

THE INTER-AMERICAN
COURT OF HUMAN RIGHTS:
THEORY AND PRACTICE,
PRESENT AND FUTURE

Yves HAECK
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(eds.)



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The Inter-American Court of Human Rights: Theory and Practice, Present and Future

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*In Memory of Prof. Dr. Fried van Hoof,
for his dedication to human rights*

FOREWORD

It is a true honor to write the foreword to this important collective work commemorating the 35 years that the Inter-American Court of Human Rights (henceforth the “Inter-American Court”, or the “Court”) has been functioning. This enterprise was achieved with the participation of academics from different parts of the world who, with their reflections on diverse aspects of the Court’s jurisprudence and work, enhance and enrich the legal debate on this subject.

The Court currently exercises jurisdiction over approximately 500 million inhabitants; this is a direct consequence of the fact that 20 of the 34 countries that make up the Organization of American States (OAS) have accepted the Court’s jurisdiction. In the three and a half decades of its existence, the Inter-American Court has become both the last hope for the victims of human rights violations, and the institution that is most strongly setting the course and legal debate of human rights, on the American continent.

We can trace the first building blocks of the creation of a regional human rights court in the Americas to the Ninth International Conference of American States that took place in 1948, in Bogota, Colombia. This event saw the signing of the Charter of the Organization of the American States, a document that ushered in a new system of organization among the member States of the Inter-American System which, until then, had been organized under the auspices of the Pan-American Union.

The American Declaration of the Rights and Duties of Man was also adopted during this conference. Notably, the signing of this document predates the signing of the Universal Declaration of Human Rights by several months.

At this same conference, Resolution XXXI, titled “Inter-American Court to Protect the Rights of Man”, was also adopted. This document considered that “a judicial entity must guarantee the proper protection of rights since no right can be appropriately ensured without the backing of a competent court”. As a consequence of this, the Inter-American Judicial Committee was tasked with writing the Statute for the creation of an Inter-American Court. In 1949 the Judicial Committee released a report that indicated that “the absence of positive substantive law on the subject constituted an obstacle for the creation of the Court” and recommended drafting a Convention. The ideas outlined in these two documents would bear fruit 20 years later.

The American Convention on Human Rights was signed on 22 November 1969 in San Jose, Costa Rica. For the treaty to enter into force, it needed to be ratified by at least eleven States, a process that took nine years to complete, ultimately entering into force in 1978. The American Convention, in addition to establishing a catalogue of rights, regulated the mechanisms for the protection of these rights and the institutions tasked with their defense: the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. Thus, the only Regional Court that currently exists in America came into being.

During the 1979 General Assembly of the OAS, the first seven judges of the Inter-American Court were elected, and on the third of September of the same year, the Court took up its current residence in San José, Costa Rica. The Court established its first Rules Of Procedure in August 1980.

When the Court was first established, it had no jurisdiction over any of the states that had ratified the Convention. This was due to Article 62 of the Convention, which required an additional voluntary act by the state party, in addition to the ratification of the Convention, in order for the Court to be competent to hear a case involving that state. Even though the Court had already been established and created, because no member state had as of yet accepted the Court's jurisdiction, none was subject to it.

The first state to accept the Inter-American Court's jurisdiction was Costa Rica in 1980. Later, Costa Rica was joined by three other states: Peru, Honduras and Venezuela. During the next 10 years, various states gradually followed in their footsteps: Argentina, Colombia, Ecuador, Guatemala, Suriname, and Uruguay. This trend continued during the 1990s, with numerous countries accepting the Court's jurisdiction, namely Chile, Bolivia, Brazil, Mexico, El Salvador, Haiti, Nicaragua, Panamá, Paraguay, The Dominican Republic, and Trinidad and Tobago. However, the last state party to accept the Court's jurisdiction was Barbados, in June of 2000; since then, no further OAS member state has granted jurisdiction to the Court. On the contrary, some states (as in the case of Trinidad and Tobago and, most recently, Venezuela) have chosen to denounce the American Convention on Human Rights and therefore to withdraw from the Court's jurisdiction. It is of the utmost urgency that this situation be reversed.

Since the American Convention on Human Rights came into effect, the Inter-American *corpus juris* regarding the protection of human rights has been further enriched and strengthened. In 1988, the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social, and Cultural Rights was adopted and in 1990, the Protocol to the American Convention on Human Rights to Abolish the Death Penalty was signed. Subsequently, a series of conventions were adopted within the Inter-American system: the Inter-American Convention on Forced Disappearance of Persons (1994), the Inter-American Convention to Prevent and Punish Torture (1985), the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against

Women (1994), and the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities (1999).

In narrating the origin and development of the Inter-American Court in these preceding paragraphs, a question arises: what practices or procedures give the Court its distinct identity and character? To begin to answer this question we must first consider the functions of the Court. In addition to hearing contentious cases of human rights violations, the Court fulfills a significant advisory function. Under this advisory jurisdiction, it issues opinions on matters regarding the interpretation of the American Convention and other human rights treaties brought to its attention by other OAS bodies or member states. The Court can also order provisional measures, which can be precautionary or protective in nature. Moreover, this is a tribunal that meticulously oversees the compliance and implementation of its decisions. It does this by requesting status reports, holding special hearings, and issuing resolutions on the matter.

A characteristic element of this tribunal is that the Inter-American Court does not allow the individual (victim) to submit cases directly to the Court. It rather requires that the Inter-American Commission on Human Rights, an autonomous OAS organ, submit the case. However, once the case is before the Court, the victims can present their own arguments, claims and evidence (they can adopt a distinct and independent position, completely separate from that of the Commission). Therefore, there are three distinct parties that participate in the proceedings before the Court: the Inter-American Commission, the victim, and the state. A further characteristic of the Court is the presence and direct intervention of the judges in the proceedings: every case brought before it results in a public hearing (generally lasting two days), in which the testimonies of victims, witnesses and experts, along with the opening and closing arguments of the parties, are heard by the judges, who can then question the various participants. Regarding evidence, in certain recent cases the Court has begun to make “in situ” visits in order to better understand and assess the issues that they must resolve, and to do so with greater proximity.

The Court’s sessions take place at its principal seat in Costa Rica and elsewhere and, since 2005, it has begun to hold extraordinary sessions in various American states. The object of this exercise is to bring the Court closer to the various social segments and geographical regions in the continent. Even now, as I write this, one of these extraordinary sessions is about to take place in Colombia, where over 8000 people are registered to attend the public hearings.

Additionally, as of 2010, the Court provides free legal aid to people who do not have access to a lawyer. It also provides financial aid to those who do not have the resources to invest in the production and discovery of evidence (usually, this encompasses plane tickets and accommodation for victims, witnesses, and expert witnesses that testify before the Court).

From a purely numerical point of view, the Inter-American Court appears rather insignificant: in its 35th year of existence, ours is the International Court with the least financial resources worldwide; that receives, on average, less than 25 cases and produces a similar number of rulings annually; and is composed of judges that only meet twice a year. Yet, if you look closer, the true significance and impact of the Court's jurisprudence becomes apparent. A by-the-numbers approach masks the great influence of the Court's positions and legal opinions, which transcend the individual case: its jurisprudence is not only observed and closely followed by the high Courts of the region, but it also guides the design of laws and public policy within the states. It is clear that the Court has become an influential and effective institution within the American continent.

At the same time, the Court has become the guardian and repository of a significant number of the accounts of human rights abuse victims. Such individuals appear before the Court in order to bear witness to the horrors and ordeals that they or their loved ones have endured, to seek justice and restitution for past wrongs, and to ensure that such abuses never happen again.

Throughout this 35-year-long journey, the Inter-American Court has presided over a wide array of cases, issuing judgments that enrich the Inter-American system and provide comprehensive and authentic interpretations of the American Convention and the other human rights treaties that make up the *corpus juris* of international human rights law. Furthermore, the Court's decisions have created a distinct legal heritage and play an essential role in the direction and legal debate on the American continent in issues as varied as the enforced disappearance of persons, extrajudicial execution, massacres, impunity, capital punishment, personal integrity, personal liberty, military tribunals, amnesty laws, freedom of expression, free access to information, property rights, due process guarantees, rights of members of indigenous communities, gender, sexual orientation, discrimination, and rights of immigrants, children and prisoners, to name a few.

Of the many contributions that the Court's jurisprudence has made towards the effective defense and protection of human rights, the most significant may be the concept of full reparation ("*reparación integral*") and the non-repetition guarantee ("*garantía de no repetición*") which it has developed. These two concepts seek to repair the damage caused by taking the individual, collective and/or structural dimensions of the issue into account, depending on the circumstances. The particular non-repetition guarantee ("*garantía de no repetición*") ordered by the Court that requires a change in law, public policy, or common practices, aims to transform or dismantle the structural shortcoming that allowed or enabled the violation to occur so that such a situation does not repeat itself in the future, ensuring that the rights contained in the American Convention can be fully enjoyed and exercised. In addition to the impact that these kinds of measures can have on society as a whole, they also fulfill an important role: when these measures are properly implemented and the aforementioned structural defect is

actually remedied, they work as a kind of “escape valve”, with fewer cases being brought before the Court.

Integral reparation and the guarantee of non-repetition have allowed hundreds of victims to not only receive financial compensation for their suffering, but also other forms of reparation: being apologized to, the construction of memorials, the naming of streets, schools, and public institutions in their honor, the return of land and property, and the achievement of justice. This concept has for example also caused the Chilean Constitution to undergo reforms to eliminate prior censorship as to films (replacing censorship with a ratings system); Peru’s amnesty laws were rendered null and void, allowing thousands of criminal cases to be reopened and human rights violators to be brought to justice (the same legal arguments were later applied in Argentina to nullify their “*obediencia debida*” and “*punto final*” amnesty laws); the creation of a law in Nicaragua that permitted the delimitation of indigenous property from private and state property, allowing dozens of communities to solve their disputes; the application of the death penalty in Guatemala has been avoided in dozens of cases because it is considered to go beyond what is permitted under the American Convention; and in Mexico, military jurisdiction has been replaced by civil jurisdiction for military officers in cases where human rights abuse is present.

The jurisdictional dialogue (“*diálogo jurisprudencial*”) currently taking place between the Inter-American Court and national courts is certainly worth mentioning, since it may be one of the most dynamic and rich developments in the region’s jurisprudence. This dialogue is horizontal and reciprocal in nature, and has encouraged the increasing use by national courts of the standards developed by the Inter-American Court, as well as the Court’s use of national jurisprudence in turn. This dynamic impacts the way that the law is understood and viewed within each state, and serves to further prevent human rights violations. Furthermore, this dynamic is not limited to the American Continent, since this dialogue is also taking place between the Inter-American Court and other International Courts, such as the African Court on Human and Peoples’ Rights and the International Criminal Court.

Taking all of the above into account, it becomes apparent that the legal and academic study of the Inter-American Court of Human Rights’ work is of fundamental importance. It is precisely with this object that this volume has been compiled, and in its ten chapters it invites the reader into this process of study and reflection. The great significance of this work makes it required reading for scholars of international human rights law, and especially for those studying the Inter-American system.

Finally, I wish to personally thank the editors of this collective work: Clara Burbano Herrera, Yves Haeck, and Oswaldo Ruiz, for having taken the initiative and having had the strength to assemble this group of academics to reflect upon the Inter-American Court of Human Rights’ 35-year-long journey. Academic

endeavors such as this serve as valuable contributions to the Inter-American legal debate and help strengthen the Inter-American Court.

San José, Costa Rica, April 2015

Pablo Saavedra Alessandri
Registrar
Inter American Court of Human Rights

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