



# Policy Brief

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## Overview

This policy brief examines the context, development and future of the human rights regime in the Americas—a region where people in many states have suffered brutal repression on a massive scale. It argues that the changing nature of human rights violations in Latin America demands a refocusing of international and domestic policies, building state capacity and improving the implementation of judicial reforms. The significant progress achieved in protection of civil and political rights should inspire and guide strategies to promote economic, social and cultural rights.

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## *The Human Rights Regime in the Americas*

**T**HE HUMAN RIGHTS REGIME IN THE AMERICAS IS ONE of several regional regimes underpinning and complementing the international system by which human rights are promoted and enforced. These regimes manifest the perpetual effort to reconcile the aspirational ideals of universal human rights with the realist, power-driven world in which violations of rights occur on a daily basis. Although transnational human rights structures have often been criticized for their lack of enforcement mechanisms, they maintain a powerful ability to evaluate state behaviour and promote norm acceptance. The constructive dimension of international law, in which transnational agreements represent emerging shared values, has creative and generative influences on political practice.

Legal and institutional changes have gone further in the Americas than in any other part of the world except Europe, and the dramatic progress achieved in both democratization and human rights allow the continent's experience to effectively inform policy and further research.

### Latin America

Latin American history in the second half of the 20th century was dominated to a large extent by political violence. Almost the entire subcontinent has suffered from the repression of authoritarian regimes, which, usually in the name of security or "national order", systematically ordered the kidnapping, detention, torture and murder of whomsoever they considered to be "subversive" in order to eliminate even the slightest opposition. General Ibérico Saint Jean, governor of the province of Buenos Aires during the brutal first Junta rule in Argentina, expressed this clear and mercilessly inhuman mindset: "*First we kill all the subversives, then we kill their collaborators, then ... their sympathizers, then those ... who remain indifferent, and finally we kill the timid*".

For decades, gross human rights abuses were part of daily state terror "routines" in many Latin American countries. Some military regimes were more atrocious than others; states' terrorism varied significantly from country to country regarding its duration, intensity, scope and consequences. Whereas the murdered and disappeared "only" numbered in the hundreds in some countries, for example in Brazil or in Uruguay, the civil war in Guatemala between 1960 and 1996—including oppression by state security forces widely regarded as genocide—claimed

**Development of Legal Human Rights Structures**

**1948** Charter of the OAS (came into effect **1951**), American Declaration on the Rights and Duties of Man, Universal Declaration of Human Rights

**1959** Inter-American Commission on Human Rights

**1969** American Convention on Human Rights (entered into force **1978**)

**1979** Inter-American Court of Human Rights

**2001** Inter-American Democratic Charter

more than 200,000 lives. The dictators of Argentina, Chile, Uruguay, Paraguay, Bolivia and Brazil even clandestinely collaborated for years in the infamous Operation Condor, a repressive joint military campaign to violently eliminate opposition.

Today the “dark years” of mass violence and dictatorial military rule in Latin America appear to be over, and processes of democratic transition have dominated political developments on the subcontinent since the end of the 1970s. All Latin American countries today are democratic, with the exception of Cuba.

**The inter-American System**

The American Declaration on the Rights and Duties of Man, signed along with the Organisation of American States (OAS) Charter in 1948, was the very first international human rights instrument, predating the Universal Declaration of Human Rights (UDHR) by six months. American states were instrumental in the drafting of the UDHR, but despite this early enthusiasm and optimism, the wave of military dictatorships in the Cold-War era was to bring widespread violations of human rights. The emergence of military rule in the region spurred activists, lawyers and the church to try to internationalize human rights issues, involving and engaging the support of a wider range of actors. Civil society groups and individuals are now able to utilize transnational mechanisms for the protection of rights, which can hold governments accountable for internal violations.

**State Sovereignty and the Protection of Human Rights**

The deepest tension related to human rights lies between their enforcement and the principles of sovereignty

and non-intervention in the domestic jurisdiction of states. Promoting and defending rights falls not only within the jurisdiction of states, but also, increasingly, that of the international community. Many governments did not accept intervention by the international community on human rights issues until relatively recently. In many cases the ratification of human rights treaties became a politicized issue, being seen as acceptance of foreign intervention in domestic affairs. It is hard for leaders to make a case for the benefits of such treaties; the unique nature of human rights treaties is their focus on the protection of rights for individuals, as opposed to other treaties which aim to secure some reciprocal mutual benefit for states parties.

In Mexico, diplomats opposed the UN Security Council’s linking of international security with democracy and human rights, arguing that the UN’s mandate was limited to cases where national institutions were either unable or unwilling to protect rights. The ‘Estrada Doctrine’ that persisted until Ernesto Zedillo’s presidency in the late 1990s was specifically intended to protect state sovereignty against outside interference. Under President Zedillo, Mexico began to make concessions to international and domestic pressure, although it was not until the Vicente Fox administration that human rights were acknowledged as a matter for more than solely domestic jurisdiction. As Mexico gradually opened to international scrutiny, participation in the inter-state human rights regime was strengthened, even to the extent of supporting human rights protection in other states, including Cuba.

Although some human rights-related achievements of Cuba’s 1959 revolution were widely recognized in fields such as health, education and

racial equality, the Cuban people to this day are still deprived of the full range of political and civil liberties. The denial of these rights has been justified by the Cuban regime as a sovereign necessity to defend “the revolution” against external threats—typically associated with the US. The US has been the actor most consistently pressing for democratization in Cuba and calling international attention to the precarious human rights situation on the island, despite holding hundreds of detainees at Guantanamo Bay without basic legal protections. The enduring US strategy of political and economic isolation of Cuba seems to be unsuccessful. That is not to say, however, that more constructive approaches such as rapprochement, aid and investment, combined with human rights-related recommendations and criticism—pursued by Canada and the EU—have been effective either. Although the Cuban government continues to be resistant to both sanctions and incentives, external actors have been successful in drawing international attention to the human rights situation and exerting pressure on the Cuban government. As a result, it is now expected that Cuba will finally sign the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights in 2008.

The effectiveness of international pressure as a driver for change requires the pressure to be as consistent as possible. During the Cold-War period, the potential for seeking support from one bloc or the other meant that states were rarely entirely isolated. Some forms of international pressure can be indirect: in the case of Mexico, increasing cooperation with the EU tied Mexico to improving human rights standards in order to achieve economic and other benefits; in the case of Chile, the deten-

tion of former dictator Augusto Pinochet in London provided a spur to domestic human rights efforts.

### From Impunity to Accountability

The legacy of long-lasting repression continues to afflict many Latin American societies. The balance between peace and justice is often fragile—while peace integrates, focusing on the future and requiring reconciliation between former enemies, justice looks backwards, requiring trial and punishment of perpetrators.

The legitimacy of incoming, democratic regimes is based, at least in part, on the denunciation of past human rights abuses, so if they subsequently ignore these abuses, this endangers their legitimacy. By pursuing the abusers and pushing for prosecutions, this legitimacy is enhanced, but at the risk of impeding the development of a peaceful, secure state. Post-authoritarian governments must strike a careful balance between maintaining their moral superiority over the outgoing regime by pursuing abusers, and moving forward to quickly establish conditions where citizens’ rights can be effectively protected.

When government forces have been involved in atrocities, it is extremely difficult to achieve justice. Efforts to promote accountability are hampered by a variety of factors, including legal obstacles left in place by departing regimes, the ineffectiveness of judicial systems, and the elusiveness of evidence needed to obtain convictions. The weakness of institutions is often a cause of impunity for past abuses. Potential solutions include that undertaken by Chile in 2001: assigning special judges, prosecutors and special police divisions to work exclusively on human rights cases. However, even where special organs are created to tackle past abuses, the case of Mexico’s “Special

### Approaches to Accountability

Approaches range from Brazil’s choice to let rest issues of past violence, to Uruguay’s amnesty laws that actively pardoned all human rights violations under military rule. Such amnesties sometimes excluded certain crimes, for example torture and genocide in Guatemala, but few military perpetrators have faced penal consequences to this day. In an exception to the prevailing impunity, Argentina tried junta leaders in special tribunals, and recently the Supreme Court overturned previous amnesty laws.

Truth commissions offer extrajudicial accountability, often employed to substitute criminal proceedings. Some, as in Argentina, issued detailed public reports, whilst findings elsewhere have not been made public. Several commissions suffered from weak mandates; some were not allowed to focus on particular types of abuses. Obstacles included insufficient resources, restricted access to evidence and time constraints. Reports included recommendations; the Salvadorian Commission even named individual perpetrators and recommended their dismissal from official positions. Governmental compliance has often been limited—few victims of repression have received the reparation payments recommended. In many cases perpetrators ignored or dismissed reports; in others such as Chile, heads of state publicly apologized for past crimes.

*A related project on “Effectiveness of Accountability Mechanisms in Eastern Europe and Latin America”, run by the UNU Peace and Governance Programme and El Colegio de México, is ongoing.*

Prosecutor’s Office” shows that without political and technical support, investigations can be obstructed by the institutions implicated in the abuses, including the military.

Access to documentary evidence is extremely difficult to achieve, particularly where officials from the time of the abuses still hold office. Only in a few countries in the region have the courts had access to classified documents from security forces or military intelligence; the most striking example is the discovery of an “archive of terror” in the ruins of an Asunción police station after the collapse of Paraguay’s Stroessner dictatorship. Mechanisms for obtaining and maintaining access to information relating to human rights abuses are essential. The only country with a clear policy is Mexico, which is ironically the country with the most deep-rooted tradition of secrecy. In June 2002, 80 million documents from government agencies were deposited in the National Archive, allowing journalists, victims, and victims’ families to investigate and document human rights abuses which had previously been mostly based on testimonies.

Obtaining testimonies from current and former state officials can be difficult. Some offers of sentence reduction, and even pardons, have proven effective in Peru to expedite prosecution of the Fujimori-Montesinos political mafia. However, this method is not without risk, as in the case of Colombia where thousands of paramilitaries have been granted sentence reductions, but little progress has been made in providing remedies for human rights atrocities. The use of such measures to obtain cooperation must be evaluated in order to maintain proportionality and ensure that they do more good than harm. Impunity can pose a threat to peace, because criminals remain at large, and

the underlying public desire for revenge can result in further violence.

### **The Changing Nature of Violations**

Despite the tangible progress that has been achieved in the inter-American regime, particularly in countering the use of repressive violence, rights violations continue to occur. The nature and causes of these violations, however, have changed from institutionalised state abuses of rights, to those which occur due to state weakness or failure to act. These violations involve challenges to the rule of law—rather than the “traditional” abuses committed by authoritarian governments—and challenges to the rights of vulnerable groups. Such violations include cases of low-level police brutality, discrimination against indigenous peoples, and inequality; as well as the denial of land-ownership, access to healthcare, and access to justice. The regional human rights system is geared towards protecting individuals from the actions of the state; it assumes that pressure can be exerted effectively on states, as they possess the means to address violations. However, the changing nature of rights violations requires a change of focus, concentrating more on developing state capacity to better meet these challenges.

Several countries in Latin America are plagued by organised crime, drug trafficking in particular, and lack the resources to effectively tackle the problem. Where powerful private armed groups threaten and carry out attacks on lawyers, officials, human rights activists and journalists, weak state institutions struggle to achieve justice. Guatemalan human rights advocates have proposed establishing an international commission to investigate criminal networks and collaborate with local prosecutors to bring them to justice.

This would not only help to achieve justice in individual cases, but more importantly, would strengthen the capacity of domestic law enforcement mechanisms. Although the proposal was supported by the UN, the national human rights ombudsman, local civil

criminals going unpunished. Successive administrations have attempted to solve the problem of torture, but have failed by concentrating on individual cases, rather than addressing the underlying causes—this is a common failing when approaching human

## A universal model to discourage torture would be to only accept confessions made directly before a judge

society leaders and the government, it was halted by the Constitutional Court on the grounds that some of its provisions were unconstitutional.

Abuses of indigenous rights are still common; they are frequently structural, and are a function of current law enforcement and other systems in need of reform. Despite Mexico's enthusiastic support for inter-state initiatives to support indigenous rights, the domestic situation remains poor in many respects. This is not aided by the frequent police practice of overemphasizing links between indigenous people and insurgent groups. Any progress may also be due less to human rights advocacy and more to the increasing mobilization of indigenous groups in the democratic context, as shown by the election of Evo Morales in Bolivia.

Many current abuses result from, or are exacerbated by, government attempts to "crack down" on crime. Torture, arbitrary detention and other forms of police abuse continue to be widespread problems, and while crime is justifiably a major concern for people in the region, the use of abusive practices is an illegal response. Without rights protections, policing is often much less effective, as evident in Mexico where the pervasive culture of using torture to extract confessions leads to innocent people being convicted, and

rights violations. In Mexico, the root of the torture problem lies in the relative certainty of convictions based on confessions, even when retracted by defendants in court. A proposal by President Vicente Fox in 2004 to deny any evidentiary value to confessions that are not made directly before a judge radically eliminates the incentive for obtaining confessions through torture. This proposal would not only benefit human rights protection in Mexico, but would also be a universal model to discourage torture, making it futile and redundant. Unfortunately the proposal has not yet been implemented, and seems to be stalled in Congress.

Measures such as these are vital if the human rights regime is to respond to the changed nature of violations, but they often fail due to the common belief that human rights protections diminish the effectiveness of crime-fighting. One of the greatest challenges for human rights advocates now is to promote human rights as a central component in combating crime. Public misperceptions can be countered by reformulating the problem as: *While police obtain confessions through torture, criminals walk free on the streets.* Torture is a tool of incompetent, lazy policemen who prefer to intimidate suspects, instead of analyzing evidence and acting preventatively.



### **Economic, Social and Cultural Rights**

While violations of civil and political rights have been reduced, the “second-generation” rights—economic, social and cultural rights—are now rising to the fore. Issues such as poverty are becoming central to human rights advocacy; poverty affects half of

### **North America**

Canada was fortunate enough not to suffer the widespread human rights violations common to most of the Americas, although issues of indigenous rights remain. It has an opportunity to play a significant role in the regional regime, leading by example and championing human rights. This

Human rights advocates should concentrate on individual rights, violated through discrimination, negligence or corruption, and avoid becoming embroiled in political struggles

the global population, and for people in extreme poverty, civil and political rights are of lesser urgency.

Human rights advocates have begun to address economic, social and cultural rights more vigorously since the end of the 1990s, but the results have been mixed at best. It is much harder to bring charges related to abuses of these rights, compared with abuses of civil or political rights. Under international law they require more progressive realization, compared to the relatively immediate realization of civil and political rights, and governments often plead poverty as an excuse for not undertaking their positive obligations.

It is crucial for rights advocacy to provide clear and specific remedies. However, international law allows states to interpret the content and form of implementation of economic, social and cultural rights, to be decided by democratic decision-making processes. Rather than becoming embroiled in political debates about the content of policies, human rights advocates should concentrate on fighting discrimination, negligence and corruption, and leave issues such as privatization or taxes to the domain of political parties.

contribution has particular value due to Canada’s ability to bridge the common-law and civil-law traditions that otherwise divide the hemisphere. Cases provided by Canada would be advanced—based on constitutional or policy disputes rather than individual acts of violence—and so would have precedent value for the inter-state system. Canada has a wide range of very active NGOs advocating greater involvement in the regional regime, and the country has been positively and effectively involved with international issues in the past, most notably the ban on landmines, establishment of the International Criminal Court (ICC), “responsibility to protect” and human security.

In contrast, the relationship between the inter-American human rights system and the United States, by far the most powerful country in the region, has frequently been problematic. Throughout various administrations, the US has actively—and often openly—supported many of the region’s most brutal regimes, and even worse, it has used the language of human rights in its justifications for doing so. Following September 11, 2001, the rule of law has been undermined, with systemic abuses of human

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rights committed under the claimed justification of fighting terrorism. While the Bush administration claims that the US does not engage in torture, it defines the practice so narrowly as to render its prohibition meaningless. The systemic use of coercive interrogation that has been evident at Abu Ghraib and Guantanamo Bay has shown this denial to be false, and demonstrated the complicity of the highest ranks of the administration in abusive practices. In addition, following the US' disregard for *habeas corpus*, the ban on torture, the right to a fair trial, and other fundamental principles, other states have also introduced similar draconian security measures, extended their pre-trial detention periods, and engaged in questionable extradition policies.

The US opposition to the ICC, whose statute has been ratified by almost all Latin American states, also demonstrates hostility to international mechanisms aimed at promoting human rights. Moreover, many Latin American governments have been aggressively pressured through cuts in military aid and humanitarian assistance into signing bilateral agreements with the US, preventing them from turning Americans over to the court. As these agreements violate both international treaty obligations and domestic laws, governments have been forced to choose between their commitment to the rule of law and their relationship with the US. The flagrant disregard for human rights and the fundamental principles of international law demonstrated by the US has significantly damaged the international human rights project, and set dangerous precedents for other states to emulate such behaviour. The return to similar hypocrisy and double-standards in the sphere of human rights as seen during the Cold War has led to renewed questioning of any US criticism aimed at abu-

sive states. The current trend in Latin America towards what are claimed to be more “redistributive” and “participatory” modes of democracy as evident in Venezuela and Bolivia is partly a result of discontent with liberal economic reforms, and alarmingly has led to US criticism reminiscent of that espoused during the Cold War.

### Conclusion

If American countries are to meet the challenges identified above, a unified approach, without double standards, is vital in asserting the legitimacy of the human rights regime. Despite the numerous and significant positive developments in the constitutional, legal and institutional frameworks of American states, they have not always resulted in an improvement in the situation of human rights in practice. In many states, human rights continue to suffer from judiciaries weakened by previous subordination to the executive branch.

The changed nature of rights violations demands a refocusing of international and domestic policies, to concentrate on building state capacity and implementation of judicial reforms. Building on past successes in the areas of civil and political rights, human rights advocacy must now approach the issues of economic, social and cultural rights. By adapting to meet the current challenges, the human rights regime will continue to develop and improve the lives of millions in the Americas.

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## Policy Brief

### *The Human Rights Regime in the Americas*

Policies must evolve to reflect changes and advance the human rights regime in the Americas

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