

*Paolo Saggio in Partnerschaft
Johannes Pöschner + Anna*

Studienreihe des Ludwig Boltzmann Instituts für Menschenrechte
herausgegeben von Manfred Nowak, Fiona Steinert und Hannes Trefter

Band 16



GLOBAL STANDARDS - LOCAL ACTION

15 Years Vienna World Conference on Human Rights
Conference Proceedings of the International Expert
Conference held in Vienna on 28 and 29 August 2008

edited by

Wolfgang Benedek, Clare Gregory, Julia Kozma,
Manfred Nowak, Christian Strohal, Engelbert Theuermann

Federal Ministry for
European and International Affairs



intersentia



Wien · Graz 2009

Bibliographic information published by the Deutsche Nationalbibliothek
The Deutsche Nationalbibliothek lists this publication in the Deutsche
Nationalbibliografie; detailed bibliographic data are available in the Internet at
<http://dnb.d-nb.de>.

All rights reserved.

Publication in Belgium:
ISBN 978-90-5095-868-4
Intersentia N.V.
Groenstraat 31
B-2640 Mortsel (Antwerpen)
Phone: ++32 3 680 15 50, Fax: ++32 3 658 71 21

Publication in Austria:
ISBN 978-3-7083-0587-5
Neuer Wissenschaftlicher Verlag GmbH Nfg KG
Argentinierstraße 42/6, 1040 Wien
Phone: +43 1 535 61 03-24, Fax: +43 1 535 61 03-25
e-mail: office@nwv.at

Geldortgürtel 20, 8010 Graz
e-mail: office@nwv.at

Homepage: www.nwv.at

Neuer Wissenschaftlicher Verlag, Wien · Graz 2009

Staat Nyomdai-parti Kft., Győr

Paulo Sérgio PINHEIRO

Revisiting the Unicorn: The Inter-American Commission on Human Rights at the Eve of its 50th Anniversary

'If human rights regimes confirmed the dictum of the Modernist Movement... – "Form follows Function" – then, anatomically speaking, the Inter-American one should resemble the European about as much as the unicorn resembles the ox.'

By associating the European regime with an ox, I intend not to insult but rather to celebrate its solid bourgeois virtues: the stolid, efficient application of energy and consistent production of effective decisions, all within the context of an orderly, stable and prosperous community...

Latin America, by comparison has been a feral jungle for most of the Inter-American regime's remarkable life. And although today, most of the beasts have withdrawn to their lairs... passersby still see eyes gleaming angrily the shadows and hear the tense scrape of claws across stony floors.'

Tom Farer¹

We are celebrating the 60 years anniversary of the Universal Declaration on Human Rights and here the 15th anniversary of the Declaration and Programme of Action of the World Conference on Human Rights. If we consider the process of setting standards, establishing legally binding conventions, creating international and regional bodies opened to the participation of civil society, the obvious answer is that there has been progress to be celebrated.

Even if outstanding, these formidable processes have always been affected by the contradictory dimension of the modern state, its monopoly on legitimate physical violence. The state as we know is at the same time the major perpetrator of violations and the defensor pacts, the protector of the vulnerable. Besides this, the state is also one form of contradictory social relations: its actions and its morphology reflect this contradiction,² very much present in the area of human rights protection.

Democracy is a great facilitator to promote human rights, but both in consolidated democracies as well as in the new, it is not necessarily a guarantee against human rights violations. We had the illusion that these contradictions in a certain way had been resolved at the World Conference

1 Farer, T. 'The Rise of the Inter-American Human Rights Regime: No longer a Unicorn, Not Yet an Ox' (1997) 19(3) *Human Rights Quarterly*, p 510.

2 Rey, M. T. 'The State as a contradiction' (Spring 2005) *Capital and Class*, in http://findarticles.com/p/articles/mi_qa3780/is_200504/a1_n13498475.

on Human Rights held in Vienna in 1993 by the Declaration and Programme of Action, when democracy was enshrined as being the best regime to implement human rights. Democracy, we have learned à chaud in Latin America is not a panacea that dissolves authoritarianism and prevents human rights violations from occurring. Political transitions from dictatorships had more continuity in terms of human rights violations than real change.

Do we have anything to commemorate in Latin America bajo el Rio Grande? Here in the festivities we must include the American Declaration on the Rights and Duties of Man, approved three months before the other by unanimous vote of the then recently formed Organization of American States (OAS) and it was 30 years ago that the American Convention on Human Rights came into effect. In 2009 we will commemorate the 50th anniversary of the establishment of the Inter-American Commission on Human Rights (Commission) in Washington, DC, (perhaps motivated by the fear provoked in the region by the Cuban Revolution), the 40th anniversary of the adoption of the Convention and the 30th anniversary of the installation of the Inter-American Court for Human Rights (Court)⁵ in San José de Costa Rica.

Celebrations of declarations and treaties are often exercises in frustration, inevitable when we compare the principles with the appalling contemporary reality. Of course, if we consider the process of setting standards, establishing legally binding conventions, the mobilization of civil society, the imposition of some degree of accountability for state agents, the growing (even if incipient) protection of social, economic and cultural rights, the obvious answer is that there has been progress.

I will focus these brief remarks on the Commission because of my current experience in that body. Its members are seven pro bono independent expert members nominated by their respective countries and elected by the General Assembly of the OAS for a mandate of 4 years, with the possibility of reelection. In the first twenty years the 'Commissioners' (a title with some Soviet flavor) behaved as delegates of their respective governments, protecting them from accusations, practicing denial of the accusations directed at their respective governments. Happily, nowadays the Commissioners do not represent any country and cannot participate in any deliberation about their own countries.

The Commission⁴ considers petitions from individuals who claim their rights have been violated by the state and who have been unable to find justice in their own country. The Commission brings together the petitioners and tries to explore the possibility of a 'friendly settlement'. If this outcome is not possible, the Commission may recommend that the state carry out specific measures to remedy the violation. If the state does not imple-

ment the recommendations, the Commission may publish a report or send the case to the Court, as long as the state has accepted the Court's compulsory jurisdiction. Under certain circumstances, answering to an urgent appeal from people believing to be in grave risk, the Commission can call on a state to adopt precautionary measures to prevent irreparable harm.

The Commission can also take the initiative to assess and report on the human rights situation in specific countries in the region. It conducts periodic 'on-site' visits to gather information for its reports and can issue specific recommendations to member states. The first on-site visit was made to the Dominican Republic in 1961, after the assassination of Rafael Trujillo followed by a military intervention by the OAS; and the visit to Argentina in 1979 to investigate human rights violations under the military dictatorship of General Jorge Rafael Videla had an enormous impact.

The Commission is a quasi-judicial organ performing the role of a public prosecutor of the Inter-American system. Noncompliance with the recommendations of the Commission results in the case being sent to the Court, which is an autonomous tribunal (the Commission is a body of the OAS). The two bodies have developed independently of one another. This is not very exceptional because until the Vienna Conference the same happened among the treaty bodies and the special procedures of the Commission on Human Rights, CHR,⁵ it was only in the last decade that a dialogue among those bodies began.

The Commission has sent 115 contentious cases to the Court. Amongst those, eleven are waiting a hearing, sentence is pending for seven, 85 are waiting for implementation of sentences and twelve are closed. The binding sentences of the Court aim to restore the guarantees of the rights disrespected and to impose reparations and indemnities on the states that have recognized the jurisdiction of the Court, to which the governments are expected to comply.

Only after the consolidation of authoritarian military regimes in the Southern Cone in the 1980s did the IACHR begin to monitor human rights, under the pressure of appalling reports on human rights violations presented to the Commission.⁶ This development was very similar to what happened at the CHR: only after the denunciations of torture by the Pinochet military dictatorship and concerning apartheid in South Africa did the CHR begin to monitor human rights, at the end of the 1970s. The IACHR also has the function of investigating violations of human rights guaranteed in the Convention, of holding hearings for fact-finding in disputed cases either of its own initiative or at the request of a party, and may engage in on-site observations.⁷ From July 1, 2006 to February 28, 2008,

3 See the excellent paper by Duitzky, A. 'The 50 years of the Inter-American Human Rights System: a proposed reflection about necessary strategic changes', The Bernard and Audre Rapoport Center for Human Rights and Justice, the University of Texas and Austin School of Law, (2008).

4 This description of how the Commission works is based on a very concise presentation from OAS, IACHR, Defending Rights, Inter-American Commission on Human Rights [sine data].

5 Pinto, M., 'Fragmentation of Unification Among International Institutions: Human Rights Tribunals' (1998) 31 *The New York University Journal of International Law and Politics*, p 84-1.

6 This evolution is very well documented in Green, J, *We Cannot Remain Silent: Opposition to the Brazilian Military Dictatorship in the United States, 1964-85* (Duke University Press, Durham, 2009), and *Apesar de vocês: a oposição a ditadura militar nos Estados Unidos, 1964-85*, (Companhia das Letras, São Paulo, 2009).

7 Pinto, op. cit., pp 838-839.

1990 petitions were received by the IACHR. The IACHR can also grant cautionary measures for urgent protection cases: in 2007 the IACHR received 250 requests and granted 40 (16%).

The IACHR has also been inspired by the practice of the former CHR and has established thematic and country rapporteurships that follow their respective country's cases under discussion by the Commission or are devoted to specific themes and make visits and prepare reports. Of course the special rapporteurs in both bodies have operated in a very contradictory framework and on a thin edge because at the same time they are obliged to make public what they see and to try to convince the governments to comply and to establish some kind of cooperation with the CHR (and now with the Human Rights Council and the Commission). In a certain sense this contradiction is analogous to the other contradiction between the 'repressive' face of the state (that perpetrates human rights violations) and the 'benevolent' face of the state that implements human rights policies: the rapporteurs are compelled to report *prima facie* and to try to establish a constructive dialogue with the 'benevolent', positive face. The work of the special rapporteurs is delicate and often thankless, to say the least, but it is essential and the system itself is a great achievement which we must protect. The fight is ongoing and success is not assured.

There are great similarities between the Inter-American system and the European human rights system, but the issues considered by the two systems in their evolution differed. In the Inter-American system, most cases concerned disappearances, massacres and summary executions in the 1970s and 1980s – characteristic of the absence of the rule of law that prevailed until the middle of the 1980s in almost all of the region. By contrast, in Europe the issues typically brought before the Court related to an improvement of the existing rule of law. Nowadays among the 35 members of the OAS, 25 have ratified the American Convention on Human Rights, the basic document of the system from 1969, and 22 have recognized the jurisdiction of the Court.

Since the creation of the Commission, there have been successful modifications in the Inter-American human rights systems that have enlarged the role of the Commission and broadened the guarantees for the populations in the region. Even if a democratic regime prevails in 34 of the 35 members of the OAS⁸ and most political guarantees have been restored on the continent, there is still a persistent deficit in terms of civil, economic and social rights for the majority of the population which provokes an increasing flow of cases presented to the Commission.

In fact, the last decade has witnessed that an 'increased judicialisation of the Inter-American system has curtailed the Commission's capacity to play a more important role in the designs and adoption of public policies. The high concentration of resources in the processing of cases has not allowed the Commission to effectively utilize opportunities that democratic Governments offer...'⁹

⁸ Cuba continues to be member of the OAS but has been excluded from participation since 1962.

⁹ Dutilzky, op. cit., p 8.

The present challenge of the role of the Commission vis-à-vis the 'new' democracies across in the continent is how to develop a constant 'political' dialogue of a new type with the governments despite the continuation of human rights violations patent in the cases admitted by the Commission.

It is time that the Inter-American human rights regime develops more actively its communication with other universal treaty bodies to contribute to the creation of a global safety net of rights applicable to all persons, everywhere and beyond any cultural exceptionalism.¹⁰ There are issues that must be urgently confronted all over the world such as judicial enforcement through courts, detention, migration, climate change and transnational organized crime. The human rights systems in the UN or the regional bodies in the Northern and Southern Hemisphere will never be fully effective for those excluded if states do not overcome the deficit in domestic legislation, the ill-functioning of the judiciary, the repressive apparatuses and the precarious implementation of rights at the national level. The obstacles to the protection of human rights will continue if the right of development and the elimination of extreme poverty, the rights to food and to health are not seriously tackled as a crucial issue not only for the four billion but also for the developed world, where there is also a third world continuously immobilized by fear, discrimination and racism. Social deprivation and economic exploitation must be considered serious violations of human rights, the same as political oppression, torture or racial discrimination.¹¹ Only the indivisibility of human rights and international cooperation between regional and universal human rights bodies can reinforce the universality of human rights.¹²

¹⁰ Franck, 'Are Human Rights Universal?' (January-February 2001) *Foreign Affairs*.

¹¹ Taroor, S, 'Are Human Rights Universal?' (Winter 1999-2000) 16(4) *World Policy*, pp 1-6.

¹² The author would like to thank the CNPq and the FAPESP for their support in the preparation of this paper.