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CRIME AND HUMAN RIGHTS

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Editors

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INTRODUCTION: ON THE DOUBLE RELATIONSHIP OF CRIME AND HUMAN RIGHTS

Stephan Parmentier and Elmar G. M. Weitekamp

Since the end of the Second World War, human rights have gained an increasing significance in law, politics and society, both at the national and the international level. According to the American scholar Louis Henkin in his book *The Age of Rights*, human rights have become "the paradigm of our time", and in that process they have displaced previous major paradigms, such as religion and socialism (Henkin, 1990).

The rise of human rights is first and foremost illustrated by the gigantic framework of legal instruments, binding and non-binding, which were and continue to be developed in the realm of international organizations, such as the United Nations (Alston & Megret, 2007; http://www.unhchr.ch), the Council of Europe (http://www.coe.int), the European Union (Alston, 1999; http://www.eu.int), the Organization of American States (Buergenthal & Shelton, 1995; http://www.oas.int), the African Union (http://www.africa-union.org) and others. Related to this is the rapid proliferation of organizations, mostly non-state and civil society based, that aim to promote and to protect human rights and try to foster human rights monitoring and education (http://www.hri.ca). Many of them are quite local and small, and have limited impact, but some of them, like Amnesty International (http://www.amnesty.org) and Human Rights Watch (http://www.hrw.org), are truly transnational and are exercising a strong influence on international

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organizations, individual states and public opinion. Finally, the importance of human rights is also demonstrated by the gigantic amount of scholarly work that is generated every year, about the concept of human rights, their philosophical, legal and political underpinnings, their impact in practice, their mobilizing effects on individuals and groups in society, etc. (Steiner & Alston, 2000).

It goes without saying that this rapid proliferation of human rights norms and standards has not come overnight, but has instead been the product of a long development. The French lawyer, Karel Vasak, has argued that human rights have come about in waves or so-called ''generations'' of rights, thereby distinguishing three such generations: (a) civil and political rights, conceived more in ''negative'' terms, meaning that the state has to refrain from any intervention; (b) social and economic rights, considered more in ''positive'' terms as they require an active intervention from the state; and (c) solidarity rights, most often viewed in ''collective'' terms and requiring the concerted efforts of all social forces, nationally and internationally (Claude & Weston, 2006, p. 8). In doing so, he has linked the three generations to the three principles of the French revolution: freedom (*liberté*), equality (*égalité*) and solidarity (*fraternité*). In recent years, a fourth generation of human rights seems to have gaining ground, according to some covering bio-ethical issues that relate to the beginning and the end of human life (e.g. on the use of embryos, cloning, euthanasia, etc.), according to others relating to the rights of women and of future generations, and the rights of access to information and communication. American scholars Richard Claude and Burns Weston (2006), while following the three-prong approach in their excellent textbook, have suggested different names for these categories, being: (a) participatory rights, also including equality and the rights of refugees and indigenous peoples; (b) security rights, encompassing work, food, health, education and culture; and (c) community or group rights, including self-determination, development, environment and peace.

Whatever categorization is chosen, it is crystal clear that human rights nowadays provide a wide menu of legal norms and standards to promote and to protect human life and human relations. They range from the prohibition of torture and the protection of private life, to the promotion of an adequate standard of living and the right to leisure for every human being, and to the promotion of a healthy and peaceful environment for all. These norms foremost cover all of humanity, but some are also targeted to specific categories such as women and children, migrants and refugees, handicapped and impaired persons, and not to forget human rights

defenders as well. This international trend is paralleled by the proliferation of human rights standards and norms at the level of nation states and regions thereof. They have – to a greater or a smaller extent – incorporated the international instruments into their domestic legal orders and which, in some cases, even provide the preliminary testing ground for taking the international norms a step further. In certain parts of the world today, it is impossible to refer to human rights before a national court without referring to the legislation and the case-law developed by an international legislative or judicial authority.

Claude and Weston (2006) have sketched a fairly optimistic account of human rights. In their view, human rights nowadays serve at least four major functions: (a) they constitute a challenge to state sovereignty and non-intervention, as they can be used to criticize human rights violations that take place on the territory of independent countries; (b) they have become an agenda for preferred world policy, supplying a general framework for a comprehensive world order of human dignity; (c) they are used as a standard for assessing the national behaviour, of governments and state institutions for sure but also of non-state actors; and (d) they form a populist worldwide movement that influences international relations, with particular reference to the important educational and lobbying roles of non-governmental organizations in the broad sense.

To many people the development of the human rights framework in law and politics may appear as the linear unfolding of civilization, a steady development of a progressive nature, with a view of freeing mankind from the shackles of domination towards an era of liberation and emancipation. Looking at human rights from a social science point of view, however, cannot but reveal many pitfalls and detours on this road, and may even call into question the existence of a clear road altogether. From the work by Claude and Weston (2006) also stem a number of critiques related to human rights. One is that human rights are far from universal, partly because their origins are Western – dating back to the philosophical ideas of the 17th and 18th centuries in Europe – and moreover because they are not firmly rooted in all societies and cultures of the world. As a result, the daily reality seems to display more violations of human rights than it shows compliance with them. Another critique is more of a political nature and relates to the "double standards" with which human rights are applied by governments and other actors. In many cases, human rights seem quite strong when applied at the domestic level, but they wither away in the foreign policy of states and then become subordinate to their national interests. In the same vein, it is argued that human rights are fine for situations of democracy,

stability and peace, but they hardly possess any teeth when it comes to times of crisis or breakdown (such as during civil conflicts and outright wars, terrorism of all sorts, poverty and natural disasters). And more recently, the human rights discourse has been criticized for overemphasizing the claims of individual persons, without due attention to the duties and responsibilities they bear in society, and without reference to other entities that may possess rights and responsibilities, such as communities and even states. Whatever the assessment of their legacy and their day-to-day reality, it is clear that human rights do not constitute an ontological reality in se, but are the results of social constructs, and are thus subject to the same possibilities and limits of other social constructs in the life of man and society.

However, it should be emphasized that all of these debates are not at the heart of the present volume, which in fact is not about human rights as such, but about their relationship with issues of crime and justice. This relationship can be sketched from two main angles. First of all, criminal justice systems around the world have not been immune to the rapid rise of human rights over the past half century but contrarily have been very deeply influenced by them. The first and still classical chapter of human rights protection relates to upholding the rules of due process for suspects and offenders in the main phases of the criminal justice system, when police forces are reporting and investigating crimes, when public prosecutors are charging suspects or are dealing with criminal cases outside of court, when judges hear cases and reach their verdict, and when the sanctions are executed in places of detention or through other means. In the last 20 years, another chapter has been added, one claiming attention for the role of victims in the same stages of the criminal justice system, thereby enlarging the traditional dualistic relationship in criminal justice between the offenders and the state, to a triadic relationship that (albeit partly) includes victims of offences and crimes. Both long-term human rights legacies in domestic systems, the protection of suspects and offenders and the increasing attention to victims, have also exerted considerable influence on the recent establishment of and the proceedings in international tribunals and courts that are dealing with international crimes. Secondly, the impact of human rights is not limited to the functioning of criminal justice systems, but it has gradually extended to the conceptualization of crime and delinquency itself. One way has been to add a human rights component to existing criminal behaviour, and thus to open the existing human rights mechanisms to the victims of such crimes. This is very well illustrated by the case of trafficking in human beings, which instead of being viewed as yet another form of criminal behaviour has become to be seen as a violation of

the fundamental rights of victims. The other route has been to take specific human rights violations and to redefine them in terms of criminal behaviour and to incorporate these definitions in domestic legal systems. This is the case of serious violations of human rights law and humanitarian law, such as genocide, crimes against humanity and war crimes, which have been re-conceptualized as international crimes and as such have also been incorporated in the domestic law of many states.

This double relationship between crime and human rights cannot be isolated from a number of new, yet important trends in modern-day societies. Arguably among the most salient ones are the trends towards technological innovation, towards economic globalization, towards multiple layers of political decision-making, towards multiculturalism, and towards ideological diversification (Parmentier & Van Houtte, 2003). Criminologists Susanne Karstedt and Kai Bussmann (2000) have convincingly argued that the drastic social and cultural changes of the past two or three decades pose enormous challenges for criminology, both in its theoretical aspects as well as for its empirical work. Of particular interest in this context are the transitions from authoritarian rule to democratic forms of government, and the implications for crime, criminal justice and criminology that derive from such transitions (Neild, 2006; Vande Lanotte, Sarkin, & Haeck, 2001).

Given the impressive development of the human rights framework and its far-reaching impact on issues of crime and criminal justice, it may be called surprising – if not incomprehensible – that criminology as a discipline has paid very little attention to human rights. The references to human rights in the criminological literature can be counted on the fingers of one hand. Among these, specific reference should be made to the work of American criminologists Herman and Julia Schwendinger who, as early as 1970, tried to import the human rights paradigm in the criminological theories and debates of the time (Herman & Julia Schwendinger, 1970). They shifted the focus from crime as a violation of criminal law, predominantly committed by individuals, to "social injury" as an infringement of fundamental values and human rights, for which state institutions bore a heavy responsibility. According to British criminologist Stan Cohen, the human rights connection – and thus the legacy of the Schwendingers – became lost in criminology because the mainstream theories failed to problematize and conceptualize the relationship between crime and politics. Only critical criminology continued to study "crimes of the state", but it got snowed under by the left realism of the 1990s that reclaimed attention for "the state of crime" (Cohen, 1993).

This volume on Crime and Human Rights is intended to address some of the issues raised before and to fill some of the gaps indicated. By way of a caveat, it should be clear that the book is not designed as another legal book with many details about legal standards and norms, although inevitably it will have some references to the national and international human rights framework. Its first and foremost lenses are those of criminology and sociology, precisely because these disciplines have thus far paid scant attention to the rise and the impact of human rights, both in their normative aspirations and in their practical effects. The book is therefore intended to contribute to a better understanding of the complex yet vibrant relationship between crime and justice on the one hand and human rights on the other hand.

This volume has been structured as follows. In the first part, we look at several types of crimes, old and new, from the angle of human rights and human rights violations. This part starts with an overview of the human rights framework in Europe and the Americas (Ambos & Meyer-Abich). Particular attention is paid to trafficking in human beings as a human rights problem (Albrecht), to the new conception of children's rights as related to problematic behaviour and crime (Burssens & Walgrave), to racism and xenophobia as infringements of the right to non-bias (Coester & Rössner), and to the broad category of political crimes and serious human rights violations (Parmentier & Weitekamp). The second part of the book in turn sketches the influence of the human rights paradigm on criminal justice systems and raises important questions about justice in general. It starts with the impact of human rights on police discretion (Greene), it discusses the differences between a traditional approach to criminal justice and a restorative one (Skelton), it investigates how dispute resolution can give effect to human rights (Froestad & Shearing), and it looks at human rights and justice through the eyes of indigenous peoples in the present (Mulvale) and the past (Cunneen). All of the contributions to this book are original and have specifically been written for this purpose.

The volume is addressed to students and researchers in criminology and criminal justice studies, and to professionals and policy-makers in the criminal justice system, primarily but not exclusively in North America and Europe. By being one of the first of its kind (also see Downes, Rock, Chinkin, & Gearty, 2007), this book aspires to be a source of inspiration for all those wishing to explore the exciting relationship between crime and human rights. Needless to say, all comments and suggestions are very welcome.

Finally, this appears the right place to express our thanks to some persons without whom this volume would not have seen the light of day: Mathieu Deflem, for his generous offer to host this book in the series on the Sociology

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PART I:
CRIME AND HUMAN RIGHTS

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HUMAN RIGHTS IN EUROPE AND THE AMERICAS: REGIONAL PROTECTION SYSTEMS AND THE PROCESS OF REGIONAL INTEGRATION

Kai Ambos and Nils Meyer-Abich

1. INTRODUCTION

Although any culture of this world has made efforts in developing its own, often contradictory categories of favoured and undesirable behaviours and treatments, the idea of elaborating a catalogue of universal rights being inherent to every human being regardless of its cultural and social background has a long history (Camargo, 2002, p. 15ff.). Beside the universal human rights instruments, e.g. multilateral treaties and UN declarations,[1] other instruments and systems have – especially in the last decades – emerged on a regional level.[2] Taking as examples Europe and Latin America, it can be observed that human rights play an important role in at least two senses: on the one hand, comprehensive regional human rights systems have been created in both regions; on the other hand, human rights may have an impact on a process of regional (economic) integration in different ways. Both aspects are important to understand the general

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framework applicable for dealing with crime, and for preventing crime altogether.

2. THE SYSTEMS OF HUMAN RIGHTS PROTECTION IN EUROPE AND THE AMERICAS

In the following paragraphs we will give an overview of the two regional systems of human rights protection, thereby suggesting the links with issues of crime and justice.

2.1. The European System of Human Rights Within the Council of Europe

The origins of the Council of Europe may be traced back to the political initiatives shortly after the Second World War with the aim of a closer cooperation between the sovereign states of Europe (Blackburn, 2001, p. 3). It was founded on 5 May 1949 in Strasbourg, France, and with its 46 member states is currently the largest European organisation.[3] Its task is to achieve a greater unity between its members on the basis of the maintenance and further realisation of human rights and fundamental freedoms (Art. 1 (a), (b) Statute of the Council of Europe) (Jacobs & White, 2002, pp. 1–3; Oppermann, 2005, pp. 23–24). The Statute contains a quite unique requirement for membership in its Art. 3, namely that every member state "must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms". Complementing this provision, Art. 8 states that a member state which has seriously violated Art. 3 may be suspended from its rights and requested by the Committee of Ministers to withdraw from the Council of Europe or, if the state does not comply, expelled. The most important Convention of the Council of Europe is the European Convention on Human Rights and Fundamental Freedoms (hereafter ECHR or the Convention).

In 1948, when representatives of European states came together in The Hague with the purpose of establishing an organisation to protect democracy and human rights, there was a discussion as to whether all categories of human rights – civil and political as well as social and economic rights – should be included in one instrument. Although the latter rights were recognised, it was decided to include only the political and civil rights into the ECHR and create another instrument for the social and economic rights (Betten & Grief, 1998, p. 27). The ECHR was signed by the

then Council of Europe member states on 4 November 1950 and entered into force on 3 September 1953, becoming the first binding regional human rights treaty (Camargo, 2002; Ehlers, 2005a, 2005b; Jarass, 2005). The European Social Charter (hereafter ESC or the Charter) was signed in Turin in 1961 and entered into force in 1965.

Art. 1 of the Convention requires the contracting parties to secure that everyone within their jurisdiction is able to enjoy the rights and freedoms defined in Section I of the Convention (Art. 2–12), i.e. the right to life; the prohibition of torture and inhuman treatment; the prohibition of slavery and forced labour; the right to liberty and security of the person; the right to a fair trial; the prohibition of retrospective penal legislation; the right to respect for privacy and family life; the freedom of thought, conscience and religion; the freedom of expression; the freedom of assembly and association; the right to marry and to found a family. Section II (Art. 19–51) refers to the establishment, composition and functions of the European Court of Human Rights, Section III embodies different final provisions. The membership of the Convention is, albeit not legally, de facto linked to the membership in the Council of Europe (Ambos, 2006a, 2006b). As every member state must accept the fundamental human and individual rights via Art. 3 of the Council's Statute (cf. supra), the membership in the Council implies the adherence to the Convention. The relationship between the Convention and national law depends on the rules provided for in the latter, especially in the (unwritten) Constitutions. As a result the Convention has a different status in the different member states (Betten & Grief, 1998, p. 30). Thus in some countries (e.g. Austria and Switzerland) it is granted a formal or factual constitutional status, meanwhile in other countries it is treated as ordinary law (e.g. Germany) (Ambos, 2003, p. 588ff.; Ambos, 2006a, 2006b, pp. 329–330). In any case the majority of the member states attribute a supra-legal value to the Convention.

The original protection system, emanating from the Convention, consisted of two basic institutions: the European Commission on Human Rights (hereafter the Commission) and the European Court of Human Rights (hereafter the Court or ECourtHR). Both institutions were entrusted to guarantee the respect for the Convention by dealing with applications made by states and individuals alleging violations of the Convention (Jacobs & White, 2002, p. 6ff.). The Commission, being the organ primarily in charge of the establishment of facts and the admissibility of a complaint, operated as an entrance door or filter to the Court or the Committee of Ministers. If a case was declared admissible, the Commission could try to reach a friendly settlement, particularly in the case of an individual complaint or – if such a

solution was not obtained – transmit a report to the Committee of Ministers (Harris, O'Boyle, & Warbrick, 1995, p. 587; Frowein, 1996, pp. 23–25; Betten & Grief, 1998, p. 37; Jacobs & White, 2002, pp. 6–7). Within three months the report would be forwarded to the Court if the state concerned had accepted the Court's jurisdiction over individual complaints (Art. 25 (I), 46 (I) ECHR). This requirement of a separate acceptance of the ECHR's jurisdiction led to the unfortunate situation that some member states had done so but others not.

This "old" system worked more or less well as long as the Convention remained a "sleeping beauty, frequently referred to but without much impact" (Frowein, 2004, p. 268). But with a higher caseload and more impact on the domestic level a new system was introduced by the Additional Protocol 11 to the Convention coming into force on 1 November 1998. Accordingly, the Commission and the Court were replaced from that date on by a new permanent Court, which is responsible for both the admissibility of the applications and a possible friendly settlement of cases (Art. 32, 38, 39 ECHR). The Court's organisation and procedure is mainly regulated in Art. 19–51 ECHR. It is composed of 46 judges, one from each member state (Art. 20 ECHR). Although the judgments of the Court cannot annul national judgments but only have a declaratory character, the member state concerned is under a treaty obligation to comply with the judgment. In addition, the Court may, at the request of the Committee of Ministers, give advisory opinions on legal questions concerning the interpretation of the Convention and its protocols (Art. 47 (1) ECHR). The execution of the judgments is supervised by the Committee of Ministers (Art. 46 (2) ECHR), i.e. a political, not a judicial organ.

2.2. The Inter-American System of Human Rights

In 1969, 19 years after the creation of the ECHR, the Organization of American States (hereinafter OAS) established the second regional system for the protection of human rights in San José, Costa Rica, with the American Convention on Human Rights (hereafter ACHR) (Camargo, 2002, p. 561).[4] Already more than 20 years before, in 1948, the American Declaration of the Rights and Duties of Man was adopted by the Ninth International Conference of American States in Bogotá, Colombia. Yet, as this was not a binding instrument and provided for no enforcement mechanism, it was merely of symbolic value (Buergenthal, Norris, & Shelton, 1986; Camargo, 2002, p. 566; Kokott, 1986; López Garelli, 2004, p. 92). As in the case of

Europe, also in the Americas, albeit less forcefully, the horrors of World War II played a decisive role in pushing the demand for a human rights convention for all American states (Sánchez Padilla, 2005, pp. 90–91).

On an institutional level, the inter-American human rights system consists of the Inter-American Commission on Human Rights (hereafter IACom) and the Inter-American Court of Human Rights (hereinafter IACourt); thus, it resembles the "old" system of the ECHR. The IACom was founded in 1959 with the aim "to promote the observance and the protection of human rights and to serve as a consultative organ of the Organization in these matters" (Art. 106 (1) OAS Charter). The Commission is, unlike the Court, not only an organ of the ACHR but also of the OAS Charter with jurisdiction over all OAS member states (Art. 53, 106 OAS Charter; Art. 33, 41 ACHR, Art. 1 IACom Statute).[5] It has, above all, a kind of watchdog or "Public Office" function with regard to the observance of the ACHR in the OAS member states (Sánchez Padilla, 2005, p. 115). It shall inform about human rights abuses in the Americas, enabling other organs, instances and authorities to intervene by political, diplomatic or judicial means. Its decisions are compulsory as far as the measures it may impose are provided for in the ACHR (cf. Art. 41 ACHR).

When the IACom receives a petition (individual/non-governmental complaint, Art. 44 ACHR) or a communication (inter-state complaint, Art. 45 ACHR) it primarily has to examine its admissibility (Art. 46, 47 ACHR). If the petition is considered admissible the Commission follows the procedure provided for in Art. 48 ACHR, i.e. it tries to obtain information about the case from the state concerned and, if necessary, carries out own investigations. If the grounds of the petition or communication still exist (Art. 48 (1) (b)) and if no friendly settlement has been reached (Art. 48 (1) (f), 49 ACHR), the Commission sends a preliminary report with conclusions and recommendations to the respective state (Art. 50 ACHR). If, within a period of three months from the date of the transmittal of the report, the matter has not either been settled or submitted to the Court the Commission "may set forth its opinions and conclusions" and shall, where appropriate, "make pertinent recommendations and prescribe a period within which the state is to take the measures to remedy the situation examined" (Art. 51 ACHR). When the indicated period has expired, the Commission decides "whether the state has taken adequate measures and whether to publish its report" (Art. 51 (3) ACHR). Thus, the Commission enjoys certain discretion as to referring the case to the IACourt or to put pressure on the state by publishing the report. According to Davidson (1997, pp. 118, 183), the corresponding Art. 50–51 ACHR have been modelled after

Art. 31–32 ECHR, ''but because there was no equivalent to the Committee of Ministers in the American Convention's framework, the Inter-American Commission was empowered to decide whether to submit a case to the Court or to deal with it itself''. If the IACom does not refer the case to the Court, it has the possibility to include the final report ''in the Annual Report to the OAS General Assembly, and/or to publish it in any other manner deemed appropriate'' (Art. 45 (3) Rules of procedure IACom).

The proposal to create a Court was already made by the Brazilian delegation at the Bogotá meeting in 1948, yet it was only after the establishment of the IACom in 1959 that the original idea was reassumed. The Court is the judicial institution of the inter-American system of human rights but it is not an organ of the OAS, despite all attempts to this effect (Sánchez Padilla, 2005, p. 113). It does not enjoy the same support as the European Court, since only 21 out of the 35 states of the American continent have accepted the contentious (adjudicatory) jurisdiction of the Court and the major powers U.S.A. and Canada did neither ratify the ACHR nor accept the Court's jurisdiction.[6] Also, the IACourt is not a permanently sitting institution as its (new) European counterpart. A case can be submitted to the IACourt only by a member state or by the Commission (Art. 61 (1) ACHR), individual victims have no direct access to the Court. They have to refer first to the Commission, complying with some requirements, especially the exhaustion of local remedies. The Court has the power to award monetary compensation or to impose other remedies, but it cannot execute its judgments; in case of non-compliance it may only inform the General Assembly of the OAS (Art. 65 ACHR). This system is complemented by various other institutions on a sub-regional and national level, e.g. human rights commissions and groups, ombudspersons, etc. (Baranyi, 2005, p. 5).

As the ECHR the ACHR only encompasses the civil and political, not the economic and social rights (Art. 3–25). Yet, the catalogue of rights proclaimed by the ACHR is longer than that of the ECHR, especially by drawing on the American Declaration of the Rights and Duties of Man as well as on the International Covenant on Civil and Political Rights. Concretely speaking, the ACHR covers eight rights not protected by the ECHR: the right to juridical personality (Art. 3); the right to compensation (Art. 10); the right to reply to ''inaccurate or offensive statements'' in the media (Art. 14); the right to a name (Art. 18); the rights of the child (Art. 19); the right to nationality (Art. 20); the freedom of movement and residence (Art. 22); the right to equal protection (Art. 24). Thus, as to the list of rights,

the ACHR rather resembles the International Covenant on Civil and Political Rights than the ECHR. States Parties to the Convention are obliged not only to respect, but also to ensure the free and full exercise of these rights (Art. 1). The additional Protocol to the Convention including Economic, Social and Cultural Rights was adopted only in 1988 in San Salvador and is therefore called the ''Protocol of San Salvador''.

2.3. Assessment

While the Inter-American system has considerably and steadily improved since its creation, there are still many deficits and the ''achievements have been the exception rather than the rule'' (Buergenthal & Cassell, 1998, p. 540ff.). The widespread impunity with regard to the human rights violations under the military regimes in Central America and the *Cono Sur* could not be effectively impeded by the human rights system. While the ACHR is, on a normative level, a highly advanced instrument, the reality in almost all states is far away from compliance with these norms; there is a wide gap between the de iure situation of the ACHR and the de facto situation on the ground in the respective member states (Buergenthal et al., 1986, pp. 14–15). Apparently the Commission is under too much influence of the states, especially the ones, like the U.S.A., which are not even a (full) part of the human rights system (Camargo, 2002, p. 565). There is no political organ that could effectively supervise the execution of the judgments of the Court.

Against this background many observers look to Europe and argue for a reform with more power and authority for the inter-American Court and a *locus standi* of the individual modelled after the recent reform of the European human rights system (Camargo, 2002, pp. 564–565; Sánchez Padilla, 2005, pp. 115–116). With this reform the former structural similarities between both systems do no longer exist (Quiroga León, 2003). Such a reform would also be welcomed with a view to the increasing case law of the Court. In particular as far as the rights of victims of serious human rights violations are concerned the Court's case law demonstrates a clear commitment to effective legal remedies of the victims (Art. 8 (1), 25 ACHR) entailing, inter alia, a state's duty to investigate the crimes and sanction the responsible, the victims' or their families' right to know the truth and a whole set of measures of reparation (ranging from economic to pure symbolic measures like the setting up of memorials or public acts of apology).[7] Notwithstanding, the Court's strengthening by a reform of the

system similar to the one implemented in Europe does not seem to be feasible in the near future (Camargo, 2002, pp. 542–543).

3. HUMAN RIGHTS AND REGIONAL INTEGRATION

In the second half of the 20th century the processes of regional cooperation and integration have become a basic structural element for the "New World Order" (Schirm, 1997, p. 11). Today the most industrialized and "developing" states are members of at least one Regional Integration Agreement (RIA).[8] Having said this, it must not be overlooked that the concept of regional integration encompasses quite different conventions and models of development. Although the most important motive of integration is mostly to further economic development by taking off trade barriers (Kühn, 2003, p. 111), the processes of integration sometimes also lead to profound political changes, such as the formation of common executive, judicial and legislative institutions. The "new regionalism" must be seen within the context of the end of the Cold War and the process of globalization (Kühn, 2003, p. 124ff.). Contrary to a simple economic integration as a "process of reducing the economic significance of national political boundaries within a geographic area" (Anderson & Blackhurst, 1993, p. 1), the so called "new regionalism" can be described as "a comprehensive multidimensional process including new political and economic objectives beyond trade and investment issues within a multi-polar world of globalized markets" (Preusse, 2004, p. 6; also Sangmeister, 2005, p. 12ff.). In this sense an increasing significance of RIAs does not only refer to free trade and economic issues but also intend to promote human rights and democratic principles with the aim to create an investors' friendly infrastructure and to strengthen historical and cultural ties (Kühn, 2003, p. 109; Leuprecht, 2002, p. 129). Despite the fact that the development or strengthening of economic relations normally entails some positive side-effects with regard to the political or social situation, an integration process driven exclusively or predominantly by economic interests is cause of some concern, at least from the perspective of human rights and conflict prevention. Indeed, a "peace-making" effect of economic cooperation and integration (especially by the mutual exchange of goods) has been long recognised by studies of social and legal anthropology (see Malinowski, 1922; Schott, 1970).

Be that as it may, ultimately conflicts can only be prevented if the integration is accompanied by specific political and social projects with that

aim. In theory there are quite a number of reasons for regional trade agreements to be supportive of peace, but free trade can also be a factor for the creation of inequalities and social unrest leading to conflicts within or even between states (Brown, Faisal Haq, Shaheen Rafi, & Moeed, 2005, pp. 12–13; Leuprecht, 2002, p. 73). Trade (liberalisation) may have an enormous impact on conflict dynamics and crime prevention. In this sense tensions between different agendas exist, take for example the antagonistic relationship between development policies and the war on terror (as a full fledged military war) or between (asymmetrical) trade liberalisation and structural conflict prevention (Baranyi, 2005, pp. 10–12; Guedes de Oliveira, 2004, p. 26; Russau, 2004, p. 24ff.). The discussion, therefore, in particular in Latin America, should not be limited to the aspect of ''economic transnationalisation'' but has to take the overall social effects of economic transformations into account (Zuber, 2005, pp. 31–32). A human rights agenda must not come along as a pure side-effect of trade agreements, rather that trade agreements must be human rights oriented (Pitanguy & Heringer, 2001, p. 15). In this sense the sustainable development of a state or a region, especially with a view to the prevention, management and resolution of violent conflicts, presupposes the corresponding social, democratic and human rights measures.[9] Thus, in the following paragraphs the human rights component of the integration processes of EU/EC, MERCOSUR/SUL and NAFTA will be looked at in more detail.

3.1. European Communities and European Union

While the founding treaties of the European Economic Community (EEC), the European Community for Coal and Steel (ECCS) and the European Atomic Agency (Euratom) contained no explicit reference to human rights, the general process of European integration has always been accompanied by the awareness of common values and the need of a politically unified Europe (Zimmermann, 2002, p. 9; Williams, 2004, pp. 137–138). Take as examples the idea of a close cooperation between France and Germany to avoid military confrontations in the future (Ambos, 2006a, 2006b, p. 305; Fischer, 2001, p. 8) or the transition from dictatorship to democracy in Spain and Portugal within the framework of their integration into Europe (Fischer, 2001, p. 10; Oppermann, 2005, p. 13). In this sense even the original focus on (only) economic integration was linked – as a kind of ''spill-over-effect'' – to the more ambitious aim of a common political organisation which at least led to the creation of the EEC in 1957 (Fischer,

2001, pp. 8–9; Herdegen, 2005, p. 8; Oppermann, 2005, pp. 9–10). With time it was more and more recognised that the Communities are not only economic but also human rights actors, and the protection of human rights was increasingly recognised as an objective and aim of the Communities (e.g. in the preamble of the Single European Act of 1987) (Jarass, 2005, p. 8; Zimmermann, 2002, p. 9). With the formal creation of the Union (Art. 1 of the Treaty of Maastricht of 7 February 1992) the Communities finally developed from a free trade area to a political Union and its inhabitants developed from "market citizens" (*Marktbürger*) to "Union citizens" (*Unionsbürger*) (Kadelbach, 2005, p. 553).

3.1.1. Protection of Human Rights Within the EU

Despite the absence of a written catalogue of fundamental rights the existence of such rights at the Community level has been recognised by the European Court of Justice (ECJ) at least since 1969, invoking the "principles of the Community Legal Order" that must be safeguarded according to Art. 220 EC (ex Art. 164 EC) that entails the fundamental rights of persons.[10] To develop these principles the Court has employed a method of value judgment based comparison of the legal systems of the member states (*wertende Rechtsvergleichung*) in order to identify common concepts and principles of the national constitutional law, in particular with regard to the fundamental rights considering them as an unwritten source of the community law,[11] and thus be used as a source of law. Already in 1974 the ECJ extends its case law explicitly to human rights treaties binding for the member states arguing that these treaties must be taken into account as a further source of law within the framework of Art. 6 (2) EU (former Art. F (2) EU) as general principles of law besides the constitutional principles of the member states.[12] Along the same lines the ECJ often stressed the special importance of the ECHR,[13] which thereby has become the most important catalogue of fundamental rights of the EU. This case law, which established and developed the concept of fundamental rights as part of the general principles of Community law (Philippi, 2002, pp. 47–48; Winkler, 2000, p. 24ff.), was finally also recognised and reinforced by the written law, first by Art. 4 EU of the Maastricht Treaty in 1993, and subsequently by Art. 6 EU. Indeed, Art. 6 (2) EU explicitly refers to the ECHR whose fundamental rights must be respected (Ehlers, 2005a, 2005b, p. 386; Zimmerman, 2002, p. 9).

Despite this positive normative development the ECHR has no jurisdiction *ratione personae* about EU-acts since only the member states but not the EU as such is a member of the ECHR (Peters, 2003, p. 27). Although