

HUMAN RIGHTS IN LATIN AMERICA AND THE CARIBBEAN: A REGIONAL PERSPECTIVE

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I. Introduction:

At the end of World War II, the international community sought to prevent both future wars and human rights violations by means of international law. In the short span between late 1945 and mid-1949, the world witnessed the creation of the United Nations (1945), the promulgation of the Universal Declaration on Human Rights (1948) and the approval of the four Geneva Conventions on the laws of war (1949). In the Americas, a similar process was taking place. In 1948, at a Conference in Bogota, the countries of the Western Hemisphere created the Organization of American States, now formed by 35 independent States. An important difference with the process at the universal level was that, right from the start, the Americas created a regional political and diplomatic body, but also approved a Declaration on the Rights and Duties of Man. Significantly, in the same act, a Social Charter was also approved, with a roster of economic and social rights mostly related to the world of labor; unfortunately, that charter is all but forgotten today.

The American Declaration predates the Universal Declaration by eight months. Its unfortunate mix of rights and duties probably reveals an authoritarian streak in many government representatives present at its inception. Its reference to the rights “of man” would rightfully be rejected today as non-inclusive language. In spite of these shortcomings, the American Declaration has survived the passage of fifty years and, even today, is an important instrument. The Inter-American Court of Human Rights has said, in an advisory opinion, that the Declaration is binding on the member States of the OAS by virtue of its incorporation into the OAS Charter.³ Though an important debate remains as to its binding nature, all Western Hemisphere countries agree that they have pledged to live and govern by its precepts.

Another significant difference with the universal system is that the OAS in 1948 made an explicit link between human rights and democracy. Today, international law

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³ Inter-American Court on Human Rights (IACtHR), Advisory Opinion OC-10/89, July 14, 1989, *Interpretation of the American Declaration on the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights*.

seems to be moving towards a universal democratic principle.⁴ In 1945, however, the international community was more preoccupied with ideological and cultural inclusion as a means to prevent war and to promote peace, so the emphasis was on the peaceful coexistence of widely divergent political systems. In that historical perspective, the Western Hemisphere's pioneering attitude may not have been as enlightened as it now sounds. The stated preference for democracy may well have been a part of the initial stages of the Cold War, as well as a remnant of historical apprehensions about letting European powers establish footholds in the continent.

As will be seen later, the democracy clause in the Americas was not taken as seriously as in Europe, where a democratic form of government is a condition of membership in the European Union. Significantly, the adoption of the democracy clause did relatively little to preserve the region as a truly democratic zone of the world. In the 1940s and 1950s most countries were governed by *caudillos*, charismatic leaders who governed as if an election was a blank check to impose their will on institutions and people. These authoritarian figures, even if clothed in a veneer of electoral legitimacy, built political power bases outside the branches of government, mostly among corrupt business elites or through the military forces. Increasingly, powerful sectors and the armed forces enjoyed high degrees of autonomy and non-accountability. The outside world looked critically upon these regimes, but tolerated and even encouraged them for as long as they made the region safe for foreign investment.

When the winds of change of the 1960s swept through Latin America, they took a particularly violent form in the region. Disenfranchisement and lack of faith in democracy combined with the mirage of success of the Cuban Revolution to feed the hope of a generation that more just societies could be attained through political violence. If armed revolutionary movements succeeded in anything, they pulled the "democratic" mask off Latin American regimes and revealed the repressive cruelty of which they were capable. In the 1970s and 80s, harsh military dictatorships with pretensions of durability in power governed most of the region; other countries had lame elected governments with little or no control over the armed forces. And the sphere of autonomy of the military elites – not only to lead the counter-insurgency strategy, but also to decide on strategic matters of natural resources and development – continued to grow. In this period, the military and their supporters developed the "national security doctrine" to justify this accumulation of decision-making authority in non-accountable hands.

Lack of transparency, destruction of institutions of control, and domination of public opinion through the media led – inevitably, it seems – to grotesque forms of massive and systematic human rights violations. In those countries where an active guerrilla movement existed, there were also egregious violations of the laws of war committed by all parties to the conflict. Finally, the world reacted to the appalling tragedy of forced disappearance, massacre of peasant villages, torture and prolonged arbitrary detention. Concern in the developed world led to loss of international and domestic prestige by totalitarian governments and encouraged resistance. In the 1970s

⁴ Thomas M. Franck, *The emerging right to democratic governance*, Am.J.Int'l.Law, Vol. 86, Number 1, Jan. 1992, pp. 46-91.

and 80s, Latin America witnessed the birth of a strong movement in civil society to defend human rights. Over the years, it would diversify and develop into exemplary organizations that offer hope for a brighter future.

The changing international scene in the 1980s and the bolder demands of civil society made the military and military-dominated regimes increasingly unstable. This led in a relatively short time to a series of transitions to democracy in almost every country. These transitions were probably inevitable; yet in all cases there were attempts (some more successful than others) by the military to condition the pace and extent of the reform. In some cases, the military establishments wanted to retain control over key political and economic decisions. In all cases, they were intent on ensuring that they would not be called to account for the legacy of human rights violations they were leaving behind. During the transition, they often bullied democratically elected governments into preserving that sphere of impunity.

The transitional regimes were characterized by this tension between their immediate need to consolidate themselves and avoid relapses into dictatorship, and their aspiration to be true alternatives to the recent past. The debate over impunity dominated the agenda of the transition. Self-amnesty, pseudo-amnesty and real amnesty laws, pardons and other forms of clemency for the perpetrators were obstacles in the way of creating a more democratic order. Fortunately, victims and larger sectors of society fought through those obstacles and insisted on accountability. Some political leaders responded positively to these societal demands. The result was some prosecutions for human rights abuses in a few well-known cases. Although many of these initiatives were ultimately frustrated, it must be pointed out that never before in the history of the hemisphere had previously powerful men been brought to justice. Truth commissions were another form of accountability used in this period, sometimes as an alternative to prosecution, but not necessarily so. The experience gathered in Latin America with these efforts to establish Truth and Justice in the face of massive violations and impunity has been studied closely by societies in the rest of the world that later confronted similar problems.

Truth Commissions were an important tool in this period for accountability for the crimes of the recent past. In 1983, newly elected President Raúl Alfonsín, of Argentina, appointed a National Commission on Disappearance of Persons, chaired by the writer Ernesto Sabato. After a very active collection of information from all sources, in 1984 it produced an important report called *Nunca Más* ("Never Again") that established an unimpeachable description of the machinery of death created by the military dictatorship. Immediately thereafter, the Argentine courts heard the historic case against the members of the three successive military Juntas that had governed the country between 1976 and 1982, which resulted in the conviction and sentencing of some men who had been omnipotent only a few years before. Restlessness in the armed forces over continued prosecutions caused for different attempts at uprisings. In the end, the Alfonsín government enacted two pseudo amnesty laws. His successor, Carlos Menem, closed the

cycle with presidential pardons for the officers who had been convicted and for the few who were by then awaiting trial.⁵

Following this experience, the democratic government of Patricio Aylwin in Chile created a Truth and Reconciliation Commission, chaired by Raúl Rettig and formed with representative members of a wide political spectrum. Rather than describe the patterns and structure of repression in general, like the Sabato Commission had done, the Rettig Commission gave each family of a victim an individualized version of the events, to the extent that they were able to reconstruct them. Because of the wide attention received by these two experiments, the United Nations proposed a similar Truth Commission as part of the peace accords in El Salvador. This Truth Commission was the first one whose members were not nationals of the country. It was chaired by Belisario Betancur, former President of Colombia, and its two other members were Prof. Thomas Buergenthal of the United States and Reinaldo Figueredo, former Foreign Minister of Venezuela. Its report was an important milestone in the peace process. Since its members had no faith that any of the crimes they described would be prosecuted, they “named names” of the perpetrators to the extent that they could establish them. The Salvadoran government promptly issued an amnesty law so that none of them could ever be investigated. More recently, the U.N. also sponsored a Truth Commission for Haiti, with mixed Haitian and non-Haitian membership. The work of this commission, and its report, never attained the credibility or weight of its predecessors. In Guatemala, the U.N. also sponsored a Commission on Historical Verification, chaired by German Professor Christian Tomuschat, with two Guatemalan members drawn from civil society (one, a woman of indigenous origin). Despite the fact that the mandate given to this commission by the parties to the peace negotiations was unfairly limited from the start, the Commissioners and their staff did a very credible job, obtained much fresh evidence, heard the victims’ families, and produced a very strong, sobering report.

Although not in the form of truth commissions, other Latin American countries have followed in this path. Paraguayan judges have seized records of the Stroessner regime and allowed researchers to investigate them. The Brazilian government has created a process by which victims of military abuse in the 1960s and 70s can have their claims heard and obtain compensation. In Uruguay and Brazil, the efforts of civil society (in the first case with active opposition of democratically elected leaders) have also succeeded in breaking the cycle of silence. The important legacy of these and similar experiences is that the matter of accountability for past crimes has far outlived the transitional periods (see Section III of this paper for latest developments on the “right to truth”). A key insight is not to see truth commissions as alternatives to justice, but as part and parcel of a policy on accountability. Truth Commissions succeed if society sees them as an effort not only to *know* what happened, but also to *acknowledge* the plight of the victims. In such cases, efforts of this sort say much about the new democratic State that these societies want to build.⁶

⁵ Méndez, Juan E., *Truth and Partial Justice in Argentina: An Update*, Americas Watch, New York, 1991

⁶ Méndez, Juan E., *Accountability for Past Abuses*, in *Human Rights Quarterly*, ---. See also, Hayner, Priscilla, *Fifteen Truth Commissions*, in *HRQ*, ---; Zalaquett, José, *Confronting...* in *Hastings Law Rev.*,---

There is no question, however, that in proportion to the enormity of the crimes, very little justice has been achieved and not enough truth has been disclosed. Elected leaders and their friends attribute this to the limitations of a transitional situation. This is unhelpful because it lowers the expectations about the governments' performance regarding human rights and democracy. It constitutes an easy way for rulers not to live up to their responsibility to build democratic institutions by using them even in politically difficult cases. Transitions cannot last forever and, by conventional standards at least, the Latin American transition to democracy should be considered complete.⁷ Some would argue that many important features of democracy have not been achieved – doing justice to past human rights abuses among them -- and, for that reason, Latin American transitions still continue.

Whether these States are still in transition or not, they are certainly not full-fledged democracies as they approach the end of the century. For many reasons, Latin America and the Caribbean are well short of what we would call fully functioning democracies. Evidently, there are important differences between countries, and generalizations are always dangerous. But there are traits that are common to the entire region in one degree or another and we have called the present state one of “insufficient democracy.”⁸

This characterization is intended to emphasize the enormous advantage of the present situation over what the region lived through in recent decades. Insufficient or not, democracy does offer an incomparably better structure to deal with all the problems of human rights violations in the region. One meaningful advantage is that almost everywhere in the region there is now a free press and a vibrant debate about public issues. Of course, the fact that we can now change governments periodically via elections is also an important aspect of this period. However, our democracy is insufficient because most of our problems originate in the residue of authoritarianism left in our societies, and all of them could be treated effectively by deepening our commitment to the rule of law, to equality of treatment and to democratic values. In other words, the problems of democracy in Latin America in the year 2000 are to be solved with more democracy.

Our attempt at describing the features of “insufficient democracy” is made against a model of democracy that would not require such an adjective. That model goes far beyond the existence of periodic, free and fair elections, and even beyond the effective alternation in power of adversarial parties. For us, democracy also means several other things, all of them related to its day-by-day exercise by free citizens in a certain measure of equal footing despite their many differences. In order to practice democracy, citizens

⁷ A frequently cited benchmark is a second peaceful change from one elected government to another, proposed by Samuel Huntington in *The Third Wave: Democratization in the late XXth Century*, U. of Oklahoma Press, Norman and London, 1991. It has been criticized as overly mechanic.

⁸ IHR, *Vision of the IHR about the State of Democracy and Human Rights in Latin America and of its Mission*, San Jose, Costa Rica, 1997. In a more rigorous theoretical analysis, Guillermo O'Donnell describes democratic regimes that coexist with highly undemocratic aspects of the exercise of authority. A country may qualify as “democratic” even while exhibiting serious deficiencies as to the effectiveness of civil and social rights. O'Donnell, Guillermo, *Democratic Theory and Comparative Politics*, mimeo, 1999.

must see that there is an effort to include them in the formulation of policies of common interest, regardless of their standing in the economy and of their membership in particular social groups. In other words, democracy must strive to eliminate the factors that exclude certain members of the polity from the decision-making process.

In fact, in the Western Hemisphere there is a serious danger of going backward in this regard. There is evidence of diminished political participation even in elections. Even more worrisome, participation in policy debates and formulation is increasingly limited to fewer people. The patterns of participation and non-participation mirror those of participation in the economy: the poor participate less in politics, even if their stake in the decisions adopted by government is arguably at least as high as that of any other. In some countries, the dated electoral machinery places a heavy burden of travel and inconvenience on those who want to vote. Mandatory voting only partially limits the damage of reduced participation, and it is rarely enforced in any event. As in the developed world, electoral campaigns are becoming expensive and therefore dominated by money.

If participation on election day is dwindling, day-by-day participation in policy formulation is more rare now than in previous democratic moments in the history of Latin America. Social policy, where it exists, is made more and more by professional politicians and bureaucrats or technocrats, with little or no debate among the public.⁹ The widening gap between rich and poor that characterizes Latin America has a definite expression also in the strong differentiation in political participation by rich and poor.

The patterns of exclusion (from the economy as well as from politics) go beyond rich and poor. Social sectors that have suffered long term discrimination are similarly excluded from the decision-making process. In these democratic times there is more awareness of the special situation of women, of indigenous peoples, of ethnic minorities (especially African-American), and of children, especially if the latter belong also to any of the previous categories. But that awareness does not yet result in any attempt to include them in the political process. On the contrary, the disenfranchised are increasingly more disenfranchised.

In addition, in many of our countries the political process yields benefits for a certain breed of political leader, reminiscent of the old *caudillos*, though with a veneer of modernism. Free market economies and structural adjustment policies are embraced easily by modern-day Latin American leaders. But their loyalty to other principles of liberalism is conspicuously absent. In particular, they do not believe in self-restraint in the exercise of power, which is a defining note of democratic rulers. They believe that the election is a blank check to exercise power the way they see fit. As a result, they do not feel constrained by notions of representation, much less by campaign promises; for them, their election is an act of delegation of power by the electorate, without conditions or restraints.¹⁰ This trend towards concentration of power, to consider elections as establishing winners and losers for all purposes, and to govern with little concern for the

⁹ Goglio, Hector, Study of the formulation of social policy in three countries, for IIHR, 1999 (unpublished).

¹⁰ O'Donnell, Guillermo, *Delegative Democracies*, Journal of Democracy, Vol. V, No. 1, 1994, pp. 55-69.

essence of democratic limits on power, has been rightly called *sultanistic*, in the words of Max Weber.¹¹

Delegative democracy shows daily in the way some leaders react to any questions by the public about personal or state finances. It is particularly striking, however, in its relation to the state of freedom of expression in the region. There has never been a period in our history where there has been a more aggressive and courageous exercise of press freedom and particularly of investigative journalism. And yet the journalistic profession in Latin America remains as hazardous as ever. There are alarming and well-documented attacks on journalists, including killings.¹² Those attacks do not, by and large, originate in government forces, but it is fair to say that governments are not favorably inclined to allow the machinery of investigation and prosecution to act in response to them.

More importantly, the normative framework in which freedom of expression is exercised in Latin America and the Caribbean lags far behind the needs of a modern democratic society. For example, more than a dozen countries retain the offense of *desacato* (contempt of a public official) in their criminal statutes, long after the Inter-American Commission on Human Rights has stated categorically that it is incompatible with the American Convention on Human Rights.¹³ The same Convention bans prior censorship of any kind, yet some Latin American courts routinely forbid the circulation of books and the exhibition of film, supposedly to protect the honor of living or deceased persons.¹⁴ Some countries have retained press laws meant to regulate freedom of expression and the very existence of such laws has a chilling effect on expression, whether or not they are consistently applied (and often, if they are applied at all, they are inconsistently or arbitrarily applied). Finally, slander and libel laws are also outdated because they do not make distinctions between private and public persons who act upon them, and thus inhibit the inquiry and debate that is essential in a democratic society.¹⁵

The state of freedom of expression and of its guarantees is only a symptom of a larger malaise. For all the progress that has been made in elections (not just in *having* them, but also in their being more fair and fraud-free), there is little or no progress in the

¹¹ Max Weber, *Economy and society: an outline of interpretive sociology*, edited by Guenther Roth and Claus Wittich, University of California Press, Berkeley, 1978. O'Donnell and Juan Linz prefer to use the category of "patrimonialism," a less extreme version of anti-democratic exercise of power, for the Latin American cases. O'Donnell, Guillermo, *Illusions About Consolidation*, *Journal of Democracy*, Vol. VII, No. 2, 1996, pg. 34-51; Linz, Juan, *Totalitarian and Authoritarian Regimes*, *Handbook of Political Science*, F. Greenstein and Nelson Polsby, editors, Addison-Wesley, Reading, 1984, Vol. III, pp. 175-411.

¹² See Fn 107.

¹³ Inter-American Commission on Human Rights, *Report on the compatibility of Desacato laws with the American Convention on Human Rights*, *Annual Report*, 1994, Chapter V.

¹⁴ IACHR, Report No. 11/96, *Martorell v. Chile*, No. 11230, May 3, 1996, in *Annual Report*, 1996. A case involving the prohibition of the Martin Scorsese film *The Last Temptation of Jesus Christ*, called *Olmedo Bustos v. Chile*, No. 11803, has been submitted by the Inter-American Commission to the Inter-American Court and is presently pending there. A case called *Matus v. Chile*, regarding the prohibition of a book called *El Libro negro de la Justicia Chilena*, is currently pending before the Commission.

¹⁵ European Court on Human Rights, *Lingens v. Austria*, July 8, 1986. European Commission on Human Rights, *Castells v. Spain*, January 8, 1991.

development of other institutions that are just as essential to the rule of law. The administration of justice has never been, by and large, very credible in the region; but in recent years it has in fact seen its effectiveness further eroded. This is the result primarily of neglect: there is insufficient perception of the need to invest in more modern and efficient courts. But it is also the result of the attitude of high officials who will trample on the independence and impartiality of judges if they see the need to defeat any challenge to their *sultanistic* or *patrimonialistic* use of power. Courts are respected only if they provide a measure of legitimacy to what the Executive branch has decided to do.

To be sure, international lending institutions and foreign development agencies have placed great emphasis in the reform of the judiciary in recent years. But local authorities (executive, legislative *or* judicial) do not always share their enthusiasm. Most of these efforts are squandered because the object, pace and scope of the reform are left to be decided by those who do not see a problem with the present state of the matter. Latin American and Caribbean nations have tried to compensate for the weakness of institutions designed to control government and to provide guarantees of human rights protections. Many such efforts have resulted in the creation of offices of the human rights Ombudsman (*Defensor del Pueblo*, *Defensor de los Habitantes*, *Protecteur des Citoyens*, *Procurador de Derechos Humanos*, *Comision Nacional de Derechos Humanos* and so on). The development of this institution is still a promising feature in Latin American and Caribbean democracies, and more time is needed to evaluate its achievements and shortcomings.

Perhaps the most salient aspect of the state of institutions of control is the acute problem of lack of access to justice by large and underprivileged sectors of society. Not only is it hard and expensive for members of those categories to be heard by courts of law, and legal services – when they exist at all -- are nowhere up to the task of representing those who cannot afford private counsel. Procedures are cumbersome and long, and dominated by obscure and formalistic rituals. And even substantive law has not kept up with the needs of societies striving for modernization. Again, unquestionably there is some attention to this problem in present-day Latin America and the Caribbean. Statutes allowing for alternative means of conflict resolution have been passed. Their impetus is not so much to enhance access to justice by the underprivileged, but to relieve the courts from the pressure of their dockets. Nevertheless, they could eventually have a beneficial impact on both counts. Until that happens, however, it is hard to think of members of underprivileged sectors as citizens if they are unable to petition the courts for redress of their grievances.

The weakness of institutions of control has direct bearing on the perception and reality of impunity. The legacy of impunity for egregious abuses of the past (discussed earlier) is continued now by the absence of serious investigation, prosecution and punishment of the abuses of power committed in democratic times by State agents, particularly police forces. Encouraged by a sense of insecurity in cities and streets, police agents fight crime with extreme brutality, use torture as a regular interrogation technique, and generally abuse their powers secure in the knowledge that they will not be brought to account. This results in more, not less insecurity, because a citizenry afraid of the police

will not likely cooperate with it in fighting crime. This paradox is lost, however, in the rhetoric of politicians who exploit the fears of the citizens and promise *mano dura* (toughness), which simply means looking the other way when police violate the rights of any person.

Impunity is not restricted to police agents. When a pervasive sense exists that abuses of power will be tolerated, the lack of accountability spreads to issues of corruption by high officials, by legislators, by magistrates, and even by business and trade union leaders. Democracies in which officials are not effectively accountable to the electorate and to the law and its mechanisms are not sufficiently democratic.¹⁶

Directly related to impunity is the matter of the proper response to a violation of a human rights norm. Unquestionably, abuses of power will and do take place in all systems, and even citizens of model democracies will sometimes encounter such an occurrence. What distinguishes democracy from other systems is precisely the institutional response to such abuses. A human-rights-respecting State is one that not only does not commit violations, but also one in which any instance of abuse triggers the machinery of control of the State so that such actions are investigated, prosecuted and punished in good faith.¹⁷ The Inter-American Court of Human Rights has said that international law obliges the State to organize its whole apparatus in such a way as to afford effective protections to all persons under its jurisdiction.¹⁸ Even if, in our time, there are no massive and systematic violations of rights committed as State policy in Latin America, the lack of institutional response to those abuses that are indeed committed constitutes a serious deficiency.

Our next point in describing the insufficiencies of our democracies relates to the debate about the role and meaning of civil society in a modern democracy. As the State is forced to divest and abandon important services it once provided, the conventional wisdom is that “non-governmental organizations” (NGOs) will naturally step in and fill the gaps. In fact, many international development agencies promote this idea by financing such NGOs, whether or not they are legitimate and spontaneous creations of the societies where they act. On the part of government leaders, there is an openly contradictory message: on the one part, economic policies are put in place that cancel services long provided by the government, and organizations of civil society are expected to take on those roles without gaps in their delivery. The State may be absent, but it is not its fault if organizations of civil society are non-existent. In fact, civil society is now expected to fulfill tasks that should never have been abandoned by the State, like those related to security of the citizenry. On the other hand, governments show open hostility to those organizations of civil society that do exist, especially if they take their duties seriously in regards to preserving their independent and critical stance vis-à-vis governmental policies. In those cases, political leaders will dismiss NGOs as “non-

¹⁶ Accountability is a fundamental feature of democracy, see Schmitter, Phillippe and Karl, Terry L., *What Democracy is...and is not*, *Journal of Democracy* 2, No. 3, 1991.

¹⁷ In the international law of human rights, these twin duties of the State are called the duties *to respect and to ensure* human rights (International Covenant on Civil and Political Rights, Art. 1; American Convention on Human Rights, Art. 1).

¹⁸ IACtHR, *Velasquez Rodriguez* Case, Judgment on the merits, July 29, 1988, par. 166.

representative,” even though it is in the nature of these organizations to represent only the cause they serve, not any particular constituency.

Despite this misunderstanding about the role of spontaneous and autonomous organizations of civil society, there is no question that they exist and grow in present-day Latin America and the Caribbean. Organizations that were born as a response to political repression now have expanded their mission to look into what Jose Zalaquett calls “endemic violations,” in the sense that they are there in democratic as well as non-democratic times. NGOs now defend the rights of incarcerated and institutionalized persons and highlight the need for more humane prison conditions; they defend “street children” victimized by crime as well as by neglect; they represent landless peasants and persons displaced because of conflict over land. They also promote the right of indigenous peoples and ethnic minorities collectively and individually to enjoy their culture; and they promote laws and standards to eliminate all forms of invidious discrimination.¹⁹ Many times these NGOs have to combine advocacy with direct delivery of services, and the funding is always scarce, especially in a region that the rest of the world has – perhaps prematurely – pronounced democratic and therefore no longer a priority for international assistance.

The income distribution gap is becoming wider in Latin America, a region that has always had the widest dividing line between rich and poor in the world. The impact of this on the quality of democracy cannot be underestimated. Although it may be hard to measure the relationship, it is clear that equality of access to services and to political participation cannot be sustained while larger numbers of persons fall beneath the poverty line. Although the equality that is a goal of democracy is not economic equality, the exercise of rights does need a foundation of satisfaction of basic needs. Even in poor countries, the quality of democracy would be enhanced by policies designed to protect all from falling through the safety nets. Instead, in most of the region those safety nets are simply disappearing. Under those conditions, some countries (but not all) may indeed experience economic growth in macroeconomic terms; but that growth is not strictly speaking development, especially because it is hard to see it as self-sustaining. And it is certainly not the implementation of a “right to development,” since this concept assumes the ability of all to participate fairly in the benefits of economic growth.

II. The Inter-American system of protection of human rights:

If the “democracy clause” has had only a limited effect on the creation of truly democratic conditions in the domestic sphere of each country, at least it could be expected to act internationally as a check against anti-democratic adventures. Here, the record is also checkered at best. The only time in which the clause was applied as a sanction against a non-democratic regime was in 1962, at the Punta del Este General Assembly. The Cuban Government had its rights of membership in the OAS suspended (while the Cuban State retained its obligations), a situation that remains the same today.

¹⁹ Stavenhagen, Rodolfo, *Las Organizaciones Indígenas: Actores Emergentes en América Latina*, in *Presente y Futuro de los Derechos Humanos: Ensayos en Honor a Fernando Volio Jiménez*, Lorena González, editor, IIDH, San Jose, 1998, p. 408.

Previously, in 1952, it was invoked at another General Assembly to isolate the reformist government of Jacobo Arbenz in Guatemala, a diplomatic gesture that served later to legitimize the military invasion of the country.²⁰ It was never even mentioned to express any concerns about interruptions of democracy that led to the dictatorships of Pinochet in Chile, Videla in Argentina, the 1964 *coup d'état* in Brazil. The countries that voted to isolate Guatemala in 1952 and Cuba in 1962 were led, among others, by “elected” leaders like Trujillo, Somoza and Stroessner; the democracy clause was never invoked to inquire on the manner in which they ruled their own countries.

With the era of transitions to democracy, interest in the clause has had a revival of sorts. In 1991, the General Assembly approved the “Commitment of Santiago” by which the democracies of the Americas pledged to respond collectively to threats to the constitutional order in any sister nation.²¹ This declaration has been ratified in several successive General Assemblies, and complemented by the Presidents of the American nations in the Protocol of Washington.²² Less than a year after the Santiago Commitment, the region was confronted with the “self-coup” of April 5, 1992, when President Alberto Fujimori of Peru dissolved Congress and stripped the judiciary of its tenure and independence. Hector Gros Espiell, then Minister of Foreign Relations of Uruguay and Chair of the General Assembly, was appointed by the OAS to apply the Santiago rule and negotiate a return to democracy in Peru. As a result of the shuttle diplomacy that ensued, in late 1992 Fujimori held elections for a Constituent Democratic Congress (CCD in Spanish) and won them handily. The OAS declared the job done, even though the opposition had boycotted the election. The CCD eventually enacted a Constitution that concentrates power in the Executive Branch. Even today, Peru has not recovered an independent judiciary.

The Santiago Commitment fared better in the following attempts to replace democratic institutions with authoritarian and concentrated power. In Guatemala, international pressure – led by the OAS – succeeded in turning back President Jorge Serrano’s attempt to dissolve Congress and the courts, an experiment doubtless inspired in Fujimori’s success. In Haiti, the military *coup* against Jean-Bertrand Aristide elicited an immediate response by the OAS. Although it took more than two years to restore Aristide to the presidency, as well as the involvement of the United Nations and President Clinton’s willingness to deploy U.S. forces, the OAS stayed engaged and provided leadership.

²⁰ Kinzer, Stephen and Schlesinger, Stephen, *Bitter Fruit: The Untold Story of the American Coup in Guatemala*, Doubleday, Garden City, NY, 1982.

²¹ GA Res. No. 1080. It took the OAS 46 years to adopt a doctrine first proposed by Uruguayan Foreign Minister Rodriguez Larreta in 1945. Earlier, the proposal had been rejected as vague and interventionist in nature, especially because of the lack of a treaty as its basis (the Charter of the OAS later filled that void) or of any mechanism of implementation (this aspect is still lacking in the Santiago Commitment). See Gros Espiell, Hector, *La democracia en el sistema interamericano*, p. 129, and Cancado Trindade, Antonio A., *Democracia y Derechos Humanos*, p. 515.

²² Protocol of Reforms to the Charter of the OAS, signed in Washington on 14 December 1992. An article was added to the Charter of the OAS, and certain other articles were amended, in connection to the defense of democracy in the hemisphere.

The balance of this reaffirmation of the democracy clause in the 1990s is mixed. It appears, on the positive side, that Latin American democracies emerging from years of military tyranny do act sincerely in reacting to threats to constitutional order in their neighboring countries. Debates about these events at the General Assembly or at specially convened meetings of Foreign Ministers do contribute to de-legitimize undemocratic adventures. But there is a tendency to be satisfied, like in Peru, with a nominal return to elections, as long as they are more or less defensible as expressions of majority opinion, though not fully free and fair by more rigorous standards. The effect is to lend an aura of international legitimacy to regimes that are certainly not democratic in the way they exercise power. There is also no desire to use objective mechanisms in the course of negotiations under the Santiago Commitment. Independent organs like the Inter-American Commission on Human Rights should play an important expert role in determining the extent of violations of human rights and democracy and thus assist the diplomatic negotiators. Instead, there is no desire to rely on the Commission's findings or even to seek its advice.

Perhaps an important reason for this unsatisfactory state of development of the link between human rights and democracy is structural and not simply political. In the European system, a democratic form of government and ratification of the European Convention on Human Rights are conditions of membership in the European Union, both for applications made by prospective members and for those who have already joined. As a result, participation in the benefits of an international organization is predicated on each State's acceptance of these conditions, and – significantly – on its willingness to abide by decisions of the organs designed to adjudicate human rights complaints. Resistance to those decisions can lead to suspension from the Union, and the Council of Ministers regularly monitors compliance with the decisions of the European Court with that possible result in mind. When the “dictatorship of the colonels” governed Greece, in the 1960s, the threat of suspension was effectively applied. Greece withdrew voluntarily, but it did not return to the European fold until democracy was restored. In contrast, American States can choose to ratify the American Convention on Human Rights or not to do so. Though they are obligated to abide by the decisions of the Inter-American Court (if they have ratified the Convention), the only mechanism contemplated in case of non-compliance is the Court's annual report to the General Assembly. In recent years, the General Assembly has refused systematically to debate any report of non-compliance of this sort. The result is that the price to pay in the Americas for being undemocratic or for refusing to accept binding decisions of specialized organs is simply not very high.

These shortcomings notwithstanding, the region has, over the years, created an important system of international protection of rights. It is based on the Charter of the OAS and the American Declaration, mentioned earlier, but more recently it incorporates more sophisticated and progressive instruments. The most important is the American Convention on Human Rights, also known as Pact (or Covenant) of San Jose de Costa Rica.²³ Other important human rights instruments are the Inter-American Convention on Forced Disappearances, the Inter-American Convention against Torture, the Convention on the Prevention of Violence against Women (also known as Pact of Belem do Para),

²³ Adopted in San Jose, Costa Rica, November 1969, entered into force in 1979.

and an additional protocol to the Pact of San Jose de Costa Rica on economic, social and cultural rights, known as the Protocol of San Salvador.

The American Convention is fundamentally a civil and political rights treaty, but its Art. 26 is a window to economic, social and cultural rights that has not yet been fully used. Among its substantive norms, it is worth noting that freedom of expression receives a more progressive treatment in the American Convention than either in the International Covenant on Civil and Political Rights or the European Convention. Prior censorship is forbidden under any circumstance, except in public exhibitions and then only for the protection of minors. State parties must outlaw “hate speech,” but only insofar as it constitutes instigation to commit crimes or acts of violence. In contrast, the ICCPR and the European Convention require prohibition of this kind of speech even if it only results in instigation to discrimination. The Inter-American formula strikes a better balance between free speech and the demands of tolerance of diversity.²⁴ In the American Convention, freedom of expression encompasses the right to seek, receive and impart information and ideas of all kinds, the prohibition of restrictions by indirect methods and means, and the right to reply to inaccurate or offensive statements.²⁵

The “right to life” clause in the American Convention (Article 4) includes a controversial qualification that does not exist in other multilateral treaties: that the right to life “...shall be protected...in general, from the moment of conception.” This has been interpreted as an obligation to prohibit abortions. However, there has only been one decision by the Commission on this matter, and in a divided vote it stated that that language does not imply an obligation to prohibit abortion.²⁶ The area in which the American Convention is definitely less protective of rights than the ICCPR or the European Convention is on suspension of guarantees during emergencies, generally known as the “derogation clause.” The ICCPR and the European Convention set a high standard for derogation: the emergency has to be so serious as to affect “the life of the nation.” In contrast, in the Americas, State parties can suspend certain important rights “in time of war, public danger, or other emergency that threatens the independence or security of a State Party...” (Article 27). As it may be obvious, in Latin America almost any excuse is enough to declare a threat to national security, and to govern for prolonged periods under a state of emergency. Perhaps by way of compensation, Article 27 includes, among the rights that cannot be suspended under any circumstance, the right to political participation, a novelty with little significance in a region where *coups d’etat* have so frequently suspended this right or rendered it meaningless.

The American Convention’s greater contribution to the development of international law is in the institutions and mechanisms it creates. An Inter-American

²⁴ Although at first Art. 13 of the American Convention was not frequently used, in the last few years there have been some important decisions applying it. See, IACtHR, Advisory Opinion OC-5/85, *Compulsory Membership in an association prescribed by law for the practice of journalism*, Nov. 13, 1985; and Inter-American Commission (IACHR), Report No. 22/94, *Verbitsky v. Argentina*, No. 11012, Sept. 20, 1994; as well as IACHR report in *Martorell v. Chile* and Report on *desacato* laws, *cit.*

²⁵ Arts. 13.1, 13.3 and 14.

²⁶ IACHR, *Baby Boy* case (vs. United States), Report 23/81, Case 2141, March 6, 1981, Annual Report 1980-81.

Commission (IACHR) and an Inter-American Court (IACtHR) are the organs of implementation and the authoritative interpreters of the Convention. Historically, the IACHR was founded in 1959 by General Assembly resolution and with a mandate limited to promotional activities. Soon it understood its mandate as an authorization to receive complaints against certain practices and to process them. In 1967 there was a Charter amendment and the IACHR was incorporated as a “principal organ” of the Organization of American States, thus becoming a treaty-based organ. In 1969, it was also incorporated into the American Convention, a specifically human rights treaty. The Convention created a second organ, the Inter-American Court on Human Rights (IACtHR), and established competencies for and institutional relations between both organs. The American Convention entered into effect in 1979, and at that time the Court came into being.

The Inter-American system is one of the three existing regional systems of protection that coexist with the universal treaty-based and non-treaty-based mechanisms. Regional systems exist also in Europe and Africa. Their distinguishing feature is their preference for judicial and quasi-judicial approaches, whereas universal (i.e., United Nations-based) procedures regarding individual complaints are generally non-judicial and even conciliatory in nature. Of the three regional systems, the European is by far the most developed, and the African the least developed. Coincidentally, the European is the one that has gone farthest in the judicial nature of the process (Africa has only a Commission, and a Court will be created only after a proposed Protocol is ratified by the requisite number of States). As can be surmised, the European system enjoys the highest rate of “efficacy” in the sense of compliance by States with its decisions, and the African is the weakest in that sense. The Inter-American system lies in between these two on all of those counts.

Members of the IACHR are elected at the General Assembly by the votes of all Member States. Only the States that have signed and ratified the Convention (24 of the 35 OAS States at this time) choose Court magistrates. Each body is composed of seven members who serve in their personal capacity as experts, not representing any State. A Secretariat or Clerkship and professional staff also assists each body. The Court has two types of jurisdictions: advisory and contentious (adversarial in better English). In its advisory capacity, the Court can receive requests from States that have ratified the Convention and from several OAS organs – including the Commission – to issue an “advisory opinion” on the correct interpretation of a treaty obligation regarding human rights. There have been already 16 advisory opinions, and several of them have advanced important concepts in the progressive development of rights.

In its contentious jurisdiction, the Court can receive cases submitted to it by the Commission against States that have made an additional declaration of acceptance of this possibility (21 States at this writing). Additionally, cases can be submitted by a State party against a Commission decision, or by a State party against another State party, invoking a violation of an obligation under the American Convention. In practice, however, State parties never avail themselves of this access to the Court; all cases

resolved so far have originated in Commission submissions.²⁷ Nevertheless, the Court has been able to compile an impressive record of progressive decisions regarding matters like forced disappearance of persons,²⁸ arbitrary detention and criminal due process,²⁹ compensation for massacres of indigenous populations,³⁰ and so on.

For its part, the Commission combines promotion and adjudication functions. The IACHR advises governments on legislation or proposed legislation affecting human rights, with or without a formal request. It also publishes “country reports” of an occasional nature, usually after an on-site visit, describing objectively and comprehensively the human rights situation in the nation. It has, from time to time, advanced a standard-setting agenda by drafting and proposing new instruments for consideration by the General Assembly and the Member States. As an adjudicator of claims against States, the IACHR can receive complaints against all member States of the OAS. For those that have not ratified the Convention, the IACHR examines the complaint under the American Declaration on the Rights and Duties of Man. If the State has ratified the Convention, the case is heard under the latter treaty and using the relatively structured procedures established therein. If the country has made an additional declaration accepting the contentious jurisdiction of the Court, the Commission can, at its discretion, submit the case to the Court. If the country is a signatory of the Convention but has not accepted the Court’s automatic jurisdiction, the Commission can “invite” the State to accept it on an *ad hoc* basis.

Precisely this diversified approach to the system’s jurisdiction to hear complaints is fast becoming one of its weaknesses. The original intent – just like at the United Nations – was to promote adherence to the treaty by making it easier for countries to take some obligations but relieve themselves of others. It is hard to tell if the result has been positive in that sense (i.e., would we have more or less ratifications if the norms were more strict?). Undoubtedly, however, the system has resulted in a bewildering combination of country obligations. In addition to the possibilities outlined in the previous paragraph, there are also the following: (a) Trinidad and Tobago has denounced the Convention altogether. As regards this country, the Commission and the Court retain jurisdiction for all cases occurring within one year after Trinidad and Tobago deposited the instrument of denunciation.³¹ Thereafter, cases can be heard only by the Commission and under the Declaration, not under the Convention. (b) Peru has deposited an instrument that purports to withdraw, “effective immediately,” its acceptance of the contentious jurisdiction of the Court, but not its ratification of the Convention.³² (c) With

²⁷ The only exception is the early case of *Viviana Gallardo*, submitted by Costa Rica against herself, over the objections of the Commission. The Court dismissed the case (IACtHR, Decision of 13 November 1981).

²⁸ IACtHR, *Velásquez Rodríguez Case*, *cit.*, and *Godínez Cruz Case*, Judgment on Merits of Jan. 20, 1989.

²⁹ IACtHR, *Loayza Tamayo v. Peru*, Judgment of September 17, 1997.

³⁰ IACtHR, *Aloeboetoe et al. v. Surinam*, Reparations, Judgment of September 10, 1993.

³¹ Art. 78.

³² In September 1999, the Court declared that declaration invalid, and retained jurisdiction over two pending cases against Peru (*Tribunal de Garantías Constitucionales* and *Ivcher*). Prof. Héctor Gros Espiell, who as Chair of the General Assembly had negotiated Peru’s “return to the democratic fold” (see above), has openly sided with Fujimori on this latest attempt to undermine the Inter-American Court, the only international law specialist to do so. Besides criticizing decisions of the Court to which he once

respect to Cuba, the Commission has long stated that its suspension from the OAS affects its rights of membership but not its obligations under the American Declaration, so it has continued to receive complaints and issue decisions and “country reports.” Cuba not only ignores these decisions but also refuses to cooperate with the Commission in any way. (d) Finally, the Convention allows countries to make reservations to its provisions, in conformity with the Vienna Convention on the Law of Treaties of 1969.³³

The problem with this state of affairs is that it provokes ill-feelings in countries of the region that ratify the Convention with few or no reservations and accept the jurisdiction of the organs, when they compare themselves to other members of the OAS that are not parties to it. It seems unfair to those who contribute to the development of international law that they then become singled out for criticism when they receive an adverse decision by the organs. Instead of prompting a renewed effort to promote signature and ratification by *all* eligible States, this perception often leads to a discussion of reform of the system. If the starting point is this dissatisfaction, it is easy to see how most proposals for reform are geared towards the *lowering of standards*.³⁴ The treaty organs, academics and the growing number of users of the system do not think this would be a fair bargain. They point, instead, to the many ways in which the system can be improved upon without resort to an amendment process that may well result in retreat from what has been achieved so far.³⁵

The debate about reform of the system had its peak in 1996 and 1997, when the IACHR and the Committee on Juridical and Political Affairs of the Permanent Council of the OAS held conferences and convened practitioners, academic experts and government representatives. Those debates resulted in important discussions about the strengths and weaknesses of the system, and on how to move it in a forward direction. Proposals for reform that would have had the effect of weakening the institutions were largely set aside.³⁶ In May 1998, however, the debate about the system took a wholly different turn, when Trinidad and Tobago surprisingly denounced the Convention, as mentioned above. The stated reason for this decision was that the protracted proceedings before the IACHR in death penalty cases lengthened the period between imposition of a death sentence and its execution, which could result in the country being responsible for cruel, inhuman and

belonged, Gros Espiell opined favorably about the “immediate effect” of this unprecedented withdrawal of consent to jurisdiction, even though it meant that Peru would not abide by the Court’s decisions in the pending cases. Those cases include one in which Fujimori disbanded Peru’s Constitutional Court. In Guatemala, an attorney representing a right-wing party filed a constitutional challenge to the country’s acceptance, in the 1980s, of the Court’s jurisdiction, alleging that a vote by Congress was necessary. In October 1999, the Constitutional Court of Guatemala rejected the challenge on a 4-3 vote.

³³ Art. 75

³⁴ See, for example, Edmundo Vargas Carreño, *Intervención del Representante de Chile durante la Sesión Ordinaria del Consejo Permanente de la OEA, 27 Noviembre 1996*, in El futuro del Sistema Interamericano de Protección de los Derechos Humanos, Juan E. Mendez and Francisco Cox, editors, IIDH, 1998, p. 49.

³⁵ Pedro Nikken, *Perfeccionar el Sistema Interamericano de Derechos Humanos sin Reformar el Pacto de San Jose*, in El Futuro del Sistema Interamericano..., *cit.*

³⁶ Mendez and Cox, El Futuro del Sistema..., see previous footnote.

degrading treatment.³⁷ This action is significant because no other country in the world had ever denounced a human rights treaty. There was only very mild discussion in the General Assembly of 1998 in Caracas, which met only days after this announcement. Although the denunciation could not take effect until one full year had elapsed (see above), Trinidad and Tobago refused to attend Court hearings on precautionary measures, and openly defied Inter-American Court orders to suspend some executions. In fact, only a few days before the General Assembly of Guatemala, in June 1999, Trinidad and Tobago executed persons named by the Court in such orders. This time there was not even any debate at the General Assembly, despite a specific request by the Court to put the matter on the agenda.

In July 1999, Peru filed the instrument mentioned earlier. Though there has not been a meeting of the General Assembly after this development, the response by the political organs and by representatives of other member States has been muted at best. These episodes may well encourage other States to follow the paths of Trinidad and Tobago and Peru, especially if politicians continue to win elections by espousing toughness against crime. The Convention does represent an obstacle to reinstatement of the death penalty and to expanding it to new criminal offenses, and it could be an obstacle to legislation cutting down on judicial protections.³⁸ In any event, the spirited and principled response of the two treaty organs to these challenges is a hopeful sign that the storm will be weathered.

To complete this section, it is important to mention that the United Nations has also contributed to international protection of human rights in the Americas. Most Latin American and Caribbean nations are also signatories of the ICCPR and of other universal treaties, and generally accept the jurisdiction of treaty organs. In particular, the Human Rights Committee (the treaty organ of the ICCPR) has had occasion to produce important decisions regarding cases in Latin America, via its case complaint mechanism and its periodic country reports. Some of the non-treaty-based mechanisms like Special Rapporteurs and thematic Working Groups have also exerted influence in the improvement of conditions in the region.

In recent years, however, the United Nations has protected human rights in the region quite successfully by means of a different and more innovative approach. As the UN involved itself in making peace in various domestic armed conflicts, it has developed a certain “doctrine” that puts great emphasis on human rights, not solely as an ultimate objective of the peace process, but also as a confidence-building measure and a step toward peace. Field operations to monitor human rights violations, mounted in El Salvador, Haiti and Guatemala in the 1990s, have had a significant impact in both senses. Despite some loss of momentum after initial impetus, they are generally seen as highly

³⁷ In *Pratt and Morgan*, the Privy Council of the House of Lords (Trinidad and Tobago’s highest court) ruled that more than five years in death row amounted to cruel, inhuman and degrading treatment (*Pratt and another v. Attorney General of Jamaica*, Privy Council [1994] 143. NLJ 1639). Later, in *Hillaire*, the Privy Council said that courts were obliged to suspend the execution of sentences in order to allow the convicted person to exhaust international proceedings available. Read together, these decisions suggest that if the delay is caused by the IACHR proceedings, the five-year rule does not apply.

³⁸ See Articles 4, 5, 7, 8 and 25.

successful enterprises. Significantly, the UN has also promoted and executed some controversial initiatives with similarly good results. This is especially true when the UN has borrowed pages from Latin America's own experiences and created Truth Commissions as a way for societies to reckon with the crimes of the past and to seek reconciliation without oblivion.³⁹

More recently, the Office of the High Commissioner for Human Rights has established programs of technical assistance in the region. At this writing there are programs of that sort in El Salvador, Guatemala, Bolivia and Colombia. In Colombia, the program includes as well a small monitoring operation. Both the OAS and the UN could play important roles in seeking and making peace in the remaining armed conflicts in the region. In Colombia, peace talks are under way. In Chiapas, Mexico, the talks initiated under the Agreement of San Andres seem stalled at this moment. Experience shows that when the actors to the conflict have the political will to "internationalize" the peace process (among other ways by calling on the UN and the OAS to cooperate), it is possible to break the deadlock and advance towards peace. Experience also shows that even the existence of a serious peace process contributes enormously to the alleviation of tensions and to diminishing the incidence of human rights abuse.

III. Human Rights and Domestic Institutions

The recent years of democratic renewal in Latin America have resulted also in an important process of constitutional reform. Invariably, the new constitutions or their most recent amendments have incorporated human rights treaties into the law of each Nation. This positive aspect of constitutional law making should not hide the fact that, at least in some cases, constitutional reform was pursued as a means to allow re-election of incumbent Presidents or otherwise to legitimize concentration of power in the dominant parties. In addition, specific mention of international human rights instruments in the new Constitution can be a meaningless gesture unless there is also the political will to enact implementing legislation, or on the part of judges an inclination to enforce international obligations directly.

Nevertheless, the trend towards incorporation of the international law of human rights in the text of the new constitutions is an important new development. In some cases, the full text of all treaties ratified by the country is reproduced as constitutional text, and special majorities in Congress are required to denounce a human rights treaty.⁴⁰ In other cases, international instruments that have been ratified are incorporated by reference in the new constitutional text, or else a general reference to "human rights

³⁹ See United Nations, The UN and El Salvador for a full documentary history of ONUSAL and the Salvadoran Truth Commission, in United Nations Blue Book Series, Vol. IV, UN, New York, 1995; United Nations, Guatemala: Memorias del Silencio, Report of the Commission on Historical Clarification, Guatemala, 1999. For reasons that exceed the scope of this article, the Haiti Truth Commission, also supported by the UN, has not been a success.

⁴⁰ See Article 74, sec. 11, Constitution of the Argentine Republic, as amended, 1994.

treaties” is included as the description of the body of law to be applied.⁴¹ These differences, in turn, have bearing on the position that international treaties occupy in relation to other laws of the country. Most Latin American countries accept the notion that treaties (especially human rights treaties) prevail over acts of Congress, and are trumped only by the Constitution itself. At the very least, they are considered in the same hierarchy as laws, and courts are supposed to give them immediate effect once they have been ratified.⁴²

Despite this, in general, Latin American judges are not particularly known for applying international human rights norms directly. There are, however, important recent trends in the opposite direction. The Constitutional Court of Costa Rica has stated that international human rights have prevalence even over the country’s Constitution.⁴³ The same court ruled that a law of mandatory affiliation of journalists to a professional association was unconstitutional, on the basis of an advisory opinion of the Inter-American Court that had stated that such laws violate the freedom of expression clause of the American Convention.⁴⁴ The Argentine Supreme Court, in a 1995 case, said that international treaties are directly applicable in domestic law and that judges are obliged to apply not only their text, but also interpretations of them emanated from authoritative organs.⁴⁵

It is also fair to point out that, in general, Latin American and Caribbean states in the last decade of the XXth century have continued and deepened a tradition of constructive contribution to the development of international law. This has been particularly true in their support for new instruments for the protection of human rights. Latin American and Caribbean nations generally vote in support of the more progressive alternatives, and are generally in the forefront of efforts to ratify human rights treaties. In international forums where these matters are discussed, the nations of this part of the

⁴¹ Ayala Corao, Carlos, *La Jerarquía de los Tratados de Derechos Humanos*, in *El Futuro del Sistema Interamericano...*, cit. (Fn. 31). Also, Sagués, Pedro Néstor, *Mecanismos de Incorporación de los Tratados Internacionales sobre Derechos Humanos al Derecho Interno*, in *Presente y Futuro de los Derechos Humanos*, Ensayos en Honor a Fernando Volio Jiménez, Lorena González, editor, IIDH, San Jose, 1998.

⁴² This is sometimes called the “monist” doctrine, in the sense of a single body of law. In contrast, the “dualist” theory, generally applied in the United Kingdom and some countries that follow the Anglo-Saxon system of law, postulates that treaties are international obligations of the State when they are ratified, but they can only be invoked domestically after implementing legislation is passed by Parliament.

⁴³ Corte Suprema de Justicia de Costa Rica, Sala IV (Constitucional), Judgment No. 1786, 1993, regarding the right to Costa Rican nationality of the Gaymí indigenous people, a nomadic group that lives on both sides of the border with Panama, in which the Court directly enforced ILO Convention 169. See also its Judgment 3435, 1992 about the male’s preferential right to nationality through marriage, in which it applied the American Convention (cited in Ariel Dulitzky, *Introducción: Un Estudio Comparado*, in *La Aplicación de los Tratados sobre Derechos Humanos por los Tribunales Locales*, M. Abregú and Ch. Courtis, editors, CELS-Editores del Puerto, Buenos Aires, 1997).

⁴⁴ Corte Suprema de Justicia de Costa Rica, Sala IV (Constitucional), Judgment No. 2313, 1995.

⁴⁵ Supreme Court of Justice of Argentina, *Giroldi H.D. s/Recurso de Casación*, Judgment of April 7, 1995. This case referred to the length of preventive detention, and the Supreme Court of Argentina decided that the IACHR’s interpretation of the American Convention was directly binding on Argentine courts. More recently, however, without revoking *Giroldi* explicitly, the same court, in a case called *Acosta*, ruled against the release, via *amparo*, of persons whose conviction the IACHR had ruled to violate due process under the American Convention.

world tend to form solid blocks and to act in agreement with the most advanced democracies of the world. This was especially visible in the drafting of the Rome Statute for an International Criminal Court, completed in 1998. It was also true in the drafting process of the Convention on the Rights of the Child (CRC) and its quick ratification. The most recent example is the decisive role of key Latin American governments for an Additional Protocol to the Convention on Elimination of Discrimination Against Women (CEDAW).⁴⁶

The process of incorporation of international norms into domestic legislation has undoubtedly been assisted by the work of both the IACHR and the IACtHR. In individual cases as well as in country and thematic reports, the Commission has repeatedly called on governments to amend legislation that is inconsistent with obligations under the American Convention or other treaties. The Court has done the same in several instances, both in decisions on contentious cases and in advisory opinions. These opinions are important particularly in matters affecting the impartiality and independence of the judiciary, particularly as they affect due process rights of criminal suspects. “Faceless courts” and military courts with jurisdiction to try civilians have thus been deemed in violation of international law.⁴⁷ The IACHR has also recently made an exhortation to all governments in the system to adopt jurisdictional norms in their legislation to give effect to the principle of universal jurisdiction for genocide, war crimes and crimes against humanity.⁴⁸

In some ways, it is possible to see efforts to legislate human rights and to sign and ratify treaties merely as token gestures, especially considering the slow pace of change in actual conditions in each country regarding those violations that we have called “endemic.” A serious problem in the legal and political culture of this region is a tendency to write laws without any serious effort to put them in practice. For example, despite the many lofty statements about respect for human rights, democratic governments do not seem to think that the matter deserves an integral, determined, sustained effort in the form of a *policy* of protection and promotion of rights. An important exception to this is the National Human Rights Plan announced by President Fernando Henrique Cardoso in Brazil.⁴⁹ As a relatively unique instance of national human rights policy, it would be important to evaluate the degree of implementation and results obtained by this plan.

⁴⁶ IIDH, *Convention on the Elimination of all Forms of Discrimination against Women; Optional Protocol. Working Document*, IIDH, San Jose, 1998. In 1998 and 1999, an influential network of women lawyers, under the auspices of the Inter-American Institute on Human Rights, successfully worked together with Latin American diplomats to obtain approval for this important document that will eventually allow the Committee of CEDAW to hear individual complaints.

⁴⁷ IACtHR, *Loayza Tamayo, cit.* and *Castillo Petruzzi v. Peru*, Judgment of May 30, 1999. The Commission has also asked that military jurisdiction be amended if on its terms it promotes impunity for abuses committed by military personnel, see IACtHR, *Genie Lacayo v. Nicaragua*, Judgment of January 29, 1997.

⁴⁸ IACHR, Recommendation to the Member States on Universal Jurisdiction and an International Criminal Court, 101st. Special Session concluded on Dec. 9, 1998.

⁴⁹ Government of Brazil, National Human Rights Program, launched on May 13, 1996, after the trauma caused by the massacre in Eldorado dos Carajás.

Even without such comprehensive policy planning to obtain effectiveness in human rights protection, many Latin American countries have incorporated a new institution in their constitutional or legislative frameworks, variously known as Defender of the People, Procurator for Human Rights, National Commissioner or National Commission for Human Rights, and so on. Some of these institutions are national in nature, in the sense that the office has jurisdiction or competency over the whole territory. In federal systems, there are also many local and state or provincial institutions of the same sort. In all cases, the model is broader than the Nordic *Ombudsman* and resembles the Spanish *Defensor del Pueblo* or the Portuguese *Ouvidor*.⁵⁰ There are now at least 12 national *defensorías* in Latin America and Haiti, and scores of regional or municipal offices. In several countries that do not presently have such a national office, there is active debate about creating it. Several English-speaking Caribbean nations have Parliamentary ombudsmen, though the institution there is modeled after the British (and Nordic) precedent.⁵¹

Most of these national offices have been incorporated into the Constitution of each country. In others (e.g. Costa Rica), they were created by law, or even by Presidential decree later ratified by law. The manner of appointment and conditions of removal of the *Defensor* determines his or her independence and impartiality. For the most part they are elected by Congress after nomination by the Executive; occasionally the judiciary has some say as well. In all cases, however, they are supposed to act without instructions from any other branch of government (this marks an important distinction with the Office of the Prosecutor General, which in some countries is charged with similar functions). Though their powers of investigation and adjudication are broad, their decisions are not binding on other bodies. For this reason, they are generally defined as *magistraturas morales*, alluding to their power of persuasion to affect the conduct of other public officials. Nevertheless, in most cases they are explicitly allowed to act before the courts, by way of *amparo*, *habeas corpus* or petitions for declaration of unconstitutionality.⁵² In addition to these offices with a wide spectrum of powers, there are several specific offices, like the Ombudsman of the Penitentiary System and the Office of Protection of Victims of Crime, both created recently under the aegis of the Federal Ministry of Justice of Argentina. There have been some experiments as well with ombudsmen for the police forces, and proposals for the creation of an ombudsman for the rights of the child.

The rapid expansion of this institution (the very first one in Latin America was created and filled in Guatemala only about ten years ago) is indicative of the great

⁵⁰ Broadly speaking, the difference is this: the Nordic Ombudsman is an administrative law authority that clears away bureaucratic obstacles. The Spanish office, created in the transition to democracy of the 1970s, is empowered to receive complaints of violations of rights of a broad spectrum, and against all types of authorities.

⁵¹ *El Ombudsman y la Protección de los Derechos Humanos en América Latina*, Estudios Básicos de Derechos Humanos, Vol. VIII, Irene Aguilar, editor, IIDH, San Jose, 1997. The offices of Spain, Portugal and Latin America have joined together in a *Federación Iberoamericana del Ombudsman* (FIO), currently chaired by the National Commissioner of Human Rights of Honduras, Dr. Leo Valladares Lanza.

⁵² Brewer Carías, Allan, *Hacia el Fortalecimiento de las Instituciones de Protección de los Derechos Humanos en el Ambito Interno*, in *Presente y Futuro de los Derechos Humanos...*, cit.

expectations placed on a more dynamic institution to control abuses of power. On the other hand, this illustrates the low credibility of traditional institutions like the judiciary in the eyes of the public. In any event, if these offices succeed in opening up access to justice and to being heard by the administration, their existence is amply justified. They may also contribute effectively to more transparency in the conduct of the affairs of state. In fact, the *defensores* are invariably figures of high visibility in the press, a factor that undoubtedly helps them perform their tasks.

This high visibility, however, is also their Achilles' heel. In some cases, individuals who have occupied the office have used it to launch political careers beyond it. Some *defensores* have misused their visibility by engaging in flashy actions of questionable legal basis and political judgment. For their part, powerful politicians have reacted to the popularity of the *defensores* by refusing to honor their suggestions, by cutting down their budget through Congress, by attempting to terminate their terms of office, or simply by filling the post with political cronies when the occasion arrives. These attitudes, needless to say, constitute a serious risk for the independence, impartiality and effectiveness of this promising institution. At this time, most of these offices operate on a fragile financial basis, almost wholly dependent on funds from international cooperation agencies. Beyond the telling symbolism of creating an institution of control and refusing to fund it appropriately, it is clear that international assistance will not always be there, and that it could even be inappropriate in certain circumstances.

Even with the shortcomings mentioned above, there is no doubt that the domestic law of most Latin American and Caribbean nations is gradually becoming more protective of human rights. New institutions are contributing to this favorable development; the attitude of some political leaders and government officials (some of them victims of human rights violations in the past) is also to be credited. Judges and court officials are also becoming more sensitive to the needs of persons and collectivities whose rights have been ignored. But by far the largest contributing factor is the tireless and creative work of hundreds of organizations of civil society. In section one of this essay we have already mentioned the growth of NGOs as an important positive development in many areas. Here we focus on their successes in promoting new standards of human rights protection, both at the domestic and international level.

The women's movement in the region has quickly established itself as a main actor in the formulation of national agendas, particularly in the areas of more equitable participation in politics, prevention and punishment of domestic violence, effective protection against discrimination in employment, housing and family law, and reproductive rights. Though there is still a lot to be done in those areas, there has been progress, for example, in the establishment of quotas for women in elective offices, and access by women to higher education and positions of influence in the judiciary. There is also some success in police attention to certain crimes – like domestic violence – of which women are particularly victimized. As a matter of international law, the already mentioned Convention of Belem do Para breaks ground by blurring the traditional

distinction between the private and public spheres, in establishing State responsibility for acts of domestic violence.

Organizations that work on children's rights have also succeeded, not only in a swift ratification process for the Convention on the Rights of the Child, but also in obtaining implementing legislation. Here again there is some stretch of road to cover in abandoning the old doctrines that treated "minors" as wards of the State and incapable of choices, and giving effect to the doctrine of integral protection, that treats children as a certain class of citizens.⁵³ Even in these times of structural adjustment, some Latin American NGOs have succeeded in maintaining high visibility for issues of economic, social and cultural rights.⁵⁴

Problems like land tenure and use still do not get the attention they deserve, given their relationship to the livelihood and fate of millions of the poorest among Latin Americans. Non-governmental organizations are trying to remedy this neglect. Recognition by the State of ancestral land ownership and the return of the internally displaced to their land are important agenda items of civil society in Guatemala, Mexico and Colombia. In Colombia alone, indigenous communities are claiming title to some five million hectares (12.5 million acres) of land. Lack of recognition of title by the State, unfortunately, is only one of the problems. In many areas, colonizers and new farmers pushing the frontiers of the market-based economy have dispossessed indigenous peoples and local *campesinos*. They resort to fraudulent titles, to purchases and leases obtained under questionable circumstances, or simply to occupation. The struggle for land that ensues is punctuated often by threats and violence perpetrated by "private armies" at the service of large landowners or illegal occupants. Communities who were forced out and displaced by political violence face the same problems when they try to return.⁵⁵

Accumulation of land and the failure of land reform programs have resulted in large number of "landless peasants" and the organization of NGOs representing them. Though generally non-violent, these movements have resorted to controversial land demonstrations and land occupation that are often met with violence on the other side. The best known of these organizations is the Brazilian Movement of the Landless (MST is the acronym in Portuguese). The Catholic Church in Brazil has given the matter a great priority, and established a very effective Pastoral Land Commission (CPT).

NGOs representing indigenous peoples have gone to the Inter-American system in their plight for recognition of ancestral lands, and on this they have been assisted by other

⁵³ García Méndez, Emilio, *De Menor a Ciudadano*, a paper submitted to the Kellogg Institute on International Relations, University of Notre Dame Press, forthcoming.

⁵⁴ In addition to the indigenous peoples' organizations mentioned in Stavenhagen (see Footnote 17) and women's groups that challenge the *maquila* industry's discriminatory practices against pregnant women, three NGOs are worth citing for their work on ESC rights: the Colombian Commission of Jurists (CCJ), the Venezuelan Program for Education and Action on Human Rights (PROVEA), and the Center for Legal and Social Studies (CELS), of Buenos Aires.

⁵⁵ IACHR, Third Report on the Situation of Human Rights in Colombia, Ch. X, par. 22 and 23.

NGOs with expertise in international litigation.⁵⁶ The National Indigenous Organization of Colombia (ONIC), that represents most of the country's indigenous peoples, has tried this approach with the assistance of the Colombian Commission of Jurists (CCJ), one of the hemisphere's most prestigious human rights groups. Working jointly, these organizations have been able also to force investigations into the murder of indigenous leaders in the context of land struggles, like in the case of the Zenu community.

Another urgent task for both governments and civil society is in the area of prison conditions and prison reform. Prisons are the lowest priority of any Latin American and Caribbean government, and yet there is a constant growth in offenses punishable by prison and length of prison terms, in consequence of the concern for insecurity discussed later in this paper. Prison systems remain more unreachable by efforts at accountability than any other agency of government, and the result is not only overcrowding and inhumane treatment, but also frequent riots and violence between inmates. Local organizations provide work training for inmates, help distribute crafts made in prison, and are thus able to have an effective dialogue with prison authorities. A good example of this line of work is the Manos Utiles Association of Costa Rica. In Guatemala, the Institute on Comparative Penal Studies has conducted diagnostic assessments and policy recommendations on the penal system. Covenant House of Central America has been in the forefront highlighting the situation of children and adolescents in custody and, with the help of the Center for Justice and International Law (CEJIL) won a major case against Honduras on the mingling of adults and juveniles in prisons. The Ecumenical Commission on Human Rights of Ecuador has also done pioneering work on prison conditions in that country, and successfully litigated the *Congo* case before the IACHR, about a mentally disturbed prisoner who died in custody for lack of care.⁵⁷ Human Rights Watch, a well-known international human rights organization, has conducted well-publicized studies on prison conditions in Brazil, Venezuela, Mexico, Jamaica, Puerto Rico and Peru, among others, for the last fifteen years.⁵⁸

The organizations that began their work in the defense of civil and political rights during the years of repression led a courageous and often misunderstood battle for the restoration of democracy. In some cases, their adaptation to changed circumstances was not easy, especially as the transitions left unresolved important legacies of the recent past, like the fate and whereabouts of the disappeared and impunity for egregious crimes. Yet

⁵⁶ See Section IV of this paper for litigation examples concerning the communities of the Enxet in Paraguay and Awas Tigni in Nicaragua. In Argentina, the *Centro de Estudios Legales y Sociales* (CELS) filed a complaint with the IACHR in 1998, on behalf of the Lhaka Honaht ("Our Land") Association of Communities of Salta Province. The complaint claimed that the Provincial and Federal governments built an international bridge through territories the communities vindicate, cutting hunting and gathering areas. The communities were never consulted about the public works. CELS, *Informe Annual 1998*, Eudeba, Buenos Aires, 1999, p. 348. See also: *Centroamérica Territorio Indígena*, Proceedings of a Seminar on Land Rights and Legalization, URACCAN-IEPPA, Centro Skoki, Managua and San Jose, 1998.

⁵⁷ IACHR, *Caso Menores Detenidos* (v. Honduras), Report of 10 March 1999; and *Congo* (v. Ecuador), Report No. 63/99, of 13 April 1999.

⁵⁸ Human Rights Watch, *Global Report on Prisons*, New York, 1993. With Argentine jurists, HRW filed the case of *X and Y v. Argentina* before the IACHR, about vaginal inspections for prison visitors, mentioned in Section IV.

in all cases they engaged in a serious discussion of their role in new contexts.⁵⁹ Unfortunately, some pioneering organizations, like the Vicariate of Solidarity of the Archdiocese of Santiago, decided to close their operations after the return of democracy. Most others, however, did make a successful transition and now occupy important places in the policy formulation debate in their countries.

Still, the struggle against serious and massive human rights violations continues in some Latin American countries, and occasionally it is intensified. This is especially true, though not exclusively, in countries that are still experiencing a protracted armed conflict of a political nature. In those countries, human rights work is still a hazardous occupation. It is particularly sad that, as late as 1998, two prominent human rights leaders in the region were murdered: Colombian attorney Eduardo Umaña and Mons. Juan Gerardi, Auxiliary Bishop of Guatemala. It is even more intolerable that both crimes remain clouded in mystery and impunity.

In the realm of civil and political rights, human rights organizations are holding the line, albeit precariously, against the reinstatement of the death penalty in some of our countries. They are also preventing politicians from tinkering with codes of criminal procedure to eliminate due process guarantees for those accused of common crimes. In some cases they have been partially successful in forcing police forces to be more transparent and to allow their members to be properly investigated and prosecuted for the use of torture and other abuses of police power.

They have had an important success, as well, in the adoption of new standards in domestic and international law. An example of this is the emerging “right to truth,” that Latin American judiciaries and governments are now more ready to accept as an obligation of the State, even after the promulgation of impunity laws. When pseudo-amnesty laws were passed to prevent investigation of the crimes of the recent past, NGOs challenged them both domestically and before international bodies. Decisions by the IACHR and the IACtHR, prompted by NGOs, have been cited frequently for the proposition that, when it comes to crimes of an egregious nature (such as disappearances, massacres, torture), the State is obliged to investigate, prosecute and punish the perpetrators.⁶⁰ The UN Human Rights Committee (HRC) has repeatedly stated that these laws are inconsistent with the ICCPR if their effect is to create an “atmosphere of impunity.”⁶¹ The HRC has also frequently insisted that States have an obligation to

⁵⁹ Basombrío, Carlos, *Y ahora qué...*, IDL, Lima, 1998.

⁶⁰ IACHR, Informes 28 y 29/1992; IACtHR, *Velasquez*. For their influence on the development of international standards, see Orentlicher, Diane, *Addressing Gross Human Rights Abuses: Punishment and Victim Compensation*, in *Human Rights: An Agenda for the Next Century*, Louis Henkin and John L. Hargrove, editors, ASIL, Washington, 1994; *Impunity and Human Rights in International Law and Practice*, Naomi Roth-Arriaza, editor, 1995; and European Court on Human Rights, *Aksoy v. Turkey*, Judgment of December 18, 1996.

⁶¹ UNHRC, *Report of the Committee on Human Rights*, Vol. I, General Assembly, Official Documents, 51st Session, Supplement No. 40 (A/51/40), Peru, par. 347.

cleanse their armed and security forces of all known perpetrators of these crimes, even if there are legal impediments to their punishment.⁶²

Such an atmosphere is created when known perpetrators are allowed to go unpunished and when the State refuses to disclose what is known or can be known about the circumstances of the events, of the role played by different actors, and the fate and whereabouts of the victims. That this emerging right to truth has been recognized is a tribute to the persistence and creativity of NGOs and their lawyers. In 1995, Argentina was shaken by the revelations of a Navy officer who told a journalist of his role in throwing *desaparecidos* alive from planes into the sea.⁶³ The late Emilio Mignone, the country's most distinguished human rights leader, filed a brief with the Federal Court of Appeals for Buenos Aires. On the basis of this new evidence, he petitioned for an order to investigate the fate of his daughter, taken by the Navy in 1976 and still counted among the disappeared. This and similar court actions were eventually accepted by the Supreme Court of Argentina, establishing that the pseudo-amnesty laws of the 1980s, and the presidential pardons of the 1990s, were no obstacle for the pursuit of truth through judicial means.⁶⁴ A companion case made its way to the IACHR, and at a hearing in Washington the Argentine government offered a friendly settlement that has been accepted by the petitioners and approved by the Commission. In it, the Government "accepts and ensures the right to truth that consists in the exhaustion of all possible means to clarify what happened to disappeared persons (our translation of the original in Spanish)." The government further pledges the competency of federal appellate courts throughout the country to hear these claims, and the appointment of at least two special prosecutors to assist in the task.⁶⁵

The right to know the truth about human rights violations of the recent past is also being recognized in Chile, after the intense change of circumstances prompted by the arrest in London of General Pinochet and his protracted legal battle to avoid extradition to Spain on charges of torture. Chilean society has realized that the wounds of the past had remained open despite an official attitude of "enforced reconciliation." Even the armed forces seem ready at least to initiate discussions about the historical record, something they had arrogantly refused to do until Pinochet's arrest. The Truth and Reconciliation Commission produced an important report at the beginning of the

⁶² UNHRC, Report of the Committee on Human Rights, Vol. I, General Assembly, Official Documents, 50th. Session, Supplement No. 40 (A/50/40), Paraguay, par. 206, Argentina, par. 154, Haiti, par. 232 and 236, and Bolivia, par. 205.

⁶³ Verbitsky, Horacio, The Flight: Confessions of an Argentine Dirty Warrior, New Press, New York, 1997.

⁶⁴ Supreme Court of Argentina, *Urteaga*, Judgment of October 15, 1998.

⁶⁵ "Derechos Humanos II: Acuerdo por el Derecho a la Verdad," La Nación (Buenos Aires), November 17, 1999. Some federal courts have begun a process of investigation, following the *Urteaga* precedent. At the request of the Asamblea Permanente por los Derechos Humanos, a non-governmental organization, the Federal Court of Appeals for La Plata declared "... the right of the relatives of the victims of State abuse that took place during the most recent de facto government...to know the circumstances related to their disappearance and, eventually, the final fate of their remains." The court then ordered the accumulation of some 1800 files related to those events that took place in its territorial jurisdiction. The court subpoenaed information from several government offices and has held several hearings with witnesses and other evidence.

democratic transition, but little more had been done since.⁶⁶ Now, a *Mesa de Diálogo* between NGOs, government representatives and armed forces chiefs is under way. Although some NGOs have boycotted it claiming that it is a naked attempt to clean up the international image of the Chilean military, its sole existence is a recognition that the victims are owed something more than a report.⁶⁷

At the international level, civil society organizations have also made impressive gains in recognition. In the last three annual meetings of the OAS General Assembly there have been carefully organized parallel events by a large number of NGOs that coordinate their agendas and obtain observer status. Nevertheless, some government representatives only very grudgingly accept this role, and instead attempt to curb their limited rights of observation and presence. A proposal to regulate access to OAS deliberations by civil society organizations has been under discussion now for several years.⁶⁸

IV. Unfinished Agenda

Perhaps the greatest challenge facing Latin American democracies is the problem of social exclusion, i.e., their citizens' inability to realize their economic, social and cultural rights, which leads, in turn, to political exclusion. Although in some countries macroeconomic indicators point to improvements in certain areas, poverty and extreme poverty, in absolute and relative terms, have actually increased. The biggest debt that the States have is with the vast majority of their citizens. Growing numbers of persons do not have access to basic services such as health, education, food, housing, work, social security and others, although these are recognized as rights in the constitutions of the respective countries and in international norms. The States' failure to guarantee these rights cannot be challenged because no effective international mechanisms have been established to protect them (they are not "justiciable") and because of the widely accepted notion that the realization of these rights will be "*achieved progressively*."⁶⁹

⁶⁶ Report of the Chilean National Commission on Truth and Reconciliation (Rettig Commission), Secretariat of Communication and Culture, Santiago, 1991. English version in University of Notre Dame Press and Center for Civil and Human Rights, Notre Dame and London, 1993.

⁶⁷ Hugo Estenssoro, "Persisten Dudas sobre Intenciones de Straw," *El Mercurio*, Santiago, Tues., November 11, 1999. For the situation in Uruguay, see Michelini, Felipe, *El Largo Camino a la Verdad*, *Revista IIDH*, No. 24, San Jose, 1996. See also, Abregú, Martín, *La Tutela Judicial del Derecho a la Verdad en la Argentina*, and Ibáñez, Perfecto Andrés, *La Impunidad no es sólo una Cuestión de Hecho: Sobre la Persecución en España de los crímenes de la Dictadura Militar Argentina*, both in *Revista IIDH*, No. 24, *cit.*

⁶⁸ González, Felipe, *El Control Internacional de las Organizaciones No Gubernamentales*, in *Revista IIDH*, No. 25, San Jose, 1997.

⁶⁹ Art. 26 of the American Convention: "The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires." Similar language can be found in Art. 2.1 of the International Covenant on Economic, Social and Cultural Rights, and in Art. 1of the Protocol of San Salvador.

In the Americas, economic, social and cultural rights are recognized in the Charter of the Organization of American States and in the American Declaration and Convention.⁷⁰ The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, known as the *Protocol of San Salvador*, was adopted in 1988 but, with an average of only one ratification per year, has not yet entered into effect.⁷¹ This document is perhaps the best example of an instrument that fails to provide protection mechanisms: twenty or so rights are recognized in the protocol, but protection may only be invoked for one right and half of another.⁷²

The fact that such rights cannot be invoked before the courts leads to the conclusion that they are norms only in the *formal*, and not the *material*, sense, if we accept the Kelsenian notion that a provision can only be considered a norm when failure to comply with it entails a sanction, and when complaints mechanisms exist.⁷³

The situation is not much better in the universal system, since, unlike the Committee on Civil and Political Rights, the Committee on Economic, Social and Cultural Rights cannot accept individual petitions, and its reporting system is weak.⁷⁴

In our region, the Inter-American Commission has analyzed the situation regarding economic, social and cultural rights in its *country reports*, although not on a regular basis. It did so, for example, in its reports on El Salvador (1978) and Haiti (1979), and, more recently, in those on Brazil (1996), Mexico, (1998) and Colombia (1999). In comprehensive reports of this kind, the Commission analyzes the legal framework of each country, economic and social conditions (based on certain indicators such as the rate of illiteracy, access to health and educational services, and the distribution of wealth) and makes recommendations.

As stated earlier, no protection mechanisms were created in the instruments because it was believed that such rights would be *achieved progressively*. This theory is the key to the ill-conceived separation of human rights into different “generations,” a monumental error of the Cold War era for which we are still paying a high price. Based on this, other governments with great fanfare point to accomplishments in the area of civil and political rights because they can show no progress vis-à-vis economic and social rights, and viceversa. Many governments, recognizing that this occurs not only in our

⁷⁰ Among others, the Preamble and Arts. 33, 44 and 48 of the Charter of the OAS; Arts. XI, XII, XIII, XIV, XV, XVI and XXII of the American Declaration; and Art. 26 of the American Convention.

⁷¹ Art. 21.3 of the Protocol establishes that it will enter into effect when eleven States have ratified it.

⁷² Under the Protocol, the organs of the inter-American protection system can only consider individual petitions alleging violations of the right to education (Art. 13) and, of all the trade union rights recognized in Art. 8, only violations of the right to organize trade unions and to affiliate with others (Art. 19).

⁷³ Hans Kelsen, *Pure Theory of Law*, Translation from 2d Rev. and Enl. German Ed. by Max Knight, U. of California Press, Berkeley, 1967.

⁷⁴ The reports of several Latin American states are overdue. See *States parties to the Covenant and the status of submission of reports -as of February 1, 1998-* in Committee on Economic, Social and Cultural Rights, Report on the 16th and 17th Periods of Sessions, E/1998/22, Annex I.

hemisphere, “insist on “choosing” the rights “to prioritize” and promote, putting off the realization of all others until some time in the future.”⁷⁵ⁱ .

This problem will only be solved when the states make a serious effort to honor their commitments and civil society develops strong and creative mechanisms for exerting pressure on and exercising control over government. However, steps have been taken toward *justiciability*, bearing in mind the relationship that exists between civil and political, and economic, social and cultural rights, and these experiences are worth analyzing in our context. The European Court of Human Rights has heard several cases with strong economic and social implications, despite the fact that its jurisdiction is limited to violations of the rights enshrined in the European Convention, which, like the American Convention, focuses almost exclusively on civil and political rights.⁷⁶

In one of these cases, a judge of the European Court said that the war on poverty could not be won by means of a broad interpretation of an instrument dealing with civil and political rights. This position may sound reasonable. However, the issue is the effective exercise of rights inherent to the human person, regardless of whether or not at some time they were erroneously divided into civil and political, or economic, social and cultural rights. It can hardly be argued that, because of an historical and conceptual error, the right to adequate food should not be protected because it is an “*economic and social*” right.

One solution could be to develop the “*justiciable*” aspects of certain economic and social rights. At all events, sight should not be lost of what is involved. It seems inconsistent, even ridiculous, to speak of guaranteeing the (civil and political) right of freedom of expression when the vast majority of the population cannot read and write because they do not have access to basic primary education services, which is a social-economic right. To date, the division of rights into different categories, and the paradigm of the *progressive development of rights*, have served only one purpose: to provide those States that do not fulfil their obligations with a means of justifying their position.

Another key item on the future human rights agenda in Latin America is the implementation of women’s rights.⁷⁷ While equality and the prohibition of

⁷⁵ Cançado Trindade, *La Justiciabilidad*, pp. 93.

⁷⁶ For a study of these cases and a proposal, see Víctor Abramovich, *Los Derechos Económicos, Sociales y Culturales en la Denuncia ante la Comisión Interamericana de Derechos Humanos* in Presente y Futuro de los Derechos Humanos. Ensayos en honor a Fernando Volio Jimenez, IHR, San Jose, Costa Rica, 1998; in the same book, Antonio Cançado Trindade, *A Justiciabilidade dos Direitos Económicos, Sociais e Culturais no Plano Internacional*. See also Víctor Abramovich and Christian Courtis, *Hacia la exigibilidad de los derechos económicos, sociales y culturales. Estándares internacionales y criterios de aplicación ante los tribunales locales* in La aplicación de los tratados sobre derechos humanos por los tribunales locales, CELS-Editores del Puerto, Martín Abregú and Christian Courtis, eds., Buenos Aires, 1997.

⁷⁷ For an analysis of the problems of economic, social and cultural rights from a gender perspective, see Ligia Bolívar O., *La protección internacional de los derechos económicos, sociales y culturales desde una perspectiva de género* in Revue Quebécoise de Droit International, joint issue with the IHR, Montreal-San Jose, 1999.

discrimination are basic principles that are to be found in all Latin American constitutions and in the principal instruments of the Inter-American System, present practices, and even domestic legislation, fail to live up to these principles.⁷⁸ Beginning in 1994, the regional system was strengthened with the adoption of the Convention on the Prevention, Punishment and Eradication of Violence Against Women, known as the *Pact of Belem do Para*. Since then, women in the Americas have enjoyed the formal protection afforded by three mechanisms.

Unlike the United Nations system, which has no specific mechanism for individual petitions regarding violations of gender-related rights,⁷⁹ in our hemisphere, in addition to individual complaints or petitions brought before the Inter-American Commission and the Inter-American Court, States are required to submit reports to the Inter-American Commission on Women (CIM).⁸⁰ Such reports should include the measures adopted to prevent and eradicate violence against women, to assist women who are victims of violence, the difficulties encountered in implementing such measures, and the factors that contribute to violence against women. Lastly, a third mechanism was created under the *Convention of Belem do Para*: the CIM may request advisory opinions of the Inter-American Court.⁸¹

Despite the inter-American norms, mechanisms and treaty bodies, the situation faced by Latin American women gives cause for concern, according to the *Report of the Inter-American Commission on Human Rights on the Status of Women in the Americas*, published in 1999. This report is based almost exclusively on information submitted by a number of States in the region.⁸² Even so, it points to the existence of problems such as: restrictions on the exercise of a profession or on work by women insofar as the authorization of the husband is required; inequality between men and women in acquiring, administering, and disposing of assets of the conjugal union; differences between men and women with respect to parental authority; the classification of women

⁷⁸ Preamble and Art. 3k of the Charter of the OAS; Art. II of the American Declaration; Arts. 1 and 24 of the American Convention; and Arts. 2.1 and 26 of the International Covenant on Civil and Political Rights.

⁷⁹ "As the members of the Committee on the Elimination of Discrimination against Women stated during their 14th period of sessions, the existing international mechanisms for implementing the CEDAW are inadequate or insufficient. The only implementation mechanism provided for in the Convention is the reporting procedure.....There are no specific procedures within the United Nations System for seeking redress for individual or large-scale violations of women's human rights; nor for the review of cases by a specialized and independent organ that incorporates the analysis of the gender approach and the perspective of women's human rights" in Convention on the elimination of all forms of discrimination against women; Optional Protocol, Working Document, IIHR, San Jose, 1998, p. 10. At its last meeting at the United Nations, in March 1999, during the forty-third session of the Commission on the Status of Women, the Working Group approved the draft optional protocol, which would permit individual petitions. The text now awaits approval by the General Assembly.

⁸⁰ In addition to the mechanisms contemplated in the American Convention, complaints may be lodged concerning a state's violations of its obligations under Article 7 of the Convention of Belem do Para.

⁸¹ Created in 1928, the Inter-American Commission of Women was the first official intergovernmental institution in the world to be expressly assigned responsibility for ensuring recognition of women's civil and political rights.

⁸² Nineteen of the Member States of the OAS replied to the questionnaire distributed by the Special Rapporteur of the IACHR. Only two civil society organizations filled out and returned the questionnaire, one in El Salvador and another in Honduras. Report *cit.*, foreword and p.4.

with minors; differences with respect to access to the administration of justice; diminished penalties or the absence of penalties when the victim is a woman; significant differences in income between men and women; and problems regarding the maternal mortality rate.

There is also evidence of a relationship between economic and social exclusion, and political exclusion. According to the Inter-American Commission's report, even though at least fifteen countries have created institutions for the protection or promotion of women's human rights, the legislatures and executive branches of Latin America continue to be dominated by men.⁸³ Nor is the situation any better in the judicial branch, where "*in many countries in the region, participation by women in the higher levels of the judiciary is low, and virtually nonexistent at the Supreme Court level.*"⁸⁴ Sad to say, the States are quite consistent in their actions, for the situation at the national level is replicated within the inter-American system. During the twenty years that the Court has existed, only one of the judges has been a woman. The Inter-American Commission was created forty years ago, but has had only four women members among some 45 commissioners along that time, and will have only one woman out of seven in the term beginning in 2000.

The *Convention of Belem do Para* entered into effect in March 1995, only a few months after its adoption. With twenty-nine ratifications, it is the instrument of the inter-American system that has been ratified by the largest number of countries. Although promising, this development must be weighed against other facts. The Inter-American Court has heard only four cases related to gender and, as of late 1997, two years after it entered into force, the *Convention of Belem do Para* had been invoked in only one case.⁸⁵

The first of the Court's four decisions dates from 1983, when Costa Rica asked the Court to issue an advisory opinion on several constitutional amendments related to nationality and naturalization. Under one of these, foreign men and women who married Costa Rican citizens were treated differently. The Court found that the idea of bestowing the husband's nationality on the wife was based on the long-standing practice of granting the husband and father authority within the marriage and the family, and was therefore an outgrowth of conjugal inequality. The Court said that "*the different treatment envisaged for spouses, which applies to the acquisition of Costa Rican nationality in cases involving special circumstances brought about by marriage, cannot be justified and must be considered to be discriminatory.*"⁸⁶ In March 1996, the Inter-American Commission issued a report in which it dealt with rape as a form of torture. The Commission found that the victim in the case concerned had been denied the right to protection of her honor and dignity, and categorized sexual abuse in general as a "*deliberate outrage*" to the

⁸³ The percentage of women legislators is small: in Argentina, they account for only 31.9 % of the total; in Bolivia, the figure is 22%. Some countries, such as Brazil and Costa Rica, have enacted laws under which political parties must ensure that 20% and 40% of candidates, respectively, are women.

⁸⁴ Report *cit.*, p. 25.

⁸⁵ Report *cit.*, p. 10.

⁸⁶ Inter-American Court, Advisory Opinion OC 4/84, *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, January 19, 1984 (p. 64 ff.).

dignity of women.⁸⁷ Similarly, in the *Loayza Tamayo* case, the Commission found that Peru had violated several articles of the American Convention, inasmuch as the victim had been subjected to torture and inhuman and degrading treatment, including rape by agents of the State while she was being detained. The Court decided that agents of the Peruvian state had indeed subjected the victim to torture and cruel, inhumane and degrading treatment; held the State responsible for violating her human rights; and ordered that she be released and paid compensation. However, despite having received a sworn statement from the victim, the Court "*without conducting a thorough examination or explaining the type and nature of the evidence received, or the burden of proof, stated that it could not conclude that the alleged rape by agents of the State had been proven.*"⁸⁸ The last case also involves a Commission report dating from 1996. The wife and thirteen-year-old daughter of a man in prison, referred to as X and Y, were subjected to vaginal inspections. The Commission decided to lay down guidelines to be applied in such cases where rights of inmates and their relatives clashed with legitimate considerations of prison security. It also concluded that the Argentine State had violated the women's right to physical and moral integrity, to the protection of their honor and dignity, and the rights of the family and the child, as set forth in the American Convention. The Commission recommended that the State of Argentina adopt the necessary legislation to adjust its provisions to the obligations established by the Convention, and grant adequate compensation to the victims.

In addition to the system of individual cases, the Commission has referred to violations of women's rights in several of its country reports.⁸⁹ It has frequently recommended that the Member States adopt concrete measures to combat gender discrimination. The IACHR has urged governments to ratify international protection instruments such as the Convention of Belem do Para. It has also suggested they incorporate the gender perspective into the formulation and implementation of public policies, intensify efforts to increase the number of women who hold public office and give women a bigger role in government decision making.⁹⁰ The efforts to improve the status of women in Latin America are barely beginning, however.

Entire populations that were once mistakenly categorized as minorities are also subject to economic, social and political exclusion. It is estimated that 400 identifiable indigenous groups exist in our hemisphere, making up a total population of 40 million people, ranging from small, numerically insignificant and nearly extinct communities in the jungles of the Amazon, to rural societies in the Andes whose members number several millions. Mexico has the largest indigenous population in Latin America -- ten to twelve million --, but these peoples account for only 10-15% of the country's total population. In contrast, the indigenous peoples of Guatemala and Bolivia make up the

⁸⁷ Report *cit.*, p. 14 (of the Spanish version). See also Inter-American Commission, Report 5/96, Case 10.970, *Raquel Martín de Mejía vs. Peru*, Inter-American Commission on Human Rights, Annual Report, 1995.

⁸⁸ Report *cit.*, p. 14 (of the Spanish version). See also Inter-American Court, *Loayza Tamayo* case, Judgment of September 17, 1997.

⁸⁹ For example, Ecuador (1996), Brazil (1997), Mexico (1998) and Colombia (1999).

⁹⁰ Annual Report of the Inter-American Commission on Human Rights, 1996, p. 801 ff.

majority of the population, while in Peru and Ecuador they account for nearly half the population.⁹¹

Together with the “*wave of democratization*” that swept through Latin America in the 1970s and 1980s and the struggles of indigenous organizations, many States reformed their national constitutions to include provisions on respect for, and the promotion or protection of, the human rights of indigenous communities.⁹² These efforts marked an attempt to clear away the legacy left by the *indigenism* that was formally instituted following the First Inter-American Indigenous Congress, held in Patzcuaro (Mexico) in 1940. *Indigenism* was the first hemisphere-wide policy on the subject and it had two primary objectives. The first was to speed up and consolidate the national integration of Latin American countries. The second, to promote economic and social development in order to overcome the “*centuries-long backwardness*” of these communities and assimilate them into the Nation-State model.⁹³ This policy was a reflection of the societies that existed at the time. Nationalistic and dominated by the white and *mestizo* urban middle class, they rejected cultural diversity or did not recognize the indigenous components of their culture. Some critics of *indigenismo* make a persuasive case that it resulted in a policy of *ethnocide*.⁹⁴ *Indigenismo*, which in practice assigned indigenous people the same legal status as minors, did not solve but rather exacerbated problems related to the recognition of ancestral lands, extreme poverty, marginalization, malnutrition, attacks on the identity and social unity of the communities, and forced displacement. These problems are compounded by the low prices paid for the crafts and agricultural products of the indigenous population and the lack of space in the market to sell their products. The nonexistence of basic services, the lack of access to justice and the failure to recognize their political autonomy -- including the administration of *indigenous* or *traditional* justice, also contribute to the state of injustice in which indigenous peoples live.⁹⁵ They are as serious a handicap to the communities today as they were fifty years ago, and may have even grown worse.

For its part, the Inter-American Commission has issued several decisions and demonstrated a greater understanding of the matter.⁹⁶ In March 1998, the Inter-American

⁹¹ Rodolfo Stavenhagen, *Las organizaciones indígenas...*, *cit.*

⁹² The scope of such reforms varies, but the countries include: Panama (1971); Brazil (1988); Colombia (1991); El Salvador, Guatemala, Mexico and Paraguay (1992); Peru (1993); and Argentina, Bolivia and Ecuador (1994). “*These reforms include distinctive elements of ethnic diversity, with the basic idea of strengthening the positive recognition of specific rights related to identity, land tenure, indigenous languages, education, access to and administration of justice, and the value of indigenous cultures, confirming the multiethnic and multicultural nature of Latin American States.*” Derechos de los pueblos indígenas, legislación en América Latina, National Human Rights Commission, Mexico City, 1999, p. 13.

⁹³ Rodolfo Stavenhagen, *El Sistema Internacional de los Derechos Indígenas* in Memoria II Seminario Internacional sobre Administración de Justicia y Pueblos Indígenas, Inter-American Institute of Human Rights, San Jose, 1999, p. 349.

⁹⁴ Rodolfo Stavenhagen, *Las Organizaciones...*, *cit.*, p. 408.

⁹⁵ Roger Plant, *A Rural Perspective*, in The Un-Rule of Law and the Underprivileged in Latin America, Juan E. Méndez, Guillermo O’Donnell and Paulo Sergio Pinheiro, editors, University of Notre Dame Press, 1998.

⁹⁶ In an earlier decision – *Aché Tribe Case* – the IACHR evaded a critique of government policy and – in language reminiscent of *indigenismo* – stated that the policy of the Paraguayan State was not one of genocide but was “oriented to the promotion of assimilation.” An analysis of this decision and a summary

Commission was able to get the Government of Paraguay and the Enxet-Lamenxay communities to reach a friendly settlement, under which the Government of Paraguay recognized the community's title to ancestral lands. Under the agreement, the Government pledged to purchase some 22,000 hectares of land for the communities concerned and, in order to speed up relocation, to contribute supplies, tools and vehicles in which to transport the families and their belongings to the new lands. The Inter-American Court is presently hearing its first case related specifically to the ownership of ancestral lands, in which the parties are the Awás Tigni community and the State of Nicaragua.⁹⁷

There are many issues that the States and the inter-American system will have to resolve in the first years of the new millennium. They include: the definition of the legal status of indigenous communities, the ownership of ancestral lands and respect for their cultural diversity -- including their social and legal organization.⁹⁸ One issue of special importance for the effective protection of their rights is the need to rethink the present concept of human rights -- inherited from the French Revolution -- which recognizes individual but not collective rights. This is a conceptual problem, but one which has very concrete effects and calls for a major intellectual effort and greater commitment. It is, indeed, essential for the effective development of indigenous communities.⁹⁹

Exclusion has a direct bearing on another conflict for which comprehensive solutions are urgently needed in Latin America. In addition to political exclusion, economic and social exclusion directly affects citizens' security. The link between social conditions and criminalization has, of course, long been a focus of the literature of criminal law and policy.¹⁰⁰ In Latin American cities and streets there is a growing feeling of insecurity which, in addition to making daily life unpleasant, causes reactions that threaten the effective exercise of human rights. One, of course, is the all-too-predictable call to bring back capital punishment,¹⁰¹ a practice that in the end only makes us feel

of decisions of the inter-American system in Dulitzky, Ariel, "*Los pueblos indígenas: jurisprudencia del sistema interamericano de protección de los derechos humanos*", in *Revista IIDH* N° 26, IIDH, San José, 1997.

⁹⁷ Inter-American Court, XLIV Regular Session, Hearing over preliminary objections, May 31, 1999. The Court in *Aloeboetoe vs. Suriname*, made reference to, and applied indigenous law to allocate compensation, a fact that, surprisingly, has not been commented on by the academic community.

⁹⁸ One of the issues pending is undoubtedly the adoption of an inter-American norm recognizing the rights of indigenous communities. The process that has been ongoing for several years vis-a-vis the drafting of the American Declaration on the Rights of Indigenous Peoples should be brought to a successful conclusion.

⁹⁹ Carlos Federico Mares, *Los indios y sus derechos invisibles* in *Derecho Indígena*, National Indigenous Institute and Mexican Association for the United Nations, Magdalena Gómez, coord., Mexico City, 1997.

¹⁰⁰ Zaffaroni, E. Raúl, *Sistemas Penales y Derechos Humanos en América Latina* (Informe Final), IIDH-De Palma, San José and Buenos Aires, 1986; _____, *Criminología. Aproximaciones desde un Margen*, Temis, Bogotá, 1993; Pavarini, Massimo, *Control y dominación*, Siglo XXI, Mexico, 1980; Baratta, Alessandro, *Criminología Crítica y Crítica del Derecho Penal*, Siglo XXI, Mexico, 1993.

¹⁰¹ In recent years, the Presidents of Argentina and Peru expressed their support for the death penalty and hinted at the possibility of denouncing the American Convention, whose Article 4 prohibits reinstatement of capital punishment after it has been abolished or extending it to further offenses. In the October 24, 1999 elections in Argentina, the successful candidate for Governor of the Province of Buenos Aires (by far the most powerful district) also proposed to denounce the American Convention to bring back the death

ashamed of what we can do to our fellow human beings in the name of law and order, even though we know it accomplishes nothing. The feeling of insecurity also leads to the acceptance by society of other practices that violate human rights. We tend to tolerate an increase in the number of suspicious “confrontations” involving poorly trained police forces. Excessive use of force becomes a euphemism for extra-legal or summary executions and at best we look the other way, at worst we cheer on the “trigger happy” policemen. Insecurity also breeds acceptance of the widespread practice of incarcerating people before their guilt has been established. This practice is so widespread that a number of countries in Latin America can make the dubious claim that up to seventy or eighty percent of the people being held in their prisons are those who are technically innocent, because they have not been proven guilty.¹⁰²

In many cases, the executive and legislative branches, instead of adopting a rational and serious approach to the problem, use these feelings of fear and insecurity as a pretext for “declaring war on crime.” With nothing but political gain in mind, they promise *tough measures*. These include longer jail terms and denying parole or early release from prison to the actual or suspected perpetrators of certain crimes. They can include also use of paralegal investigative methods that violate constitutional guarantees, and even greater coercive powers to the security forces. In other words, politicians are willing to advocate reaching for whatever it takes to “win the war”, even if it means trampling over freedoms earned after long societal struggles.

Insistence on this type of measures purporting to solve the complex citizens' security issue has installed a false dichotomy in civil society. We are told to choose between respecting human rights and reducing crime. Our societies are told, falsely but convincingly, that a crime-fighting policy respectful of human rights is by definition ineffective to control crime.

Nevertheless, several regional experiences have shown that this is indeed a false dichotomy. Security programs like Viva Rio in Brazil, or an experiment conducted in the Hatillos neighborhood of San Jose, Costa Rica, have directed their efforts at promoting partnerships between community actors and diverse governmental agencies, principally the police. They have defined human rights' protection as a primary goal, and have proven to be efficient in reducing crime. On the other hand, continued implementation of security policies based on a blunt disregard for fundamental rights had a devastating effect on civil society. They have not only failed to solve the insecurity problem but they have also undermined the public's confidence in the police and the judiciary.

penalty, and stated that he would fight crime by shooting to kill criminals (“*meter bala a los delincuentes*”).

¹⁰² The information provided by high ranking officials of Central-American penitentiary systems shows that the average of innocent inmates (in the sense of not yet proven guilty) is the following: Panama 63%, Honduras 93%, El Salvador 78%, Guatemala 80%. *Sistemas Penitenciarios de Centroamérica y Panamá; Actualización de Datos Básicos*, Program for the Integrated Prevention of Torture, Inter-American Institute of Human Rights, San José, Costa Rica, May of 1999. Similar figures are reported by a number of countries in the region.

Even though it solves nothing, acting tough continues to be the preferred response of the governments. A basic principle of law enforcement policy is that the practice of increasing penalties *in abstracto* – in paper only -- is ineffective in reducing crime rates. Experts in this discipline have shown with some degree of certainty that the only true deterrent is an increase in the real possibility of the perpetrator of a crime actually going to jail. Furthermore, granting greater powers to police forces that have not yet been fully purged, and in which some members, hiding behind the institution, devote their time and best efforts to committing rather than solving crimes, seems almost designed to defeat its stated purposes. Unfortunately, any critique of this non-sensical approach is dismissed with the simplistic argument that equates the protection of human rights with the “protection of criminals”.

Society is the loser in this war, as it gradually gives up its freedoms in the interest of winning it and thus legitimizes further violence (now state-sponsored) and greater exclusion. The machinery of the criminal justice system fosters further social marginalization and violence. Referring to the operation of criminal justice in Latin America, Raúl Zaffaroni notes that among its functions “*one of the most notorious is the creation and deepening of social antagonisms and contradictions and the subsequent weakening and destruction of community, horizontal or affective links.*”¹⁰³ Society knows that it is an indisputable fact that jail does not re-socialize anyone,¹⁰⁴ and that it denigrates and destroys inmates and their families.¹⁰⁵ However, given the fear citizens feel and the lack of creative options on the part of political leaders, society prefers to accept the least rational solution: criminal sanctions for social and economic problems.

In consequence, courts are so overburdened with cases that they cannot provide a proper response, making a vicious cycle even worse. As exclusion increases, so does the caseload of the courts, the number of cases that go unresolved, the ineffectiveness of the administration of justice, as well as errors and delays. This increases the feeling of insecurity, and the perception that nothing works. Changing this vicious cycle into a virtuous one is a major task facing the democracies in Latin America. A central challenge for democratic governments in this area is to redefine security policies and incorporate human rights in the agenda. Of course, an even mightier challenge is to convince electorates that human rights are not an obstacle to fighting crime but a condition of effectiveness of any serious security policy.

According to studies on the issue, citizen insecurity is generated by crimes against property and, to a lesser extent, those against persons. This is not because victims are more preoccupied with their property than with their physical integrity, but because in fact the crime rate grows faster in offenses like theft. This should by itself indicate a relationship between social exclusion and rising crime. On the other hand, white-collar

¹⁰³ Zaffaroni, Raul, En Busca de las Penas Perdidas, Ediar, Buenos Aires, 1989, p. 149.

¹⁰⁴ We realize that this is not the place to enter into a discussion of this matter, but we feel obliged to mention the need to maintain the idea of resocialization as part of the State's obligation to provide inmates with education, work and medical, psychological and social services.

¹⁰⁵ Zaffaroni, En Busca..., cit., p. 139.

crime, which is committed by those in power, while not creating a feeling of citizen insecurity, does the most social harm. The accountability of public officials is a key issue in the Americas. Responsibility has been established for grave violations of human rights in the past, but the accountability of current public officials has yet to take hold. Corruption in high places breeds distrust and disaffection with the democratic process. Its contribution to social and economic exclusion, to political marginalization and to social violence, is worth some deeper analysis. Unfortunately, our democracies have a long way to go in the area of public ethics and accountability of public officials. A professional and independent judicial branch has a key role to play in this process.

At the risk of sounding pessimistic, it must be said that the reaction of the judicial branch to these problems leaves much to be desired and that there are serious problems regarding its independence. As a result, in recent years the credibility of journalists and other members of the media has been on the rise in Latin America. Journalism has assumed a key role as watchdog of the actions of government and has investigated many public officials, something which oversight agencies, the judicial branch included, have not done. Hence, certain democratic governments in the Americas view journalists as political enemies and fail to honor their international commitments regarding respect for, and the promotion of, freedom of expression. This freedom is being restricted as a result of judicial decisions or laws or decrees issued by the legislative and executive branches. However, the problem of attacks on freedom of expression goes beyond the existence of laws and regulations in conflict with international standards, and even beyond arbitrary judicial or administrative decisions. The number of journalists injured or killed is considerable and the list of unsolved cases is growing.¹⁰⁶

A recent development illustrates the attitude of some democratic governments regarding freedom of expression. The most recent General Assembly of the OAS was about to consider a draft Inter-American Declaration on Freedom of Expression, proposed originally by the United States --otherwise a true leader in the struggle to protect freedom of expression in Latin America. The draft, however, would significantly water down the protections of Article 13 of the American Convention. During the discussion process, conducted solely among the missions to the OAS and without consultation with journalists or civil society, certain Latin American governments introduced dangerous modifications to the document. The draft declaration would have replaced the guarantees and protections afforded in Article 13 of the American Convention with ambiguous language that would have been used to justify certain forms of censorship and prior restrictions. Thanks to the quick action of entities and persons concerned with freedom of expression, it was aborted in time.¹⁰⁷

The unfinished agenda of human rights in the Americas must include a serious look at the normative framework under which free expression is exercised. In addition to more serious action to prevent and punish physical attacks against journalists, it is urgent to abolish all *desacato* statutes and all press laws of a regulatory kind. We also need to

¹⁰⁶ In the last ten years in Latin America, 202 journalists have been murdered, 87 kidnapped and 1731 withstood physical aggression, Inter American Press Association, *Libertad de Prensa*, pp. 96

¹⁰⁷ See *The New York Times*.

review the statutes on libel, slander and defamation, both criminal and civil, to adjust them to the needs of a broad, vibrant debate about all public issues in a democratic society.

V. Conclusion:

The preceding analysis of the state of democracy and human rights in the Americas is necessarily sketchy and overly broad. It is a mistake to assume that democracy and human rights are in full effect only because elections are generally held. On the other hand, it would be an even more serious mistake to overlook the immense benefits and opportunities that the new democratic period offers. The political leadership and civil societies of the region have a great opportunity to build a lasting society based on liberty and justice, yet they sometimes fail to realize that it will not come about by itself. The lack of concerted plans to implement human rights norms on a daily basis is in stark contrast with the willingness to enact lofty principles into constitutional standards.

The problem with the lack of progress is that things are never stagnant in Latin America and the Caribbean. If our societies do not move forward to a more satisfactory democracy, the risk of backsliding into authoritarianism is very real. It may not be immediately in the form of military *coups d'état*; fortunately, the international milieu in the year 2000 is very hostile to that kind of adventure. But messianic leadership and constitutional reform by sheer will of the majority can well lead Latin America back into concentration of power, abuse of minority rights and impunity again.

In this paper we have identified several ways in which independent organizations of civil society are implementing change in different areas. In their efforts lie the hopes that the gap between rich and poor, and the distance between leaders and populace, may be bridged. Latin America urgently needs an independent and impartial judiciary that is also effective in dealing with conflict. There is no other way to build such a judicial branch than to put the present courts to the test, by suing legal mechanisms creatively in the search for solutions to political, social and economic problems. But the agenda should not be solely a legal one. The moment is ripe to use the media and its newly found freedom and credibility to shape the national agenda, not against but with the political parties – and certainly not yielding its control to politicians. Human rights organizations in the whole continent have learned that their task is a strategic one. In that sense, they no longer rely exclusively in the immediate duties to defend persons from abuse, but are placing great emphasis on human rights education at all levels, as a way to generate the conditions for a lasting and true democracy.

November, 1999.

