THE AMERICAN CONVENTION ON HUMAN RIGHTS

Crucial Rights and Their Theory and Practice

Cecilia Medina

2nd edition

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Intersentia Ltd
Sheraton House | Castle Park
Cambridge | CB3 0AX | United Kingdom
Tel.: +44 1223 370 170 | Fax: +44 1223 370 169
Email: mail@intersentia.co.uk
www.intersentia.com | www.intersentia.co.uk

Distribution for the UK and Ireland:
NBN International
Airport Business Centre, 10 Thornbury Road
Plymouth, PL6 7 PP
United Kingdom
Tel.: +44 1752 202 301 | Fax: +44 1752 202 331
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Distribution for Europe and all other countries:
Intersentia Publishing nv
Groenstraat 31
2640 Mortsel
Belgium
Tel.: +32 3 680 15 50 | Fax: +32 3 658 71 21
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Distribution for the USA and Canada:
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Tel.: +1 800 944 6190 (toll free) | Fax: +1 503 280 8832
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To Pablo, Amalia Matilde, Anaïs and Max,
and to the memory of Jerónimo

PREFACE

The first English edition of this book on the American Convention on Human Rights advanced the idea that a second edition would show the Court on its way towards maturity. This is indeed the case; the Court has developed greatly and its case law has been affirmed in many respects. In addition, my idea when I started to work on the case law of the Court was that the egregious violations of human rights seen in the first cases would dwindle to give way to new case law addressing problems of democratic societies. In that prediction, I was wrong. I did not take sufficient account of the delay the Inter-American Commission on Human Rights had in processing cases and of the fact that a systematic effort would be made to attempt to clear the significant backlog. From 2004 to 2014 – the period of case law covered in this edition – the Commission has sent a considerable number of cases to the Court concerning facts that occurred in the 1980s and 1990s, many of them massacres or disappearances. This means that systematic and gross violations have been a significant part of the Court's work despite the change in political and social circumstances in the region.

This second edition is not merely an update on the jurisprudence. As I mentioned in the first edition, I suspended my writing when I was elected to the Court, as I believed my approach to the analyses of the Convention and the Court's jurisprudence would probably be changed by this experience. The knowledge I acquired in the law of the different States under the jurisdiction of the Court, the many social and cultural problems on the continent, and my experience of the different approaches that were necessary to build a good relationship with the States while at the same time maintaining independence, needed some time to sink in. Only after it had settled in did a review of what I wrote in the first edition seem sensible. I believe I was right about this. Certain subjects began to emerge as being more significant than before and so they had to be explored and developed further. Moreover, there is a further reason why merely updating the first edition would not have been adequate. In this regional system for the protection of human rights, political factors are always present. When I look back to the State Parties as they were at the beginning of my term and later at the end of it, I cannot ignore the major changes they underwent. The Court grew at that time and this must be taken into account. The first edition shows the Court handling cases during periods of non-democratic States or States that had recently been able to do away with dictatorships. The jurisprudence of that time reflects this and it is with that perspective in mind that the judgments

should be read: a Court struggling to make of the American Convention an instrument that would start improving the human rights situation of those living in the American continent in hostile environments. However, from 2004 to 2014 the Court adjudicated for States already in the process of accustoming themselves to international human rights law and international supervision. This period also saw an increasing number of cases reaching the Court whose legal nature reflects the problems of States already embarking on the process towards democracy. They deal not only with deprivation of lives, or torture, or arbitrary deprivation of life during dictatorships, but also with *inter alia* freedom of speech, structural discrimination, and the lack of proper protection for women's human rights and for persons due to their sexual orientation. Cases involving alleged violations of torture or ill-treatment and of personal freedom continue to come in, but not in the framework of a situation of generalized gross, systematic violations; instead, they mainly arise from remaining practices of badly trained police forces and judiciary.

My experience in the Court as a judge from 2004 to 2009 reaffirmed my belief that the American Convention, although written along the same lines as the European Convention, does not completely resemble it: the reality of life on the American continent shows through in many provisions. Europe and its Council of Ministers belonged to a group of States that were determined to eradicate Nazism from their lands and promote respect for human rights. Latin America wrote the American Convention, I believe, with the hope that if they wrote the words and placed them in a treaty, there would be a chance for human rights to become important and respected at some future point in time. There is an old saying from colonial times that guided the Spanish conquistadors when carrying out the king's orders: one respects the order but does not comply with it (*se acata, pero no se cumple*). This position, much attenuated, still remains today. There was a glimpse of this when the Inter-American Commission on Human Rights (the Commission or IACHR) was created in 1959. A resolution of a Meeting of Ministers of Foreign Affairs established the Commission; however, the Meeting had in principle no power to create organs of the Organization of American States (OAS), a problem they circumvented by deciding the organ would be a *sui generis* entity. Some countries opposed this initiative because "to create an organ to promote the rights before respect of these rights became a precise and clear obligation" would be illogical.[1] Among the defenders of the setting up of this organ was the delegate of Venezuela. He did not resort to legal or technical arguments but to what he thought was the appropriate approach, asserting that, leaving legality aside, "there is [in America] a democratic surge which must be put to use to strengthen everything that serves the purpose of

[1] The most coherent opposition came from the delegate from Uruguay, quoted in C. Medina, *The Battle of Human Rights. Gross, Systematic Violations and the Inter-American System*, Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1988, pp. 67–68.

making human rights to be respected". The Honduran delegate added his vote "because it means a voice of encouragement to American democracy".[2] This has been the spirit of the system.

The fact of life that a written legal provision would not necessarily be complied with and that there would probably be obstacles placed in the way of victims wishing to avail themselves of the system made the drafters of the Convention take some precautions to limit that possibility, and it is these precautions that made the American Convention unique. The Commission and the Court, making use of their powers to interpret the Convention and to decide on their Rules of Procedure, developed the sometimes scant provisions in the Convention with regard to the functions of both organs. They aimed at making the Convention adequate for the sorts of cases that they would have to deal with, while also taking into account the volatile political situation in many countries. One precaution is the admittance of an *actio popularis* to start cases before the Commission. It was expected that disappeared individuals, those subject to prolonged arbitrary detention, or those subject to severe physical or psychological ill-treatment could not or would not start a case before the system against the State that was subjecting him or her to those severe violations. Thus, the way out was that the individual complaint could be started by the victim, a third person, a group of persons, or any non-governmental entity legally recognized in one or more Member States of the OAS,[3] with or without the victim's knowledge or consent. In its Rules of Procedure, the Commission stated that it "may also, *motu proprio*, initiate the processing of a petition which, in its view, meets the necessary requirements".[4] In the Rules of Procedure of the Court, there is the possibility of ending a case through friendly settlement, acquiescence of the responding State to a complaint, or discontinuance as a result of the petitioner's decision to withdraw his or her complaint. In spite of the clear intention of the parties to the case in all three of these situations, a provision in the Rules gives the Court the power to decide to continue the case "bearing in mind its responsibility to protect human rights".[5] There is thus the possibility of going beyond the will of the parties when the Court feels that it has not considered the protection of human rights properly. The Court will not allow any arrangement between the alleged victim and the State that could be detrimental to the scope and content of all human rights for all those under the umbrella of the inter-American system. In this sense, the Court sees its role as going beyond that of a judge deciding individual cases: it is the custodian of the public order created by the system.

As one can observe, the Commission and the Court take on a very important role in looking after individuals who certainly appear to be in a weak position

2 *Ibidem*.
3 American Convention, article 44.
4 IACtHR, Rules of Procedure 2009, Article 24.
5 IACtHR, Rules of Procedure 2009, Article 64.

with respect to the States. This attitude shows that the Court has felt the need – due to the frequent periods of dictatorships or authoritarian regimes that have plagued the continent – "to apply the Convention as creatively as possible to counter the authoritarian tendency of those who have ruled the continent and the tendency of society towards the maintenance of privileges that lead to discrimination".[6] Regardless of the continent's peculiarities, the conduct of the Court is common among international supervisory organs. There are strong reasons in the field of international human rights law to support it. Human rights treaties give the judges or other international decision-makers ample room to exercise their functions creatively. The Convention is formulated in terms of principles and general norms, which require further development in the face of new situations; the evolution of society will also require new interpretations from the Court; in this sense, interpretation is dynamic. The fact that interpretation must be *pro persona* also allows the Court to spread its wings, as it were, to make human rights available to everybody and to define the mechanism by which it operates in a manner that will help all.

The organization of this book has not been easy. The rights examined are closely interlinked. Life and integrity are sometimes analyzed together by the Court; the right to personal liberty, as set forth in the American Convention, contains aspects related to integrity and to due process; due process and the right to judicial remedy are so entwined that the Court has almost never separated them in a judgment. Furthermore, the phenomenon of disappearances touches all these rights – and this is reflected in each chapter – but yet it has an individual identity that I thought should be addressed in a chapter of its own. I hope the reader will not be confused by this new approach. In addition, as I find the social, cultural and economic situation an important element in the study of human rights, a few pages are dedicated to very briefly examining this subject.

6 See C. Medina Quiroga, "The Role of International Tribunals: Law-making or creative interpretation?" in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law*, Oxford University Press, 2013, pp. 649–669.

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