

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

CONSERVATIVE GOVERNMENTS AND LATIN AMERICA'S HUMAN RIGHTS LANDSCAPE

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In 2009, as the American Convention on Human Rights turned forty, Left-wing governments ruled in almost all Latin American countries. The democratization wave that began in the late 1980s had produced a seemingly hegemonic turn to the Left—the so-called “Pink Tide.”¹ A decade later, the political landscape was radically different. With only a few exceptions, Right-wing governments are in power throughout Latin America.² The implications of the conservative wave have been felt in a number of areas—including human rights. This essay explores the ways in which the new conservative governments of Latin America have tried to curb the inter-American human rights system and examines the potential long-term consequences that their efforts may have on the regional system and the protection of human rights. It then suggests possible avenues for sound engagement between states and the system, observing that the Inter-American Court’s expansive case law may cause more harm in the long run.

Protection Through Debilitation

It is not uncommon for states to seek to contain the work of human rights institutions that scrutinize how they comply—or fail to comply—with their international obligations. In Latin America, there have been multiple instances of state pushback and resistance against both the Inter-American Commission and the Inter-American Court of Human Rights.³ In some cases, states have carried out frontal attacks against these institutions; in others, they have engaged in covert operations by attempting collectively to undermine the Commission’s and the Court’s powers under the guise of review processes. Many times, resistance has come from countries’ executives: Latin American presidents have often resorted to international affairs to advance their internal political agendas. Resistance has also come from domestic courts.

One of the most significant forms of resistance occurred between 2011 and 2013, when states carried out a review process (allegedly) aimed at strengthening the system. Most commentators observe that the process’s ultimate objective was quite the opposite—to debilitate the system, by restricting many of the Inter-American

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¹ See James D. Bowen, *The Right in “New Left” Latin America*, 3 J. POL. LATIN AM. 99 (2011).

² See *THE RESILIENCE OF THE LATIN AMERICAN RIGHT* (Juan Pablo Luna & Cristóbal Rovira Kaltwasser eds., 2014); Omar G. Encarnación, *The Rise and Fall of the Latin American Left*, THE NATION (May 9, 2018).

³ See Jorge Contesse, *Resisting the Inter-American Human Rights System*, 44 YALE J. INT’L L. 179 (2019); Alexandra Huneecus & René Uruña, *Treaty Exit and Latin America’s Constitutional Courts*, 111 AJIL UNBOUND 456 (2017); Ximena Soley & Silvia Steininger, *Parting Ways or Lashing Back? Withdrawals, Backlash and the Inter-American Court of Human Rights*, 14 INT’L J. L. CONTEXT 237 (2018).

Commission's (and, to a lesser extent, the Inter-American Court's) powers. Led by Venezuela and other Left-wing countries that harshly criticized the work of the Commission and the Court, the process aimed at showing the inter-American human rights system who the real masters of the system were. The system responded by adopting new guidelines and regulations aimed at easing states' pushback. In the meantime, Hugo Chávez's Venezuela withdrew from the American Convention and several of the leftist governments that took part in the diplomatic attack against the Commission and the Court lost to Right-wing challengers. The new conservative governments denounced the Left's attacks on regional human rights and the rule of law and promised to bring order and prosperity, and to maintain or reinvigorate states' commitment to the rule of law, democracy, and human rights.

These promises would prove hard to sustain. In April 2019, five South American governments submitted a statement to the Inter-American Commission on Human Rights that sent shockwaves through the Latin American human rights community. The statement urged Latin American human rights bodies to adopt a more deferential approach in their interactions with states.⁴ Unlike the 2011-2013 process, where states patiently worked through the bureaucratic hurdles of adopting regional resolutions through the Organization of American States, the statement came as an unexpected and sudden attack. Notably, the submission resembled many of the arguments that leftist regimes, such as Venezuela's Hugo Chávez, Ecuador's Rafael Correa, and Bolivia's Evo Morales had put forward in the past. This time, however, the attack came from the Right: led by Chile and seconded by Argentina, Brazil, Colombia, and Paraguay, the statement asked the Commission and the Court (i) to respect states' "legitimate realm of autonomy" and "margin of appreciation," as well as the principle of subsidiarity; (ii) to use a "strict application" of the doctrine of sources of international law; and (iii) to take into consideration states' "political, economic and social realities" when ordering reparations.⁵

Leading human rights organizations and academics reacted vehemently, denouncing the statement as a "grave mistake."⁶ Advocates disavowed the letter as "a defense of the archaic principle of sovereignty,"⁷ claiming that it sought to introduce "legal concepts foreign to the doctrine and jurisprudence of [the] inter-American system,"⁸ such as the margin of appreciation—a deferential doctrine developed by the European Court of Human Rights. The Inter-American Commission responded on social media, simply declaring that it "valued states' constructive attitude" and that it would "examine the issue at the coming hearings."⁹

A Decade of Human Rights Maximalism?

To better understand the April 2019 attack by conservative governments, it is useful to situate it in the larger context of Latin American judicial politics. The pushback comes at a time when the Inter-American Court has developed a doctrine called "conventionality control" that seemingly transforms the Court into a superconstitutional court.¹⁰ The evolution of the Court's activist jurisprudence in fact seems to be an immediate cause of the

⁴ [Statement from the Governments of Argentina, Brazil, Chile, Colombia and Paraguay to the Inter-American Commission on Human Rights](#) (Apr. 11, 2019).

⁵ *Id.*

⁶ See [Letter from José Miguel Vivanco](#), Human Rights Watch Americas Director (Apr. 25, 2019).

⁷ *Id.*

⁸ *Id.*

⁹ [@CIDH](#), TWITTER (Apr. 23, 2019, 2:04 PM).

¹⁰ According to this doctrine, domestic judges and national authorities are directly bound by the American Convention and the Court's interpretation of the Convention. See [Symposium on the Constitutionalization of International Law in Latin America](#), 109 AJIL UNBOUND 89 (2015).

conservative attack on the inter-American system.¹¹ In its first fifteen years of existence, the Court developed an influential jurisprudence on the invalidity of amnesty laws that erased liability for atrocity crimes, starting with the seminal case of *Barrios Altos v. Peru*, in 2001.¹² The Court has subsequently moved to expand its powers in unprecedented ways: in the past decade, as noted, the Court articulated the conventionality control doctrine;¹³ found that the Court's interpretation of human rights law trumps democratic deliberation;¹⁴ and used its advisory jurisdiction to announce that all members of the Organization of American States should legalize same-sex marriage—a move that no other international court has made—despite the fact that the issue had not been submitted to the Court's consideration.¹⁵ In recent years, the Court has developed unprecedented jurisprudence on social rights whereby *any* claim is now justiciable under the American Convention, despite the Convention's text—which does not stipulate judicial enforcement of social rights—and the existence of an additional protocol that specifically addresses—and restricts—the enforcement of social rights.

The social rights cases offer a stark illustration of the Court's expansive caselaw. Starting with the case of *Lagos del Campo v. Peru*, the Inter-American Court now declares that Article 26 of the American Convention allows for the enforcement of any claim on social rights.¹⁶ The Court essentially justifies this unprecedented reading with the *iura novit curia* (“the court knows the law”) principle.¹⁷ In *Lagos del Campo*, petitioners did not raise an Article 26 claim, yet the Court addressed it anyway, finding not only that Peru had violated petitioners' right to a stable job but also—and more significantly—that the right could be directly enforced under the American Convention. Although some members of the Court have rejected this jurisprudential approach as “an act of normative creativity and an expansion of competences that the international community may have never seen before,”¹⁸ the Court has used a similar rationale in subsequent cases.

Similarly, the advisory opinion on same-sex marriage and gender identity caused unprecedented backlash.¹⁹ The opinion is the latest in a rapidly evolving jurisprudence on sexual orientation and reproductive rights,²⁰ which has irritated and prompted conservative groups across Latin America to mobilize in new and aggressive ways. A

¹¹ Once the five governments' letter to the Inter-American Commission was made public, the Chilean House of Representatives summoned the Minister of Justice and Human Rights to explain the statement. Before the House, the minister expressed concerns with the inter-American system's performance, ranging from the Court's handling of public policy issues that should be left to states' democratic processes to the Court's misuse of sources of international law. See *Gobierno Reiteró Fundamentos de Carta a Comisión Interamericana de DD.HH.*, Cámara de Diputados de Chile (May 13, 2019).

¹² *Barrios Altos v. Peru*, Merits, Inter-Am. Ct. H.R. (ser. C) No. 75 (Mar. 14, 2001).

¹³ See *id.* at 10 (explaining the doctrine).

¹⁴ *Gelman v. Uruguay*, Merits and Reparations, Inter-Am Ct. H.R. (ser. C) No. 221 (Feb. 24, 2011).

¹⁵ *State Obligations Concerning Change of Name, Gender Identity, and Rights Derived from a Relationship Between Same-Sex Couples (Interpretation and Scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, In Relation to Article 1, of the American Convention on Human Rights)*, Advisory Opinion OC-24/17, Inter-Am. Ct. H.R. (ser. A) No. 24 (Nov. 24, 2017) [hereinafter Advisory Opinion OC-24/17].

¹⁶ *Lagos del Campo v. Peru*, Preliminary Exceptions, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 340 (Aug. 31, 2017). Article 26 of the American Convention provides: “The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.”

¹⁷ *Id.* at para. 139.

¹⁸ See *Poblete Vilches and Others v. Chile*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 349 (Mar. 8, 2018), Concurring Opinion by Sierra Porto, J., ¶ 17.

¹⁹ *Latin America's Human-Rights Court Moves into Touchy Territory*, THE ECONOMIST (Feb. 1, 2018).

²⁰ See Jorge Contesse, *Sexual Orientation and Gender Identity in Inter-American Human Rights Law*, 44 N.C. J. INT'L L. 353 (2019).

remarkable feature of this opinion is that the Court was *not* asked to address the question of same-sex marriage. Yet the Court expanded the scope of the specific questions and decided to render an opinion anyway, declaring that its finding was “legally relevant” to all members of the Organization of American States, including those that are not parties to the American Convention.²¹

How Can the Inter-American System Respond to New Attacks?

To address the instances of pushback and resistance levied by nationalist governments, the Court (and the Commission) should certainly not back down.²² It is the job of human rights institutions to hold states accountable for their human rights violations, which means making governments uncomfortable. But in an era of democratic retrenchment and the rise of populist and nationalist governments, human rights institutions should adopt strategic mechanisms to continue their work and even enhance their authority.²³ More significantly, it is important to distinguish state discomfort that is grounded in lack of commitment to human rights from discontent that is triggered by the human rights institutions’ stepping beyond their mandate.

One way to address the current (and future) attacks on the inter-American system is to strive for a clearer delineation of the spheres of competence among the different actors, and to review the avenues of interaction between states and regional human rights bodies. Against the intrusive jurisprudence mentioned above, there are recent examples of good practices in which the Inter-American Court has smartly calibrated its engagement with states and, conversely, in which states have interacted constructively with the Court. These examples may show a way forward and help shield the system from attacks by governments that wish to undermine the human rights regime.

The primary demand of the five governments’ letter seems to be more autonomy for states. One way in which the Inter-American Court may effectively provide such space without renouncing its critical role as a regional human rights arbiter is to grant states “constrained deference.”²⁴ Under this model, the Inter-American Court would reaffirm established doctrines—e.g., the incompatibility of domestic measures that promote impunity with the American Convention—while setting the parameters within which national courts must review domestic measures. For example, in 2018, the Inter-American Court was asked to review the presidential pardon granted on humanitarian grounds to former Peruvian dictator Alberto Fujimori. Petitioners asked the Court to declare that the presidential pardon *lacked any legal effect*, in line with the Court’s doctrine on the incompatibility of amnesty laws with the American Convention.²⁵ Yet the Court refused to do so. Instead, it ordered Peru to set up a process by which domestic courts would review the merits of the presidential decision under both Peruvian constitutional norms and inter-American human rights standards. The Court provided international human rights standards under which an individual convicted for crimes against humanity may legally be pardoned, but refused to act as a regional constitutional court because it declined directly to apply those standards itself. In October 2018, following the Inter-American Court’s decision, the Supreme Court of Peru opened a “conventionality control

²¹ See [Advisory Opinion OC-24/17](#), *supra* note 15.

²² See René Uruña, [Double or Nothing? The Inter-American Court of Human Rights in an Increasingly Adverse Context](#), 35 WISC. INT’L L.J. 398 (2018).

²³ See Alexandra Huneus, [When Illiberals Embrace Human Rights](#), 113 AJIL UNBOUND 380 (2019); Laurence R. Helfer, [Populism and International Human Rights Institutions: A Survival Guide](#), in HUMAN RIGHTS IN A TIME OF POPULISM: CHALLENGES AND RESPONSES (Gerald L. Neuman ed., forthcoming 2019).

²⁴ See Jorge Contesse, [Case of Barrios Altos and La Cantuta v. Peru](#), 113 AJIL 568 (2019).

²⁵ In previous decisions, the Inter-American Court had declared that amnesty laws “lack legal effect.” See [Barrios Altos v. Peru](#), *supra* note 12, para. 44.

procedure” to review the presidential pardon, and found that it lacked legal effect, pursuant to the Inter-American Court’s caselaw and Peruvian law.

This form of interaction has the virtue of holding states accountable without invading what states may see as a space of sovereign deliberation. In this sense, it is noteworthy that a leading human rights organization responded to the April 2019 letter to the Inter-American Commission by asserting that the letter was based on the “archaic” principle of sovereignty.²⁶ If anything, such a principle supports the whole system of international (human rights) law: states adopt human rights treaties and cede (part of) their sovereignty in exchange for active membership in the international community. To be sure, the limits of how much sovereignty states cede may always be a subject of contestation—and it will be international bodies’ burden to properly justify legitimate limitations on states’ sovereignty. In any event, denouncing the attacks by states (whether conservative or progressive) against international human rights institutions should not imply neglecting states’ sovereignty claims.

Another criticism that deserves attention is the inter-American system’s failure to give “strict application” to the sources of international law.²⁷ Although the Chilean minister failed to elaborate on the issue, the claim is not without merit. The Inter-American Court has in fact used the doctrine of sources of international law in expansive and often ungrounded ways, such as when it found that the principle of equality was a *jus cogens* norm (a doctrine that no other court has embraced),²⁸ and when the Court gave equal application to both soft law and hard law instruments. The same was true with the Commission’s use of precautionary measures without proper justification, which prompted harsh attacks from certain governments.²⁹ The Court’s new reading of Article 26 as allowing for the direct enforcement of social rights is arguably the latest in a series of uses and misuses of the sources of international law: having a treaty that directly addresses the matters at hand, the Court’s use of the *iura novit curia* principle is in fact leading the Court to render judgments that go beyond the Court’s powers.

Conclusion

As the inter-American human rights system turns fifty, it is important to take stock of the fundamental contribution it has made to the protection of human rights in Latin America. At the same time, however, it is critical to observe how the region’s political and legal landscape has changed. The surge of illiberal governments has also reached Latin America—and international institutions must be equipped to deal with them in strategic ways. The push to use human rights to solve almost all matters of social life—reflected in the notion that the Inter-American Court has become a regional constitutional court—should be resisted.³⁰ The fact that current judges of the Inter-American Court are raising concerns on these issues should be a warning sign, as it is one thing to disagree—even nastily, as seen in the practice of certain domestic courts—but a whole different thing to challenge the Court’s authority. The system may better shield itself if it saves its resources to address issues where the inevitable pushback can be denounced as simply coming from states that are unwilling or unable to protect their citizens’ human rights.

²⁶ *Id.*

²⁷ See [Statement from the Governments of Argentina, Brazil, Chile, Colombia and Paraguay to the Inter-American Commission on Human Rights](#), *supra* note 4.

²⁸ See Andrea Bianchi, [Human Rights and the Magic of Jus Cogens](#), 19 EJIL 491 (2008).

²⁹ The Inter-American Commission routinely issues precautionary measures on behalf of individuals who face imminent risk of irreparable harm to their right to life or physical integrity.

³⁰ As judge Sierra Porto has written, “the Inter-American Court is an *international* tribunal and, therefore, it is reasonable to expect that it acts as such.” [Poblete Vilches and Others v. Chile](#), Merits, Reparations and Costs, Concurring Opinion by Sierra Porto, J. para. 22 (March 8, 2018) (emphasis added). On the distinction between international and constitutional authority, see Jorge Contesse, [The International Authority of the Inter-American Court of Human Rights: A Critique of Conventionality Control](#), 22 INT’L J. HUM. RTS. 1168 (2018).