivotal was the entry into force in 1976 of the international human rights Covenants – on Civil and Political Rights and on Economic, Social and Cultural Rights – which not only helped translate into specific rights many of the aspirations embodied in the 1948 Universal Declaration, providing them with a legal foundation, but re-energized and helped legitimize the activities of human rights advocates around the world.[39] Likewise, the arrival of Jimmy Carter in the White House not only turned human rights into a leading priority of US foreign policy but helped modify the – regional and global – institutional environment in which internationally recognized human rights were debated and advanced.[40] Last but not least, widespread revulsion towards the brutal repression exercised by military rule in both Chile and Argentina acted as a catalyst for a wider and deeper global shift characterized by the mutually reinforcing dynamics of state-led policies and grassroots activism.[41] Thus, in the United States activists not only helped trigger concern for human rights, but would emerge as vital sources of information for debates in the US Senate and country hearings in Congress.[42]

The combination of factors and events that made for this deepening of the regime is too complex to be unravelled here, but we can at least point to some auspicious trends and identify some of the key factors. It is obvious, for a start, that the unfolding of detente provided a more promising atmosphere in which to advance the human rights cause. But one must also consider the key role played by a group of developed and developing countries in pushing the human rights agenda, as well as the impact of the emergence of a much tighter and strategic network of human rights groups.[43] Thus, helped by the leadership provided by countries including the United States, Canada and the Netherlands, a chain of new human rights treaties were negotiated in this period, including: the International Convention on the Elimination of All Forms of Racial Discrimination (1965); the human rights Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights (1966); the Convention on the Elimination of All Forms of Discrimination against Women (1979); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984); and the Convention on the Rights of the Child (1989). The degree of support granted by states to these half a dozen core international human rights treaties can be gauged by the level of endorsement granted by 168 parties and 86 ratifications.[44]

Since the Second World War, then, international human rights had undergone an unparalleled degree of growth and evolution, at both the

global and the regional levels. In the post-1945 world, the continuous codification of human rights norms and law laid the basis for the emergence of a truly "global human rights culture". These changes are difficult to understand without reference to the growing body of standards and conventions that have come to regulate relations among states. But, at the same time, it is impossible to account for such a cultural transformation without giving due weight to the emergent human rights constituency within political communities across the world – from Latin America to South Africa, from Eastern Europe to parts of Asia. It would be wrong to make a hasty judgement of the extent to which these apparent changes have redefined the boundaries and contexts within which human rights values and practices are routinely exercised. But it would be equally misleading to disregard and ignore the growing awareness about human rights and the power of human rights to mobilize against impunity and abuse.[45]

The bounce forward of international human rights through the 1970s had reflected the understandable confidence unleashed by the adoption of human rights as a central component of US foreign policy. Under President Carter, not only did human rights gain an institutionalized foreign policy status but efforts were again made to bring the United States on board for the ratification of human rights instruments. Although, even under Carter, the implementation of US human rights policy was undoubtedly uneven and marked by inconsistencies, there were clearly consequential outcomes that helped keep human rights afloat through harder times.[46] Indeed, once human rights were institutionalized in US law and foreign policy and embedded in national, regional and international institutions, their normative resilience allowed them to survive the adversity of the Reagan years as well as the more recent and tortuous war on terror.

As was the case in the early 1980s, at the turn of the century many of the policies deployed by the United States and other powerful countries were in direct conflict with human rights norms and values. In both these periods, a reputation for effectiveness in combating communism and terrorism again came to challenge its international reputation for upholding human rights. Indeed, in both the second Cold War and through the post-9/11 era the social practices and the normative understandings that had helped steer interactions among state and non-state actors around human rights were seriously challenged by common assumptions about the ascendancy of security concerns over fundamental freedoms and human rights considerations.

In all these periods, the gravitational pull of the United States on the direction of the international human rights regime has been noteworthy. Through the 1970s and in the early post–Cold War period, Washington's

actions played a key role in establishing the reputational weight of human rights standards; through the 1980s and in the ensuing post-9/11 period, the United States' promotion of reputational security benchmarks endangered human rights standards.[47] On this account, as has been the case in the context of other international regimes, policy decisions taken by Washington tend to have a significant impact on the direction and shape of the regime and thus on the range of opportunities and constraints facing state and non-state actors.

In the 1980s, then after 9/11, there is no doubt that the human rights cause was not only poorly served by the salience gained by US security priorities but seriously damaged by Washington's decisions to pursue security goals at high costs.[48] The symmetries are stark: in the early 1980s the perception of an unfolding second Cold War led the Reagan administration to prioritize security and stability over human rights; in the most recent post-9/11 period, security imperatives again prevailed over human rights obligations and considerations. So too in the 1980s, countries that had been targeted for human rights abuses, including Argentina and Chile, were suddenly promoted to the status of key partners; and, in the early twenty-first century, countries once reproved by Washington, such as Pakistan, Malaysia and Indonesia, were soon rehabilitated because of the priorities established by the counter-terrorism agenda.[49]

In the two periods, serious doubts arose not only about the compatibility between the security measures taken by the United States and the protection of human rights, but also about Washington's overall commitment to the human rights regime.[50] In the 1980s, the Reagan administration sought to downgrade human rights policies in favour of democracy promotion; in the recent past, the enactment of the Patriot Act, the amendments made to several federal statutes and immigration laws, and the new powers granted to law enforcement and intelligence agencies have clearly come at the expense of fundamental freedoms. Moreover, actions such as the imprisonment, in some cases without trial, of 1,200 non-US citizens and the incarceration in the notoriously irregular Guantánamo Bay naval base prison of several hundred detainees have seriously called into question Washington's adherence to the human rights cause.

Certainly, at different times, the erratic commitment by powerful states to the international human rights regime has allowed authoritarian and repressive states to take advantage of such permissive environments. Evidently, where the human rights culture has remained thin and where judicial and legislative independence has failed to take root, human rights can hardly be expected to thrive. Yet experience has also shown that the presence of a dense and vibrant civil society, a clear separation of powers and the rule of law are all vital components of a resilient human rights culture. This has been well illustrated by the role played by certain states,

mostly characterized by a reasonable level of human rights institutionalization, in resisting the retreat of human rights at the regional and international level. Indeed, largely because of this, the reputation for human rights protection has survived the adversity of hard times.[51]

Thus, despite the uneven support and occasional disparagement by Washington and other powerful states of the UN human rights regime, a more nuanced strand of interpretation is required to account for the resilience of the human rights idea. Indeed, even in the midst of adverse times it is possible to trace the power of the human rights norm and the capacity of both domestic and international institutions to resist the backsliding of national and international human rights standards.[52] At the regional and international level, both the embeddedness of the human rights norm and a continuing political offensive deployed by key state and non-state actors have ensured that pressures do continue to play a critical role in weighting the case of human rights against that of security considerations. Of all the many factors that help explain the resilience of human rights norms, three in particular deserve special consideration: the weight gained by human rights ideas and values within domestic and international institutions; the density of, and impetus attained by, domestic and international human rights constituencies; and, finally, the magnetic power and entrapment logic of the human rights discourse.[53]

In the course of over half a century not only has the language of human rights spread out to almost all corners of the world, but the system of international law devised to protect a cluster of basic human rights has also steadily expanded. The consent given by the majority of states to the seven core human rights treaties and the proliferation of national human rights institutions, ombudsmen, national truth commissions and transitional justice exercises all testify to the ever-deepening endorsement of the idea of human rights.

In sum then, from the mid-1970s human rights standards were set and reaffirmed by a dense layer of reporting and monitoring bodies supplied by human rights instruments, and carried out by both state and non-state organizations. Indeed, human rights institutions both internationally and regionally, along with many political actors, strove hard to sustain certain core values and ideas even during hard times.[54]

True, with the exception of cases of genocide and torture, sovereignty most often continues to trump human rights. But it would be wrong to conclude that such an impressive body of human rights treaties and agreements signed under the auspices of the United Nations has no import.[55] Indeed, the expansion and widespread acceptance of this body of law has had significant implications for relations between citizens and states and for the wider conduct of international relations. The worldwide legal and political recognition granted to human rights law has strongly

reinforced the view that a government's treatment of its citizens can be a matter of legitimate international concern, and also that the protection of internationally recognized human rights is a precondition of full political legitimacy.[56]

Clearly, there is a danger of overstating an elite-based international legal universality. However, the evidence from the Americas suggests that the language of human rights has trickled down and penetrated more deeply than ever imagined. It is to there that we now turn.

The rise of a human rights regime in the Americas

In the early post-war period, the Americas played their own part in the new position gained by human rights in international relations. The protection of human rights was a theme in the Inter-American conferences from the 1920s, and an embryonic regional system for the protection of human rights began to take shape in 1945 with the adoption of a resolution on the "International Protection of the Essential Rights of Man" at the Inter-American Conference on Problems of War and Peace (also known as the Chapultepec Conference), held in Mexico City only a few days before the more remembered meeting in San Francisco. Three years later, in 1948, the American states signed the first major international document on human rights, the "American Declaration of the Rights and Duties of Man". Drawing on natural law theory, this Declaration asserts that the fundamental rights of man "are not derived from the fact that he is a national of a certain state, but are based upon attributes of his human personality".[57]

As was the case with the Universal Declaration, this Declaration did not have the status of a legally binding instrument. Yet, as of 1948, the Latin American republics had endorsed the idea of a regional convention and had entrusted the Inter-American Juridical Committee with the task of drafting a statute for an Inter-American Court to be charged with the protection of the rights regionally enshrined.

Although in its early stages this regional campaign, like previous regional efforts, sought to promote human rights within the framework of a regional order built around the principles of non-intervention and national sovereignty, by the late 1950s the tension between non-intervention and human rights gradually eased in favour of the latter. The initial position in favour of a human rights regime that recognized the need to keep human rights within international purview, but that stopped short of any multilateral monitoring or enforcement of human rights, had been well in line with wider international trends vis-à-vis human rights.[58] Yet, by the end of the 1950s, regional states cautiously moved away from a rigid

adherence to the imperatives of sovereignty and – partially inspired by the European example – shifted, in an incremental way, towards a system of regionally enforced human rights norms. Thus, as the 1950s came to an end, a number of decisions helped lay the foundations for a regional system devoted to the protection of human rights. During the Fifth Meeting of Consultation of Ministers of Foreign Affairs held at Santiago de Chile in 1959, regional states addressed the interrelationship between anti-democratic regimes and poorly protected human rights. That conference approved resolutions for the drafting of a Convention on Human Rights and the establishment of two regional bodies entrusted with the regional protection of human rights: an Inter-American Commission on Human Rights and an Inter-American Court for the Protection of Human Rights.

Soon after, in the summer of 1960, the Council of the Organization of American States (OAS) approved the statute of the Inter-American Commission on Human Rights as an "autonomous entity", one responsible for raising awareness of human rights among the peoples of the Americas, issuing recommendations to regional governments and preparing case studies and reports. Although drafting the Convention proved to be a more complex and lengthy process – owing to the impact of the Cuban Revolution on regional dynamics and disagreements over the actual content of the text – the final text was eventually approved during the Inter-American Specialized Conference on Human Rights held in San José, Costa Rica, in November 1969.[59]

As was the case in Europe, the Inter-American human rights system was designed to rest on two pillars: the Commission and a regional human rights court adjudicating cases of individual human rights violations. Although important differences in the human rights context in the two continents help explain the evolution and performance of their respective regimes, both systems shared important similarities in terms of the design of their enforcement mechanisms. Notwithstanding the wide regional disparities in the conditions underpinning the development of regional human rights systems in both Europe and the Americas, it is impossible to deny that the provision of international enforcement procedures built around individual petition and compulsory jurisdiction shifted the balance against non-intervention in both continents while providing the basis for the eventual activation of these regional legal systems.

There is little doubt either, though, that the rise of Cold War politics and the spread of authoritarianism and military dictatorship in the region did not augur well for the development and consolidation of the regional human rights regime, to put it mildly. Although the Inter-American Commission on Human Rights and the human rights regime itself were soon caught in the turbulence of these regional trends – with Cuba emerging

as an early and continued priority – already in 1965 a resolution passed by the OAS not only expanded the functions and power of the Commission but demanded that it pay special attention to the rights embodied in the 1948 American Declaration: rights to life, liberty and personal security; to equality before the law, due process and fair trial; to religious freedom, freedom of investigation, opinion, expression; protection from arbitrary arrest.[60]

Yet, as was the case at the global level, regional progress on the human rights front was slow and erratic. Both the impact of the Cold War and the presence of a hostile and tortuous environment, with authoritarian and military regimes sweeping into power in Central America and the Southern Cone, held back any further initiatives. Human rights norms had been in effect internationalized, but their implementation and enforcement remained in the hands of national states.

Although Cold War dynamics seriously challenged not just the practice of the Commission but also the conceptual coherence of the regional human rights regime, in a quiet way the regime continued to evolve – largely from decisions taken by some regional governments and from the country reports issued by the Commission. The impact of these developments gathered force in the second half of the 1960s, when the Commission was upgraded into a special organ of the OAS. The notable role played by this body in the Dominican Republic in 1965 and in the context of hostilities between Honduras and El Salvador in 1969 further strengthened its position.

At the regional level, the entry into force of the American Convention on Human Rights in 1978 provided a new impetus to the regional Commission. Although the Commission had exercised self-restraint and had refrained from using its powers to submit cases to the Inter-American Court, it clearly played a leading role in advancing the human rights agenda in the Western hemisphere.[61] This was nowhere truer than in the three country reports produced by the Commission on Chile in 1974, 1976 and 1977, those for Paraguay and Uruguay in 1978, and the groundbreaking report on Argentina in 1980. Not only did these reports unveil the systematic nature of human rights violations in these countries, but, most importantly, they provided a crucial referent that enabled other governments and agencies both to shape their policies and to enhance their capacity to exert pressure on these repressive regimes.

Although the supervisory bodies had been established, there was little regional enforcement of human rights. Through the 1970s and well into the mid-1980s, the individual petition system remained in a state of paralysis. Cases opened by the Commission were simply blocked or boycotted by hostile military and authoritarian governments, and no regional human rights norms were effectively enforced. Notwithstanding this, by the

1980s an incremental deepening of the human rights regime had become evident in the region. The changes that accompanied this trend have, of course, a long history, but what is beyond doubt is that they helped consolidate the position of human rights norms as an important feature of the region's international relations.

Events in the mid- and late-1970s had already demonstrated how the weight of human rights in the region had begun to change. Human rights norms had been effectively internationalized and regionalized, but their implementation remained firmly in the hands of national governments, and no significant transfer of power or authority from states to regional mechanisms and institutions had as yet taken place. Yet, by the 1980s a number of developments in the normative and practical dimensions of human rights helped reposition the place of these norms in regional politics, as referents for the ordering of political and social life. A long and traumatic process of struggle had borne fruit.

Tracing the origins and causes of this regional shift is a complex task, but the evidence of the period points to four major internal and external causal factors. They were: the adoption of human rights as a key component of US foreign policy; the incorporation of human rights concerns into regional bilateral relations; the third wave of democratization; and the rise of human rights NGOs as an international political actor to be reckoned with. These all played a part in the deepening and widening of human rights in the region. In the course of the 1980s, the human rights regime evolved largely as the result of the interaction of internal change and normative external concern about the conditions of human rights in key regional states. Indeed, through the compounded effect of these factors, states in the region were not only locked into discursive human rights enunciations but progressively enmeshed in the normative web of the regional human rights regime. By the 1990s, the issue of human rights had become an integral part of regional politics. That is not to say, however, that things had become clear-cut. In many ways, indeed, the following years were defined by new uncertainties. Why should this have been so?

Conclusion: Looking back and ahead

On the large scale, the historical developments traced so far indicate that there has been a steady convergence around the idea of global legal commitments to protect human rights. The forces for convergence have been so strong that periods such as the 1980s and the immediate post-9/11 years stand out as exceptions – serious setbacks to be sure, but surmountable setbacks. The Obama administration in the United States is set to

make its contribution to the process of rectification here. A liberal internationalist discourse of human rights has become a key part of the international landscape, and the contours of a global human rights regime are clearly visible.

Tracing back to the landmark declarations of the years following the Second World War, the global evolution of the human rights regime was given depth by a little-known but remarkably parallel thrust within the Americas as of 1945. That coincidence alone makes the Americas especially fruitful as an object of investigation into the actual workings of the regime.

Normative and institutional evolution has brought with it many notable achievements in this region, to which the subsequent chapters in this volume pay due regard. Yet, still on the grand scale, the single most salient factor anyone looking at this regional landscape – like others – soon confronts is the disparity between the rhetoric of human rights and the realities of state behaviour.[62] Human rights aspirations have become highly articulate, but the effective implementation of human rights instruments remains an elusive goal. More than anything else, this is why we find the human rights *Zeitgeist* to be one of stress and frustrated transition.

The glum tone of most of the case studies assembled in this book speaks for itself. Behind this is the even more discouraging appreciation now of the amount of evidence suggesting that widespread ratification of international human rights instruments does not automatically translate into an effective protection of human rights. Moreover, the actual protection of human rights afforded by ratification has been seriously called into question by the vicious practices of states parties to these instruments. This is grimly illustrated by the cases of Guatemala and Iraq. In the period between 1982 and 1992 Guatemala ratified the six core human rights treaties while engaging in genocidal and vicious practices. Similarly, as Iraq ratified the fifth of the six core instruments in 1994, Amnesty International made public its sombre conclusion that repression had become extreme, systematic and population-wide.[63] These and other experiences undoubtedly show that, in itself, ratification of human rights instruments is a poor indicator of a state's observance of human rights commitments. They also suggest that some of the headier talk of "norms cascades" should be treated warily.

States' ratification of human rights instruments has often been aimed at signalling their implicit acceptance of the goals and values enshrined by human rights norms, even their tentative willingness to comply with such norms, but not often have they counted on having to match words with deeds. What seems clear is that the structures of incentives under-

lying both ratification and implementation do not necessarily share a common logic.[64]

Discouraging as this is, it becomes all the more important to reflect on why compliance levels have remained patchy and irregular. Examination of the main causes of compliance points to both legal and more complex sources of conformity, as well as to internal and external variables. What is at issue here is the way in which states, having endorsed certain legal norms, comply, resist or fail to observe their provisions. Legal explanations of compliance point to the self-interest of states in entering into norm negotiations in the first place, to the mechanical inertia of compliance and to the more elaborated impact of normative standards and legal norms on state behaviour. Although the logic of these arguments may help us understand the considerations underpinning adherence processes, it falls short of explaining *compliance* levels.

There is little doubt that treaties and conventions establish global legal commitments to protect human rights. But at the same time it is difficult to deny – as Engstrom and Hurrell show here in Chapter 2 – that the resulting normative regime was poorly provided with institutional mechanisms to monitor and effectively enforce these norms. In the course of over half a century, the regime developed an elaborate institutional capacity to accumulate, compile and share human rights information, but its legal enforcement capability remained fairly weak.[65] This helps explain why ratification of legal instruments in itself does not translate into an effective protection of human rights. Yet, endorsement and compliance with human rights norms have been a function not simply of legal obligations but of the presence of more complex systems of compliance.

As many of the chapters in this volume show, the basis of this complex system of compliance was laid both by the very negotiation and tacit endorsement of human rights instruments by governments, and by the attendant rise of human rights organizations with the remit of monitoring their performance. Although the very commitment to global norms opened up opportunities and offered arenas for the vigorous engagement of human rights organizations, the credibility of the complex system of compliance relied on the capacity of state and non-state actors to both socialize states and build human rights capacity, as well as to publicize abusive practices, to name and shame repressive states and ultimately to delegitimize failing governments.

Indeed, as the cases examined in this book suggest, once the provisions of legal commitments and complex systems of compliance came together, the pressure exerted by human rights organizations helped produce change at the level of national policies and institutions, while contributing to the reconfiguration of regional and international organizations.

The credibility and effective implementation of human rights norms thus ultimately depends on the capacity to exert pressure effectively on a targeted state.

So, whereas some perspectives attribute improvement in human rights standards more or less exclusively to international legal commitments, the analysis of these complex systems of compliance rather places the emphasis on human rights organizations and on the density of their linkages to international civil society. This seems a promising pathway for future research, enabling us to better understand the failures as well as the successes.

There is, though, another road, one that has been more travelled in the Americas. On this route, domestic dynamics and internal political bargaining are identified as the key variable, with democratic accountability being singled out as the main arena within which human rights implementation is more commonly accomplished. In its simplest and most appealing form, the argument is that democracy provides the best, or only, context for the respect of human rights.

In the Americas, as elsewhere, mobilization around human rights norms played an important part in the overthrow of authoritarian and repressive regimes and, in many places, transition to democracy was to have a significant impact on the human rights landscape. And yet, tracing the contribution of democratization and democratic rule to the protection of human rights can be a tricky business. Often democratization processes can have murky trajectories, with their contributions to human rights clouded and not clearly apparent. A growing sense of this is also near the heart of current uncertainties.

On one level, in processes of transition and democratization the challenge of authoritarian legacies and enclaves often takes centre stage, unleashing two powerful and opposing logics: that of impunity and that of democratic survival. Separate cases reveal how distinct have been the ways in which these logics have been juggled in the Americas, with an arguably clearer consensus now emerging (and challenging some of the influential early literature) that transitions will remain incomplete unless the authoritarian enclaves are dismantled and human rights issues effectively tackled.[66] Yet the issue is deeper than hitting on the right mechanisms to punish past impunity; it involves the manner in which "accepted" democracies, possessing most of the standard institutional attributes of democratic government, have managed to coexist with poor or relapsing human rights standards.[67]

The so-called Third Wave of democracy did significantly increase the number of recognized electoral democracies, but the expansion of political competition and contestation did not necessarily result in the strengthening of civil and minority rights. On the contrary, in some cases

the gradual consolidation of the formal institutions of procedural democracy has been accompanied by a clear deterioration of civil liberties and minority rights. In cases including Guatemala, Colombia and Brazil, not only did the transition to democracy and the intensification of political competition fail to improve the human rights landscape but, in a context punctuated by the continued presence of oligarchic power and military prerogatives, it may well have played a role in the worsening of civil and minority rights.[68]

Thus, where representation and electoral representation have not been matched by a parallel improvement in the rule of law and an effective protection of individual and group liberties, the gap between the commitments embraced by governments in international forums and the realities within states will continue to widen.

This is not to say that democracy should be a negligible concern for all concerned with human rights, but it is to say that the promotion of human rights now has hit an uncomfortable paradox. Essentially it is that the international regime depends more than ever on individual state capacities, for, in the contexts of institutional breakdown that menace so many states in the Americas, human rights are sure to be the losers. It seems fair to claim that this was not the conclusion that earlier generations of human rights campaigners had in mind when they braved repressive state apparatuses. Yet their very achievement in making human rights a cause for inspiration and an agent for political mobilization may best be honoured by creative adaptation to the bracing challenges of new times.[69] If, as this book sets out to demonstrate, the rhetoric and reality of human rights have come adrift, the need for fresh analysis does not have to be understated.

Notes

1. Quoted in J. H. Elliott, *Empires of the Atlantic World*, *Britain and Spain in America 1492–1830* (New Haven, CT: Yale University Press, 2007), p. 66.
2. Elliott, *Empires of the Atlantic World*, *Britain and Spain in America 1492–1830*, pp. 66–78; J. H. Elliott, "Spain and America in the Sixteenth and Seventeenth Centuries", *The Cambridge History of Latin America,* vol. I (Cambridge: Cambridge University Press, 1984), pp. 304–310; Anthony Padgen, "Human Rights, Natural Rights and European Imperial Legacy", *Political Theory* 31:2 (2003), pp. 177, 182; Jack Donnelly, "The Social Construction of International Human Rights", in Tim Dunne and Nicholas J. Wheeler, eds, *Human Rights in Global Politics* (Cambridge: Cambridge University Press, 1999), pp. 82–83.
3. Padgen, "Human Rights, Natural Rights and European Imperial Legacy", pp. 173 & 177.
4. Jack Donnelly, "The Relative Universality of Human Rights", *Human Rights Quarterly* 29:2 (2007), pp. 281–306.

5. François Furet, "The French Revolution and the Development of Western Democracy", Annual Lecture XXVI, Ditchley Foundation, 30 June 1989.
6. Padgen, "Human Rights, Natural Rights and European Imperial Legacy", p. 189; Hans Peter Schmitz and Kathryn Sikkink, "International Human Rights", in Walter Carlsnaes, Thomas Risse and Beth A. Simmons, eds, *Handbook of International Relations* (London: Sage, 2002), p. 517.
7. Donnelly, "The Relative Universality of Human Rights", p. 284; Donnelly, "The Social Construction of International Human Rights", pp. 78–79.
8. The few-and-far-between interventions to safeguard human lives were more often restricted to the protection of nationals in difficulty abroad, and the restrictions present in humanitarian law concerned foreign nationals and not the state's own citizens. Jack Donnelly, "Human Rights and International Organizations: States, Sovereignty, and the International Community", in Friedrich V. Kratochwil and Edward D. Mansfield, eds, *International Organizations: A Reader* (New York: HarperCollins, 1994), p. 204.
9. Ibid., p. 204; Kathryn Sikkink, "Human Rights, Principled Issue-Networks, and Sovereignty in Latin America", *International Organization* 47:3 (1993), p. 413.
10. The broad agreement on human rights among the Western powers did not, by any means, lead to an absolute consensus, as the case of the United Kingdom shows. Imperial considerations and diverging perspectives between the Foreign Office and the Home and Colonial Offices help explain the more rhetorical and defensive UK approach to international human rights and more specifically to the issue of mandatory enforcement mechanisms. Whereas the Foreign Office perceived only benefits and was keen to bolster the United Kingdom's stature and credibility in the post-war order, the Home and Colonial Offices were concerned with the costs to British domestic and colonial policy. Clearly the costs of implementation would be transferred to the Home and Colonial Offices, the offices "directly involved in the messy business of government". See Adam Roberts, "The United Nations and Humanitarian Intervention", in Jennifer Welsh, ed., *Humanitarian Intervention and International Relations* (Oxford: Oxford University Press, 2004), p. 73; Andrew Moravcsik and Ioannis D. Evrigenis, "Britain and the Creation of the United Nations Human Rights Regime", paper prepared for the Annual Meeting of the American Political Science Association, Philadelphia, 2003, p. 14; Brian A. W. Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford: Oxford University Press, 2001).
11. The two standard definitions of regimes are those given by Stephen Krasner and Robert Keohane. The first defines regime as "implicit or explicit norms, rules and decision-making procedures around which actors' expectations converge in a given area of international relations". Keohane's definition equates regimes with "institutions with explicit rules, agreed upon by governments, which pertain to particular sets of issues in international relations". Although the emphasis of both definitions on "explicit, persistent and connected sets of rules" has brought regime theory and international law closer together, they both seem to imply that regimes are intergovernmental constructions and so allow little or no role to civil society. See Stephen Krasner, "Structural Causes and Regime Consequences: Regimes as Intervening Variables", in Stephen D. Krasner, ed., *International Regimes* (Ithaca, NY: Cornell University Press, 1983), pp. 1–21; Oran R. Young, "Regime Dynamics: the Rise and Fall of International Regimes", in Krasner, ed., *International Regimes*, pp. 93–115; and Robert O. Keohane, "Neo-Liberal Institutionalism: A Perspective on World Politics", in Robert O. Keohane, ed., *International Institutions and State Power: Essays in International Relations Theory* (Boulder, CO: Westview Press, 1989), pp. 1–20. See also Andrew Hurrell, "International Society and the Study of Regimes. A Reflective Approach", in Wolker Rittberg (with Peter Mayer), ed., *Regime Theory and International Relations* (Oxford: Clarendon Press, 1993), p. 54, and

John Gerard Ruggie, *Constructing the World Polity* (London and NY: Routledge, 1998), Part 1 "International organization: 'I wouldn't start from here if I were you' ", pp. 41–130.

12. Key members of CSOP were Clark M. Eichelberger, James T. Shotwell and Quincy Wright among others. For a detailed account of the invaluable contribution of this Commission, see Glenn Tatsuya Mitoma, "Civil Society and International Human Rights: The Commission to Study the Organization of Peace and the Origins of the UN Human Rights Regime", *Human Rights Quarterly* 30 (2008), pp. 607–630.
13. In Wright's view, an international bill of rights and the development of international mechanisms for its enforcement could offer a solid defensive barrier against militant nationalism. See Tatsuya Mitoma, "Civil Society and International Human Rights", pp. 614–615.
14. Ibid., p. 613.
15. Ibid., p. 616.
16. Ibid., p. 625.
17. Although the first blueprints for the new organization did not consider a role for non-governmental organizations, the San Francisco Conference, attended by big, small and middle powers, provided for the establishment of a relationship between the Economic and Social Council (ECOSOC) and civil society organizations. At the time, the provisions envisaged in Article 71 of the UN Charter allowing for ECOSOC's consultation with non-governmental organizations concerned economic and social issues, but in no way matters related to peace and security. Subsequently, the alliance forged among small and middle powers and NGOs concerned with these issues would enable the latter to secure a voice within the UN system. Carolyn M. Stephenson, "NGOs and the Principal Organs of the United Nations", in Paul Taylor and A. J. R. Groom, eds, *The United Nations at the Millennium: The Principal Organs* (London: Continuum, 2000), pp. 271–294.
18. Colombia and South Africa submitted draft preambles declaring that the promotion of rights was a key catalyst for the creation of an international organization. Mexico, Brazil and the Dominican Republic submitted a joint proposal that identified the protection of human rights as a main purpose of the organization, while Panama and Cuba submitted specific lists and bills of rights. Tatsuya Mitoma, "Civil Society and International Human Rights", p. 625; Bertrand Ramcharan, *The Quest for Protection. A Human Rights Journey at the United Nations* (Geneva: The Human Rights Observatory, 2009), p. 16. See also Jack Donnelly, "Universal Human Rights: A Critique", in Dunne and Wheeler, eds, *Human Rights in Global Politics*, p. 73.
19. Quoted in Kathryn Sikkink, *Mixed Signals: US Human Rights Policy towards Latin America* (Ithaca, NY: Cornell University Press, 2004), p. 28.
20. Sikkink, *Mixed Signals*, p. 24.
21. Roberts, "The United Nations and Humanitarian Intervention", p. 73; Moravcsik and Evrigenis, "Britain and the Creation of the United Nations Human Rights Regime", pp. 14–15.
22. Roberts, "The United Nations and Humanitarian Intervention", p. 71.
23. Hurrell, "International Society and the Study of Regimes", p. 54.
24. Donnelly, "Universal Human Rights: A Critique", p. 71.
25. Ibid., p. 73.
26. Roberts, "The United Nations and Humanitarian Intervention", p. 75.
27. Charles Beitz, "What Human Rights Mean", *Daedalus* 132:1 (2003), p. 41.
28. Donnelly, "Human Rights and International Organizations", p. 204; Donnelly, "Universal Human Rights: A Critique", p. 72; Roberts, "The United Nations and Humanitarian Intervention", p. 75.

29. Such uncertainty played both ways. In the case of the United Kingdom, initial concern about potential human rights restrictions on "the power of those in authority" and their implications for colonial interests was handily reconciled by a perception that the instruments negotiated at the time, including the 1950 European Convention on Human Rights, were non-binding. See Simpson, *Human Rights and the End of Empire*, pp. 11–18.
30. Ramcharan, *The Quest for Protection*, pp. 1–26; Hurrell, "International Society and the Study of Regimes", p. 54; Sikkink, "Human Rights, Principled Issue-Networks", pp. 411–441; Donnelly, "Universal Human Rights: A Critique", p. 73.
31. Ken Booth and Tim Dunne, "Learning Beyond Frontiers", in Dunne and Wheeler, eds, *Human Rights in Global Politics*, p. 304.
32. The first signs of the potential reach of the regime were nonetheless also evident in this period. In the United States itself, civil rights organizations and social movements not only resorted to the human rights language but actually filed three petitions before the United Nations against the US government on charges of racism and racial discrimination. Sikkink, *Mixed Signals*, pp. 38–39.
33. The relentless pressure exerted by this coalition on the US government eventually forced the Eisenhower administration to remove Eleanor Roosevelt from her role as US representative to the UN Human Rights Commission and to pledge to the US Senate that the United States would not become a party to the UN Human Rights covenants. Ibid., pp. 39–42.
34. The literature on the role played by what is now widely referred to as "transnational civil society" in the codification, institutionalization and actual human rights practice is massive. For key references see the inspiring account by Hopgood on the role and moral and practical dilemmas faced by the pioneer Amnesty International in its efforts to advance the cause of human rights since the early 1960s: Stephen Hopgood, *Keepers of the Flame. Understanding Amnesty International* (London: Cornell University Press, 2006). See also Margaret Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Ithaca, NY: Cornell University Press, 1998); Ken Booth and Tim Dunne, "Learning Beyond Frontiers" and Stephen Krasner, "Sovereignty, Regimes and Human Rights", in Rittberg (with Mayer), ed., *Regime Theory and International Relations*, pp. 139–167; Andrew Hurrell, "Norms and Ethics in International Relations", in Carlsnaes, Risse and Simmons, eds, *Handbook of International Relations*, p. 143, and Andrew Hurrell, *On Global Order. Power, Values, and the Constitution of International Society* (Oxford: Oxford University Press, 2007), chapter 6, "Human Rights and Democracy", pp. 143–164.
35. In carrying out this procedure the Commission on Human Rights adopted a resolution in 1967 that provided the ground for its annual investigations of serious human rights violations. This decision paved the way for the conduct of investigations in countries across the world. Ramcharan, *The Quest for Protection*, pp. 17–18.
36. By 1977 Amnesty's work on disappearances and its worldwide efforts aimed at "pushing out the normative boat of human rights" and human rights law were duly acknowledged with the Nobel Peace Prize. Ironically, success and crisis came in tandem. While its membership expanded, the proportion of paying members soon outnumbered that of active members, and this was inevitably reflected in the cases taken up by the organization. Hopgood, *Keepers of the Flame. Understanding Amnesty International*, pp. 81–83.
37. Donnelly, "The Social Construction of International Human Rights", pp. 77–78.
38. The pressure exerted by these member states prompted the UN to move from standard-setting towards implementation of human rights norms. This involved a shift within the UN Human Rights Division towards innovative investigative methods and mechanisms that were first adopted in 1975 under the leadership of its Director, Marc

Schreiber. Such innovative approaches included the creation of working groups and the appointment of special and thematic rapporteurs looking at enforced and involuntary disappearances, summary executions and torture in several countries including Burundi, Brazil, Chile, Haiti, Indonesia, Portugal, Tanzania and Uganda. See Ramcharan, *The Quest for Protection*, pp. 19–26.

39. The Covenant on Civil and Political Rights invokes certain key rights – to life, liberty and security; against arbitrary imprisonment, slavery, torture and genocide – and establishes provisions associated with the rule of law (the right to a fair trial) and political rights (the right to take part in the government of the country and to periodic and genuine elections). The economic and social rights designated in the Covenant on Economic, Social and Cultural Rights include: choice of employment, just and favourable remuneration [sufficient for] an existence worthy of human dignity, health care and the rights of communities (self-determination). Beitz, "What Human Rights Mean", pp. 36–38; Donnelly, "The Social Construction of International Human Rights", pp. 74–75.
40. The origins of the US human rights policy can be traced to a decade-long chain of key hearings on US policy and human rights violations around the world. These hearings not only established the foundations for the main body of US human rights legislation, which would eventually help condition and regulate US military and economic aid, but also set the institutional stage for US human rights policy with the creation of a Bureau of Human Rights within the State Department and the compilation of the now highly esteemed country reports. See Jack Donnelly and Debra Liang-Fenton, "Introduction" in Debra Liang-Fenton, ed., *Implementing U.S. Human Rights Policy: Agendas, Policies and Practices* (Washington DC: United States Institute of Peace, 2004), pp. 3–25; Sikkink, *Mixed Signals*, pp. 53–70; Rosemary Foot, "Human Rights and Counterterrorism in Global Governance: Reputation and Resistance", *Global Governance* 11 (2005), p. 294.
41. The powerful and widespread revulsion against the Pinochet regime took tangible form with the adoption of a ground-breaking resolution by the Commission on Human Rights forcefully condemning the mass human rights violations which were taking place in Chile. This was soon followed by the creation of the first Ad Hoc Working Group within the Commission tasked with the investigation of the allegations of serious human rights violations in Chile. Ramcharan, *The Quest for Protection*, pp. 27–42.
42. These hearings and debates proved to be instructive for both US officials and grassroots activists. The intense deliberations accompanying these hearings prepared the ground for a more complex elucidation of the limits of state sovereignty and contributed to the professionalization of human rights organizations. Sikkink, *Mixed Signals*, pp. 66–70.
43. Sikkink refers to the emergence of this network as an "international human rights issue network" more expansive than the obvious proliferation of human rights groups – 38 in 1950, 72 in 1960, 103 in 1970 – and more characterized by the density and quality of their interconnections. See Sikkink, "Human Rights, Principled Issue-Networks", pp. 415–419.
44. Drawing on the UN Working Group on Chile, new special representatives and rapporteurs were appointed in particular countries – Bolivia, El Salvador, Equatorial Guinea, Iran and Afghanistan – and also instructed to deal with specific issue areas: enforced or involuntary disappearances, summary or arbitrary executions and torture. See Donnelly, "The Social Construction of International Human Rights", p. 76; Donnelly, "The Relative Universality of Human Rights", pp. 281–306.
45. See Booth and Dunne, "Learning Beyond Frontiers", p. 316.
46. Carter's human rights record has been divided into two phases: an active initial period that ran through 1977–1978, and a period of disenchantment, which coincided with the

rise of the second Cold War in 1979–1980. But the overall consistency and effectiveness of human rights policies varied depending on the country and the capacity of the United States to work with other countries and through multilateral institutions. See the various chapters included in Liang-Fenton, ed., *Implementing U.S. Human Rights Policy*; Sikkink, *Mixed Signals*, pp. 121–124.

47. Foot, "Human Rights and Counterterrorism", pp. 291–293.
48. As the reputation for security considerations took precedence over human rights obligations, the costs for human rights violations diminished. Equally troublesome has been the interpretation of the security obligations in both developed and developing states as an authorization to abuse human rights in the name of anti-communist and anti-terrorist security priorities.
49. Foot, "Human Rights and Counterterrorism", pp. 299–300.
50. Not only has the record of the international leadership provided by the United States in promoting human rights been clearly uneven; it has also been defiant of international obligations. According to Ignatieff it is precisely this combination of leadership and resistance that defines "American human rights behavior as exceptional". See Michael Ignatieff, "Introduction: American Exceptionalism and Human Rights", in Michael Ignatieff, ed., *American Exceptionalism and Human Rights* (Princeton: Princeton University Press, 2005), pp. 1–26.
51. In the United States, the two opposing trends have been plainly visible in the recent past. In the aftermath of 9/11, the Bush administration spent time and effort weighing up Washington's legal commitments to human rights, and more specifically against torture and war crimes. In a number of infamous documents, US officials claimed that the costs of violating instruments such as the Convention against Torture were low, and that its definition of torture was so high that only "serious physical injury, such as organ failure, impairment of bodily function or even death" would qualify as torture. On the other hand, the production of the documents themselves suggests concern about the potential costs of treaty violations, and the perception that the executive was exceeding the limits of its authority mobilized other powers. Not only did the media soon label Dick Cheney as the "Vice President for Torture", but the Supreme Court both challenged the administration's claim that detainees held in Guantánamo were beyond US law and firmly reaffirmed the US commitment to due process. See Jay Goodliffe and Garren G. Hawkins, "Explaining Commitment: States and the Convention Against Torture", *Journal of Politics* 68:2 (2006), pp. 358–359; Foot, "Human Rights and Counterterrorism", pp. 304–307.
52. Foot, "Human Rights and Counterterrorism", pp. 302–304.
53. In the post-9/11 context, the pressures exerted on the working procedures of the UN Sanctions Committee and Counter-Terrorism Committee (CTC), via the human rights standard provisions of Security Council Resolutions 1267 and 1373, bear witness to the power and relative autonomy of human rights. The key steps taken by various actors mobilizing in favour of civil liberties and human rights included: the decision taken by the then UN Secretary-General Kofi Annan to establish a Policy Working Group on the United Nations and Terrorism; his remarks to the Security Council in 2002; the statements made by various UN human rights experts including Mary Robinson, Sergio Vieira de Mello and Sir Nigel Rodley; the actions taken by regional organizations, most notably the European Union and the Organization of American States; the strong individual statements made by key states, most notably Brazil, Costa Rica, Germany and Mexico before the CTC itself, calling for the appointment of a human rights expert within that body; the informal working groups on targeted sanctions set up by various states; and the report issued in 2004 by Human Rights Watch. See Rosemary Foot, "The United Nations, Counter Terrorism, and Human Rights: Institutional Adaptation and Embedded Ideas", *Human Rights Quarterly* 29:2 (2007), pp. 489–514.

54. Sikkink, *Mixed Signals*, pp. 18–22. See, more generally, Michael Barnett and Martha Finnemore, *Rules for the World: International Organizations in Global Politics* (Ithaca, NY: Cornell University Press, 2004), and Hurrell, *On Global Order*.
55. The arrest of Augusto Pinochet in London on 10 October 1998 unleashed by the efforts of the Spanish judges Baltasar Garzón and Manuel García Castellón to have the dictator account for the brutality that followed his overthrow of the government of Allende in 1973, and the setting up of international tribunals, including the momentous establishment of the International Criminal Court in 2002, opened a heated debate and raised expectations about universal jurisdiction. Yet the practice of states suggests that states have endorsed the principle of universal jurisdiction for a limited range of human rights abuses, chiefly war crimes and torture, but not necessarily for crimes against humanity and other human rights abuses. See Darren Hawkins, "Universal Jurisdiction for Human Rights: From Legal Principle to Limited Reality", *Global Governance* 9 (2003), p. 348.
56. Donnelly, "The Relative Universality of Human Rights", pp. 281–306; Roberts, "The United Nations and Humanitarian Intervention", p. 76.
57. This Declaration includes civil and political rights and economic and social rights. The civil and political rights enumerated broadly reaffirm those already included in the constitutions of most Latin American republics: equality before the law, rights to due process, petition and assembly, religious freedom, protection from arbitrary arrest, and so on. The economic and social rights include the right to the preservation of health and to well-being, to the benefits of culture, to work and to a fair remuneration for work. The first human rights commitments adopted by regional states to focus on "naturalised citizens", "aliens" and asylum appeared to be aimed at bolstering a regional order underpinned by the principles of non-intervention. See Robert K. Goldman, "Historia y Acción: el Sistema Interamericano de Derechos Humanos y el Papel de La Comisión Interamericana de Derechos Humanos", in Ana Covarrubias and Daniel Ortega, *La Protección Internacional de Los Derechos Humanos: Un Reto en el Siglo XXI* (México D.F.: El Colegio de México, 2007), pp. 113–114.
58. In its first session, held in 1947, the UN Commission on Human Rights concluded that it had "no power to take any action in regard to any complaints concerning human rights". Quoted in Donnelly, "Universal Human Rights: A Critique", p. 73.
59. The entry into force of the Convention on Human Rights in 1978 in effect established a dual regional human rights system. The Convention emerged as the primary human rights referent for party states, whereas the Declaration and the OAS Charter continued as the main referents of regional states not party to the Convention. Although the Commission can decide cases submitted against both groups of states, it can refer cases to the Court only against states that have both ratified the Convention and accepted the jurisdiction of the Court. Goldman, "Historia y Acción: el Sistema Interamericano de Derechos Humanos y el Papel de La Comisión Interamericana de Derechos Humanos", p. 122.
60. Ibid., pp. 124–125.
61. The fact that only 11 countries had by then ratified the Convention limited its prerogative to submit cases to the Court. Ibid., p. 131.
62. Approximately 150 countries have ratified two of the key human rights instruments, the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and yet states parties have remained engaged in grossly abusive practices. See Emilie M. Hafner Burton, "Human Rights Institutions: Rhetoric and Efficacy", *Journal of Peace Research* 44:4 (2007), pp. 379–383.
63. Emilie M. Hafner-Burton and Kiyoteru Tsutsui, "Human Rights in a Globalising World: The Paradox of Empty Promises", *American Journal of Sociology* 110:5 (2005), pp. 1374–1377.

64. Ratification can proceed on the assumption that it will have little or no consequence or, more troublesomely, that it may help a state fend off international pressures. The United Kingdom's early decisions to adhere to human rights instruments fit the first scenario, Guatemala the second. See Hafner-Burton and Tsutsui, "Human Rights in a Globalising World", p. 1384.
65. Ibid., p. 1383. See also Emilie M. Hafner-Burton and James Ron, "Human Rights Institutions: Rhetoric and Efficacy", *Journal of Peace Research* 44:7 (2007), pp. 379–383; Emilie M. Hafner-Burton and Kiyoteru Tsutsui, "Justice Lost! The Failure of International Human Rights Law to Matter Where Needed Most", *Journal of Peace Research* 44:4 (2007), pp. 407–425.
66. Manuel Antonio Garretón, "Human Rights in Processes of Democratization", *Journal of Latin American Studies* 26 (1994), pp. 221–234.
67. Laurence Whitehead, "Democratisation and Human Rights in the Americas", in Louise Fawcett and Monica Serrano, eds, *Regionalism and Governance in the Americas. Continental Drift* (Basingstoke: Palgrave Macmillan, 2005), pp. 159–184.
68. Joe Foweraker and Roman Krznaric, "The Uneven Performance of Third Wave Democracies: Electoral Politics and the Imperfect Rule of Law in Latin America", *Latin American Politics and Society* 44:2 (2002), pp. 35–37. See also Joe Foweraker and Todd Landman, "Constitutional Design and Democratic Performance", *Democratization* 9:2 (2002), pp. 43–66.
69. Paul Gready, "The Politics of Human Rights", *Third World Quarterly* 24:4 (2003), pp. 745–757.

2

Why the human rights regime in the Americas matters

Par Engstrom and Andrew Hurrell

The hugely increased normative ambitions of international society are nowhere more visible than in the field of human rights and democracy – in the idea that the relationship between ruler and ruled, state and citizen, should be a subject of legitimate international concern; that the ill-treatment of citizens and the absence of democratic governance should trigger international action; and that the external legitimacy of a state should depend increasingly on how domestic societies are ordered politically. The Americas provide a particularly important regional vantage point from which to analyse these developments. In part this is because legal and institutional changes have gone further in the Americas than in any other part of the world except Europe. In part its interest lies in the range of the challenges and problems faced by the regime and what these can suggest in terms of comparative experience.

This chapter is divided into three parts. The first considers some of the ways in which the legal and institutional landscape of the Americas has changed, highlighting three developments: the expansion and increased intrusiveness of regional norms concerned with human rights and political democracy; the increased pluralism of norm creation, referring to the plurality of actors participating in regional forums; and the hardening of enforcement as regional structures are gradually strengthened and increasingly used for the implementation of regional norms. The second part of the chapter considers the ways in which the regional human rights regime may affect political actors. Here we lay particular emphasis on the emergence of a transnational legal and political space as the judicialization

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of domestic politics becomes more and more enmeshed with the regional human rights system. In the final part of the chapter we highlight four of many challenges faced by the regional regime: the changing character of human rights violations in the context of weak states and fragile social order; the character of democratization and the changing nature of challenges to democratic order; the problematic interface between continuing human rights violations and democratization; and the changing context of US–Latin American relations and the impact of the broader security context.

The changing character of the system

Historically Latin America can be placed within a broadly pluralist conception of international law and international society. It is true that governments in the region (and still more Latin America's distinguished tradition of international lawyers) aspired from the earliest days of independence to a regional system of law that would accomplish ambitious goals and far-reaching purposes. These aspirations included the creation of formal regional organizations, mechanisms aiming at the peaceful settlement of disputes and, from the middle of the twentieth century, the incorporation into regional law of ideas concerning human rights and democracy. There were also frequent appeals to transnational solidarity based on shared culture and, at times, shared political or ideological values. And there was repeated invocation of the idea that regional law and institutions should embody a clear sense of Latin America's particular identity.

Although the achievements were not wholly negligible (for example, diplomatic concertation and arbitration to manage contested borders), most of these aspirations towards more elaborate regional governance and more ambitious solidarist goals remained simply that: aspirations that were usually cloaked in legalistic and moralistic rhetoric. The norms that were politically most salient were those of the classical pluralist international society: sovereign equality; strict non-intervention; increasingly tight restrictions on the use of force; territoriality and the pragmatic use of *uti possidetis*[1] to stabilize borders. Indeed, Latin American states were in the vanguard of the struggle to export pluralist understandings of European international society to the non-European world, playing a particularly central role in the struggle for equal sovereignty (for example in relation to the treatment of foreign firms and foreign nationals) and restrictions on the use of force (for example in relation to the collection of debts). Close proximity to an increasingly powerful and increasingly expansionist United States boosted the value to Latin America of

these, albeit fragile, pluralist protections. The area of human rights and democracy provides one of the clearest areas where this traditionally pluralist and sovereigntist picture has been progressively eroded.

Normative expansion/intrusion

Despite the pluralist reality of the regional society of states, the norms associated with the principle of sovereignty in the Americas developed in parallel with those of democracy and human rights, often leading to institutional and political tensions. The original 1948 Charter of the Organization of American States (OAS) declared that American solidarity was based on respect for democratic governance and proclaimed the importance of individual rights. Traditionally, these tensions have been resolved in favour of state sovereignty, as evidenced in the mute response by regional institutions to decades of undemocratic rule and widespread human rights violations as state policy in the region. Yet, through the latter part of the Cold War and particularly in the 1990s, we could observe a significant expansion of regional institutions and important changes in the ambition, scope and density of regional governance in the Americas. On the one hand, the Inter-American system of human rights has developed into a legal regime that provides citizens with supranational mechanisms with which to challenge the domestic activities of their own governments. This challenge to the pluralist nature of the regional order could be seen in the light of the trend towards a transnational governance framework in the issue-area of human rights.

The other part of the challenge to the pluralist nature of the regional order comes from the emergence of a regional democracy regime, which is given its most recent expression in the Inter-American Democratic Charter. With the adoption of the Democratic Charter in 2001, the doctrine on the defence and promotion of democracy in Inter-American relations has evolved from declaratory principles constrained by the notion of national sovereignty into a normative obligation that is being exercised through collective action. These institutional changes mark another significant departure from the traditional pluralist nature of regional governance in the direction of a system based upon notions of solidarism. Furthermore, these institutional developments are undeniably connected with domestic developments across the region as more than two decades have passed since what have been described as *regional* processes of political democratization were set in motion. One of the most important features of the regional system is therefore the coincidence of a regional human rights system and a regional democracy system. The strengthening of regional institutions concerned with the promotion and protection of human rights and the defence of representative democracy represents a

clear expansion and increased intrusiveness of the overarching regional normative context in which domestic political developments occur.

Increased pluralism of norm creation

A second dimension concerns the pluralism of regional institutions and of the politics surrounding them. As the density and complexity of regional institutions grow, and as regionalization processes open up new channels of transnational political action, so the process of norm creation becomes more complex, more contested, and harder for even powerful states to control. Moreover, non-state actors as well as transnational and transgovernmental coalitions have played a considerable role in this normative expansion of regional institutions. Consequently, although states remain decisive actors in processes of regional institutionalization, the growing political pluralism that characterizes these institutions has strengthened the normative salience of regional human rights and democracy norms.

The Inter-American human rights regime has developed in an independent fashion, with, at its most positive reading, benign neglect on the part of most OAS member states vis-à-vis the system. Despite this apparent general disregard, or perhaps because of it, the human rights system has provided various civil society groups and individuals with transnational mechanisms of human rights protection that effectively seek to hold governments accountable for purely internal activities.[2] The Inter-American democracy regime, on the other hand, has emerged with the active support of, and intensive lobbying efforts by, a number of both influential and – interestingly so – traditionally less influential member states. Although regional civil society groups did indeed play a significant role in the process of drafting the Inter-American Democratic Charter,[3] the democracy regime operates with relatively little civil society participation and remains largely within the intergovernmental mould that has traditionally characterized regional institutions. As such, the notion of solidarism that underpins the democracy regime is still fundamentally state centred.

The hardening of the system

The third feature to be noted concerns the gradual hardening of implementation and enforcement mechanisms. Following the adoption of the OAS Charter and the American Declaration of the Rights and Duties of Man in 1948, states have developed human rights norms in the American Convention on Human Rights (the Convention) and a number of regional human rights instruments.[4] Under the Convention, the regional human rights regime became a two-legged system. Firstly, under the mechanisms

developed under the OAS Charter, the Inter-American Commission on Human Rights (the Commission) is authorized to supervise human rights in the territories of OAS member states. Secondly, the mechanisms set forth in the Convention authorize the Commission and the Inter-American Court of Human Rights (the Court), to handle individual complaints of human rights violations allegedly committed by any state party of the Convention (under its contentious jurisdiction[5]), and the Court has the further competence to render Advisory Opinions on matters of interpretation of the Convention and other human rights instruments.

With the incorporation of the Convention into the Inter-American system, the regional human rights regime started the transition from what Jack Donnelly refers to as a purely promotional regime to one characterized by strong promotion with emerging enforcement mechanisms. From promoting human rights standards with significant exceptions, the Convention, in Donnelly's view, consolidated regional norms within a procedural framework that has the potential to yield authoritative regional decisions.[6] Similarly, Jane Peddicord notes that "[t]he Convention culminates the first evolutionary stage of the inter-American human rights system. Eliciting binding commitments from states parties, it prescribes an international scheme to protect human rights."[7] In so doing, the Inter-American system adopted a more judicial approach towards the promotion and protection of human rights in the region. On the basis of these legal instruments, from its roots as a quasi-judicial entity with an ill-defined mandate to promote respect for human rights in the Hemisphere, the Inter-American system of human rights has emerged as a legal regime formally empowering citizens to bring suit to challenge the domestic activities of their own government. An independent Court and Commission are each invested with the mandate to respond to individual claims by judging whether the application of domestic rules or legislation violates international commitments.

In the context of heightened Cold War tensions accompanied by region-wide systemic human rights abuses at the beginning of the 1980s, this development towards the strengthening of the human rights regime would have seemed highly improbable. As Tom Farer has noted, in comparison with the European human rights regime the Commission had a wider mandate than its European counterpart but, whereas the European human rights regime "largely reinforced national restraints on the exercise of executive and legislative power", the Latin regime "was attempting to impose on governments restraints without domestic parallel".[8] Indeed, throughout its existence, the OAS – from which the regional human rights system derives its authority – has included member states many of which on numerous occasions have been governed by repressive regimes with scant regard for human rights. During the period of

authoritarian regimes, none of the great malefactors – Argentina, Chile, El Salvador, Guatemala, Paraguay and Uruguay – were parties to the Convention, and all were the subject of multiple cases before the Commission or of investigations initiated by the Commission.

Yet the regional human rights system in the Americas has developed into a normatively intrusive regime with a far-reaching mandate to regulate domestic political norms and the practices of regional states. With the transition to democracy there seems to be an increasing willingness among states to formally declare adherence to international standards. An indication of the evolution of the regional human rights system as it extended its reach across issue-areas as well as into the domestic affairs of states could therefore be seen in the increasing number of ratifications of regional human rights instruments and the increasing acceptance of the Court's jurisdiction.[9] Although there is no mechanical equivalence between ratification and "compliance", the hardening of the regional human rights system should be seen in terms of an evolving and dynamic relationship between the regional regime and domestic processes of political change. More specifically, the nature, direction and pace of the evolution of the human rights system should be seen in relation to the patterns of change in the processes of political democratization in the region. That is, the evolution towards a transnational human rights regime should be seen in light of the demands and claims of domestic actors in turn interacting with external actors and pressures.

How the regime affects political actors

The increased intrusiveness of the regional human rights regime represents a clear challenge to the inherited emphasis on sovereignty that traditionally characterized international law and society. Sovereignty, in the sense of the power of the state over its nationals, has been eroded by human rights law and an increased availability of a variety of national courts and international tribunals – hence the tendency to view sovereignty not as an absolute claim to independence or the sign of membership in a closed club of states, but rather as a changing bundle of competences, and as a status that signals a capacity to engage in an increasingly complex set of international transactions. But it is also important not to overlook the extent to which international human rights regimes in the post-1945 period continued to be marked by statism and sovereignty – not just in terms of the capacity of states to resist the transfer of effective authority but also in terms of how the system itself was conceived. As Louis Henkin noted:

> In our international system of nation-states, human rights are to be enjoyed in national societies as rights under national law. The purpose of international law is to influence states to recognize and accept human rights, to reflect these rights in their national constitutions and laws, to respect and ensure their enjoyment through national institutions, and to incorporate them into national ways of life.[10]

States, then, are the source of the system – the locus of responsibility and the focus for pressure. The road to a common humanity lies through national sovereignty. This perspective suggests that we should think of the human rights regime as affecting political actors primarily at an inter-state level and in terms of the dynamics of the inter-state system. For some, human rights come to "matter" only when big and powerful states take them up and seek to use their own power to enforce human rights standards. In this view, human rights institutions are of only marginal importance. Also in this view, the role of non-governmental organizations (NGOs) and advocacy groups is principally to publicize human rights violations in order to sway public opinion within the political system of powerful states, especially in the United States and Europe. For others, the system might matter but primarily because of what it can do to shift the incentives facing member states – by generating publicity, by naming and shaming, and by creating positive or negative linkages with other issues.

However, this way of thinking about the human rights regime in the Americas underplays its transnational character – in terms of the transnational political spaces that have been created, and in terms of the increased dialogue and interaction between national legal orders and transnational and regional constitutionalism. It should be noted that the transnational element of the regime is particularly important because of the weaknesses of the regional system, especially in relation to its funding and to the absence of a clearly mandated political compliance mechanism (as in the role of the Committee of Ministers in the European system). Four dimensions can be observed regarding the transnational character of the human rights regime: legal and normative developments; regional–national interactions; the role of national and transnational actors; and compliance and enforcement.

Legal and normative developments

First, we should note the importance of legal and normative developments within the regime itself and through the development of regional human rights jurisprudence. These include on the one side the strengthening over time of individual access to the human rights regime as the

system has evolved into a judicial regime with a procedural focus on the force of legal argumentation and the generation of regional human rights jurisprudence. On the other, the system has increasingly exercised its jurisdiction to explicitly advocate the strengthening of regional democracies as the strongest guarantees of the protection of a wide range of human rights. The emergence of a regional democracy norm within the overall regional institutional framework has added further impetus to the trend towards the constitutionalization of regional political norms on the basis of more ambitious and intrusive normative foundations explicitly concerned with the regulation of state–society relations.

One of the most important regional modifications to international law that came with the entry into force of the Convention was the establishment of a right of private petition, thereby legally strengthening the access of individuals to the enforcement process. Although the power of the Court to consider and rule on a case referred to it is conditioned on the acceptance of its jurisdiction by the state in question in the dispute,[11] the competence to judge states for international human rights violations and to order states to award compensation to victims has, as Christina Cerna notes, "virtually transformed the [Court] into a kind of international criminal court".[12] Furthermore, the Court may pass judgment on the compatibility of national legislation with the Convention.[13] The Inter-American system, in other words, has developed regional jurisprudence in the direction of an increased procedural focus on the individual. In the interplay between the Commission and the Court, there has been a discernible evolution towards a more case-oriented existence. In this sense, the human rights mechanisms provided by the Inter-American system give further impetus to the development of the transnationalization of international legal institutions. The general tendency observable in the 1990s – evidenced in the former Yugoslavia and Rwanda tribunals, the establishment of an International Criminal Court, the Pinochet case, and the various tort cases taken before US courts[14] – was towards the "individualization" of allegations involving violations of human rights.

The Inter-American system itself has also actively worked towards the legal consolidation of supranational supervision. The Court, for example, has stated that human rights treaties are different in nature from traditional multilateral treaties, because they focus not upon the reciprocal exchange of rights for the mutual benefit of the contracting states, but rather upon the protection of the basic rights of individuals. In other words, the obligations are *erga omnes* (in relation to everyone), rather than in relation to particular other states.[15] Furthermore, the Court has established that laws refer to "general legal norms tied to general welfare, passed by *democratically* elected legislative bodies established by the constitutions of state parties for that purpose".[16] This normative

equation between "laws" and "democracy" received a further boost with a ruling on habeas corpus, in which the Court referred to the "inseparable bond between the principle of legality, democratic institutions and the rule of law".[17] In short, through a number of rulings, the Court has explicitly coupled the democratic form of government with the principle of legality in the promotion of human rights in the region. Moreover, it has established the legal obligation of states under regional and international law to protect the rights of citizens and, if they fail to do so, the international obligation to hold states accountable.

Regional–national interactions

Secondly, thinking of the regime in transnational terms focuses attention on the interaction between regional human rights developments and national-level political and legal debates. The story of amnesty laws provides a good example. Characteristically, these laws have been enacted just before or just after transitions from military government back to a democratic government, resulting in legal immunity for perpetrators of human rights violations under authoritarian rule. As can be seen in the different approaches taken by various governments, the issue of how to deal with the legacy of past abuses came to define the nature of the transition to democratic rule and the different conditions prevailing in the various countries. Holding perpetrators fully accountable for their crimes would include the appropriate trial and punishment of each individual responsible for the crimes committed, together with appropriate reparations made by perpetrators to victims. However, in many contexts, some form of truth commission to ensure the credible and authoritative revelation, documentation and memorialization of the events in question became the favoured option.[18]

These internal dilemmas facing democratically elected governments were compounded as international legal obligations introduced issues concerning the "proper balance between notions of sovereignty and non-intervention in internal affairs and effective ways to implement fundamental principles of humanity".[19] This raised questions as to whether governments have a right to guarantee impunity to the offenders under the argument that it is necessary for national reconciliation or to maintain democracy; whether the state has an international obligation to provide individual victims of gross and systematic violations of human rights with effective remedies despite the alleged concern for the "social good"; and whether amnesty laws are compatible with a state's international human rights obligations, more specifically with the Convention. In its dealings with these issues the Commission unequivocally argued for there being international grounds for official state investigations and

dissemination of the truth, in effect promoting a "society's right" to know the truth to ensure human rights in the future.[20] As can be seen in the case of Uruguay – where an electorate threatened with the restoration of military rule had endorsed immunity – this "collective" right to truth could not trump the individual victims' rights to due process or humane treatment.[21]

The Commission's approach to the international responsibility of states to provide individuals with domestic remedies and to ensure accountability for human rights abuses was given further impetus with an Advisory Opinion of the Court in 1994.[22] In that ruling, the Court established the international duty to investigate and to punish human rights offenders, because it judged the promulgation of domestic laws in conflict with international obligations to be in violation of provisions of international law. Furthermore, it established that the punishment of state agents violating human rights protected under the Convention is an international responsibility of a state; and, if the violation is an international crime, it becomes the responsibility of the international community to enforce accountability. Although the impact of these precedents is difficult to determine, Roht-Arriaza and Gibson note that "the trend has been from broader to more tailored, from sweeping to qualified, from laws with no reference to international law to those which explicitly try to stay within its strictures". They conclude that it is "possible to trace this result at least in large part to the growing importance of a discourse about impunity and accountability on an international level".[23]

The cases dealt with by the human rights system during this period of democratic transition in the region were predominantly concerned with the practice of forced disappearances under authoritarian regimes, the status of judicial guarantees in states of emergency, the legal and political admissibility of amnesty laws, the provision of domestic remedies for human rights victims, questions of accountability for past human rights abuses, and the right to individual access to the regional human rights system. Hence, national approaches to transitional justice, although reflecting different and country-specific political concerns across the region, interacted with the development of regional human rights jurisprudence. It seems, in other words, that the short-term advantages of political pragmatism that inevitably shape approaches to "transitional justice" have over time led to a formal convergence towards international norms – norms in part developed and formalized by the Inter-American system.[24]

The role of national and transnational actors

Thirdly, viewing the human rights regime in transnational terms suggests a number of important questions to be addressed in order to understand

the ways in which the regime affects political actors and also where the major constraints lie. It is important to ask how far (if at all) integration and interaction with the regime may affect the relative power of sections of the bureaucracy dealing with human rights, or may lead to processes of socialization on the part of those state officials involved. Whatever these officials' original views, operating within the system, having to justify policy within the terms of the dominant discourse of the system and having to engage with other related actors (especially the domestic human rights community) may well foster such socialization.

It is also important to see domestic judiciaries as political actors. Clearly, the impact of the regional system and of regional human rights depends on the "value conferred upon them by the domestic laws of the states that have ratified the convention".[25] This points to the importance of developments at the domestic level as governments pass laws to ensure constitutional safeguards for the protection of human rights. In many states of the region and in various forms, human rights have been "constitutionalized". Nevertheless, there is widespread variation not just in the effective enforcement of human rights within domestic legal systems but also in the willingness of judges to engage in the transnational legal culture of human rights and to take advantage of the potential legal and argumentative resources available. Understanding the sources of this variation (for example, divergent national legal traditions, patterns of legal education, or engagement with the transnational legal community) forms an important part of understanding the ways in which the human rights regime does or does not affect political outcomes.

It is also important to understand the capacity of transnational civil society groups to engage directly with the regional regime. Processes of regionalization open up space for transnational political agency. From this perspective, democratization is partly shaped by the relationship that arises from the complex interplay between forces outside states and actors based within them. Because political actors increasingly operate across state borders as a way of effecting changes within states,[26] it also becomes increasingly important to identify the linkages and tensions that exist between the "inside" and the "outside" of domestic political action.[27] A similar picture can be seen in relation to human rights. As Jean Grugel maintains, "human rights is probably the most clearly defined issue area in which Latin American NGOs, social movements and political parties have developed transnational contacts".[28] The regional experience of Latin America therefore offers an instructive example of the logic of transnational political and legal activism conducted for essentially domestic ends. Although the practice of human rights conventionally adopts a universalistic discourse, Todd Landman correctly points out that "the history of human rights is one of the increasing internationalization of

an idea that has traditionally been defended nationally".[29] In contrast to Europe, NGOs in Latin America play a far more important role in taking human rights cases to the regional system. Thus, processes of regionalization with regard to human rights and democracy norms have provided domestic actors with transnational political and legal opportunities to pursue their interests. Here the political question emerges in terms of explaining why NGOs in some states are more active transnationally and also adopt divergent strategies corresponding, respectively, to the legal and to the more political sides of the human rights movement.

Compliance and enforcement

Fourthly, and finally, thinking of the human rights regime in transnational terms shapes how we might best think about "compliance" and "enforcement". As Martha Finnemore and Stephen Toope emphasize in relation to international human rights law generally, "[o]utside of the European context, the entire law of human rights operates and affects world politics without any mechanisms of compulsory adjudication. Where modern treaties create mechanisms to promote implementation, they are often premised on the need for positive reinforcement of obligations rather than on adjudication and sanctions for noncompliance. There is no extensive delegation of decision-making authority."[30] Indeed, the implied subtext of many conventional accounts of international law is that it is an inferior form of law in relation to municipal law, mainly owing to the absence of proper enforcement mechanisms at the international level. However, such positivist critiques of international law generally fail in their understanding of the complex force of international legal norms and practices. For example, Jack Donnelly maintains that, despite their weak capability to enforce their provisions, the importance of human rights instruments lies in their capacity to appraise state action.[31] In other words, human rights instruments establish criteria on which to judge the legitimacy of states' behaviour in this issue-area. Hence, the merits of this view of international human rights law lie in that it takes a helpful step away from international human rights law's traditional focus on enforcement (or, rather, the lack thereof).

Thus, the study of the role of law, and of norms more generally, in world politics has suffered from inadequate attention to the processes of legitimizing law as well as from failing to properly recognize that international law consists of processes as much as it consists of the structural manifestations of law in international institutions.[32] Again, drawing from Finnemore and Toope, international law is more than merely a matter of cases and courts or formal treaty negotiation. It has a constructive

dimension in which actors participating in the construction of the law "contribute to legitimacy and obligation, and to the continuum of legality from informal to more formal norms".[33] Law in this view draws attention to those rules, norms and decision-making procedures of institutions that shape expectations, interests and behaviour. The force of law in politics – its "impact" – therefore does not merely manifest itself in the form of constraints, but also has important creative, generative and constitutive influences on political practice.

In the context of the regional human rights system, this perspective on the role of law in shaping political developments brings to our attention the criteria established by the system by which to judge the legitimacy of states' behaviour. These define norms by which governments can be held accountable by their own citizens, as well as by others. With the growing participation of civil society groups within and around the regional system, the transnational character of these developments is becoming increasingly significant. Furthermore, this points to the influence of transnational human rights actors and their role in framing political demands in terms of human rights in countries undergoing processes of democratization. These various groups and coalitions have actively drawn from the pre-existing regional institutional framework and they have also found willing interlocutors within the human rights system. Therefore, the regional human rights regime matters in its dynamic interaction with country-specific patterns of political democratization. The transnational legal and political processes that result from such interaction create patterns of behaviour and generate norms of appropriate conduct that in turn influence domestic legal and political processes. Hence, the "impact" of regional institutions concerned with the promotion and protection of human rights and the deepening of democratic rule lies in their ability to shape the nature and direction of the processes of democratization and the role of human rights in these processes.

Challenges and problems

If the previous section opened up possible avenues for change and for thinking about the potential impact of the human rights regime, this section looks, rather more soberly, at the challenges and constraints. In this section we highlight four of many challenges faced by the regional regime: the changing character of human rights violations; the changing character of democratization; the interface between human rights and democratization; the changing regional context and the deterioration in US–Latin American relations.

The changing character of human rights violations

Although the spread of elected governments has marked a significant improvement in the condition of human rights, cases of indisputable and grave violations continue to arrive at the Inter-American Commission. In particular, the Commission has begun to receive more cases from the "grey borderland where the state's authority to promote the general interest collides with individual rights".[34] It has also had to confront cases of structural human rights violations, whose causes do not lie in the exercise of arbitrary state power but are rather the consequence of state weakness and failure to act. It is clear that sustained and "structural" human rights violations occur on a large scale and include low-level police brutality, the murder of street children, rural violence and continued discrimination against indigenous peoples. In many cases the role of state authorities may be difficult to demonstrate, or may indeed be entirely absent. The capacity of weak and inefficient state institutions to address such violations may be extremely limited. It is important to note that this problem is by no means confined to situations of societal collapse, civil war and the total breakdown of central authority. Indeed, working with a single and rigid category of "failed states" is an extremely unhelpful way of approaching this phenomenon. It is better to consider the multiple forms of violence, the blurred character of relations between public and private power, and the way in which actually existing Latin American states have always diverged from neat Weberian models. The historical legacies of processes of state formation have therefore continued to shape both the character of human rights violations and the capacity of states to address them (including, for example, the often difficult political and legal relationship between federal governments and local authorities, or between the army and different parts of the police service).

The overall human rights trend therefore could be characterized as a move away from "traditional" human rights violations perpetrated by state agents as part of a deliberate state policy. Although much of the regional human rights agenda is still taken up by the legacies of authoritarianism and issues of transitional justice (amnesty laws, proper compensation, and the right to know details of past violations), these forms of human rights abuses have tended to decline with the end of military governments in the region. Increasing attention has therefore been given to violations that involve challenges to the rule of law (access to justice and due process) and to the rights of vulnerable groups (especially the rights of indigenous peoples in relation to land ownership and access to healthcare, the rights of women, and the rights of children). The focus of attention has shifted to structural violence by police against mar-

ginal communities, to collapsed prison systems and to deeply problematic judiciaries.

These trends pose major challenges for the regional human rights system, which is geared towards the protection of individuals against actions of the state, is built around legal notions of state responsibility and assumes, politically, that pressure can be exerted on states that possess the levers to improve the situation – in other words, that states that are part of the problem can also be part of the solution. These trends also challenge those notions of human rights (especially deriving from the US tradition) that place almost their entire emphasis on the relationship between the individual and a potentially threatening state. Finally, especially when considering situations of protracted conflict and violence (as in Colombia), "traditional" human rights law comes into an intrinsically closer relationship with other bodies of law, including international humanitarian law. Even assuming widespread goodwill, these changes pose major challenges to the mechanisms of a regional human rights system.

The changing character of democratization

The deepening institutionalization of norms and practices pertaining to human rights and democracy is taking place in a regional context in which the majority of the countries have been undergoing complex and uncertain processes of democratization. Latin America has routinely been singled out as the prime example of a region of the world where the allegedly irreversible advances of (liberal) democracy have been the most prominent. For nearly two decades, regional experiences with processes of political (and economic) liberalization,[35] political transitions from an authoritarian regime to a democratically elected one, and the institutionalization of democratic norms and practices – referred to as "processes of consolidation" – have provided students of democratization with ample empirical material. Indeed, across the region (with the notable exception of Cuba), "democracy" is widely considered to be "the only game in town".[36]

The regional character of democratization has prompted observers to analytically construct systemic theories of change.[37] But the crucial point is that the significant differences in terms of political outcomes from democratization across the region cast doubt on the idea of a straightforward narrative of regional convergence around values of liberal democracy. Instead, what can be observed is the weakly institutionalized nature and practice of democratic regimes in the region. Indeed, these divergences between the formal and procedural characteristics of the political arrangements and the subjective perceptions of experiences with

democracy of those living under its regime vary across as well as within countries.[38] The instability of the advances in citizenship rights accompanying regional processes of democratization remains especially characteristic of the types of democratic regimes that have emerged in the region.

Accordingly, the challenges to democracy in the region have shifted. Whereas the act of taking power by means of a coup d'état, for example, is unambiguous, the undemocratic exercise of power may be less obvious. There are indeed multiple ways in which power obtained through democratic means may be exercised undemocratically.[39] If democratic backsliding were simply a matter of military coups and the failure to hold clean elections, a regional consensus might be relatively easy to sustain. But contemporary challenges to democracy in Latin America have far more to do with the murky erosion of democratic systems, near-coup crises and the deterioration in the social and economic fabric and the interpersonal trust that sustain democratic institutions.

It is also clear that there is increasing contestation about the nature of democracy, rising expectations about what democratic systems should deliver, and growing discontent with the gap between inflated expectations and delivered outcomes. As the countries of Latin America have moved through the phase of transition to what is commonly referred to as the phase of democratic consolidation, the concerns regarding the nature of the region's democracies have changed. Hence, departing from the minimalist and procedural conception of democracy as implied by the consolidation paradigm,[40] expectations of what democracy *should* deliver, and how, expand. But, as the demands on democracy shift, reality does not necessarily follow. In particular, the gap between the claims and predictions of the consolidation paradigm and the subjective experiences of democracy in the region is wide and potentially growing. On closer examination, therefore, the actually existing democracies of the region show evidence of being weakly institutionalized, and as a result emerging citizenship rights are unstable. Consequently, with democracy widely perceived as the only legitimate form of political regime available, the concerns of democratization scholars have adjusted accordingly. The modernization literature focused on a number of social and economic prerequisites for democratization to occur.[41] The transitology literature emphasized political processes and elite initiatives and choices to account for the move from authoritarian rule to democratic regimes.[42] The analysis of consolidation processes shifts interest away from the search for preconditions or catalysts of change to the study of factors that enable or constrain the stabilization and legitimization of new democracies. There is, therefore, a growing recognition that the nature and direction of democratization as a process are contingent and open-ended.[43] As such, the

scope for disputes surrounding the requirements of regional democracies is wide.

Hence, as processes of democratization continue apace, the analytical perspectives required to explain such changes need to adapt accordingly. Although the early literature on democratization tended to downplay international factors, there is a growing recognition of the "international dimensions" of (regional) democratization processes.[44] In this vein, Laurence Whitehead argues that, whereas questions of institutional design and representative procedures have been exposed to limited international influences, the broader issues of "democratic accountability, rule of law observance and rights protection, anti-corruption enforcement, citizen security, local democracy, and so forth, all take much longer and may require more international cooperation and support".[45] In other words, the causal mechanisms relevant to processes of consolidation differ from those pertaining to processes of transition and, whereas the latter might have a predominantly local flavour, the former need to incorporate international actors and processes. Similarly, Charles Tilly maintains that it is important to understand how the international arena supplies domestic actors with ideas and practices concerned with how to construct and re-construct democracy.[46] Once democracy was seen as a contingent outcome of national struggles for power, but international recognition is increasingly seen as part and parcel of the democratic idea in its contemporary form.[47] In this sense, the regional developments reflect the broader normative changes in the international system that have contributed to the emergence of the democracy agenda. Respect for democratic principles has become the *sine qua non* for legitimate members of the world community with regard to both political and economic systems of governance.[48]

The interface between human rights and democratization

There is a long and powerful tradition of thought that asserts a close relationship between human rights and political democracy. Especially for those working within the human rights area, democracy is often understood in human rights terms; and conceptions of democracy are advanced that take democracy to be the sum total of a number of political rights as enshrined in international legal instruments.[49] For Cerna:

> The existence of a democratic form of government – evidenced by fair and free periodic elections, three branches of government, an independent judiciary, freedom of political expression, equality before the law and due process – is a sine qua non to the environment of human rights. Consequently, the elements

> of democracy are found in the international human rights norms. For example, by becoming a party to an international human rights instrument, a state agrees to organize itself along democratic lines by establishing independent tribunals, allowing freedom of expression, and conducting free elections.[50]

This view of the role of (international) human rights in (national) processes of democratization forms the dominant position within the human rights "community": it stresses unequivocal positive reinforcement and supports the idea of a "right" to democratic governance. Such a "right to democracy" in the Americas would call into question the traditional notion that internal political legitimacy is essentially a matter under the state's exclusive jurisdiction and therefore that it is exempt de jure, although arguably not de facto,[51] even from a "soft intervention by international organizations or by the entire international community".[52] To the extent that this is an accurate description of the normative changes in the region, this development would constitute a gradual move away from the traditional pluralist nature of the hemispheric system towards a more solidarist model. This would mark a shift of international law from its de facto approach to statehood and government towards a normative commitment in favour of liberal democracy.[53]

And yet, although there may be an elective affinity between human rights and democracy, serious tensions complicate the workings of the regional system. At a general level, Isaiah Berlin and Jon Elster have underlined the extent to which formal political democracy can entrench murderous majorities of all kinds.[54] Very large numbers of democratic states commit violations of human rights, especially highly unequal and stressed societies. Looking over the past 20 years (beyond the recent focus on counter-terrorism), nearly one in three institutional democracies have committed significant violations of human rights.[55] It is also far from clear that the "right to democracy" can be turned into a coherent, credible and enforceable right.[56] And, most importantly, the complexities and uncertainties of democratic consolidation in Latin America make the relationship especially tricky. In some cases (such as Colombia), relatively successful electoral democracy has coexisted with severe and persistent human rights violations. In other cases (such as Argentina and Chile), there have been tensions between the political bargains associated with transition and the requirements of transitional justice. In the "actually existing democracies" in the region, the relationship between human rights and democracy is not straightforwardly progressive. Although the (re)turn to democracy in the region has significantly improved the human rights situation compared with the period of authoritarian regimes, structural human rights violations constitute part of everyday life for many sectors of society. In other words, there is, as Laurence White-

head reminds us, "no mechanical equivalence between democratization and the promotion of human rights".[57]

Rights are conceptually distinct from democracy. They are designed to protect their bearers from actions or conditions that threaten individual autonomy or well-being. The whole point of rights is to ring-fence certain activities from the decisions of day-to-day democratic politics, to insulate certain areas of politics from the control of others, and to set limits on what may be legislated. The values protected by rights are more basic than the values of democracy. For the rights purist, rights are "trumps" and belong to a normative sphere that lies beyond politics. This is their power and their particular appeal. But, despite the moral emphasis of "rights talk", the apparently apolitical quality of rights is itself the product of political struggles, political compromises and political traditions that vary greatly across time and across space.

Why does this matter? It matters, firstly, because it creates divisions within the regional human rights movement regarding the best way to secure "good" outcomes. To what extent should the movement focus narrowly on human rights rather than joining broader political struggles? Is it not the case that human rights activism can easily lead to excessive expectations about the role of law and the possibilities for legalizing progressive social change? Does it not confine the human rights movement to the role that states and the human rights system allow it to play rather than pragmatic political engagement with what works?[58]

It matters, secondly, because of broader scepticism about the value of human rights. Given the sorts of challenges described in the previous sections, the rediscovery of rights in the struggles against authoritarian rule in Latin America has, to a significant extent, lost ground to those who argue that political action is the best way to secure progressive goals. This might, for example, involve land reform, redistribution and direct assistance to the poor. Such action should neither be impeded by an excessive concern with the procedural purity of democracy nor be diverted by a concern with human rights. Do human rights policies lead to a strengthening of the "quality" of democracy, broadly defined? Or is "a successful rights-based politics . . . parasitic on features of the polity that have nothing to do with rights – indeed, which may even be inimical to rights thinking"?[59]

If the relationship between human rights and democracy within individual countries is far from straightforward, so too is the relationship at the regional level. As has been noted, "human rights and democracy often appear disconnected on the inter-American agenda".[60] One aspect of the relationship concerns the origins and relative strength of the human rights regime itself. By one much-cited account, there is a powerful interest-based logic to the emergence of international human rights regimes. Thus

Andrew Moravcsik has emphasized the ways in which the European process of post-war democratization coincided with the development of a strong human rights regime in that region.[61] In his view, the emerging democratic regimes of Europe chose human rights as external institutional safeguards in order to "lock-in" domestic political arrangements. This sort of logic can be discerned in some places in the Americas (perhaps Argentina under Alfonsín and, more recently, Mexico under Fox). But, in general, consolidating democracies have not sought to strengthen the regional human rights regime as much as this theoretical approach might lead us to suppose. Instead they have placed much greater emphasis on the construction of a regional system for protecting and promoting democracy – one that is far more directly under the control of states, that is politically and legally less constraining, and that is less susceptible to progressive development both from within the "system" and by civil society groups.

The other aspect of the relationship concerns the operation of the system. Although the human rights challenges and democratic challenges of the region are indeed overlapping, the disconnect between the two regimes raises questions concerning the development of regional institutions and their interaction with domestic political developments. There is much less mutual reinforcement than might be expected. Although a people's right to democracy is affirmed in the Democratic Charter and the protection of human rights is deemed essential, above and beyond the holding of periodic elections the mechanisms for evaluation and implementation contained in the Charter are unclear.[62] Furthermore, on the terms of the Charter, the OAS will ultimately exercise its own discretion when choosing to intervene (or not) in the defence of democratic principles.[63] This puts the state concerned itself in the position to choose whether to solicit an inquiry, leaving no recourse provided for in the Charter for civil society groups or individuals seeking to trigger an investigation into alleged violations of the Democratic Charter.[64] Given these strong state-based biases inherent in the democracy regime, political considerations will inevitably influence, and could potentially override, the objective of defending democracy.

Moreover, there is no explicit reference to the Inter-American human rights system in the Democratic Charter. Although the human rights system – as outlined above – has been increasingly willing to make explicit the connection between the protection of human rights and the democratic form of government, the institutional mechanisms developed to meet these overlapping challenges remain distinct. The Inter-American Commission on Human Rights in particular could play an important role in monitoring human rights, initiating debate around situations that appear to threaten democratic governance, helping to raise "early warn-

ings" about breakdowns in democracy, studying situations that merit the adoption of measures under the Democratic Charter, and evaluating the application of such measures.

The changing regional context and the deterioration in US–Latin American relations

As with the global system, much of the optimism of the 1990s regarding human rights and democracy within the region reflected a broader view of the changing character of US–Latin American relations and the apparently unprecedented degree of convergence that was taking place across the Hemisphere. Indeed, much of the liberal writing of the 1990s suggested, explicitly or implicitly, that power concerns were being driven to the margins of Inter-American relations by four sets of factors: first, by deepening integration and interdependence, which both created a powerful demand for interest-driven cooperation and effectively tamed or blunted US hegemonic power; secondly, by the pluralist character of politics within the United States; thirdly, by the consensus that developed around human rights and democracy; and, finally, by the broader spread and internalization of shared liberal preferences and normative understandings. As a result, traditional concerns about sovereignty and non-intervention and traditional worries about US hegemony were becoming more muted and less disruptive to effective regional governance.

Less than a decade on, the picture looks very different. First, the human rights and democracy regimes are clearly not embedded within a stable structure of hemispheric cooperation. The negotiations on hemispheric economic integration have broken down and there can hardly be a more striking contrast than that between the Miami Summit of the Americas in 1994 and the Mar del Plata Summit of the Americas of 2005. If the prospects for a Free Trade Area of the Americas have receded and become highly politicized, the OAS has become more marginalized from tackling the real sources of insecurity in the region, and the progress made in the 1990s in relation to monitoring elections and promoting democracy is threatened by growing divergence between the United States and much of South America. As very often in the past, but especially given the decline in the salience of the region to US foreign policy, Washington's policy initiatives have been made with little attention to their impact on the region (as with the decision to strengthen the US–Mexican frontier). Policy for much of the Bush presidency was in the hands of people who brought a strong Cold War and ideological vision to their understanding of events in the region.

Secondly, the change in the broader security climate and the nature of Washington's response in what it has termed the "long war on global

terror" have had clearly negative repercussions for human rights – in terms of the human rights violations committed by the United States itself, most notably in Guantánamo, in terms of the cynicism that the mismatch between US words and US deeds has engendered across the region, and in terms of the incentives and political space for other groups to emulate Washington's rhetoric and behaviour.[65]

And, finally, even taking the US desire to promote democracy at face value, divergences between the United States and many Latin American countries over the nature of democracy have grown starker. On one side, the United States denounces both the alleged move to the left in the region and what it sees as the abuses of "populism" and "democratic cesarism". On the other, there have been widespread discontent across the region with the results of democracy and liberal economic reform, calls for much greater attention to the social agenda, and the loud proclamation of more "authentic", "redistributive" and "participatory" modes of democracy (most notably in Venezuela and Bolivia). Whatever the exact truth of these respective claims (with both sides presenting far too simplistic a picture of political change in the region), the point here is simply to note the difficulty of promoting democracy when there is so little consensus on its meaning and the direction in which democratic change should proceed. Moreover, the political space to support democracy and to accept the inherent unpredictability of democracy has also been affected by the reappearance of security issues that press the United States to support illiberal regimes and to turn a blind eye to their violations of human rights.

Notes

1. Meaning literally "as you possess", this principle was used in nineteenth-century South America to agree the frontiers of the newly independent states on the basis of the frontiers that had existed during the Spanish and Portuguese empires.
2. Andrew Moravcsik, "The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe", *International Organization* 54:2 (2000).
3. Andrew F. Cooper, "The Making of the Inter-American Democratic Charter: A Case of Complex Multilateralism", *International Studies Perspectives* 5:1 (2004).
4. These regional human rights instruments are: the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador"), adopted on 17 November 1988; the Protocol to the American Convention on Human Rights to Abolish the Death Penalty, adopted on 8 June 1990; the Inter-American Convention to Prevent and Punish Torture, adopted on 12 September 1985 and entered into force on 28 February 1987; the Inter-American Convention on Forced Disappearance of Persons, adopted on 9 June 1994 and entered into force on 28 March 1996; the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women ("Convention of Belém do Pará"),

adopted on 9 June 1994; and the Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons With Disabilities, adopted on 8 June 1999 and entered into force on 14 September 2001.

5. In contrast to giving Advisory Opinions, contentious jurisdiction allows the Court to hear cases and complaints provided the states concerned have given their consent.
6. Jack Donnelly, *Universal Human Rights in Theory and Practice* (Ithaca, NY: Cornell University Press, 1989), pp. 24–25 and 215–217.
7. Jane D. Peddicord, "The American Convention on Human Rights: Potential Defect and Remedies", *Texas International Law Journal* 19:1 (1984), p. 159.
8. Tom J. Farer, "The Rise of the Interamerican Human Rights Regime: No Longer a Unicorn, Not Yet an Ox", *Human Rights Quarterly* 19 (1997), pp. 511–512.
9. For example, Argentina ratified the Convention in 1984 and accepted the jurisdiction of the Court in the same year. Uruguay followed suit in 1985, Paraguay in 1989 (accepting the jurisdiction of the Court in 1993), Chile in 1990 and Brazil in 1992 (accepting the Court's jurisdiction 1998).
10. Louis Henkin, "International Human Rights and Rights in the United States", in Theodor Meron, ed., *Human Rights in International Law: Legal and Policy Issues* (Oxford: Oxford University Press, 1989), p. 25.
11. A state party is not deemed to have accepted the jurisdiction of the Court by a mere ratification of the Convention. Out of the 26 signatory countries to the Convention, 22 have accepted the jurisdiction of the Court (the United States is a notable exception).
12. Christina M. Cerna, "The Structure and Functioning of the Inter-American Court of Human Rights, 1979–1992", *British Year Book of International Law* 135 (1993), p. 135.
13. In order for the Court to hear a case, the proceeding before the Commission must have been completed, a provision that locates the Commission at the centre of the Inter-American system. Once the Commission has recognized a petition or communication as admissible, has investigated the facts denounced as violations to the Convention and has drafted the preliminary report, with its proposals and recommendations, to the accused states, the Convention empowers both the Commission and the state to submit the matter to the Court. Yet it should be noted that only states parties to the Convention and the Commission have the right to submit cases to the Court, and individuals have no standing to do so. So, although the Convention establishes individual access to the Inter-American system, "the deep-rooted idea that international law regulates relations between states, [is] reflected in the rule that in general individuals have no locus standi before international tribunals". Cecilia Medina Quiroga, *The Battle of Human Rights: Gross Systematic Violations and the Inter-American System* (The Hague: M. Nijhoff, 1988), p. 169. In its stead, the mechanism adopted is that any person or group of persons, or any non-governmental entity legally recognized in one or more member states, may file petitions with the Commission alleging violations of the Convention by states parties.
14. Ellen Lutz and Kathryn Sikkink, "The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America", *Chicago Journal of International Law* 2:1 (2001).
15. Inter-American Court of Human Rights, *In Definition of Other Treaties Subject to the Interpretation of the Inter-American Court*, Advisory Opinion No. 1 (1982). With this ruling, the Court took the view that the objective of the Convention is to integrate the regional and universal systems of human rights protection, and that therefore any human rights treaty to which American states are parties could be the subject of an Advisory Opinion.
16. Inter-American Court of Human Rights, *The Word "Laws" in Article 30 of the American Convention on Human Rights*, Advisory Opinion No. 6 (1986).

17. Inter-American Court of Human Rights, *Habeas Corpus in Emergency Situations*, Advisory Opinion No. 8 (1987).
18. Contrasting experiences with and approaches to "transitional justice" are to be found in Argentina (National Commission on Disappeared Persons), Chile (National Commission on Truth and Reconciliation), El Salvador (United Nations Truth Commission), Guatemala (Commission for the Historical Clarification of Human Rights Violations and Incidents of Violence That Have Caused Suffering to the Guatemalan Population – sponsored by the United Nations), Honduras (Report by the National Commissioner for the Protection of Human Rights) and, most recently, Peru (Truth and Reconciliation Commission). On these issues, see Neil Kritz, ed., *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, vols 1–3 (Washington, DC: United States Institute of Peace Press, 1995).
19. Juan E. Méndez and Javier Mariezcurrena, "Accountability for Past Human Rights Violations: Contributions of the Inter-American Organs of Protection", *Social Justice* 26:4 (1999), p. 84.
20. Jo M. Pasqualucci, "The Whole Truth and Nothing But the Truth: Truth Commissions, Impunity and the Inter-American Human Rights System", *Boston University International Law Journal* 12:2 (1994).
21. Inter-American Commission on Human Rights, Report No. 29/92 (1992), on Uruguay. For further examples of the Commission's views on amnesties, see Report No. 26/92 (1992) on El Salvador, and Report No. 28/92 (1992) on Argentina.
22. Inter-American Court of Human Rights, *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention*, Advisory Opinion No. 14 (1994).
23. Naomi Roht-Arriaza and Lauren Gibson, "The Developing Jurisprudence on Amnesty", *Human Rights Quarterly* 20:4 (1998), p. 884.
24. Any consideration of the influences of the regional human rights system in these processes should not exclude the role played by other international and extra-hemispherical influences. For the latter, consider, for example, the role of European governmental aid agencies and European political party foundations in financially supporting, respectively, local human rights initiatives and the development of political party structures.
25. Edmundo Vargas Carreño, "Some Problems Presented by the Application and Interpretation of the American Convention on Human Rights", *American University Law Review* 30:1 (1980), p. 128.
26. Jean Grugel, "Contextualizing Democratization: The Changing Significance of Transnational Factors and Non-State Actors", in Jean Grugel, ed., *Democracy without Borders: Transnationalization and Conditionality in New Democracies* (London: Routledge, 1999), p. 12. For the influence of transnational political actors generally, see Thomas Risse-Kappen, ed., *Bringing Transnational Relations Back In: Non-State Actors, Domestic Structures and International Institutions* (Cambridge: Cambridge University Press, 1995).
27. Hans Peter Schmitz and Katrin Sell, "International Factors in Processes of Political Democratization", in Grugel, ed., *Democracy without Borders*, p. 24.
28. Grugel, "Contextualizing Democratization", p. 15.
29. Todd Landman, "The Political Science of Human Rights", *British Journal of Political Science* 35:3 (2005).
30. Martha Finnemore and Stephen J. Toope, "Alternatives to 'Legalization': Richer Views of Law and Politics", *International Organization* 55:3 (2001), p. 747.
31. Jack Donnelly, "Human Rights and International Organizations: States, Sovereignty, and the International Community", in Friedrich Kratochwil and Edward D. Mansfield,

eds, *International Organization: A Reader* (New York: HarperCollins College Publishers, 1993).

32. Finnemore and Toope, "Alternatives to 'Legalization'". See also Benedict Kingsbury, "The Concept of Compliance as a Function of Competing Conceptions of International Law", *Michigan Journal of International Law* 19 (1998).
33. Finnemore and Toope, "Alternatives to 'Legalization'", p. 744.
34. Farer, "The Rise of the Interamerican Human Rights Regime", p. 544.
35. For a study of the origins, transmission and evolution of economic liberalism in the context of political liberalization in Latin America, see Rosemary Thorp, ed., *Economic Doctrines in Latin America – Origins, Embedding and Evolution* (Basingstoke: Palgrave, 2005).
36. Juan J. Linz and Alfred C. Stepan, "Toward Consolidated Democracies", *Journal of Democracy* 7:2 (1996).
37. The most prominent example of this tendency is of course Samuel P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (Norman: University of Oklahoma Press, 1991).
38. Guillermo A. O'Donnell, "On the State, Democratization, and Some Conceptual Problems: A Latin American View with Glances at Some Postcommunist Countries", in Guillermo A. O'Donnell, ed., *Counterpoints, Selected Essays on Authoritarianism and Democratization* (Notre Dame, IN: University of Notre Dame Press, 1999).
39. For claims regarding "illiberal" democracies, see Fareed Zakaria, *The Future of Freedom: Illiberal Democracy at Home and Abroad* (New York: W.W. Norton, 2003). For a discussion of liberal democracy in Latin America, see Laurence Whitehead, "The Alternatives to 'Liberal Democracy': A Latin American Perspective", in David Held, ed., *Prospects for Democracy: North, South, East, West* (Cambridge: Polity Press, 1993).
40. The status of consolidation is generally conferred upon those regimes that fulfil the minimal condition of organizing open or freely contested, fair, regular and competitive elections. Linz and Stepan, "Toward Consolidated Democracies", outline three minimum conditions for the consolidation paradigm: (1) the existence of a state, (2) the holding of free and contested elections, and (3) rulers who govern democratically. Whereas conditions (1) and (2) echo the minimalist and procedural aspects of the consolidation paradigm, the inclusion of the comprehensive and indeterminate third condition considerably raises the bar for admission to the club of democracies. For general misgivings regarding the concept of consolidation, see, for example, Guillermo A. O'Donnell, "Illusions about Consolidation", *Journal of Democracy* 7:2 (1996).
41. Seymour Martin Lipset, *Political Man: The Social Bases of Politics* (London: Heinemann, 1983); Barrington Moore, *Social Origins of Dictatorship and Democracy: Lord and Peasant in the Making of the Modern World* (Boston: Beacon Press, 1993); Dietrich Rueschemeyer, Evelyne Huber and John D. Stephens, *Capitalist Development and Democracy* (Cambridge: Polity; Chicago: University of Chicago Press, 1992).
42. Guillermo A. O'Donnell, Philippe C. Schmitter and Laurence Whitehead, eds, *Transitions from Authoritarian Rule* (Baltimore, MD: Johns Hopkins University Press, 1986).
43. Laurence Whitehead, *Democratization: Theory and Experience* (Oxford: Oxford University Press, 2002).
44. Jon C. Pevehouse, *Democracy from Above: Regional Organizations and Democratization* (Cambridge: Cambridge University Press, 2005); Richard Youngs, *The European Union and the Promotion of Democracy* (Oxford: Oxford University Press, 2002).
45. Laurence Whitehead, "Postscript", in Laurence Whitehead, ed., *The International Dimensions of Democratization: Europe and the Americas* (Oxford: Oxford University Press, 2001), p. 445.

46. Charles Tilly, "Democracy Is a Lake", in George Reid Andrews and Herrick Chapman, eds, *The Social Construction of Democracy, 1870–1990* (London: Macmillan, 1995).
47. Thomas Franck, "The Emerging Right to Democratic Governance", *American Journal of International Law* 86 (1992).
48. In addition to the clear coercive dimensions to these international normative developments (e.g. donor conditionalities), particular attention needs to be given to processes of social construction of democratic norms of political legitimacy. See, for example, Martha Finnemore and Kathryn Sikkink, "International Norm Dynamics and Political Change", *International Organization* 52:4 (1998); Martha Finnemore and Kathryn Sikkink, "Taking Stock: The Constructivist Research Program in IR and Comparative Politics", *Annual Review of Political Science* 4 (2001).
49. This view is most prominently espoused by Thomas Franck. See, for example, his "Democracy as a Human Right", *Studies in Transnational Legal Policy* 26 (1994).
50. Christina M. Cerna, "Universal Democracy: An International Legal Right or the Pipe Dream of the West?", *Journal of International Law and Politics* 27:2 (1995), p. 295. See also Heraldo Muñoz, "The Right to Democracy in the Americas", *Journal of Interamerican Studies and World Affairs* 40:1 (1998).
51. Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* (Princeton, NJ: Princeton University Press, 1999).
52. Fernando R. Téson, *Changing Perceptions of Domestic Jurisdiction and Intervention* (Washington DC: Inter-American Dialogue Seminar, 1993).
53. Franck, "The Emerging Right to Democratic Governance".
54. Isaiah Berlin, "Two Concepts of Liberty", in *Four Essays on Liberty* (Oxford: Oxford University Press, 1969), especially pp. 165–169; and Jon Elster, "Majority Rule and Individual Human Rights", in Stephen Shute and Susan Hurley, eds, *On Human Rights. The Oxford Amnesty Lectures* (New York: Basic Books, 1993), pp. 111–134.
55. Emilie Hafner-Burton and Kiyotera Tsutsui, "Human Rights in a Globalizing World: The Paradox of Empty Promises", *American Journal of Sociology* 110:5 (2004).
56. This also raises the fundamental question of how we think about institutions that are designed to be weak. On this point, see Jack Donnelly, *Universal Human Rights in Theory and Practice*, 2nd edn (Ithaca, NY: Cornell University Press, 2003).
57. Laurence Whitehead, "Democratization and Human Rights in the Americas: Should the Jury Still Be Out?", in Louise Fawcett and Monica Serrano, eds, *Regionalism and Governance in the Americas* (Basingstoke: Palgrave Macmillan, 2005), p. 164.
58. On these broader struggles within the human rights movement, see Stephen Hopgood, *Keepers of the Flame. Understanding Amnesty International* (Ithaca, NY: Cornell University Press, 2006), especially chapter 8; and David Kennedy, *The Dark Sides of Virtue. Reassessing International Humanitarianism* (Princeton, NJ: Princeton University Press, 2004).
59. Chris Brown, "Universal Human Rights: A Critique", in Tim Dunne and Nicholas J. Wheeler, eds, *Human Rights in Global Politics* (Cambridge: Cambridge University Press, 1999).
60. Andrew F. Cooper and Jean-Philippe Thérien, "The Inter-American Regime of Citizenship: Bridging the Institutional Gap between Democracy and Human Rights", *Third World Quarterly* 25:4 (2004), p. 732.
61. Moravcsik, "The Origins of Human Rights Regimes".
62. In particular, the Charter is vague in defining conditions that would constitute a violation of the Charter – the "unconstitutional alteration or interruption" of the democratic order noted in Article 19.
63. The mechanism described in Article 17 of the Democratic Charter – "When the government of a member state considers that its democratic political institutional process or

its legitimate exercise of power is at risk" – suggests that member states must invite OAS intervention, at least in the first instance.

64. In the case of a more dramatic "interruption" of the constitutional order, such as a coup d'état, any member state can request that a process of assessment be initiated, the consequences of which could include suspension of the violating member state from the OAS. However, the mechanism for collective action is weak because it is still unclear whether or not the acquiescence of the state in question is a precondition for collective action.
65. See, for example, Rosemary Foot, "Human Rights and Counterterrorism in Global Governance: Reputation and Resistance", *Global Governance* 11 (2005).

3

Democracy, human rights and the United States: Tradition and mutation

Tom Farer

The terms "democracy" and "human rights" are not used consistently or in ways that allow easy identification of their absence, at least in popular discourse and the discourse of journalists and political elites. It would therefore be useful to begin with a very brief definitional note for each of them. At least it should then be clear what I mean when I use the terms.

Definitions

Democracy

Probably still the most widely acknowledged definition of democracy is the one enunciated by Joseph Schumpeter in his classic *Capitalism, Socialism, and Democracy*.[1] Democracy, he wrote, is the institutional arrangement in which the power to decide is determined by a competition for the people's votes.[2] This is democracy as the political analogue of a liberal economic system: just as producers compete for consumer preference manifested in purchases, politicians compete for consumer preference manifested in votes. In order to satisfy the liberal individualist values that animate and justify it, the competition must be conducted fairly. Students and practitioners of anti-trust law will attest that the concept of "fair competition" is far from easy to define to everyone's satisfaction, much less to apply in complex societies where resources and skills are very unevenly distributed. Initial success achieved through luck

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or skill or undetected (or inadequately sanctioned) predation translates into market power, which thereafter tilts the field of play even when its potential is not fully employed.

On the demand side, election monitors can determine whether present power-holders, by inhibiting access to the voting booth or miscounting the votes, have distorted the expression of preference. On the supply side, they can identify gross barriers to entry or changes in market shares. But they have no mandate to rule elections unfair either on the grounds of grossly false advertising by the winners concerning their own résumés and programmes or those of their opponents or on the grounds that the winners exploited previously acquired advantages in wealth, celebrity and the prestige arising from the occupation of public and private offices. They have no mandate to take those considerations into account because to do so would challenge the legitimacy of electoral systems in many of the *established* democracies.

This is only the first, and arguably the lesser, difficulty in construing and applying Schumpeter's dictum. The second one concerns not the character but the result of the competition. It is a competition for the power to decide *what*? All issues that bear on the electorate's concerns or only those that are properly subject to political resolution; that is, resolution by the public authorities? And who but the electorate is entitled to decide on the allocation of issues between the public and private realms? Or does democracy by its nature presume a sphere of life beyond the reach of official power even if some of the activities that occur there have broad social consequences?[3]

In capitalist societies, the decisions of investors and corporate managers generally do more to shape quotidian life for most of the electorate than do the decisions of elected officials (and the persons who work under their direction).[4] And in many capitalist democracies, constitutional provisions shielding property from less than fully compensated takings preclude public action to alter the distribution of capital. Moreover, certain key public institutions, particularly the central banks, are in varying degrees and ways insulated from direct political control. Nevertheless, because constitutions can be changed, albeit by weighted majorities, and the private economy can at least in theory be comprehensively regulated or its impacts partially offset, most of us find capitalist arrangements comfortably compatible with, in fact a necessary condition for, Schumpeterian democracy.

Human rights

Human rights are not a synonym for idealism. Idealists can be found at every point on the political spectrum; Hitler and Mao no less than

Gandhi and Mandela have dreamed impossible dreams. The modern human rights texts such as the Universal Declaration – which enumerate economic and social as well as political and personal rights – incorporate the particular kind of idealism I will call "transnational welfare liberalism", with its commitment to the widest range of unfettered individual choice consistent with the survival of an equivalent range of choice for everyone else. It differs from classic liberalism by recognizing that the goal of optimal free choice requires collective action through the institutions of the state to restrain private power and to limit economic deprivation. It differs from Marxism by implicitly rejecting the proposition that freedom is an absolute state to be realized only under particular economic conditions. Freedom is rather the always approximate result of a ceaseless process in which rights and obligations, community activity and community tolerance function in a state of dynamic tension by means of which the process is maintained.

Commitment to this ideal does not allow one to think only in national terms. On the contrary, its incorporation into legal texts purporting to create, for all nation states, mutually binding obligations and corresponding rights to assess each other's compliance, and the subsequent recognition of an individual's right to petition the international community for redress of grievances against his or her government, constitute the most severe normative challenge to the state as the primary focus of human loyalty since secular authorities defeated the political claims of the Roman Catholic Church.

Hence, although for prudential reasons they may render it rhetorical support, persons shaped by nature or nurture to treat *raison d'état* as the highest value are not communicants of the human rights movement. Nor are libertarian conservatives (worshipping as they do at the altar of Social Darwinism) or those, whether on the left or on the right, who reject any categorical restraint on the means available to achieve their ends, including the end of a more perfect human freedom. Try as they will, then, and they do try, persons drawn to human rights as a collective enterprise cannot avoid being sectarian, although the sect is mercifully broad and unusually tolerant. And in the main they are also adherents of what in United States political discourse is called internationalism. As usefully defined by Thomas Hughes, president of the Carnegie Endowment, internationalism is a general foreign policy orientation characterized by a presumption in favour of international cooperation, consultation and conciliation; international law, institutions and treaties; international negotiation, norms and dispute settlement; economic interdependence, growth and freer trade; international development, aid and technical assistance; diligence in seeking arms control; and restraint in the use of force. Rightly or wrongly, most participants in the movement, including myself,

see an intimate relationship between internationalist policies and the promotion of human rights.

Foreign policy, democracy and human rights

The Cold War end game

Ronald Reagan campaigned for US President as the arch-enemy of internationalism and opened his administration with demonstrations of will to act the part. The man he selected as his first Secretary of State, Alexander Haig, seized the earliest possible moment to announce that human rights would be replaced as a United States foreign policy goal by the suppression of terrorism.[5] One might have put this down to the man's congenital peculiarities of speech, had he and like-minded members of the administration, such as Ambassador Jeane Kirkpatrick, not clarified their intentions by renewing amiable relations with those thuggish regimes of the right that Jimmy Carter had led out of the free world alliance.[6] One consequence of this policy reversal in the executive branch and the concurrent waffling of a divided Congress was an enhanced flow of private resources and public attention to human rights organizations as the only surviving source of human rights initiatives. It gave them, as well, a single powerful focus: exposing the delinquencies of administration clients and the administration's colluding acts of commission and omission.

But the phase of open hostility to human rights was soon gone,[7] along with General Haig, and in its place a rhetorical crusade for human rights accompanied the second phase of the administration. Under its benign rubric, however, the administration continued to ignore – when it did not frontally assault – the tenets of internationalism, above all the importance of multilateral institutions and the presumption in favour of preserving restraints on the use of force and encouraging the peaceful settlement of disputes, whether through negotiation or recourse to arbitration and judicial settlement. As far as specific human rights issues were concerned, the crusade did not prevent – indeed it was held to require – reincorporation of countries such as Guatemala and Chile into the free world alliance, tolerance of the mass butchery that constituted El Salvador's counter-insurgency policy in the early 1980s, and steady escalation of the Nicaraguan insurgency. "Liberal beliefs and practices lie at the core of the Reagan Administration's orientation toward politics", Ambassador Kirkpatrick intoned around the same time she was gratuitously associating herself and her country with Augusto Pinochet.[8]

Although the radical discrepancy (from the perspective of internationalists) between practice and rhetoric shrank during Ronald Reagan's

second term, the lesson administered during the Manichaean phase of his government survives among leaders of the human rights movement. Now they more fully appreciate the perverse turns a human rights crusade can take in a country where people with repressed authoritarian values and chauvinist passions, who elsewhere find a distinctive idiom for their expression, must swaddle them in the anodyne language of universal democratic liberalism.

From Cold War's end to 9/11

During the 12 years between the destruction of the Berlin Wall and the destruction of the World Trade Center on 11 September 2001, the foreign policy of the George H. W. Bush and Bill Clinton administrations lacked an overriding theme, possibly because it lacked an organizing Manichaean focal point. Themes were indeed debated by politicians and commentators, usually in dyadic terms: unilateralism vs. multilateralism, humanitarian intervention vs. national self-restraint, realism vs. idealism, coercive vs. persuasive diplomacy, and the West vs. the Rest. There were also values such as human rights and democracy airily invoked but ambiguously and controversially expressed in the quotidian details of policy.

September 11th and the subsequent war on terrorism provided a new, thoroughly Manichaean policy template with implications for domestic as well as foreign affairs. But within that template the existing dyads and values continued to colour debate. Should the United States organize coalitions of the willing or act through the United Nations? Should the United States ethically sanitize any government that aspired to join the war on its side or seek ideological coherence among its allies? Should it succour failed and failing states or simply quarantine them and deter export of their pathologies? And what restraints should human rights impose on the United States' means? In short, September 11th did not discharge the United States from facing old issues. The context had arguably changed; the traditional divisions within the community of foreign policy analysts and practitioners had not.

The post–Cold War debate over grand strategy

As soon as the Cold War became history, analysts, practitioners and politicians began debating four grand strategies for the United States.[9] One, often labelled "*neo-isolationism*", called for withdrawal from overseas military commitments and a corresponding reduction in defence expenditures. Its advocates were a curiously mixed crew. There were the libertarians, who championed a minimalist foreign policy that would in turn

help make minimalist government possible and who were confident that two oceans, nuclear deterrence, weak neighbours, non-existent competitors for global power and regional balances of power outside the Western Hemisphere made minimalism safe, indeed safer to the extent it discouraged US involvement in other people's quarrels.[10] Libertarians are not provincial in their sympathies; they believe that free markets and the US example make the world a better place.

Starting with similar security premises but rather more provincial values – basically the traditional conservative conviction that duties are owed only to members of one's own national tribe – the shrinking band of paleo-conservatives, led by the perpetual presidential candidate Patrick Buchanan, arrived at roughly the same general policy preference.[11] Despite its contrastingly cosmopolitan view of human obligation and sour view of American society, so did the old left (epitomized by Noam Chomsky),[12] driven by the conviction that the structure of social power ensures that the United States will generally act ungenerously. Thus, it joined some odd bedfellows in urging minimal engagement with the rest of the world, albeit for the sake of the world.

Selective engagement, the second grand strategy, also had its adherents. Although they too were generally sanguine about the United States' long-term security position, they regarded regional power-balancing as sufficiently problematic to require monitoring and occasional intervention, either to restore or to reinforce local power balances in regions or sub-regions of real importance to the United States. One advocate, the European commentator Josef Joffe, called explicitly for a foreign policy of "offshore balancing".[13]

Since the importance of different regions and sub-regions is likely to vary over time and since reasonable people can and will differ in their perceptions of the need for US intervention to prevent the emergence of regional hegemons, selective engagement invariably slides toward the two other competitors for doctrinal dominance, *unilateral and multilateral global engagement*. Adherents of these two strategies had much in common. They believed that developments worldwide can have a serious impact on the security and welfare of the American people and that a relatively benign global political, economic and military environment requires unremitting involvement. They differed, however, in at least two respects: in the way they prioritized threats and, more importantly, in basic ideas about remedies.

Global unilateralists, like selective engagers, emphasized classical political-military threats, precisely those that are most amenable to mitigation by military power, the resource that the United States possesses in singular abundance.[14] Global multilateralists, although they would not eliminate the hierarchy, would at least flatten it, thus reducing the steep

distinction between threats that often yield to coercive diplomacy and threats such as pandemics, global warming, destruction of the seas' living resources and the rain forests, and volatility in the global economy that are not amenable to military remediation.[15] Nor, of course, will they yield to any other form of unilateral action.

There is something less here than a simple policy polarity. Specifying a pure example of either the unilateralist or the multilateralist is not easy. There is a continuum of attitudes and a tendency for policy-makers to position themselves rhetorically near what they believe the US electorate will perceive as the centre. For example, it is virtually a cliché to describe the Bush administration as "unilateralist". Yet, when pressed on this point, senior officials reject the designation. They invoke their efforts to construct different coalitions for different tasks.[16] In the war in Iraq they have been at pains to publicize numbers of cooperating states (including those preferring to remain anonymous) many magnitudes larger than those directly engaged in the fighting.[17] So, they argue, they cannot be categorized as unilateralists; they simply are not in favour of multilateralism for the sake of multilateralism, as one senior official put it in a private meeting, or, in the words of another still-higher official, they are not "lowest-common-denominator" multilateralists.[18]

By comparison, the Clinton administration was widely seen as distinctly multilateralist. The President struggled to secure appropriations from Congress to pay UN arrears. He signed global environmental agreements and the treaty establishing an International Criminal Court (ICC). And, in the case of Somalia, he antagonized conservatives by placing US troops at least notionally under the direct authority of the UN Secretary-General.[19] Yet, following the lethal fire-fight in the streets of Mogadishu, Clinton authorized UN Ambassador Madeleine Albright to deliver a lecture at the National War College declaring a readiness to use force without reference to, or even in defiance of, the world organization's Charter. In an address that could as easily have been written by her Reaganite predecessor, Jeane Kirkpatrick, the future Secretary of State remarked that the United States would approach international conflicts on "a case by case basis, relying on diplomacy whenever possible, on force when absolutely necessary".[20]

Right-wing populism and US foreign policy

As competitive symbols, "multilateralism" and "unilateralism" connote more than disagreement about the instrumental value to the national interest of intergovernmental institutions and international law. They suggest the collision of identities and deep cultural attitudes about the use

of force, the extent of individual and collective moral responsibilities, the limits of tolerance and the hierarchy of virtue, and faith versus reason. They stand on opposite sides of the abyss that separates fundamentalist from cosmopolitan Protestantism.[21]

Populism in the United States is a movement that seeks to mobilize middle- and lower-middle-income people (in Europe the latter population segment would be divided into shopkeepers and the poorly paid among white-collar employees, on the one hand, and the fully employed working classes on the other).[22] Left-wing populism mobilizes largely on the basis of class resentment stemming from a material inequality. Right-wing populism emphasizes cultural or racial resentment. However, the two can merge where a minority enjoys disproportionate affluence or where a segment of the upper class can be identified with the rebellious struggles of a traditionally despised minority. As the experience of European fascism suggests, right-wing populism normally becomes powerful only when its entrepreneurs can form a strategic alliance with portions of the upper classes, a scenario familiar to every student of Adolf Hitler's rise to power.[23]

Americans do not, however, need to look abroad. A coalition of the black and white poor at the turn of the twentieth century would have overthrown the system of upper-class rule and working-class poverty. If, at that point, federal power had been deployed to enforce the black population's constitutional right to vote, such a coalition might have coalesced. Instead, political entrepreneurs in most states mobilized white voters in defence of racial hierarchy and the status quo.[24]

Obviously the uses and character of right-wing populism in the United States in the second half of the twentieth century were far more complex than they were in the South at the turn of that century. But it retains its inherent character in domestic politics as a political strategy to bond people of modest means with very rich people and corporate managers who, by virtue of possessing great economic power, have material interests that conflict with those of their lower-class partners. There needs to be a cultural bond, an "other" or "others" against whom to relate. In an earlier era, African-Americans and Jews were prominent among the perceived "others".[25] The former still play that role to varying degrees in some parts of the United States, although in others they have been largely, if not entirely, released from that role. Jews have been almost uniformly released from the realm of the "other" and admitted wholesale to the imagined community of true Americans. If "Jewish bankers" no longer serve as "the other" in the negative pantheon of populism, who has replaced them?

The new "other" has less well-defined features. It is all those who do not respect the national tradition of virile religiosity, who have pushed

prayer from the public schools and replaced it with sex education, who sully the immaculate view of US history, who take notice of slums in the City on the Hill, who would take from ordinary citizens their right to bear arms and to dispense Old Testament justice in the form of capital punishment, and who question the proposition that success is a function of virtue not of luck.

The "other" is liberal, urbane, financially comfortable, cosmopolitan, secular and unpatriotic in the sense of being unappreciative of the splendid singularity of America, uneasy with the rituals of patriotism, ready to expend national treasure to defend the supposed human rights of obscure peoples in remote places, and eager to subject national sovereignty to rules made by and institutions run by other peoples, including enemies of the US way of life.[26] Coincidentally, he or she worries about inequality in income and wealth and does not believe that markets are self-policing or can produce all necessary public goods.[27]

Like many caricatures, this clustering and generalizing of characteristics is not wholly unconnected to reality. People who worry about inequality and the environment, believe in the careful monitoring of private markets by public institutions, favour restricting matters of faith largely to the private sphere, and find much to condemn in US history tend also to be the people who favour multilateralism in the defence of national interests and human rights. And they are the people who tend to staff and support the principal human rights non-governmental organizations and to pressure the US government to use statecraft in defence of human rights around the globe.[28]

The majority is located at multiple points on a continuum between irreducible hostility to every restraint on US power and theological support for the United Nations as well as the International Bill of Rights (the Universal Declaration and the two Covenants). Otherwise, the US Democratic Party would not have won an election in the last 50 years, or it would be entirely indistinguishable in its platform from the Republicans. Since the 1970s, polling data have regularly provided evidence of a large majority sympathetic to US participation in the United Nations and at least a mild multilateralist orientation.[29] But public opinion is volatile. For months prior to the invasion of Iraq, a majority of Americans favoured war only with UN approval.[30] By the eve of the invasion, the majority endorsed invasion irrespective of a legitimizing resolution.[31]

In a political system with multiple points for the insertion of influence, in which money often trumps all and legislative power is widely dispersed, impassioned minorities can often defeat a diffuse majority's mild policy preferences. To understand how the character of domestic politics can influence the outcome of policy conflicts within the foreign policy elite over multilateral versus unilateral engagement, one therefore needs to recognize the political importance of the minority that understands

itself as the conservator of traditional values and the opposite of the cosmopolitan "other". It is naturally sympathetic to foreign policy arguments couched in Manichaean terms, it is dismissive of the views of other countries and it favours the use of coercive diplomacy.[32] It is, however, important to recall that people forming the contemporary right wing have not traditionally favoured overseas adventures. Like the majority of Americans in the 1930s, they could not be aroused to support preventive action against Hitler or the Japanese until the attack on Pearl Harbor and Germany's ensuing declaration of war.[33] Certainly in the past their instincts and general convictions would seem to have placed them in the paleo-conservatives' more than the global engagers' camp.

There is a second caveat when trying to assess the domestic political arena in which advocates of multilateral policies compete with unilateralists. Some of the convictions that resonate powerfully with the populist right also engage more cosmopolitan types. The "City on the Hill" is an image that precedes by two centuries the country's founding and has never been restricted to provincial constituencies.[34] Many Americans far removed from the "Moral Majority" bloc also are receptive to the view that there are evil people who understand only the language of force and who mean to do Americans harm for crimes of which Americans are innocent or for acts that in Americans' judgement are not crimes at all.

Certain enduring features of US history and society help to illuminate the struggle between elites over how the United States should engage globally. One is religiosity. Periodic surveys of the intensity of religious sentiment in the main industrial democracies reveal a continuum: the United States is almost alone at one end and Japan is at the other; European states are much closer to Japan.[35] Intense monotheistic religious beliefs predispose adherents to see the world in stark Manichaean terms. The Calvinist version of Christianity, the United States' dominant monotheism, which deeply insinuated itself into US culture at the very outset of its national adventure, predisposes adherents to see success, national as well as personal, as a sign of divine will.[36]

A second key background feature is the failure of the working and intellectual classes to bond ideologically.[37] Christian democracy, with its natural cosmopolitanism and communitarianism, as well as its emphasis on the responsibility of the successful for the poor of the community, also failed to take root in the United States. The language of reform has been liberalism, with its emphasis on restraining power for the benefit of the striving meritorious individual.

A third background feature is the ideological supremacy of laissez-faire capitalism. The mental soil of the United States is far more receptive than European culture to a politics of either isolation or episodic self-assertion in foreign policy, and of acquisitive individualism in the domestic realm, than it is to a cosmopolitan foreign policy and a domestic policy

that champions greater equality of results or special benefits for historically disadvantaged groups.[38] In politics, therefore, liberal cosmopolitans swim a bit against the tide, and their projects are in general limited by a need to use the dominant discourse to overcome cultural resistance.

This account of the cultural and ideological background of contemporary US politics simplifies a more complex or ambiguous reality, certainly in comparison with Europe before the Second World War. Pre-war European conservatism, at least on the continent, was hierarchical in its view of the good society, qualified in its commitment to majority rule, and racially and ethnically intolerant.[39] It valued faith and tradition over utilitarian reason and extolled the interests of the state in foreign policy, regarding war, therefore, as an inevitable instrument of statecraft and imperialism as the natural condition of the world.[40] Whatever their differences, reformist liberals and social democrats were largely united in rejecting everything that conservatives affirmed. In the wake of the Second World War, the right cut loose from its ideological moorings and moved toward the centre, where it now encounters a left with whom it largely shares a rational, secular, cosmopolitan and moderately communitarian outlook.[41]

Since the defeat of the South in the American Civil War, the division between left and right has never had the same clarity in the United States that marked pre-war Europe. Liberal individualism has been the principal normative idiom of the political leaders of both major parties.[42] Each has evoked utilitarian instrumentalism to defend its favoured domestic policies and has defended foreign policy with a mix of idealism and national self-interest. To be sure, the wealthy did in general virulently resist the effort to soften the rough edges of corporate capitalism and provide a modest amount of income security for the white working class.[43] But when, after 20 years of Democratic rule, the Republicans again captured the White House in 1952, the party made its peace with the regulatory and social security structures erected during the era of reform.

The rise of neo-conservatism

The wider electorate sets limits to, and is arguably the ultimate arbiter of, disputes between insiders over foreign policy issues, but it does not define them. In all countries that is the work of a relative few. And although – at least in a democratic country – those few have a more or less vital connection to the wider society, elites have their own histories.

In the face of the near-insurrectionist style of some student protests and the rise and spread of social protest and violence during the 1960s and early 1970s, the bulk of the intellectual class remained liberal-to-

social democratic in its politics. But, under the flag of "neo-conservatism", a minority seceded.[44] They were alienated by what struck them as an acute threat to traditional liberal politics – incrementalism, compromise and technocratic reform. A credible if wildly exaggerated assault on liberal values as traditionally construed was not, however, the only factor encouraging ideological secession from the main body of the intellectual class. Within that class there were fault-lines dating from the early Cold War. For most of the century, intellectuals had had a distinctly leftist tilt in comparison with the rest of US society.[45] By the 1960s, however, the affluence and individual freedom manifest in the developed capitalist states in contrast to the disjunction between Marxist visions and reality in the Soviet Union had persuaded many intellectuals that the Soviet dystopia stemmed not from the peculiarities of Russian history or the accident of bad leaders but rather from the very nature of the socio-political model implicit in Marxism and actualized in the Leninism practised by states.[46]

What followed among that cluster of leftists moving right was a corresponding embrace of capitalist development and generalized hostility not only to Marxist regimes but to movements that self-identified as Marxist in their inspiration, or advocated a state-dominated economy, or received assistance from Marxist regimes. They became, in short, enemies of revolutionary movements in principle, as most famously articulated by Jeane Kirkpatrick.[47] Revolutionary regimes were totalitarian by their nature and thus could not evolve in a democratic direction, whereas authoritarian governments of the right did have a democratic potential. By contrast, the bulk of liberal-to-leftist intellectuals felt that, in developing countries with extreme and embedded inequalities sustained by remorseless repression, virtually any movement that challenged the status quo was worthy of conditional encouragement. Moreover, the popular mobilization encouraged by revolutionary movements and, following their victory, a radical change in property relationships carried out by a strong state were necessary preconditions for the evolution of freer and fairer societies.

Ethnic identities and interests also played a role in the emergence of neo-conservatism, helping to crystallize divisions over foreign and domestic policy. Americans of Jewish extraction had played (as they continue to play) a prominent role in every dimension of the country's intellectual and artistic life and also in the struggle for civil rights and civil liberties. In domestic conflicts, Jews and African-Americans were the main elements of the coalition battling to complete the emancipation, announced almost a century earlier, and provided many of its leaders.[48] Civil rights legislation had demolished the formal and also the most palpable de facto barriers to upward social movement. The victory of the civil rights coalition opened doors through which the talented and well-prepared could

pass. The high percentage of the Jewish minority that was university educated or already in the middle-to-upper classes surged through. African-American university graduates also benefited, but a large number could not get through the newly opened doors or could do so only with some form of assistance.[49] For many, poverty replaced race as the principal barrier to social mobility.

One result for relations between Jews and African-Americans was erosion of the common interests that, along with liberal values, had bonded their coalition. Many African-American leaders, accurately invoking a historical experience comparable in its trauma only to that of Native Americans, began calling for affirmative action by the state and by large private entities such as corporations and universities to shrink the existing barriers and to compensate for the traumatic legacy.[50] Affirmative action could take quite a variety of forms but, to the extent it was construed to mean race-based preferential access to jobs and opportunities such as seats in selective universities or positions in public service and the professions, it bruised the interests of those ethnic groups, such as Jews, who had broken discriminatory barriers in part by excelling in the tests of merit devised by the old White Anglo-Saxon Protestant (WASP) majority. Despite this emerging conflict, many Jewish intellectuals supported affirmative action. But, for some among them, it contributed to the confluence of events and issues pushing them to the right.[51]

Perhaps hastening that move was a coincident movement within a part of the African-American community of what is sometimes called "nationalism", a perceived need to assert a distinctive identity and to build ethnically homogeneous social and political action organizations. At one point, a small minority within one of the established civil rights organizations – the Student Non-violence Coordination Committee (SNCC) – even considered the exclusion of whites, which to a considerable extent meant excluding Jews.[52] For some Jews who had seen themselves as champions of black interests, the increased edginess in relations between the two groups and more generally between black and white liberals was disillusioning.[53]

Two other developments encouraged the rightward drift of a portion of the Jewish intelligentsia. One was increasing friction between the communities at their socio-economic bases.[54] The second was a growing identification of the African-American intelligentsia with the views and interests of the developing world, particularly with respect to the issue of "national liberation" for the peoples who had been colonized.[55] By the 1970s, most colonial territories had become sovereign states and UN members. The refusal by the United States and a number of its European allies to reduce their economic relations with South Africa, and a US style of diplomacy that seemed dismissive of the developing world generally,[56] led to polarization at the world organization.

One notorious outcome was the 1975 General Assembly Resolution 3379 equating Zionism with racism. US Permanent Representative Patrick Moynihan voiced the outrage of the US Jewish community (and, to be sure, many others)[57] and committed himself to confronting the developing world on this and every other issue construed as inimical to US interests and values, a position that added to the polarization at the United Nations and would later help catapult him into the Senate.[58]

Hostility by the developing world majority in the General Assembly to Israeli policy, or, as many saw it, to Israel itself and to US interests and values more generally, induced a reciprocal hostility toward the United Nations that spread beyond the confines of the far right. It became one of the distinguishing features of neo-conservatives and further distanced them from African-American leaders.[59] The African-American leaders did not endorse the Zionism-as-racism position, but at least some could not help feel a certain sense of identity with Palestinians living without political rights and even without well-protected civil rights in the territories occupied by Israel in 1967.[60] They naturally sympathized with anyone who sought to overturn white racist rule in South Africa and they felt some affinity with those demanding a fairer economic deal for poor countries and some form of redress for past exploitation.[61] A General Assembly in which African states formed the largest bloc meant that the African-American intelligentsia could not in general share the hostility towards the United Nations present among their conservative Jewish counterparts, particularly among those moving right for other reasons as well.

Traditional conservative realists and neo-conservatives: Conflict and reconciliation

Henry Kissinger and James Baker – foreign policy stalwarts in the administrations of Richard Nixon, Gerald Ford, Ronald Reagan and George H. W. Bush – epitomize the realist conservative. For them, the purpose of statecraft is to advance US power and protect material interests in a dangerously competitive and structurally anarchic world; the promotion of democracy and the defence of human rights is incidental.[62] One result of this worldview is a readiness to strike deals with regimes seemingly of any ideological stripe or level of brutality in the treatment of their own people so long as those deals appear to advance national interests. Another is a certain measure of restraint in the exercise of power because the United States should not slay dragons that have no capacity or incentive to threaten either the country or its allies.[63]

Jeane Kirkpatrick, Ronald Reagan's first ambassador to the United Nations, and Elliott Abrams, who became Assistant Secretary of State for

Human Rights and Humanitarian Affairs early in the Reagan administration, epitomize the foreign policy views of neo-conservatives. For them, the *Realpolitik* statecraft of Kissinger and Baker is too limited in its goals and too restrained in its means. The United States, for them, is not simply a great power but also a cluster of ideals. And by a marvellous, even divine, coincidence, pursuit of those ideals can only enhance the country's power, wealth and security. In praising Reagan as the defender of liberal values, Kirkpatrick enunciated the core vision of the neo-conservative.[64]

"Liberal" was not, however, a description that Reagan's first Secretary of State, General Alexander Haig, would have welcomed. As I noted earlier, to underscore differences from the defeated Democratic administration of Jimmy Carter and to signal support for right-wing regimes in Latin America, Haig announced that human rights were off the agenda.[65] Suiting deed to word, he purged the diplomatic corps of those ambassadors most closely identified with Carter's human rights policies.

This remained the declared position of the administration until, still early in his first term, President Reagan accepted Secretary of State Haig's resignation. Shortly thereafter, Elliott Abrams became Assistant Secretary. His accession roughly coincided with a sea change in administration rhetoric. Until Haig left, there was dissonance between the Reaganite characterization of the relationship with the Soviet Union – a struggle between the free world and the "evil empire" – and hostility to Carter's human rights legacy. After Haig, the rhetoric segued into harmony by equating the defence of human rights with the promotion of democracy defined narrowly in terms of elections that were not grossly fraudulent.[66] This was a conspicuous departure from Carter administration policy, which had been deeply concerned with torture and summary execution in the developing world, even when perpetrated by such dependable US clients as right-wing military governments in Latin America.[67]

The post-Haig State Department responded by minimizing, denying or rationalizing delinquencies and urging elections while opposing negotiated power-sharing arrangements in cases where massive human rights violations were entangled with civil wars between military governments and left-wing guerrillas.[68] Thus, policy incorporated the view announced by Kirkpatrick before the administration assumed office, namely a categorical hostility to regimes and movements of the left.

After Haig's departure, latent tensions between realists and neo-conservatives rarely surfaced conspicuously. Whatever the differences in motives – between the conservative aim of maintaining unchallenged US hegemony in the Western Hemisphere or the additional neo-conservative one of maintaining ideological purity by pulverizing left-wing authoritarian regimes – both supported ruthless right-wing regimes in El Salvador

and Guatemala and efforts to overthrow a leftist one in Nicaragua. Conflicts over relations with Moscow lost their edge once Mikhail Gorbachev assumed office and initiated multifaceted policies that would, with astonishing speed, liquidate Moscow's empire and then the Soviet Union itself. But once George H. W. Bush took office and put James Baker in charge of foreign policy, discord re-emerged, particularly over the failure to use the occasion of the first Gulf War to eliminate Saddam Hussein and to engineer a viable settlement of the Arab–Israeli dispute.[69] Modest pressure on Israel for concessions to Palestinian nationalism, including for the first time in years a hint of material sanctions, evoked a furious assault from neo-conservatives, even to the point of implying that Baker was a hidden anti-Semite.[70]

Beyond factional conflict over particular issues lay the broader difference of worldviews. In a seminal statement of neo-conservative goals for the post–Cold War era, Charles Krauthammer caught the policy community's eye with an article calling for full exploitation of the "unipolar moment".[71] Specifically, the United States was to employ its unrivalled power to shape a world reflective of American values, elected governments and free markets. Neither the cautious democracy-promoting efforts of realists nor their strategy of positive engagement with the nominally communist regime in China came close to satisfying this vision. And so the neo-conservatives noisily nursed their dissatisfactions, seemingly as disappointed as right-wing Christian groups with an administration so plainly indifferent to the excited ambitions and cultural sensibilities of both factions.[72]

Whatever their sour disappointment with the first President Bush, it was as nothing to the fury and contempt evoked by William Jefferson Clinton, the incarnation of the detested countercultural lifestyle, and his First Lady, a feminist icon. Hardly friends of Clinton's easy virtue and broad tolerance, the neo-conservatives were even more enraged by the dissipation of US opportunity and power. Realist conservatives could make common cause with neo-conservatives and the religious right, their sometime allies in the broad conservative coalition, because they disliked Clinton's stance on humanitarian intervention and state-building.

To the limited extent that the 2000 US presidential campaign debates engaged foreign policy, George W. Bush sounded the themes of the realists. On his watch, US troops would be used as soldiers, not as humanitarian hand-holders.[73] He would not waste the United States' human and material resources on errant adventures in nation-building or to rescue feckless peoples. Asked what he would have done had he been faced with the Rwandan genocide, he replied that he would not have sent US troops.[74] Presumably to propitiate the Jesse Helms wing of his own party, he also criticized placing American forces under UN command, as had

happened briefly in Somalia, a position Clinton himself seemed to have adopted after October 1993.[75] Beyond that, Bush actually mirrored Clinton by deploring his father's accommodationist behaviour toward China and intimated that he would shift to a much cooler tone.[76] In brief, nothing in the rhetoric of George W. Bush's campaign or in his selection of two apparently realist conservatives, Colin Powell and Condoleezza Rice, to be his top foreign policy advisers portended a major change in foreign policy. Still, given the number of neo-conservatives who were slated for important posts, the role of the Christian right (now in close alliance with the neo-conservatives), the volatility of the Middle East and the existence of al-Qaeda, with its expressed determination to drive the United States out of the Middle East, it would not have taken clairvoyance to imagine circumstances that would open the door for a quite dramatic policy departure.

From the inauguration in January 2001 until 11 September 2001, the Bush administration complied roughly with the expectations that the President had cultivated while he was a candidate. Even his curt dismissals of US participation in international treaty regimes such as the Kyoto Protocol, the ICC and the supplemental enforcement protocol to the Biological Weapons Convention were hardly at odds with his general approach to national security policy. Then the attacks on the World Trade Center and the Pentagon opened a world of risk previously envisioned only by some of the national security cognoscenti. Neo-conservatives alone had a grand strategy of response, one that in its very ambition and vision corresponded to the shock and fury of the US public and to its congenital sense that wars should end in glorious, transformative victory.

The neo-conservative project

Hegemony, as neo-conservatives argued in the 1990s, is not the mere possession of dominating power, but also the will to use it on behalf of a coherent project. In the Clinton years, hegemony was only latent. The catastrophe of September 2001 created the circumstances in which it could be made real.

Although there is not a single comprehensive statement of the neo-conservative project and its premises, out of the particular policies advocated by its high priests and house organs, as well as the thicket of argument surrounding them, project and premises do materialize.[77] Having won the Third World War, conventionally called the "Cold War" although it had many hot incidents, the United States is now by dint of circumstance launched into a fourth. Like the second and third World

Wars, it stems from a conflict of values, not of mere interests. It is a war between believers in free peoples and markets, on the one hand, and infidels, on the other; it is a war between democratic capitalism and its enemies. Democratic capitalism is expanding, not at the end of a bayonet but in response to the desire of people everywhere to receive it or at least its blessings. It expands, in other words, by pull and not push. And that expansion is coterminous with the expansion of individual freedom.

The expansion coincidentally threatens – where it does not immediately demolish – the practices, beliefs and institutions that thrive only where freedom is alien and can be made to remain so. As the financial and cultural base of the expansion (sometimes labelled "globalization"), the United States is the inevitable target for all those who, being threatened, resist. And since globalization is not a public policy but the summation of millions of private initiatives, the US government could not erase the bull's eye from the nation's flank by any policy other than attempting to remake the country in the image of its enemies, a closed society. For political reasons, the government cannot do that; for moral ones, it should not try even if the political obstacles were to diminish.

So war is America's fate. It is a war on behalf of democracy and human rights. Democracy serves the national no less than the human interest because democratic countries do not fight each other and they fit comfortably into the open world trading system – the win–win game that has so brilliantly served American national interests and those of ordinary people all over the world. A key, if not always clearly declared, premise of neo-conservative grand strategy is that, given the opportunity, ordinary people will prove to be *homo economicus*, rational maximizers of their material well-being. To serve its interests and theirs, the United States should provide the opportunity, as it provides the quintessential model: strict limits on state power; the rule of law, including transparency of the public realm; an independent judiciary; extensive rights to private property associated with constitutional limits on the confiscatory power of the state; and free elections to sustain the rest.

The individual, being protected from the depredations of the state, is thereby liberated to pursue material well-being. The ethic of consumption will trump all other ends. An electorate of economic strivers will disown projects that conscript their wealth; they will find dignity and meaning in the struggle to produce and sufficient pleasure in the satisfaction of their appetites. That is why liberal democracies do not war with each other. To be sure, fanatics immune to the ethic of material consumption will not altogether disappear. But they will no longer be able to multiply themselves so easily. And liberal democratic governments, driven by the coercive power of elections to mirror the interests of their electors, will cooperate with the United States to extirpate fanatics.

Francis Fukuyama, who declares himself a former neo-conservative, continues to insist that the commitments to the promotion of human rights and of democracy are two of the principal elements of neo-conservative thought and are allied to the belief that "American power can [and should] be used for moral purposes".[78] As I suggested above, a third feature of the neo-conservative canon is a conviction that international law and international institutions inhibit unacceptably the exercise of that power to advance the national and the human interest. Originally there was a fourth element, namely a view that ambitious social engineering (for example, forced bussing to integrate schools and long-term support for the non-working poor) dangerously inflates the size of the state, often disrupts pre-existing social relations, with attendant individual and community costs, and in all cases has unintended consequences that generally defeat the goals of the engineers. This element, however, got lost in the heady days following the dissolution of the Soviet empire and then of the Soviet state. In Fukuyama's words: "By the time of the Iraq war, the belief in the transformational uses of power had prevailed over the doubts about social engineering."[79]

Liberals, neo-conservatives and human rights: Why not an alliance?

Historically, American liberals have been relatively optimistic about social engineering. By definition they are promoters of democracy and human rights. And although some have inclined toward a view of force as the absolute last resort, many have advocated armed intervention at least in cases of sustained violation of fundamental human rights and, in the case of Haiti, have supported armed intervention on behalf of democracy. So why the raw hostility to the neo-conservative movement among political liberals and most of the leading figures and institutions in the international human rights world?

Is the scepticism a merely visceral response to the conservative messenger? Or are there reasoned grounds, rooted in liberal values and the deep essence of human rights, for rejecting this message? Actually, taking the messenger's identity into account is entirely reasonable, part of the seasoned wisdom of everyday life. We do not entrust things that we value except to persons who have created grounds for trust. And there are essentially two reasons why we trust people. One is that they have a record of fulfilling their commitments, and the other is that we have common values. The latter is particularly important when the mission we are called upon to entrust to the messenger has as its very purpose the advancement of our values.

If our end is the broader realization of human rights and the proliferation of liberal democracies, there are substantial reasons for root-and-branch distrust both of the neo-con militants who helped to shape and provided much of the intellectual gloss on post-9/11 Bush administration foreign policy until the disasters of 2006, and of the President, who after 9/11 made their rhetoric his own. As noted above, when George W. Bush sought the presidency, he disowned use of the coercive power of the United States where the only potential gain in a given case would be protection of human rights. This was also the position of his National Security Advisor.[80] But the case for scepticism does not rely simply on the place of human rights in the President's declared hierarchy of concerns. In addition, his Secretary of Defense had served as a special envoy to Saddam Hussein during the Reagan administration, when it was assisting the dictator whose aggression against Iran had backfired to the point where, without extensive external support, he faced utter defeat.[81] It was during this period that Saddam Hussein employed chemical weapons against both the Iranians and the Kurdish population of Iraq without in any way compromising Washington's support for his regime.

Many senior members of George W. Bush's administration served in the earlier Bush administration when it stood idly by as Yugoslavia disintegrated and Serbia initiated mayhem in Croatia and Bosnia. To be fair, they do not have more to answer for morally than the Clinton administration, which also wrung its hands as Slobodan Milosevic and his colleagues murdered their way around the Balkans and as Rwanda's slow-motion genocide took place.[82] But Clinton never promised a no-holds-barred crusade for liberal democracy and did not ask the country to entrust him with wartime power to spread the American Way.[83]

One could, moreover, argue that, if we are going to ground scepticism on past words and performance, we need to disaggregate realist conservatives such as Rumsfeld and Rice from neo-conservatives such as former Deputy Secretary of Defense Paul Wolfowitz or the National Security Council's Elliott Abrams, or pundits such as Charles Krauthammer.[84] Even if it is hard to credit the traditionalists with an epiphany in September 2001, have the neo-conservatives not been at least rhetorically consistent? Indeed, is not a declared commitment to Wilsonianism with fixed bayonets a defining feature of neo-conservatism?[85] Thus, the problem seems less one of the messenger's sincerity than of the humanitarian implications of the message itself.

A crusade for democracy, even full-blown liberal democracy, overlaps but is not synonymous with a crusade for human rights. Moral criteria for evaluating the exercise of power stretch into the remote past.[86] So does the idea of possessing rights in relationship to power-holders. But the idea of rights held in common not just by all members of the same

class, profession, guild, race, religion or nation but by every human being simply by virtue of being human – now that is a modern idea. And just as it is not synonymous with liberal democracy, it is not synonymous with general human welfare.

A common conception of human rights is that they are categorical claims on human beings and institutions, primarily on governments to act or refrain from acting in ways injurious to the exercise or experience of the right.[87] At least the so-called first generation of civil and political rights that have evoked the widest consensus on their imperative quality are focused on the individual, not the wider community. More than that, they are claims that the community cannot trump or be subordinate to some presumed general good that, while causing injury to a few, enhances the welfare of the many.

It is conceivable that a good-faith effort to implant liberal democracy throughout the Middle East and in other areas where it is largely absent, an effort carried out in part by war, armed subversion, assassination and other instruments of coercive statecraft, might in the long course of history enhance human well-being beyond anything that could be achieved through such non-violent means as education, economic incentives, financial and technical assistance to democratic movements, and improving the welfare consequences of democracy so as to increase its attractions. But, even if we could be certain that human welfare would in the long term be better served by violent statecraft, if one were committed to the view that human rights are trumps, then one might still oppose a crusade for democracy. The taking of innocent lives is among the probable features of a violent crusade for whatever end. One particularly awful instance occurred during the invasion of Iraq, when a missile flying off course struck an apartment complex, wiping out a child's immediate family and ripping off his arms.[88] Because civilians were not targeted – on the contrary, it appears that the US military made an unusual effort to minimize civilian casualties[89] – this child's horror was entirely within the boundaries of the humanitarian laws of war.[90] Nevertheless, pain and death inflicted predictably – albeit unintentionally – on the innocent go against the grain of human rights in any war of choice rather than self-defence. And that would be the case whether the choice is made for the purpose of preserving US freedom of action or extending the incidence of democracy.

The one certain thing about armed intervention is the death and mutilation of the innocent.[91] Because the core human rights are imperative claims by individuals not open to trumping by some supposed long-term general good, a crusade to defend them has built-in restraints that a crusade for the general expansion of democracy does not. In the former case, we are constrained at least to balance the lives we hope to save against those we will take in order to save them. But if democracy alone

is the end, then, as long as we are confident that some will survive to hold free and fair elections, what matters more than civilian deaths other than the lives of our own troops? This may seem like an unfair *reductio ad absurdum*, carrying the logic of the neo-conservatives' position beyond the point that most of them would probably go. Yet, in fact, it is grounded in experience such as Central America in the 1980s.[92] There, in the name of democracy, neo-conservatives championed war rather than fostering compromise and leveraging the social change that might have given substance to democratic forms. They did so in alliance with Jacksonian chauvinists exemplified by Senator Jesse Helms and traditional conservative policy realists epitomized by Henry Kissinger. What helped unite them then, and appears to unite them now, is indifference to what liberal humanitarians deem essential: due regard for the opinion of the United States' old democratic allies and due concern for the lives of the peoples the United States proposes to democratize.

Notes

1. Joseph A. Schumpeter, *Capitalism, Socialism, and Democracy*, 2nd edn (New York: Harper, 1947).
2. Ibid., p. 269.
3. Democratic polities differ significantly in their view of the proper reach of government action, including regulation and intervention, in nominally voluntary transactions. The social-capitalist ideology of a democratic state such as Germany legitimates considerably more public action on behalf of community interests than the laissez-faire capitalist ideology of the United States. On Germany, see, e.g., Donald P. Kommers, "German Constitutionalism: A Prolegomenon", *Emory Law Journal* 40 (1991), p. 837.
4. The exceptions to this rule in normal periods are people rich enough to insulate their lifestyle from the consequences of private decision-making in the economic sphere, and the very poor who depend for their survival on public transfers of goods and services. Perhaps we should add those professional criminals who organize their lives around coerced transfers.
5. See Tamar Jacoby, "Reagan's Turnaround on Human Rights", *Foreign Affairs* 64 (Summer 1986), p. 1069.
6. See Jeane Kirkpatrick, *Dictatorships and Double Standards: Rationalism and Reason in Politics* (New York: Simon & Schuster, 1982), pp. 35–43.
7. Jacoby's article ("Reagan's Turnaround") is a brief but lucid account of the administration's policy reversal – its roots and its consequences.
8. *The Reagan Phenomenon and Other Speeches on Foreign Policy* (Washington DC: American Enterprise Institute, 1983), p. 7.
9. Barry R. Posen and Andrew L. Ross, "Competing Visions for U.S. Grand Strategy", *International Security* 21:3 (1996/1997), pp. 5–53. For a slightly idiosyncratic, sevenfold categorization, see Robert J. Art, "Geopolitics Updated: The Strategy of Selective Engagement", *International Security* 23:3 (1998/1999), pp. 79–113.
10. See, for example, Earl C. Ravenel, "The Case for Adjustment", *Foreign Policy* 81 (Winter 1990/1991), pp. 3–20.

11. See, for example, Andrew J. Bacevich, "Bush's Grand Strategy", *The American Conservative*, 4 November 2002, available at <http://www.amconmag.com/article/2002/nov/04/00012/> (accessed 18 August 2009); and Pat Buchanan, "The Unintended Consequences of War", *The American Conservative*, 24 February 2003, available at <http://www.amconmag.com/issue/2003/feb/24/> (accessed 18 August 2009).
12. See Noam Chomsky, *Rogue States: The Rule of Force in World Affairs* (Cambridge, MA: Southend Press, 2002). For his views on the recent war with Iraq, see "Drain the Swamp . . . No More Mosquitoes", *Toronto Star*, 20 October 2002, p. B1.
13. Josef Joffe, "How America Does It", *Foreign Affairs* 76 (September/October 1997), pp. 13–27. See also Art, "Geopolitics Updated".
14. See Charles Krauthammer, "The Unipolar Moment Reconsidered", *The National Interest* 70 (Winter 2002/03), pp. 5–27; Robert Kagan, "The Benevolent Empire", *Foreign Policy* 111 (Summer 1998), pp. 24–35, and "Power and Weakness", *Policy Review* 113 (June/July 2002), pp. 3–28; and John Bolton, "Should We Take Global Governance Seriously?", paper presented at the conference "Trends in Global Governance: Do They Threaten American Sovereignty?" at the American Enterprise Institute, Washington, DC, 4–5 April 2000.
15. See, for example, Jessica Matthews, "Power Shift", *Foreign Affairs* 76 (January/February 1997), pp. 50–66.
16. See, for example, Donald Rumsfeld, "A New Kind of War", *New York Times*, 27 September 2001, available at <http://www.defenselink.mil/speeches/speech.aspx?speechid=440> (accessed 18 August 2009).
17. Remarks by President George W. Bush at the Cincinnati Museum Center, 7 October 2002, available at <http://georgewbush-whitehouse.archives.gov/news/releases/2002/10/20021007-8.html> (accessed 18 August 2009). See also Paul W. Schroeder, "Iraq: The Case Against Preemptive War", *The American Conservative*, 2 October 2002.
18. I was present at both meetings. Others associated with the Bush administration have made similar declarations. For example, Richard Haass, formerly head of the State Department's Policy Planning Staff, has defined the administration's policy of selective engagement as "à la carte multilateralism". See Irwin M. Stelzer, "Is Europe a Threat", *Commentary* 112 (October 2001), pp. 34–42.
19. Senator Trent Lott wrote at the time that "placing US military forces under UN command and in harm's way to create government where none exists, is poorly conceived and ill-defined". Trent Lott, "UN Must Not Direct US Troops", *Christian Science Monitor*, 16 November 1993, p. 20.
20. Thomas W. Lippman, "Clinton Struggles to Define World Vision", *Chicago Sun Times*, 30 September 1993, p. 30.
21. See William Martin, *With God on Our Side: The Rise of the Religious Right in America* (New York: Broadway Books, 1996).
22. Michael Kazin, *The Populist Persuasion: An American History* (Ithaca, NY: Cornell University Press, 1998).
23. See James Cross Giblin, *The Life and Death of Adolf Hitler* (New York: Clarion Books, 2002); Ian Kershaw, *Hitler, 1889–1936: Hubris* (New York: Norton & Company, 1999).
24. See C. Vann Woodward, *The Strange Career of Jim Crow* (Oxford: Oxford University Press, 2001), chapter 3.
25. Kazin, *The Populist Persuasion*.
26. Pat Buchanan, *Right from the Beginning* (Washington DC: Regnery Publishing, 1990). See also Tom Wolfe's *Radical Chic & Mau-Mauing the Flak Catchers* (New York: Farrar, Straus & Giroux, 1970).
27. See, for example, Thomas Frank, "The Rise of Market Populism", *The Nation* 271 (30 October 2000), pp. 13–17; William Greider, "Global Agenda", *The Nation* 270 (31 January 2000), pp. 11–15.

28. See Aryeh Neier, *Taking Liberties: Four Decades in the Struggle for Rights* (New York: Public Affairs, 2003).
29. The Chicago Council on Foreign Relations has regularly conducted polling on "American Public Opinion and U.S. Foreign Policy" since the late 1970s. See Chicago Council on Foreign Relations and German Marshall Fund of the United States, "American Public Opinion and U.S. Foreign Policy, 2002" [Computer file], ICPSR03673-v1 (Ann Arbor, MI: Inter-university Consortium for Political and Social Research [distributor], 2004), available at <http://www.icpsr.umich.edu/cocoon/ICPSR/STUDY/03673.xml> (accessed 18 August 2009).
30. Martin Merzer, "Poll: Majority of Americans Oppose Unilateral Action against Iraq", *Knight Ridder Newspapers*, 1 January 2003.
31. Adam Nagourney and Janet Elder, "More Americans Now Faulting U.N. on Iraq, Poll Finds", *New York Times*, 11 March 2003, p. A1.
32. Former Senator Jesse Helms exemplified these views. For the text of his speech before the UN Security Council on 20 January 2000, see *Newswatch Magazine*, 1 June 2000, "A U.S. Senator Rebukes the U.N. – Why?", available at <http://www.newswatchmagazine.org/jun00/helms.htm> (accessed 18 August 2009).
33. See, generally, Arthur Schlesinger, *The New Deal in Action* (New York: Macmillan, 1940), pp. 60–68.
34. This view was sown by the writings and teachings of seventeenth-century Puritan New Englanders. See Perry Miller, ed., *The American Puritans: Their Prose and Poetry* (Garden City, NY: Doubleday Anchor, 1956).
35. The International Social Survey Program conducted cross-national surveys of religious belief in 1991 and 1993. See "The ISSP Cross-National Religion Survey", *The Public Perspective* 5 (March/April 1994), pp. 21–25.
36. Miller, *The American Puritans*.
37. Werner Sombart, *Why Is There No Socialism in the U.S.?* (Armonk, NY: M. E. Sharpe, 1978). See also Michael Harrington, *Socialism, Past and Future* (New York: Mentor Books, 1992).
38. See Samuel Huntington, "American Ideals versus American Institutions", *Political Science Quarterly* 97:1 (1982), pp. 1–2.
39. Kevin Passmore provides a good overview of pre-war European conservatism and its relationship with various forms of fascism. *Fascism: A Very Short Introduction* (New York: Oxford University Press, 2002), pp. 72–86.
40. In the words of Heinrich von Treitschke, "[w]ar and conquest . . . are the most important factors in State construction". *Politics*, vol. 1, trans. Arthur James Balfour (London: Constable, 1916), p. 108. See also pp. 597–600 of vol. 2.
41. For a description of the evolution of the contemporary left, see Anthony Giddens, *The Third Wave and Its Critics* (Cambridge: Polity Press, 2000).
42. See Louis Hartz, *The Liberal Tradition in America*, 2nd edn (New York: Harvest Books, 1991).
43. See Schlesinger, *The New Deal in Action*, p. 35; and Schlesinger, *The Coming of the New Deal: 1933–1935, The Age of Roosevelt*, vol. 2 (Boston: Houghton Mifflin, 1958), pp. 274–275.
44. Norman Podhoretz is perhaps the best example. See *Making It* (New York: Random House, 1967) and *Breaking Ranks: A Political Memoir* (New York: Harper & Row, 1979). Rosenberg and Howe contended that Podhoretz's editorship of *Commentary*, however, was not part and parcel of the development of a new conservative ideology because it was "against recent versions of what Podhoretz takes to be vulgarizations of liberalism". See Bernard Rosenberg and Irving Howe, "Are American Jews Turning Toward the Right?", in Lewis A. Coser and Irving Howe, eds, *The New Conservatives: A Critique from the Left* (New York: Meridian, 1976).

45. Sidney Hook and Irving Howe are prime examples. On Hook, see Christopher Phelps, *Young Sidney Hook: Marxist and Pragmatist* (Ithaca, NY: Cornell University Press, 1997). On Howe, see Edward Alexander, *Irving Howe: Socialist, Critic, Jew* (Bloomington: Indiana University Press, 1998); and Gerald Sorin, *Irving Howe: A Life of Passionate Dissent* (New York: New York University Press, 2003).
46. In an interview with Michele Norris on National Public Radio's *All Things Considered* (19 June 2003) about his forthcoming book *An Execution in the Family*, Robert Meeropol, the younger son of Julius and Ethel Rosenberg, contends that revelations about the horrors of Stalin's rule that emerged after his death precipitated the largest single decline in membership in the US Communist Party, from 30,000–40,000 members to fewer than 10,000. At the height of its popularity in the 1930s, membership was around 100,000.
47. Jeane Kirkpatrick, "Dictatorships and Double Standards", *Commentary* 68 (November 1979), pp. 34–45. For a critical analysis, see Tom J. Farer, "Reagan's Latin America", *New York Review of Books* 28 (March 1981), p. 10.
48. See Julian Bond's comprehensive overview of this history in his Introduction to Maurianne Adams and John H. Bracey, eds, *Strangers & Neighbors: Relations between Blacks & Jews in the United States* (Amherst, MA: University of Massachusetts Press, 1999).
49. See Andrew Hacker, "American Apartheid", *New York Review of Books* 34 (December 1987), pp. 26–33.
50. Glenn C. Loury cites the problem of African-Americans' employment of a form of "comparative victimology" – especially equating the suffering and consequences of chattel slavery with the Holocaust – as a significant source of the split between the two groups. See "Behind the Black–Jewish Split", *Commentary* 81 (January 1986), pp. 23–27.
51. The 1978 Bakke–University of Michigan case (Regents of the University of California v. Bakke (438 US 265 (1978)) was the basis for many of the earliest formulations of "affirmative action quotas" which caught the attention of some Jewish commentators – see, for example, Joseph Adelson, "Living with Quotas", *Commentary* 65 (May 1978), pp. 23–29 – and black intellectuals such as Thomas Sowell – see, for example, "Are Quotas Good for Blacks?", *Commentary* 65 (June 1978), pp. 39–43. See also the special issue of *Commentary* 69 (January 1980) entitled "Liberalism & the Jews: A Symposium".
52. This was during the particularly divisive period of 1966–1967. The proposal came from a local chapter operating in Georgia. The leader of the SNCC, Stokely Carmichael, never actually endorsed the exclusion of whites from the organization.
53. See Morris Abrams' autobiography *The Day Is Short* (New York: Harcourt, 1982). Abrams' trajectory from a prosecutor at the Nuremberg Trials, to champion of the civil rights movement in the United States, to embittered neo-conservative is typical. Abrams died in 2000.
54. For a historical account of the Ocean Hill-Brownsville crisis, see Jerald E. Podair, "The Ocean Hill-Brownsville Crisis: New York's *Antigone*", paper prepared for the 2001 Gotham History Festival, sponsored by the Gotham Center for New York City History, 6 October 2001, available at <http://www.gothamcenter.org/festival/2001/confpapers/podair.pdf> (accessed 18 August 2009). For an account from a sociological perspective, see Jane Anna Gordon, *Why Couldn't They Wait? A Critique of the Black–Jewish Conflict over Community Control in Ocean Hill-Brownsville, 1967–1971* (New York: Routledge, 2001).
55. Randall Robinson, the founder of the TransAfrica Forum, is a representative and key figure in the reparations movement, not only for African-Americans, but also in the form of North–South transfers for the injustices of African colonialism.
56. See, for example, Walter Isaacson, *Kissinger: A Biography* (New York: Simon & Schuster, 1992), p. 675.

57. Paul Hofman, "Moynihan's Style in the U.N. Is Now an Open Debate", *New York Times*, 21 November 1975, p. A3.
58. See Moynihan's "The United States in Opposition", *Commentary* 59 (March 1975), pp. 31–44.
59. Ibid. See also the special issue of *Commentary*, "Liberalism & the Jews", passim.
60. The 1967 war is considered by some to have been decisive in the black–Jewish split because it was widened to include foreign policy. See Huey L. Perry and Ruth B. White, "The Post-Civil Rights Transformation of the Relationship between Black and Jews in the United States", *Phylon* 47:1 (1986), pp. 51–60. They quote heavily from Nathan Glazer's *Ethnic Dilemmas: 1964–1982* (Cambridge, MA: Harvard University Press, 1983).
61. This was the movement begun by the Group of 77 and the Non-Aligned Movement, starting first within the UN Conference on Trade and Development and culminating in the adoption by the General Assembly of the "Programme of Action on the Establishment of a New International Economic Order" and the "Charter of Economic Rights and Duties of States" in 1974. The most recent articulation of the issue of redress was at the 2001 World Conference on Racism, held in Durban, South Africa. The Declaration adopted at the Conference is available at <http://www.un.org/WCAR/durban.pdf> (accessed 18 August 2009).
62. See, especially, "Henry Kissinger: Realism in Power", in Michael J. Smith, *Realist Thought from Weber to Kissinger* (Baton Rouge: Louisiana State University Press, 1986), pp. 192–217.
63. With reference to the rapidly deteriorating situation in the Balkans in the early 1990s, Secretary of State James Baker was quoted as telling George H. W. Bush, "We don't have a dog in that fight". Max Boot, "Paving the Road to Hell: The Failure of U.S. Peacekeeping", *Foreign Affairs* 79 (March/April 2000), p. 146.
64. Kirkpatrick basically wrote the blueprint for what would become Reagan's Latin American policy, especially with respect to Central America, in her "U.S. Security & Latin America", *Commentary* 71 (January 1981), pp. 29–40. For other expositions of Kirkpatrick's policy on Latin America, see her collection of speeches *The Reagan Phenomenon and Other Speeches on Foreign Policy* (Washington, DC: AEI Press, 1983). Elliott Abrams – as Assistant Secretary of State for Human Rights and Humanitarian Affairs, and later as Assistant Secretary for Inter-American Affairs – would become deeply enmeshed in the Iran–Contra scandal.
65. James Reston, "The Reagan Show", *New York Times*, 1 February 1981, p. E21.
66. See Robert H. Johnson, "Misguided Morality: Ethics and the Reagan Doctrine", *Political Science Quarterly* 103 (1988), pp. 509–529.
67. See Lars Schoultz, *Human Rights and United States Policy toward Latin America* (Princeton, NJ: Princeton University Press, 1981).
68. In late 1980, four American Maryknoll nuns were killed by US-backed Salvadoran soldiers during the civil war against the Frente Farabundo Martí de Liberación Nacional (FMLN). At the time Kirkpatrick remarked, "they were not just nuns . . . they were political activists on behalf of the Frente". Flora Lewis, "Keeping It Honest", *New York Times*, 27 March 1981, p. A27. Also notorious was the administration's involvement in concealing the truth about the El Mozote massacre of December 1981, in which over 750 Salvadoran men, women and children were killed by a US-trained unit of the Salvadoran Army. See Mark Danner, *The Massacre at El Mozote: A Parable of the Cold War* (New York: Vintage Books, 1994). Also Alan Riding, "Duarte's Strategy May Work Better in U.S. than in Salvador", *New York Times*, 27 September 1981, p. E5.
69. William Safire, "Bush's Moral Crisis", *New York Times*, 1 April 1991, p. A17.
70. This was primarily a result of the administration's decision to temporarily suspend loan

guarantees to Israel in order to halt expansion of Jewish settlements in the West Bank. For an account of the fallout, see Jay P. Leftkowitz, "Does the Jewish Vote Count", *Commentary* 111 (March 2001), pp. 50–53.

71. Charles Krauthammer, "The Unipolar Moment", *Foreign Affairs* 70 (Winter 1990/1991), pp. 23–33.
72. See, for example, Michael Isikoff, "The Robertson Right and the Grandest Conspiracy", *Washington Post*, 11 October 1992, p. C3.
73. While referring to Somalia during the 11 October 2000 presidential debate at Wake Forest University, Bush said, "I don't think our troops ought to be used for what's called nation-building. I think our troops ought to be used to fight and win war." The text is available at <http://www.debates.org/pages/trans2000b.html> (accessed 18 August 2009).
74. Ibid.
75. This criticism was levelled on Bush's presidential campaign website; see "George W. Bush on Foreign Policy", <http://www.issues2000.org/2004/George_W__Bush_Foreign_Policy.htm> (accessed 18 August 2009).
76. When asked by the TV personality Larry King "What area of international policy would you change immediately?", Bush's response was, "Our relationship with China. The President has called the relationship with China a strategic partnership. I believe our relationship needs to be redefined as competitor. . . . [W]e must make it clear to the Chinese that we don't appreciate any attempt to spread weapons of mass destruction around the world, that we don't appreciate any threats to our friends and allies in the Far East." *Larry King Live*, 15 February 2000.
77. See, for example, Krauthammer, "The Unipolar Moment"; Mark Helprin, "What Israel Must Do to Survive", *Commentary* 112 (November 2001), pp. 25–28; Daniel Pipes, "Who Is the Enemy?", *Commentary* 113 (January 2002), pp. 21–27; Norman Podhoretz, "How to Win World War IV", *Commentary* 113 (February 2002), pp. 19–29. For a critical view, see Nicholas Lemann, "The Next World Order", *The New Yorker*, 1 April 2002, pp. 42–48.
78. Francis Fukuyama, *America at the Crossroads: Democracy, Power, and the Neoconservative Legacy* (New Haven, CT: Yale University Press, 2006), p. 4.
79. Francis Fukuyama, "After Neoconservatism", *New York Times*, 19 February 2006, p. 62.
80. See, for example, Condoleezza Rice, "Promoting the National Interest", *Foreign Affairs* 79 (January/February 2000), pp. 45–62.
81. Christopher Dickey and Evan Thomas, with Mark Hosenball, Roy Gutman and John Barry, "How Saddam Happened", *Newsweek*, 3 September 2002, pp. 34–40.
82. See Samantha Power, *A Problem from Hell: America and the Age of Genocide* (New York: Basic Books, 2002), chapters 9 and 10.
83. This was due mostly to Clinton's emphasis on domestic – especially economic – policy. See David Halberstam, *War in a Time of Peace* (New York: Scribner, 2001), pp. 167–168, 212–216.
84. See, for example, Ramesh Ponnuru, "Getting to the Bottom of this 'Neo' Nonsense", *National Review*, 16 June 2003, pp. 29–32; and "The Shadow Men", *The Economist*, 26 April 2003, pp. 21–23.
85. Or even, "Wilsonianism in boots". See Stanley Hoffmann, "The High and the Mighty: Bush's National-Security Strategy and the New American Hubris", *The American Prospect*, 13 January 2003, available at <http://www.prospect.org/cs/articles?article=the_high_and_the_mighty> (accessed 18 August 2009).
86. See Micheline Ishay, *Human Rights Reader: Major Speeches, Essays and Documents from the Bible to the Present* (London: Routledge, 1997).
87. Jack Donnelly, *Universal Human Rights in Theory and Practice* (Ithaca, NY: Cornell University Press, 2002), p. 35.

88. Samia Nakhoul, "Boy Bomb Victim Struggles against Despair", *Daily Mirror*, 8 April 2003.
89. See George F. Will, "Measured Audacity", *Newsweek* 141, 14 April 2003, p. 66.
90. The primary treaties of humanitarian law governing international armed conflict are the 1907 Hague Convention, the 1949 Geneva Conventions and the 1977 Additional Protocol 1 to the Geneva Conventions. Taken in concert, the provisions of these treaties require that military attacks must be directed at military targets and that the rules of necessity and proportionality be followed, but it does not mean that there cannot be civilian casualties. See Michael Bothe et al., *New Rules for Armed Conflicts* (Dordrecht: Kluwer Law International, 1982), pp. 304–305.
91. Stuart Taylor Jr, "In Wake of Invasion, Much Official Misinformation by U.S. Comes to Light", *New York Times*, 6 November 1983, p. A20. The invasion of Panama resulted in the deaths of 300 Panamanians. Adam Isaac Hasson, "Extraterritorial Jurisdiction and Sovereign Immunity on Trial: Noriega, Pinochet, and Milosevic – Trends in Political Accountability and Transnational Criminal Law", *Boston College International & Comparative Law Review* 25 (Winter 2002), pp. 125–158.
92. See, for example, Danner, *The Massacre at El Mozote*; David K. Shipler, "Senators Challenge Officials on Contras", *New York Times*, 6 February 1987, p. A3; Marlene Dixon, *On Trial: Reagan's War against Nicaragua* (San Francisco: Synthesis Publications, 1985); and Aryeh Neier, *Taking Liberties* (New York: Public Affairs, 2003), pp. 184–221.

4

Strengthening the protection of human rights in the Americas: A role for Canada?

Bernard Duhaime

Notwithstanding Canada's recent integration in the Organization of American States (OAS), it has yet to take full part in the Inter-American system of protection of human rights. This chapter will argue that Canada can contribute considerably to the strengthening of the Hemisphere's human rights regime in several ways. Not only will it discuss the reasons for greater Canadian participation in the regime; it will also provide a series of recommendations to strengthen the Inter-American institutional framework in a diversified manner, which corresponds to Canadian interests and expertise.

The Inter-American system of protection of human rights

The Inter-American system of protection of human rights[1] consists of the main Inter-American norms and institutions, which seek to promote and protect the rights of individuals, groups and peoples within the member states of the OAS.[2] The normative framework of the system is composed of the OAS Charter;[3] of a certain number of human rights treaties,[4] including its main one, the American Convention on Human Rights;[5] and of other types of instruments,[6] including the American Declaration of the Rights and Duties of Man,[7] which, although not a treaty per se, can be said to be binding on all member states, at least in part.[8]

The Inter-American Commission on Human Rights (IACHR), created in 1959, is the principal organ of the OAS; it promotes the observance

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and protection of human rights and serves as a consultative organ of the Organization in this matter.[9] It is composed of seven commissioners – independent experts – and an executive Secretariat. It has many functions, including promoting human rights in the region, formulating recommendations to member states and observing human rights situations – including via *in loco* visits, publishing reports, and so on. It also processes individual petitions logged against member states by individuals alleging violations of Inter-American human rights norms. In certain cases, the IACHR can also refer cases to the Inter-American Court of Human Rights and, in serious and urgent cases that may cause irreparable harm to persons, it can adopt precautionary measures.[10]

The Inter-American Court of Human Rights (IACtHR), created with the adoption of the American Convention on Human Rights in 1969, consists of seven judges assisted by a Secretariat. It decides contentious cases between the Commission and the member states relating to the observance of the Convention or any other instrument that grants it such jurisdiction.[11] In addition, the Court, at the request of the Commission or any member state, can issue Advisory Opinions regarding the interpretation of the Convention or any other instrument related to human rights in the Americas. It can also be consulted by a member state regarding the compatibility of one of its laws with the Convention. Finally, in serious and urgent cases, the Court can also adopt provisional measures.[12] Both the Commission and the Court report annually to the OAS General Assembly.

The Inter-American system currently faces many challenges, which have been frequently discussed by the Inter-American institutions themselves,[13] member states,[14] civil society[15] and many commentators.[16] Among the main concerns raised, one could mention the absence of a universalized acceptance of a common set of human rights obligations across the Hemisphere, resulting in a two-speed Inter-American human rights system,[17] composed on the one hand of a majority of Latin American states (of civil law legal tradition), which are bound by the American Convention and subject to the competence of the Commission and the Court, and, on the other hand, of a group of states mainly composed of Canada, the United States and most of the states in the English-speaking Caribbean (of common law legal tradition), which are bound only by the American Declaration and are subject to the jurisdiction of the Commission alone.

Another issue of great concern in the system is the unequal implementation of decisions of the Commission and orders of the Court.[18] Although both assess the implementation of their decisions by member states and report on the matter to the OAS General Assembly, there is no additional mechanism that ensures their full respect and application,

in contrast to the European system. For many, this constitutes a major flaw, considering in particular the defying of declarations by certain states in this respect or the lack of capacity of others to comply.[19]

But the most important challenge facing the Inter-American system is, of course, its lack of resources.[20] Both the Commission and the Court have seen their respective work-loads increase in recent years but their regular budgets have not been adapted accordingly.[21] Also, the Commission has been entrusted with additional mandates by the Organization, without the latter granting it adequate resources for their accomplishment.[22] The results are obvious: the individual petition system suffers considerable delays owing to the petition backlogs and to the incapacity of the Secretariat personnel to process the claims.[23] Victims who have suffered human rights violations and who were unable to access or obtain an effective remedy domestically must often wait several years before their case is processed at the Inter-American level. Both states and victims are frustrated and the credibility of the procedure is greatly affected.[24] The Commission has also become dependent on targeted voluntary contributions from states, which affects its appearance of independence.[25] Notwithstanding well-intentioned political declarations by OAS officials and member states, no additional funds are granted to the system, attesting to a latent lack of political will.

Many other institutional challenges lie ahead: the need for greater coordination between the Inter-American system human rights institutions and other OAS agencies; the guarantee of the autonomy and independence of the Commission and the Court; and better access to the system for human rights victims.[26] In addition, certain thematic issues raise important concerns such as the respect for human rights in the context of the fight against terrorism, the full implementation of social, economic and cultural rights in the Hemisphere, as well as the impact of globalization and free trade on the enjoyment of human rights in the Americas.[27]

Canada's incomplete membership

Canada has been a member of the Organization of American States since 1990.[28] Although it has adhered to a certain number of Inter-American treaties,[29] it has not adhered to any of the main human rights treaties, the Convention in particular. It is thus bound only by the OAS Charter's human rights provisions, mirrored in the American Declaration of the Rights and Duties of Man. Accordingly, it is subject only to the jurisdiction of the Commission, whose decisions it should implement in good faith. Canada cannot be subjected to the scrutiny of the Inter-American Court of Human Rights in contentious matters. This in-

complete membership on the part of Canada has been criticized both nationally and internationally.

The Inter-American institutions and procedures have not often been solicited by Canadians.[30] In fact, very few petitions are logged against Canada on a yearly basis when compared with petitions logged against other OAS member states: only five were logged against Canada in 2003, nine in 2004, five in 2005, and four in 2006.[31] Our understanding is that, although many petitions against Canada are being processed by the Commission, many are to be archived soon for lack of petitioner response – only about 10 petitions in total were still active and under review by the IACHR Secretariat in 2006. These statistics can be explained by many factors of course, among them the obvious fact that the human rights situation in Canada is allegedly not as serious as in other OAS member states. In addition, many claims are addressed by domestic judicial and administrative bodies, which can be said to function relatively well in Canada.

However, Canadians' low participation before the Commission can also be explained by a lack of knowledge of the system in general among Canadian victims and the Canadian legal community. Canada's incomplete membership in the system is of course partly to blame for this flaw.[32]

There are accordingly very few Commission reports on Canada. To our knowledge, only four reports (two on admissibility and two on inadmissibility) on individual petitions against Canada were published by the Commission between 1990 and 2005.[33] At the end of its 126th Period of Sessions in October 2006, the Commission adopted two additional admissibility reports regarding Canada.[34] The IACHR also issued an important thematic report in 2000, dealing with the *Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System*, in which the IACHR formulated a series of recommendations to the Canadian state.[35] This report followed the only onsite visit undertaken in Canada by the Commission, in October 1997, dealing with the human rights situation of refugees in Canada.[36]

Although Canada is not subject to the jurisdiction of the Court, it can nevertheless request and participate in the Court's judicial proceedings with regard to Advisory Opinions. For example, the Canadian government presented a brief to the Court regarding the Court's eighteenth Advisory Opinion, dealing with the juridical condition and rights of undocumented migrants.[37]

Canada has never succeeded in getting a Canadian national elected as a member of the Commission[38] or of the Court.[39] It unsuccessfully presented a candidate to the Court once,[40] and it has never presented candidates for positions at the IACHR. There is nothing preventing Canada from nominating Canadian experts as candidates for these positions –

and it should do so – and Canadian candidates would of course benefit from fuller Canadian membership in the system.[41]

There are many political reasons justifying greater Canadian participation in the Inter-American system of protection of human rights, but none can be deeper than Canada's own historical human rights and democratic traditions.[42] Perceived across the world as a human rights champion, Canada's involvement in the field of human rights in the Americas is somewhat limited because of its partial membership in the system. This relative omission is particularly important at a time when the other regional economic and political power, the United States, is engaged in security-driven policies, disengaging itself from initiatives seeking a better protection of human rights in the Americas.[43] Canada could occupy a greater political space in this field regionally and become the main economic and political partner of OAS member states wishing to strengthen the rule of law and the protection of human rights internally.[44]

It goes without saying that greater and better participation by Canada in the Inter-American system, mainly via Canadian adherence to the American Convention and the recognition of the mandatory jurisdiction of the Inter-American Court of Human Rights, would also mean greater and better protection of human rights for Canadians themselves.[45] Currently, victims of human rights violations in Canada can present claims primarily to the United Nations Human Rights Committee, regarding alleged violations of the International Covenant on Civil and Political Rights (ICCPR),[46] and to the Inter-American Commission on Human Rights, regarding alleged violations of the American Declaration. Providing Canadians with additional conventional human rights protection (at least the American Convention) and with additional international remedies would grant a greater and more diversified protection of Canadians' human rights.[47] Athough the two previously mentioned petition procedures and their respective instruments are important and useful, they do not afford as thorough a protection as do the possibility of bringing claims regarding the American Convention and being able to argue cases to the Inter-American Court of Human Rights, which allows for a different and more complete judicial procedure.[48]

Also, by adhering to the Convention, Canada would then be able to adhere to the Protocol of San Salvador, which provides for a specific set of guarantees in this area and allows for individual claims to be presented to the Commission and later to the Court regarding a certain number of rights.[49] Again, this would provide Canadians with better protection of their rights in this area.[50]

Of course, the main reason for adhering to the Convention is that this is what Canadians want. As reiterated by the Canadian Senate's Standing Committee on Human Rights, contrary to the Canadian government's

allegations, there is very strong support on the part of Canadian citizens and Canadian organizations for such adherence.[51]

Daring to do the right thing

Canada currently contributes in a significant way to strengthening the Inter-American human rights regime by providing considerable political support to the regime. However, greater participation and fuller membership, as well as targeted interventions, could provide much-needed help to the system.

Notwithstanding Canada's partial and incomplete membership in the system, it has in recent years played a constructive role in its support by adopting political positions that have maintained and sometimes strengthened the regime. Although it is always difficult to assess the contribution of specific states in support of a particular resolution of the Permanent Council or of the OAS General Assembly, one can nevertheless recognize that Canada has always adopted very clear official positions in support of the Inter-American human rights system. For example, it has always argued strongly in favour of increasing funding for the Commission and the Court to allow them to fulfil their mandates,[52] siding with member states such as Brazil and Argentina on such matters. It has also supported resolutions in favour of ensuring the protection of human rights while combating terrorism and requesting closer collaboration between the Commission and the Committee against Terrorism on the matter.[53] In addition, it has pushed for greater participation by the Commission in the monitoring of human rights in Haiti.[54] Canada has also been a firm advocate of the autonomy of the Court and the Commission.

On the legal front, Canada's existing legal regime and institutions could also contribute in the long run to the development and strengthening of the Inter-American human rights system in several ways. For example, Canada's bi-juridical legal traditions of English common law and Quebec civil law could certainly help a better integration in the system of the influences of both legal traditions on the continent (the common law tradition in Canada, the United States and the English-speaking Caribbean; the continental civil law tradition in the rest of the Hemisphere).[55] The recent development of international law and international legal institutions, particularly in the field of international criminal law, has shown the importance of this dynamic for the effective functioning of international legal institutions.[56]

Similarly, the rather effective Canadian judicial system, as well as the national and provincial human rights protection regimes, could serve as examples or models of best practice for other OAS member states

wishing to adopt positive reforms in this field.[57] This is particularly relevant considering the fact that the Inter-American human rights system relies mainly on domestic judicial systems to ensure the effective protection of human rights. This can be seen in the admissibility requirements of the petition procedure, which obliges victims to exhaust all domestic remedies before presenting claims to the IACHR. Because many Latin American judicial systems do not allow for effective remedies for human rights violations, many petitions are filed with the Commission, creating the previously mentioned huge backlogs. In this context, a transmission of the positive Canadian judicial experience as a model for institutions and procedures could be an encouraging step towards more effective human rights protection in domestic judicial and administrative institutions across the Americas. For example, this sharing of best practice could be done through the IACHR: Canada could invite the Commission to undertake *in loco* visits to the country and could collaborate in efforts to prepare guidelines, recommendations and other promotional material to be made available to OAS member states. Positive Canadian experiences in specific themes relevant to the defence of human rights in the Americas could also benefit the continent, in such fields as women's rights for example. By becoming a full member of the Inter-American human rights system, Canada could have a more complete and positive impact on the continent in that field,[58] as has been noted by other OAS member states, Inter-American institutions and civil society.[59]

Enhancement of Canada's already beneficial membership and participation in the system requires that it adhere at least to the American Convention and that it recognize the compulsory jurisdiction of the Court. Although this issue has been discussed in Canada since the early 1990s, the Canadian government has still not pronounced itself clearly in favour of such an endeavour. It has claimed on several occasions that some provisions of the Convention are weak or obsolete and grant lower protections than existing Canadian law. It has also argued that some Articles of the Convention are incompatible with certain aspects of Canadian law, in particular regarding issues such as the right to life and abortion and the right to freedom of expression and the criminalization of hate speech in Canada.[60] This still does not amount to a valid reason for Canada not to adhere to the Convention.

Concerning Canada's first preoccupation, one should note that, in accordance with its Article 29, the Convention cannot be interpreted in a way that would grant a lower protection than that applicable under relevant national laws or other treaties in force in the state concerned.[61] If current Canadian law provides greater protection than the Convention in some regards, the Convention could not be invoked to restrict human rights guarantees afforded by current Canadian law. Moreover, one

should consider that the American Convention is in many ways similar to the International Covenant on Civil and Political Rights ratified by Canada. In fact, many provisions of the American Convention bring broader protections than those provided under other international human rights instruments, including the ICCPR.[62]

With respect to Canada's second main concern, namely that Article 4.1 of the Convention (protecting the right to life from the moment of conception in general) could be incompatible with current Canadian law on the issue of abortion,[63] many factors should be taken into consideration, including the fact that the Commission has already addressed this issue in one of its cases, the *Baby Boy* case,[64] dealing with a decision of the US Supreme Court overturning the conviction of a physician who had conducted an abortion. In the decision, the Commission ruled in an *obiter dictum* that Article 4 of the Convention does not per se prohibit states from allowing abortion. In that case, the Commission analysed the drafting history of Article I of the Declaration and Article 4 of the Convention. The Commission concluded that the drafters had removed language previously proposed during the negotiations of Article I of the Declaration, which protected the right to life *from the moment of conception*, and replaced it with its final wording, so avoiding the problem that several states derogate laws that allow abortion in certain circumstances. The Commission also analysed the drafting history of Article 4 of the Convention and concluded that the terms "in general" were inserted into the final version of the Article as the result of a compromise during the drafting negotiations between states that tolerated abortion and those that were against it, and that this reflected the fact that the drafters did not intend to move away from the meaning of Article I of the Declaration. The Commission finally ruled that the United States did not violate the American Declaration.

In addition, while interpreting the Convention, one should also consider the fact that current trends in international law, including guarantees provided under the ICCPR ratified by Canada, seem incompatible with another interpretation of the right to life and should be taken into consideration when interpreting the Convention in accordance with the above-mentioned Article 29[65] and with the current practice of the Inter-American human rights institutions.[66]

Notwithstanding the above, if doubt were to remain, Canada could very well adhere to the Convention and formulate an interpretative declaration regarding 4.1 of the Convention, as other OAS member states have done and as suggested by civil society, several experts and the Canadian Senate itself.[67] Although an adherence coupled with a reservation would also be a feasible option,[68] it should be used only as a solution of last resort, considering that Canada could then be perceived as affirming

to other member states that it renders inapplicable to Canadians what it considers as a human rights guarantee provided under the Convention.[69]

With respect to an eventual incompatibility of Canadian legislation on hate speech with the interdiction of prior censorship as provided under Article 13 of the Convention, one should consider the fact Article 13.5 seems to provide that states be allowed to regulate hate speech, even through prior censorship. Although there is no case law on this issue, this position was adopted in 2004 by the OAS Special Rapporteur on Freedom of Expression, who specified that the Spanish version of Article 13.5 provides that hate speech "estará prohibida por la ley", which suggests that hate speech – given that it must be "prohibited" – can be regulated through censorship.[70]

In addition, the Special Rapporteur indicated that such an interpretation would be in line with current trends in international law,[71] including the recent developments in the field of international criminal law,[72] as well as the guarantees provided in the ICCPR, ratified by Canada. The Rapporteur noted that although the Canadian legislation on hate speech had twice been challenged before the Human Rights Committee, on the basis of Article 19 of the ICCPR, both times the Committee confirmed the validity of the Canadian measures.[73]

Accordingly, Canada should not refrain from adhering to the Convention for fear that the Convention would be contrary to current Canadian legislation on hate speech. This being said, the Canadian government could also adhere with an interpretative declaration or a reservation as suggested before.[74]

At this point, one should emphasize that, by adhering to the Convention and recognizing the compulsory jurisdiction of the Inter-American Court, Canada would strengthen the system considerably, for many reasons. This would be a positive step towards the universalization of the regime, weakening the current division between states bound only by the Declaration and subject only to the Commission's jurisdiction, and states bound by the Convention and subject to the Court's jurisdiction.[75] It would also strengthen the credibility of the system and encourage the United States and the English-speaking Caribbean states to adhere because they would no longer be able to invoke Canada's incomplete membership to justify their own.[76]

This integration of Canada into the human rights system would enrich Inter-American human rights case law because it is likely that more petitions would be brought against Canada, based on the Convention and possibly other treaties (including the San Salvador Protocol), on issues of a certain complexity and sophistication and regarding innovative issues, in particular in the field of security as well as social, economic and

cultural rights.[77] One can assume that, considering the effective judicial and administrative recourses in place in Canada, most petitions reaching the Commission and then later the Court would deal with controversial issues of law and policy rather than the (unfortunately all too frequent) mainly fact-based cases dealing with impunity, public violence and ineffective judicial systems that are currently brought by victims in the Americas. More petitions from Canadian petitioners could contribute to raising the bar, in terms of both quality and complexity, of Inter-American jurisprudence.

However, the most positive consequence of full Canadian membership in the system would be that, by adhering to the Convention, Canada's capacity to engage other OAS member states to better respect human rights would be freed up.[78] Currently, it is very difficult, if not impossible, for the Canadian government to address its concerns to other OAS member states regarding their human rights situation because Canada has no real legitimacy and credibility for doing so without having adhered to the Convention. This prevented Canada from using all of its leverage as a human rights champion when the system suffered the crisis of the denunciation of the Convention by Trinidad and Tobago in 1998 and when the Fujimori administration in Peru tried to pull out of the Inter-American Court's jurisdiction.[79] The same could be said of the occasion in 1999 when OAS member states engaged in discussions about reforming the Inter-American human rights system: some states with dubious human rights records tried to exclude from the debate states that had not ratified or adhered to the Convention.[80] Although this attempt was not successful,[81] it does certainly confirm how full membership in the human rights regime constitutes a quasi-essential token of legitimacy and credibility on the issue at the political level. If Canada wants to have a true impact regarding the protection of human rights in the Hemisphere, it needs to be able to engage in discussions with other OAS member states, multilaterally and bilaterally, as it does in other systems or regions.[82] Adhering to the Convention is the best way to allow Canada to pursue its efforts efficiently in this sense.

In recent years, the debate on adherence to the Convention has progressed considerably in Canada. After a period of standstill in the 1990s, the issue was again under intense discussion by civil society, commentators and public institutions at the beginning of the following decade. A significant step in this process has been the publication of two reports by the Canadian Senate's Standing Committee on Human Rights recommending, in 2003 and again in 2005, that Canada adhere to the Convention no later than 2008.[83] It rightly noted that there is no reasonable legal justification preventing Canada from adhering and that there is considerable

support in the Canadian population for such an initiative. In fact, all persons and entities who addressed the issue before the Senate Committee were in favour of Canadian adherence to the Convention. The 2005 Senate Committee Report urged the federal government to adopt and publicly release a schedule of consultations with the provincial governments and to conduct public consultations with civil society.

After the release of the Senate's May 2005 report, the Canadian government indicated, in November of the same year, that it would first analyse the issue and consult federal ministries regarding the appropriateness of adherence. It would then ask provincial governments to proceed with their own analysis of the adequacy of adherence. Subsequently, consultations would be undertaken between the federal and provincial governments. The federal government announced that throughout this process it would engage in consultations with civil society. At the end of all consultations, the relevant federal ministers would then decide whether Canada would adhere to the Convention.[84]

Although this proposal is certainly a step in the right direction, it does raise serious concerns regarding the length of the process. In the spring of 2004, the federal government had completed its inter-ministerial consultations and was assessing whether to go forward with consultations with the provincial governments. The November 2005 proposal seemed to re-initiate the efforts of analysis and of federal consultations that had taken place 18 months earlier. The same could be said of federal–provincial consultations, which have been said to be under way since early 2004.[85]

Another major concern lies with the fact that, notwithstanding the Senate Committee's 2005 recommendations,[86] all federal and provincial consultations are undertaken behind closed doors. This prevents civil society and commentators from providing useful input to the process, especially regarding potential Convention obligations on Canada in provincial fields of competence such as the administration of justice, private property and civil rights, and provincial lands.

Although federal consultations did take place with civil society organizations at the beginning of 2006, these organizations proceeded cautiously, requesting more transparency in the process and greater participation in the consultations, rather than adopting clear-cut substantive positions regarding adherence. This caution may be explained by the change of federal government that had taken place very early in 2006: some civil society actors probably preferred first to understand the new government's position concerning adherence, before formulating specific positions and recommendations. While the lengthy process continues, its most positive aspect is certainly the fact that it has raised the visibility of the Convention and of the Inter-American system in Canada: debates are taking

place in all sectors of society and the issue has truly become one of the main contemporary international human rights law concerns in Canada.

Supporting the institutional framework of the Inter-American human rights system

Of course, an important area of intervention in which Canada should be more active is financial and political support. Although all OAS member states have claimed publicly that adequate resources should be granted to the Inter-American human rights institutions,[87] it is alarming to see that the regime is dramatically underfunded, in particular considering increases in unfunded mandates conferred by the OAS to the Inter-American human rights institutions and the considerable increases in individual petitions received.[88]

Notwithstanding the generalized financial crisis that has handicapped the OAS in recent years, the issue of the funding of the Inter-American human rights system is mainly one of political will.[89] It is alarming to note that OAS member states seem to have moved away from past political undertakings on the matter. And it is revealing that, whereas the 2001 Quebec Summit Declaration specifically called for the 31st OAS General Assembly to envisage increasing the system's resources,[90] the 2005 Mar del Plata Summit Declaration affirmed instead the need to strengthen and improve the *effectiveness* of the regime.[91]

Although Canada has publicly supported necessary increases in the funding of the human rights system, and has endorsed OAS statements on the matter,[92] it has not taken pronounced leadership on the issue. Canada could play a more important political role both on that specific issue and in promoting the importance of the Inter-American human rights regime for the OAS and the continent in general. It could and should become one of the important leaders and campaigners in favour of the system, as it has done regarding other important issues such as the establishment of the International Criminal Court and the adoption of international instruments banning land mines.[93] This being said, political positions taken by Canada at the multilateral level regarding important human rights issues are not encouraging signs of short-term political support by Canada on such issues.[94]

In addition, Canada could contribute to the OAS member states' voluntary fund destined for the Inter-American human rights regime, or fund particular initiatives, as many states have done with regard to the general functioning of the institutions or in specific areas of interest.[95] Canada could provide support to the Commission's Office of the

Rapporteur on the rights of indigenous peoples or on the rights of women for example. It could also support its work in the field of social, economic and cultural rights, an area of great interest for Canada, and in which it has significant experience and expertise.

Canada has taken steps in the right direction in this regard. For example, the Inter-American Program of the Canadian International Development Agency (CIDA) contributes financially to the activities of the Inter-American Institute of Human Rights.[96] It also provides significant financial support to the initiatives of the OAS Special Mission in Haiti in such fields as justice and human rights.[97] Finally, we understand that in 2006 CIDA was in discussions with the IACHR concerning possible funding initiatives, and that support from the Agency might be granted soon to help the Commission tackle its enormous petition backlog and to allow it to better undertake promotional and outreach initiatives in a more integrated manner. Such endeavours can only be encouraged.

Canada could also contribute to strengthening the ties between the Inter-American human rights regime and the anglophone Caribbean as well as Haiti, both part of Canada's two linguistic and cultural communities.[98] On this issue, one must recognize that Canada has been proactive in terms of promoting the better protection of human rights in Haiti.[99] Furthermore, it insisted on greater involvement of the Inter-American Commission in Haiti.[100] However, Canada could certainly do more to facilitate support of the Inter-American human rights regime in that country. For example, it could insist that all relevant materials produced by the Inter-American institutions on this issue be available in French, one of the official languages of the OAS and of Canada. The current lack of documents, reports and decisions in French renders the Inter-American human rights system less accessible to Haitian victims and human rights defenders, for whom the system is already extremely inaccessible for obvious economic reasons. In this context, linguistic hurdles should be eliminated, at a bare minimum. On this issue, Canada could imitate initiatives by France, which is not an OAS member state but which finances the translation into French of relevant Inter-American human rights materials pertaining to Haiti, as well as promotional activities in that country.[101]

In addition, Canada could encourage new types of intervention by the Inter-American system to respond to some of the concerns raised by the contemporary human rights context and to current preoccupations regarding the efficiency of the system.

Many of the Hemisphere's major human rights issues have evolved since the creation of the regime. From a system addressing human rights violations raised in the context of authoritarian regimes (forced disappearances, massive and systematic infringements of the right to life and the physical integrity of individuals), it is now called upon to redress vio-

lations raised in the context of democratic governments.[102] More and more, the Inter-American institutions and initiatives must deal with the close interrelations that exist between the protection of human rights and the consolidation of democratic institutions. This dynamic was reaffirmed by OAS member states with the adoption of the 2001 Inter-American Democratic Charter, which attests to the importance of human rights for democracy, and vice versa.[103]

Since it joined the OAS, Canada has been a very active supporter of interventions seeking the strengthening of democracy within the continent, *inter alia* the creation of the Democracy Unit, now the OAS Secretariat for Political Affairs,[104] as well as through timely diplomatic interventions such as the Canadian government's very constructive involvement in resolving the 2000 Peruvian crisis.[105] Many of these interventions included positive initiatives towards the strengthening of democratic institutions and processes, such as the observation of elections.[106]

But, as the 2000 Peruvian experience showed, such actions cannot take place in isolation, disregarding the importance of the protection of human rights to stable democracies.[107] So Canadian support for OAS democracy-related initiatives should incorporate a greater human rights component.[108] For example, the observation of electoral processes by the OAS could integrate specific observation initiatives dealing with particular human rights issues such as the right to freedom of expression, the proper administration of justice, and the right to freedom of association and of assembly. The Inter-American Commission could take part in such initiatives through on-site visits and reporting, as it did on its own for Peru prior to and during the 2000 crisis.[109] In addition to its constructive support of the OAS operations dealing with democratic development, Canada could insist on adding a solid human rights institutional component to those actions and possibly fund parts of such initiatives.[110] Moreover, specific projects dealing with defined substantive issues regarding the interrelations of human rights and democracy could be supported by Canada.[111] For instance, among other initiatives, greater analysis and reporting could be undertaken by the Inter-American Commission on Human Rights and the Inter-American Institute of Human Rights on topics such as the impact of the polarization of political debates and processes on the effective protection of human rights.[112]

Another type of innovative human rights initiative that should get Canada's attention and support is the need for greater synergies between the OAS's political institutions and human rights agencies. Although the Commission and the Court have been very dynamic in recent years, in particular with respect to the individual petition and case system, some contend that their interventions have been isolated within the OAS, at least on the political level, and proposals have been made for a

greater integration of the human rights discourse within the OAS's political arena.[113]

With the arrival of José Miguel Insulza as Secretary General of the OAS in 2005, many innovations have been undertaken in this direction, and these need to be applauded and encouraged. For instance, the Department for the Promotion of Good Governance of the Secretariat for Political Affairs has suggested a series of initiatives to encourage OAS policy-makers to take into account member states' human rights obligations.[114] Although the means and methods to be adopted to implement such objectives were still vague in 2006,[115] and further discussions are needed to coordinate such initiatives with existing OAS human rights agencies, including the IACHR, the mere fact that high-ranking OAS political officers wish to introduce a human rights approach into the Organization's political framework is a significant step forward. Much is to be hoped of this type of opening up. Will it mean that OAS member states will be invited to address human rights issues more directly and frequently within the Organization's multilateral forums?[116] Will it also mean greater political support for human rights initiatives within the OAS?[117]

These questions raise the important issue of the need for greater cooperation between Inter-American human rights institutions and OAS specialized agencies.[118] Although the OAS member states have reiterated the importance of such cooperation in many instances,[119] the results are uneven.

There are of course interesting instances of collaboration, in particular in the fields of social, economic and cultural rights[120] and of indigenous people's rights.[121] But several cooperation initiatives are certainly disappointing, being mainly formal in nature (in particular with regard to respect for human rights in the fight against terrorism)[122] or close to nonexistent (in particular regarding initiatives related to policies dealing with illegal drugs).[123] This type of collaboration is especially important where OAS political bodies are called on to work with independent experts to assess the implementation of Inter-American human rights instruments, as is the case regarding the implementation of the Convention of Belém do Pará.[124]

That being said, although greater cooperation and coordination are certainly needed, respect for the autonomy of the Inter-American human rights organs is crucial.[125] Past attempts to limit this autonomy have generated considerable controversy.[126] In addition, cooperation initiatives resulting from specific OAS mandates should be accompanied by proper fund allocations, ensuring the effectiveness of such actions. The multiplication of unfunded additional mandates can only worsen the critical financial situation of Inter-American human rights organs, which can barely fulfil their current mandates.[127]

As mentioned before, Canada has pushed for greater cooperation between Inter-American institutions regarding human rights.[128] It should continue to do so in a more proactive manner, ensuring that the Inter-American Human Rights Commission, Court and Institute are part of initiatives surrounding the adoption of OAS policies and programmes affecting human rights in the Hemisphere. Canada should make sure that the OAS allocates the necessary funding for such initiatives and could even finance some of them.

Conclusion

In our view, one of the main problems hindering the Inter-American human rights system is the fact that the judicial systems of many OAS member states are dysfunctional or ineffective, in whole or in part. The Inter-American human rights organs have often decried this situation.[129] Such major problems not only generate violations of the human right to judicial guarantees[130] and to judicial protection,[131] but also force many victims to rely on the Inter-American system for remedy. Human rights victims are not required to exhaust domestic remedies before presenting petitions to the IACHR on certain conditions, which include the lack of human rights guarantees under domestic law, the unavailability of effective and timely remedies, or the lack of access to justice.[132] Consequently, deficient domestic justice systems result in greater use of the Inter-American system by victims and contribute to the system's petition backlog. By playing a role in the reinforcement of domestic justice systems, Canada could directly strengthen the protection of human rights in the Americas and indirectly allow for a more efficient functioning of the Inter-American human rights system, because domestic judicial institutions, rather than the IACHR, would constitute the first step towards remedying human rights violations.

Canada has done a great deal in this field. For example, it has supported and funded initiatives seeking the strengthening of justice systems in OAS member states such as Haiti,[133] in particular regarding issues such as the assistance and training of police forces[134] and the strengthening of judicial institutions as a whole.[135] It is also contributing significantly to regional initiatives in the field of justice such as the Justice Studies Center of the Americas.[136]

Canada should continue to fund these types of initiatives. It could also extend its support to specific projects of the Inter-American institutions in fields of particular interest. It could, for instance, support and contribute to the preparation of the report on "Women's rights and the

administration of justice" under way in 2006 at the IACHR's Rapporteur on the Rights of Women.

Canada should also continue to support the activities of non-governmental organizations (NGOs) that are active in the defence of human rights in the Americas, because they of course contribute to the protection of victims across the continent. As the main users of the Inter-American regime, these NGOs contribute to the system's development by constantly challenging it through innovative recourses, which raise issues adapted to the contemporary human rights realities of the Hemisphere. In fact, a considerable proportion of the system's innovations are developed in response to civil society's stimulus.[137] Moreover, civil society has provided constructive criticism of the system's institutions and processes, often resulting in their modification.[138] The continent's NGOs frequently take part in consultations with Inter-American human rights organs to develop and strengthen the system in general[139] or in specific fields.[140]

Canada should thus continue to support and fund initiatives by human rights civil society actors in the Americas because they contribute to the strengthening of the Inter-American human rights system. In fact, many Latin American NGOs receive considerable support from the Canadian International Development Agency. The same can be said of many Canadian organizations, which support human rights NGOs in the South through partnerships and project funding initiatives.[141]

Finally, Canada should encourage initiatives that increase the visibility of the Inter-American regime and promote it in Canada itself.[142] As mentioned before, although the few Canadians who are aware of its existence support Canada's greater integration into the Inter-American human rights system, many are unaware that Canada is even part of the OAS and that there is an Inter-American regime that can be turned to for greater human rights protection.[143] Accordingly, Canada should support bar associations and university law programmes wishing to introduce courses and other types of promotional activities on the Inter-American system, as is the case with many Latin American institutions. Other types of outreach initiatives could be encouraged, in particular dealing with Canada-related issues as regards the system. The Canadian federal government should thus respond positively to the Canadian Senate's recommendation and civil society actors' requests that all interested sectors of society be invited to participate actively in consultations regarding the possible adherence of Canada to the American Convention, at both the federal and the provincial levels.[144] It should also encourage the active participation of Canadian civil society actors in the Inter-American human rights organs and OAS political bodies.[145]

Another good way to promote the system within Canada would be to put forward Canadian candidates for election as members of the IACHR

and of the Court. This would encourage greater visibility and understanding of the system within Canada, would increase Canada's visibility within the regime and would allow Canadian expertise to contribute to the strengthening of the institutions. Of course, adherence to the Convention by Canada would increase Canada's chances of having such candidates elected.[146]

The Inter-American system has contributed greatly to the protection of human rights in a continent that has faced significant human tragedies and is now confronting new challenges. It is argued that Canada could contribute considerably to this regime by becoming one of its key actors and playing the role of leader and model. Canada's contribution to the promotion and protection of human rights in the Americas implies greater integration and participation on its part.

Although Canada's current membership certainly supports the system to a considerable extent, a greater and fuller integration by Canada not only would allow it to better protect human rights abroad but also would respond to the needs and the will of Canadians. Specific Canadian initiatives designed to strengthen the institutions of the system, as well as those of OAS member states, and to support civil society organizations would also contribute to a better protection of human rights regionally. Canada can and should take such actions to enable citizens of the Americas fulfil their aspirations for liberty and development.[147]

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Notes

1. For an overview of the Inter-American system of protection of human rights, see the Inter-American Commission on Human Rights (IACHR), *Basic Documents Pertaining to Human Rights: The Inter-American System*, OEA/Ser.L/V/I.4 rev. 8, 22 May 2001. See also Bernard Duhaime, "Protecting Human Rights: Achievements and Challenges", in Gordon Mace, Jean-Philippe Thérien and Paul Haslam, eds, *Governing the Americas: Assessing Multilateral Institutions* (Boulder, CO: Lynne Rienner, 2007); Jean-Philippe Thérien, Patrick Héneault and Myriam Roberge, "Le régime interaméricain de citoyenneté: Acquis et défis", *Revue Études internationales* 33:3 (2002), p. 426 et seq.
2. The Organization of American States is an international organization as provided for in the Charter of the Organization of the United Nations (Art. 52 of the UN Charter, 1945, 59 Stat. 1031, UN Treaty Series [UNTS] 993, 3 Bevans 1153). The members of OAS are Antigua and Barbuda, Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominica, Dominican Republic, Ecuador,

El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Lucia, Saint Vincent and the Grenadines, St Kitts and Nevis, Suriname, Trinidad and Tobago, the United States, Uruguay and Venezuela.

3. Charter of the Organization of American States, 119 UNTS 3, amended by 721 UNTS 324, OAS Treaty Series [OASTS] 1-A, No. 66, 25 International Legal Materials [ILM] 527, by 1-E Rev. OEA Documentos Oficiales OEA/Ser.A/2 Add.3 (SEPF), 33 ILM 1005, and by 1-F Rev. OEA Documentos Oficiales OEA/Ser.A/2 Add.4 (SEPF), 33 ILM 1009 (OAS 1948).
4. See, *inter alia*, Inter-American Convention to Prevent and Punish Torture, OASTS 67 (1985); Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador), OASTS 69 (1988); Optional Protocol to Abolish the Death Penalty, OASTS 73 (1990); Inter-American Convention on Forced Disappearance of Persons, 33 ILM 1429 (1994); Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women (Convention of Belém do Pará), 33 ILM 1534 (1994).
5. American Convention on Human Rights, OASTS 36, 1144 UNTS 123 (1969).
6. See, for example, certain substantive instruments such as IACHR, Declaration of Principles on Freedom of Expression, 108th Regular Session, 19 October 2000; see also some procedural and constitutional instruments such as IACHR, Rules of Procedure of the Inter-American Commission on Human Rights, approved by the Commission at its 109th Special Session held 4–8 December 2000, amended at its 116th Ordinary Period of Sessions, held 7–25 October 2002 and at its 118th Ordinary Period of Sessions, held 7–24 October 2003 [IACHR Rules of Procedure]; OAS, Statute of the Inter-American Commission on Human Rights, OAS Res. 447 (IX-0/79), OAS Off. Rec. OEA/Ser.P/IX.0.2/80, vol. 1 at 88, *Annual Report of the Inter-American Commission on Human Rights*, OEA/Ser.L/V/11.50 Doc. 13 rev. 1 at 10 (1980), 214 [IACHR Statute]; Inter-American Court of Human Rights (IACtHR), Rules of Procedure of the Inter-American Court of Human Rights, approved by the Court during its 49th Ordinary Period of Sessions, held 16–25 November 2000, and partially reformed by the Court during its 61st Ordinary Period of Sessions, held from 20 November to 4 December 2003 [IACtHR Rules of Procedure 2003].
7. *American Declaration of the Rights and Duties of Man*, 2 May 1948, Res. XXX. Final Act, Ninth International Conference of American States, OAS Off. Rec. OEA Ser. LVII.23/Doc. 21 rev. 6 (1979).
8. See, generally, IACHR, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/11.116 Doc. 5 rev. 1 corr. (2002), p. 39. The binding nature of some of the American Declaration's provisions has been reaffirmed on several occasions by the OAS General Assembly (see, for example, AG/RES. 314 (VII-0/77), 370 (VIII-0/78) and 1829 (XXXI-0/01)); by the Commission (IACHR, Case 9647, Res. 3/87, James Terry Roach and Jay Pinkerton (United States), *Annual Report of the IACHR 1986–87*, 22 September 1987, paras 46–49; IACHR, Case 12.067, Report No 48/01, Michael Edwards et al. (Bahamas), *Annual Report of the IACHR 2000*, para. 107); and by the Inter-American Court of Human Rights (IACtHR), Advisory Opinion OC-10/89, *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*, 14 July 1989, Ser. A 10, paras 29–47).
9. OAS Charter, Art. 106.
10. See American Convention on Human Rights, Arts 34–51; IACHR Statute, Arts 18–20; IACtHR Rules of Procedure, Art. 25. See, generally, Victor Rodriguez Rescia and Marc David Seitles, "The Development of the Inter-American Human Rights System: A Historical and Modern-Day Critique", *New York Law School Journal of Human Rights* 16 (2000), pp. 505–611.

11. To be subject to the Court's jurisdiction, a state must have first ratified the Convention and expressly recognized the jurisdiction of the Court. Concerning a case, the Court can issue an order or judgment, which is binding for states as a matter of international law. See American Convention on Human Rights, Arts 62–63.
12. See, generally, American Convention on Human Rights, Arts 52–73. See also Rescia and Seitles, "The Development of the Inter-American Human Rights System", pp. 611–619.
13. See, for example, OAS, "Exposición del Presidente de la Comisión Interamericana de Derechos Humanos", *Minutes of the Thirty-fifth Regular Session of the General Assembly*, 4th Plenary Session, June 2005, pp. 170–174 [IACHR presentation to the 2005 OAS GA]; OAS, "Exposición del Presidente de la Corte Interamericana de Derechos Humanos", IACtHR presentation to the 2005 OAS GA, pp. 174–178.
14. See, for example, OAS, Permanent Council, Committee on Juridical and Political Affairs, *Dialogue on the Inter-American System for the Promotion and Protection of Human Rights*, CP/CAJP-1610/00 rev.2, Washington DC, 24 April 2000 [OAS PC CJPA April 2000], available at <http://www.oas.org/consejo/CAJP/human%20rights.asp> (accessed 19 August 2009).
15. See, for example, Coalición Internacional de Organizaciones para los Derechos Humanos en las Américas, "Pronunciamiento presentado con ocasión del proceso de preparación de la IV Cumbre de las Américas", GRIC del 8 y 9 de Septiembre "Crear Trabajo para Enfrentar la Pobreza y Fortalecer la Gobernabilidad Democrática", Mar del Plata, Argentina, 4–5 November 2005, p. 3 [Coalition 2005 Summit Presentation], available at <http://www.civil-society.oas.org/Events/XL%20meeting/coalicion1.doc> (accessed 19 August 2009). See also Coalición Internacional de Organizaciones para los Derechos Humanos en las Américas, *Pronunciamiento presentado con ocasión del Trigésimo Quinto periodo ordinario de sesiones de la Asamblea General de la Organización de Estados Americanos*, pp. 1–7, available at <http://www.cejil.org/asambleas.cfm?id=156> (accessed 19 August 2009) [Coalition 2005 GA Presentation]. In addition, see Amnesty International, *Appel en faveur des droits humains*, IOR 62/005/2005 (2005), p. 2; Center for Justice and International Law (CEJIL), "La necesidad de mantener un dabate abierto en la evaluacion del sistema interamericano", *Gaceta* 7 (1997), pp. 1–2; CEJIL, "Desafíos del Sistema Interamericano en la Actualidad", *Gaceta* 19 (2004), p. 1; Amnesty International, "Letter Concerning Canada's Commitment to the Inter-American Human Rights System", 12 January 2004, available at <http://www.amnesty.ca/amnestynews/view.php?load=arcview&article=1188&c=Canada-News> (accessed 19 August 2009).
16. See Bernard Duhaime, "Commission Interaméricaine des Droits de l'Homme en 2005: Enjeux", *Assymétries, analyses de l'actualité internationale* 1 (2005), p. 138; Duhaime, "Protecting Human Rights"; Felipe González M., "La OEA y los derechos humanos despues del advenimiento de los gobiernos civiles: Expectativas (in)satisfechas", *Cuaderno de Análisis Jurídicos Serie Publicaciones Especiales* 11, Derechos Humanos e Interés Público (2001); Lucie Lamarche, "L'exigence du respect des droits de la personne dans le processus d'intégration économique continentale", *Intégration Hémisphérique et Démocratie dans les Amériques, Citoyenneté, Participation, Responsabilité*, Droits et Démocratie (2000), pp. 51–55; Geneviève Lessard, "L'OEA dans la dynamique de la ZLÉA – Renforcement ou affaiblissement de l'État de droit?", CEIM (2000), available at <http://www.er.uqam.ca/nobel/ieim/IMG/html/Lessard.html> (accessed 19 August 2009); Brian D. Tittemore, "The Mandatory Death Penalty in the Commonwealth Caribbean and the Inter-American Human Rights System: An Evolution in the Development and Implementation of International Human Rights Protections", in *William & Mary Bill of Rights Journal* 13 (2004–2005), p. 445. Rescia and Seitles, "The Development

of the Inter-American Human Rights System", p. 593; Michael F. Cosgrove, "Protecting the Protectors: Preventing the Decline of the Inter-American System for the Protection of Human Rights", *Case Western Reserve Journal of International Law* 32 (2000), p. 39; Thérien, Héneault and Roberge, "Le régime interaméricain: Acquis et défis". The issue of reform of the Inter-American human rights system was also addressed at length during the First Annual Meeting on Human Rights, "The Washington Colloquium on the Inter-American Human Rights System", Washington DC, 26–28 May 2005 (see <http://www.wcl.american.edu/humright/hracademy/meeting.cfm>, accessed 20 August 2009).

17. See, for example, González, "La OEA y los derechos humanos", p. 66; Duhaime, "Protecting Human Rights", p. 233; Amnesty International, *Appel en faveur des droits humains*, p. 2; Rescia and Seitles, "The Development of the Inter-American Human Rights System", p. 621; Coalition 2005 GA Presentation, p. 3; "The Washington Colloquium on the Inter-American Human Rights System"; Amnesty International, "Letter Concerning Canada's Commitment", p. 2; Thérien, Héneault and Roberge, "Le régime interaméricain: Acquis et défis", p. 436; OAS PC CJPA April 2000, p. 4.
18. See, *inter alia*, IACHR presentation to the 2005 OAS GA, and IACtH presentation to the 2005 OAS GA; Coalition 2005 GA Presentation, p. 4; "The Washington Colloquium on the Inter-American Human Rights System"; CEJIL, "La necesidad de mantener un dabate abierto", p. 2; Thérien, Héneault and Roberge, "Le régime interaméricain: Acquis et défis", p. 430; IACHR, Report of the Executive Secretary during his meeting with representatives of civil society, Washington DC, 20 October 2006, pp. 6–7 [2006 Report of the IACHR Executive Secretary].
19. See, for example, Duhaime, "Commission Interaméricaine des Droits de l'Homme en 2005: Enjeux", p. 139; Duhaime, "Protecting Human Rights", pp. 235–236; "The Washington Colloquium on the Inter-American Human Rights System".
20. See CEJIL, "La necesidad de mantener un dabate abierto", p. 1; CEJIL, "Desafíos del Sistema Interamericano", p. 1; Coalition 2005 GA Presentation, p. 2; "The Washington Colloquium on the Inter-American Human Rights System"; Rescia and Seitles, "The Development of the Inter-American Human Rights System", pp. 622–623, 626; Thérien, Héneault and Roberge, "Le régime interaméricain: Acquis et défis", p. 438; Andrew F. Cooper, "The OAS Democratic Solidarity Paradigm: Questions of Collective and National Leadership", *Latin American Politics and Society* 43:1 (2001); Duhaime, "Protecting Human Rights", p. 237.
21. See, for example, 2006 Report of the IACHR Executive Secretary, pp. 15–16.
22. See, for example, ibid. See also Amnesty International, *Appel en faveur des droits humains*, p. 2.
23. On the volume of petitions received and processed, see 2006 Report of the IACHR Executive Secretary, pp. 4–8.
24. See Rescia and Seitles, "The Development of the Inter-American Human Rights System", p. 622 et seq.; Cosgrove, "Protecting the Protectors", pp. 53–58; Thérien, Héneault and Roberge, "Le régime interaméricain: Acquis et défis", p. 440. See also OAS PC CJPA April 2000, pp. 7–9.
25. See, generally, Duhaime, "Commission Interaméricaine des Droits de l'Homme en 2005: Enjeux"; Duhaime, "Protecting Human Rights", pp. 237–238.
26. See CEJIL, "La necesidad de mantener un dabate abierto", pp. 1–2; "The Washington Colloquium on the Inter-American Human Rights System"; Thérien, Héneault and Roberge, "Le régime interaméricain: Acquis et défis"; Duhaime, "Protecting Human Rights", pp. 236 and 242.
27. See, for example, Coalition 2005 GA Presentation, pp. 1, 4, 7; Amnesty International, *Appel en faveur des droits humains*, pp. 3, 6; CEJIL, "La necesidad de mantener un

dabate abierto", p. 2; Rescia and Seitles, "The Development of the Inter-American Human Rights System", pp. 626–627; Amnesty International, "Letter Concerning Canada's Commitment", p. 2; Thérien, Héneault and Roberge, "Le régime interaméricain: Acquis et défis", pp. 431, 440 et seq.; Duhaime, "Protecting Human Rights", pp. 225–228, 239–242.

28. For a history of Canada's ratification of the OAS Charter and of its links to the Americas, see Standing Senate Committee on Human Rights, *Enhancing Canada's Role in the OAS: Canada's Adherence to the American Convention on Human Rights*, May 2003, pp. 8–10 [Senate 2003 Report].
29. Ibid., p. 10. See, for example, Inter-American Convention on the Granting of Civil Rights to Women, 1438 UNTS 51 (1948). See also Standing Senate Committee on Human Rights, *Canadian Adherence to the American Convention on Human Rights: It Is Time to Proceed*, Eighteenth Report, May 2005, p. 4 [Senate 2005 Report].
30. See, generally, Canadian Lawyers for International Human Rights (CLAIHR), "Canada's Accession to the American Convention on Human Rights", A submission to the Standing Senate Committee on Human Rights from Canadian Lawyers for International Human Rights, March 2003 [CLAIHR 2003], available at <http://www.claihr.org/publications_docs/project_documents/Imprespect/Senate.pdf> (accessed 15 November 2006).
31. For the same period, 189 petitions were logged against Peru in 2003, 333 in 2004, 278 in 2005 and 236 in 2006. See 2006 Report of the IACHR Executive Secretary, p. 7.
32. See, for example, Geneviève Lessard, "From Quebec to Lima: Human Rights, Civil Society and the Inter-American Democratic Charter: A Perspective from Rights and Democracy", *Canadian Foreign Policy/La Politique étrangère du Canada* 10:3 (2003), p. 88.
33. IACHR, Report 27/93, Case 11.092, Cheryl Monica Joseph (Canada), *Annual Report of the IACHR 1993*; IACHR, Report 7/02, Petition 11.661, Manickavasagam Suresh (Canada), *Annual Report of the IACHR 2002*; IACHR, Report 74/03, Petition 790/01, Michael Mitchell (Canada), *Annual Report of the IACHR 2003*; IACHR, Report 81/05, Petition 11.862, Andrew Harte and family (Canada), *Annual Report of the IACHR 2005*.
34. IACHR, Report 84/06, Petition P-225–04, James Demers (Canada), 21 October 2006; IACHR, Report 121/06, Petition P-554–04, John Doe et al. (Canada), 27 October 2006.
35. IACHR, *Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System*, OEA/Ser.L/V/II.106, Doc. 40 rev., 28 February 2000.
36. See online at <http://www.cidh.org/visitas.eng.htm> (accessed 19 August 2009).
37. IACtHR, Advisory Opinion OC-18, *Juridical Condition and Rights of the Undocumented Migrants*, 17 September 2003, Series A No. 18, at p. 20. See also Senate 2005 Report, p. 6.
38. See online at <http://www.cidh.org/Previous%20members.htm> (accessed 26 September 2009).
39. See Rights & Democracy, "Brief Regarding Ratification by Canada of the American Convention on Human Rights", 19 May 2000, p. 4, available at <http://www.dd-rd.ca/site/publications/index.php?lang=en&subsection=catalogue&id=1270&page=&tag=&keyword=&show_all=&action=> (accessed 19 August 2009).
40. Ibid.
41. Ibid.
42. See, for example, Peter M. Boehm, "A Fresh Look at Old Friends", Notes for an address to the FOCAL/CIIA Conference, "Where Can Canada Really Make a Difference?",

Ottawa, 21 April 2006, available at <http://www.focal.ca/pdf/PBoehm.pdf> (accessed 19 August 2009), p. 8.

43. On this issue, see Andrew F. Cooper, "Ownership and the 'Canadian' Model of New Multilateralism: Negotiating the Inter-American Democratic Charter", *Canadian Foreign Policy/La Politique étrangère du Canada* 10:3 (2003), p. 36.
44. See CLAIHR 2003, p. 4.
45. See CLAIHR 2003, p. 5; Rebecca Cook, "Women's Rights and the Canadian Ratification of the American Convention on Human Rights", 29 January 2001, available at <http://www.dd-rd.ca/site/publications/index.php?id=1274&subsection=catalogue> (accessed 19 August 2009).
46. International Covenant on Civil and Political Rights, GA Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966), 999 UNTS 171.
47. Concerning contemporary human rights concerns in Canada generally, see the various reports published by Amnesty International and in particular "'Essential Actors of Our Time': Human Rights Defenders in the Americas", Amnesty International, 2003, available at <http://www.amnesty.org/en/library/info/AMR01/009/2003> (accessed 19 August 2009).
48. See CLAIHR 2003, p. 5, and Rights & Democracy, "Brief Regarding Ratification by Canada of the American Convention on Human Rights", p. 7. For example, it allows for longer and more thorough hearings, during which petitioners can examine and cross-examine witnesses and present material evidence. Although this is possible before the Commission, it is certainly more restricted in time and scope. As for the UN Human Rights Committee, this type of proceeding is simply non-existent. Another significant advantage of being able to bring cases to the Inter-American Court of Human Rights is the fact that the latter's decisions are obligatory for states as a matter of conventional international law. See Convention, Art. 63. The Court also closely monitors the implementation of its decisions, allowing for victims to have a say regarding their implementation. See Senate 2005 Report, p. 5. See also IACtHR, Case of *Baena-Ricardo et al.* v. *Panama*, Judgment of 28 November 2003, Series C No. 104.
49. Education and labour rights – see Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, Arts 8 and 13.
50. See John W. Foster, "La ratification canadienne de la CARDH et du Protocole de San Salvador: vers un plus grand respect des droits économiques, sociaux et culturels des Canadiens et Canadiennes", 8 March 2001, at <http://www.ichrdd.ca/site/publications/index.php?id=1267&lang=fr&subsection=catalogue> (accessed 26 September 2009), p. 3.
51. See Senate 2005 Report, pp. 3, 8. See also Amnesty International, "Letter Concerning Canada's Commitment", p. 2.
52. See Senate 2003 Report. See also OAS GA resolutions *Evaluation of the Workings of the Inter-American System for the Protection and Promotion of Human Rights with a View to Its Improvement and Strengthening*, AG/RES. 1890 (XXXII-O/02); *Strengthening of Human Rights Systems Pursuant to the Plan of Action of the Third Summit of the Americas*, AG/RES. 1925 (XXXIII-O/03); *Strengthening of Human Rights Systems Pursuant to the Plan of Action of the Third Summit of the Americas*, AG/RES. 2030 (XXXIV-O/04); *Strengthening of Human Rights Systems Pursuant to the Plan of Action of the Third Summit of the Americas*, AG/RES. 2075 (XXXV-O/05).
53. *Protecting Human Rights and Fundamental Freedoms While Countering Terrorism*, AG/RES. 2143 (XXXV-O/05).
54. *Strengthening Democracy in Haiti*, AG/RES. 2147 (XXXV-O/05).
55. On the potential contribution of Quebec civil law to Latin American legal systems,

see Fabienne D. Struell, "Quebec's Creative Regime as a Model for Chile's Secured Transaction", *Southwestern Journal of Law and Trade in the Americas* 5 (1998), pp. 207 et seq. See, generally, Boehm, "A Fresh Look at Old Friends", pp. 7–8.

56. The legal regimes set out in the statutes of the ad hoc International Criminal Tribunals for the Former Yugoslavia and for Rwanda, as well as that of the International Criminal Court, which integrate concepts and procedures of both common law and continental civil legal traditions, have shown interesting results. Canadian attorneys and legal experts have played a constructive role in the development of such institutions. This positive experience could benefit the Inter-American human rights system as well. See Cook, "Women's Rights and the Canadian Ratification of the American Convention on Human Rights". See, for example, IACHR, Case 12.053, Report No. 40/04, Maya Indigenous Community of the Toledo District (Belize), OEA/Ser.L/V/II.122 Doc. 5 rev. 1, *Annual Report of the IACHR 2004*, at 727.
57. See Cook, "Women's Rights and the Canadian Ratification of the American Convention on Human Rights".
58. See Senate 2003 Report, p. 6.
59. See, for example, IACHR, *Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System*, para. 182.
60. See, generally, Senate 2003 Report, pp. 6–8.
61. Senate 2003 Report, p. 39. See Rights & Democracy, "Brief Regarding Ratification by Canada of the American Convention on Human Rights".
62. See, for example, IACHR, *Report on Terrorism and Human Rights*, p. 174, referring to IACtHR, Advisory Opinion OC-5/85, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Articles 13 and 29 of the American Convention on Human Rights), 13 November 1985, Ser. A 5, para. 50.
63. See Senate 2003 Report, pp. 42–44, where the Senate indicates that "[t]he Supreme Court of Canada found in *R*. v. *Morgentaler* that the procedure created under section 251 of the criminal Code for obtaining an abortion was incompatible with a woman's right to the security of her person. No new provision has been adopted to replace s. 251."
64. IACHR, Case 1241 (USA), *Annual Report of the IACHR 1980–1981*.
65. See Senate 2003 Report, pp. 42–44.
66. See, for example, IACtHR, Villagran Morales Case, Judgment of 19 November 1999, Series C No. 63, where the Court interpreted Article 19 of the Convention in the light of subsequent developments in international law regarding the rights of children. See, for example, IACHR, Case 11.140, Report No. 75/02, Mary and Carrie Dann (United States), *Annual Report of the IACHR 2002*, where the Commission did the same with regard to indigenous people's rights.
67. See Senate 2003 Report. See also CLAIHR 2003, p. 6, referring to the interpretative declaration made by Mexico regarding Article 4(1). See Rights & Democracy, "Brief Regarding Ratification by Canada of the American Convention on Human Rights", p. 4, providing a text proposal for a possible reservation or possible interpretative declaration; Cook, "Women's Rights and the Canadian Ratification of the American Convention on Human Rights", suggesting text proposals for a possible interpretative declaration.
68. On this issue, the Inter-American Court of Human Rights held that, although as a general principle a reservation to a fundamental right such as the right to life (which is a non-derogable right as per Article 27 of the Convention) would be incompatible with the object and purpose of the Convention, "the situation would be different if a reservation sought merely to restrict certain aspects of a nonderogable right without depriving the right as a whole of its basic purpose". See IACtHR, Advisory Opinion

OC-3/83, *Restrictions to the Death Penalty* (Arts. 4(2) and 4(4) American Convention on Human Rights), 8 September 1983, Ser. A 3, at para. 61.

69. On this issue, see Cook, "Women's Rights and the Canadian Ratification of the American Convention on Human Rights"; Rights & Democracy, "Brief Regarding Ratification by Canada of the American Convention on Human Rights".
70. See OAS, *Annual Report of the Office of the Special Rapporteur on Freedom of Expression 2004*, OEA/Ser.L/V/II.122, Doc. 5 rev. 1, 23 February 2005, at paras 38 et seq., available at <http://www.cidh.oas.org/relatoria/showarticle.asp?artID=459&lID=1> (accessed 19 August 2009).
71. Ibid., paras 7–33.
72. Ibid. See, for example, *Prosecutor* v. *Nahimana, Barayagwiza and Ngeze*, ICTR-99-52-T.
73. See *Annual Report of the Office of the Special Rapporteur on Freedom of Expression 2004*, paras. 11–15, 19. See also *"Ross v Canada" Views of the Human Rights Committee*, UN GAOR Hum. Rts Comm., 70th Sess., UN Doc. CCPR/C/70/D/736/1997 (2000); *J.R.T. and the W.G. Party v. Canada*, Communication No. 104/1981, UN Doc. Supp. No. 40 (A/38/40-) at 231 (1983).
74. See, for example, Rights & Democracy, "Brief Regarding Ratification by Canada of the American Convention on Human Rights", proposing that Canada specify that it is bound by Article 13 to the extent that it is compatible with Canada's other international obligations under international law.
75. See Cooper, "The OAS Democratic Solidarity Paradigm".
76. See, on this issue, Amnesty International, *Appel en faveur des droits humains*; Duhaime, "Protecting Human Rights", pp. 233–234; Thérien, Héneault and Roberge, "Le régime interaméricain: Acquis et défis", p. 436; CLAIHR 2003, p. 4.
77. See, for example, *Guérin c. La Reine*, [1984] 2 R.C.S. 335.
78. See, for example, Amnesty International, "Summit of the Americas: Canada Must Take Concrete Action in Favour of Human Rights", 6 April 2001, available at <http://www.amnesty.ca/amnestynews/view.php?load=arcview&article=296&c=Human+Rights+Defenders+News> (accessed 19 August 2009); CLAIHR 2003, p. 4; Cook, "Women's Rights and the Canadian Ratification of the American Convention on Human Rights".
79. See, generally, Rights & Democracy, "Brief Regarding Ratification by Canada of the American Convention on Human Rights", p. 3; see also, generally, Thérien, Héneault and Roberge, "Le régime interaméricain: Acquis et défis", p. 440.
80. On this issue, see Rights & Democracy, "Brief Regarding Ratification by Canada of the American Convention on Human Rights", p. 3.
81. See, generally, OAS PC CJPA April 2000.
82. As Canada argued it does; see online at <http://www.international.gc.ca/foreign_policy/human-rights/hr4-approach-en.asp> (accessed 15 November 2006).
83. Senate 2003 and 2005 Reports.
84. For the official position of the Canadian government on this issue, see Ministère des affaires étrangères et du commerce international du Canada, *Adhésion du Canada à la Convention américaine relative aux droits de l'homme: Le temps est venu de passer à l'action; Réponse du gouvernement au Dix-huitième rapport du comité sénatorial permanent des droits de la personne*, November 2005, available at <http://geo.international.gc.ca/latin-america/latinamerica/whats_new/default-fr.asp?id=3957&content_type=2> (accessed 15 November 2006).
85. Senate 2005 Report, p. 7.
86. Ibid.
87. See, for example, OAS PC CJPA April 2000, p. 15. See also *Strengthening of Human*

Rights Systems Pursuant to the Plan of Action of the Third Summit of the Americas, AG/RES. 2075 (XXXV-O/05).

88. Duhaime, "Protecting Human Rights", pp. 237 et seq.; Coalition 2005 GA Presentation, p. 3; 2006 Report of the IACHR Executive Secretary, p. 9.
89. Amnesty International, *Appel en faveur des droits humains*; "The Washington Colloquium on the Inter-American Human Rights System".
90. Third Summit of the Americas, *Declaration of Quebec City*, Quebec, Canada, 2001, available at <http://www.summit-americas.org/documents%20for%20quebec%20city%20summit/quebec/Declaration%20of%20Quebec%20City%20-%20Eng%20-%20final.htm> (accessed 19 August 2009).
91. Fourth Summit of the Americas, Declaration of Mar del Plata, "Creating Jobs to Fight Poverty and Strengthen Democratic Governance", Mar del Plata, Argentina, 5 November 2005, para. 63, available at <http://www.summit-americas.org/Documents%20for%20Argentina%20Summit%202005/IV%20Summit/Declaracion/Word%20Format/Declaracion%20IV%20Cumbre-eng%20nov5%209pm%20rev.1.doc> (accessed 19 August 2009). See also Duhaime, "Protecting Human Rights", p. 238.
92. See, for example, OAS PC CJPA April 2000, p. 15.
93. See Cooper, "Ownership and the 'Canadian' Model", p. 32; Amnesty International, "Summit of the Americas: Canada Must Take Concrete Action".
94. For example, Canada voted against the UN Draft Declaration on the Rights of Indigenous Peoples, adopted by the UN Human Rights Council. For details on the Canadian position, see Valerie Taliman, "U.N. Human Rights Council Adopts Declaration on Indigenous Rights", *Indian Country Today*, 5 July 2006, available at <http://www.indianlaw.org/sites/indianlaw.org/files/resources/ICT_hrc_adopts_declaration_20060705.pdf>. See also Rights & Democracy, "International Day of the World's Indigenous Peoples – A Bitter Anniversary for the Rights of Canada's Aboriginal Peoples", 8 August 2006, available at <http://www.dd-rd.ca/site/media/index.php?lang=en&subsection=news&id=1855> (accessed 19 August 2009).
95. See, for example, "Mexico Contributes to Inter-American Commission on Human Rights", OAS Press Release E-223/06, 18 October 2006, available at <http://www.oas.org/OASpage/press_releases/press_release.asp?sCodigo=E-223/06> (accessed 19 August 2009).
96. See online at <http://www.acdi-cida.gc.ca/CIDAWEB/acdicida.nsf/En/JUD-32712382-NPB> (accessed 15 November 2006).
97. See online at <http://www.acdi-cida.gc.ca/CIDAWEB/acdicida.nsf/En/EMA-21812118-NLL> (accessed 15 November 2006).
98. These OAS member states are also members of other multilateral cultural organizations of which Canada is a leader: the Commonwealth and the Organisation internationale de la Francophonie. See Boehm, "A Fresh Look at Old Friends", pp. 7–8.
99. See online at <http://geo.international.gc.ca/cip-pic/current_discussions/reconstructinghaiti-en.asp> (accessed 15 November 2006); see also Boehm, "A Fresh Look at Old Friends", p. 9.
100. *Strengthening Democracy in Haiti*, AG/RES. 2147 (XXXV-O/05).
101. IACHR, *Haïti: Justice en Déroute ou l'État de Droit? Défis pour Haïti et la Communauté Internationale*, OEA/Ser.L/V/II.123, Doc. 6 rev. 1, 26 October 2005, summary, para. 7.
102. See González, "La OEA y los derechos humanos". See also "Weak Institutions a Threat to Open Society, George Soros Tells International Audience at OAS", OAS Press Release E-209/06, 4 October 2006, available at <http://www.oas.org/OASpage/press_releases/press_release.asp?sCodigo=E-209/06> (accessed 19 August 2009); Thérien, Héneault and Roberge, "Le régime interaméricain: Acquis et défis", pp. 422,

428 et seq.; Rights & Democracy, "Brief Regarding Ratification by Canada of the American Convention on Human Rights", p. 3.

103. *Inter-American Democratic Charter*, OAS Doc. OEA/SerP/AG/Res.1 (2001); OAS General Assembly, 28th Special Session, 11 September 2001, OAS Doc. OEA/Ser.P/AG/RES.1 (XXVIII-E/01), 40 ILM 1289 (2001); see also Coalition 2005 GA Presentation, pp. 1 and 7; Thérien, Héneault and Roberge, "Le régime interaméricain: Acquis et défis", pp. 422, 433 et seq.; Lessard, "From Quebec to Lima".
104. See online at <http://www.oas.org/sap/english/default.asp> (accessed 19 August 2009); Cooper, "Ownership and the 'Canadian' Model", p. 35; Cooper, "The OAS Democratic Solidarity Paradigm". See also "Highlighting Human Security", *Americas* 52:3, 30 June 2000, which refers to the views of Canada's former Minister of Foreign Affairs, Lloyd Axworthy, regarding Canada's programme on human security and the importance of strengthening democracy.
105. See, for example, Lloyd Axworthy, "A Model for Promoting Democracy in the Americas", *Canadian Foreign Policy/La politique étrangère canadienne* 10:3 (2003), pp. 13–14.
106. See Thérien, Héneault and Roberge, "Le régime interaméricain: Acquis et défis", pp. 434–435.
107. See, for example, Lessard, "From Quebec to Lima", p. 90; IACHR, *Report on the Situation of Human Rights in Peru (2000)*, OEA/Ser.L/V/II.106, Doc. 59 rev., 2 June 2000.
108. See also Thérien, Héneault and Roberge, "Le régime interaméricain: Acquis et défis", pp. 422–423; see, generally, Cooper, "The OAS Democratic Solidarity Paradigm".
109. See IACHR, *Report on the Situation of Human Rights in Peru*; IACHR Press Release 18/00, 8 December 2000; Duhaime, "Protecting Human Rights", p. 231 et seq.; Lessard, "From Quebec to Lima", p. 90.
110. See also Thérien, Héneault and Roberge, "Le régime interaméricain: Acquis et défis", pp. 442–443; Cooper, "The OAS Democratic Solidarity Paradigm".
111. This would correspond to Canadian Foreign Affairs Minister Axworthy's views on human security, as expressed in his June 2000 speech to the OAS General Assembly, describing how human security requires respect for human rights and how the OAS did contribute to this dynamic via the Unit for the Promotion of Democracy, supported mainly by Canada. See "Highlighting Human Security", p. 2.
112. In some OAS member states, for example, there have been instances of grassroots organizations and other types of political entities allegedly being involved in repressive actions against political opponents and activists, journalists and so on. See, for example, "IACHR Concerned over Recent Events in Haiti", IACHR Press Release No. 33/03, 9 December 2003; see also "IACHR Voices Concern at the Continuing Deterioration of the Rule of Law in Venezuela", IACHR Press Release No. 5/03, 10 March 2003.
113. "The Washington Colloquium on the Inter-American Human Rights System"; CEJIL, "La necesidad de mantener un dabate abierto", p. 2.
114. Presentation by Mariclaire Acosta before the Coalición Internacional de Organizaciones para los Derechos Humanos en las Américas, 21 October 2006, Washington DC.
115. This could entail consultations within the Permanent Council as well as specific reports on issues such as human rights and security, immigration, etc.
116. The fact that the 2006 General Assembly allowed for a two-hour discussion among member states on human rights issues (in comparison with about 10 minutes in most previous assemblies) is certainly encouraging. See also OAS PC CJPA April 2000, p. 16.
117. The presentation of an IACHR report by the OAS Secretary General himself certainly contributed to raising the report's profile, importance and credibility. See "Insulza Resalta Labor de Defensores de Derechos Humanos en el Continente", OAS Press

Release C-225/06, 18 October 2006, available at <http://www.oas.org/OASpage/press_releases/press_release.asp?sCodigo=C-225/06> (accessed 19 August 2009).

118. On the general issue of cooperation, see Rescia and Seitles, "The Development of the Inter-American Human Rights System", p. 622. See also OAS PC CJPA April 2000, p. 1.
119. See, for example, *Protecting Human Rights and Fundamental Freedoms While Countering Terrorism*, AG/RES. 2143 (XXXV-O/05). See also the *Fourth Biennial Report on Fulfillment of Resolution AG/RES. 1456 (XXVII-O/97), "Promotion of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, 'Convention of Belém do Pará'"*, AG/RES. 2138 (XXXV-O/05).
120. See, for example, *Standards for the Preparation of Periodic Reports Pursuant to the Protocol of San Salvador*, AG/RES. 2074 (XXXV-O/05); see also Duhaime, "Protecting Human Rights".
121. See, for example, *American Declaration on the Rights of Indigenous Peoples*, AG/RES. 2073 (XXXV-O/05); see also Permanent Council of the Organization of American States Committee on Juridical and Political Affairs, Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples, *Report of the Chair on the Seventh Meeting of Negotiations in the Quest for Points of Consensus*, OEA/Ser.K/XVI, GT/DADIN/doc.258/06, 25 March 2006.
122. Notwithstanding the fact that the OAS General Assembly has urged the Inter-American Committee against Terrorism to cooperate with the Inter-American Commission on Human Rights (see AG/RES. 2143 XXXV-O/05), our understanding is that very few initiatives are undertaken jointly on this issue.
123. See, for example, *Observations and Recommendations on the Annual Report of the Inter-American Drug Abuse Control Commission (CICAD)*, AG/RES. 2098 (XXXV-O/05). Although both CICAD and IACHR are concerned with the effects of the aerial spray programme for coca and poppy control in Colombia, to our knowledge no joint initiative has been undertaken on the matter. See CICAD, Alternative Development Projects, "Environmental and Human Health Assessment of the Aerial Spray Program for Coca and Poppy Control in Colombia" at <http://www.cicad.oas.org/desarrollo_alternativo/eng/projects%20by%20country/colombia/fumigation-project.asp> (accessed 19 August 2009); CICAD initiatives deal mainly with environmental and health-related issues rather than possible human rights violations as such. See also IACHR Press Release No. 34/06 at <http://www.cidh.org/Comunicados/English/2006/34.06eng.htm> (accessed 19 August 2009) regarding the 24 October 2006 hearing of the IACHR dealing with "Human rights situation of inhabitants of the Ecuadorian and Colombian border area".
124. See, for example, *Fourth Biennial Report on Fulfillment of Convention of Belém do Pará*, AG/RES. 2138 (XXXV-O/05). See also Follow-Up Mechanism to the Convention of Belém do Pará (Mesecvi), Committee of Experts on Violence (Cevi), *Meeting of Experts on the Follow-Up Mechanism to the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Convención of Belém do Pará)*, OEA/Ser.L/II.7.10, MESECVI/CEVI/doc.66/06, 24 July 2006. On the importance of independence in such control mechanisms, see Amnesty International, *Appel en faveur des droits humains*, p. 4.
125. See *Strengthening of Human Rights Systems Pursuant to the Plan of Action of the Third Summit of the Americas*, 3rd considerando, AG/RES. 2075 (XXXV-O/05).
126. Duhaime, "Commission Interaméricaine des Droits de l'Homme en 2005: Enjeux". See also "IACHR Considers That the New Structure Designed by the OAS Secretary General Affects Its Independence and Autonomy", IACHR Press Release No. 21/04, 21

October 2004; "IACHR Reaffirms Its Independence at the Conclusion of Its Sessions", IACHR Press Release No. 23/04, 28 October 2004; "The Washington Colloquium on the Inter-American Human Rights System".

127. Duhaime, "Protecting Human Rights", p. 237 et seq.; 2006 Report of the IACHR Executive Secretary, pp. 15–16.
128. For example, Canada did support General Assembly AG/RES. 2147 (XXXV-O/05), which urges the Inter-American Commission on Human Rights to continue to monitor and report on the human rights situation in Haiti and to work with the OAS Special Mission on the promotion and observance of those rights (para. 13).
129. See, for example, IACHR, *Report on the Situation of Human Rights in Peru*; IACHR, *Haïti: Justice en Déroute ou l'État de Droit?*
130. American Convention on Human Rights, Art. 8; American Declaration of the Rights and Duties of Man, Art. XXVI.
131. Convention, Art. 25; Declaration, Art. XVIII.
132. Convention, Arts 46–47; IACHR Rules of Procedure, Arts 31 and 50.
133. See, generally, <http://geo.international.gc.ca/cip-pic/current_discussions/reconstructing haiti-en.asp> (accessed 15 November 2006). See also CIDA, "Haiti", at <http://www.acdi-cida.gc.ca/CIDAWEB/acdicida.nsf/En/JUD-12912349-NLX?OpenDocument> (accessed 15 November 2006).
134. See, for example, "Interview with Graham Muir, Chief Superintendent in the RCMP", at <http://www.international.gc.ca/cip-pic/video/haiti/muir.aspx?lang=eng> (accessed 19 August 2009).
135. See <http://www.acdi-cida.gc.ca/cidaweb/acdicida.nsf/En/ALA-7259307-HUD> (accessed 15 November 2006); justice and human rights constitute one of the four priority areas for projects financed by the Canadian International Development Agency. In particular CIDA's "Consolidation of the Rule of Law" project assists in strengthening the Haitian criminal justice system by training court clerks, improving management within the penitentiaries system, and strengthening the Office of the Ombudsman. CIDA's "Fund for Support of Justice and Human Rights – Phase II" project supports initiatives aimed at promoting access to justice and representing the rights of Haitians before courts and tribunals. CIDA's "Fonds Kore Famn – Phase II" project supports interventions seeking a better defence of women's human rights. See <http://www.acdi-cida.gc.ca/CIDAWEB/acdicida.nsf/En/NIC-223124220-NS3> (accessed 15 November 2006).
136. See <http://www.cejamericas.org/> (accessed 19 August 2009). See also "Highlighting Human Security", p. 2. This project seeks to improve the criminal justice system in selected Latin American countries to achieve greater transparency and efficiency.
137. Most of the Inter-American human rights law's innovations result from cases brought by NGOs, whether it be in fields such as the struggle against impunity, the application of human rights law during armed conflicts and counter-terrorism operations, the rights of indigenous peoples, and so on.
138. See, for example, the modifications to the IACHR Rules of Procedure, which resulted in part from civil society's criticism of some of the Commission's internal processes. "CIDH aprueba reformas a su reglamento y establece normas de procedimiento para designación de Relatores especiales", IACHR Press Release No. 41/06; "The Washington Colloquium on the Inter-American Human Rights System"; Lessard, "From Quebec to Lima", p. 88 et seq.
139. "The Washington Colloquium on the Inter-American Human Rights System"; Lessard, "From Quebec to Lima", p. 88 et seq.
140. Duhaime, "Protecting Human Rights", p. 241 et seq.
141. For example, CIDA funds Canadian institutions such as Rights & Democracy, Alternatives and the Canadian Foundation for the Americas (FOCAL). See CIDA,

"Inter-American Program", at <http://www.acdi-cida.gc.ca/CIDAWEB/acdicida.nsf/En/JUD-32712382-NPB> (accessed 19 August 2009); the Rights & Democracy website at <http://www.ichrdd.ca/site/home/index.php?lang=fr> (accessed 19 August 2009); the Alternatives website at <http://www.alternatives.ca/> (accessed 19 August 2009); the FOCAL website at <http://www.focal.ca/> (accessed 19 August 2009).

142. See Senate 2003 Report, p. 5.
143. See Lessard, "From Quebec to Lima", pp. 91, 94.
144. See Senate 2005 Report, p. 7 et seq.
145. See Coalition 2005 GA Presentation, p. 8.
146. See Rights & Democracy, "Brief Regarding Ratification by Canada of the American Convention on Human Rights", p. 7.
147. OAS Charter, Preamble, para. 1.

5

Human rights and the state in Latin America

Ramesh Thakur and Jorge Heine

In one of those extraordinary coincidences that suggest a rich vein of irony runs through history, on 10 December 2006, International Human Rights Day, General Augusto Pinochet, who ruled Chile with an iron fist from 1973 to 1990, passed away. Pinochet's government engaged in some of the worst human rights violations committed by the region's bureaucratic-authoritarian regimes in the 1970s and 1980s.[1] In turn, the way that the successor democratic governments, from the 1990s to today, handled that legacy provides a succinct catalogue of the difficult dilemmas faced by new democracies as they deal with an evil past.[2] The purpose of this chapter is to provide some partial and limited observations on the evolution of human rights regimes in the context of changing conceptions of the state, with a special focus on Latin America in general and on Chile in particular, where developments have arguably had a significant impact on international human rights law.[3]

The state, the rule of law and human rights

The state

Latin America is unusual in the degree to which the basic identity and existence of its states have not been threatened, even though many regimes have undergone fundamental transformations. The state is an abstract yet powerful notion that embraces the total network of authoritative institutions that make and enforce collective decisions throughout a

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country. The modern state is the most substantial manifestation of political power that has been progressively depersonalized, formalized and rationalized. That is, the state is the medium through which political power is integrated into a comprehensive social order. The state embodies the political mission of a society, and its institutions and officials express the proper array of techniques that are used in efforts to accomplish this mission.

In development theory the state was viewed as autonomous, homogeneous, in control of economic and political power, in charge of foreign economic relations, and possessing the requisite managerial and technical capacity to formulate and implement planned development. In reality, in many developing countries the state was a tool of a narrow family, clique or sect that was fully preoccupied with fighting off internal and external challenges to its closed privileges. In most of the literature, development has meant a strengthening of the material base of a society. A strong state would ensure order, look after national security and intervene actively in the management of the national economy. Yet the consolidation of state power can be used, in the name of national security and law and order, to suppress individual, group or even majority demands on the government, and also to plunder the resources of a society.

The rule of law

As described above, a normative core – the moral mission – is integral to the identity of a state. A norm can be defined statistically – the normal curve – to mean the pattern of behaviour that *is* most common or usual; that is to say, to refer to the *prevailing pattern* of behaviour. Or it can be defined ethically, to mean a pattern of behaviour that *should* be followed in accordance with a given value system; that is to say, to refer to a generally accepted *standard* of proper behaviour. Norms are standards of appropriate behaviour; rules are specific applications of norms to particular situations, either prescribing or proscribing action to conform with the norm; laws are formal rules duly passed and promulgated by the authorized institutions of a political system.

The unifying theme that brings democracy and human rights together is the importance of the rule of law. Because that is what tames power; mediates relations between the citizen and the state and other actors; puts them on an equal footing; mediates relations between the big and the small, the powerful and the weak, the rich and the poor. But if we are going to have a functioning rule of law, state capacity is a prerequisite. We cannot have a rule of law under the conditions of a failed state. We cannot have it under a weak state. We need a functioning state. And if we accept that the rule of law is the prerequisite for human rights, then a

capable state is a condition *sine qua non* for the fulfilment of human rights and the protection and defence of those rights.

At the same time, in Western theory and most of Western practice, the state is the neutral arbiter of inter-group competition for the authoritative allocation of values. In much of the developing world, the reality is that the state has itself been the most prized lever and instrument, the capture of which allows an individual, a family, a clique, a clan or whatever to suppress, repress, oppress or even liquidate others, and to plunder and expropriate the resources and wealth of society.

Therefore, although a functioning state may be a prerequisite, a necessary condition, by no means is it a sufficient condition. We need to look at the type of state, the constraints on the state and how to create a legitimate state within the terms we are looking at. When we speak of a democracy, we actually have in mind liberal democracy – and that is important, because it safeguards and embeds the protection of minorities within the liberal system, defending them from majority oppression. Democracy by itself can lead to majority brutality over minority communities, and we have to guard against that as well.

There is also a risk of privileging one segment or sector or profession – a part of the state over the others – and making that too strong, which leads to a denial of human rights and to abusive practices, and may at the extreme end, as we started off by saying, bring in the international responsibility to protect.

Like domestic law, international law is an effort to align power to justice. Politics is about power: its location, bases, exercise, effects. Law seeks to tame power and convert it into authority through legitimizing principles (e.g. democracy, separation of powers), structures (e.g. legislature, executive and judiciary) and procedures (e.g. elections). Law thereby mediates relations between the rich and the poor, the weak and the powerful, by acting as a constraint on capricious behaviour and setting limits on the arbitrary exercise of power. Conversely, the greater the gap between power and authority, the closer we are to anarchy, to the law of the jungle where might equals right, and the greater is the legitimacy deficit. Equally, the greater the gap between power and justice in world affairs, the greater the international legitimacy deficit.

Human rights

The rise and diffusion of human rights norms and conventions and the extension and diffusion of international humanitarian law were among the truly great achievements of the twentieth century. The "first-generation negative rights" emerged from constitutional traditions that prevented the state from curtailing the civil rights and political liberties of citizens;

the "second-generation positive rights" reflected the agenda of many newly independent but poor countries to prescribe an activist agenda of social and economic rights for their citizens; and the "third-generation solidarity rights" pertain to collective entities rather than individuals, based on notions of solidarity.[4]

International concern with human rights prior to the Second World War dwelt on the laws of warfare, slavery and the protection of minorities. The experience of Fascism/Nazism strengthened the concern and enlarged its scope. In 1948, conscious of the atrocities committed by the Nazis while the world looked silently away, the United Nations adopted the Universal Declaration of Human Rights. It is the embodiment and the proclamation of the human rights norm. On a par with other great historical documents such as the French Declaration of the Rights of Man and the American Declaration of Independence, the Universal Declaration was the first *international* affirmation of the rights held in common by all.[5] International Covenants in 1966 added force and specificity, affirming both civil and political rights and social, economic and cultural rights, without privileging either set. Together with the Declaration, they comprise the International Bill of Rights, and are our "firewalls against barbarism", "a tool kit against oppression" and a source of power and authority on behalf of victims.[6]

A right is a claim, an entitlement that may be neither conferred nor denied. A human right, owed to every person simply as a human being, is inherently universal. Held only by human beings, but equally by all, it does not flow from any office, rank or relationship. "Human rights is the language that systematically embodies" the intuition that the human species is one, "and each of the individuals who compose it is entitled to equal moral consideration".[7] The debate in US circles on whether in some circumstances torture – whose prohibition "appears on every short list of truly universal standards"[8] – can be justified if it leads to preventing mass terrorist attacks, and may therefore be authorized by judges through "torture warrants", mirrors long-argued positions on cultural relativism. The idea of universal rights is denied by some who insist that moral standards are always culture specific. Human beings do not inhabit a universe of shared moral values. Instead, we find diverse moral communities cohabiting in international society. Article 16.2 of the Universal Declaration of Human Rights proclaims the right to marriage "only with the free and full consent of the intending spouses" – a norm as *ought*; the clause contravenes the widespread practice of arranged marriage, which many societies regard as perfectly consistent with their moral systems – a norm as *is*. Political rights (freedoms of speech, press and assembly; political and legal equality) are rights held by the individual against the state. By contrast, in many societies the individual as a person is a social

construct: individual beliefs, religions, worldviews, language, gestures, mores are all shaped by and products of society and culture.

A posture of moral relativism can be profoundly racist, proclaiming in effect that "the other" is not worthy of the dignity that belongs inalienably to one. By contrast, human rights advocacy rests on "the moral imagination to feel the pain of others" as if it were one's own, treats others as "rights-bearing equals", not "dependents in tutelage", and can be viewed as "a juridical articulation of duty by those in zones of safety towards those in zones of danger".[9] Relativism requires an acknowledgement that each culture has its own moral system, and that institutional protection of human rights must be grounded in historically textured conditions and local political culture. But just because moral precepts vary from culture to culture does not mean that different peoples do not hold some values in common. This is what makes human rights protection embedded in particular cultural traditions compatible with moral pluralism. For every society, murder is always wrong. But few proscribe the act of killing absolutely in all circumstances. At different times, in different societies, war, capital punishment or abortion may or may not be morally permissible. So the *interpretation and application* of the moral proscription of murder varies from one time, place and society to another.

UN leadership on human rights has helped to change the public policy discourse in all parts of the world.[10] "Those whose rights have been trampled are no longer alone; the state's monopoly on international affairs has been broken, and literally hundreds of organizations watch for human rights abuses by whoever might commit them."[11] As a universal organization, the United Nations provides a unique institutional framework to develop and promote human rights norms and practices and to advance legal, monitoring and operational instruments to uphold the universality of human rights while respecting national and cultural diversity.

The "juridical, advocacy and enforcement revolutions" in human rights[12] rest on a partnership between intergovernmental and non-governmental actors with regard to standard-setting, rule creation, monitoring and compliance. There is a symbiotic relationship between the United Nations and civil society organizations (CSOs) in the implementation of existing human rights standards and the establishment of new ones. Acting in concert, the United Nations and the CSOs have helped to establish the principle that states are responsible for the protection of the human rights of their citizens and internationally accountable for any failures to do so. Conversely, CSOs set the standard against which UN efforts at censuring and preventing human rights abuses are often measured. The United Nations can proclaim the human rights and humanitarian norms that we hold dear; CSOs can monitor compliance of state behaviour with these lofty proclamations.

At the same time, the state can also be the articulator of human rights (particularly in law), the chief promoter, defender, monitor and enforcer of human rights. In other words, the way in which a society confronts the issue of violence against specific groups, such as women or minorities, defines the experience of rights, dignity and security for these sectors of the population. And it is the state that has to have the lead responsibility for doing something about this – starting with laws and their enactment for the protection of these groups; through the creation of bureaucratic machinery, police machinery and judicial machinery for the enforcement of these laws, for training officials in gender sensitivity, for taking these laws seriously, and so on and so forth.

But of course we also encounter difficulty: if the state is to be the embodiment of the moral mission of a society and the lead moral agent, what happens if the state is well ahead of social mores and norms? Whose values are they now incorporating? And this is often where the disconnect can come in, between the national level and global norms, and between social norms at the national level. In other words, we have to bear in mind that we cannot go too far from existing social practices, otherwise the whole mission might fail. Nonetheless, if we are going to protect vulnerable groups, we need a state that can collect information, that can enact laws and that can enforce its laws. None of this is possible for a weak, failing or failed state.

Of course, as already noted, if we have too strong a state, too strong in many senses – a particular group (say the Sunnis in Iraq) or sector (say the military in Pinochet's Chile, Suharto's Indonesia or Pakistan for most of its existence) can be too strong compared with the others – we have a problem. In a number of Latin American countries, where the Europeanized, Spanish-speaking, *criollo* elite has held sway over the rest of the population, be it indigenous, *mestizo* or black, this is especially apparent, and has been underscored by the fact that President Evo Morales of Bolivia, who took office in January of 2006, was the first indigenous head of state elected in Bolivia in almost two centuries of its independent history. Something similar can be said about the privileged position that the military have held for long periods and, in some cases, to this day. There can also be a problem if a particular religion is privileged.

Democracy and human rights: The Latin American experience

With respect to the relationship between the state and human rights abuses, the state can be incapable of preventing human rights abuses; it may prove itself to be unwilling to protect human rights; or it may itself

prove to be the perpetrator of human rights abuses. And if it chooses to be the perpetrator, then of course it can be the worst perpetrator of all.

Both democracy and human rights are about the location, the distribution and the exercise of public power, between a range of actors, social groups and citizens. They both involve principles that underpin such an exercise, the distribution of power, institutions in which the principles are embedded, and checks and constraints on them, especially in law but also by convention and practice. This is why democracies, grounded in the rule of law that puts citizens and rulers alike on the same footing and constrains arbitrary and harmful behaviour by both, promote and protect human rights better than alternative regimes.

In the case of Latin America, there has been an interesting evolution on human rights issues, which have been closely associated with the region's democratic development. For these purposes, we can distinguish three distinct phases: rule under dictatorships; transitions from dictatorships to democracies; and coming to terms with and reaching closure about the human rights abuses committed during dictatorships.

Defending human rights under dictatorships

Two separate issues are often merged and confused in the public discourse on human rights: the relevant legal regime that should apply to citizens, and abuses in the actual treatment of people. Only the latter is a problem under democracies limited by the rule of law; both can be problematical under dictatorships acting above and beyond the law.

Interestingly and revealingly, the vocabulary of human rights was used very sparingly (if at all) in Latin America until the early 1970s. Although dictatorships and their abuses had for long been entrenched in the region, it was not until General Augusto Pinochet took power in a bloody coup in September 1973 in Chile that human rights emerged as a serious issue in international organizations and in US foreign policy.[13] The worldwide attention that Salvador Allende's "Chilean road to socialism" had attracted, the breakdown of one of the world's oldest democracies, the brazenness of the repression unleashed by the military junta and the ostensible support provided to it by Washington turned out to be an explosive cocktail that catapulted human rights to the top of the agenda both at home and abroad.

In a few short years, much of Latin America found itself under military rule (in 1979, only two countries in South America – Colombia and Venezuela – had elected governments). Some military regimes were more repressive than others, but those of the Southern Cone proceeded in a particularly systematic fashion; they even coordinated among themselves elaborate procedures to identify, target, capture and eliminate political

adversaries, as well as to "repatriate" them to their countries of origin, in the infamous "Operación Cóndor", of which General Manuel Contreras, head of Chile's secret police, was one of the masterminds.[14]

At this point, the nature of political cleavages changed. The sharp ideological differences between socialism and capitalism and between revolution and the status quo, which had been such prominent features of the 1960s, were displaced by a different axis, in which human rights took centre stage. Political parties, which had largely been banned, were displaced by organizations such as the Catholic Church and by prominent lawyers and organizations representing the relatives of the victims and the "disappeared".[15] Through a variety of means, they sought to protect the lives and physical integrity of those whom the military regimes identified as "subversives".[16]

Given the unwillingness of much of the judiciary to take a stand and defend a rule of law that had been largely compromised by the arbitrariness of dictatorial rule, internationalizing the defence of human rights became a key part of this strategy. Considering the critical view that important sectors of public opinion in North America and Western Europe had of the role that their own governments had played in facilitating (if not directly promoting) the emergence of military rule in Latin America, any further news of killings and "disappearances" was bound to elicit even stronger reactions. Often, the only way to save someone's life was to make public that he or she had been detained, and to make this known abroad.

In the United States, a critical turning point came with the election of Jimmy Carter as President in 1976. By making the defence of human rights in Latin America one of the key features of his campaign, he struck a very different chord from that of his Republican predecessors.[17] Upon coming into office, it was quickly established that one way to enforce his campaign promises to stand up for human rights in the Hemisphere was to revive the by then somewhat moribund Inter-American Commission on Human Rights within the Organization of American States (OAS). With a proper budget and the appointment of a respected international law specialist, jurist Edmundo Vargas, as its executive director, the Inter-American Commission on Human Rights quickly became a force to be reckoned with in the region, making governments realize that there was a price to be paid for arbitrary arrests, wilful imprisonments, torture and "disappearances".[18]

The "internationalization" of the issue made it much more difficult for the region's military regimes to ignore denunciations of human rights violations. Norm-violating governments can choose to deny the validity of global norms and reject critics as agents or stooges of ignorant or ill-intentioned foreigners. But, if vulnerable and subjected to sufficient

pressure, they may begin to make tactical concessions in order to mollify domestic and international critics, lift aid suspensions and so on. The discourse has shifted now from denying to accepting the validity of the norm but rejecting specific allegations of norm violation by questioning the facts and evidence presented by critics, or else insisting that these are isolated incidents and the cases will be investigated and perpetrators will be punished, etc. By such a process of "self-entrapment"[19] the war for human rights is won, though many battles might remain to be fought. Increasingly isolated in international organizations and in terms of public opinion in the developed world, the last thing the juntas needed was another United Nations resolution condemning their crimes, another editorial from *The New York Times* or *The Washington Post* (referred to for this very reason by the generals in their inner circle as *The Washington "Pravda"*), or still another rally in Hyde Park in London with demonstrators protesting against Latin American dictators.

Pushing for democratic transitions

None of this meant that human rights violations came to a full-stop, especially in the Southern Cone, where the bureaucratic-authoritarian regimes that came into existence in the 1960s and early 1970s had engaged in them with special brio. But they did diminish quite considerably, and the generals quickly realized that there were benefits to be gained from being somewhat more circumspect in these matters.

Few instances embody the changes that also took place in US human rights policy towards Latin America better than the ones to be observed between the first and the second term of Ronald Reagan's presidency. In a classic "pendulum" reaction against President Carter's policy, Jeane J. Kirkpatrick, one of the ideologues of the new administration that took office in January 1981, had elaborated on the distinction between "authoritarian" and "totalitarian" regimes.[20] According to her argument, Carter's mistake had been to confront too harshly the former (i.e. the Latin American military governments) while being much too tolerant of the latter (i.e. the communist countries). This would have been a particularly serious mistake since with authoritarianism there was always hope of democratic change, whereas totalitarianism had foreclosed any possibility of it (a prediction that turned out to be less than fully accurate, as the year 1989 was to attest).

In many ways, then, the return of the Republicans to the White House was seen as a reprieve by the Latin American juntas, which had felt somewhat beleaguered by the Carter administration. However, it is a testimony to the momentum that human rights as an issue had acquired by then that, whatever ideological and material succour the military regimes

were to receive from Washington in the 1981–1985 period, this came to an abrupt end in Ronald Reagan's second term. The stark contradiction between promoting democratization in Central and Eastern Europe and supporting authoritarian regimes in the Americas became too acutely apparent to be sustainable. The US State Department's official policy in Latin America therefore shifted to one of espousing democratic change in the Hemisphere and of strict condemnation of human rights violations. US Ambassador to Chile Harry Barnes, who made it a point to engage the democratic opposition to General Pinochet's rule, went so far as to attend the funerals of the victims of police repression, giving a clear signal as to where Washington stood.[21]

In many ways, then, the defence of human rights became inextricably linked with the struggle for democratization, and the strictly political arguments for putting an end to authoritarian rule became considerably strengthened by moral suasion.

Dealing with an evil past

Throughout much of the 1980s, the story of Latin America was one of transition to democracy, and by 1989 even Paraguay's long-lasting President, General Alfredo Stroessner, was out of office. The return of democracy meant the end of "death squads" and of centralized repression, as well as the re-establishment of civil liberties, a free press and elected governments. The newly elected democratic rulers, many of whom had made their mark by standing up for human rights, found themselves with their hands full as they faced the daunting challenges of re-crafting government institutions, looking for ways to pay what was often a considerable "social debt", and trying to reconnect their countries to an international system from which they had effectively been isolated for many years.

For obvious reasons, none of these leaders was especially eager to "frontload" his or her already busy agenda with additional issues, particularly if they were divisive ones. Nonetheless, they could not ignore the burning question of what to do about an "evil past", meaning the human rights violations of the previous regime. The choice was by no means an easy one. If, as was often the case, the possibility of authoritarian regression was very much there, did it make sense to risk sliding back to the dark days of dictatorship for the sake of revisiting and reopening old wounds about which nothing much could be done anyway?

The logics of peace and justice can sometimes be contradictory. Peace is forward looking, problem solving and integrative, requiring reconciliation between past enemies within an all-inclusive community. Justice is backward looking, finger pointing and retributive, requiring acknowledgement and atonement, if not trial and punishment, of the perpetrators of

past crimes. The pursuit of human rights violators can delay and impede the effort to establish conditions of security so that displaced people can return home and live in relative peace once again. Mercy has a role to play in reconstituting society after trauma, but justice has many more, and more fundamental, roles to play beyond bringing wrong-doers to account: acknowledging the suffering of victims, educating the public, deterring future criminal atrocities, establishing universal justice; in sum, easing the Kantian transition from barbarism to culture.

As mentioned above, the very legitimacy of the incoming coalition in several Latin American countries after the "decade of the disappeared" was often based on their moral superiority over the outgoing elites. It was their denunciation of those human rights violations that had depleted the political capital of the *ancien régime* and impelled them to the opposition frontlines.

What to do?

The Southern Cone provides us with four very different approaches to this conundrum. Brazil essentially opted to "let sleeping dogs lie" and simply let the issue rest. Uruguay, on the other hand, passed an amnesty law that in effect pardoned all human rights violations committed under military rule, thus "sweeping them under the rug", as it were. Argentina, in turn, set up special tribunals to try the top rung of the leadership of the outgoing regime, largely following the model of the Nuremberg and Tokyo trials after the Second World War. The shortcomings of these approaches, contested *ex post facto*, and which as a result ended up weakening the newly incoming civilian leaders (whose prescribed solutions did not "hold"), ultimately led to the development of a fourth approach – that of the truth and reconciliation commission (TRC) – followed in Chile and in several other countries.

Truth commissions and human rights regimes

As shown by the fate of General Pinochet, the landscape of international criminal justice has changed dramatically over the past 15–20 years. In 1990, a tyrant could have been reasonably confident of the guarantee of sovereign impunity for his atrocities. Today, there is no guarantee of prosecution and accountability; *but not a single brutish ruler can be confident of escaping international justice*. The certainty of impunity is gone.

The credit for the dramatic transformation of the international criminal landscape belongs to the ad hoc tribunals set up by the United Nations.[22] The ethic of conviction imposes obligations to prosecute people for their past criminal misdeeds to the full extent of the law. The ethic of responsibility imposes the countervailing requirement to judge the wisdom of alternative courses of action with respect to their consequences for social

harmony in the future. Although the ad hoc international tribunals have helped to bring hope and justice to some victims, combat the impunity of some perpetrators and greatly enrich the jurisprudence of international criminal and humanitarian law, they have been expensive and time consuming and have contributed little to sustainable national capacities for justice administration.

By contrast, TRCs can provide a halfway house between victors' or foreigners' justice and collective amnesia.[23] Truth commissions take a victim-centred approach, help to establish a historical record and contribute to memorializing defining epochs in a nation's history. They are officially appointed (albeit independent) bodies tasked to investigate human rights violations during a specific period (often that of the previous authoritarian regime). Their powers vary, but they are generally composed of respected personalities who are supposed to produce, within a specified time period (ideally from six months to two years), a report that documents those violations for the record and establishes a factual truth of sorts about what actually happened. TRCs are not tribunals, and they may be formed by nationals (the general rule), foreign nationals (in cases where nationals dare not tread) or both. They are not necessarily incompatible with pre-existing amnesty provisions (the Chilean military regime passed one such self-amnesty law in 1978), nor do they preclude subsequent prosecutions by the courts, but they have increasingly emerged as the policy tool of choice for new democracies eager to heal past wounds.

Although estimates vary, the United States Institute of Peace lists a total of 25 TRCs in as many countries, of which 10 are Latin American ones.[24] There is little doubt, therefore, that the Latin American experience with TRCs is significant, perhaps more so than in any other region of the world. At the same time, it is also true that TRCs provide no magic wand to wave away the dark issues of the past. Like all policy tools, they are only as good as their design, their implementation and the commitment to respect their recommendations by the government of the day. And, in this, the record is decidedly mixed; some reports were never made public (such as that of Guatemala) and others were simply filed away, without any effort at dissemination (such as that of Haiti). Other commissions have come up with widely respected reports – the products of painstaking research and careful drafting – which have also been widely disseminated, such as those of Chile and Peru.

Apart from these considerable variations, three additional things stand out in the Latin American experience with TRCs. The first is that, counter-intuitively, even two decades after the region's transition to democracy, TRCs refuse to go away. Uruguay initially applied a very different approach in the 1980s (that is, one of a blanket amnesty for human rights violations) but, having gone through two plebiscites where the repeal of this amnesty was mooted, in 2000 it appointed a Truth Commission

to look into these violations. Peru did the same in 2001, and even Chile, which had set up its own TRC in 1990, 13 years later saw the need to appoint a second one, this time to look into the situation of torture victims, which had not been included in the ambit of the first.[25]

The second point is the importance of timing. A course of action that might be injurious to a fledgling democratic regime's health in the beginning may become feasible after some time. By definition, countries coming out of protracted experiences of systematic assaults on the human rights of many (if not most) citizens are going to be fragile democracies. The passage of time, the experience of repeated elections and the frequent exercise of political freedoms, backed by an increasingly robust civil society, free press and independent judiciary, help to consolidate democracy and give it greater resilience to withstand more serious shocks to the system. At this stage, former perpetrators whose persona was once off-limits to prosecutors can indeed be hauled back into the criminal justice system for their past misdeeds. This has been the experience in Argentina and Chile.

The third and final point is what we might call "the TRC as a comparative public policy learning experience", and the degree to which this specific policy instrument has been used in different settings with widely differing historical and political circumstances, yet building on previous experiences and thus refining it further. The related experiences of Chile, South Africa and Peru are instructive in this regard. Whereas, in the early 1990s, it was the Chilean TRC that authored a widely praised report setting the standard in the field, by the late 1990s the one TRC that was acknowledged to have done the most thorough and wide-ranging job was the South African one, under the chairmanship of Nobel Laureate Archbishop Desmond Tutu, which had been partly inspired by the Chilean experience. In turn, when the Peruvian government decided to set up its own Truth Commission to look into the human rights violations committed under President Alberto Fujimori's government in its fight against the Shining Path insurgents in the 1990s, it did not take up the more modest and less ambitious "Chilean version", but drew directly from the South African one, producing a highly balanced and respected nine-volume report, published in 2003.

Human rights abuses, atrocities and international intervention

Latin America has probably been subjected to more external military intervention than any other continent. Where previously interventions were undertaken unabashedly in pursuit of geopolitical and commercial inter-

ests, today's sensibilities require different grounds of justification and legitimation. In particular, the intersection of the trend for the victims of armed conflict increasingly to be civilians, the rise of the human rights and international humanitarian law movements, and the globalization of media and communications means that there is enormous pressure on outsiders to provide forceful assistance to victims of atrocities inside sovereign borders, although preferably acting through the collective forums of the United Nations. That is, there is increasing restriction of the authority of states to use force unilaterally either against their own citizens inside their borders, or against other countries across borders.

As became evident from the recent reform efforts in the United Nations, one of the key questions is: in what circumstances, if ever, is the use of force both lawful and legitimate in order to provide effective international assistance or humanitarian protection to at-risk populations without the consent of their governments? And without consensus and clarity on this, UN performance will be measured against contradictory standards, incurring charges of ineffectiveness from some and of irrelevance from others, and increasing the possibility of unauthorized interventions, further eroding the United Nations' primacy in the area of peace and security.

The debate over when and how force may be used lies at the intersection of law, politics and norms. The United Nations is the forum of choice for debating and deciding on when collective action is required to use military force. It may not be the only appropriate forum – that is a different issue. The United Nations, we believe, has also been the principal forum for the progressive advancement of the human rights agenda, including group-based social, economic and cultural rights as well as individual civil and political rights.

Much of the debate on human rights reflects a certain ambivalence on this point. The human rights movement grew as an effort to curb arbitrary excesses by states against the liberties and rights of their own citizens, and in this regard it is a distinctive movement. International humanitarian law emerged as an effort to place limits on the behaviour of belligerent forces during conflict. The convergence of the interests of human rights and humanitarian communities with respect to protecting victims of atrocity crimes is a logical extension of their original impulses.

But, although it is a logical extension, it produces a major conundrum. The paradox of humanitarianism, defined by David Kennedy as "an endless struggle to contain war in the name of civilization",[26] is that it today encourages, even demands, the use of force to protect human rights, and that is a paradox that we have to grapple with.

Humanitarianism, then, provides us with a vocabulary and an institutional machinery of emancipation. But it must also be judged against the

pragmatic yardstick of intentions and consequences; this is the distinction that Tom Farer makes between the old utilitarianism and the new conservative one – because the old utilitarianism would have measured intentions against pragmatic consequences.[27] In this sense, what is intriguing is that, far from being a defence of the individual against the state (the original impulse), today human rights have become a standard part of the justification for the external use of force by the state against other states and individuals. That is a key transformation, and our point of departure in looking at this.

One of us (Ramesh Thakur) became especially interested in this topic during his work with the International Commission on Intervention and State Sovereignty, where the reformulation of the "Responsibility to Protect" took place.[28] In fact, the Commission ended up with a surprising conclusion, that the best world for us was actually a world of strong sovereign states, though with some qualifications.

Let us now go back to the two sets of iconic documents in the human rights tradition, the Universal Declaration of Human Rights and the two International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights of 1966. Of course, there is a whole range of others, but let us just stick to those, for the sake of simplifying. Tom Farer has brought in the important element of dignity.[29] We tend to forget the emphasis on dignity in the Universal Declaration, and we think of human rights independently of dignity.

In one tradition, or stream, we have the civil and political rights, with the emphasis on individual rights and therefore the accompanying tenets of a restrictive and limiting conception of state authority. But in the other stream we have the cultural, economic and social rights, which are much more collectivist and communitarian in their emphasis and impulse, and therefore call for an expansive and enabling conception of state authority. This tension is inherent in the human rights movement, if we think of human rights in their totality and do not privilege the civil and political over the economic and social. Certainly in the UN scheme, we are not permitted to privilege one over the other; they are equally important.

This is not an absolute distinction; there are cross-over points. To be permitted to be a Muslim is in practice meaningless if all the Muslims together are not permitted to engage in the rituals and practices of Islam, including praying in a mosque and receiving religious instruction. In Latin America over recent decades there have been many instances, in countries such as Argentina, Colombia, El Salvador and Guatemala, where paramilitary groups have undertaken kidnappings and assassinations against certain groups with extraordinary impunity. In these cases, it has not been the state itself that has been responsible for these actions, but it has tolerated them.

Another example of how the distinction between individual and group rights can be a false one is provided by the major debate over the place of indigenous people in Latin America today. It is very difficult to assert and maintain an identity as a Maya (in Mexico or in Guatemala), an Aymara (in Bolivia, Chile or Peru) or a Mapuche (in Chile) if the people concerned do not have access to bilingual education or if they are not provided with the public spaces in which to hold their traditional ceremonies and rituals and otherwise engage in the collective practices that define who they are.[30] Thus, sometimes we need the community and the collectivity in order to give practical expression to some individual rights that are essential, particularly in their dignity aspects.

Another good example of the need to maintain both individual and group rights is Cuba. From one point of view, there have been massive advances in human rights in Cuba under the communist regime – in social and economic rights, possibly for a greater share of the population than elsewhere in the region. This is reflected in life expectancy and traditional health and education indicators, which put Cuba at the very top in most regional comparisons. But, from another point of view, there are major problems with regard to individual human rights. If we look at Cuba in relation to almost any other Latin American country today, it will be unquestionably less democratic, whichever way we want to define it. But if we look at human rights, both individual and collective considered together, we are not at all convinced that the answer is as clear-cut. There are problems here. The same dilemma can be seen on the global plane in a comparative evaluation of the human rights records of China and India, with one having the better record on economic rights against the other's superior performance on civil and political freedoms.

Conclusion: Corruption as a cancer on state capacity

Let us finish with a particular illustration that most people do not think of, yet one that is highly relevant both to China and to India: the case of corruption and its relevance to state capacity. After this we will conclude with one broad statement.

Very few people think of corruption in relation to human rights.[31] But if there is large-scale corruption in public life, then the entire cycle of state capacity, from the enactment of laws through to judicial conviction and imprisonment, and everything in-between, can be bought at a price. That transaction is at the expense of the rule of law. If the purpose of the rule of law is to put everyone on the same footing, the availability of market power distorts that; it enfeebles and hollows out state capacity, other than in a formal nominal sense. Empirically, state capacity has

been denuded and has been bought. Once again, the Pinochet case is revealing. For a long time, a standard defence of Pinochet and his 17-year rule was that, although a number of people were killed and tortured in those years, this was done for the sake of restoring order in a situation closely resembling civil war. Moreover, it was argued, the crucial difference between him and other Latin American dictators was the seemingly unquestionable "honesty" of the general. Although the claim was always somewhat dubious (the precise origin of his large number of real estate holdings, which kept increasing in the course of his years in power, was never adequately explained), it received a death blow of sorts when the US Senate, in the course of the post-9/11 investigations on potential sources of financing of terrorist networks, uncovered almost 100 US bank accounts, mostly at Riggs Bank, in his name and/or a number of aliases, with up to US$25 million in unaccounted funds.

This is an interesting way of linking even corruption to state capacity and the denial of human rights. And it is in this respect that many countries in Latin America have such a dubious record. Many citizens of the region, despite living in regimes that can be described as democracies, really do not have a full and fair recourse to the law and to the judiciary, which can often be "bought" or otherwise manipulated and distorted in order to serve the purposes of the elites that control the levers of economic and political power.

The basic conclusion is that a world that maximizes human rights is a world of stable, consolidated, functioning, efficient and effective democracies – but also, then, a world where states are democratic, legitimate, subject to the rule of law, respectful of their citizens' rights, responsive to citizens' demands, tolerant of diversity, mindful of their obligations as well as of their prerogatives and rights, and where each state is neither too strong nor too weak, but a balanced state.

Notes

1. The literature on the Pinochet regime is extensive. See, especially, Carlos Huneeus, *The Pinochet Regime* (Boulder, CO: Lynne Rienner, 2006); Pamela Constable and Arturo Valenzuela, *A Nation of Enemies: Chile under Pinochet* (New York: W. W. Norton, 1991); and Arturo Valenzuela and Samuel Valenzuela, eds, *Military Rule in Chile: Government and Opposition* (Baltimore, MD: Johns Hopkins University Press, 1986).
2. See Manuel Antonio Garretón, *Incomplete Democracy: Political Democratization in Chile and Latin America* (Chapel Hill, NC: University of North Carolina Press, 2003).
3. This has happened in a variety of issues, but most dramatically as a result of the arrest of General Pinochet in London in October 1998, which was the first time a former head of state was arrested abroad for human rights violations committed in his own country. See Madeleine Davis, ed., *The Pinochet Case: Origins, Progress, Implications* (London: Institute of Latin American Studies, 2003); Geoffrey Robertson, *Crimes against Human-*

ity: The Struggle for Global Justice (New York: New Press, 2000); José Zalaquett, *The Pinochet Case: International and Domestic Implications* (Toronto: University of Toronto Faculty of Law, 2001); and Naomi Roht-Arriaza, *The Pinochet Effect: Transnational Justice in the Age of Human Rights* (Philadelphia: University of Pennsylvania Press, 2005).

4. Thomas G. Weiss, David P. Forsythe and Roger A. Coate, *The United Nations and Changing World Politics*, 4th edn (Boulder, CO: Westview, 2004), p. 142.
5. See Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (Philadelphia: University of Pennsylvania Press, 1999).
6. Michael Ignatieff, *Human Rights as Politics and Idolatry*, ed. and intro. by Amy Gutmann (Princeton, NJ: Princeton University Press, 2001), pp. 5, 57–58.
7. Ibid., pp. 3–4.
8. Diane F. Orentlicher, "Relativism and Religion", in Ignatieff, *Human Rights as Politics and Idolatry*, p. 150.
9. Ignatieff, *Human Rights as Politics and Idolatry*, p. 163.
10. See Roger Normand and Sarah Zaidi, *Human Rights at the UN: The Political History of Universal Justice* (Bloomington: Indiana University Press for the UN Intellectual History Project, 2007).
11. Thomas W. Laqueur, "The Moral Indignation and Human Rights", in Ignatieff, *Human Rights as Politics and Idolatry*, p. 129.
12. Ignatieff, *Human Rights as Politics and Idolatry*, p. 17.
13. See Lars Schoultz, *Human Rights and United States Policy toward Latin America* (Princeton, NJ: Princeton University Press, 1981).
14. See John Dinges, *The Condor Years: How Pinochet and His Allies Brought Terror to Three Continents* (New York: New Press, 2003).
15. Perhaps the best known of the organizations that emerged to stand up for the rights of the "disappeared" was the "Mothers of the Plaza de Mayo". Made up largely of mothers of victims of repression under the Argentine military junta in the 1970s, they made their first public appearance in 1977. They made their mark by their continued presence in one of Buenos Aires's most prominent public squares, the Plaza de Mayo, and remained active until 2006. See Marysa Navarro, "The Personal Is Political: Las Madres de Plaza de Mayo", in Susan Eckstein, ed., *Power and Popular Protest in Latin America* (Berkeley: University of California Press, 1989), pp. 241–258.
16. See Brian Smith, *The Church and Politics in Chile: Challenges to Modern Catholicism* (Princeton, NJ: Princeton University Press, 1982). See also Daniel Levine, ed., *Religion and Political Conflict in Latin America* (Chapel Hill, NC: University of North Carolina Press, 1986).
17. Some of the foundations for that policy can be found in Jimmy Carter's commencement address at the University of Notre Dame in June 1977, entitled "Human Rights and Foreign Policy". For the reflections of his Director for Latin American Affairs at the National Security Council, see Robert Pastor, *Whirlpool: U.S. Foreign Policy Toward Latin America and the Caribbean* (Princeton, NJ: Princeton University Press, 1993).
18. The subsequently established Inter-American Court of Human Rights and the Inter-American Institute of Human Rights, both headquartered in San José, Costa Rica, were also to play an important role in what is known now as the "Inter-American human rights system". On this topic, see Thomas Buergenthal and Robert E. Norris, eds, *Human Rights: The Inter-American System* (Dobbs Ferry, NY: Oceana Publications, 1982).
19. Thomas Risse, "'Let's Argue!': Communicative Action in World Politics", *International Organization* 54:1 (2000), p. 32.
20. Jeane J. Kirkpatrick, "Dictatorships and Double Standards", *Commentary* (November 1979). It is believed that the decision of President Reagan to appoint Kirkpatrick as US Permanent Representative to the United Nations, where she served from 1981 to

1985, was largely triggered by this article, which deeply impressed Reagan. Kirkpatrick subsequently elaborated on her argument at some length in her book by the same title, *Dictatorships and Double Standards: Rationalism and Reason in Politics* (New York: Simon & Schuster, 1982). Kirkpatrick, who taught at Georgetown University and was later a fellow at the American Enterprise Institute, had started her career as a political scientist doing research on Latin America; the subject of her dissertation had been the Peronist movement in Argentina.

21. See Harry G. Barnes, "U.S. Human Rights Policies and Chile", in Debra Liang-Fenton, ed., *Implementing U.S. Human Rights Policy* (Washington DC: United States Institute of Peace Press, 2004), a volume that provides a good overview of the subject more generally. On the role that the United States played in the period up to the 1988 plebiscite, which effectively ended Pinochet's rule, see Marc Falcoff, Susan Kaufman Purcell and Arturo Valenzuela, *Chile: Prospects for Democracy* (New York: Council on Foreign Relations, 1988).
22. See Ramesh Thakur, *The United Nations, Peace and Security: From Collective Security to the Responsibility to Protect* (Cambridge: Cambridge University Press, 2006), chapter 5.
23. This paragraph draws on Jorge Heine's "All the Truth But Only Some Justice? Dilemmas of Dealing with the Past in New Democracies", Sixth Oliver Tambo Lecture, Delhi University, 22 March 2005.
24. The Latin American countries where Commissions of this sort have been established are: Argentina, Bolivia, Chile, Ecuador, El Salvador, Guatemala, Haiti, Panama, Peru and Uruguay. The other countries that have had them are Chad, East Timor, Germany, Ghana, Nepal, Nigeria, the Philippines, Rwanda, Serbia and Montenegro, Sierra Leone, South Africa, South Korea, Sri Lanka, Uganda and Zimbabwe. For some comparative studies, see Priscilla B. Hayner, "Fifteen Truth Commissions – 1974 to 1994: A Comparative Study", *Human Rights Quarterly* 16:4 (1994), pp. 597–655; Neil J. Kritz, ed., *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, 3 vols (Washington DC: United States Institute of Peace, 1995); Kofi A. Annan, *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies*, Report of the Secretary-General, UN Doc. S/2004/616 (New York: United Nations, 23 August 2004); Priscilla Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* (London: Routledge, 2001); A. James McAdams, ed., *Transitional Justice and the Rule of Law in New Democracies* (Notre Dame: University of Notre Dame Press, 1997); Robert I. Rotberg and Dennis Thompson, eds, *Truth versus Justice: The Morality of Truth Commissions* (Princeton, NJ: Princeton University Press, 2000); and Ruti G. Teitel, *Transitional Justice* (Oxford: Oxford University Press, 2000).
25. See *Informe de la Comisión Nacional sobre Prisión Política y Tortura* (Santiago: Ministry of the Interior, 2004).
26. David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton, NJ: Princeton University Press, 2004), p. 323.
27. See Chapter 3 in this volume.
28. *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (Ottawa: International Development Research Centre, 2001).
29. See Chapter 3 in this volume.
30. On the condition of aboriginal people in the region, see *Indigenous Peoples, Poverty and Human Development in Latin America 1994–2004* (Washington DC: World Bank, 2005).
31. An exception is C. Raj Kumar, "Corruption and Human Rights – Promoting Transparency in Governance and the Fundamental Right to Corruption-Free Service in India", *Columbia Journal of Asian Law* 17:1 (2003), pp. 31–72.

6

Human rights in context: Brazil

Fiona Macaulay

A quarter century after the return to civilian rule in 1985, Brazil scores well on a number of minimum procedural measures of *political* rights: universal suffrage (illiterates acquired the right to vote in the 1988 Constitution); free and fair elections (fraud and high levels of spoilt votes were eliminated by the now comprehensive use of electronic voting); multi-party competition;[1] and adequate separation of powers (excessive presidential powers, such as the extensive use of the decree law, were curtailed in 2002), with an autonomous, although not necessarily impartial or effective, judiciary. With respect to *civil* rights, Brazil has also signed up to all the regional and international human rights protocols and conventions, is an active backer of the United Nations (UN) system of human rights protection, and has been engaged in a gradual rapprochement with the Inter-American system. The 1988 Constitution offers wide-ranging guarantees for the protection of civil liberties, and Brazil was one of the first countries to institute a National Plan of Action on Human Rights.

However, Brazil suffers from an apparent paradox, or disjunction,[2] within its democracy because several key elements of civil rights protection are still missing. The country's human rights record remains poor and patchy.[3]

Police violence is still endemic, notably in the larger urban centres, and targeted mainly against low-income and socially marginalized communities.[4] Police enjoy impunity in relation to their torture and extrajudicial execution of criminal suspects and are not subject to accountability for their inability to reduce collective insecurity and social violence. Death

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squads linked to law enforcement officials are active in several states, targeting suspected criminals and land activists. In response to drug trafficking and network crime activities in Rio de Janeiro, the last few years have seen a proliferation of *milicias* (composed of retired or off-duty police) that have taken control of scores of low-income neighbourhoods, combining vigilantism with protection rackets.[5] Severe overcrowding, lack of investment and gang activity in the prison system have resulted in a loss of state control, high levels of violence and recidivism, and cruel, inhuman and degrading conditions. Meanwhile, the judicial branch, although functionally strong and independent, has failed to exercise its powers of oversight over these institutions in order to guarantee due process and uphold basic civil liberties.[6] To this litany of rights violations could be added ongoing violence related to land disputes, the vulnerability of indigenous communities, and the structural violence of poverty and exclusion suffered daily by the millions of Brazilians who live on or below the poverty line.

From this one might conclude that little has changed in the past two decades or, if anything, that democracy has brought about a turn for the worse. This would, however, be to oversimplify. Owing to a lack of baseline data, we cannot state for certain that all of these problems are now statistically worse than they were under the military regime (1964–1985). What is clear, however, is that the general populace believes, with justification, that democratization *ought* to have provided the opportunity to resolve these problems. Brazilians, when polled, cited fear of crime and violence in their top three concerns,[7] and the inability of the state to attend to these anxieties undermines the legitimacy of the democratic regime, as year after year of the annual *Latinobarómetro* surveys of social attitudes demonstrate.[8]

What, then, are the features of Brazilian democracy that have acted as either accelerators or brakes on the development of an effective regime of human rights protection? This chapter examines the evolution of, and interplay between, human rights and democracy in Brazil, which are treated, following Whitehead,[9] as a work-in-progress rather than as a fixed set of outcomes, in terms of both the *values* expressed by institutions and individuals and the *practices* of those state institutions. The analysis begins by tracing the shifts in Brazil's attitudes towards, and interaction with, regional and international and human rights regimes since the first steps towards political democracy in the post-war period, and in particular since 1985. The second section of the chapter then explores a number of domestic political variables affecting Brazil's human rights record and considers the degree of responsiveness of these variables to a changing international context.

Evolving human rights and democracy regimes

Democratic beginnings

Historically, Brazil had had no long or continuous experience with a formally complete system of democratic government. However, this did not place it outside the influences of democratizing and rights-promoting forces. Both the authoritarian *Estado Novo* regime of Vargas (1937–1945) and the 21-year military regime saw their demise speeded by the contact of Brazilian political actors with international organizations embodying the principles of Western liberal democracy. Ironically, this contact came about in 1945 primarily through the senior military officers who had participated in the liberation of occupied Europe, and had returned to overthrow Vargas.[10] However, although they supported political rights, they had little concern for wider civil or social rights. Nonetheless, in this brief democratic spring, Brazilian diplomats became enthusiastic participants in the establishment of the United Nations, supported the Universal Declaration of Human Rights, and aspired even then to a permanent seat on the nascent Security Council.[11] The following interregnum was minimally democratic, with multi-party competition and the direct election of presidents, but was undermined by the frequent interventions of the military, restrictions on voting, and low voter turnout. Human rights were still conceptually very low on the agenda, because the Populist Republic (1946–1964) was engaged in corporatist strategies to meet the social needs of political client groups.

The military regime

Under the military regime, the security apparatus, which had antecedents in Vargas' repressive police apparatus, grew in size and importance, and the techniques of extrajudicial execution, torture, disappearance and arbitrary detention were used not only against political dissidents and guerrillas but principally against common criminal suspects.[12] However, the regime did not foreclose all democratic spaces. It maintained two-party electoral competition, albeit heavily restricted at times, which opened up small but significant spaces for dissidence around the regime's violation of the principles of democracy and human rights. For example, the activism of Congressman Márcio Moreira Alves in defence of human rights enabled Brazilian clergy to take denunciations of torture to counterparts in the United States and beyond, leading to a perception of Brazil as a symbol of repression in Latin America long before the Chilean and Argentinian coups, in a classic first phase of Keck and Sikkink's "boomerang"

effect, whereby domestic actors seek external allies to exert pressure on unresponsive or undemocratic governments.[13]

Amnesty International (AI) took up the issue of torture in Brazil as early as 1966, and had adopted some 100 prisoners of conscience there by 1967. In 1972, the organization chose the case of Brazil for its first intensive survey of the political use of torture in a specific country in its worldwide campaign,[14] and in 1973 launched its distinctive campaigning tool, the *Urgent Action*, in connection with a Brazilian case.[15] International pressure on the Brazilian case moved the Inter-American Commission on Human Rights to focus for the first time, in 1974, on the collective documentation of the mistreatment of detainees. So Brazil's human rights record under the military not only drew the attention of international – and regional – human rights organizations but actually catalysed the activities and internal development of these bodies.

Thus it was that, as Brazil began its gradual path back to democracy in 1974 and other countries in the Hemisphere began to experience even grosser human rights violations, the human rights instruments that Brazilians had helped develop, directly or indirectly, would be invoked elsewhere in the region. Even as domestic politics suffered upheaval, Brazilian diplomats continued to engage with the international human rights regimes, helping to draft the United Nations' two principal covenants, on Civil and Political Rights (ICCPR) and on Economic, Social and Cultural Rights (ICESCR), both approved in 1966, and brought into force by 1976. In 1978 Brazil became a member of the UN Human Rights Commission and became more active in standard-setting, for example in the drafting of the Convention against Torture. The military regime also opened dialogue with thematic mechanisms of the United Nations, such as the Working Group on Disappearances, and it ratified two UN Conventions, on the Elimination of All Forms of Racial Discrimination in 1969 and on the Elimination of All Forms of Discrimination against Women in 1984. Thus, a culture of internationalism and legalism, characteristic throughout the continent but particularly strong within the "insulated" bureaucracy of Brazil's Foreign Ministry,[16] has led Brazil over the past half-century to play a key role in the construction of the international (although not the regional) human rights apparatus. One of the puzzles to address therefore is why Brazil is still so unresponsive to putting into domestic practice the international norms it helped create.

Democratization

The post-1985 civilian governments continued this process of gradual opening up to the normative framework of the international human rights system[17] as part of a strategy, common in the democratizing South-

ern Cone countries, to shore up the government's international legitimacy[18] and strengthen domestic democratic institutions.[19] This in turn was consonant with Brazil's long-run preoccupation with its international projection and status, as evidenced in its campaign since the early 1990s for a permanent seat on a reformed UN Security Council.[20] The Sarney government (1985–1989) represented an intermediate stage between the defensive isolationism of some sectors of the military regime and the active multilateralism of its successors. Sarney signed the ICCPR and the ICESCR, the Convention against Torture and the American Convention on Human Rights; the more progressive elements in the government party, the Partido do Movimento Democrático Brasileiro (PMDB – Party of the Brazilian Democratic Movement), supported the establishment of national and state-level councils on women's rights and women's police stations, and inserted a number of very important human rights guarantees into the 1988 Constitution. Nonetheless, the government was still prone on occasion to use the language of imperialism to deflect criticism by foreign human rights groups.[21] Brazil remained abstentionist in international forums, being unwilling to support attacks on other countries' human rights records, which reflected the non-aligned position it had taken historically. Domestically, human rights violations worsened in certain respects. Most egregious was the soaring rate of murders of rural trade unionists that resulted from the mobilization of right-wing landowner groups in reaction to the 1988 Constitution and Sarney's promised land reform.

The Collor de Mello government (1990–1992) represented a turning point in actively pursuing policy and norm convergence not just with the international trade and financial regimes, through its neo-liberal economic policies, but also with international human rights regimes. Both regimes were becoming hegemonic owing to the post–Cold War geopolitical influence of the United States and their diffusion and export through multilateral institutions. Collor de Mello's government abandoned the national sovereignty argument and opened Brazil's doors to the international community, for example by hosting the UN Conference on Environment and Development in Rio de Janeiro in 1992. Brazil recognized the right of the UN Human Rights Commission to comment on human rights violations around the world, and its diplomatic missions shifted away from denial and damage control towards greater transparency.

Collor de Mello's administration was the first to receive missions from Human Rights Watch and Amnesty International, and it adopted the principles of universality and the indivisibility of human rights. In Congress, the ratifications of the UN and Inter-American Conventions against Torture (in 1989), the ICCPR, the ICESCR and the American Convention on Human Rights (all in 1992) were pushed through by progressive

senators such as Fernando Henrique Cardoso, a founder of the Partido da Social Democracia Brasileira (PSDB – Brazilian Social Democratic Party), and Eduardo Suplicy, a founder of the Partido dos Trabalhadores (PT – Workers' Party). Under Collor, violence against street children became symbolic of the state's failure to protect human rights and, when this came to dominate international headlines, Collor ordered governmental action such as the 1991 Statute for Children and Adolescents, modelled closely on the UN Convention on the Rights of the Child, which Brazil ratified in 1990. The removal of Collor from office on corruption charges through legislative action and popular mobilization might even be construed as the effective application to Brazilian democracy of the principles of oversight and accountability that his government had accepted in the field of human rights. At a moment when the new Brazilian democracy seemed most fragile, it proved itself capable of dealing with a political crisis through legal, institutional channels.

The interim government of Itamar Franco (1992–1994) boosted multilateralism by its participation in the 1993 UN Conference on Human Rights in Vienna. There, the Brazilian delegate, senior diplomat Gilberto Sabóia, chaired the Drafting Committee and played a key role in building consensus, defending the universality principle in the face of the Asian countries' argument of cultural relativism. In particular, the Brazilian delegation praised and promoted the new understanding that "democracy, development and human rights" are mutually constitutive and beneficial. In a new departure, the government also collaborated with Brazilian non-governmental organizations (NGOs) before, during and after the conference. Indeed, it had good reason to do so as human rights violations continued to hit the headlines: the highest-profile were the killings of 111 prisoners by military police in the São Paulo House of Detention (1992), of street children by off-duty police outside the Candelária church in Rio de Janeiro and of Vigário Geral slum-dwellers by a police death squad (1993). Brazil also moved in the direction of the regional human rights community when, in 1994, it hosted the Belém do Pará Inter-American conference on violence against women, which resulted in the first ever regional convention on the issue.

On the downside, although all the major conventions were now ratified, it took another decade for Brazil to recognize the jurisdiction of the oversight bodies associated with these treaties. The only exception was Brazil's recognition of the individual complaints mechanism of the Inter-American Commission on Human Rights (IACHR), which is linked to membership of the OAS rather than to the ratification of the 1948 American Declaration on the Rights and Duties of Man.[22] When Brazil ratified the American Convention on Human Rights in 1992, it became the only country in the region to make a "declaration" (in effect, a reservation)

on Articles 43 and 48, claiming that the Inter-American Commission had no automatic right to conduct *in loco* field visits, which could occur only with the express permission of the host country. In the event, Brazil has had relatively few dealings with the Inter-American system, through both avoidance on the part of successive governments and ignorance of its mechanisms on the part of the human rights community. Only a handful of cases came before the Commission under the military,[23] and by 1994 only two of the hundreds of cases pending before the IACHR concerned Brazil, whose governments had been successful in persuading the IACHR not to process complaints received.[24] However, there has been a gradual increase since then as a result of "transnational legal activism" by Brazilian civil society.[25]

From norm convergence to structural change

Risse, Ropp and Sikkink put forward a theory of policy and norm convergence in relation to human rights in which activism and advocacy by local and international civil society are the key drivers of change. In their "spiral model", countries pass through a sequence of definable stages.[26] Brazil went through the first phase, that of state-sponsored gross human rights violations, under the military regime.[27] By the time of the *abertura* (democratic opening) in the late 1970s and early 1980s, it had moved into the second phase, that of denial of past or present abuses, which continued through Sarney's government.[28] The Collor government took Brazil into the third phase by making tactical concessions in response to international criticisms and introducing human rights language into domestic political discourse. The governments of Fernando Henrique Cardoso (1995–2002) and of his successor Luiz Inácio Lula da Silva (2003–2010) deepened this third phase.

The Cardoso government

When Fernando Henrique Cardoso was elected President in 1994, many believed that his government could make significant advances in tackling gross human rights violations. Cardoso and some of his key political collaborators[29] had themselves been targeted by the military government's repression and had protested against human rights violations by the security forces through their involvement in NGOs, in the Church or in government during the *abertura* period. They thereby developed an ideological sympathy with the cosmopolitan rights agenda that possibly ran deeper than was later evident in the government's eventual policy choices, which often appeared instrumentally aimed at appeasing vocal domestic critics and improving the country's international image, in which it only partially succeeded.

Under Cardoso, Brazil's alignment with international human rights standards and active multilateralism intensified and became key foreign policy tenets, establishing the country's authority as both a rule-abider and an agenda-setter within global and regional political and economic structures.[30] Brazil accepted international norms restraining missile technology, nuclear proliferation and arms exports, signing the Mine Ban Treaty in 1997. It also threw its weight behind the International Criminal Court. It finally accepted human rights monitoring by the agencies of the United Nations and the Inter-American system and by non-governmental bodies, becoming possibly the most inspected country in the Hemisphere.[31] Both accepting and utilizing the "soft power" of the international human rights regime,[32] the Cardoso government was able to defuse the hostility of nationalist-conservative sectors of the state towards supranational human rights governance. The Foreign Ministry had long regarded submission to international scrutiny as an infringement of Brazilian national sovereignty, and the Supreme Court had been divided as to whether Brazil's international treaty obligations legally overrode the 1988 Constitution. The turning point came in December 1998, when, in honour of the fiftieth anniversary of the Universal Declaration of Human Rights (UDHR), the government finally recognized the jurisdiction of the Inter-American Court of Human Rights and started to accept the oversight mechanisms of the six principal human rights conventions ratified by Brazil.[33] Under some pressure from human rights activists, the Cardoso government also began to submit some key implementation reports.[34] This shift from an obstructionist to a more cooperative relationship with the monitoring bodies enabled the government to reach "friendly solutions" to cases before the Inter-American Commission on Human Rights, agreeing to demolish the notorious Carandiru prison and accepting, grudgingly, in the UN Committee on Torture that police abuse of detainees was widespread and systematic.[35] The Foreign Ministry even set up its own Department for Human Rights and Social Issues to accelerate and institutionalize these changes.

Cardoso did much to consolidate Brazilian democracy. He brought the military under civilian control, re-equilibrated the relationship between central and state-level governments, and began the process of second-generation institutional reforms alongside the completion of first-generation economic reforms. Overall, this consolidation process enabled his government to embed the vocabulary of human rights further into political discourse and to create or strengthen key elements in a new institutional architecture for human rights protection. One of the President's first acts, at the direct request of the Secretary General of Amnesty International, was to set up a Commission on the Dead and Disappeared. This Commission acknowledged state responsibility for the fate of the dead

and disappeared and compensated over 300 families, although it stopped short of investigating their fate, apportioning blame or attempting to overturn the 1979 Amnesty Law, which still shields the military from prosecution.

Cardoso also immediately set up a committee to draft Brazil's first ever National Plan of Action on Human Rights,[36] under the direction of the Centre for the Study of Violence at the University of São Paulo and in consultation with human rights groups around the country. Launched in 1996 and revised in 2002, the Plan required a new government department, the National Secretariat for Human Rights (NSHR), set up in 1997 inside the Ministry of Justice.[37] Cardoso's first Secretary of State for Human Rights, long-time political collaborator José Gregori, won a UN human rights prize in 1998 for his work, which consisted of promoting an annual conference on human rights and liaising with both the national government and international organizations. The creation of the NSHR also gave a new lease of life to the Conselho de Defesa dos Direitos da Pessoa Humana (CDDPH – Council for the Protection of Human Rights), Brazil's first national human rights body set up in 1964 as a means of protecting within the framework of the UDHR the political liberties of the then political opposition. Ahead of its time, the Council's members were predominantly drawn from civil society organizations, notably the Bar Association, which caused it to be co-opted and effectively silenced under the military regime. The political backing and resources it received under Cardoso enabled it to be proactive for the first time in investigating rural violence, death squads and police violence.

The Lula government

The Lula administration was predisposed to be even more responsive in terms of human rights questions. The background of many Workers' Party (PT) members in opposing the military and supporting social movements had made the party an important actor in building a localized, micro-institutionality for protecting human rights. It established both the national parliamentary Committee on Human Rights, which it has chaired almost continuously since its inception in the early 1990s, and its many equivalents in state and municipal legislatures, which have played an invaluable role in documenting abuses, supporting victims and initiating the passage of local legislation on human rights. Its municipal administrations also created secretariats for human or minority rights and, since 2000, have also begun to get involved in the area of public security, through municipal security plans and units and the boosting of the role of the Municipal Guard.

The Lula government inherited the human rights infrastructure laid down by Cardoso and began by elevating the National Secretariat to the status of a Special Secretariat, under the aegis of the President's Office

rather than the Ministry of Justice. One of its clearest successes in the justice field was to set up a new secretariat to direct the reform of the judiciary, which had been drifting through various legislative subcommittees for over 15 years.[38] With an injection of fresh political will, the Judicial Reform Bill was finally passed in December 2004.[39] Some of the reforms (such as binding precedent) represent gains in terms of efficiency and lower transaction costs for government in passing new legislation. However, where previously the PT, along with the lower ranks of the judiciary, had construed such moves as "undemocratic", the Lula government now emphasized oversight of the judiciary and anti-nepotism provisions as markers of judicial democratization. Cannily, it used the "boomerang" effect of a visit by the UN Special Rapporteur on the independence of judges and lawyers as a means of disarming residual resistance from judges to the reform package.

On the democracy side of the coin, however, the second half of Lula's first term in office was dogged by corruption and vote-buying scandals that paralysed the government's ability to push through any reforms of substance. Although this did not dent popular support for Lula himself, who was re-elected by an even larger margin in 2006 than in 2002, or even for democracy in general, there was nonetheless a considerable opportunity cost. For example, in 2003 Brazil passed a ground-breaking gun control bill, the Disarmament Statute, which dramatically curtailed gun sales and banned civilians from carrying unregistered guns. According to the government, firearm-related homicides subsequently dropped by 13 per cent. The same Statute required a referendum on the future sale of guns and ammunition to civilians. Held in October 2005, at the peak of the corruption scandals, the referendum became a plebiscite on the government in general, and the motion was rejected by 64 per cent of the 122 million who voted.[40] Aside from anti-Lula sentiment among many who voted "No", this also vividly illustrated the failure of successive governments to restore public faith in the criminal justice system, with the opponents of the motion, assisted by the US-based National Rifle Association, arguing that citizens had the "right" to private firearms in order to compensate for the incompetence of the police in tackling violent crime. Thus – very democratically – some 78 million Brazilians expressed the view that their democracy had delivered neither the rule of law nor collective freedom from violence and insecurity, a supply-side problem that resides essentially with governmental policies, or the lack of them, regarding reform of the police and other aspects of the criminal justice system.

In summary, despite apparent political sympathy for human rights and the laying of considerable institutional groundwork, neither President

Cardoso nor President Lula was able to move Brazil into the fourth phase of Risse et al.'s "spiral" model, that of substantive policies that would tackle the deeper, structural factors needed to sweep away the institutional "authoritarian débris".[41] The following section explores possible explanations for this inertia in terms of both the international context and the domestic governance environment.

Obstacles to reform, or "My boomerang won't come back"[42]

In the "boomerang" model of interaction between national and international human rights advocates, Brazil should have been sensitive to global condemnation once local human rights activists had managed to access international forums to amplify complaints of human rights abuses. However, Brazil presents a case of a country that is an enthusiastic player in the international human rights arena and at least a grudging collaborator with regional human rights mechanisms, and yet has a domestic human rights situation that is at best static and at worst deteriorating. As Keck and Sikkink acknowledge, the chain of cause and effect linking domestic and international actors and responses is complex.[43] What are the factors in the Brazilian case that have interrupted the circle of pressure and advocacy? Why has the boomerang not come back to pressurize Brazilian governments of the past decade to take the political initiative to secure more enduring human rights protection?

The international environment

In the 1990s the international context was very favourable to democratic consolidation and human rights reforms in Brazil and to a universalization of rights discourses. However, the advent of the so-called "war on terror" has degraded key international human rights norms such as the absolute prohibition of torture and the right to a fair trial. The "war on terror" has not been invoked by Brazilian politicians or justice system operators directly as an argument for inaction on human rights abuses, because the same justification for exceptionalism has already been deployed through various "wars on" (communism, terror, crime and drugs) in recent decades. The Brazilian police began their "war on crime" during the 1970s, under the cover of political repression, and those same police forces were never purged or reformed. Thus, persistent police abuse reflects historical continuities and institutional path-dependencies occasionally amplified by more immediate changes in the operational environment, such as the trafficking of drugs and other commodities that now

dominates crime in certain locales in Brazil, such as Rio de Janeiro and the Western Amazon, the upsurge in associated crime and violence that has resulted in an alleged "Colombianization" of law and order, and the periodic waves of urban violence orchestrated by crime networks such as the Primeiro Comando da Capital in São Paulo and the Comando Vermelho in Rio de Janeiro. Perhaps the chief impact of the global "war on terror" has been to deflect international condemnation towards a new set of pariah states, and away from democratic ones such as Brazil whose human rights problems seem both intractable and at odds with the country's international commitments and legal framework.

Domestic governance

There comes a point when the international community exhausts its capacity for diagnosis and for pressure, and national governments have to assume responsibility for tackling essentially domestic structural problems affecting human rights. In Brazil's case, rule of law is absent in many rural and urban areas, corruption and clientelism routinely undermine governance and democratic governability. Governability, that is, the sustained capacity of the state to implement effective policies for the public good through decision-making processes that are open, transparent and accessible, is compromised by factors such as the federal system of government, multi-party presidentialism, insufficient mechanisms of institutional checks and balances, the governance of the Ministry of Justice, and a scarcity of fiscal and political capital. Three of these key variables in particular may be picked out.

Federalism

Lack of coordination between and among different levels of government was identified as a major obstacle to effective human rights protection as early as 1964, in the mandate of the Council for the Protection of Human Rights (CDDPH). Federalism constitutes a keystone in "an extremely fragmented and heterogeneous polity which limits the central state's capacity to implement effective strategies",[44] and goes a long way to explaining federal government inaction on structural reforms, particularly of the police, which are key actors in violations of the right to life. Although the military has been placed under civilian tutelage, the chief legacy of authoritarianism remains the militarization of the forces of law and order. This continues to hinder the shift to a different mode of security for citizens and impedes demands for accountability.

Cardoso's coalition government did not perceive the justice sector as a high priority and came into power without a reform agenda, in contrast to its programme of global integration and privatization. In consequence,

it could react only weakly to a looming crisis in law and order, which included police violence (including in land disputes), almost weekly prison riots and breakouts, and an ever more discredited judiciary. However, there was no shortage of diagnoses and solutions issuing from outside central government: the many inspection reports published by international and local human rights organizations presented a clear picture of the scope of the micro and macro structural reforms required. In 2000, the government eventually launched a National Plan on Public Security consisting of 124 different policy proposals – the result of an earlier and more ambitious consultation aimed at a root and branch review of the criminal justice system. This watered-down version was criticized – as was the National Plan of Action on Human Rights – for lacking a central unifying vision, clear priorities, measurable outputs or a timetable for implementation, and for avoiding all mention of structural reforms. It contained no rational criteria for the allocation of funding, emphasized the repressive rather than the preventive aspect of policing, and focused on providing more funding and equipment to the police rather than imposing conditions on their performance.[45] Although in the final year of Cardoso's government the National Public Security Fund released the unprecedented sum of R$396 million, this arrived too late to have much impact.[46]

Lula's government, by contrast, came into office promising to implement a 100-page blueprint for justice sector reform. A new National Secretariat for Public Security was established to encourage the state governments down a reform path, even though it had no formal jurisdiction over them. However, the excellent technical team led by Secretary of Public Security Luis Eduardo Soares was deposed after just 10 months as a result of internal conflict within the Ministry of Justice. Indeed, in both the Cardoso and Lula governments, technically competent justice sector reformers quickly lost the political support of the President. Why did this happen?

David Garland has identified a predicament facing modern states as high persistent crime rates have become a "normal" social and political fact. This, combined with what he terms "structural constraints on the policy horizon",[47] the principal one being the state's own recognition of the limitations of its criminal justice apparatus, forces states to respond and adapt just as individuals do in the face of rising insecurity. One state response is to deny the magnitude of the problem, and thereby deny the necessity of major reforms to the law and order apparatus. In relation to the federal government, despite the high anxiety of the population about crime and violence, until the 2006 election campaign presidential candidates were silent on the issue and there was no debate about the various policy options that a federal government could pursue. Both the Lula

and Cardoso administrations realized that the potential electoral cost of promising to tackle crime and violence, and failing, would outweigh any possible benefits of success. Luis Eduardo Soares and two reforming ministers of justice fell when it appeared that the government had overplayed its hand by pledging major reforms that threatened to attract too much public attention. However, this strategy was shaken when, following an unprecedented wave of violence orchestrated across São Paulo city in May 2006 by the Primeiro Comando da Capital (PCC) crime network, both Lula and his opponent, former São Paulo state governor Geraldo Alckmin, were forced to address police failure.

States in denial also generally respond to evidence that new police powers or harsher sentencing have not reduced crime with ever more punitive policies that are expressive and populist, rather than effective. State-level governments in the areas of highest urban crime have taken this path. In Rio de Janeiro, the Marcello Alencar government encouraged a "shoot to kill" policy that resulted in police officers being rewarded for the summary execution of those they deemed "criminal suspects". Similarly "tough" policing strategies were adopted under Anthony Garotinho and, increasingly, in São Paulo under Geraldo Alckmin and his successors. This policy has done nothing to reduce crime rates but has encouraged systematic human rights abuses against many unarmed and innocent civilians. Local politicians in particular are prone to a related response, which is to "act out", that is, to deploy an outraged political rhetoric about crime that does not necessarily lead to new, effective policy measures. This has resulted in a "bidding war" over tough law and order measures in gubernatorial contests in Brazil, as in national elections in Central America.

The federal government has avoided such a politicized discourse, preferring to distance itself by "redistributing the task of crime control" to sub-national government. The 1988 Constitution enforced this delegation through the shift from a centralized authoritarian government to a decentralized democratic polity. Although, unusually for a federal country, the justice system's normative framework (legal codes, organizational norms) is determined by the national legislature and applied across the country, the key institutions of the criminal justice system operate at state level. The bulk of the court system (courts of first instance and appeal) is located primarily at state level, although it has national governance structures in the Supreme Court and courts of final appeal. Policing is even more dispersed, through four distinct forces: a relatively small federal police force to tackle cross-border crime; two state-level police forces, the civil, investigatory police and the uniformed military police, which form the bulk of the country's police forces; and municipal police, which some larger cities are now deploying as a preventive, community-oriented

force. The prison system has, until recently, operated purely at state level.[48] Brazil's federal government also shares policy-making powers in relation to the justice sector with a number of other policy entrepreneurs and veto players. These include: the Ministry of Justice and its dependent agencies; the judiciary, its chief justices and professional cohorts; the legislature, which can pass or block new legislation and constitutional reforms; the state governors, with their operational responsibility for the state police forces and prisons; and the professionals in direct charge of the police and prisons. The result is that the federal state sees its task as "not to command and control but rather to persuade and align, to organize" these myriad actors in the field of justice.[49]

In relation to insecurity, the federal government has consistently alleged that the federative states bear chief responsibility. It is telling that, in the 2006 presidential debate about the PCC episode, it was the former governor who was most damaged politically, with the incumbent President able to distance himself from responsibility, emphasizing that the government of São Paulo had rejected the assistance that the federal government had immediately offered. However, the "federal argument" does not wash in relation to human rights protection, for which the federal government holds the ultimate moral and legal responsibility as the state party to regional and international human rights conventions. Therefore, since the early 1990s the government tried to respond to a demand for a "federalization of human rights", that is, the legal transfer of jurisdiction for the investigation and prosecution of the most egregious or high-profile human rights violations from state level to the federal authorities. In some senses this occurred informally as the National Secretariat for Human Rights together with the CDDPH worked with the Federal Attorney General's office on emblematic cases such as the Eldorado dos Carajás police killing of 19 landless workers. However, although the principle of federalization was approved in the Judicial Reform Bill, it addresses only the post hoc aspects of human rights abuses. Prevention still requires structural changes that can be achieved only through executive-led constitutional reforms.

Governance of the Ministry of Justice

The 222 proposals contained in the National Plan of Action on Human Rights were immediately criticized as being merely aspirations, listing piecemeal police, prison and court reforms with no targets, division of responsibility or clear intra-governmental coordination. Although the Plan was revised in 2002, its value lay more in setting out a broad agenda for reform rather than in providing a policy roadmap. Such a roadmap should have been produced and spearheaded by the Minister of Justice as the most obvious policy entrepreneur. The Ministry of Justice's function has,

however, traditionally been political rather juridical, consisting chiefly of acting as intermediary between the state governors and the President of the Republic.

For the first 17 years of the New Republic, the Ministry saw a new minister each year, on average. Cardoso's appointments failed to give it a consistently modernizing and justice-focused role. His first and longest-serving Justice Minister, Nelson Jobim, oversaw a number of key reforms, setting up national commissions to revise the criminal code, the criminal procedure code, and the law governing prison regimes and sentence-serving. However, most incumbents were uninterested in justice sector policy apart from two other ministers, José Carlos Dias and Miguel Reale Jr. Neither had been the President's first choice for the post and both saw this minimal political backing evaporate when powerful veto players within the federal government were allowed to block reform initiatives. However, under the Lula government, the Minister of Justice became a stable appointment, starting with Márcio Thomaz Bastos (2003–2007). A long-time political associate of Lula's as his erstwhile personal criminal lawyer, he displayed perhaps more political skill in advising and protecting the President than in pushing forward the more difficult reforms, particularly in the area of police reform. His successor, Tarso Genro (2007–), is a senior PT politician and former state governor, and has finally brought more political weight to the post.

A Justice Ministry without an accumulated capital of technical expertise and professional personnel has been unable, as well as unwilling, to impose any kind of coherent direction on the country's criminal justice system or on those state governments that opted to enact repressive, retributive and rights-violating law and order policies. In consequence, human rights reforms have tended to be reactive, partial and ineffectual in relation to escalating institutional violence. It was only in 1996, in reaction to outcry over the Eldorado dos Carajás case, that the government intervened to speed up passage of a legislator-sponsored Bill seeking to transfer jurisdiction over crimes committed by uniformed military police from the military to ordinary courts. The same reactive dynamic occurred with the criminalization of torture. A Bill stuck in Congress for several years was rushed through in response to a televised episode of police brutality in 1997. This incident spurred the government to consider total restructuring of the police, and a working group proposed the elimination of the military courts, "deconstitutionalization" of the police (to allow the states to choose whether to retain separate civil and military police, to unify them, or to abolish one branch), and the establishment of a witness protection scheme. Only the last proposal was ever implemented.

The institutional patchwork of a federal system is extremely challenging to manage without an overall vision. The lack of such a vision has

allowed institutional path-dependency to persist and reform efforts to be derailed by well-organized producer groups. The judiciary (including the prosecution service) initially blocked external oversight and binding precedent, and continues to uphold repressive police tactics. The military police lobby in the Senate blocked attempts at "deconstitutionalization", civilian oversight and demilitarization, and was able to limit civilian jurisdiction to intentional homicide. The armed forces wielded enough power in the Ministry of Justice to oust one reforming Justice Minister in a turf war.

Political and fiscal capital

Multi-party presidentialism, combined with the constitutionalization of virtually every area of public policy, exacts a very high governance price. Justice reforms were also crowded out of the legislative agenda by macroeconomic management and related constitutional reforms. The Cardoso administration took a "Big Bang" approach to economic restructuring, enacting simultaneously, rather than sequentially, both the first- and second-generation reforms needed for market opening.[50] This included the re-election amendment, which Cardoso saw as crucial for pursuing reforms through a second term. The governability question has also loomed large throughout the Lula administration, because its governing coalition was shakier and its incentive system for party loyalty more chaotic. All this absorbed an enormous amount of political capital, which was available for criminal justice reform only during sporadic conjunctural crises. Cardoso avoided antagonizing the supporters of the military police (governors and former governors sitting in the Senate) by not pursuing demilitarization of the police. Even under the Lula government, it was a media outcry that forced the President and the Secretary for Human Rights to insist that the government was legally empowered to oblige the military to cooperate in investigations into the fates of the dead and disappeared.[51]

Both governments also under-spent their budgets on all social policy areas owing to tight fiscal targets, whether these were imposed internally by the all-powerful Planning and Finance ministries, or externally by the International Monetary Fund agreements.[52] This prevented any increase in staffing and capacity in the Ministry of Justice in key areas such as the Penitentiary Department. The Human Rights Committee in the Chamber of Deputies, dominated by the political opposition, even found itself obliged to stop the executive branch from cutting funding to the latter's own National Secretariat for Human Rights. The collapsing prison system was also starved of cash. Funds accumulated in the ring-fenced National Penitentiary Fund (FUNPEN) were held back by the Treasury as a means firstly of offsetting the deficit, then of maintaining the current

account surplus. Over an eight-year period, the Cardoso government released only 72 per cent of FUNPEN's income, a pattern repeated under the Lula government. The primacy accorded fiscal targets also hindered the institutional strengthening of the Federal Penitentiary Department in the Ministry of Justice. Understaffed and subordinated to an Advisory Council on Penal Affairs, it has struggled to produce reliable national data, policy guidelines or operational procedures, or to carry out inspections and diagnoses of the system. It is therefore unsurprising that the institutional architecture for human rights turned out not to be robust enough to tackle the political difficulties of structural reforms to the justice system.

Conclusion

Over the last 30 years, as Brazil has democratized, two dynamics have been set in motion. In relation to the international human rights regime, Brazil has moved from a defensive, nationalistic position to a multilateralist and activist one, a phase of convergence driven by aspirations to regional hegemony and international recognition.[53] Its multilateralism is primarily projected outside the region, although it has played an important, brokering role around fragile or threatened democracies in the region, for example through the Contadora process in Central America and, more recently, in acting as a buffer between Venezuela and the United States and in assuming leadership of the peacekeeping mission in Haiti. Discourses of national sovereignty are not now deployed by key political or policy actors in relation to international human rights norms, which contrasts with Brazil's nationalism in relation to trade issues or to the intervention of international financial institutions such as the IMF. There has been an active absorption of internationalist discourses that has trumped pockets of resistance, for example within the Foreign Ministry, in a form of sovereignty bargaining whereby Brazil gains by being seen as a team player on the international stage.

In relation to human rights protection at home in Brazil, the "easy" gains in terms of constitutional norms and the human rights infrastructure have now all occurred, owing to the absence of any strong veto players, in the shape of an ideologically inclined political right wing or parallel powers such as an autonomous military. However, the harder reforms have foundered on an unwillingness to allocate political capital to the reforms themselves and to the governance structures that would support them. Although Brazil's very diversified and rights-focused civil society has both pressurized and collaborated with the state, contributing to the micro-institutionality of human rights, interacting with transnational human rights networks, such as the Inter-American system,[54] and setting

a discursive agenda that has filtered through the mainstream media, a number of factors have reduced the extent to which civil society has been able to refract and amplify the recommendations of the international human rights communities on Brazil's human rights record.

First, the lesser scale of repression in Brazil compared with other countries in the Hemisphere (most dissidents had their political rights removed or were exiled),[55] the fact that the 1979 Amnesty Law was actually the initiative of the regime's opponents (and was then used by the military to shield itself) and the long, slow transition disallowed the possibility of rupture. The police forces were left operationally and institutionally intact. Because Brazil's democratic governments have been required to deal with post- rather than pre-transition violations, they have been unable to capture the moral high ground by distinguishing democratic government practice from the authoritarian period and civil society has been unable to create the political rewards apparently necessary to reward the government for taking thorny reform initiatives.

The human rights movement also needs to learn to use the international and Inter-American system of human rights protection more strategically, and to recognize the need for local political coalitions to push the government to implement the various decisions and recommendations passed. For example, Brazil still does not respect all the rules of the game when it comes to accepting the jurisdiction of the Inter-American system, "routinely disregard[ing] the procedural norms of the system", and it has not implemented some key decisions, such as the ground-breaking protective measures demanded by the Inter-American Court of Human Rights in relation to the Urso Branco prison killings case.[56]

In the past decade, the Brazilian populace, politicians and institutions seem to have adjusted to a persistently high level of human rights violations and citizen insecurity, just as they did to very high levels of inflation in the 1980s, owing to the very specific transaction and opportunity costs of this accommodation to the status quo. In order to break this steady state, a shift in consensus is needed through public debate and through the creation of new political costs and rewards. Organized civil society can achieve progress only through the institutions of Brazilian democracy, so that democracy, rule of law and respect for human rights continue to be mutually reinforcing rather than existing in apparently separate realms.

Notes

1. In 2006, 21 parties won representation in Congress, of which seven gained more than 5 per cent of the total seats. Four could be deemed to be national in scope but they held only two-thirds of the 513 seats.

2. Teresa P. R. Caldeira and James Holston, "Democracy and Violence in Brazil", *Comparative Studies in Society and History* 41:4 (1999); Guillermo O'Donnell, "Polyarchies and the (Un)Rule of Law in Latin America: A Partial Conclusion", in Juan E. Méndez, Guillermo O'Donnell and Paulo Sérgio Pinheiro, eds, *The (Un)Rule of Law and the Underprivileged in Latin America* (Notre Dame, IN: University of Notre Dame Press, 1999).
3. This chapter focuses on the most fundamental human rights: the right to life and to physical integrity.
4. Police kill, on average, about 1,000 people a year in both Rio de Janeiro and São Paulo, accounting for some 10 per cent of violent deaths in both cities. Based on official police figures, these are certainly underestimates. For example, local analysts put the number of police killings annually in Rio de Janeiro state at nearer to 3,000 (US State Department, *Country Report on Human Rights Practices, Brazil*, Washington, DC, 2005). Despite fluctuations caused by shifts in state policy in both locations – for example, the "shoot to kill" policies adopted in Rio in 1995–1998, later abandoned, or the moves in São Paulo to retrain officers who used their firearms – these figures have remained discouragingly high since the early 1990s.
5. Assembléia Legislativa do Estado do Rio de Janeiro (ALERJ), *Relatório da CPI das Milícias da Cidade do Rio de Janeiro* (Rio de Janeiro, ALERJ, 2008).
6. United Nations Commission on Human Rights, "Report of the Special Rapporteur, Sir Nigel Rodley, submitted pursuant to Commission on Human Rights Resolution 2000/43: Addendum: Visit to Brazil", UN Doc. E/CN.4/2001/66/Add.2, 30 March 2001; United Nations Commission on Human Rights, "Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Asma Jahangir, on her mission to Brazil (16 September – 8 October 2003)", UN Doc. E/CN.4/2004/7/Add.3, 28 January 2004; United Nations Human Rights Council, "Report by the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, Addendum: Mission to Brazil", UN Doc. A/HRC/11/2/Add.2, 14 May 2008; United Nations Commission on Human Rights, "Report of the Special Rapporteur on the Independence of Judges and Lawyers, Mr Leandro Despouy, Addendum: Mission to Brazil", UN Doc. E/CN.4/2005/60/Add.3, 22 February 2005. See also the annual reports on human rights in Brazil produced by Amnesty International, Human Rights Watch, the United States State Department and Global Justice.
7. Inflation has now receded as the chief anxiety, but unemployment remains a major preoccupation owing to neo-liberal restructuring of the economy.
8. Between 1996 and 2006 Brazil ranked consistently in the bottom three in the region in terms of public scepticism in regard to the proposition "Democracy is preferable to any other type of government" (*Latinobarómetro* survey, 2006; see <http://www.latinobarometro.org>, accessed 21 August 2009).
9. Laurence Whitehead, *Democratization: Theory and Experience* (Oxford: Oxford University Press, 2002).
10. Leslie Bethell, "Brazil", in Leslie Bethell and Ian Roxborough, eds, *Latin America between the Second World War and the Cold War 1944–48* (Cambridge: Cambridge University Press, 1992).
11. Cold War rivalry at the inception of the United Nations resulted in Brazil being selected as a suitably large, modernizing and non-aligned country to make the opening speech at the annual UN General Assemblies, a privilege that has persisted to the present.
12. Caco Barcellos, *Rota 66: A historia da polícia que mata* (São Paulo: Editora Globo, 1992).
13. Margaret E. Keck and Kathryn Sikkink, *Activists beyond Borders: Advocacy Networks in International Politics* (Ithaca, NY: Cornell University Press, 1998).

14. The 1984 report by the Archdiocese of São Paulo, *Brasil: Tortura Nunca Mais*, received valuable contributions from AI's archives.
15. The arrest and detention of Professor Luiz Rossi, a professor of economics at the University of São Paulo.
16. The professionalization and insulation of key state sectors from clientelism and political influence were a legacy of the modernizing impulses of Vargas' Estado Novo.
17. Paulo Sérgio Pinheiro, "Brazil and the International Human Rights System", Working Paper No. 15, University of Oxford, Centre for Brazilian Studies (2000); Flávia Piovesan, *Direitos humanos e o direito constitucional internacional* (São Paulo: Max Limonad, 1996).
18. In his message to Congress urging it to ratify the American Convention on Human Rights, President Sarney noted: "This will help us to advertise in the international arena Brazil's domestic conversion to democracy and to crystallize definitively our image as a country that respects and guarantees human rights." Cited in Piovesan, *Direitos humanos*, fn. 291, my translation.
19. Laurence Whitehead, *The International Aspects of Democratization: Europe and the Americas* (Oxford: Oxford University Press, 2001).
20. Brazil sat nine times as one of the elected, non-permanent members of the Security Council between 1946 and 2005, equalling only Japan in terms of length of tenure.
21. Ambassador Tarso Flecha de Lima, who was posted both to the United Kingdom and to the United States, was famously hostile towards and disparaging about international human rights NGOs.
22. Brazil ratified this in 1992.
23. Piovesan, *Direitos humanos*, pp. 247–301.
24. James Cavallaro, "Towards Fair Play: A Decade of Transformation and Resistance in International Human Rights Advocacy in Brazil", *University of Chicago Journal of International Law* 3:2 (2002), pp. 483–484.
25. Cecília MacDowell Santos, "Transnational Legal Activism and the State: Reflections on Cases against Brazil in the Inter-American Commission on Human Rights", *Sur: International Journal on Human Rights* 7:4 (2007).
26. Thomas Risse, Steve C. Ropp and Kathryn Sikkink, *The Power of Human Rights: International Norms and Domestic Change* (Cambridge: Cambridge University Press, 1999).
27. Wolfgang S. Heinz and Hugo Frühling, *Determinants of Gross Human Rights Violations by State and State-Sponsored Actors in Brazil, Uruguay, Chile, and Argentina 1960–1990* (The Hague: Kluwer Law International, 1999).
28. Pinheiro, "Brazil and the International Human Rights System"; Piovesan, *Direitos humanos*.
29. Including his first Secretary of Human Rights (later Justice Minister), José Gregori.
30. Whitehead, *International Aspects of Democratization*.
31. The following officials and bodies conducted inspection visits at the invitation of the Brazilian government: Inter-American Commission on Human Rights, 1995; United Nations Special Rapporteur (UNSR) on violence against women, 1996; UNSR on torture and other cruel, inhuman or degrading treatment or punishment, 2000; UNSR on the right to food, 2002 and 2009; UNSR on extrajudicial, summary or arbitrary executions, 2003 and 2007; UNSR on the sale of children, child prostitution and child pornography, 2003; UNSR on adequate housing as a component of the right to an adequate standard of living, 2004; UNSR on the independence of judges and lawyers, 2004; UNSR on the rights of indigenous people, 2008; and Special Representative of the Secretary-General on the situation of human rights defenders, 2006. The United Nations High Commissioner for Human Rights has visited three times (2000, 2002 and 2007).

32. Andrew Hurrell, "Power, Principles and Prudence: Protecting Human Rights in a Divided World", in Tim Dunne and Nicholas J. Wheeler, eds, *Human Rights in Global Politics* (Cambridge: Cambridge University Press, 1999).
33. These allow individuals or NGOs to take human rights abuse cases to the treaty bodies overseeing the conventions on Women, on Racial Discrimination, on Torture, on Economic, Social and Cultural Rights, and on Civil and Political Rights, once all domestic remedies have been exhausted.
34. Brazil's first report in 10 years to the Committee on Torture was submitted in 2001, the first report on the Women's Convention was submitted 17 years late in 2002, and the government reported on the International Covenant on Economic, Social and Cultural Rights only after human rights groups had first submitted a "shadow" report.
35. This approach has paid diplomatic dividends, with Brazil's attitude and reports praised in various UN committees as "remarkably frank and self-critical", "candid" and "constructive".
36. This was a key recommendation of the 1993 Conference on Human Rights in Vienna. Australia was the only other major country to undertake such a Plan.
37. Its status was gradually increased, with its office-holder promoted to the rank of Secretary of State.
38. For a fuller account of the politics of judicial reform, see Fiona Macaulay, "Democratisation and the Judiciary: Competing Reform Agendas", in Maria D'Alva Kinzo and James Dunkerley, eds, *Brazil since 1985: Economy, Polity and Society* (London: Institute of Latin American Studies, 2003).
39. The final Bill included external oversight of the judiciary and prosecution services and measures to reduce corruption among judges and prosecutors.
40. According to UN data, some 39,000 Brazilians died as a result of being shot in 2003.
41. A term coined by Cardoso when he was an opposition senator.
42. The title of a novelty hit song by Charlie Drake in 1961.
43. Keck and Sikkink, *Activists beyond Borders*.
44. Francisco Panizza and Alexandra Barahona de Brito, "The Politics of Human Rights in Democratic Brazil: 'A lei não pega'", *Democratization* 5:4 (1998), p. 21.
45. Fórum Nacional contra a Violência, August 2000, see <http://www.ucamcesec.com.br/at_sem_texto.php?cod_proj=1> (accessed 21 August 2009).
46. Available at <http://contasabertas.uol.com.br>.
47. David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford: Oxford University Press, 2001), pp. 105–106.
48. The federal government is building five federal prisons to hold the most dangerous prisoners at the request of the state justice authorities. They fall under the purview of the federal police.
49. Garland, *The Culture of Control*, pp. 125–126.
50. The Cardoso government submitted a record 17 constitutional amendments in the first year in office, and averaged 4.1 per annum. Marcus André Melo, "O sucesso inesperado das reformas de segunda geração: Federalismo, reformas constitucionais e política social", *Dados* 48:4 (2005), p. 851.
51. The law regulating the government Commission on the Dead and Disappeared gave the executive the power to do so.
52. The government routinely spent less on social policy areas than was mandated in the annual budget approved by Congress.
53. Nonetheless, Brazil is still unwilling to engage in criticism of the human rights records of individual countries in the Hemisphere and beyond.
54. The number of Brazilian petitions to the Inter-American system went up dramatically once NGOs such as Human Rights Watch, the Center for Justice and International Law

(CEJIL) and Global Justice started training local activists to use the system. Some 100 cases concerning Brazil have been taken to the Inter-American Commission in the past decade.

55. The government committee set up in 1995 to compensate the relatives of those killed or "disappeared" during the repression dealt with some 300 cases, whereas, under the Amnesty Law 4, 650 individuals regained their political rights.
56. Cavallaro, "Towards Fair Play", p. 485.

7

Human rights and democracy in Chile

Felipe González

Over the past two decades, Latin America has moved from a context in which an overwhelming majority of political regimes were dictatorships to one in which elected governments exist in almost all countries of the region.[1] Within this significant change of context, the issue of human rights has played a major role: the upsurge of military regimes in the 1970s brought the gravest violations of these rights in the region in modern times. Military regimes were not at all new in the region; what was new, at least since the independence of these countries, was the sheer scale of the crimes committed as a result of systematic state policies. Although Chile followed a similar evolution from military dictatorship to democratic regime, its progress is different in one respect: the Chilean military had hardly tasted power at all before 1973.[2]

Both in Latin America in general and in Chile in particular, the growing importance of human rights during the emergence of civilian governments has had two central concerns. On the one hand, there is the matter of whether or not (and, if the answer is yes, to what extent) prior gross violations must be confronted. On the other hand, challenges have emerged regarding the transformation of the legal system and state practices concerning other human rights issues, including due process of law, freedom of expression, and the rights of vulnerable groups. This chapter deals with both of these concerns.

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Confronting violations committed by the dictatorship

An initial step towards confronting the abuses of the past in Chile was taken by the Aylwin administration (1990–1994) when it created the National Commission for Truth and Reconciliation (Rettig Commission) just a couple of months after taking office. After working for one year, the Commission issued a six-volume report. This both provided a general picture of human rights during the military regime and described all the specific cases in which there was information on extrajudicial executions, forced disappearances or torture leading to the death of the victims.[3] Because it was established by executive decree instead of by law, the Commission did not have powers of subpoena, which limited its work. Additionally, it was decided that the report would not mention the names of those allegedly responsible for the crimes, as this was said to be a task for the tribunals.

The Rettig Report elicited a strong reaction from the military and the Supreme Court, the two institutions that were most strongly criticized by the Commission for their part in the abuses. Following publication of the report, the government created another organ, the National Corporation for Reparation and Reconciliation, which continued the investigation of further cases on the same criteria as before but used different methods to compensate the families of the victims.

The Aylwin government envisioned that the Rettig Report would be instrumental in increasing judicial investigations, if not prosecutions. President Aylwin himself also declared that the amnesty law (enacted by the dictatorship to cover the period 1973–1978, which is when most of the three types of crimes that were within the remit of the Commission took place) could be reasonably interpreted as allowing the *investigation* of the crimes. Some judges started to apply this doctrine, rather than the jurisprudence that had broadly prevailed during the dictatorship, according to which the amnesty law not only prevented the punishment of the crimes but also precluded their investigation. However, when the cases reached the Supreme Court they were closed on the basis of the amnesty.

There was one case, though, that was exempted from the amnesty law: the assassination of Orlando Letelier, a former Minister of Foreign Affairs in the Allende government, who was killed in Washington, DC, by DINA (Dirección de Inteligencia Nacional – National Intelligence Directorate), the political police of the Pinochet regime.[4] Despite this exemption from the amnesty law, the case was held up for many years in the Chilean courts and no serious investigation was undertaken by the local tribunals. During the transition to democracy that began in 1990 (the *Transición*), however, the investigation was revitalized, and this led to a final judgment by the Supreme Court in 1995 that sentenced to

imprisonment the former head of DINA (retired General Manuel Contreras) and his second-in-command, retired Colonel Pedro Espinoza. At the time, the second *Concertación* (coalition) government was in power, led by President Eduardo Frei Ruiz-Tagle (1994–2000). The Court's decision created a serious crisis, with Contreras and Espinoza avoiding arrest for several months, finding some tacit support from the armed forces (Pinochet was still Commander-in-Chief of the Army). Contreras and Espinoza finally went to prison, but at the cost of the government having to send signals to the tribunals that investigations should be closed under the amnesty law. The evolution of jurisprudence began to go into reverse again. In addition, the government tried to pass legislation establishing a "*punto final*" (deadline) for a definitive closing of such cases. Overall, government authorities repeatedly stressed that the transition had ended with the imprisonment of Contreras and Espinoza, and that it was necessary not to dig more into the past but rather to look to the future.

The situation changed again in the late 1990s. Civil tribunals now came to play an unprecedented and very active role in prosecuting the abuses committed by the dictatorship. This was the result of two main factors: the detention of Pinochet in London and the change in membership of the higher tribunals (especially the Supreme Court) in Chile.[5] These events had a strong impact in impelling the investigation and even punishment of the gross abuses of the past. During the 18 months that Pinochet was kept in custody in England, the Chilean government, the right-wing opposition and the armed forces all repeatedly argued, for their own reasons, that the domestic tribunals were capable of investigating human rights violations, including the Pinochet case. As a result, while Pinochet was still in London, the local tribunals started to make important advances in the investigation of other crimes.[6]

As is well known, Pinochet returned to Chile to become the subject of wide-ranging litigation. At times the investigations were suspended on mental health grounds, only to be resumed later. Before his death in late 2006, Pinochet was indicted in several high-profile cases. More generally, the change of attitude of the tribunals has been reflected in the prevalence of a jurisprudence based on international legal grounds, according to which the amnesty law did *not* prevent the investigation and punishment of gross human rights violations. Additionally, the judges have taken an active role in investigating and punishing crimes committed in the 1978–1990 period (the years not covered by the amnesty law), which, despite the lack of legal impediments, had received virtually no serious judicial action before.

In this new context, the political authorities adopted additional measures to confront the past, notably the creation of the National Commission on Political Imprisonment and Torture (Valech Commission), which

in 2004 reviewed tens of thousands of cases. The Valech Commission's remit covered all types of cases of torture, unlike the Rettig Commission, which, as stated above, had studied only cases of torture leading to the death of the victims. A law was subsequently passed to compensate the victims. Although the amounts of compensation and the concealment of the names of the perpetrators have been criticized, few dispute that the work of the Valech Commission represented an important step. In particular, the magnitude of the violations revealed by the findings had a very strong public impact.

The Valech Commission's findings, along with the numerous high-profile cases under investigation, have made clear to virtually all sections of Chilean society the role played by the dictatorship in violating human rights in a massive, systemic fashion. Unlike the situation during the early years of the transition, when a relatively large proportion of Chileans still defended the Pinochet regime, support has dramatically diminished, and all political parties are trying to distance themselves from the Pinochet legacy.

As for the armed forces, over the past few years they have also sought a new role, one more consistent with a democratic system. All branches of the armed forces have also publicly apologized (more or less openly) for their role during the dictatorship. However, there remains difficulty in pursuing prosecutions because military retirees continue to apply pressure to close cases and the *Concertación* has been somewhat indecisive. The judiciary is instead enhancing its role in investigating the abuses.[7]

Adapting the Chilean legal system to international human rights standards

Historically, Chile had been one of the most active Latin American players in international forums on human rights, as demonstrated by its significant role in the drafting of the Universal Declaration of Human Rights and the American Convention on Human Rights. The lengthy period of dictatorship not only facilitated gross human rights violations, but also had the effect of keeping the country lagging behind developments in the international arena of human rights for 17 years. As a result, when the military regime ended, many key provisions of the legal system were wholly incompatible with international standards.[8] The new civilian authorities thus faced a challenge here as well. Their task is not yet finished, although some significant changes have occurred.

As a consequence of Pinochet's defeat in the 1988 plebiscite, a series of negotiations took place between the military and the opposition. These led to numerous reforms to the Constitution enacted by Pinochet

in 1980, and approved in a subsequent plebiscite in 1989. One of these reforms established the obligation of Chile to respect and promote the human rights covered in international treaties to which Chile is a party. Therefore, in addition to the catalogue of rights explicitly provided for in the Constitution, those endorsed by international treaties were now included (although not specifically listed).[9] Chilean jurisprudence has not made full use of this provision, and its application has varied from one topic to another, but it has nonetheless had an impact in supporting legal reforms to make domestic laws compatible with international standards. This process has been more thorough in some areas than in others, as will be reviewed below.

Reform of the criminal justice system

The criminal justice system is the area in which the most significant changes have taken place in adapting domestic Chilean legislation to international standards.[10] In fact, the *Concertación* governments have presented it as "the most important legal reform of the twentieth century". Since colonial times, criminal prosecution in Chile had been conducted exclusively on the basis of an inquisitorial system, which was a paperwork-based, secretive process that required judges to both investigate a case and pronounce a verdict. It was a system in which the written investigation file was the pivotal instrument and the most crucial stage of the procedure. This was an antiquated system that flew in the face of due process and fair trial. A trial should be an equal debate between two adversarial parties that is heard and adjudicated by an impartial referee, but the structure of the inquisitorial system negated the very concept of impartial judgment. Indeed, requiring one and the same individual to perform the roles of both investigator and judge violated the right to be tried by an impartial court. The inquisitorial system also failed to afford defendants the basic premise of any trial: a proper defence. A trial with no provision for adversarial challenge precludes meaningful, balanced debate and makes it extremely difficult for defendants to resist the prosecutorial force of the state. During the enquiry, judges not only investigated and indicted; to some extent they were also the guardians of the accused's interests, which precluded any significant involvement by the defence. In addition, such crucial components of the concept of defence as the right to be heard; the right to produce, review, assess or object to evidence; the rule barring higher courts from changing a decision to the detriment of the defendant when he or she is the sole appellant; and the right to competent counsel are all negated by the inquisitorial type of procedure.

Furthermore, this archaic system prosecuted abstractly on behalf of society and paid no significant attention to the needs and concrete interests of the victims, who were often subject to secondary victimization at the hands of the criminal process, through lengthy waits in court, no room for plea bargaining, humiliating confrontations with defendants, and in general a treatment inconsistent with their status as victims. Trials, for their part, failed to meet such key requirements as immediacy, openness and adversarial challenge. Another feature of the Chilean inquisitorial system was its failure to presume innocence. Additionally, pre-trial imprisonment was common practice.

In December 2000, after lengthy congressional debate and amidst widespread agreement that the inquisitorial system had all but collapsed and was in breach of international human rights treaties, Chile enacted a new criminal procedural code, which established an adversarial system. Implementation of the new system went through several stages. It was first applied in a couple of regions and then expanded through the country year by year, before coming into force across the entire country in mid-2005.

The new system separates the prosecutorial and judicial roles. A new institution, the Public Prosecutor, leads investigations in a coordinated and flexible manner, with assistance from the police. The makeup of the courts has also changed, with pre-trial hearings designed to safeguard individual rights during the preliminary investigation. The reform also created the institution of the Public Defender, which represents defendants throughout all of the procedural stages. These new institutions help to ensure basic principles of due process, such as trial by an impartial judge and genuine adversarial argument under conditions of equality.

A key new component that was absent in the inquisitorial system is the ability to select cases, which helps to keep the prosecution's caseload manageable. This ensures that prosecutorial efforts remain focused on relevant cases for which sufficient evidence exists for a successful prosecution. The system also considers alternatives to a final judgment, such as reparations and a conditional stay of proceedings. These newly introduced features enable conflict resolution through non-traditional means, which in cases of minor and intermediate criminality are often more satisfactory to the parties involved and are more socially effective than purely repressive methods.

The criminal justice reform undertaken in Chile is part of a larger Latin American trend in which many countries have undergone similar processes. It is widely recognized, though, that despite persisting problems the Chilean reform has been among the most successful, because it has effectively changed judicial and police practices to make them more compatible with international norms.

Freedom of expression and public debate

The process of creating effective standards of freedom of expression and establishing strong public debate has proved to be much more complex than the reform of the criminal justice system. In a way, the evolution of freedom of expression since the beginning of the transition to democracy has been a mirror of the transition itself.[11]

During the first stage, which took place throughout the 1990s, the legacy of the military regime and the so-called "*política de los consensos*" (consensus politics) resulted in restriction of the freedom of expression. The governing coalition placed a strong emphasis on reaching agreements with the right-wing opposition and with the military on virtually all relevant issues, to avoid conflicts that would allegedly jeopardize the transition. This led to a lack of mobilization of civil society (compared with the strength it had gained during the final years of the dictatorship) and to undue restrictions on public debate. Although during this first stage the most repressive provisions of the State Security Law were abrogated, this legislation continued to be used in many high-profile cases, including several brought by Augusto Pinochet in his capacity as Commander-in-Chief of the Army. Additionally, a number of criminal complaints were filed by the political authorities (under both the State Security Law and other statutes) against those who dared to challenge the "consensus" by criticizing the authorities in a robust and open manner.

This first stage of the transition also featured attempts by conservative groups to restrict freedom of expression on religious grounds. For example, the film *The Last Temptation of Christ* was banned by the Supreme Court because it allegedly violated the honour of Jesus Christ, of the Catholic Church and of Catholics. The Court stated that Catholicism, being by far the most widely practised religion in Chile, deserved special protection from the state. This was despite the fact that the state and the Catholic Church in Chile have been separate since the 1925 Constitution. Several years after the film's prohibition, the Inter-American Court of Human Rights overturned the domestic decision.[12]

A second stage started in the late 1990s and is ongoing. Criticism of restrictions on public debate became stronger and more frequent, from both civil society and the media, with some political authorities also joining the critics. At a more general level, this stage was influenced by the detention of Augusto Pinochet in London and by the implementation of a series of judicial reforms that led to a Supreme Court membership quite different from that at the beginning of the transition. Some notable cases of censorship and other kinds of restrictions still occurred, however. In particular, "The Black Book of Chilean Justice" (*El Libro Negro*

de la Justicia Chilena), which detailed the role of the domestic judicial system in the violations of human rights, was banned as the result of a criminal complaint filed by a Supreme Court judge. But the general reaction against these restrictions gained momentum. This led to a series of legal reforms, including the total repeal of the "*desacato*" (contempt of authority) laws contained in the State Security Law and the derogation of censorship from the Constitution – this latter reform was a direct consequence of the Inter-American Court judgment in *The Last Temptation of Christ* case. In addition, for the first time in the country's history, some rules were adopted to guarantee citizens' access to public information, although this was still in its early stages.

These developments, however, were accompanied by contradictory signs: *desacato* laws were kept intact in the penal and military justice codes; tribunals continued to censor different forms of expression on the grounds that judicial prohibitions did not constitute censorship; and the rules on access to information were severely distorted by a series of regulations adopted by a wide range of state organs. Furthermore, the power gained by citizens and the media to express their opinions led to a new situation, in which there seemed to be less fear about "breaking the consensus". This, in turn, produced frequent conflicts between those actors and the political and judicial authorities.

Several additional reforms took place in 2005: the Constitution explicitly established the public nature of the information gathered by the state and of state activities, thus enhancing public access to information; *desacato* laws were removed from the penal code; and restrictions on freedom of expression in a state of emergency were modified in order to make them compatible with international standards.

It can be concluded that advances have occurred, especially in the last few years. However, there are still some issues that have not been dealt with. The most important of these seem to be military jurisdiction over certain kinds of expression (including over civilians as potential accused); *desacato* provisions that give special protection to the honour of military authorities; the persistence of the judicial doctrine according to which the prohibition of certain forms of expression does not constitute censorship; and the still uncertain status of access to information.[13]

Vulnerable groups

International human rights standards concerning vulnerable groups significantly evolved during the 1973–1990 period. Thus, at the start of the transition to democracy in Chile many changes were needed to adapt Chilean legislation and practices to these standards. In fact, important

changes have occurred in this regard in Chile, despite a number of persistent flaws and insufficiencies.

One area in which significant reforms have taken place is the human rights of women.[14] Before 1990, provisions regarding women were based on a paternalistic approach, in which the legal system was intended to provide "protection". International standards, in contrast, require the state to play a different role, one that must be focused on guaranteeing the autonomy of women to enjoy their rights.

In line with this new approach, a Ministry of Women (SERNAM) was set up at the beginning of the transition. SERNAM is responsible, *inter alia*, for reviewing governmental policy and programmes for compliance with the Convention on the Elimination of Discrimination Against Women (CEDAW). Other initiatives include local government programmes supporting fuller integration of women into public life and country-wide training programmes designed to educate municipal, judicial, police, education and public health workers regarding key gender issues.

The rights of women in the workplace were significantly enhanced in the course of the transition period. Pregnancy tests as a condition of employment were banned; men and women were allowed paid leave to care for seriously ill children; and an archaic rule banning women from underground occupations was struck out. Court and administrative rulings have reaffirmed that women cannot be asked to waive maternity rights and have extended these rights to workers on short-term contracts. On the negative side, women are far from earning equal pay with men for work of equal value. Rules on sexual harassment were adopted in 2005, and it is still too early to determine the effectiveness of this legislation. As for the appointment of women to senior posts, the most relevant example has been the election of Michelle Bachelet as the President of Chile in 2006; at a more general level, however, progress is slow.

Domestic violence has become a matter of public concern, whereas in the past it was relegated to the margins and usually considered an issue to be dealt with privately, within the family. Prior to the passage of domestic violence legislation in 1994, women could only report such incidents to a low-level judge or apply to a court for a restraining order. These requests were routinely turned down, and some courts would go so far as to deny jurisdiction, alleging that family or marital disputes were not covered by injunctive relief laws. Although the 1994 legislation improved the situation (especially by calling public attention to the issue), it has not been very effective, as many abuses of this kind continue to be reported. Most recently, in 2005, the legislation was substantially amended, creating renewed optimism.

As for abortion, no significant debate has taken place. Therapeutic abortion, historically the sole type allowed, was banned in the last year of

the dictatorship. Despite repeated calls from international human rights organizations, attempts to reinstate it in legislation have not succeeded.

Indigenous peoples' rights is another issue that experienced important developments at the international level while the dictatorship was in power. After a series of initiatives adopted during the early years of the transition, the situation has stagnated.[15] As a result of a pact signed between the *Concertación* and indigenous leaders in 1990, the Special Commission on Indigenous Peoples was created. This led to the adoption of legislation defining who is indigenous, creating funds for indigenous people, banning the buying and selling of their lands, and establishing a permanent National Corporation for Indigenous Development (CONADI) with a mandate to promote, coordinate and implement public policies to enhance the development and rights of indigenous peoples. This law also extended formal standing to indigenous groups and proclaimed the state's duty to guarantee their rights.

In spite of these advances during the Aylwin administration, no efforts of similar magnitude have been undertaken over the course of the following coalition governments. Recognition of native rights in Chile lags far behind that in other Latin American countries. The governing coalition has tried to introduce reform of the Constitution to give the same recognition to indigenous peoples' rights, but the right-wing parties have opposed this. Chilean legislation thus still refers to the indigenous population solely as an "ethnic group".

The persistence of discrimination and land ownership problems have led some indigenous groups to acts of violence. The state has at times responded by using the Law Against Terrorism, which has been criticized by the UN Special Rapporteur on Indigenous Rights, who has also called attention to other violations of the rights of these groups.

During the Lagos administration (2000–2006), it seemed at times that public policies on indigenous peoples would be seriously reformulated, especially when the government established a high-level commission for this purpose (the Comisión de Verdad Histórica y Nuevo Trato), chaired by former President Aylwin. However, no significant state response followed the recommendations of the Commission, which in many respects were similar to those of the UN Special Rapporteur.

Over recent years there has also been increasing state and social attention to other vulnerable groups, such as persons living with disabilities, immigrants and others. However, these public policies have not been sufficient to satisfy the needs of most of these groups.

Generally speaking, the judiciary has moved slowly towards a more protective role concerning vulnerable groups. Restrictive interpretation of constitutional provisions and the negligible influence of international human rights standards in domestic judicial decisions have prevailed. In

fact, the change that has been experienced in Chilean jurisprudence in relation to confronting past gross violations has no counterpart as far as current abuses are concerned.

Reforming the political system

As a result of the agreements between the military government and the opposition after Pinochet was defeated in the 1988 plebiscite, the framework of the political system established by the Constitution was changed in only minor aspects. It was not until 2005 that major modifications were made to the Constitution in this respect. These reforms brought the Chilean political system into line with the resolution passed by the Inter-American Commission in 2000 to which I turn below. Most notably, in March 2006 the position of appointed senators was abolished.

However, the most pressing matter is the electoral system. Under the current system, two parliamentarians are elected for each district. In practice, this has strongly benefited the right-wing parties, which have been able to secure almost half of the seats with only a 30–40 per cent share of the total votes cast. This, combined with the system of appointed senators, meant that for many years right-wing political parties had a majority in the Senate. Additionally, this system kept the coalition with the third-highest number of votes (comprising parties of the left) out of Congress. Although the *Concertación* governments have tried to change this system, the right-wing parties have consistently opposed such reform. In the end, an agreement was reached that reform of the electoral system would be addressed not through constitutional reform but by means of legal reform. However, because the kind of law that would be needed for this purpose requires a qualified majority, support from some right-wing parliamentarians will still be necessary to make the reform a reality.

Chile and the Inter-American human rights system

Prior to the Pinochet regime, Chile was a significant actor in the promotion of the human rights agenda at the international level, both in the United Nations and in the Organization of American States. During the dictatorship, Chile itself became scrutinized by international human rights organizations. For instance, Chile was the first country for which the UN Commission on Human Rights designated a Special Rapporteur, and the Inter-American Commission on Human Rights published numerous reports on conditions in the country. It seems plausible to conclude

that Chilean people benefited from this international attention – without it, the abuses would have been even more widespread.

Since the very beginning of the transition to democracy, the government has tried to re-establish Chile's historical reputation as a major actor on human rights. Chile quickly moved to ratify key treaties, such as the American Convention on Human Rights, as well as to recognize the jurisdiction of the Inter-American Court over contentious cases. Also, at the start of the transition Chile became a member of inter-governmental human rights organizations (notably the UN Human Rights Commission) and presented as candidates a number of Chilean nationals who were elected to other human rights organizations whose members serve in their individual capacities. These included the Inter-American Court and Commission, the UN Human Rights Committee and the UN Sub-Commission on Human Rights.

However, until very recently this evolution was not matched by a consistent attitude of the Chilean state towards cases presented against it in the Inter-American system. Indeed, during the 1990s and the early years of the next decade, the Inter-American Commission issued several decisions on specific (and landmark) cases against Chile, which the state either did not obey or took many years to do so. This occurred in the case of the book *Impunidad Diplomática* ("Diplomatic Impunity"): the Commission established in 1996 that the prohibition on its entry and sale in Chile should be lifted, but it remains banned.[16] Then there were two groups of cases where the Commission declared the Chilean amnesty law to be contrary to the American Convention.[17] No action was taken by the state at the time, and it was only years later that Chilean jurisprudence would change in this regard. Finally there was the case in which the Commission decided in 1999 that appointed senators adversely affected the political rights of Chilean citizens. It took six years to respond to this decision.[18] Only in the case of *The Last Temptation of Christ*, issued by the Inter-American Court, did Chile eventually take a more active role in implementing a decision.[19]

In addition, until a few years ago the Chilean state did not engage in amicable settlements during proceedings at the Commission, in contrast to the trend among other states that were interested in supporting the Inter-American system. Furthermore, during the 1990s Chile repeatedly argued before the Commission that it had no responsibility for actions by the judiciary (invoking the separation of the branches of power), an argument that had no serious basis in international law, because a state is accountable for the behaviour of all of its branches.

It has only been in the last few years that the Chilean state has changed its attitude vis-à-vis cases at the Commission, arguing in a more serious manner, engaging in negotiations that have led to some amicable

settlements, and generally playing a role more consistent with that of a state that allegedly supports the enhancement of the Inter-American system. Taken together with domestic developments, this new attitude warrants a degree of cautious optimism about the progress to be expected from a country making its way down the long road of transition.

Notes

1. This chapter was written in 2006, before I became a Commissioner at the Inter-American Commission on Human Rights.
2. On the transition to democracy in Chile, see Ascanio Cavallo, *La Historia oculta de la transición* (Santiago: Grijalbo, 1998); Paul Drake and Iván Jaksic, eds, *El modelo chileno: Democracia y desarrollo en los noventa* (Santiago: LOM, 1999); Alfredo Jocelyn-Holt, *El Chile perplejo* (Santiago: Planeta/Ariel, 1998); Tomás Moulian, *Chile actual: Anatomía de un mito* (Santiago: Universidad Arcis – LOM, 1997); Rafael Otano, *Crónica de la transición* (Santiago: Planeta, 1995); Felipe Portales, *Chile: Una democracia tutelada* (Santiago: Sudamericana, 2000).
3. Comisión Nacional de Verdad y Reconciliación, *Informe* (Santiago, 1991).
4. This special exclusion was the result of pressure brought to bear on the Pinochet government by the Carter administration, which had a serious interest in the investigation.
5. As the result of reform in 1997, most of the Supreme Court judges appointed by the dictatorship left the bench, having been offered strong economic incentives to do so.
6. Human Rights Watch, *When Tyrants Tremble: The Pinochet Case* (Washington, DC, 1999).
7. For a more detailed description of the confrontation of past gross violations during the Chilean transition, see Elizabeth Lira and Brian Loveman, *Políticas de reparación: Chile 1990–2004* (Santiago: LOM, 2005); see also Felipe González, ed., *Informe anual sobre derechos humanos en Chile 2003* (Santiago: Universidad Diego Portales, 2003), pp. 135–206.
8. See Cecilia Medina and Jorge Mera, *Sistema jurídico y derechos humanos* (Santiago: Universidad Diego Portales, 1996). This comprehensive book shows the status of the Chilean legal system vis-à-vis the country's international obligations in the early years of the transition to democracy.
9. Among the publications that deal with this subject, see Francisco Cumplido, "Historia de una negociación para la protección y garantía de los derechos humanos", in *Nuevas dimensiones en la protección del individuo* (Santiago: Universidad de Chile, Instituto de Estudios Internacionales, 1991), pp. 191–197; Rodrigo Díaz Albónico, "La reforma al artículo 5º de la Constitución Política", in *Nuevas dimensiones en la protección del individuo*, pp. 199–208; Claudio Troncoso and Tomás Vial, "Sobre los derechos humanos reconocidos en tratados internacionales y en la constitución", *Revista Chilena de Derecho* 20 (1993).
10. Mauricio Duce, "Criminal Procedural Reform and the Ministerio Publico: Towards the Construction of a New Criminal Justice System in Latin America", thesis submitted to the Stanford Program on International Legal Studies at Stanford Law School, Stanford University, 1999. See also, Carlos Rodrigo de la Barra Cousino, "Adversarial vs. Inquisitorial Systems: The Rule of Law and Prospects for Criminal Procedure Reform in Chile", *Southwesterm Journal of Law and Trade in the Americas* 5 (1998), pp. 323, 326.
11. Ken Dermota, *Chile inédito: El periodismo bajo democracia* (Santiago: Ediciones B, 2002).

12. For a detailed analysis of the status of freedom of expression during the early years of the transition to democracy in Chile, see Human Rights Watch, *Los límites de la tolerancia: Libertad de expresión y debate público en Chile* (Santiago: LOM, 1998).
13. For a comprehensive analysis of freedom of expression during the transition, see Felipe González, ed., *Libertad de expresión en Chile* (Santiago: Universidad Diego Portales, 2006).
14. For a general picture of the evolution of women's human rights during the transition, see González, ed., *Informe anual sobre derechos humanos en Chile 2003*, pp. 247–293.
15. See Instituto de Estudios Indígenas, *Los derechos de los pueblos indígenas en Chile* (Santiago: Universidad de La Frontera–LOM, 2003). See also, José Aylwin, ed., *Derechos humanos y pueblos indígenas: Tendencias internacionales y contexto chileno* (Santiago: Instituto de Estudios Indígenas Universidad de La Frontera/WALIR/IWGIA, 2004).
16. Inter-American Commission on Human Rights, Report No. 11/96 ("Chile"), 3 May 1996, available at <http://www.cidh.org/annualrep/96eng/Chile11230.htm> (accessed 24 August 2009).
17. Inter-American Commission on Human Rights, Report No. 34/96 ("Chile"), 15 October 1996, available at <http://www.cidh.org/annualrep/96eng/Chile11228.htm> (accessed 24 August 2009); and Report No. 25/98 ("Chile"), 7 April 1998, available at <http://www.cidh.org/annualrep/97eng/Chile11505.htm> (accessed 24 August 2009).
18. Inter-American Commission on Human Rights, Report No. 137/99 ("Chile"), 27 December 1999, available at <http://www.cidh.org/annualrep/99eng/Merits/Chile11.863.htm> (accessed 24 August 2009).
19. Inter-American Court of Human Rights, "Case of 'The Last Temptation of Christ' (Olmedo-Bustos *et al.*) v. Chile", Judgment of 5 February 2001, available at <http://www.corteidh.or.cr/docs/casos/articulos/seriec_73_ing.pdf> (accessed 24 August 2009).

8

Human rights in Cuba and the international system

Ana Covarrubias

To talk about the state of human rights in any country is always difficult, even in countries where there are no massive violations. Socio-economic and ethnic differences or the war on terror, for example, pose specific problems in relation to respect for human rights. The Cuban case has its own interesting peculiarities. First, one of the alleged successes of the 1959 Revolution was the improvement in the status of certain human rights: education, health and racial equality. Secondly, the lack of civil and political liberties is justified by the regime on the basis of an external threat to the Revolution, to the regime itself. According to this argument, as long as the regime is threatened by the United States, political opening is not possible because those who defend political and civil liberties are allies of the external enemy. The denial of political and civil liberties therefore becomes a national security requirement.

This duality in the position of the Cuban government is illustrated by its commitment to international obligations in the area of human rights. The Cuban government has ratified 15 international treaties relating to torture, racial discrimination, genocide, and women and children, but when it comes to two of the most important pillars of the international human rights regime – the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights – Cuba's position is as follows:

> Cuba reaffirms its commitment to the provisions of the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights, a commitment that was assumed at the time of their

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> adoption by the General Assembly of the United Nations. The Cuban people enjoy the rights protected by each covenant in Cuba's constitution and laws. There are many policies and programmes offered by the Cuban state to protect and promote such rights. However, Cuba will not acquire new international obligations in a context of confrontation and manipulation of international cooperation on human rights with political ends.[1]

The case of Cuba, in consequence, is a combination of praise in the social area (at least it was for some years) and condemnation in the political sphere. Cuba is not an example of massive violations resulting in death or widespread violence, nor is it a situation where the army consistently violates human rights – as it was in other Latin American countries from the 1960s to the 1990s. Ideologically speaking, it is also a distinct case: the regime's performance is the result of a national project that raised the expectations of many Cubans – and non-Cubans as well – and it is precisely this national project that the government appeals to – and manipulates – in order to justify the lack of civil and political liberties.

Since 1959, the Cuban state has created revolutionary mass organizations, replacing "bourgeois" groups and associations, to guarantee the unification of all social efforts for the singular purpose of "constructing socialism".[2] Cuba's has been a mobilized society, but always in terms of the Revolution's national programme. The one-party system established by the Constitution and the series of mass organizations linked to the Party and the state deny citizens the right to organize in political associations that are independent from the state.[3]

According to the revolutionary experience and Marxist ideology, socialist politics should be free of conflict, since, after all, the 1959 Revolution embodied the people's aspirations. Moreover, the Revolution required cohesion in the face of internal and external threats and could not tolerate deviations that compromised its security. In Cuba, according to Damián Fernández, the state is not understood as a plural entity.[4] Because "the people" were in power, Congress, the press, political freedom, habeas corpus, university autonomy, separation of powers and political parties were not necessary. The people and the government became one, making any mechanism of representation superfluous.[5] The Cuban government, in consequence, claims to have fulfilled the "Cuban people's aspirations" by means of a socialist project but, to defend this project, political and civil liberties have had to be sacrificed.

Academics and political analysts argue that one of the consequences of Cuba's economic crisis since the 1980s has been a deterioration in education and health services and the resurgence of discrimination.[6] This is, of course, a subject of discussion, since, even if this interpretation is true, Cuba's record in those sectors may still be comparatively better than that

in other Latin American countries. Therefore, this chapter will exclude this discussion and will instead focus on civil and political liberties, that is, on political dissidence or opposition in Cuba. The question to be addressed is whether international actors have had any influence in promoting respect for political rights in Cuba, especially since the end of the Cold War and the emergence of the "liberal agenda" in the Americas. The chapter will look at general tendencies and not at specific cases of individual dissidents or groups, except for illustrative purposes.

As is well known, the Cuban government has been prevented from participating in any of the activities of the Organization of American States (OAS) since 1962, when the Marxist–Leninist character of Cuba's regime was declared incompatible with membership of the regional Organization. According to the OAS Charter, all member states should be representative democracies, and Castro's government was clearly not heading in that direction.[7] As a consequence, the Inter-American system is not a unitary international actor in a position to be considered in the case of Cuba, but its three main constitutive actors are: the United States, Latin American countries and Canada. The United Nations Organization (UN) and the European Union (EU) are also relevant actors.

Cuba's dissidence movement

The 1976 Cuban Constitution, modified in 1992, seems to guarantee civil and socio-economic rights (such as freedom of association) but, as stated by Fernández, a closer look at the Constitution reveals a major contradiction: according to the text, all individuals may exercise their civil liberties, but only to the extent that they do not oppose the consolidation of the Revolution and the socialist system. This means, in practice, that there are clear limits to civil and political rights. Castro's maxim "everything within the Revolution, nothing against it" in fact reveals the limits of civil and political rights. Moreover, the legal code includes an "Endangerment Law" – Ley de la Peligrosidad – under which any individual considered to be "dangerous" may be imprisoned even without having committed any crime.[8]

Despite the law and practice of the Cuban state, there are about 350 (rather small) independent organizations, and the Cuban state has been gradually less capable of controlling them.[9] Repression is recurrent but more dissident groups have organized since the 1980s and are less fearful of the state, as a result, in part, of international pressure on the Cuban government to respect human rights (the expectation that the regime will soon collapse has also encouraged opposition in Cuba).[10] Fernán-

dez divides Cuba's opposition into four categories: human rights groups, proto-political parties, labour associations and cultural organizations, all of which are organizations with specific aims. Whatever their differences, these organizations share their opposition to the state, their concern about their own existence and their rejection of a one-party system that offers civil society no space to act.[11]

Cuban dissidence has progressed through four stages.[12] The first was from 1959 to 1966, and relates to those revolutionaries who disagreed with Castro's political and economic course after he took power. Among them were Huber Matos and others who had fought to re-establish the 1940 Constitution.[13] Most of them were executed, exiled or imprisoned, as were former supporters of Fulgencio Batista's government. There was some international condemnation of the revolutionaries' conduct but, as Fernández argues, there was a rather romantic idea of the Cuban Revolution abroad and little attention was paid to violations of human rights (regional condemnation of Cuba focused more on its alliance with the Soviet Union).

The second period of dissidence in Cuba occurred between 1967 and 1986. In 1976, Ricardo Bofill, Marta Frayde and Elizardo Sánchez Santacruz organized the Cuban Committee for Human Rights (CCHR) to monitor and document human rights violations. Some of the members of the Committee were or had also been revolutionaries. The Committee had contacts with foreign embassies and journalists, and sent letters to international organizations and prominent individuals denouncing specific cases of violations as well as the general situation on the island. The Cubans copied dissident models from the Soviet Union and Eastern Europe: they acted in small cells inside and outside of prison. After the Mariel boatlift in 1980,[14] the Committee's membership increased but many of its associates were finally imprisoned. Jails therefore became the centre of activity for the defence of human rights. Although the international community did not pay much attention to the activities of Cuban dissidents, French president François Mitterrand pressed for the release of some members of the opposition, and the United States launched a campaign in the UN Commission on Human Rights to promote human rights in Cuba.

A third phase started in 1988 when the UN Commission visited Cuba, and it lasted until 1996. Allegedly, more than 1,000 Cubans met with the Commission's representatives to give details of human rights violations, and the Commission produced one of the most extensive reports in the history of the United Nations.[15] The US-based Radio Martí supported the actions of human rights advocates and apparently many Cubans applied for membership of the CCHR. The Committee's leaders, in turn, decided to create the Pro-Human Rights Party.

The changing international context in those years seemed favourable to human rights activists. Mikhail Gorbachev's policies in the Soviet Union and the activities of Vaclav Havel and Lech Walesa in Eastern Europe influenced the way in which Cubans fought for human rights. Additionally, after the Soviet bloc disintegrated, many thought that Castro's fall was imminent and therefore that the margins for action would widen. Cuba's dissidents came together in an umbrella organization, Concilio Cubano, but it was attacked by the Cuban government in 1996, dismantled, and never recovered.

The fourth phase lasted from the disintegration of Concilio Cubano in 1996 until 2002, and was characterized by the fragmented reorganization of the dissidence movement. Opposition groups and individuals preferred to remain separate to avoid another violent reaction from the government as had been the case of Concilio Cubano. Law 88 for the Protection of the National Independence and Economy of Cuba – known as *Ley Mordaza* – was issued in February 1999, and was aimed at those who intended to "disrupt internal order, destabilize the country and destroy the Socialist State and the independence of Cuba".[16] Law 88 made it illegal to say, write or do anything that Washington could use against Havana: "The revolution will apply with the necessary rigor . . . the laws created to defend it from new and old tactics and strategies against Cuba". In practice, Law 88 allowed for the discretionary exercise of repression and even the application of the death penalty.[17]

One might add a fifth phase, beginning when the Varela Project was presented to the National Assembly of Popular Power in 2002 and ending, perhaps, in the spring of 2003, when the government imprisoned 75 dissidents and executed 3 hijackers.[18] The Varela Project was an initiative supported by the Christian Liberation Movement – Movimiento Cristiano Liberación – and designed according to Articles 1, 62 and 88 G of the Cuban Constitution. Article 88 G allows Cuban individuals to propose initiatives of law as long as they are endorsed by at least 10,000 citizens. That is, Cuba's internal opposition intended to change the regime within the framework of Cuba's laws. The initiative collected 11,020 signatures and was presented to the National Assembly of Popular Power on 20 May 2002. The Project called for freedom of association, freedom of expression, amnesty for political prisoners, free enterprise and free elections. During his visit to Cuba, a few days after the initiative was presented, former US President James Carter mentioned the Varela Project in a widely broadcast speech. Carter praised the fact that the Cuban Constitution allowed individual citizens to present initiatives that might change the country's laws: "When Cuban citizens exercise the right to peacefully change their laws through direct vote, the world will see how Cubans and not foreigners will decide the future of this country."[19]

The Cuban Communist Party (CCP) responded by instructing eight of the most important mass organizations to present "a popular counter-proposal" to the National Assembly to declare socialism "perpetual and irrevocable". The Cuban press claimed that more than 8 million people endorsed this constitutional reform to make socialism "untouchable". The opposition, in turn, drafted a manifesto "All United for Freedom" – "Todos Unidos por la Libertad" – in which they demanded that the National Assembly respect the Constitution and promulgate the Varela Project. On 26 June 2002, the National Assembly unanimously approved the constitutional reform that made socialism "irrevocable".[20]

In March 2003, Castro's government tried and imprisoned 75 Cubans for crimes against their country's security, including four members of Todos Unidos por la Libertad and 26 journalists and 40 supporters of the Varela Project, but not Oswaldo Payá Sardiñas, head of the Christian Liberation Movement (Payá was even allowed to travel to Europe to collect the European Parliament's Sakharov Prize for Freedom of Thought).[21] The Cuban Commission for Human Rights and National Reconciliation, headed by Elizardo Sánchez Santacruz, also had two important members imprisoned, Marcelo López Bañobre and Marcelo Cano Rodríguez, who had monitored political prisoners before being imprisoned themselves.

The detainees were taken to Villa Marista, a detention centre of the political police, and were denied habeas corpus. On 11 April, three Cubans who had hijacked a boat to flee to the United States were executed and eight more were sentenced to prison (four were sentenced to life, one was sentenced to 30 years in prison and three women were sentenced to five, three and two years respectively). An official note issued by the government stated that Cuba was "being subjected to a sinister plan of provocations plotted by the most extremist sectors of the US government and their allies from the Miami terrorist mafia with the sole purpose of creating conditions and giving excuses to attack our motherland, which will be defended at any price".[22]

According to Amnesty International's 2005 report, during 2004 and 2005, 19 prisoners of conscience were released and 14 were granted "*licencia extrapenal*" (conditional release), "permitting them to carry out the rest of their sentences outside prison for health reasons", but they could be detained again.[23] In general, however, the situation did not seem to improve much:

> Human rights activists, political dissidents and trade unionists were harassed and intimidated. Such attacks were frequently perpetrated by quasi-official groups, the rapid-response brigades, allegedly acting in collusion with members of the security forces.

> Freedom of expression and association continued to be under attack. All legal media outlets were under government control and independent media remained banned. Independent journalists faced intimidation, harassment and imprisonment for publishing articles outside Cuba. Human rights defenders also faced intimidation and politically motivated and arbitrary arrests.
>
> The laws used to arrest and imprison journalists, relating to defamation, national security and disturbing public order, did not comply with international standards. According to the international NGO Reporters without Borders, 24 journalists were imprisoned at the end of 2005.[24]

Although, in May, the Assembly to Promote Civil Society – a coalition of more than 350 independent non-governmental organizations (NGOs) – held an unprecedented meeting of dissidents in Cuba, in December, the Ladies in White ("Las Damas de blanco") – who had marched every Sunday since March 2003 demanding the release of their male relatives – were denied permission to travel to Strasbourg, France, to receive the European Parliament's Sakharov Prize for Freedom of Thought.[25]

International actors

The United States

The first and most important international actor pressing for democratization and respect for human rights in Cuba is the United States, including, of course, the exile community.

Although the United States' initial concern with the Cuban Revolution was its alliance with the Soviet Union, democracy in Cuba has always been a key aim of US policy, especially since the exile community started gaining political and economic weight in internal politics.[26] The United States therefore implemented a policy of political and economic isolation of Cuba: Cuba's "suspension" from the OAS or the US promotion of resolutions on Cuba at the UN Commission on Human Rights are a fine illustration of isolation at the diplomatic level, and the US commercial embargo on Cuba has been the most enduring – and unsuccessful – instrument to overthrow Castro's government. The commercial embargo was reinforced first by the Torricelli Act – or Cuban Democracy Act – in 1992, and then by the Helms–Burton Law – or Cuban Democracy and Solidarity Act – in 1996. Interestingly, both these initiatives openly link the lifting of the embargo to the "transition to democracy in Cuba" and, moreover, they stipulate the way in which this process should take place. In other words, beyond economic isolation, the United States government has drafted the recipe that Cubans should follow in order to move to-

wards democracy. More recently, George W. Bush's government launched the Commission for Assistance to a Free Cuba and the Compact with the People of Cuba.[27]

Despite the profound difference in power between Cuba and the United States, and despite the enormous influence of the exile community in US policy towards Cuba, it might be safe to argue that, so far, the United States as an actor has not been helpful in promoting democracy and respect for human rights in Cuba. On the contrary, US policy in general, as well as particular initiatives, tends to encourage Castro's government to resist political opening even more. The Cuban government's explanation of its repressive policies in March 2003 was that those people had been directly linked to the conspiring activities of Mr Cason – head of the US Interests Section. In an official TV announcement, the Cuban government stated: "It is not possible to think that the treacherous acts at the service of a foreign power that jeopardize the security and interests of our heroic motherland, may enjoy guaranteed impunity."[28]

The United States is therefore a key actor, not necessarily for promoting human rights but for *preventing* Cuba's opening. However, one should not underestimate the power of the United States to attract international attention to Cuba, something that may be a positive factor for other actors.

Canada

Canada and the European Union have followed a different strategy from that of the United States. Canada and European countries did not break relations with Cuba in the 1960s, nor did they comply with the US embargo.

Jean Chrétien's liberal government in Canada implemented a constructive engagement policy towards Cuba in 1994. This policy must be understood in terms of Canada's foreign policy in general – Canada's presence in Latin America and relations with the United States[29] – but it resulted in closer relations with Cuba. High-level contacts increased; Cuba was included in the category of countries eligible to receive official aid for development through the non-governmental Canadian sector; humanitarian aid increased; the government supported the expansion of Canadian companies into Cuba; and Canada stood for Cuba's full participation in international affairs.[30] These initiatives did not require any conditions to be met by the Cuban government. At the same time, however, Canada expressed its concern about Cuba's human rights situation at the United Nations and through contacts by embassy officials with human rights activists and religious communities on the island. The Canadian government wanted to participate in the process of economic and political reforms in

Cuba since the beginning; in other words, it wanted to support a movement towards a peaceful transition, total respect of human rights, genuinely representative governmental institutions, an open economy and full integration in hemispheric institutions.[31] In January 1997, the Cuban and Canadian governments signed a Joint Declaration of Ministers of Foreign Relations during Foreign Minister Lloyd Axworthy's visit to Cuba. The Declaration strengthened the Canadian–Cuban rapprochement even more by encouraging Canadian development aid, trade, investment, cultural exchange, diplomatic contacts and support of Cuba in international forums. The Canadian government started granting technical aid to reform Cuban institutions in the economic, legal and judicial spheres.[32]

But Castro's government did not react as the Canadian government expected and, in the face of a lack of improvement in the area of human rights, the Canadian government started to cool its relations with Cuba. In April 1998, Jean Chrétien visited Cuba and pressed for the release of members of the opposition known as the Group of Four (Grupo de Trabajo de la Disidencia Interna), but failed. Ten months later, after issuing the Law for the Protection of the National Independence and Economy of Cuba, Castro's government charged the dissidents with sedition and tried them in a closed trial. The dissidents were found guilty and sentenced to between three and a half and five years in prison. Chrétien informed the Cuban government that Canada would review all the bilateral projects that had been agreed upon.[33] In the face of Cuba's resistance to change and the hardening of its policies against the opposition, Canada put an end to human rights programmes with the Cuban government.[34]

The Canadian government protested over the crackdown on dissidents in the spring of 2003. On 3 October 2005, during the Cuban Foreign Minister's visit to Canada, Canada's Minister of Foreign Affairs, Pierre Pettigrew, brought up the subject of the human rights situation in Cuba and expressed particular concern about three political prisoners who were on hunger strike: José Daniel Ferrer García, Víctor Rolando Arroyo and Félix Navarro.[35]

The European Union

After the adoption of the Helms–Burton Law, the Council of the European Union issued a "Common Position Concerning Cuba" on 2 December 1996:

> Purpose: to encourage the process of transition to pluralist democracy and respect for human rights and fundamental freedoms in Cuba, and a sustainable recovery and improvement in the living standards of the Cuban people. In order to promote peaceful change in Cuba the European Union will intensify

> its present dialogue with the Cuban authorities and with all sectors of Cuban society, will remind the Cuban authorities of their responsibilities regarding human rights, will encourage the reform of internal legislation and observance of international agreements while continuing to provide *ad hoc* humanitarian aid and funding focused economic cooperation projects. As the Cuban authorities make progress towards democracy the European Union will lend its support to that process through closer economic cooperation and more intensive dialogue.[36]

After the repression of 2003, on 21 July 2003 the European Union issued a statement concerning Cuba:

> Stressing the severe deterioration in the human rights situation in Cuba since the previous evaluation by the EU, the Council expressed deep concern at the attitude of the Cuban authorities, and in particular the resumption of executions, the attacks on freedom in the country and the worsening relations with the EU's Member States and acceding countries. It reaffirmed the continuing validity of Common Position 96/697/CFSP and called for a change of attitude and major reform efforts on the part of the Cuban authorities, these being preconditions for any reinforcement of EU development cooperation with Cuba.[37]

The European Union decided to postpone indefinitely the presentation of its analysis regarding Cuba's request to join the Cotonou Agreement, and took the following measures: (1) to limit bilateral high-level government visits; (2) to reduce the participation of member states in cultural events; (3) to invite Cuban dissidents to national holiday celebrations; and (4) to re-examine the European Union's Common Position on Cuba. At the beginning of 2005, after some political prisoners were released for health reasons, the European Union and Cuba normalized diplomatic relations.

Latin America

Most OAS members supported the US policy of isolation during the 1960s, but they re-established relations with Cuba in the 1970s. However, it is difficult to say that democracy and the protection of human rights in Cuba were a decisive consideration in Latin American foreign policies.

As in the cases of Canada and the European Union, in the 1990s some Latin American countries – and even the OAS[38] – thought it was time to expect change in Cuba and to do something to bring it about. The Rio Group and Ibero-American Summits were the arenas where Latin American countries expressed their positions regarding Cuba. The Final Declarations of the Ibero-American Summits have in general endorsed the idea of reinforcing democracy and the protection of human rights in

the region. More specifically, at the first Summit in 1991, Presidents Carlos Saúl Menem of Argentina and Carlos Salinas de Gortari of Mexico illustrated opposing positions regarding Cuba: the former intended to impose conditions on Cuba's government whereas the latter defended non-intervention in Cuba. And, according to President Alfredo Cristiani of El Salvador, if Cuba did not change it would remain regionally and internationally isolated.[39] In November 1991, at the Rio Group Summit, Latin American countries expressed their "profound concern about the situation and future of Cuba" but were divided over whether or not to press Castro to hold democratic elections: Argentina and Uruguay favoured that course whereas Mexico, Colombia and Venezuela opposed it.[40]

Argentina's and Mexico's opposing positions continued at the second Summit in Madrid. During the IV Ibero-American Summit in Cartagena de Indias in June 1994, the issue of Cuba's change was discussed again: Brazil's President Itamar Franco supported the idea of Cuba's reintegration into the OAS but Argentina maintained its position of demanding change before Cuba re-entered the Organization.[41] Also in 1994, the Rio Group meeting took up the discussion on Cuba. A resolution asked for the lifting of the US embargo and it ratified the need for a peaceful transition towards democracy and pluralism in Cuba. Argentina, Chile, Venezuela, Uruguay, Paraguay, Ecuador, Panama and the Central American delegation strongly demanded the democratization of the Cuban regime whereas Brazil and Mexico supported non-intervention.[42]

According to Heller, the Cuban government started negotiations to join the Rio Group as an observer at the end of 1995 and the beginning of 1996 but the shooting down of the "Hermanos al Rescate" planes in 1996 closed any such possibility.[43] At the VII Ibero-American Summit in November 1997, Venezuela, Argentina and Nicaragua proposed a resolution requesting freedom of expression and respect for human rights in Cuba, but it was not approved.[44]

In general, then, the Latin American countries have defined their positions towards Cuba according to the US embargo, on the one hand, which they condemn, and democracy and human rights in Cuba, a subject on which they are divided. The end of the 1990s, however, saw a reconfiguration of power in Latin America and Castro now has the support of Venezuela, Bolivia and Mercosur. Mexico's change in policy under President Fox resulted in a severe deterioration in relations with Cuba and, needless to say, no changes in Cuba.

The United Nations

The two UN organs that have dealt with the human rights situation in Cuba are the Commission on Human Rights in Geneva and the Gen-

eral Assembly. The resolutions adopted or voted on were not condemnations of the human rights situation in Cuba but requests that the Cuban government improve its record on the subject. The resolutions voted on every year in Geneva provoked the strongest reaction from the Cuban government because the Human Rights Commission was perceived as a highly politicized forum and an additional instrument of US foreign policy. It can be argued that the Commission's efforts were partially successful in 1988 when representatives of the Commission were allowed to visit Cuba. Since then, however, Castro's government has refused to allow the Commission's representatives – or any other human rights body – to visit Cuba. Following the departure of the Commission, Cuban human rights leaders were harassed and imprisoned. The March 1990 vote by the Commission was also followed by the arrest of nine members of the Pro-Human Rights Party, who were charged with belonging to a "counter-revolutionary organization".[45] The Commission voted to ask the Cuban government to comply with its pledge not to detain, repress or otherwise mistreat Cuban human rights activists. The resolution also asked Cuba to provide answers to questions that the delegation had posed during its 1988 visit to the island. Cuba opposed the resolution and was sponsored by Czechoslovakia and Poland. Voting with the United States were Bulgaria and Hungary.[46] Castro referred to dissidents in a January 1990 speech as "cockroaches who try to create fifth columns at the service of imperialism", and he promised that the Cuban people would "crush" them.[47]

After the 2003 crackdown on dissidents, the United Nations also appealed to the Cuban government to pardon the dissidents.[48] In general, the UN resolutions may have helped to draw attention to the situation in Cuba but so far they have not helped to improve Cuba's human rights situation.

Castro's reaction to international pressure

Cuba's reaction to US policy is well known: resistance and defence, and more repression. By linking the US threat to domestic dissidence, Castro's policy becomes unified: it is defence against foreign aggression within the island.[49] It is difficult to believe that Castro truly thinks there is a link between domestic opposition and national security, but such manipulation of ideas certainly helps to justify internal repression. In the regime's logic, the United States does not therefore exert an influence to improve the state of human rights on the island; quite the contrary – it is the source of human rights violations. As long as this logic continues to apply, the United States will not become a positive influence in Cuba.

One of the arguments explaining why Castro decided to move against dissidents in March 2003, for example, suggests that it was precisely a way of avoiding an improvement in relations with the United States as a result of a growing bipartisan opposition to the embargo.[50] As mentioned previously, Castro justified repression by referring to the head of the US Interests Section.

During the period when Canada was implementing its policy of constructive engagement with Cuba, its government claimed that the release of Ismael Sambra in May 1997 (he then went into exile in Canada) proved that it was a successful policy.[51] This success, however, did not last long: Chrétien was not able to obtain the release from prison of the Group of Four. Cuba's reaction in this case was stronger as Castro's government reiterated that it would not accept the liberal notion of economic and political rights. Canada then halted all human rights programmes with the island. In July 1999, Castro accused the US and Canadian governments of planning to damage Cuba during the Pan-American Games and called Canada "enemy territory". And after Canadian Foreign Minister John Manley justified the fact that Cuba had not been invited to the 3rd Summit of the Americas in Quebec in 2001, Castro criticized the way in which the Canadian government was repressing peaceful demonstrations to protest against crimes committed against the political and economic rights of the peoples of Latin America: "They are governments [Canada's] that deceive the world by calling themselves defenders of human rights while they treat their people in such a way."[52] After the Summit, Castro called Chrétien a "fanatical believer in capitalism" and accused him of acting as an instrument of US foreign policy.[53]

The European Union took a series of measures against Cuba after the 2003 crackdown on the dissidence movement. One of them was a decision on 30 April, at the request of a Spanish EU Commissioner, to postpone consideration of Cuba's request to join the Cotonou Convention; Cuba's reaction was to withdraw its application. On 27 May, Cuba's Ministry of Foreign Affairs refused to accept one of the European Union's protest notes, describing it as "intolerable inference in Cuba's internal affairs" in an official Statement on 11 June 2003.[54] In the same Statement, the Ministry of Foreign Affairs called the European Union's behaviour "hypocritical and opportunist" and attacked specifically Spain and Italy. The note warned Europeans that Cuba would not tolerate provocation and blackmail, and that Cuba's laws would be rigorously applied to those "mercenaries" who used European embassies as centres for conspiring against the Revolution. In fact, the Cuban authorities would "take the appropriate measures" in relation to the Spanish Cultural Centre in Havana, whose activities were in defiance of Cuba's laws and institutions.[55] The Statement was clear:

> This new campaign of the European governments against Cuba also stems from Aznar's initiative.
>
> Mr Aznar, obsessed with punishing Cuba and now a minor ally of the Yankee imperial government, has been the person mainly responsible for the fact that the European Union has not developed an independent and objective approach to Cuba and today is the man mainly responsible for its traitorous escalation in aggression, just when our little island has become the peoples' symbol of resistance to the threat that the United States may impose a Nazi-fascist tyranny on the rest of the world, including European peoples . . .
>
> Cuba knows that the Spanish government has been funding the annexationist and mercenary groups which the superpower is trying to organise in our country – just as the U.S. government does, following the dictates of the Helms-Burton Act.[56]

The Statement also mentioned the Italian government's unilateral decision to cancel its development cooperation with Cuba: "This is the highly strange way in which the Italian government is preparing to defend the human rights of the Cuban people."[57] The Statement concluded:

> Cuba does not recognise the European Union's moral authority to condemn it and much less to issue it with a threatening ultimatum about relations and cooperation. Cuba has taken decisions that only the Cuban people and the Cuban government are competent to judge, these decisions are absolutely legitimate and rest solidly on our country's laws and Constitution.
>
> . . . Cuba does not accept the interfering and disrespectful language of the latest European Union Statement [a communiqué published on 5 June in which the European Union announced several diplomatic sanctions against Cuba] and asks it to refrain from offering solutions that the Cuban people did not ask it for.

On 12 June, Fidel and Raúl Castro headed a protest march outside the Spanish and Italian embassies in Havana. The Spanish government then recalled its ambassador to Cuba to Madrid (relations were normalized in November 2004).

Relations between Cuba and some Latin American governments in the 1990s, as already described, were difficult owing to the fact that some of the latter intended to put pressure on Cuba over democracy and human rights. This situation became more complicated as some Latin American countries voted in favour of the annual human rights resolution at the UN Commission on Human Rights in Geneva. In 2000, after Fernando de la Rúa's government voted in favour of the resolution, Cuba withdrew its ambassador to Argentina for eight months. In February 2001, Castro

warned that, if Argentina voted again in favour of the resolution, it would be "licking the Yankee boot". The Argentine government summoned its ambassador to Buenos Aires and cancelled a commercial mission that was due to visit Cuba and renegotiate Cuba's debt with Argentina. Argentina voted in favour. Uruguay broke off diplomatic relations with Cuba in April 2002 after Castro had called its government "servile" and "slavish" to Washington, and President Jorge Batlle Ibanez a "wan and abject Judas". In the case of Mexico, relations also deteriorated almost to the point of rupture. Mexico's vote in favour of the resolution at the Commission was an important reason, but not the only one.[58]

International actors and change in Cuba?

The story just presented could easily lead to the conclusion that the human rights situation in Cuba remains precarious, and it may well be so. But, despite the fact that Cuba is not a democracy, Cuba in 2006 was not the same as it was in the 1960s. What had changed? Why? Answers to these questions, of course, differ.

Writing before the spring of 2003, Jorge Domínguez argued that Cuba was moving from a totalitarian to an authoritarian regime. It was a slow and incomplete transition owing to the totalitarian will of the ruling elite, which was still very powerful. However, the state had started to lose its overwhelming capacity to control: there were opposition groups that the security forces had strongly attacked but had not been able to eradicate.[59] And repression was not absolute. For example, in the summer of 1994 there were protests and disturbances in Havana, where the army did not fire their weapons. In support of this argument, one might add the fact that there is religious liberty now, and the visit of Pope John Paul II to Cuba was seen as an opening gesture by Castro's government. During the IX Ibero-American Summit in Havana in 1999, the Cuban government allowed foreign officials to meet with dissident groups. The Cuban government also allows foreign news broadcasting companies on the island.

Wayne Smith, in turn, reminds us that, since the mid-1970s, Cubans have voted by secret ballot, in fair and democratic elections, for municipalities. The process of nominating candidates is "remarkably" open and anyone can run for office, not just CCP members.[60] In February 1993 the law was reformed so that citizens of each municipality could elect their National Assembly representatives. As an election, however, it was rather a farce because only one candidate could contest each seat.[61]

Even since the crackdown on dissidents in 2003, Cuba's domestic opposition has not disappeared, and prominent figures such as Elizardo Sánchez Santacruz have not been imprisoned (others who were have

been released, such as Marta Beatriz Roque). The process to present the Varela Project, however unsuccessful, did take place, and former US President Carter visited the island. This is not to say, of course, that Cuba's human rights record has improved, or that jail conditions are any better; but these examples illustrate that the state's control is not absolute. According to Domínguez, writing in 1997, the Cuban people are less intimidated by the power of the state, in part as a result of international pressure on the Cuban government. Cuba is changing because the government and the CCP cannot prevent it.[62] And at least the names of prominent figures of the opposition are known outside Cuba. The fact that Payá received the Sakharov Prize for Freedom of Thought gives the human rights situation in Cuba an international dimension.

Carmelo Mesa-Lago, on the other hand, argued in 1997 that, although changes were taking place *within* the regime, the regime itself was not changing. Except for the spaces opened up for the Catholic Church, the rest of the changes described by Domínguez had not had any impact on democratization. There was a process of recentralization of political power around Fidel Castro (until his illness), with de-institutionalization, less delegation of functions, and so on.[63] Mesa-Lago maintained that the only effort to unify opposition had been the Concilio Cubano, and that it had been disbanded. Moreover, the attempt to pursue reform by a group of academics was also abruptly stopped.[64] In updating this argument, one might use the example of the Varela Project: it tried to unify the opposition to pursue change according to the regime's rules, and the government's response was a counter-proposal and the 2003 crackdown on dissidence. However, as mentioned above, it is worth emphasizing that the Varela Project was never halted; it was just ignored. President Carter's support was of no use, or perhaps counterproductive. The international community could only condemn Castro's response.

Susan Kaufman Purcell concurs with the idea that continuity is more evident than change in Cuba. According to her, Cuba did not join other Latin American countries in implementing economic reforms in the 1990s because Castro rightly calculated that this would create new centres of economic and political power that would jeopardize the power of the state.[65] The Cuban government has therefore responded with mixed signals to discontent on the island: by both allowing opposition and repressing it. In any case, organized political opposition is illegal and does not pose a serious threat to the Cuban government.[66]

The defence of one argument or the other depends of course on how one assesses the extent of change. But the evidence suggests that international actors can only draw attention to the human rights situation in Cuba, and have so far been incapable of bringing a positive influence to bear. Whether it is a policy of isolation or of constructive engagement,

Castro's government has seemed resistant to either sanctions or incentives; nonetheless, it is perhaps less resistant than it was in the 1960s or when compared with countries for which information about the human rights situation is still scarce or unavailable abroad.

Notes

1. Ministry of Foreign Relations (MinRex) web page, <http://europa.cubaminrex.cu/CDH/61cdh?Instrumentos%20internacionales%20en%20materia%20de%20derechos%20humanos%20ratificados%20por%20Cuba.htm> (accessed 24 August 2009).
2. Velia Cecilia Bobes, "Entre la autonomía y el control: La sociedad civil", in Rafael Rojas, ed., *Cuba hoy y mañana. Actores e instituciones de una política en transición* (Mexico: Planeta-CIDE, 2005), p. 70.
3. Damián J. Fernández, "La naciente oposición cubana", in Rojas, ed., *Cuba hoy y mañana*, pp. 122–123.
4. Ibid., pp. 121–122.
5. Rafael Rojas, "Políticas invisibles", *Encuentro de la cultura cubana* 6/7 (Fall/Winter 1997), p. 25.
6. Some voices draw attention to discrimination against Cubans themselves since the government does not allow contact between ordinary Cubans and tourists. Susan Kaufman Purcell considers it a policy of "tourism apartheid". Susan Kaufman Purcell, "Collapsing Cuba", *Foreign Affairs* 71:1 (1991/1992), p. 135.
7. One of the principles of Article 3 of the OAS Charter reads: "The solidarity of the American States and the high aims which are sought through it require the political organization of those States on the basis of the effective exercise of representative democracy." See <http://www.oas.org/juridico/english/charter.html> (accessed 24 August 2009).
8. Fernández, "La naciente oposición cubana", pp. 122–123.
9. Ibid., p. 120.
10. Jorge I. Domínguez, "Comienza una transición hacia el autoritarismo en Cuba?", *Encuentro de la cultura cubana* 6/7 (Fall/Winter 1997), p. 23.
11. Fernández, "La naciente oposición cubana", pp. 120–121.
12. Damián J. Fernández, "La disidencia en Cuba: Entre la seducción y la normalización", *Foro Internacional* 43:3 (2003), pp. 591–607, and "La naciente oposición cubana", pp. 119–132.
13. See Huber Matos, *Cómo llegó la noche* (Barcelona: Tusquets, 2002).
14. A small group of Cubans broke into the Peruvian embassy in early 1980 and obtained political asylum. In response, Castro removed the Cuban security guards from the embassy and over 10,000 Cubans crammed into the grounds of the embassy. To counter the negative publicity, Castro announced that all Cubans who wanted to leave would be allowed to do so from Mariel Harbour. Cuban Americans organized the exodus by boat and between 15 April and 31 October as many as 125,000 Cubans sailed to the United States.
15. Fernández, "La naciente oposición cubana", p. 126.
16. Amnesty International, "Cuba: Prisoners of Conscience: 71 Longing for Freedom", available at <http://www.amnesty.org/en/library/info/AMR25/002/2005> (accessed 24 August 2009).
17. "Cronología", *Encuentro de la cultura cubana* 28/29 (Spring/Summer 2003), p. 117.

18. For a detailed chronology of the period and reactions to the government's repressive activities, see "Cronología", pp. 117–167.
19. Quoted in "Cronología", p. 118.
20. Ibid.
21. See Amnesty International, "Cuba: Prisoners of Conscience"; and "Cronología", p. 121.
22. "Cronología", p. 129. Between April 2000 and 2003, the Cuban government had implemented a de facto moratorium on executions.
23. Amnesty International, "Cuba: Prisoners of Conscience".
24. Amnesty International, "Cuba: 2006 Report", December 2005, available at <http://web.amnesty.org/>.
25. Ibid.
26. See Alejandro Portes, "La máquina política cubano-estadounidense: Reflexiones sobre su origen y permanencia", *Foro Internacional* 43:3 (2003), pp. 608–626.
27. The Commission for Assistance to a Free Cuba was first established in 2003 and has issued two reports. Its aim is to "explore ways [the US] can help hasten and ease Cuba's democratic transition". See "Reports to the President" at <http://www.cafc.gov/cafc/rpt/2004/67844.htm> (accessed 24 August 2009). In 2006, Bush's government offered to provide US$80 million over a period of two years "to empower Cubans to define a democratic future for their country", according to the Cuba Transition Coordinator Caleb McCarry (see <http://www.globalsecurity.org/military/library/congress/2006_hr/060727_2-transcript.pdf>, accessed 7 September 2009).
28. "Cronología", p. 121.
29. See Cristina Warren, "La Política de Canadá hacia Cuba: Evolución del compromiso constructivo", *Foro Internacional* 43:3 (2003), pp. 645–674.
30. Ibid., pp. 647–648.
31. Ibid., p. 648.
32. Ibid., p. 660.
33. Ibid., p. 666.
34. Ibid., p. 668.
35. FOCAL (The Canadian Foundation for the Americas), "Spotlight on Cuba: Crackdown on Dissidents", available at <http://www.cubasource.org/publications/spotlight/crackdown/ce_200510_e.asp> (accessed 24 August 2009). Arroyo and Navarro ended their hunger strikes on 4 and 5 October 2005, respectively.
36. "Common Position 96/697/CFSP adopted by the Council on the basis of Article J.2 of the Treaty on European Union concerning Cuba", *Bulletin of the European Union*, Bulletin EU 12-1996, available at <http://europa.eu/bulletin/en/9612/p104091.htm> (accessed 24 August 2009). See also Joaquín Roy, "Las dos leyes Helms-Burton: Contraste de la actitud de los Estados Unidos ante la Unión Europea y ante Cuba", *Foro Internacional* 43:3 (2003), pp. 719–743.
37. European Commission, "Council Conclusions on the Re-evaluation of the EU Common Position on Cuba", *Bulletin of the European Union*, Bulletin EU 7/8-2003, available at <http://europa.eu/bulletin/en/200307/p106154.htm> (accessed 24 August 2009).
38. OAS Secretary General César Gaviria Trujillo tried to bring the discussion of the Cuban case to the Organization. Gaviria spoke about the responsibilities that the Inter-American community should assume concerning Cuba, and added: "A process must be implemented in Cuba to attain more economic freedoms and to advance towards a plural system of political liberties and respect for human rights." Organization of American States, "César Gaviria Trujillo, Secretario General de la Organización de los Estados Americanos. Sesión inaugural del vigésimo quinto periodo ordinario de sesiones de la Asamblea General", Montrouis, Haiti, 5 June 1995, available at <http://www.oas.org/speeches/speech.asp?sCodigo=02-0321> (accessed 24 August 2009). The OAS mem-

bers were divided regarding whether Cuba should return to the Organization before or after undertaking domestic reform: Mexico supported the idea of welcoming back Cuba's regime as it was, whereas Argentina and the United States demanded regime change before accepting the return of Cuba. The discussion had no practical results and the shooting down of two aeroplanes belonging to the Cuban exile organization Brothers to the Rescue ("Hermanos al Rescate") and the ratification of the Helms–Burton Law in 1996 put an end to it. Claude Heller, "La Cuestión cubana en los foros multilaterales", *Foro Internacional* 43:3 (2003), pp. 681–682. The adoption of the Inter-American Democratic Charter in September 2001 makes it impossible for Cuba to return to the OAS without espousing a democratic regime.

39. Ana Covarrubias, "América Latina y Cuba: Juntos pero no revueltos", in Rojas, ed., *Cuba hoy y mañana,* p. 188.
40. Purcell, "Collapsing Cuba", p. 141.
41. Covarrubias, "América Latina y Cuba", pp. 188–189.
42. Ibid., p. 192.
43. Heller, "La Cuestión cubana", pp. 680–681.
44. Covarrubias, "América Latina y Cuba", p. 189.
45. Susan Kaufman Purcell, "Cuba's Cloudy Future", *Foreign Affairs* 69:3 (1990), p. 123.
46. Ibid., p.119
47. Ibid., p. 123.
48. FOCAL, "Spotlight on Cuba: Crackdown on Dissidents", 27 June 2003, at <http://www.cubasource.org/publications/spotlight/crackdown/index_e.asp>, (accessed 7 September 2009).
49. Which is, of course, easier than outside the island.
50. Another argument suggests that, given the situation in Iraq, Castro might have thought that a US attack on Cuba was imminent. Dissidents had to be neutralized since they were the enemy's allies. Theresa Bond, "The Crackdown in Cuba", *Foreign Affairs* (September–October 2003), available at <http://www.foreignaffairs.org/20030901faessay82509/theresa-bond/the-crackdown-in-cuba.htm> (accessed 24 August 2009).
51. Warren, "La Política de Canadá", p. 663.
52. Ibid., p. 671.
53. Ibid.
54. "Statement from the Ministry of Foreign Affairs about the European Union Position against Cuba", available at <http://www.cubaminrex.cu/English/currentissues/Statement%20-%20about%20the%20European%20Union%20position%20against%20Cuba.htm> (accessed 24 August 2009).
55. Ibid.
56. Ibid.
57. Ibid.
58. Covarrubias, "América Latina y Cuba", pp. 194–201.
59. Domínguez, "Comienza una transición?", p. 8.
60. Wayne S. Smith, "Cuba's Long Transition", *Foreign Affairs* 75:2 (1996), p. 105.
61. Ibid., p. 106.
62. Domínguez, "Comienza una transición?", pp. 14–15.
63. Carmelo Mesa-Lago, "Cambio *de* régimen o cambios *en* el régimen?", *Encuentro de la cultura cubana* 6/7 (Fall/Winter 1997), pp. 38–39.
64. Ibid., p. 39. Academics at the Centro de Estudios sobre América (CEA) prepared a study on NGOs in Cuba and suggested autonomy from the state even for the CEA. Cuban authorities were not happy with this proposal and transferred the academics involved to other posts; some left Cuba.
65. Purcell, "Collapsing Cuba", p. 134.
66. Ibid., p. 137.

9

Actors and processes in the generation of change in the human rights policy of Mexico

Alejandro Anaya Muñoz

The human rights project has developed slowly in Mexico. Even though Mexican diplomats were enthusiastic advocates of the introduction of human rights in the Charter of the United Nations, and made a significant contribution to the drafting of the Universal Declaration of Human Rights (UDHR), Mexican diplomacy did very little in support of the development of the international human rights project for most of the rest of the twentieth century. In spite of the country's ratification of key international treaties since 1981, and even though the Mexican Constitution included a broad set of individual guarantees and social rights, domestically the country had significant deficiencies with respect to the defence and promotion of rights. In 1990, the federal government established a national network of human rights commissions; but these lacked autonomy and no other reforms or public policies on human rights followed. However, during the later years of the presidency of Ernesto Zedillo (1994–2000), and particularly during the administration of Vicente Fox (2000–2006), the federal government adopted a different approach and implemented a series of reforms and initiatives pertaining to the human rights project, in both the international and the domestic arenas. Why did these two governments change the approach to human rights traditionally followed by the governments of the Institutional Revolutionary Party (PRI)? This chapter will attempt to answer this question by focusing on the interaction between domestic and international actors and processes, while probing the now well-known hypotheses of "the boomerang effect"[1] and the "spiral model".[2]

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The evolution of domestic and foreign human rights policy in Mexico

The human rights project did not flourish in Mexico during the later decades of the PRI regime.[3] Students in particular and social movements in general were severely repressed during the late 1960s and throughout the 1970s, with the notorious Tlatelolco (1968) and "Jueves de Corpus"[4] (1971) massacres in Mexico City.[5] The so-called "dirty war" of the 1970s, directed against guerrilla groups and their suspected supporters in the state of Guerrero, resulted in scores of executions, arbitrary arrests, torture and disappearances.[6] In the sphere of social and political struggle too, electoral rights were massively violated in rigged elections throughout the 1980s.

The political system began to be gradually opened in the early 1990s, in part as a response to a 1990 resolution of the Inter-American Commission on Human Rights (IACHR),[7] and some electoral victories by the National Action Party (PAN) were recognized. However, victories claimed by the leftist Party of the Democratic Revolution (PRD) were denied, and between 300 and 500 of its activists were allegedly murdered in the states of Guerrero, Oaxaca and Michoacán.[8]

In 1990, within the framework of the negotiations for the North American Free Trade Agreement (NAFTA), President Carlos Salinas de Gortari (1988–1994) promoted the creation of the National Commission on Human Rights (CNDH).[9] During the first half of the 1990s a series of reforms also gradually transformed Mexico's electoral laws and institutions, providing an improved framework for clean – if not fully fair – elections,[10] thus facilitating the development of an emerging multi-party system and significantly improving the exercise of the related political rights.

In spite of these developments, there was no "decline in human rights violations" in Mexico, as some authors have contended.[11] For most of the 1990s the CNDH lacked even a minimum level of autonomy from the federal government,[12] and its effectiveness and true commitment to human rights were often questioned by domestic and international non-governmental organizations (NGOs). Abuses of civil rights were widespread: among other things, freedom of expression, association and the press were often curtailed, and arbitrary arrest and torture were "endemic".[13]

The human rights situation was put under more stress after the 1994 indigenous rebellion in the state of Chiapas. Direct fighting between the rebels of the Zapatista Army of National Liberation (EZLN) and the Mexican military lasted for only 12 days but still caused over 100 deaths and at least 10 extra-judicial executions. Chiapas was heavily militarized, harassment and abuse of the indigenous population became common, and communal life and the social fabric were badly disrupted. Human rights NGOs denounced the Mexican government for implementing a

"low-intensity war" strategy that included the promotion, or at least toleration, of paramilitary groups, which were in turn accused of numerous and serious violations of human rights.[14] A similar scenario developed in the rural areas of the states of Guerrero and Oaxaca after the emergence of the Popular Revolutionary Army (EPR) in the second half of the 1990s.[15] It was in this context that a constitutional reform was implemented in September 1999, strengthening the autonomy of the CNDH.[16]

In sum, the human rights project did not particularly flourish during the final decades of the PRI regime. In fact, the situation worsened during the second half of the 1990s, particularly – though not exclusively – in the context of the counter-insurgency campaigns implemented in the rural areas of Chiapas, Guerrero and Oaxaca. And, although the government established a nationwide network of human rights commissions, this was not followed by other significant initiatives of internal policy intended to promote the human rights project.

The foreign policy of the PRI governments traditionally paid lip-service to human rights in international forums, but the principles of its diplomatic activity were those of national sovereignty and non-intervention. In general terms, Mexico did not accept the intervention of the international community in the internal issues of states, including, of course, those of Mexico itself. During the administration of President Luis Echeverría (1970–1976), Mexico played a very active role in the advocacy of a "new international economic order", and specifically in the promotion of a Charter of Economic Rights and Duties of States, which, according to President Echeverría, would be "complementary" to the UDHR.[17] But, by the late 1970s, Mexico had not signed the major human rights treaties adopted in the framework of the United Nations (UN) and the Organization of American States (OAS).[18] A commentator argued at the time that these treaties had not been signed and ratified by Mexico because human rights had become a politicized issue and because ratification would imply accepting foreign intervention in domestic affairs. In any event, as the same commentator noted, the Mexican government kept up its progressive rhetoric on human rights in order to obtain international moral prestige.[19]

In March 1981, Mexico ratified the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights (ICCPR) and the American Convention on Human Rights, but it did not ratify the Optional Protocol to the ICCPR – which gave the UN Human Rights Committee the capacity to receive individual complaints about violations of civil and political rights – and it did not recognize the jurisdiction of the Inter-American Court of Human Rights. Indeed, Mexico was still reluctant to yield sovereignty and to accept the direct intervention of international bodies in what were considered to be issues pertaining to domestic jurisdiction only. This contradictory

approach was maintained during the presidential period of Miguel de la Madrid (1982–1988): the Mexican government paid lip-service to the international human rights project[20] but was reluctant to take decisive steps towards strengthening the involvement of the different bodies of the OAS and UN regimes in the internal affairs of states, particularly those of Mexico itself. Diplomat César Sepúlveda[21] also argued at the time that human rights were manipulated politically, especially in the context of the ideological and political confrontations of the Cold War, and this explained Mexico's reluctance to accept the direct involvement of international human rights bodies in particular country situations. He noted, with all too plain ambivalence, that Mexico "has struggled in favour of the existence of an international regime for the protection of [human] rights, but has abstained from exerting pressure over any country that violates them".[22]

During the presidential term of Carlos Salinas, the government's rhetoric stressed the country's efforts to "modernize" the political system, particularly through democratization, but also via the promotion and respect of human rights within the country. The government insisted that this project responded to a sovereign decision that was not the result of international pressures. President Salinas maintained that "[w]e decided, *by our own will*, to transform our economic structures and our political practice. . . . The modernization of Mexico has begun with the extension of democratic life. Securing the liberties and rights of those who inhabit this land has been our primordial drive."[23] The message sent to the international community was that Mexico was on the path of broad reform, and therefore external pressures were unnecessary. Although the rhetoric focused on (electoral) democratization, President Salinas himself argued that the reform of the state in Mexico was founded on the recognition of human rights, and that the country took care to respect these rights. He also argued that Mexico had a remarkable tradition on the issue and that violations in the country were perpetrated not by the government but by organized crime.[24] However, Mexico continued to be strongly and explicitly against foreign intervention in its domestic political affairs.[25] Mexico firmly opposed the linkage adopted by the UN Security Council between international security and democracy and human rights, as well as the general tendencies towards intervention in democratization and human rights processes that started to develop within the United Nations and the OAS in the early 1990s.[26] Specifically in relation to human rights, Mexico's diplomats argued that the United Nations' mandate was limited to addressing cases of gross, systematic violations where national institutions were non-existent.[27]

In the presidential period of Ernesto Zedillo, the government's rhetoric and practice continued to stress national sovereignty and non-

intervention. However, signs of change appeared towards the end of the period: international electoral observers and some human rights bodies and their representatives (including Mary Robinson, High Commissioner for Human Rights at the time) were invited to visit the country, and the jurisdiction of the Inter-American Court of Human Rights was finally recognized. In addition, just as the administration was coming to an end, the government and the UN Office of the High Commissioner for Human Rights (OHCHR) signed a "memorandum of intent". However, while these developments were taking place, Mexican officials continued to employ the rhetoric of non-intervention, the government expelled human rights observers from the country, and President Zedillo had direct quarrels with international (especially European) human rights NGOs. The government's position was thus rather contradictory, struggling between openness and a diplomatic tradition that stressed non-intervention.

The initial signs of change that appeared during the last two years of the Zedillo administration were deepened during the presidential term of Vicente Fox.[28] The government openly acknowledged the existence of shortcomings, and accepted foreign scrutiny and cooperation without restrictions. In March 2001, at the annual session of the Commission on Human Rights, Jorge Castañeda (Secretary of Foreign Affairs from December 2000 until early 2003) stressed that "the government of Mexico is determined to face the grave deficits in human rights that persist in the country". Furthermore, he explicitly stressed that Mexico did not share the view that the defence and promotion of human rights are matters of exclusive domestic jurisdiction and that therefore they are not of legitimate concern to the international community.[29] A few months before, in December 2000, Mexico had signed an initial agreement on technical cooperation with the OHCHR. From early 2001 to late 2003, members of 14 special mechanisms of the human rights regimes of the United Nations and the OAS visited the country.[30] In addition, restrictions on the granting of visas to human rights observers, which had been introduced in 1998, were lifted.

In April 2002, a new agreement with the OHCHR provided for the examination of Mexican human rights, and in June the High Commissioner established a permanent office of representation. The diagnosis (published in December 2003)[31] described entrenched tendencies to violate civil, political, economic and social rights, and stressed the vulnerable situation of women, indigenous peoples and other oppressed groups. President Fox accepted all 31 recommendations of the diagnosis and made a public commitment to address them.

Mexico's participation in multilateral human rights forums was strengthened, particularly in the (now defunct) UN Commission on Human Rights[32] and the General Assembly of the OAS, where it supported

and sponsored initiatives for the development and implementation of international standards on issues related to, amongst other things, the rights of women, indigenous peoples, migrants and people with disabilities.[33] Particularly noteworthy is Mexico's approach to the human rights situation in other countries. Although the country had for a long period followed a policy of non-intervention, from 2002 Mexico started to vote in favour of Commission resolutions that criticized the human rights situation in Cuba.[34]

In March 2002, Mexico accepted the jurisdiction of the UN treaty bodies to receive individual complaints.[35] In addition, during the Fox period, it ratified the Inter-American Convention on Forced Disappearance of Persons; the UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity; the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, and the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict; the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and the Rome Statute of the International Criminal Court.[36]

In the domestic field, in early 2003 the government created the Commission on Governmental Policy on Human Rights Issues, composed of representatives of different ministries and government agencies. Within this framework, and in part as a response to the recommendations of the OHCHR, the government outlined a National Human Rights Programme, the details of which were published in December 2004.[37] However, the programme has been criticized for being highly ambiguous and thus failing to provide a solid basis for the design and implementation of effective public policies, and for lacking the necessary budget to have a significant impact in practice. But even if the programme did not have the time and the resources necessary to promote effective change, it represented the first attempt in Mexico to design public policies from a human rights perspective, and it advanced a process of promotion of human rights values within the bureaucracy.

President Fox also established a Commission to Prevent and Eliminate Violence against Women in Ciudad Juárez, and appointed Guadalupe Morfin – a respected human rights defender – as its chairperson. The Commission, however, has a limited, non-judicial mandate, has suffered from a lack of resources and has faced many obstacles, including a lack of support from state and municipal authorities.[38] The government also established a Special Prosecutor's Office to investigate the killings in Ciudad Juárez. By the time of writing, however, the Special Prosecutor had not provided concrete and convincing results, impunity remained wide-

spread, and killings and disappearances of women at the frontier continued to take place.

The Fox government implemented a broad plan of legal and constitutional reforms. In June 2001, the crime of disappearance was included in the Criminal Code.[39] In 2002, Congress passed a law on freedom of information, which established the right to have access to public information and created the Federal Institute for Access to Public Information (IFAI) as an autonomous organ of the state. But other important initiatives failed. In March 2004, President Fox proposed a comprehensive reform of the justice administration system. The initiative, however, was halted in Congress and was never approved. A constitutional reform passed in 2001 prohibited discrimination, and another in 2005 eliminated the death penalty. But the President's efforts to pass a far-reaching constitutional reform focused on human rights also failed.

The most high-profile initiative of the Fox government, however, was related to the human rights violations of "the past" – the late 1960s and the 1970s. On November 2001, on the same day that the CNDH published a report on the disappearances of the "dirty war",[40] President Fox announced the establishment of the Special Prosecutor's Office for Past Social and Political Movements.[41] Thousands of complaints were received by the Office, and hundreds of investigations were opened. But, after generating high expectations, the results were disappointing and highly frustrating – about a dozen proceedings related to disappearances and there were only a few arrests, no conviction sentences, no compensation for the victims and no relevant information about the fate or whereabouts of the hundreds of disappeared.[42]

In spite of all these failed initiatives, the new approach to human rights in Mexico has, overall, resulted in a limited but still important improvement in the legal and institutional framework for the advancement of the human rights project in the country. This includes the recognition of the jurisdiction of the Inter-American Court, the presence of the OHCHR, the openness to the visits of representatives of NGOs and intergovernmental bodies and procedures, the ratification of more international instruments, the direct access provided to the treaty bodies, the constitutional prohibition on discrimination and the elimination of the death penalty, the strengthened autonomy of the CNDH, the establishment of the Commission on Governmental Policy on Human Rights Issues and the creation of the National Human Rights Programme. However, it is necessary to stress that these developments in the constitutional, legal and institutional framework have not resulted in an improvement in the situation of human rights in practice.[43] In addition, it is important to emphasize that most of the initiatives of the Fox government were undertaken during the first three to four years of the administration. Indeed, as

the presidential period entered its final two years, the initial enthusiasm waned, particularly in relation to the promotion of *in loco* missions to the country by representatives of international bodies and mechanisms, and to the most relevant domestic initiatives, which were just left to linger.

International and domestic processes and actors as sources of change in human rights policy

Failures notwithstanding, there was a significant change in the government's human rights policies. How can this be explained? The theoretical point of departure is the proposition that domestic and international politics are "often somehow entangled".[44] International and domestic processes and actors interact in the determination of outcomes.[45] This interaction can be expected to be particularly relevant in the field of human rights, since the broader project of promoting and defending them falls within the jurisdiction not only of the state but also, increasingly, of the international community. But what sorts of actors and processes are likely to interact in such entanglings? The recent international relations literature that has explicitly attempted to account for the influence of internationally promoted, principled ideas – such as human rights – in domestic politics provides a key framework. Keck and Sikkink conclude that a central element provoking change in human rights policies in repressive states is the pressure exerted by international actors – mainly Western governments, intergovernmental organizations and NGOs. Such pressure is driven by campaigns conducted by transnational advocacy networks, which are mainly formed by domestic and international human rights advocates, but also by foundations, churches and some elements within governments and intergovernmental organizations. This dynamic of pressure from abroad that drives domestic change follows the logic of the "boomerang effect": local human rights advocates in civil society cannot directly influence the decision-making process of their own government, but through international NGOs they are able to reach foreign governments and intergovernmental organizations, which in turn have an influence on the repressive government.[46] Governments, therefore, are seen as actors that simply react to the initiative of others, particularly NGOs, intergovernmental organizations and foreign powers.

In a similar vein, Risse, Ropp and Sikkink proposed a descriptive explanatory model to account for variations in the development of the human rights project in particular countries. Their "spiral model" argues that the evolution of the human rights situation in repressive countries has five phases. In the first phase – "repression" – domestic opposition is

weak and international actors have little information about the violations of human rights in the country; therefore, the repressive government is not subject to significant domestic or international pressure to change its policies, and so repression continues unchallenged. In the second phase – "denial" – international and local human rights advocates manage to put the country on the international agenda. The transnational network begins to exert pressure, but the repressive government denies the validity of human rights and does not accept that its behaviour is subject to international scrutiny. As the pressure generated by the network increases from above and from below, the situation turns to the "tactical concessions" phase, in which "cosmetic changes to pacify international criticisms" are made. The government no longer denies the validity of human rights as such, but claims that violations are not taking place and engages in public debates with its critics about their accusations. In this way, the "instrumental rationality" characteristic of the previous two phases and the beginning of this third phase is complemented by an "argumentative rationality" – the government's own rhetoric reduces its choices and somehow forces it to continue the process of change. This leads to the "prescriptive status" phase, in which human rights are fully incorporated into the government's discourse – treaties are ratified, constitutions and laws are reformed, institutions are established, governments abandon the "foreign interference" argument, and they engage in a dialogue with their critics and even attempt to improve the situation in practice. The logic of argumentation is fundamental in this phase. However, human rights continue to be violated. Pressure from below and from above needs to be sustained if the government is to persevere and eventually reach the "rule-consistent behaviour" phase, in which "norm compliance becomes a habitual practice of actors".[47]

This model gives predominant explanatory weight to the role of the human rights transnational advocacy network, which generates three processes necessary for domestic human rights change: putting repressive states on the international agenda, empowering domestic actors and generating a process of pressure from below and from above. Networks are also key participants in the argumentation process of the later phases of the model. However, Risse and his colleagues also point to the important role of governments, and note explicitly that they not only react to the pressure generated by the advocacy network, but also implement precautionary measures before the "boomerang effect" occurs.[48] Furthermore, as shown by other authors, governments may also implement specific measures related to human rights policy following a domestic agenda that is not always linked to the pressures (actual or potential) generated by the advocacy network.[49] In this sense, it is necessary to stress here that the primary goal of governments is to secure their hold on power, and for

this reason they seek legitimacy. Indeed, one of the main incentives for policy change for Mexican governments has traditionally been the creation or restoration of legitimacy at home.[50]

In summary, it is now possible to derive a broad explanatory framework that includes international and domestic actors and processes. A combination of pressures from above and from below and the government's initiatives to promote its own (explicitly internal) agenda are the key dynamics that drive change in the human rights policies of repressive governments. The "instrumental rationality" characteristic of the process might also be complemented by an "argumentative rationality", in which domestic and international actors engage. In both cases, transnational advocacy networks, led by national and international human rights NGOs, are fundamental promoters of change. "Target governments", however, are also key players in their own right. This framework therefore proposes that the change in domestic and foreign human rights policy in Mexico was caused by pressure generated by the activism of a transnational advocacy network and by the government's initiatives to promote its own internal legitimacy. At some points in the process, however, a logic of argumentation – set in motion by either of the two previous factors – might "entrap" governments into a human rights discourse from which it is difficult to escape, and might thus continue to foster change.

Explaining the change in Mexican foreign and domestic policy on human rights

In the early 1990s, Mexican human rights NGOs, with the direct support of international counterparts such as Amnesty International, Human Rights Watch and the Center for Justice and International Law, started to interact more actively and effectively with the human rights regimes of the United Nations and the OAS. Specific cases were presented to the IACHR, and more information started to flow to the different Special Rapporteurs, working groups and treaty bodies of the United Nations. The transnational advocacy network began to put pressure on the Mexican government, particularly through the IACHR and the UN Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities.[51] This pressure increased as the situation in the country worsened again after 1994. In this respect, Jorge Castañeda acknowledged in the 2001 session of the Commission on Human Rights that "the events that have taken place in Chiapas since 1994 put in the spotlight an undeniable and intolerable truth [of human rights violations] which had been ignored by society and the government".[52]

In February 1996, the IACHR called for a hearing on the general human rights situation in Mexico, and in July of the same year – after intense negotiations leading to an invitation by the Mexican government – it conducted an *in loco* visit to the country.[53] According to some accounts, the Mexican government attempted to weaken the Inter-American human rights system.[54] These efforts failed, and the IACHR issued a Special Country Report in September 1998, in which it acknowledged the importance of the process of democratic opening in Mexico and the overall complexity of the situation, but nevertheless made a harsh critique of the government's performance in fulfilling the international human rights obligations of the Mexican state.[55] Cases against Mexico brought to the IACHR continued to flow, and the Commission called for hearings on the general human rights situation in the country at least once a year throughout the rest of the decade.

The activism of the advocacy network within the UN human rights machinery was just as dynamic, particularly after 1994, when Mexican NGOs participated regularly in the sessions of the UN Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities, lobbied representatives of Western governments, the OHCHR, and Special Rapporteurs and working groups, and produced "shadow" country reports for the treaty bodies.[56] The efforts of the network to obtain a resolution by the UN Commission on the situation in Mexico – which could, for instance, call for the appointment of a Special Rapporteur for the country – repeatedly failed. Nevertheless, "shaming diplomacy" was set in motion. In 1997, the Special Rapporteur on Torture visited the country, issuing a report in 1998.[57] That same year and in 1999, the representatives of the European Union to the UN Commission on Human Rights issued public statements in which they expressed their concern about the human rights situation in Mexico. In 1998, the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities issued a resolution requesting that the Mexican government combat the impunity of perpetrators of serious human rights violations (particularly those suffered by indigenous people) and guarantee the security of human rights defenders.[58] In 1999, the Chairman of the Sub-Commission issued a statement on the situation in Mexico. That same year the OHCHR offered technical assistance to the Mexican government and, as mentioned, Mary Robinson visited the country. Yet the relationship of the Mexican government with international human rights NGOs worsened.[59]

In the separate sphere of Mexico's international relations, it is also important to recall the signing in December 1997 of the Economic Partnership, Political Coordination and Cooperation Agreement with the European Union, which included a "democracy and human rights clause".

This clause establishes that respect for democratic principles and fundamental rights shall "inspire" the domestic and foreign policies of both parties. Although the Agreement, which came into force in 2000, lacks a specific mechanism to enforce this clause, its inclusion suggested that the European Union was concerned about human rights in Mexico and was willing to at least keep track of the situation.

In sum, the pressure from above reached its peak towards the end of the 1990s. As a result, the Zedillo government promoted recognition of the jurisdiction of the Inter-American Court of Human Rights and strengthening the autonomy of the CNDH, as well as inviting Special Rapporteurs and even Mary Robinson, with whom the president signed a "memorandum of intent". Evidently, the "boomerang effect" was working and the government was compelled not only to make important tactical concessions but perhaps also to begin a transition towards a "prescriptive status" scenario. But it was during the Fox administration that a more decisive and broad human rights agenda was pursued, in both domestic and foreign policy, and therefore that the country entered the fourth phase of the "spiral model".

The pressure generated by the activism of domestic and international NGOs, and exerted directly by the international NGOs and elements of the United Nations and OAS human rights regimes, is a key element in the explanation of the human rights policy change in Mexico during the last years of the Zedillo government and the first years of the Fox administration. But the Fox government was also following interests directly related to domestic politics. It needed to enhance its legitimacy at home by showing that it actually was delivering "change", the core element of Fox's electoral platform. Indeed, human rights were a part of that broad promise. In his inaugural speech, President Fox declared that "Mexico will no longer be a reference point for discredit in relation to human rights. We are going to protect them as never before, we are going to respect them as never before and to consolidate a culture that repudiates any violation and punishes perpetrators."[60] In its determined efforts to strengthen its legitimacy, the Fox administration had to prove constantly that it was making a difference. Of course, particularly important in this respect were the internal elements of the new approach to human rights described above, which were particularly aimed at the left-of-centre voters Fox managed to attract in 2000.

However, most of the reforms and initiatives were promoted during the last two years of the Zedillo administration and, particularly, the first three to four years of the Fox government. As the Fox presidential period moved towards its final years, the original enthusiasm for the new approach towards human rights waned, particularly in terms of its domestic initiatives. This can be explained on the basis of a simultaneous decline

in international pressure. From the start, the new government benefited from the "democratic bonus" given to Mexico after the transition to democracy was (apparently) fulfilled in 2000. But, most importantly, the new approach to human rights eventually had the effect – towards 2002 or 2003 – of turning Mexico from "part of the problem" into "part of the solution" in international human rights forums, particularly those of the United Nations. Even if pressure continued in relation to specific cases or situations – such as the death of human rights defender Digna Ochoa, the continued detention of General José Francisco Gallardo or the killing of women in Ciudad Juárez – "shaming diplomacy" turned away and focused elsewhere.

Similarly, the government's attempt to legitimate itself on the basis of a domestic human rights project lost vigour after the 2003 mid-term elections, in which President Fox failed to secure a congressional majority. This continued to be the case towards the end of the period. Indeed, in contrast to the 2000 presidential campaign, human rights did not figure within the basket of electoral promises made by Felipe Calderón, the candidate of Fox's party in 2006. In other words, human rights ceased to be perceived as a "legitimizing good". In this sense, the "minimalist" approach to human rights in domestic policies and initiatives that was maintained during 2005 and 2006 can be explained on the basis of the "discourse entrapment" logic mentioned above – it was quite difficult to suddenly stop "talking the talk", but that did not necessarily mean doing the real business.

Internationally, although it seems that the government lost interest in promoting more *in loco* visits to the country, in general terms it maintained its policy of openness and was active in the promotion and support of initiatives related to specific themes and countries within the United Nations and the OAS. This continuation of the foreign policy element of the new approach to human rights can be indirectly related to the "instrumental rationality" linked to the dynamic of pressure from above. The government had to preserve Mexico's new image as an ally of the international human rights project, not as a response to the "boomerang effect" but as a precautionary measure intended to avoid returning to a scenario in which "shaming diplomacy" would focus on the country again.

Conclusion

Following "instrumental rationality", the government responded to the pressure mounted by the transnational advocacy network with a clear change in foreign policy and a series of ambitious initiatives at the domestic level. This process was also complemented by the government's

entrapment within a human rights discourse. International and domestic human rights NGOs, and also intergovernmental organizations, feature as key promoters of change in Mexico. But the new human rights approach also responded to specific interests linked not directly to the activism of transnational human rights networks but rather to the government's need to buttress its internal legitimacy. Governments, therefore, are also relevant players – not only because they determine the scope and direction of their reaction to international pressure, but because they follow their own agendas.

The entangling of international and domestic political processes generated by the interaction of international and national actors (governmental, non-governmental and intergovernmental) determined the changes in the human rights policy of Mexico. It seems that, in this case, the main generator of change was an international, or rather transnational, political process promoted by actors within civil society; but governmental agency and purely domestic processes must not be discounted.

Paradoxically, however, the reforms and initiatives implemented in recent years in favour of the human rights project in Mexico have resulted (whether intentionally or not) in a context in which its future evolution appears less promising. This kind of situation is noted by the spiral model. The transition from the "prescriptive status" phase to a "rule-consistent behaviour" scenario requires that pressure from above is maintained; but such pressure tends to wane as important reforms are implemented and gross or generalized violations come to an end.[61] In this way, a forceful governmental response to the "boomerang effect" might, ultimately, subvert human rights struggles and hinder the prospects for a sustained and substantive process of change that transcends policies and has an impact on actual practice. Theoretically, this suggests that "argumentative rationality" will not suffice and that, at the end of the day, the logic of instrumentality is fundamental to lasting change.

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Notes

1. Margaret E. Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Ithaca, NY: Cornell University Press, 1998).

2. Thomas Risse, Stephen C. Ropp and Kathryn Sikkink, eds, *The Power of Human Rights: International Norms and Domestic Change* (Cambridge: Cambridge University Press, 1999).
3. The following account of the human rights situation in Mexico does not pretend to be exhaustive, but seeks only to outline general trends. The human rights situation prior to the late 1960s has not been explicitly and systematically addressed by the literature.
4. Known as the "Jueves de Corpus" massacre because it occurred on the Roman Catholic feast day of Corpus Christi.
5. The student popular movement was harshly repressed in other parts of the country, such as the state of Oaxaca. See Víctor Martínez Vásquez, *Movimiento popular y política en Oaxaca: 1968–1986* (Mexico: CONACULTA, 1990).
6. See Jorge Castañeda, *La Herencia: Arqueología de la Sucesión Presidencial en México* (México: Alfaguara, 1999); Julio Scherer and Carlos Monsiváis. *Los patriotas: de Tlatelolco a la guerra sucia* (Mexico: Aguilar, 2004); Human Rights Watch, *Justice in Jeopardy: Why Mexico's First Real Effort to Address Past Abuses Risks Becoming Its Latest Failure* (New York: Human Rights Watch, 2003), pp. 4–5; and CNDH, *Informe Especial sobre las quejas en materia de desapariciones forzadas ocurridas en la década de los 70 y principios de los 80* (Mexico: CNDH, 2001).
7. In the late 1980s, the Partido Acción Nacional (PAN; National Action Party) denounced the Mexican state for the violation of the rights to political participation, judicial guarantees and freedom of expression, assembly and association, in the context of rigged local elections in the states of Durango (1985) and Chihuahua (1986). The IACHR did not address the merits of the cases, but it did conclude that Mexican law did not offer an effective remedy to protect human rights (including political rights), and it reminded the Mexican government of its related international legal obligations. It requested that the electoral reform under way at the time (1990) address these problems, offered its assistance in the process of reform, and requested to be kept informed of future developments. Inter-American Commission on Human Rights, *Annual Report of the Inter-American Commission on Human Rights 1989–1990. Resolution No. 01/90. Cases 9768, 9780, and 9828. Mexico*, OEA/Ser.L/V/II.77, rev.1, doc. 7, 17 May 1990.
8. See Juan Molinar Horcasitas, *El tiempo de la legitimidad: Elecciones, autoritarismo y democracia en México* (Mexico: Cal y Arena, 1991), pp. 190–199; Héctor Aguilar Camín and Lorenzo Meyer, *In the Shadow of the Mexican Revolution: Contemporary Mexican History, 1910–1989* (Austin, TX: University of Texas Press, 1993), pp. 241–243; Andrew A. Reading, "Mexico: Democracy and Human Rights", Department of Justice, Perspective Series PS/MEX/95.001, Washington DC, 1995, pp. 50–52.
9. The establishment of local human rights commissions followed soon after in all 31 states of Mexico. Keck and Sikkink, *Activists Beyond Borders*, pp. 108–109, 114–115, argue that the creation of the CNDH was a preventive manoeuvre by the government, intended to neutralize possible future pressure from human rights lobbyists in Washington that could have endangered the NAFTA negotiations. On the other hand, Jorge Carpizo (first president of the CNDH) argues that the main reason for the creation of the CNDH was a governmental response to the "alarming increase" in human rights violations perpetrated by federal agents. Jorge Carpizo, "La Reforma constitucional de 1999 a los organismos protectores de los derechos humanos", *Cuestiones Constitucionales. Revista Mexicana de Derecho Constitucional* 3 (2000), p. 28.
10. See Jean-Francois Prud'home, "The Instituto Federal Electoral (IFE): Building an Impartial Electoral Authority", in Mónica Serrano, ed., *Governing Mexico: Political Parties and Elections* (London: Institute of Latin American Studies, 1998), pp. 146–150.
11. Keck and Sikkink, *Activists Beyond Borders*, p. 116.
12. See Carpizo, "La Reforma constitucional de 1999", pp. 36–37.

13. For an overall account of the human rights situation in Mexico during the early and mid 1990s, see Reading, "Mexico: Democracy and Human Rights", pp. 16–20, 50–70. Also see Americas Watch, *Unceasing Abuses: Human Rights in Mexico One Year after the Introduction of Reform* (New York: Human Rights Watch, 1991); Amnesty International, *Mexico: Torture with Impunity* (New York: Amnesty International Publications, 1991).
14. Local NGOs estimated 12,000 internally displaced people during the second half of the 1990s, and hundreds of violent deaths, including those of 45 unarmed indigenous peasants, mostly women and children, killed in the "Massacre of Acteal" in December 1997. For a detailed account of the human rights situation in Chiapas during the second half of the 1990s, see the reports of the Centro de Derechos Humanos (CDH) Fray Bartolomé de Las Casas, available at <http://www.frayba.org.mx/informes.php?hl=en> (accessed 7 September 2009). See also Human Rights Watch, *Mexico, the New Year's Rebellion: Violations of Human Rights and Humanitarian Law during the Armed Revolt in Chiapas, Mexico* (New York: Human Rights Watch, 1994).
15. See CDH Miguel Agustín Pro Juárez (CDHMAPJ), *Informe sobre la presunta implicación del Ejército Mexicano en violaciones a los derechos humanos en el estado de Guerrero* (Mexico: CDHMAPJ, 1997); *La Violencia en Oaxaca* (Mexico: CDHMAPJ, 1996); and *La Violencia en Guerrero y Oaxaca* (Mexico: CDHMAPJ, 1999).
16. See Carpizo, "La Reforma constitucional de 1999", pp. 35–39.
17. The Charter, originally envisaged as a binding instrument, was adopted as a (non-binding) "solemn declaration" of the UN General Assembly, 12 December 1974. See Jorge Castañeda Álvarez de la Rosa, "La Carta de Derechos y Deberes Económicos de los Estados desde el punto de vista del derecho internacional", in Kurt Waldheim, ed., *Justicia económica internacional* (Mexico: Fondo de Cultura Económica, 1976), pp. 84–120; Manuel Tello, ed., *La Política exterior de México (1970–1974)* (Mexico: Fondo de Cultura Económica, 1975), pp. 196–208; Luís F. González-Souza, "La Política exterior de México ante la protección internacional de los derechos humanos", in Centro de Estudios Internacionales del Colegio de México, *Continuidad y cambio en la política exterior de México: 1977* (Mexico: El Colegio de México, 1977), pp. 138–154; Mario Ojeda, *Alcances y límites de la política exterior de México* (Mexico: El Colegio de México/Fondo de Cultura Económica, 1984), pp. 176–188.
18. The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights were adopted in 1966 and entered into force in 1976. The American Convention on Human Rights was adopted in 1969 and entered into force in 1978.
19. González-Souza, "La Política exterior de México", p. 151.
20. For example, Bernardo Sepúlveda, Secretary of Foreign Affairs from 1982 to 1988, argued that Mexico's "position has always been clear and has had a noteworthy influence in agreements and resolutions adopted to promote respect for human rights". Bernardo Sepúlveda Amor, "Reflexiones sobre la política exterior de México", in Secretaría de Relaciones Exteriores, *Política exterior de México: 175 años de historia* (Mexico: Archivo Histórico Diplomático Mexicano, 1985), p. 25.
21. César Sepúlveda was member of the IACHR during the 1970s, serving as its president from 1983 to 1985.
22. César Sepúlveda, "México y los derechos humanos", in Secretaría de Relaciones Exteriores, *Política exterior de México. 175 años de historia*, p. 413.
23. Secretariado Técnico del Gabinete de Política Exterior de la Presidencia de la República, *La Política exterior de México en el nuevo orden mundial: Antología de principios y tesis* (Mexico: Fondo de Cultura Económica, 1993), p. 343, emphasis added.
24. Ibid., pp. 346, 350.
25. Fernando Solana, Minister of Foreign Affairs at the time, stressed: "Let us strive for the improvement of our democracy, but not accept lessons from those who pretend to

export their political models or use them as an excuse to argue in favour of intervention in the domestic affairs of other countries." Quoted in *La Política exterior de México en el nuevo orden mundial*, p. 345.

26. See Olga Pellicer, "México y las Naciones Unidas 1980–1990. De la crisis del multilateralismo a los retos de la posguerra fría", in César Sepúlveda, ed., *La Política internacional de México en el decenio de los ochenta* (Mexico: Fondo de Cultura Económica, 1994), pp. 201, 216–222; and Manuel Tello, "Acción de la Organización de las Naciones Unidas para la promoción y la protección de los derechos humanos y la posición de México", in Sepúlveda, ed., *La Política internacional de México en el decenio de los ochenta*, pp. 430–435.
27. Keck and Sikkink, *Activists Beyond Borders*, p. 111.
28. Ana Covarrubias identified signs of change in Mexico's foreign policy on human rights towards the end of Zedillo's presidential period, but still could not conclude that there was a "new foreign policy" on the issue. See Ana Covarrubias Velasco, "El Problema de los derechos humanos y los cambios en la política exterior", *Foro Internacional* 39:4 (1999), p. 31.
29. Jorge Castañeda, Statement to the 57th Session of the UN Commission on Human Rights, 2001; available at <http://www.sre.gob.mx/substg/dh/onu/57cdhinterv/interven_castaneda57.htm> (accessed 28 August 2009). Also see Alejandro Anaya Muñoz, "Hacia una nueva política exterior mexicana en materia de derechos humanos: Entrevista con Juan José Gómez Camacho", *Revista Iberoamericana de Derechos Humanos* 2 (June 2006), pp. 190–192 (Gómez Camacho was Director General for Human Rights in Mexico's Ministry of Foreign Relations for most of the Fox administration.)
30. Juan José Gómez Camacho, "La Política exterior de México en la nueva agenda internacional", unpublished manuscript, 2005; and Anaya Muñoz, "Hacia una nueva política exterior".
31. Oficina del Alto Comisionado de las Naciones Unidas para los Derechos Humanos en México, *Diagnóstico sobre la situación de los derechos humanos en México* (Mexico: UNHCHR, 2003).
32. Replaced on 15 March 2006 by the Human Rights Council.
33. Gómez Camacho, "La Política exterior de México".
34. For a detailed account of Mexico's policy towards Cuba, see Ana Covarrubias Velasco, "La Política Mexicana hacia Cuba a principios del siglo: De la no intervención a la protección de los derechos humanos", *Foro Internacional* 43:4 (2003), pp. 627–644. Covarrubias concludes that Mexico's votes "against Cuba" can be explained as another element of the country's efforts to strengthen its (new) international image as a democratic country that promotes human rights.
35. The Human Rights Committee, the Committee on the Elimination of Racial Discrimination, the Committee Against Torture and the Committee on the Elimination of Discrimination against Women.
36. However, important reservations and interpretative declarations that limit the effect of some of these ratifications were registered. See Amnesty International, *Mexico. "Disappearances": An Ongoing Crime* (London: Amnesty International, 2002), pp. 5–8; Human Rights Watch, *Justice in Jeopardy*, pp. 17, 23–24; and Sergio García Ramírez, *La Corte Penal Internacional* (México: Instituto Nacional de Ciencias Penales, 2002).
37. Secretaría de Gobernación, *Programa Nacional de Derechos Humanos* (Mexico: Secretaría de Gobernación, 2004).
38. See CNDH, *Informe Especial de la Comisión Nacional de los Derechos Humanos sobre los casos de homicidios y desapariciones de mujeres en el municipio de Juárez* (Mexico: CNDH, 2003); and Amnesty International, *Mexico: Intolerable Killings: 10 Years of Abductions and Murder of Women in Ciudad Juárez and Chihuahua* (London: Amnesty International, 2003).

39. See Amnesty International, *Mexico. "Disappearances"*.
40. CNDH, *Informe Especial sobre las quejas en materia de desapariciones forzadas ocurridas en la década de los 70 y principios de los 80*.
41. See Human Rights Watch, *Justice in Jeopardy*, pp. 7–8.
42. It has been argued that this lack of results meant a de facto amnesty. See Sergio Aguayo Quezada and Javier Treviño Rangel, "Ni verdad ni justicia", *Proceso* 1515 (November 2005), pp. 51–56.
43. There is a detailed description of the human rights situation in Mexico at the end of the Fox administration in Alejandro Anaya Muñoz, "Mexico after the Institutional Revolutionary Party (PRI)", in David P. Forsythe, ed., *Encyclopedia of Human Rights*, vol. 3 (New York and Oxford: Oxford University Press, 2009), pp. 495–506.
44. Robert D. Putnam, "Diplomacy and Domestic Politics: The Logic of Two-Level Games", *International Organization* 42:3 (1988), p. 427.
45. Ibid., pp. 427–433. See also Keck and Sikkink, *Activists Beyond Borders*, pp. 199 and 199n; and Rebecca Evans, "Pinochet in London – Pinochet in Chile: International and Domestic Politics in Human Rights Policy", *Human Rights Quarterly* 28:1 (2006).
46. Keck and Sikkink, *Activists Beyond Borders*, pp. 1–38.
47. Thomas Risse and Kathryn Sikkink, "The Socialization of International Human Rights Norms into Domestic Practices: Introduction", in Risse et al., eds, *The Power of Human Rights*, pp. 17–35.
48. For a case study that stresses this point, see Sieglinde Gräzner, "Changing Discourse: Transnational Advocacy Networks in Tunisia and Morocco", in Risse et al., eds, *The Power of Human Rights*, pp. 109–133.
49. See Evans, "Pinochet in London".
50. See Alejandro Anaya Muñoz, *Autonomía indígena, gobernabilidad y legitimidad en México. La legalización de los usos y costumbres electorales en Oaxaca* (Mexico: Universidad Iberoamericana and Plaza y Valdéz, 2006), pp. 21–39.
51. Replaced on 28 July 1999 by the Sub-Commission on the Promotion and Protection of Human Rights.
52. Jorge Castañeda, Statement to the 57th Session of the UN Commission on Human Rights.
53. See Ana Covarrubias Velasco, "El Problema de los derechos humanos", pp. 439–442.
54. Michel Maza (member of the National Network of Human Rights Civil Organizations "Todos los Derechos para Todos"), presentation at the Universidad Iberoamericana, Mexico City, October 2005; Ana Covarrubias Velasco, "El Problema de los derechos humanos", pp. 448–449.
55. Inter-American Commission on Human Rights, *Informe sobre la situación de los derechos humanos en México*, OEA/Ser.L/V/II.100, Doc. 7 rev. 1, 24 September 1998.
56. Michel Maza, presentation at the Universidad Iberoamericana. I directly observed such processes, serving as an adviser to Mexican NGOs in the 1997 session of the UN Sub-Commission and the 2000 session of the Commission.
57. Commission on Human Rights, *Report of the Special Rapporteur, Mr. Nigel S. Rodley, submitted pursuant to Commission on Human Rights resolution 1997/38. Addendum: Visit by the Special Rapporteur to Mexico*, E/CN.4/1998/38/Add.2, 14 January 1998.
58. UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Resolution 1998/4, 20 August 1998.
59. Ana Covarrubias Velasco, "El Problema de los derechos humanos", pp. 444–445.
60. President Vicente Fox Quezada, inaugural speech, 1 December 2000; available at <http://rcadena.com/ensayos/Fox-pos.htm> (accessed 24 August 2009).
61. See Risse and Sikkink, "The Socialization of International Human Rights Norms", pp. 29–35.

10

Battling against the odds: Human rights in hard times

José Miguel Vivanco and Daniel Wilkinson

Optimism was the prevailing mood among human rights advocates in the Americas at the end of the 1990s. We were thrilled by what we had been able to accomplish since the end of the Cold War. And we were confident about where we were headed. Human rights advocacy had played a critical role in democratic transformations throughout the region, as guerrilla forces moved their battlefields to the ballot boxes and political violence faded into the past. Local human rights advocates, who had previously risked life and limb just going to their offices each morning, suddenly found themselves named to positions of power in new governments throughout Latin America.

Great strides had been made, particularly in the area of political rights. The once-widespread practice of electoral fraud was brought under control and largely eradicated in much of the region, leading to the demise of authoritarian regimes, from the collapse of the government of Alberto Fujimori in Peru to the end of seven decades of one-party rule in Mexico. The progress made in promoting democracy at the national level was greatly reinforced by a process of international consensus-building that culminated in 2001 with the signing of the Inter-American Democratic Charter, in which all the countries in the region (with the exception of Cuba) committed themselves to actively defending democracy in the region.[1]

Of course the human rights cause had also suffered notable failures since the end of the Cold War. We had been unable to stop mass slaughters in other parts of the world, such as Iraq, Rwanda and Yugoslavia. In

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Latin America, widespread atrocities continued to occur in war-torn Colombia, basic political freedoms were still suppressed in Cuba, and police abuses remained rampant throughout the continent. Yet there had been major victories as well, from the arrest of Pinochet in London to the creation of an International Criminal Court that could investigate and try the worst tyrants and human rights abusers when domestic courts failed to do so – as they had so often in the past.

Many of us believed that the kinds of abusive practices that had characterized the Cold War in Latin America – torture, disappearance, extrajudicial execution – had been permanently discredited. Together with rights advocates in other parts of the world, we had succeeded in generating an international consensus about what was beyond the pale and who deserved protection under international human rights law. Building on these accomplishments, human rights organizations were eagerly expanding their advocacy from its traditional focus on civil and political rights to a range of economic and social rights. We were fully confident that the human rights regime we had constructed would only grow stronger and more effective in the years to come.

Today, that level of optimism is gone. For the past several years, the human rights movement has found itself largely on the defensive. The norms we struggled so long to strengthen have come under assault. The abusive policies we thought were no longer justifiable have once again become commonplace. Our hopes have been tempered, our confidence shaken.

What happened? What caused the change in mood? The most obvious cause was the radical shift in US foreign policy that occurred in the wake of the terrorist attacks of September 11, 2001, resulting in the world's most influential government actively undermining the international consensus that had been built up around basic human rights norms. Yet the lost momentum on human rights in Latin America is by no means the sole responsibility of the United States. On the contrary, it is also the product of the daunting obstacles that have hindered human rights progress in a variety of critical areas, including efforts to promote accountability for past atrocities, curb abusive policing practices and advance economic and social rights. This chapter examines the obstacles facing rights advocacy in each of these areas and explores possible strategies for regaining the forward momentum on human rights in the Americas that, at least until recently, appeared to have been lost.

September 11 and US foreign policy

The most dramatic blow to human rights progress globally in recent years was September 11, 2001. The horrific acts of terrorism that day unleashed

a reaction that has threatened to wipe away many of the gains of the previous decades. In response to the attacks, the Bush administration pursued a campaign against terrorism using abusive methods that have undermined rather than strengthened the rule of law around the globe.

One of these abusive methods was the systematic use of coercive interrogation, which led to the well-known cases of torture in Abu Ghraib prison and elsewhere. These coercive tactics blatantly violated the centuriesold consensus – which has been reaffirmed unconditionally in numerous international treaties – that governments should never subject detainees to torture or other cruel, inhuman, or degrading treatment. Yet, in fighting terrorism, the Bush administration treated this fundamental norm as a matter of choice rather than obligation.[2]

The administration claimed it did not engage in torture or other illegal interrogation techniques, but then defined these crimes so narrowly as to render their prohibition meaningless. When, in 2004, photos circulated documenting the use of dogs and sexual humiliation against detainees at the Abu Ghraib prison, the Bush administration joined in the nearly universal condemnation of these abusive practices.[3] Yet it has since come to light that then Defense Secretary Donald Rumsfeld had himself ordered the use of both of these techniques, among others.

Neither Rumsfeld nor any high-level official or military officer has been held accountable for these and other abuses committed against detainees. Indeed, the Bush administration continued to condone and even endorse the abusive treatment of terrorism suspects. In September 2006, for example, President Bush gave a speech in which he acknowledged that the CIA had operated secret prisons where they subjected detainees to harsh interrogations.[4] The President did not specify the techniques used, but declassified documents have since revealed that they involved physical and mental torture, including waterboarding, a technique whereby interrogators subject detainees to mock drowning. The President defended the practice on the grounds that the tactics had produced valuable intelligence.

To make matters worse, the Bush administration worked with the US Congress to eviscerate the norms of domestic and international law that criminalize abusive techniques. Congress passed legislation in late 2005 that prevents non-citizen detainees in Guantánamo Bay from bringing court challenges to their detention, their treatment by US officials or their confinement conditions – and then extended this legislation in September 2006 to apply to all non-citizens in US custody anywhere in the world. (Fortunately, in 2008, the Supreme Court ruled that Guantánamo detainees do in fact have a right to habeas corpus relief under the US Constitution.) In October 2006, Congress passed legislation that created a system of justice to facilitate the prosecution of terrorism suspects, including detainees who the Bush administration previously "disappeared"

into secret CIA custody. In a radical departure from both domestic and international law, this legislation granted CIA personnel immunity for past abuses, barred detainees from asserting their right to habeas corpus relief, and attempted to render the Geneva Conventions unenforceable in court.[5]

The Bush administration's flagrant disregard for the fundamental principles of international law did enormous damage to the international human rights regime. Given its unmatched power and influence in the world, Washington's open defiance of these norms served to weaken the norms themselves. If a rule as basic as the ban on torture can be disregarded, other rights are inevitably undermined as well.

Of course it is not just the United States that has been bending and breaking the rules. As part of their counter-terror efforts, several member states of the European Union (EU) have expelled people to countries where they are likely to be tortured or mistreated. With such expulsions in mind, the United Kingdom signed an agreement with Jordan and negotiated with several other countries to obtain "diplomatic assurances" – unenforceable promises from governments that they will not do what we already know they do on a regular basis: abuse detainees.[6] Even Sweden violated the absolute prohibition on such returns by sending two men to Egypt, where they claim to have been tortured.[7]

Latin America has not been a focus of the US-led campaign against terrorism. Yet the region was directly affected by shifts in US policy that, although already under way, gained significant momentum in the wake of the 9/11 attacks. One was the return to the sort of blatant double standards that characterized Washington's application of human rights norms during the Cold War. Perhaps nowhere was this inconsistency more dramatically apparent than in Cuba. For decades the United States had condemned the Cuban government's human rights practices, which are indeed among the worst in the region. Yet, at the same time, and on the same island, the US government held hundreds of detainees from the "war on terror" at Guantánamo Bay, denying them basic legal protections provided by international law.

This inconsistency was also evident in the case of the Bush administration's policy toward Venezuela. In 2001, the United States played an important role in the drafting of the Inter-American Democratic Charter, which commits governments to actively defend democracy in the region. Yet when this commitment was tested by an attempted coup in Venezuela the following year, the United States was the Charter's only signatory that balked. Instead of condemning the coup, the Bush administration initially spoke out against the deposed President, Hugo Chávez, and joined the chorus of condemnations only when the de facto government was beginning to unravel.[8]

In neighbouring Colombia, which the Bush administration considered to be the best US ally in the region, Washington was willing to overlook a horrific record of impunity for massacres and other abuses by the paramilitaries and their backers in military units and government agencies. Year after year, despite new abuses and continuing impunity, the State Department certified to Congress that the Colombian government was fulfilling legal conditions on US military assistance that required progress on these issues.[9] The Bush administration's wilful blindness led it to go so far as to ignore its own stated goals of fighting drugs and terror, by endorsing a supposed "demobilization" of the drug-running paramilitary leadership (the paramilitaries are on the US list of terrorist organizations) that, instead of furthering peace, appeared designed to let these leaders avoid accountability while retaining much of their wealth, power and criminal mafias intact.[10]

Another related feature of this US foreign policy was the open hostility to international mechanisms aimed at strengthening human rights protections. This aversion perhaps manifested itself most clearly in opposition to the International Criminal Court, an initiative for handling abusive tyrants that enjoys nearly universal approval in Latin America. The Bush administration aggressively pressed governments to sign agreements that would prevent them from turning American suspects over to the Court. It cut off military aid and threatened to withhold humanitarian assistance to countries that refused. Many Latin American officials believed, correctly, that these agreements violated their international treaty obligations, as well as their domestic laws. They found themselves, as a result, forced to choose between their commitment to the rule of law and their relationship with the United States.[11]

The legacy of past atrocities

Since the end of the military regimes and armed conflicts of the 1980s, countries throughout Latin America have successfully established democratic institutions and strengthened the protection of basic rights. Yet, in most of the region, with some notable exceptions, this much-celebrated transition has not brought an end to the impunity enjoyed by the repressive regimes of the past.

In Mexico, for example, after years of deceit and denial, criminal investigations were launched into the hundreds of forced disappearances carried out during the country's "dirty war" in the 1970s, as well as the massacres of student protestors in 1968 and 1971. Yet the courts have thrown out most of the cases brought before them, and by 2009 no one had been successfully prosecuted for these atrocities.[12]

In Guatemala, no one has been held accountable for the vast majority of atrocities committed during the country's 36-year armed conflict, in which as many as 200,000 people lost their lives, most of them civilians killed by state security forces. Although a handful of high-profile human rights cases have been successfully prosecuted, the criminal convictions in these cases were obtained only after witnesses had been assassinated and investigators, judges and prosecutors forced to flee the country.[13]

In Peru, where a majority of abuses committed during the country's internal armed conflict are attributable to insurgent groups, important progress has been made in some areas, but not in others. After releasing hundreds of people who had been wrongfully convicted of terrorism in the past, the state conducted new trials that resulted in the conviction of more than 300 people for "terrorist" crimes. But less progress has been made in prosecuting government atrocities. Of the thousands of documented abuses, only a very small number had been resolved. By 2009, 27 people had been convicted. One very important advance has been the successful prosecution of former President Alberto Fujimori for his role in two massacres and two kidnappings in the early 1990s. Fujimori was convicted in 2009 and given a 25-year prison sentence.[14]

We have seen the greatest progress in combating impunity in the Southern Cone. In Argentina in 2009, 58 former military and police personnel had been convicted for human rights-related crimes and almost 600 were facing human rights-related charges. In Chile in 2009, 277 perpetrators had been convicted; 42 former generals of the different branches of the armed forces either had received sentences or were facing trial, including Pinochet himself until his death. Hundreds of other cases were before the courts.[15]

Unfortunately, the examples of progress made in the Southern Cone can also be seen as exceptions that prove the rule regarding impunity in the region. These efforts to promote accountability have been hampered by a variety of factors, including legal obstacles left in place by departing regimes, the ineffectiveness of the justice systems and the elusiveness of evidence needed to resolve abuse cases and convict those responsible for them. A principal challenge for human rights in the region continues to be finding ways to overcome these obstacles.

Overcoming legal hurdles

A major initial obstacle that many countries have faced when confronting past abuses has been the amnesty laws that departing regimes installed to perpetuate impunity after they had relinquished control of the state. In several countries in the region, these laws made it difficult or impossible to prosecute those responsible for past atrocities.

Fortunately, a significant body of jurisprudence has been built by human rights groups battling amnesty laws. A landmark decision on amnesty laws was the 2001 ruling of the Inter-American Court of Human Rights on the Barrios Altos case, declaring that Peru's 1995 amnesty law had violated the American Convention on Human Rights.[16] Peru's Supreme Court subsequently declared that the Court's decision was applicable, and, within days, several members of the Colina death squad who had been acquitted under the amnesty law by a military court were rearrested. The Peruvian judiciary's rapid implementation of the Barrios Altos decision was a critical step in breaching impunity in Peru.[17]

Similarly, in 2003, the Argentine Congress annulled the "Full Stop" and "Due Obedience" laws, passed in 1986 and 1987 to quell a military revolt against human rights prosecutions, allowing the reopening of several important cases. In June 2005, the Supreme Court declared the laws unconstitutional, and in 2006 the first trials for "disappearances" and torture for almost 20 years were held.[18] In Chile, meanwhile, although Pinochet's 1978 amnesty decree has not yet been repealed or annulled, the Supreme Court has held it to be inapplicable to cases of disappearances because of their nature as permanent crimes.[19] The Court has also held that crimes against humanity cannot be subject to amnesties and statutes of limitation, enabling cases involving extrajudicial executions to go trial as well.[20]

In addition to problems of substantive law, there are problems created by jurisdictional arrangements. Chief among these has been the use of military courts to persecute political opponents and obstruct investigation of human rights crimes. This misuse of military jurisdiction was common to all of the military regimes of the 1970s and 1980s. International human rights bodies have repeatedly argued that military tribunals should not be relied upon to prosecute human rights abuses, and called on states to transfer jurisdiction over human rights cases from military to civilian authorities.

Yet, even after over two decades of democratic rule, re-establishing the full authority of civilian courts is still an incomplete process in some countries. In the case of Chile, for example, military courts continue to exercise jurisdiction over police abuses, as well as over acts of violence committed by civilians against the police. In Peru, both the Supreme Court and the Constitutional Court ruled against military jurisdiction over human rights cases in 2005, yet the military stalled for months before ceding jurisdiction of these cases to civilian courts.[21] In Mexico, the military justice system continues to assert jurisdiction over human rights cases involving military personnel, including cases of large-scale atrocities, and Mexico's civilian courts routinely cede jurisdiction to their military counterparts.[22]

Reinforcing weak institutions

In addition to legal obstacles to accountability, human rights prosecutions must be undertaken by a judiciary weakened by years of subordination to the executive branch. Even when political conditions favour rapid investigation of past abuses, prosecutors and courts often lack the competence and expertise to handle these cases effectively. In many countries in the region, the justice sector has traditionally been treated as the poor cousin in public administration. Without significant additional funding, it is often incapable of meeting the challenge of investigating human rights abuses.

In several countries, human rights investigations have been undertaken by prosecutors or judges who have been assigned specifically and only to this task. In Chile, for example, in 2001 the Supreme Court appointed a number of Santiago appeals court judges to work exclusively on human rights cases, and in the provinces circuit judges were instructed to give preferential treatment to these cases. A budget was provided to support the investigations. Every year since then the order has been renewed. A growing number of perpetrators have decided to collaborate with the courts, now that it is evident that the investigations are for the first time ending in convictions.[23]

In addition to the special judges, the creation of a special police division devoted exclusively to human rights cases has been another vital reason for the judicial advances in Chile. The Human Rights Brigade of the Chilean investigation bureau, with about 50 investigators, has been able to persuade many to cooperate. It seems that at some point a critical mass is reached in human rights investigations; once the dyke of impunity has been breached, more and more former perpetrators may decide that it is in their interest to cooperate with the courts.

In Argentina, the Attorney General created a special unit within his office in 2007 to reinforce the work of prosecutors investigating crimes committed during the "dirty war". The unit, which consists of several prosecutors and dozens of lawyers who work exclusively on these cases, has contributed to advancing the investigations and has proposed measures to ensure that the judicial processes move forward more quickly, such as redistributing cases that are all pending before the same criminal court.

In Mexico, a Special Prosecutor's Office was created in 2001 to investigate and prosecute massacres and forced disappearances committed during the country's "dirty war" three decades earlier. The results of this historic initiative were deeply disappointing, largely because the administration failed to provide the Office with the technical and political support needed to overcome the major obstacles it confronted, which included complete obstruction by the military and other institutions im-

plicated in the abuses. The Special Prosecutor managed to achieve the arrest and indictment of several former officials, but his efforts did not produce a single conviction.[24]

Breaking the wall of official silence

In addition to the legal and institutional obstacles, another often daunting challenge is finding the evidence necessary to resolve abuse cases and prosecute those responsible for them. Obtaining evidence from government agencies is often very difficult, especially when those in command at the time of the abuses still hold office, power and influence. In very few countries have the courts – let alone the general public – had access to secret documents from the security forces or military intelligence. There are a few exceptions, such as the "archive of terror" accidentally discovered in the ruins of an Asunción police station after the collapse of the Stroessner dictatorship in Paraguay.[25] Similarly, in Guatemala, an archive was uncovered in 2005 containing 70–80 million pages of documents of the disbanded National Police, including files on Guatemalans who were murdered and "disappeared" during the armed conflict.[26]

In some cases, key documentary evidence has been uncovered during criminal investigations. For example, a Peruvian judge who took the unusual step of searching an army intelligence headquarters in Lima obtained official documents about the formation of the Colina death squad.

Yet few countries in the region have developed adequate mechanisms for preserving and securing access to government documentation containing information on human rights abuses. The only country with a clear and unambiguous policy on access to information is Mexico, ironically the country with possibly the most deeply rooted tradition of official secrecy. In November 2001, President Vicente Fox instructed the Interior Ministry to collect and deposit in the National Archive documents from other government agencies, including the Secretary of Defence, that contained information related to Mexico's "dirty war". In June 2002 these instructions were carried out and some 80 million documents were deposited in the National Archive. These files contain detailed information on human rights violations committed during Mexico's "dirty war" as well as insights into the command structure and modus operandi of the institutions that carried them out. The availability of this information removed the cloak of secrecy around the security apparatus and provided Mexican society with an insight into the inner workings of the old regime. Journalists were able to investigate and obtain documentation on what had happened during those years. Victims of human rights violations and their families were able to review the files that government agencies kept

on them. It was finally possible to document a part of Mexican history that had been, until then, mostly based on testimonies.[27]

Even more difficult than locating archival documentation is finding current and former state actors to testify about past abuses. Measures to obtain cooperation, such as offers of sentence reduction and even immunity to those whose evidence is material to a conviction, have proven extremely effective in combating the law of silence enforced by criminal gangs, mafia, drug-traffickers and terrorist groups.

Peru provides an interesting example. Such mechanisms were used by President Fujimori to obtain convictions in the battle against the Shining Path in the 1990s. After the collapse of Fujimori's highly corrupt government, the procedure was adapted – without the notorious due process problems that had flawed its earlier use – to expedite prosecution of the Fujimori–Montesinos political mafia. It has proved effective; several members of the Colina death squad, who had been granted the benefits of a "sincere confession", have given detailed accounts of how the abduction and murder of nine students and a teacher at La Cantuta University in 1991 were planned and organized. This evidence has been instrumental in obtaining the criminal conviction of 13 members of the Colina group, a former general, and Fujimori himself.[28]

However, the use of such methods to solve human rights crimes has been very controversial, particularly within the human rights community itself. In Chile, for example, proposals to grant limited immunity and sentence reductions to lower-ranking members of the security forces who participated in human rights violations in minor roles have met determined resistance, both from human rights groups and from members of Congress, and have never been adopted.[29]

Undoubtedly, any effort to obtain cooperation by providing limited immunity runs the risk of doing more harm than good. The most dramatic example of this danger at the moment is in Colombia, the one country in the region where an internal armed conflict continues unabated. From 2003, the Colombian government pursued a "demobilization" programme in which huge sentence reductions were to be granted to paramilitaries responsible for atrocities and other serious crimes in exchange for only the most minimal collaboration with government investigators. The government claimed in 2006 that it had successfully completed the demobilization of over 30,000 supposed paramilitaries, yet the government had failed to ensure that those demobilizing provided the information necessary to resolve countless human rights atrocities.[30]

Colombia's Constitutional Court recognized these flaws and, in a May 2006 ruling, made several important improvements to the Justice and Peace Law that governs the demobilization process. Specifically, it required that paramilitaries seeking sentence reductions would have to

confess and pay reparations out of their legal and illegal assets, and that, if they lied or committed new crimes, they could risk losing their sentence reductions. It also held that prosecutors would have to investigate all confessed crimes fully.[31] Unfortunately, the implementation of this decision by the Office of the Attorney General was weak, and the Colombian government repeatedly took steps and issued decrees to water down the impact of the ruling.

The fact that the Colombian government has not granted paramilitaries a full amnesty, the way other countries in the region did when engaged in similar negotiations in the past, suggests that the region has made some progress in repudiating such measures. At the same time, however, by not requiring meaningful accountability, the "demobilization" process has been ineffective in ensuring the genuine demobilization of the paramilitary groups. Paramilitary commanders failed to take significant steps to give up their massive illegally acquired wealth, to return stolen land or to show that they have ceased their lucrative criminal activities. Moreover, new armed groups led by mid-level paramilitaries have cropped up all over the country and are continuing to engage in the same types of abuses the paramilitaries committed, including killings and forced disappearances.[32]

In sum, much work remains to be done in Latin America to overcome the legacy of impunity for political violence. Human rights advocates must continue to be both insistent and creative in pushing governments to surmount the ongoing obstacles to full accountability for past abuses.

Public security

The most pressing threat to the rule of law in Latin America today is no longer political violence; it is, rather, ineffective and abusive law enforcement. Human rights advocates have been very effective in countering the use of repressive violence in most countries in the region. But we have been far less effective in curbing the abuses that have traditionally been carried out in the name of crime control. As a result, torture, arbitrary detention and various other forms of police abuse continue to be widespread problems.

Common crime is one of the top concerns of the public in many countries throughout the region, as well it should be. People have a fundamental right to protection from crime, as well as a right to justice when they are victims of crime. Yet there is a broad consensus in many countries today that the state has largely failed to provide either. Politicians and public security officials routinely respond to this legitimate demand by promising to "get tough" on crime. They pass laws imposing harsher

sentences. They boast of the number of "criminals" thrown in jail every year. They increase the number of crimes for which preventive detention is mandatory. And they disregard calls for the eradication of abusive practices.[33]

Yet it is one thing to be tough; it is quite another to be effective. Abusive police practices undermine the rule of law not only because they violate basic rights but because they tend to be ineffective in curbing crime. A major challenge for human rights advocacy in the region, therefore, is to persuade policy-makers and the general public that curbing abuses is important, not only to protect human rights but also to promote more effective law enforcement.

Confronting organized crime

The public security crisis posed by common crime is quite real in much of the region. In many countries, the institutions charged with law enforcement – the police, prosecutors and courts – are simply outgunned (literally and figuratively) by criminals who are better organized, better funded and often more competent at what they do. This is particularly true in countries such as Colombia and Mexico where the illegal drug trade channels billions of dollars to a wide range of criminal actors, from powerful cartels to transnational gangs and street-level dealers.

Guatemala is one of several countries where organized crime has overwhelmed the justice sector. Since the end of the country's internal war in the mid-1990s, there has emerged a shadowy network of private, illegally armed groups that appear to have links to both government officials and organized crime. They are powerful, ruthless and apparently responsible for scores of threats and attacks against human rights activists, justice officials, journalists and others. The country's justice system – its prosecutors and courts – has proven no match for these groups.[34]

Yet, rather than give up in the face of this problem, Guatemalan human rights advocates, working with government officials and the international community, developed an intriguing initiative for addressing it: the Commission Against Impunity in Guatemala (CICIG). CICIG is an international commission established in 2007 to investigate these criminal networks and collaborate with local prosecutors to bring them to justice. We tend to think in terms of domestic and international institutions operating in separate spheres. This would be a hybrid: an international body working through domestic institutions. And, although its principal aim is to solve particular cases, it also aims to serve a much broader and desperately needed function: to strengthen the capacity of domestic law enforcement mechanisms. As of 2009, the Commission was participating in eight prosecutions as a joint plaintiff, and had been instrumental in

formulating legislation to promote arms control and facilitate the prosecution of members of criminal organizations.[35]

Although it is unclear at this point whether CICIG will succeed in fulfilling its ambitious objectives, what is clear is that this is the sort of innovative thinking that is needed to break new ground in promoting accountability in this region. It is *not* an ideal or permanent arrangement. It is, rather, an exceptional measure intended to jumpstart the justice system so that local institutions can begin to handle these cases more effectively on their own.

Fixing flawed legal systems

In addition to weak institutions, efforts to promote the rule of law have been severely hindered by the criminal justice systems themselves – that is, defects in the legal norms and procedures that facilitate or even encourage abuses and impunity for abuses.

A good case to illustrate this type of obstacle is Mexico and one of its most glaring human rights problems: the use of torture against criminal suspects. For years, human rights groups have been documenting and denouncing torture cases in Mexico. Yet these cases keep cropping up, in one major scandal after another (the most notorious example being the situation in Ciudad Juárez, where local prosecutors responded to mounting pressure for investigations and prosecutions by prosecuting people on the basis of coerced confessions).[36]

Mexico has *not* ignored the problem. Successive administrations have taken steps to address it, but to no avail. Anti-torture reforms in the early 1990s failed to eradicate the practice and, since then, the country has responded to one torture-related scandal after another with ad hoc measures, treating each case as an embarrassing aberration rather than a symptom of an ongoing problem. Yet, by failing to address its main underlying cause, Mexico for years allowed the practice to continue largely unchecked.[37]

This underlying cause is the significant function that torture fulfils within the Mexican criminal justice system: it generates confessions. In over 80 per cent of the torture cases reported, the aim of the abuse was to obtain a confession from a criminal suspect. Why does this happen? Prosecutors know that courts will convict people based on these confessions, even when the suspect retracts them. Consequently, what Mexico needed in order to overcome its torture problem was a reform that would make it far more difficult to use coerced confessions at trial – not in theory, but in practice.

In 2008, Mexico passed a constitutional reform that would do just that. The reform aimed at overhauling the justice system, and reflected

a broader trend of modernizing justice systems that has been continuing throughout the region. It entailed modifying the Mexican Constitution to deny probatory value to any testimony, including confessions, that was not rendered during a public hearing presided by a judge. This requirement, if enforced, could virtually eliminate the main incentive that law enforcement agents have for torturing detainees – the possibility that a coerced confession will be used to convict the victim.[38]

Countering public misperceptions

A major obstacle to securing the reforms needed to curb abusive police practices is the widespread misperception that promoting human rights and promoting public security are conflicting aims. Faced with high levels of crime, the public demands that law enforcement "get tough". And there is a general belief that "getting tough" means "taking the gloves off" – a belief that rights protections undermine the strength and effectiveness of those charged with combating crime. In the case of the stalled Mexican reform, for example, the main reason that the reform proposal got stuck in Congress was the widespread belief that measures that "tie the hands" of prosecutors would strengthen the hands of criminals.[39]

If we ever hope to overcome this political obstacle, human rights advocates will need to address it head on. We will need to change the way the public think about human rights. Specifically, we need to help reframe the debate so that rights and security are not seen as competing aims. We are not going to get very far saying: *Yes, it's important to combat crime. BUT, it's also necessary to stop the use of torture*. A far more effective message is: *Yes, it's important to combat crime, AND promoting human rights is central to doing so*.

In the case of the justice reform in Mexico, Human Rights Watch worked with our allies in government, civil society, the legal community and the press to try to reframe the public discussion of the issue. Our formulation was: *Too many crimes go unsolved and unpunished in Mexico because prosecutors are not doing their jobs. Instead of investigating crimes, the police who work for them are beating confessions out of innocent people, who then can be convicted while the real criminals go free*. Although it is impossible to measure the precise impact that this reformulation had on the passage of the 2008 reform in Mexico, it is clear that correcting those misperceptions is crucial for ongoing efforts to promote human rights reforms in Mexico and elsewhere in the region.

In addition to Mexico, there are countless other examples where similar reformulations have been necessary – whether it was convincing the public in Guatemala that the proposed international commission is essential to combating the crime that affects their lives, or convincing the US public that respecting international norms regulating the treatment

of detainees is crucial for improving the effectiveness of the country's efforts in counter-terrorism. Again, it is not easy, but if we do not work harder to reformulate the debate on these issues, not only will we *not* make progress in curbing specific abuses, but we as human rights advocates run the risk of becoming less relevant in the future.

Economic and social rights

Human rights organizations have perhaps had the most difficulty figuring out how to be relevant in the area of economic and social rights. Unfortunately, this also happens to be the area that matters the most to the vast majority of people in the world. Half of our planet's 6 billion people currently live in poverty, and 24 per cent in absolute poverty; 2 billion have no access to basic medical treatment; 1.5 billion have no access to clean drinking water. Tens of millions face life sentences owing to infectious diseases that could have been preventable and could be treatable. For people living in such extreme poverty, civil and political rights are of only secondary importance. A poll in 2004 found that large majorities in Latin America would willingly sacrifice their democratic systems if it would bring them improved economic conditions.[40]

Since the end of the 1990s, many human rights groups have made a concerted effort to build on their successes in the realm of civil and political rights to address economic, social and cultural rights. The results, unfortunately, have been mixed at best. There has been some important progress in advancing the rights of vulnerable groups – such as women, indigenous peoples, racial and ethnic minorities, and people with HIV/AIDS. Yet some might argue that these advances are due less to human rights advocacy and more to the political mobilization of affected populations or to local litigation using domestic rather than international law. And even in the areas where human rights groups have contributed to progress, it is clear that we have not become nearly as effective and influential on these issues as we are on civil and political ones.

It may well be that human rights advocacy will never be particularly relevant to addressing certain types of injustices and unnecessary deprivations (human rights law has little direct relevance to the issue of debt relief, for example). Yet there can be no doubt that there are areas where a rights-based approach is absolutely essential. Take the HIV/AIDS epidemic, for example. Since the early 1980s, HIV/AIDS has claimed some 25 million lives and infected over 60 million people, and it will kill millions more before it is controlled. After decades of ignoring the epidemic, the world community has mobilized in recent years to address it, with rich and poor nations working together on a variety of initiatives, including the creation, in 2002, of the Global Fund to Fight AIDS, Tuberculosis

and Malaria. The Global Fund, comprising a coalition of governments, civil society members, the private sector and affected communities, works to attract and distribute resources to prevent and treat AIDS, tuberculosis and malaria. As a result of initiatives such as these, significant progress has been made in providing treatment to people who previously had not received it.

Yet the global community has fallen very far short of its goals. There are far too many people who remain vulnerable to infection or unable to obtain adequate treatment. The result is millions of unnecessary deaths. And, on top of that, there is a very serious risk that the AIDS epidemic will surge completely out of control again – since these inadequately treated populations provide ample breeding grounds for new drug-resistant strains of the virus.

And here is where human rights come into play. The persistence of the epidemic today is largely fuelled by a wide range of human rights violations, including sexual violence and coercion faced by women and girls, stigmatization of men who have sex with men, abuses against sex workers and injecting drug users, and violations of the right of young persons to information on HIV transmission. Human rights violations only add to the stigmatization of persons at the highest risk of infection and thus drive underground those who need preventive services and treatment most desperately.[41]

The question is: how can human rights groups address an issue such as this effectively?

Making economic and social rights charges stick

One serious problem that international rights groups face when it comes to economic, social and cultural issues is that it is often harder to make human rights charges stick. There are several reasons for this. One is that, under international law, many of these rights require "progressive" rather than "immediate" realization, and governments can usually argue that they are doing *something* to move the country in the right direction.

Another reason is that, even in cases where international norms establish minimum standards and require immediate results, governments are likely to plead poverty as an excuse. They will say they simply do not have the resources to address the problem – or that they would have to take resources away from other worthy causes. *"You want us to fund HIV/AIDS treatment, but then we'll have to cut funding for malaria." "You want to fund primary schooling, well then we'll have to cut funding for secondary education."*

The challenge for human rights advocates, therefore, is to find ways to overcome these defences. Perhaps the easiest way is to look for patterns

of discrimination. So, when a government claims poverty, rights advocates are able to ask: *why is this group getting educational programmes and this other group not?* (Though, of course, claiming discrimination is essentially resorting to a civil and political right, and does not help in cases where there is no discrimination.)

Another method is to focus on cases where it is clear that a government *could* guarantee a specific economic, social and cultural right, *were it not for* an arbitrary policy that is, on the face of it, entirely unjustifiable. So, to continue with the example of HIV/AIDS: since the Global Fund has provided many countries with funding to cover the cost of medicines for people with the disease, the governments in those countries cannot rely on the excuse of a lack of funds if they fail to ensure treatment.

But we still have a problem here. If we limit ourselves to cases where there is egregious misconduct by governmental officials, we will be unable to address many – perhaps the majority – of the cases involving economic deprivation and social exclusion. To be effective rights advocates, it is crucial to provide clear and specific remedies to the problems that we are addressing. But, when it comes to the problems associated with extreme poverty, the question of what is the best remedy is almost always going to be open to debate.

Take, for example, child malnutrition: some will argue that the solution lies with welfare programmes or minimum wage laws, whereas others will insist that it requires expanding the economy by doing away with the very same policies. Or take the problem of improving access to clean water: some will argue for privatization of water resources; others will urge increased state control. In each of these examples, one side of the debate may be completely wrong. But to accuse that side of human rights violations for pursuing misguided (but still plausible) policies is really a stretch. These are policy questions that ultimately must be decided through democratic decision-making processes. And, largely for that reason, international law leaves the content and the form of implementation of economic and social rights open to the interpretation and application of each state.

So, in the absence of grossly arbitrary behaviour by governments, what possibility remains for using human rights norms to promote economic, social and cultural rights?

Promoting accountability for economic and social policies

Even if human rights groups cannot say much about the content of specific social and economic policies, there is no reason we cannot focus on the processes by which the policies are designed and implemented. In fact, in the area of civil and political rights we have become experts

on process – due process, judicial processes, and so on. In a similar vein, we can focus on the processes by which policies are developed and implemented.

So, for example, if healthcare and housing and water are to be treated as rights, then there will need to be procedural safeguards to ensure that states do not implement policies in a discriminatory manner or in a manner that unduly burdens vulnerable populations, that their decisions are not tainted by corruption or self-dealing, and that citizens have recourse – whether administrative or judicial – for complaints about ineffective policies or inadequate implementation. This is an area where international human rights groups can be more productive. Given that states' decision-making and enforcement procedures are usually preset through legislation or rules, it is possible, in advance, to critique and make recommendations concerning the fairness and transparency of such procedures. And, when states make important decisions regarding economic, social and cultural rights in complete secrecy, fail to implement publicly approved policies concerning these rights, or refuse to enforce their own laws protecting them, it is often fair to argue that such rights are being violated.[42]

This could be applied, for example, in cases of environmental damage that has an impact on economic, social and cultural rights. Take the case of an oil spill in a river that is the only source of drinking water for a community. If the state fails to provide some form of legal recourse to adjudicate responsibility and ensure compensation for the deprivation of this community's right to water, then there is a fairly strong case that violation has occurred. The same may be true if the state, contrary to its own laws, fails to take measures to ensure an alternative supply of water for the affected population.

So for example, in the aftermath of Hurricane Katrina, which had a particularly devastating impact on the African American community in New Orleans, there were many reports of government agencies entering into no-bid contracts with politically connected companies to build temporary homes and provide other goods or services.[43] If it could be shown that the lack of transparency in the contracting process adversely affected the quality of the housing provided to those displaced by the hurricane, there would be a compelling claim that the right to housing had been violated.

Conclusion

The human rights movement cut its teeth during the Cold War, struggling to protect basic civil and political rights in the face of political violence

and dictatorship. It came of age in the 1990s, working diligently to secure the international legal and institutional framework that it hoped could prevent a return of the bloody and brutish practices of those earlier years.

Now we are back on the defensive. And it is increasingly clear that we must do more than defend those earlier accomplishments. We must also find new and better ways to address issues that we largely neglected in the past – issues such as ineffective law enforcement and extreme poverty. If we do not do better in these areas, we run the risk of becoming increasingly irrelevant to world affairs. And, more significantly, we risk multiplying the ranks of people in the region who view the whole concept of human rights – the normative framework we have struggled so hard to construct – as something that is, at the end of the day, entirely expendable.

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11

Human rights in the Americas: Progress, challenges and prospects

Nicholas Turner and Vesselin Popovski

The preceding chapters have offered a range of deeply valuable insights into human rights in a region characterized by perplexing contradictions. The Americas are at once both the origin of the first international instrument of human rights and home to many key players in the international human rights system, but also a region that has suffered extended periods of horrific mass violence and other widespread abuses of rights. The region is one of enormous diversity and contrast, and one that has experienced rapid and fundamental change in recent decades.

The revealing accounts in this volume have provided detailed explorations of each country's unique experience with respect to human rights, from the traumas of the past to the progress and achievements of recent years. They have examined the formative role, participation and interactions of these countries in the nascent regional regime, and in doing so have traced the evolving regional environment for rights protection and promotion.

The select range of cases, although not entirely comprehensive, allows a comparative volume such as this to offer a better understanding of the operation of the regional human rights mechanisms and institutions, as well as of the particular obstacles to domestic progress and successful approaches and strategies. This conclusion attempts to draw out some of the commonalities and distinctions emerging from these cases, summarizing factors of success and failure to highlight areas of note for policy-makers and non-governmental organizations (NGOs). Some recommendations are also made concerning areas that could potentially benefit from future research.

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Historical context

Latin America's experiences in terms of democratization, dealing with past abuses and implementing protection of human rights domestically have enduring relevance and far-reaching implications for other regions. The gradual improvements in human rights practices and in diffusion of international norms have been intertwined with processes of democratization. Indeed, almost all these states are now at the stage of consolidating democracy, after hard-fought transitions from brutal authoritarian rule. It is in this context of ongoing democratic consolidation that human rights progress in the region advances.

In the past half-century, Latin America was dominated by political violence. Almost the entire subcontinent has suffered from the repression of authoritarian regimes, which, usually in the name of national security or public order, systematically allowed kidnapping, detention, torture and murder of anyone they considered to be "subversive" in order to eliminate even the slightest opposition. General Ibérico Saint Jean, governor of the province of Buenos Aires during the brutal first junta rule in Argentina, expressed this clear and mercilessly inhuman mindset: "First we kill all the subversives, then we kill their collaborators, then . . . their sympathizers, then those . . . who remain indifferent, and finally we kill the timid."[1]

For decades, gross human rights abuses were part of daily life in many Latin American countries. Some military regimes were more atrocious than others; state terror varied significantly from country to country in its duration, intensity, scope and consequences. The murdered and disappeared numbered hundreds in some countries, such as Brazil or Uruguay, whereas the civil war in Guatemala between 1960 and 1996 claimed more than 200,000 lives, with a state policy aimed at exterminating the Mayan population.[2]

In a few extreme cases, state authorities went to enormous, and very clearly illegal, lengths to silence and punish opposition. The Pinochet regime in Chile, for example, in addition to committing mass crimes at home, ordered the assassination of its critic Orlando Letelier in Washington, DC, by its political police. States even worked together, cooperating to violate human rights – the infamous "Operation Condor" involved clandestine collaboration by the dictators of Argentina, Chile, Uruguay, Paraguay, Bolivia and Brazil in a repressive joint military campaign to violently eliminate opposition.

Domestic criminal justice systems were rife with abuses, there was no presumption of innocence or habeas corpus, and pre-trial detention was commonplace. In some cases such failings continued until recently – for instance, in Chile they were corrected with the December 2000 adoption of an adversarial criminal justice system.

Today the extended period of mass violence and dictatorial military rule in Latin America appears to be over. Processes of democratic transition have dominated political developments on the subcontinent since the end of the 1970s. All Latin American countries are now democratic, with the notable exception of Cuba.

Human rights and democracy share a close but complex relationship, often seen as mutually reinforcing. Indeed, democracy is the culmination of civil and political rights, with the commitment to self-determination of peoples and the proclamation of a set of rights essential for political participation. This interplay is evident in the evolution of the regional human rights system in the Americas, which was steered by democracies. Indeed, democratic transitions benefited from – and were even guided by – the participation of the human rights movement, although Engstrom and Hurrell rightly note in Chapter 2 the lack of explicit reference to the Inter-American human rights system in the Democratic Charter.

The Inter-American system

The human rights regime in the Americas, along with its equivalents in other regions, both underpins and complements the international system by which human rights are promoted and enforced. The American Declaration of the Rights and Duties of Man, signed along with the Charter of the Organization of American States (OAS) in 1948, was the very first international human rights instrument, predating the Universal Declaration of Human Rights (UDHR) by six months. American states were instrumental in the drafting of the UDHR but, despite this early enthusiasm and optimism, the wave of military dictatorships in the Cold War era was to bring widespread violations of civil and political rights, as well as of economic, social and cultural rights. The emergence of military rule in the region spurred activists and lawyers to try to internationalize human rights issues, involving and engaging the support of a wider range of actors. Civil society groups and individuals were empowered by the Inter-American system – as well as the United Nations system – to utilize transnational mechanisms for the protection of rights in order to hold governments accountable for internal violations.

The American Convention on Human Rights was adopted in 1969, but entered into force only in 1978. It established the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, designed to provide formal mechanisms for the protection of human rights. The Convention was negotiated by mostly freely elected governments in the 1960s. However, the wave of military and autocratic regimes that was to follow made lasting impacts, holding back the de-

velopment, influence and scope of the regional regime. Nevertheless, in adopting the Convention, the Inter-American system developed from what Engstrom and Hurrell refer to as "its roots as a quasi-judicial entity with an ill-defined mandate to protect human rights in the Hemisphere, . . . [to] a legal regime formally empowering citizens to bring suit to challenge the domestic activities of their own government".

Sadly, human rights continue not only to be denied, but to be massively violated in almost all countries in the Americas. Nonetheless, these monitoring mechanisms of the regional system, along with civil society, played a key role in encouraging compliance with international norms. This volume argues that, without these mechanisms, the already horrific abuses could have proceeded unrestricted and therefore been even worse. Although human rights are often violated, their existence in documents and human consciousness can, despite the obvious limits, nevertheless restrict the abusers.

State sovereignty under challenge

The American human rights regime evolved in the context of changing conceptions of the state. For centuries, the principles of sovereignty and non-intervention in the domestic jurisdiction of states were regularly employed by governments in the Americas as arguments against internationalization of rights (the Monroe Doctrine being one example). In many countries, the prospect of ratifying human rights treaties became a politicized issue, being seen as acceptance of foreign intervention in domestic affairs.

The chapters in this volume illustrate how reluctant governments historically were to question the absolute rule of sovereignty. For example, Chapter 9 reveals the manner in which Mexican diplomats opposed the UN Security Council's linking of international security with democracy and human rights. They took an anti-interventionist stance, arguing that the United Nations' mandate was limited to cases where national institutions were either unable or unwilling to protect rights. The "Estrada Doctrine", which persisted until Ernesto Zedillo's presidency in the late 1990s, was specifically intended to protect state sovereignty against outside interference. Anaya Muñoz describes how Mexico under President Zedillo began to make concessions to international and domestic pressure, although it was not until the Vicente Fox administration that human rights were acknowledged as a matter for more than solely domestic jurisdiction. As Mexico gradually opened to international scrutiny, participation in the inter-state human rights regime was strengthened, even to the extent of supporting human rights protection in other states, including Cuba.

But, as is clearly evident in Covarrubias's chapter, in Cuba itself the denial of certain rights has been justified by the regime as a sovereign necessity to defend the Revolution against external threats – typically associated with the United States. Although some achievements related to human rights of Cuba's 1959 Revolution were widely recognized in fields such as health and education, the Cuban people to this day are deprived of many civil and political rights. The enduring US strategy of political and economic isolation of Cuba seems to have been largely unsuccessful. The more constructive approaches of rapprochement, aid and investment, combined with recommendations and criticism concerning human rights (such as pursued by Canada and the European Union), have produced better results, but still remain largely ineffective. The Cuban government continues to resist both approaches, although external actors have been successful in drawing international attention to the human rights situation and exerting pressure on the Cuban government. Indeed, such continued pressure has resulted in progress: in February 2008 Cuba signed the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

The American regional regime has clearly had lasting impacts upon the traditional conception of state sovereignty. State policies were increasingly subjected to normative, political and legal constraints that challenged conventional understandings of sovereignty and consolidated the growing consensus that human rights are matters not only of domestic jurisdiction but also of concern to the international community, particularly when large-scale violations take place. As human rights became increasingly internationalized, abusive governments were forced to choose between denying the validity of global norms or making tactical concessions to placate rising international outrage.

Factors of progress

In observing the undeniable progress that the region has made, the chapters herein have provided nuanced accounts of the sources of such advances – the means by which states have been forced first to deny abuses and then gradually to implement policies as they acknowledge the validity of criticism. The authors acknowledge the undoubted merit of applying pressure through multiple channels of diplomacy, civil society engagement and socio-economic relations, as well as the potential for change that reform-minded leaders, such as Fox in Mexico, can bring.

International pressure on the political leadership is but one of the numerous processes at work. Contrary to popular conceptions (and in stark contrast with the stubborn unilateralism of the Bush administration), dic-

tators often do care how they are perceived by the international community. Whether because of personal vanity or aspirations to greater power in the region, authoritarian leaders seek international recognition and approval much as their democratic equivalents do. In this sense, global condemnation can be extremely effective in prompting attitude changes at the higher levels of government, as well as incrementally through the day-to-day interactions of diplomats, businesspeople and educators.

Latin America's experience vividly demonstrates that the effectiveness of international pressure as a driver for change requires the pressure to be as consistent as possible. During the Cold War period, the potential for seeking support from one bloc or the other meant that states were rarely entirely isolated. Some forms of international pressure can be indirect: in the case of Mexico, increasing cooperation with the European Union tied the government to improving human rights standards in order to achieve economic and other benefits; in Chile, the arrest of former dictator Augusto Pinochet in London provided a spur to domestic human rights. As González notes in Chapter 7, the 18 months of Pinochet's detention "had a strong impact in impelling the investigation and even punishment of the gross abuses of the past". This change of attitude even prompted the increased adoption of international legal standards.

In Risse, Ropp and Sikkink's influential "spiral model" of norm socialization, the key factor for a state to progress through the early phases is for information about human rights abuses to get out.[3] As the previous chapters have shown, Latin American civil society, with its thousands of NGOs, was instrumental in this role, constantly reporting on and drawing attention to rights violations, complementing external pressure from the international community and prompting responses of denial by abusive regimes. Continued activism was successful in extracting instrumental, tactical concessions to placate international criticism, such as those made by the Collor government in Brazil. Still, not many states in the region have been able to progress to the fourth phase – institutionalizing human rights standards into domestic policies and tackling the structural causes of abuses remaining as legacies of authoritarianism. Indeed, Macaulay (Chapter 6) suggests that Brazil remains unable to make this step despite the recent efforts of Presidents Cardoso and Lula.

Words and deeds: Rights rhetoric vs. rights reality

A prominent feature in the approaches taken by governments in Latin America – although by no means unique to the region – is the disconnect between their substantial professed commitments to international human rights norms and the lack of practical action in implementing the policies

and reforms necessary to comply with such norms. Many states continued to be firmly committed to a liberal internationalist discourse of human rights, while simultaneously violating these very same norms at home. This disparity between normative commitment and behavioural changes to reform abusive practices was evident throughout the long years of repression, and it continues at least to some extent today.

Latin American states such as Chile and Brazil, throughout the years of repression and military rule in the second half of the twentieth century, were instrumental in the creation and development of the international human rights mechanisms, including the UDHR and the American Convention on Human Rights. Macaulay explains that this was the result of a persistent "culture of internationalism and legalism, . . . [which was] particularly strong within the 'insulated' bureaucracy of Brazil's Foreign Ministry", even while other organs of the state were committing large-scale rights violations. Mexico too made a substantial contribution in the drafting of the UDHR, but failed to follow this up with further engagement in the development of the regional or international systems until the presidencies of Ernesto Zedillo and Vicente Fox.

Monica Serrano explores this problem in Chapter 1, questioning the assumption that ratification of human rights treaties automatically translates into improved protection of rights. She suggests that the two may rely on different incentives: treaties can be ratified instrumentally to reduce international criticism, whereas domestic protection of rights requires a concerted, transparent and sustainable commitment to act. Here Serrano highlights the general weakness of the regional regime's legal enforcement mechanisms, especially compared with its monitoring capacity. She suggests that more complex processes are responsible for successful state compliance with human rights norms, relying heavily upon local human rights organizations working in concert with international civil society to increase the effectiveness of pressure on abusive states.

From impunity to accountability

The legacies of long-lasting repression continue to afflict many Latin American societies, as evidenced in most of the preceding chapters. To deter future violations of human rights it is essential to challenge impunity and prosecute the perpetrators of past crimes, but this imperative invariably conflicts with the concerns of maintaining fragile peace and social order. Peace integrates, focusing on the future and requiring reconciliation between former enemies; whereas justice looks backwards, requiring the trial and punishment of perpetrators. In this sense, the governments of Latin America have inevitably been forced to strike a delicate balance in satisfying the demands of peace and justice.

The legitimacy of incoming, democratic regimes is based, at least in part, on the denunciation of past human rights abuses. If they ignore these abuses, their legitimacy is forfeited. Alternatively, by pursuing the abusers and pushing for prosecutions, their legitimacy is enhanced, but at the risk of jeopardizing the development of a peaceful, secure state. Therefore a careful balance needs to be struck between maintaining moral superiority over the outgoing regime by pursuing abusers, and moving forward to quickly establish conditions in which citizens' rights can be effectively protected.

But the chapters also demonstrate the formidable practical obstacles to achieving justice in countries in transition. Efforts to promote accountability continue to be hampered by a variety of factors, including difficulties in obtaining evidence, ineffective judicial institutions lacking in capacity, and intentional legal obstacles left in place by departing regimes – all the more so where government forces have been involved in atrocities. Access to documentary evidence is extremely problematic, particularly where officials from the time of the abuses still hold office. In Chapter 10, Vivanco and Wilkinson highlight the efforts of Mexico to overcome such difficulties. Despite the deep-rooted tradition of secrecy, the Fox administration implemented a clear policy on access to information, and in 2002 made 80 million documents from government agencies available to the public.

In tackling the problem of obtaining testimony from current and former state officials, Vivanco and Wilkinson further suggest that compromise, sentence reduction and consideration of mitigating circumstances are effective tools, as employed during the prosecution of the Fujimori–Montesinos political mafia in Peru. However, they caution that these methods are not without risk, as in the case of Colombia where thousands of paramilitaries have been granted sentence reductions but little progress has been made in providing remedies for human rights atrocities. The use of such controversial measures in exchange for cooperation may run the risk of institutionalizing impunity, and obviously requires careful evaluation in order to ensure that balance and proportionality are maintained. Indeed, we would question the "peace versus justice" dichotomy – impunity itself creates a threat to peaceful life, because criminals remain at large and the underlying public desire for revenge can result in further violence. The process of pursuing justice and punishing perpetrators can become self-reinforcing, in that fighting impunity through high-profile criminal investigations and prosecutions has been seen to encourage other perpetrators to cooperate with the courts.

Transition processes are controversial and painful, and may hold back progress on democratic consolidation and the promotion of respect for human rights. During the delicate time of transition, or so the argument goes, compromises must be struck with the military in order to protect

the gradual reform process. Such arguments often led to continuations of restrictions on civil liberties, in particular freedom of expression and public debate. González's chapter on Chile provides a good example, detailing the so-called politics of consensus – "política de los consensos" – which sought to reduce criticism of the former military junta's crimes in order to maintain a peaceful transition.

From state abuses to state weakness

Despite the tangible progress that has been achieved, particularly in countering the use of repressive state violence, human rights violations continue to occur in Latin America. The nature and causes of these violations have, however, changed dramatically, from institutionalized state abuses of rights, to those that occur owing to the weakness of the state. To use the terminology of the International Criminal Court (ICC), it is now more the case that states are "unable" rather than "unwilling" to prosecute. People suffer not from "traditional" abuses committed by authoritarian governments against citizens, but rather from deficits in the rule of law and challenges to the rights of vulnerable groups. Vivanco and Wilkinson explore this evolution in detail in Chapter 10, suggesting that today's violations can be characterized as low-level police brutality, discrimination against indigenous peoples and inequality, as well as the denial of land-ownership, access to healthcare and access to justice.

Here it must be noted that the regional human rights system remains geared towards protecting individuals from the actions of the state, reflecting the needs of the time in which it was created, as well as the prevailing philosophical conception of rights at the time. The fundamental assumption of this system is that pressure can be exerted effectively on states, because they possess the means to address violations but lack the will to do so. The limitations of this model are highlighted in today's context, with regional mechanisms ill equipped to meet the pressing needs presented by the evolution in the causes and form of human rights violations. Therefore, a change of focus is clearly required to concentrate the regional mechanisms more on developing state capacity to better meet the modern challenges.

Many current abuses result from, or are exacerbated by, government attempts to "crack down" on crime. Abuse by the police, including torture and arbitrary detention, continues to be a widespread problem, and, although crime is justifiably a major concern for people in the region, the use of abusive practices is no less of a problem. Without human rights protections, policing is often much less effective. As the previous chapter has clearly shown, the pervasive culture of using torture to extract confessions leads to innocent people being convicted and criminals going un-

punished. Successive administrations in Mexico have attempted to solve the problem of torture, but have failed because they have concentrated on individual cases rather than addressing the underlying causes – which is a common mistake when approaching human rights violations. In Mexico, the root of the torture problem lies in the relative certainty of convictions based on confessions, even when retracted by defendants in court. Vivanco and Wilkinson identify a radical proposal by President Fox in 2004 to deny any evidentiary value to confessions that are not made directly before a judge – eliminating the incentive for obtaining confessions through torture. Not only would this benefit human rights protection in Mexico, but it could have wider application as a universal model to discourage torture, and in the process expose it as futile and redundant.

Measures such as these are vital if the human rights regime is to better tackle the prevailing form of violations evident in the Latin America of today. However, they often fail owing to the widespread belief among the public that human rights protections diminish the effectiveness of crime-fighting. Here Vivanco and Wilkinson highlight the need to reframe the debate, so that "rights and security are not seen as competing aims. We are not going to get very far saying: *Yes, it's important to combat crime. BUT, it's also necessary to stop the use of torture*. A far more effective message is: *Yes, it's important to combat crime, AND promoting human rights is central to doing so*." To counter public misconceptions regarding torture, they strongly advocate the message that, "[i]nstead of investigating crimes, the police who work for [the prosecutors] are beating confessions out of innocent people, who then can be convicted while the real criminals go free."

Several countries in Latin America are plagued by organized crime – drug-trafficking in particular – and lack the resources to tackle the problem. Where powerful private armed groups threaten and carry out attacks on lawyers, officials, human rights activists and journalists, weak state institutions struggle to deter them and bring justice. An innovative possible solution is highlighted by Vivanco and Wilkinson – a proposal by human rights advocates for the establishment of an international commission to investigate criminal networks and collaborate with local prosecutors to bring them to justice. This would not only help to achieve justice in individual cases but, more importantly, strengthen the capacity of domestic law enforcement mechanisms.

Abuses of indigenous and women's rights also remain common in the Americas. They are frequently structural, a function of current law enforcement and other systems in need of reform. Despite enthusiastic support for inter-state initiatives to support indigenous rights, the domestic situation remains poor. This is not aided by the police practice of over-emphasizing links between indigenous people and insurgent groups, evident in Mexico. Indeed, any progress may be the result less of human

rights advocacy and more of the increasing mobilization of indigenous groups in the democratic context, which became prominent with the election of President Evo Morales in Bolivia. Domestic violence also remains a serious problem, with daily abuses throughout the continent. González suggests in Chapter 7 that in Chile the protection of women's rights was characterized until recently by a paternalistic approach, rather than guaranteeing the autonomy of women to enjoy their rights. Chile has now implemented some significant reforms, including banning pregnancy tests for employment, reaffirming maternity rights and extending them to workers on short-term contracts.

Notwithstanding these concerns, violations of civil and political rights have clearly been reduced, and it is in this context that the "second-generation" rights – economic, social and cultural rights – are now rising to the fore. Issues such as poverty are becoming central to human rights advocacy. Human rights advocates in the Americas have begun to address economic, social and cultural rights more vigorously since the end of the 1990s, but the results have been mixed at best. Practically, it is much harder to bring charges related to abuses of these rights, compared with abuses of civil or political rights. They require more progressive realization, compared with the relatively immediate identification of violations of civil or political rights. Yet, under international law, neither set of rights should be prioritized – they all need robust consideration, actions and remedies. However, international law is more permissive in allowing states to interpret the content and form of implementation of economic and social rights through their democratic decision-making processes. Rather than becoming embroiled in political debates about the content of specific policies, human rights advocates should concentrate on fighting discrimination, negligence and corruption, and leave issues such as privatization or taxes to the domain of political parties.

Similarly to this paradigm shift in the nature of human rights violations, the character of challenges to democracy in the region has evolved. There is no longer the constant threat of coups d'état. Instead, democracy is undermined by the creeping influence of military or other powerful groups on state institutions. The ongoing processes of democratic consolidation are now focused on security sector reform, bringing the military under civilian control, and strengthening the rule of law and the democratic process, which are still weak.

Civil society

It comes as no surprise that all of the chapters in this volume have identified the particularly influential role of civil society organizations in both

the development and operation of the regional human rights system. As Engstrom and Hurrell surmise, this extensive active engagement by civil society may well be at least in part owing to "benign neglect" of the process by OAS member states. In the day-to-day operation of the regime, especially compared with Europe and other regions, NGOs are much more involved in taking cases to the regional system. As noted previously, the participation of international civil society is absolutely essential to the international pressure that initiates and sustains the "spiral" of progress towards norm acceptance and implementation. These roles, however, are not limited to monitoring and pressurizing. NGOs commonly offer support and constructive criticism for governments, and can provide domestic political rewards to incentivize reform initiatives that are often controversial and meet with entrenched opposition.

North America

Our conclusion has so far necessarily centred on the states of Latin America, because of both the remarkable progress achieved there and the progress that remains to be made. The relatively good domestic human rights records of the United States and Canada mean that most criticism relates to their influence, or lack thereof, in promoting rights within the region. That is not to say they have nothing left to do at home, where few citizens are even aware of the existence of the Inter-American system.

Canada's status as a vocal human rights advocate on the global stage is not always matched in its regional dealings: it has not adhered to the American Convention on Human Rights and is therefore subject only to the jurisdiction of the Commission on Human Rights. This severely restricts the legitimacy of Canada, and therefore its impact in raising concerns regarding human rights in other states. The number of petitions logged by Canadians against the state is very small, owing both to its incomplete membership in the regional system but also to the relatively positive domestic human rights situation. As Duhaime notes in Chapter 4, the government's claims that the Convention provides a lower level of protection of several rights, and that certain articles are incompatible with Canadian law, present no significant barriers to entry – "there is no reasonable legal justification preventing Canada from adhering and . . . there is considerable support in the Canadian population for such an initiative". Although there has been recent progress on adherence to the Convention, it remains very slow and there are concerns that civil society has been prevented from taking part in the process.

Despite its continued absence from the Convention, Canada's support for the regional system has always been strong. In financial terms though,

there is considerable room for improvement. There are clear opportunities for Canada to play a more significant role in the regional regime, leading by example and filling the gap left by the absence of US leadership. Duhaime suggests that Canada's effective judicial system could serve as a model of best practice for other states in the region in the implementation of the reforms of their domestic systems that are so vital to the protection of rights in the region. Such contributions would have particular value because of Canada's ability to bridge the common law and civil law traditions that otherwise divide the Hemisphere. Cases provided by Canada would be advanced – based on constitutional or policy disputes rather than individual acts of violence – and so would have precedent value for the inter-state system. Canada has a wide range of very active NGOs advocating greater involvement in the regional regime, and the country has been positively and effectively involved with international issues and norm development in the past, most notably the ban on land mines and the establishment of the ICC, as well as the responsibility to protect and human security.

In contrast, the relationship between the Inter-American human rights system and the United States, by far the most powerful country in the region, has frequently been problematic. Worse than merely failing to engage in the regional system, the United States has actively undermined international law and human rights norms by disregarding them in its own behaviour. Throughout various administrations, the United States has actively – and often openly – supported many of the region's most brutal regimes and, as Vivanco and Wilkinson note, has even used the language of human rights in its justifications for doing so. Following September 11, 2001, systemic abuses of human rights have been committed under the claimed justification of fighting terrorism. Witnessing the United States' disregard for habeas corpus, the ban on torture, the right to a fair trial and other fundamental international norms, other states have taken the opportunity to introduce similarly harsh security measures, extended their pre-trial detention periods and engaged in questionable extradition policies.

The post-9/11 security climate has seen the United States supporting regimes with dubious rights records and turning a blind eye to their violations of human rights. Vivanco and Wilkinson observe that this shift in US policy is a return to the sort of double standards in the sphere of human rights seen during the Cold War. The resulting loss of moral authority finds US criticism aimed at abusive states undermined by a loss of both credibility and legitimacy, while inviting widespread accusations of hypocrisy.

US contempt for international human rights mechanisms has also been apparent in its opposition to the ICC, which has been ratified by almost

all Latin American states. Not content with demonstrating hostility to such international mechanisms, the United States went further, applying direct pressure on states in the region to sign bilateral agreements not to cooperate with the ICC. Since these agreements violate both international treaty obligations and domestic laws, governments have been in effect pressured into putting their support for the United States over their commitment to the rule of law. In this fashion, the flagrant disregard for human rights and the fundamental principles of international law demonstrated by the United States has significantly damaged not only the regional regime but the entire international human rights project, and set dangerous precedents for other states to emulate.

The path ahead: Barriers and opportunities

Several Latin American states now seem to be trapped in a static domestic human rights situation, despite vocal participation in the international and regional systems, professed acceptance of international norms, and allowing access to regional mechanisms. The pervasive legacies of authoritarianism continue to obstruct progress, chiefly through still-militarized forces of law and order. In many cases, the necessary sweeping reforms have quickly become weakened, delayed or even blocked by legislatures lacking in capacity and by resistance from certain elements in the police or military. In the past, some former abusers have avoided arrest through assistance from the military, even after sentencing, as González notes in Chapter 7 in the cases of General Manuel Contreras (former head of the political police in Chile) and Colonel Pedro Espinoza (his second-in-command).

In addition to these difficulties, there is the problem of diminishing gains: it is often simply the case that reforms become progressively harder as the situation improves. Of course, governments are also aware that they will be held to account for their success or, more importantly, for their lack of it – so they are unlikely to draw public attention to issues that they know will be very difficult to solve or improve. For example, Macaulay observes in Chapter 6 that the Lula and Cardoso administrations in Brazil realized "that the potential electoral cost of . . . failing would outweigh any possible benefits of success" resulting from high-profile activity around law and order issues.

The challenges of the pace of change in democratic consolidation and in reforms related to human rights are similar to those of transitional justice – how to achieve improvements without incurring an aggressive reaction from entrenched elements that resist it at all costs. Macaulay notes that, in Brazil, "Cardoso avoided antagonizing the supporters of the mili-

tary police (governors and former governors sitting in the Senate) by not pursuing demilitarization of the police".

It is clear that the problems facing the regional regime today are significantly different from those of the past. Throughout Latin America, the domestic mechanisms and processes of rights protection have not kept pace with this paradigm shift. Although institutionalized violations have reduced, states remain unable to effectively prevent abuses and prosecute those responsible. Despite the numerous and significant positive developments in the constitutional, legal and institutional frameworks of American states, they have not always resulted in practical improvements in rights protection for their peoples. In many states, human rights protection continues to suffer as weak judiciaries struggle to break free from previous political controls.

Indeed, ineffective domestic judicial systems beset by a lack of capacity present the greatest challenge for the Inter-American regime. It is partly for this reason that so many individuals rely upon petitions to the Inter-American system, which is now overwhelmed by such cases. The regional regime must concentrate on facilitating efforts to build the domestic capacity necessary for remedies to be effectively sought locally, without resorting to the overburdened regional system.

The change in the prevailing form of rights violations demands a reappraisal of monitoring, enforcement and advocacy. Both international and domestic policies need to be refocused to concentrate on developing state capacity and implementing judicial reforms. Building on past successes in the areas of civil and political rights, human rights advocacy must now effectively tackle the issues of economic, social and cultural rights.

We are hopeful that this volume will draw much-needed attention to these tasks and highlight the need for further research exploring ways in which the regional regime in the Americas can be reformed and providing targeted recommendations to address these problems of state capacity and the increasing demands on international protection of rights. There are significant further opportunities for research into the unresolved challenge of how the normative consensus in the region can be better reflected in a regional consensus on state action. The hope remains that one day, particularly with a United States reinvigorated by the Obama administration in Washington, DC, the reality of the human rights situation in the Americas will finally match the normative rhetoric.

Notes

1. General Ibérico Saint Jean, May 1976, quoted in John Simpson and Jara Bennet, *The Disappeared and the Mothers of the Plaza* (New York: St. Martin's Press, 1985), p. 66.

2. *Guatemala: Memory of Silence*, a summary in English of the Report of the Commission for Historical Clarification: Conclusions and Recommendation, 1999, available at <http://shr.aaas.org/guatemala/ceh/report/english/conc2.html> (accessed 26 August 2009). The report found that "many massacres and other human rights violations committed against these groups obeyed a higher, strategically planned policy, manifested in actions which had a logical and coherent sequence", and that "agents of the State of Guatemala, within the framework of counterinsurgency operations carried out between 1981 and 1983, committed acts of genocide against groups of Mayan people".
3. Thomas Risse, Stephen C. Ropp and Kathryn Sikkink, eds, *The Power of Human Rights: International Norms and Domestic Change* (Cambridge: Cambridge University Press, 1999).

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"n" refers to notes.