

Prelude

ROUNDUP

After seeming to evolve into a constitutional assemblage with wide recognition of its binding jurisdiction and a respectable compliance record, the Inter-American Human-Rights System has been undergoing a lethal crisis. It bore the brunt of the storm during the 2010s and has had to cope with ongoing aftershocks. Throughout, several regimes—most conspicuously the Venezuelan, Ecuadorian, Bolivian, and Nicaraguan¹ or “Bolivarian”² faction—fiercely attacked the main organs, namely, the Commission and the Court. They chastised each for overstepping its bounds and questioned its legitimacy.

Not surprisingly, high-profile figures spearheaded the onslaught. For example, Ecuador’s President, Rafael Correa, held the overseeing Organization of American States (OAS) accountable for the alleged transgressions and urged it

¹ Nicaragua has played a relatively minor role. Venezuela, Ecuador, and Bolivia have assumed, as this Part points out, somewhat different positions on the controversy. For instance, while Venezuela has decided to abandon the Inter-American Human Rights System altogether, Ecuador has advanced specific proposals for reform and Bolivia has mainly formulated general statements in support of the group’s position. Nonetheless, all four countries have insisted on presenting themselves as a bloc and, to the extent possible, coordinating their actions.

² The term “Bolivarian” alludes to Simón Bolívar (1783–1830), who played a leading role in the Spanish American wars of independence in the nineteenth century and who has become a symbol of the struggle to unify the southern continent. See Simon Romero, *Building a New History by Exhuming Bolívar*, N.Y. TIMES, Aug. 4, 2010, at A7. The Bolivarian Alliance for the Americas (*Alianza Bolivariana para los Pueblos de Nuestra América*), for instance, promotes the cooperation and integration of these Bolivarian nations with various Caribbean islands, such as Antigua and Barbuda, Cuba, Dominica, and Saint Vincent and the Grenadines. See Simon Romero, *A Candidate in Peru Tacks Toward Brazil’s Course*, N.Y. TIMES, May 1, 2011, at A10 (“[T]he Bolivarian Alliance for the Americas, or ALBA, [is a] Venezuelan-led political bloc that includes Bolivia, Cuba and Nicaragua.”).

to “revolutionize itself or disappear.”³ Bolivia’s Commander in Chief, Evo Morales, in turn, proclaimed that it should either “die at the service of the empire or be born again to serve the peoples of the Americas.”⁴

This Part will probe into these transcontinental challenges. Ultimately, it will read them as an appealing yet partly problematic call for the politicization of human rights. According to this undergirding assertion, internationally instated decision-makers should largely defer to governmental defendants, especially those implementing such entitlements within a broader project of popular emancipation. From the presently proposed perspective, they should probably grant latitude on any required policy, while monitoring for arbitrariness or abandonment, but must exactly enforce obligatory actions or abstentions.

REVOLT

Critics of the regional regimen did not limit themselves to delivering rousing rhetoric. Additionally, they condemned with unusual ferocity certain detrimental determinations.⁵ In the same breath, the dissenting coalition recommended depriving the Commission of the ability “to adopt precautionary measures for the protection of potential victims” or “to consider individual petitions” altogether.⁶ It strove to bar organizational constituents that had not ratified the relevant treaties, whether the United States or Canada, from nominating commissioners.⁷

The Ecuadorian emissaries articulated their own additional demands, such as the discontinuation of the so-called blacklist of delinquent nations under Chapter IV of the Annual Report of the actualizing agency and the relocation

³ Mabel Azcui, *El presidente Correa dice que la OEA debe “revolucionarse o desaparecer,”* EL PAÍS, June 5, 2012 (quoting Ecuadorian President Rafael Correa) (“La alternativa es ‘revolucionarse o desaparecer entendiendo que las instituciones no son fines sino medios para el buen vivir de nuestros pueblos.’”).

⁴ Mabel Azcui, *Evo Morales: “La OEA puede morir al servicio del imperio o renacer,”* EL PAÍS, June 4, 2012 (quoting Bolivian President Evo Morales) (“La Organización de Estados Americanos (OEA) está ante la disyuntiva de ‘morir al servicio del imperio o renacer para servir a los pueblos de América.’”).

⁵ See *infra* Chapter 6.

⁶ See Eva Sáiz, *La OEA, dividida ante la reforma de su órgano de derechos humanos,* EL PAÍS, Dec. 7, 2012 (“Las propuestas que más críticas han suscitado entre las organizaciones de derechos civiles se refieren a la limitación de la capacidad de la CIDH para procesar denuncias individuales [o] la imposibilidad para ordenar la adopción de medidas cautelares para garantizar la protección de víctimas potenciales . . .”).

⁷ See César Gaviria Trujillo, *Mordaza a un líder de la libertad de expresión,* EL PAÍS, Mar. 20, 2013.

of the seat of this institutional agent from Washington to Buenos Aires.⁸ Moreover, they submitted a written proposal in 2011 exhorting the overarching outfit (1) to embrace, “in the shortest order possible,” the “objective” of funding the scheme solely out of internal “resources”; (2) to forbid external donors right away from earmarking their “contributions” for specific purposes; and (3) to equalize the funds available to—as well as the exposure enjoyed by—the various institutionalized “Rapporteurships.”⁹ The submission stresses that the decisional bodies should treat every state equally. It foregrounds that they should uphold “not only civil and political but also economic, social, and cultural” guarantees.¹⁰

After formally complaining about the agents’ bias, “politicization,” and “partiality,”¹¹ Venezuela exercised its prerogative under Article 78 to denounce the American Convention on Human Rights.¹² In 2012, it filed a Denunciation Notice, signed by Foreign Minister Nicolás Maduro, who

⁸ See Eva Sáiz, *El ALBA afronta aislado la reforma del sistema de derechos humanos de la OEA*, EL PAÍS, Mar. 21, 2013 [hereinafter El ALBA]; Eva Sáiz, *La reforma del sistema de protección de derechos de la OEA no ha concluido*, EL PAÍS, Mar. 22, 2013; Eva Sáiz, *La OEA cierra en falso la reforma del su sistema de derechos humanos*, EL PAÍS, Mar. 23, 2013 [hereinafter La OEA].

⁹ Propuestas de la delegación del Ecuador sobre los temas “financiamiento”, “universalidad”, “asuntos de procedimiento” e “informe anual de la CIDH” [Proposals of the Delegation of Ecuador on the Topics “Financing,” “Universality,” “Procedural Matters,” and “Annual Report of the Inter-American Commission on Human Rights”], submitted to the Special Working Group on the Inter-American Commission on Human Rights and for the Strengthening of the Inter-American Human Rights System, OEA/Ser.G/GT/SIDH/INF. 46/11 (Dec. 5, 2011) (on file with author) (“Que el financiamiento de los órganos del Sistema Interamericano de Derechos Humanos—SIDH—desde los recursos propios de la OEA se establezca como una meta a cumplir en el menor plazo posible, para lo cual debe darse paso de inmediato a los trabajos internos”) (“[S]e propone que los órganos del Sistema Interamericano de Derechos Humanos establezcan como política sin excepción que las contribuciones voluntarias que reciban no puedan ser condicionadas o dirigidas”) (“Que la Comisión Interamericana de Derechos Humanos—CIDH—corrija el desbalance de recursos económicos y humanos con que cuentan sus Relatorías”).

¹⁰ *Id.* (“Asimismo, que el enfoque de dicho capítulo se centre no solo en derechos civiles y políticos sino también de los DESC.”).

¹¹ Propuestas de la delegación de República Bolivariana de Venezuela sobre el tema “Criterios para la construcción del Capítulo IV del Informe anual de la Comisión Interamericana de Derechos Humanos (CIDH)” [Proposals of the Delegation of the Bolivarian Republic of Venezuela on the topic “Criteria for the Interpretation of Chapter IV of the Annual Report of the Inter-American Commission on Human Rights (IACHR)”], submitted to the Special Working Group on the Inter-American Commission on Human Rights and for the Strengthening of the Inter-American Human Rights System, OEA/Ser.G/GT/SIDH/INF. 44/11 (Dec. 5, 2011) (on file with author) (“[L]a República Bolivariana de Venezuela [reitera] lo expresado en numerosas ocasiones sobre la politización y subjetividad que ha guiado a la CIDH”).

¹² See Organization of American States (OAS), Convención Americana de Derechos Humanos [American Convention on Human Rights], art. 78, Nov. 22, 1969, O.A.S. T.S. No. 36, 1144 U. N.T.S. 123.

now wears the presidential sash, and which became effective on September 6, 2013.¹³ Ecuador and Bolivia threatened to follow suit.¹⁴

“Other countries, such as Colombia or Costa Rica,” distanced themselves from these complaints, filings, or menaces and supported the embattled establishment.¹⁵ They “argued that the Commission must preserve its autonomous and international” characters.¹⁶ The United States’ chief diplomat John Kerry signaled a somewhat similar position on it:

We’ve heard a lot of talk about [it] lately, and I think that’s good, actually. Dialogue is . . . key [for democratization], and we want . . . the [instrumentality to] work better. But we [must] bear in mind that the Inter-American [actualization-apparatus] is already making a significant difference. It’s promoting representative democracy and fundamental freedoms, and these are principles that the [sponsoring institution’s membership champions]. When we advance [the democratic process] anywhere . . . , when we take a stand against restrictions on . . . rights, when we push for greater opportunity, we are acting in solidarity with all¹⁷

More directly, César Gaviria, a onetime occupant of the Colombian presidency and subsequent Secretary General of the underwriting entity, affirmed that the systemic alterations advocated for the arrangement by the rebels “would gravely debilitate” the installed commissioners in their labors and “enable” those in command locally “to disregard” basic liberties and “to restrict free expression.”¹⁸

¹³ Letter from Nicolás Maduro Moros, Minister of Foreign Affairs of Venezuela, to José Miguel Insulza, Sec’y Gen. Organization of American States (Sept. 6, 2012) (on file with author). In the Supporting Memorandum, Venezuelan authorities also generally condemned the Commission for its partiality and vagueness in determining which countries to subject to special monitoring (blacklist), for its consideration of hypothetical facts, and for the elusiveness of its criteria for precautionary measures and individual petitions. Nicolás Maduro Moros, Minister of Foreign Affairs of Venezuela, *Fundamentación que sustenta la denuncia de la República Bolivariana de Venezuela de la Convención Americana sobre Derechos Humanos presentada a la Secretaría General de la OEA* [Grounds Supporting the Denunciation of the American Convention on Human Rights by the Bolivarian Republic of Venezuela Presented to the General Secretariat of the Organization of American States] 1–3 (2012) (on file with author).

¹⁴ See Sáiz, *La OEA*, *supra* note 8; Sáiz, *El ALBA*, *supra* note 8; Sáiz, *supra* note 6; Mabel Azcui, *El eje bolivariano ataca la Comisión Interamericana de Derechos Humanos*, *EL PAÍS*, June 6, 2012.

¹⁵ Azcui, *supra* note 14 (“Otros países, como Colombia o Costa Rica, defendieron . . . la CIDH . . .”).

¹⁶ *Id.* (“Otros países, como Colombia o Costa Rica, defendieron que la CIDH debe mantener su carácter autónomo e internacional.”).

¹⁷ Press Release, John Kerry, U.S. Sec’y of State, Comments at Organization of American States (June 5, 2013) (on file with author).

¹⁸ Gaviria Trujillo, *supra* note 7 (“Sin embargo, si fueran implementadas, debilitarían gravemente a la Comisión y facilitarían que [los que están al mando localmente] puedan ignorar derechos fundamentales y limitar la libertad de expresión.”).

In March of 2013, the sponsor's plenary session overwhelmingly rejected the reform plan espoused by the Ecuadorian executive.¹⁹ Nevertheless, it resolved to instruct the Permanent Council to "continue" the conversation on central "matters related to strengthening" the structure.²⁰ In fact, Argentina had tendered and pressed for this resolution in response to a "threat by Ecuador" to jump ship too.²¹

Without doubt, the described showdown constituted a defining moment for the Western Hemisphere. It could have transformed or even subverted the existing paradigm. The region might have ended up with a multiplicity of micro-frameworks for the enforcement of the entitlements at issue or, in the worst-case scenario, regressed to a situation of barely national effectuation.

RUMINATION

The whole confrontation provides the worldwide community of nationalities, whether nationalized or not, and their members with a unique chance to reflect upon the nature of rights. This partial lucubration will seize the occasion and dare an initial step in that direction. It will ruminate questions like: What role do principles and politics play respectively in the vindication of such guaranties? To what extent may an ideologically diverse group of governments collaborate on this front? What place, if any, should these prosecutable pledges occupy in an emancipatory political program?

The proffered meditation will recast the intercontinental quarrel as a philosophical disputation on the cardinal characteristic of the concerned commitments. It will tease out of the protestation of the leftist alliance the argument that these amount to progressive politics. From this prism, the elected leadership sets the political agenda, and nationally or transnationally invested adjudicators should respond supportively rather than critically.

This reflection will initially identify the underlying claim. It will analyze three alternative formulations in terms of their relevance to today's transnational debate on any human right, as well as their accuracy. The next two chapters will contemplate whether the claimants are primarily (2) deploying

¹⁹ Sáiz, *La OEA*, *supra* note 8.

²⁰ *Id.* (quoting from the "final text" of the resolution submitted by Argentina and adopted by the Permanent Council of the OAS) ("El bloque del ALBA . . . consiguió . . . deslizar en el texto final un llamamiento a su Consejo Permanente para que 'continúe el diálogo sobre los aspectos fundamentales para el fortalecimiento del SIDH.'").

²¹ *Id.* ("La amenaza de Ecuador, a última hora de la noche, de abandonar el sistema provocó que Argentina presentara una nueva versión de un apartado que contentara definitivamente a los países del ALBA en su exigencia de dejar abierto el proceso de revisión.").

the notions of sovereignty and nonintervention, or (3) repudiating a number of discrete decisions issued by the responsible forums. Upon discarding these twinned possibilities, the reflective study will interpret the assertion under analysis instead as (4) a plea for the politicization of the pondered judicable promises. Inevitably, this interpretation will assume the form of a reconstruction of the actual argumentation.

Then, the contemplation will assess the claim. It will (5) refuse to associate the examined entitlements exclusively with their corresponding norms and (6) recognize their crucial though far from exhaustive political or goal-oriented dimension. After underscoring the significance of both (1) precept and (2) policy, the contemplative deliberation will (7) contend that officials deserve deference with respect to the latter but much less than the dissidents seek. It will next (8–10) illustrate the point by exploring the exercise of free speech and of the guaranty of healthcare in a series of concrete controversies.

Beyond reviewing the entire discussion, the “Postlude” will venture some concluding thoughts. First, as a collectivity deepens its engagement on behalf of rights, it ordinarily relies heavily on policy and consequently widens its margin of discretion. Regardless, tribunals should not shirk their duty to control for capriciousness or inaction. Meanwhile, they should not neglect to keep in check any direct normative violation.

Secondly, the paramount official quest for societal justice sometimes collides with or trumps these entitlements. Nonetheless, it does so very exceptionally. Therefore, a polity profoundly committed to the creation of a just society neither needs nor merits a free pass on them.

Thirdly, the self-styled “Bolivarian Axis”²² and its opponents appeared to agree that these guaranties must involve either deontological principles or

²² As President of Venezuela, Hugo Chávez often used the expression “Bolivarian Axis” (“eje bolivariano”) to refer to his alliance with like-minded regimes in the region. See Javier Lafuente & Carlos E. Cué, *Los líderes iberoamericanos apoyan a Santos y el proceso de paz*, EL PAÍS, Oct. 30, 2016 (“Durante muchos años, con Hugo Chávez, Venezuela fue el gran protagonista político de Latinoamérica por su enorme influencia en el llamado eje bolivariano . . .”). He thus played sardonically on the negative connotation of the word “axis.” In fact, he even declared himself part of the “axis of evil,” mocking the rhetoric of his United States counterpart George W. Bush. See, e.g., *Chávez se incluye en el eje del mal*, LA NACIÓN (June 28, 2010). The denomination “Bolivarian Axis” in this sense dates back at least to 2005. See generally Mercedes Gallego, *Comienza a llegar la primera ayuda federal a las zonas devastadas por el “Katrina,”* ABC, Apr. 9, 2005, (“Fidel Castro joined . . . the initiative launched by the ‘Bolivarian Axis,’ which his friend, Colonel Hugo Chávez, heads.”) (“Fidel Castro se sumó . . . a la iniciativa impulsada por el ‘eje bolivariano’ que encabeza su amigo, el coronel Hugo Chávez . . .”); see also RICHARD LAPPER, *Venezuela and the Rise of Chavez: A Background Discussion Paper*, COUNCIL ON FOREIGN REL., pt. 3.3 (Nov. 22, 2005) (“Chavez talks about building a Bolivarian axis in Latin America.”).

teleological politics. In addition, they have seemingly converged upon a utopianism of sorts, pursuant to which the administration and the judiciary should approach such safeguards hand in hand with one of these authoritative units leading forward and the other tagging along. Apparently, the disagreement boils down to whether a judge should happily yield to the executive or legislative branch as an expert on policy or vice versa insofar as her expertise lies in the construal of norms.

As previously noted, however, any such guaranty simultaneously touches upon precepts and policies. Furthermore, political and judicial (or quasi-judicial) authorities partake coequally in its safekeeping. They ineluctably engage in a power struggle in this domain and must accordingly accept conflict as a way of life.