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SYMPOSIUM ON THE AMERICAN CONVENTION ON HUMAN RIGHTS AND ITS NEW INTERLOCUTORS

BETWEEN HOPE AND DESPAIR: PROGRESS AND RESILIENCE IN THE INTER-AMERICAN HUMAN RIGHTS SYSTEM

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The inter-American human rights system (IAS) faces a region that has turned distinctly hostile to human rights. For many, the ongoing crisis in Venezuela is ground zero, demonstrating the ineffectiveness of international human rights when confronted with an entrenched regime supported by major powers such as Russia and China. In this multipolar world, reinforced by a transactional and antiliberal U.S. foreign policy, human rights concerns seem to have little salience. Moreover, the regional Right-wing trend and the so-called populist resurgence underpin a political vision in the Americas that is distinctly antirights. And to make matters worse, some argue, we are anyway in the end-times of human rights—the age of international courts and liberal cosmopolitanism is over.[1] While recognizing that these overlapping political trends pose clear challenges to the IAS, this essay offers a more cool-headed analysis to suggest that the system's future is likely to be less apocalyptic than the doomsayers predict. The first part of the essay takes a sober look at the multiple political challenges facing the IAS today and their implications for human rights advocacy. In the second part, against the background of the inhospitable conditions facing human rights activists in the region, I highlight the role of civil-society actors in strengthening and embedding the IAS. As it is precisely the regional embeddedness of the IAS on which the system's future hinges, the third part highlights the need not only to defend progress, but also to strengthen resilience.

Resistance to Regional Human Rights

The IAS has not decoupled from the interstate system of the Americas; it continues to be shaped by government preferences and broader ideological trends. It is subjected to intense political pressures, not least in the context of Latin America's Right-wing turn in recent years.[2] Government criticisms have ranged from charges that the system exceeds its institutional mandate (e.g., by ordering expansive reparation orders) to critiques of the system's purported lack of democratic legitimacy and limited deference to elected officials. Some governments have sought to paint the IAS as a tool of neoimperialism. All member states of the Organization of American States (OAS), regardless of political leaning or ideological color, continue to underfund the system, threatening its continuing existence. Beyond the specific form of pushback against the IAS, there is also a revival of the regional nonintervention norm, not least evidenced in the divisions over how to respond to the unfolding crisis in

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[1] Stephen Hopgood, The Endtimes of Human Rights (2013).

[2] Jorge Contesse, *Conservative Governments and Latin America's Human Rights Landscape*, 113 AJIL Unbound 375 (2019).

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Venezuela. More broadly, the IAS is affected by the growing marginalization of the OAS from the region's many governance challenges.[3]

In addition, broader political and socioeconomic trends have become increasingly adverse. The global contours of this crisis are increasingly familiar, and they have their distinct expressions in the Americas as well. Inequalities are rising, fueling what some call our "age of anger," which in turn drives political polarization and, in some contexts, violence. Support for representative democracy as a political system is in decline according to some measures.[4] Civil-society spaces are increasingly restricted in many countries. There is a resurgence of particularly exclusionary forms of nationalism and intolerance. The trend towards the undermining of the international rule of law continues to gain strength.

These interlocking and mutually reinforcing pressures have dramatic consequences for human rights, and they have immediate and acute implications for civil-society actors seeking to use the IAS in their advocacy efforts. Most obviously, the increasingly strident questioning of the value of human rights undermines efforts to sustain the fragile and thin, yet very real, moral consensus that has underpinned them at the regional level. This means returning to struggles over first-order principles that many thought, or wished, belonged to the past. For a couple of decades now, many human rights advocates have been focusing much of their attention on questions of "implementation" or "compliance." From this perspective, the advance of human rights was understood to be hindered less by outright rejection, and more by states' failures to effectively implement already agreed-upon international commitments and/or provisions in existing domestic legislation. The turn to the equivalent of a human rights "bar fight" poses an existential challenge to the political value of human rights. It means a revival of normative confrontations and civil-society actors increasingly having to expend already scarce resources addressing accusations that human rights are good only for minorities who do not deserve protection. It also means that advocates and organizations are pushed into fighting procedural and institutional struggles—such as defending the IAS itself—rather than devoting attention to the direct and immediate defense of rights.

Relatedly, the backlash against human rights and the IAS undermines efforts to build local and transnational compliance constituencies. It is increasingly recognized that effective human rights implementation relies on the active involvement of and support from allies within state bureaucracies.[5] Similarly, the role of activists, lawyers, and critical journalists with access to state officials in the design, implementation, and monitoring of human rights policies is understood as crucial in holding states to their international human rights commitments. Sustaining such informal policy alliances is clearly a rear-guard battle, with governments increasingly questioning the value and desirability of international human rights supervision and monitoring. Similarly, advocacy work by NGOs as well as international organizations is criticized as undue interference, accompanied by accusations that they push "foreign" liberal agendas.[6] This hostile policy environment emboldens proviolation constituencies both within and outside state apparatuses. The growing resistance to human rights activism has intensified the insecurity experienced by many civil-society actors in the region.

An Inescapable Triad: Civil Society, States, and the Inter-American Human Rights System

It is precisely against the background of these contemporary political dynamics that reminding ourselves of the IAS's historical trajectory is so important. After all, the IAS has a long history of facing state pushback and its institutional development is a testimony to its ability to respond and adapt to such pressures. From its institutional

[3] René Urueña, *Double or Nothing? The Inter-American Court of Human Rights in an Increasingly Adverse Context*, 35 Wis. nt'l L.J. 398 (2018).

[4] Latinobarómetro, Informe 2018 (2018).

[5] The Inter-American Human Rights System: Impact Beyond Compliance (Par Engstrom ed., 2019).

[6] *Brazil's Bolsonaro Irks Chile with Personal Attack on UN's Bachelet*, France 24 (Sept. 5, 2019).

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origins as a "classical" intergovernmental regime, the IAS has evolved into an autonomous and normatively ambitious human rights system.[7] Nowhere is this more apparent than in the access of individuals and human rights organizations (HROs) to the IAS. While initially designed by OAS member states with a vague mandate to promote human rights, non-state access has strengthened over time as the system has become increasingly judicialized, with a procedural focus on the litigation of individual cases and the generation of an expansive regional human rights jurisprudence. Although non-state actors remain excluded from the formal decision-making fora of the IAS, they have gained significant informal influence through their agenda-setting activities and expertise. In recent years, they have even assumed the role of scrutinizing and screening candidates to the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.[8]

This expansive range of roles for civil-society actors highlights key features of the IAS's institutional development that were clearly not envisaged by the OAS member states that designed the system. Taking individual petition submissions as the measure, the use of the IAS by HROs has increased dramatically in recent decades.[9] As a result, processing, investigating, and adjudicating individual petitions constitutes the bulk of the system's contemporary workload. By leveraging the IAS, human rights groups have been able to keep human rights demands alive, even in cases in which they encountered years of resistance and obstacles at home. In the process, the IAS has become embedded in domestic political and legal systems. This internalization of IAS mechanisms and norms means that the IAS is regularly used to expose systemic human rights violations; lobby and negotiate with state institutions; frame social and political debates; promote the interests of vulnerable groups; boost human rights litigation before domestic courts; and strengthen human rights networks.[10]

This mutually dependent relationship between the IAS and civil-society actors underscores a delicate tension for the system. On the one hand, states not only designed the IAS, but also continue to govern it politically and provide it with resources. On the other hand, the legitimacy of the IAS is fundamentally derived from the perception of civil-society actors that the system is both willing and able to promote and protect regional human rights norms and standards, even when OAS member states oppose those efforts. It is clearly the case that the IAS has managed to secure a high level of independence from states over the decades, often in ways that states did not intend or expect. It is precisely the system's autonomy from direct state control that gives rise to its perceived legitimacy among civil-society actors. If these actors do not perceive the IAS to be legitimate, they will no longer make recourse to it, thereby undermining both the IAS and the human rights norms that underpin it. Put simply, no credible regional human rights system can survive without regular and substantive civil-society engagement. As such, the IAS's future will remain dependent on its dynamic interaction with civil-society actors.

Think Politically, Act Legally: Defending Progress and Strengthening Resilience

The IAS's history tells us something important about institutional resilience even in adverse geopolitical contexts. For example, this year is the fortieth anniversary of the Inter-American Commission's 1979 visit to Argentina, which put the spotlight on the human rights record of the country's military regime.[11] While the

[7] Par Engstrom & Courtney Hillebrecht, The Inter-American Human Rights System: The Law and Politics of Institutional Change (2019).

[8] Ximena Soley, *The Crucial Role of Human Rights NGOs in the Inter-American System*, 113 AJIL Unbound 355 (2019).

[9] Par Engstrom & Peter Low, *Mobilising the Inter-American Human Rights System: Regional Litigation and Domestic Human Rights Impact in Latin America*, *in* The Inter-American Human Rights System: Impact Beyond Compliance 23–58 (Par Engstrom ed., 2019).

[10] *Id.*

[11] Par Engstrom, *A Special Relationship Gone Normal? Argentina and the Inter-American Human Rights System, 1979–2013*, 38 Pensamiento Propio 115 (2013).

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Commission's work was met with fierce resistance by both the Argentine military and its allies in the U.S. administration, the visit represented a defining moment in the development of the Commission's identity as an independent and operational human rights institution. Most crucially, however, the visit firmly grounded in Argentina the idea of the institution as a distinct international resource for domestic human rights activism; it made the Commission known to Argentineans more generally, and it solidified in the country the perception of the IAS as a body that would "tell the truth."[12]

The example of Argentina shows that the IAS offers important tools for civil society actors, even when times are rough. The IAS's institutional history is rife with conflict and resistance to ambitious human rights norms and practices, and it is crucial not to overstate the case when the political pendulum swings against human rights. After all, on some rose-tinted readings of its institutional history the IAS illustrates the institutional expansion of human rights in a characteristically unstable region of the world. More minimally, the IAS offers an example of institutional survival despite dramatic political shifts.

When looking beyond its region, with global human rights increasingly under strain, the future trajectory of the IAS becomes even more significant. The United Nations human rights system is currently rocked by a budget crisis, and the International Criminal Court is subject to increasingly vociferous criticisms. From this perspective, the IAS remains a highly attractive alternative for civil-society actors to pursue human rights accountability. This is particularly the case in a regional context characterized by widespread and persistent impunity, including for gross and systematic human rights violations, and where the IAS has developed a quasicriminal jurisdiction that pushes states in the region to prosecute human rights criminals in domestic courts.[13]

The institutional "stickiness" of the IAS is particularly noteworthy when compared to global human rights institutions. It is, after all, at the regional level where human rights have become most judicialized and most firmly entrenched in domestic political and legal systems. A regional human-rights court regularly renders binding judgments on OAS member states. The IAS has also come to engage in increasingly dense interactions with domestic courts and state bureaucracies, becoming far more deeply embedded in national systems than the UN system.[14]

This perspective offers an important reminder that the IAS is institutionally more resilient than generalized human rights "end-times" narratives suggest.[15] After all, despite the rise of antirights politics in the region, human rights norms remain formally embedded in national constitutions and domestic legislation, providing crucial opportunities for individuals and groups to claim, define, and struggle over human rights. Although far from sufficient to guarantee rights, the availability of litigation before domestic courts drawing from international human rights norms incorporated in domestic law is a key legitimating factor for civil-society actors in their efforts of political and legal mobilization. Among other notable effects, this internalization of human rights has established domestic court systems and other regulatory agencies as key actors and arenas of human rights politics. Most noteworthy, the IAS has become, in the process, closer to the people whose rights it is meant to promote and protect.

While it is crucial, particularly at the current conjuncture, to defend the progress that the IAS has made in recent decades, there is clearly a pressing need to strengthen the system's institutional resilience. This is perhaps most immediately apparent in the need to expand political alliances. The vital support given to the IAS from the region's dynamic human rights movement is well documented.[16] Ultimately, however, the sustainability of the IAS will

[12] Emilio Fermín Mignone, Derechos Humanos y Sociedad: El Caso Argentino (1991).

[13] Alexandra Huneeus, *International Criminal Law by Other Means: The Quasi-criminal Jurisdiction of the Human Rights Courts*, 107 AJIL 1 (2013).

[14] Alexandra Huneeus & Mikael Rask Madsen, *Between Universalism and Regional Law and Politics: A Comparative History of the American, European, and African Human Rights Systems*, 16 Int'l J. Const. L. 136 (2018).

[15] Hopgood, *supra* note 1.

[16] Gabriela Kletzel, *The Inter-American Commission on Human Rights' New Strategic Plan: An Opportunity for True Strengthening*, 22 Int'l J. Human Rights 1249 (2018).

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depend on fostering political support for the system, and for human rights more broadly, beyond traditional groups. After all, human rights institutions, including the IAS, are not only of concern to legal experts. The political case for why the IAS matters should be made[17] in order to cultivate allies and generate broader public support for a vision of a future where human rights concern us all.

To engage with broader audiences requires a political vision of both international and regional human rights that is neither exclusively instrumentalist nor entirely normative—that is, a vision neither limited to discussion of "impact" nor exclusively concerned with the "technical" matter of dissecting the latest jurisprudential developments. It is precisely for this reason that I am skeptical of the often-repeated slogan of "less is more" and the idea that it would necessarily crystallize an attractive way forward—at least if such an approach involves narrowing and retrenching the human rights agenda, and by doing so excluding the concerns and interests of people most directly affected by contemporary inequalities and everyday experiences of violence.[18] Careful thinking and strategizing is required to make the human rights agenda more politically salient, and to strengthen the legitimacy and effectiveness of international human rights institutions, including the IAS.[19] These efforts to cultivate allies will necessarily also involve seeking to retain the support of and expand the circles of compliance partners within state bureaucracies and domestic judiciaries, including National Human Rights Institutions, Public Defenders' Offices, human rights units in Ministries, and Bar Associations.

In this endeavor, the IAS will also need to foster the critical engagement of the epistemic communities that have emerged around the system in recent years, as well as pursue changes from within. In relation to the former, as a human rights system based on international law, critical legal and jurisprudential analysis of the IAS is obviously indispensable. But any robust assessment of the system requires more directly political assessments as well. From critical evaluations of the impact of the activities of the IAS on domestic human rights protections, to strategic assessments of the political opportunities and constraints it faces, regular and critical monitoring of the system is vital. It also remains critical, however, that any scrutiny is accompanied by a constructive agenda for change. With respect to the latter, important internal institutional adaptations are already underway. Both the Commission and the Court appear more willing to open up to and engage with constructive criticism. The system's outreach efforts have also become more dynamic and creative, and there seems to be an increasing institutional awareness that individual rulings and decisions must be accompanied by broader political engagement strategies. While there is certainly further scope to engage in human rights experimentalism,[20] it is clear that the IAS has no other option than to respond to the multiple political challenges it is facing. As this essay suggests, the IAS's own institutional history provides some comfort in that the system has been rather adept at adapting to changing political contexts. Whether the future will repeat the past in this sense will depend on the mobilization of the myriad of actors that continue to engage with the IAS.

[17] Par Engstrom & Andrew Hurrell, *Why the Human Rights Regime in the Americas Matters*, *in* HUMAN RIGHTS REGIMES IN THE AMERICAS (Mónica Serrano & Vesselin Popovski eds., 2010).

[18] Jacob Mchangama & Guglielmo Verdirame, *The Danger of Human Rights Proliferation*, FOREIGN AFF. (July 24, 2013).

[19] Philip Alston, *The Populist Challenge to Human Rights*, 9 J. HUM. RTS. PRAC. 1–15 (2017).

[20] Gráinne de Búrca, *Human Rights Experimentalism*, 111 AJIL 277 (2017).

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