

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

### THE CRUCIAL ROLE OF HUMAN RIGHTS NGOS IN THE INTER-AMERICAN SYSTEM

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Since the explosion of the human rights movement in the early 1970s, civil-society organizations have played a key role in the inter-American human rights system (IAS). In the era of dictatorships, they provided the information necessary for the Inter-American Commission to be able to act in the face of uncooperative states. When democracy returned to the region, these organizations grew in number, and their role within the IAS likewise expanded. In particular, a set of organizations that focused on legal strategies and the activation of regional human rights protection mechanisms cropped up. These organizations have, at a more abstract and general level, contributed to the juridification of human rights struggles and ultimately to the creation of a legal field. They have also largely set the agenda of the IAS, although the agenda-setting power has been limited to a small number of organizations that constitute the system's "repeat players." In a manner befitting their systemic importance, these organizations have tried to make sure the organs of the IAS run smoothly, and to defend them when they come under attack. This essay explores the different roles that human rights NGOs have played in the history of the IAS and suggests that the strategy of increasing juridification that they have pursued since the region's return to democracy might have reached its limits.

#### *No Organizations in Sight: The Origins of the IAS*

The influential role that human rights NGOs have come to play in the IAS is not a product of institutional design but rather a feature that developed once the system was up and running. In fact, there was no noteworthy civil-society participation in the series of conferences and meetings that gave rise to the two main organs of the IAS—the Inter-American Commission and the Inter-American Court of Human Rights. Nevertheless, a particular openness toward civil-society organizations is observable since the Commission's early days. At its very first session, the commissioners decided to "request or accept the cooperation of organizations ... interested in the promotion or protection of human rights."<sup>1</sup> Although the call to cooperation was premature when it was rendered in 1960, it did not go unheeded once human rights mobilization grew.

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<sup>1</sup> Inter-Am. Comm'n on Human Rights, Report on the Work Accomplished during its First Session (October 3 to 28, 1960), OEA/Ser. L/V/II.I Doc. 32, at 15 (Mar. 14, 1961).

### *Dictatorships and the Emergence of Human Rights Mobilization*

It is well-acknowledged that human rights mobilization on the continent began as a response to the exceptional repression deployed by the regimes of the Southern Cone in the early 1970s.<sup>2</sup> Clearly, such mobilization around human rights did not emerge in a vacuum; rather, it came at a time of rapid multiplication of human rights organizations across the globe.<sup>3</sup> In other words, a Latin American human rights network could emerge quickly because some parts of the network—for instance, Amnesty International—were already in place before the 1973 military coup d'état in Chile.

The rise in importance of the work of the Commission—the sole organ of the IAS in operation until 1979—and the emergence of human rights NGOs went hand in hand. Although the Commission had scored some diplomatic success in the 1960s, mostly owing to its work in the Dominican Republic,<sup>4</sup> its ability to play any kind of meaningful role depended on state cooperation. Dictatorial regimes were not only uncooperative; they also followed a strategy of denial that could only be countered with information. Accordingly, faithfully documenting the actions of the regime and bringing this information to the Commission became the primordial role of human rights organizations for the IAS in the era of dictatorships. In turn, by publicly acknowledging the importance of such organizations, the Commission gave legitimacy and publicity to their actions—dispelling the notion advanced by dictatorial regimes that such organizations were merely leftist outfits looking to discredit Right-wing governments.

### *Democratization and the Flourishing of Human Rights NGOs*

The democratization process of the late 1980s did not entail the demise of the human rights movement, but rather its moment of spectacular growth. The contrast between available political opportunity structures for mobilization under dictatorship and under democracy could hardly have been starker: repression ceased or diminished, substantially lowering personal risk to participants; many former activists now found themselves in positions of power; there was unprecedented openness toward human rights claims; and power structures were in flux.<sup>5</sup> The sheer growth in the number of organizations is a testament to the human rights boom in the region. By 1997—less than twenty-five years after the human rights movement kicked off in the region—over three thousand NGOs had been created to address human rights issues.<sup>6</sup>

The agenda of the human rights movement in Latin America—enriched by the women's movement, peasant organizations, and the indigenous movement—followed two broad lines. While some groupings concentrated their efforts on justice and truth for the crimes committed by the military dictatorships of the 1970s and 1980s, others began formulating human rights claims to counter the routine violence and exclusion that the vulnerable and dispossessed had long suffered.<sup>7</sup> Thus, mobilization for the rights of indigenous peoples,

<sup>2</sup> EDWARD L. CLEARY, [THE STRUGGLE FOR HUMAN RIGHTS IN LATIN AMERICA](#) (1997).

<sup>3</sup> Samuel Moyn, [The Return of the Prodigal: The 1970s as a Turning Point in Human Rights History](#), in [THE BREAKTHROUGH: HUMAN RIGHTS IN THE 1970s](#) (Jan Eckel & Samuel Moyn eds., 2014); MARGARET E. KECK & KATHRYN SIKKINK, [ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS](#) (1998).

<sup>4</sup> Durward V. Sandifer, [The Inter-American Commission on Human Rights in the Dominican Republic - June 1965 to June 1966](#), in [THE DOMINICAN REPUBLIC CRISIS 1965: BACKGROUND PAPER AND PROCEEDINGS OF THE NINTH HAMMARSKJÖLD FORUM](#) (John Carey ed. 1967).

<sup>5</sup> CHARLES TILLY & SIDNEY TARROW, [CONTENTIOUS POLITICS](#) (2015).

<sup>6</sup> CLEARY, *supra* note 2, at 62.

<sup>7</sup> Martín Abregú, [Human Rights for All: From the Struggle Against Authoritarianism to the Construction of an All-Inclusive Democracy - A View from the Southern Cone and Andean Region](#), 8 SUR INT'L J. HUMAN RIGHTS 7 (2008).

afro-descendants, peasants, street children, women, and migrants gained ground, and issues such as police brutality, the deplorable condition of the criminal justice system, and the violence unleashed against journalists and social activists in the region were also brought to light.

### *Contributing to the Creation of a Human Rights Field*

In the era of democracy, human rights NGOs helped create a vibrant human rights field in the region—that is, they contributed to the greater juridification of human rights struggles. The increased tendency to frame social issues in human rights terms and to attempt to channel them through legal institutions became possible because of two important developments within the IAS: the entry into force of the American Convention on Human Rights (ACHR), and the start of operations of the Court. The existence of a binding international treaty and a judicial organ entrusted with the interpretation and application of its provisions were essential ingredients in the creation of a human rights field.<sup>8</sup> However, human rights NGOs also had a critical role to play in this process.

The first contribution of human rights NGOs to the juridification of human rights struggles was the very act of invoking human rights norms to denounce state action in the era of dictatorships. This was already an innovation of sorts, considering that it was not common practice to frame claims in human rights terms at the time that member states created the inter-American organs and the underlying treaty. Rights, which first made their appearance in the nineteenth-century liberal constitutions of the region, were considered rhetorical flourishes and not legally operative.<sup>9</sup> Accordingly, there was no stable world of legal professionals to routinely use and apply the language of rights.

Within the IAS, juridification intensified when organizations that favored legal strategies to attain their aims became more prevalent. Strategic litigation is the most “legal” of the strategies deployed by human rights organizations. It consists of selecting emblematic cases that deal with situations affecting a larger number of people in order to set a precedent, clear up the content and scope of a legal provision, or make a problem more visible. Many issues in the Americas—from amnesties for grave human rights violations to the right of indigenous peoples to have a say about activities in their ancestral lands—have been advanced, partially and in some instances even primarily through strategic litigation. This has given human rights NGOs in the IAS enormous agenda-setting power.<sup>10</sup>

### *The Agenda-Setting Power of Human Rights Organizations*

There are numerous ways in which human rights NGOs can influence the agenda of the IAS. For example, they can call or participate in public hearings within the Commission, provide information for the preparation of country visits or thematic and country reports, file amicus curiae briefs, and, as mentioned earlier, engage in strategic litigation. Importantly, however, agenda-setting is not something that every human rights organization is able to pursue. An organization must be a repeat player in order to be able to “identify long-term legal issues and short-term opportunities.”<sup>11</sup> Very few organizations active in the IAS have the know-how necessary to play such a role.

<sup>8</sup> Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 805 (1987).

<sup>9</sup> ROBERTO GARGARELLA, *LATIN AMERICAN CONSTITUTIONALISM, 1810-2010: THE ENGINE ROOM OF THE CONSTITUTION* 144 (2013).

<sup>10</sup> See Felipe González, *The Experience of the Inter-American Human Rights System*, 40 VICTORIA UNIV. WELLINGTON L. REV. 103 (2009) (stressing the role that NGOs play in litigation before the IAS); James L. Cavallaro & Stephanie Erin Brewer, *The Virtue of Following: The Role of Inter-American Litigation in Campaigns for Social Justice*, 5 SUR INT'L J. HUMAN RIGHTS 85 (2008).

<sup>11</sup> Antoine Vauchez, *Communities of International Litigators*, in THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION (Karen J. Alter et al. eds., 2013).

Given the economy of NGOs, there is always a risk that those topics that are “sexier” or better funded will receive attention over others that are arguably more worthy. It is difficult at this point to assess whether this has been the case within the IAS. However, absent human rights NGOs, many vulnerable populations would not have been able to voice their claims before the Commission or the Court in the first place. The costs of litigation and the duration of proceedings (decades, in some cases) suggest that NGO involvement will continue to be a logical necessity.<sup>12</sup> In general, the agenda of such organizations can be characterized as progressive—although this may be changing, as the essay by Rene Urueña in this symposium shows.<sup>13</sup>

### *Defenders of the System?*

The relationship between NGOs and the system’s organs should ideally have some element of reciprocity. Just as the Inter-American organs take human rights organizations and their claims seriously, the NGOs should take an interest in the long-term health and functioning of the IAS. Indeed, some human rights NGOs are aware of their systemic role. A clear example of this is the input they give during appointment processes. States are not known to always take a principled stance vis-à-vis the persons they nominate as commissioners or judges. This has led several NGOs to vet candidates and publicize the troubled past of some of the nominees. In 2015, together with actors from academia, they created an independent panel of experts that has monitored all appointment processes since then.

Human rights organizations also come to the aid of the IAS when states start to pose threats. After all, states often disagree with the system’s organs over specific cases or the manner in which powers and competences are exercised—particularly when socially sensitive issues are at stake.<sup>14</sup> A salient example of states’ attempt to curtail the powers of the system’s organs occurred during the controversially dubbed “Strengthening Process” of 2011–2014. Human rights NGOs participated actively within the official institutional bounds of the reform process itself, taking part in the meetings and advancing a position that would not weaken the organs of the system. They also lobbied state representatives, kept the public informed of the status of the discussions, and provided the legal community with insights into the possible repercussions of certain reform proposals.<sup>15</sup>

### *The Scenario Today*

The fiftieth anniversary of the ACHR is a moment for stocktaking, but also for inquiry into what the role of human rights organizations should be going forward. On the stocktaking front, the highly prominent role that human rights organizations have played in the IAS is not a characteristic that all human rights systems share, but it has certainly been a positive one thus far. Their track record speaks for itself—they have channeled the demands of persons whose concerns tend to be ignored, including women, peasants, indigenous peoples, afro-descendants, migrants, children, prisoners, and detainees. Moreover, they have contributed to making human rights into a language that is spoken broadly. Finally, they have given back to the system by acknowledging their responsibility to keep it in good health and protect it from those who would weaken it.

<sup>12</sup> The existence of the Inter-American Defense Fund is a welcome development but an insufficient one to democratize access.

<sup>13</sup> Rene Urueña, *Evangelicals at the Inter-American Court of Human Rights*, 113 AJIL UNBOUND 360 (2019).

<sup>14</sup> 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).

<sup>15</sup> See, e.g., *The Reform of the Inter-American Commission on Human Rights*, APORTES DPLF (Apr. 2014); *Reflections on Strengthening the Inter-American Human Rights System*, APORTES DPLF (Mar. 2012).

Going forward, it would be desirable for human rights organizations to continue contributing along these lines, but their success is far from guaranteed. Again the IAS seems to be in flux: the relatively well-established consensus on the importance of human rights, democracy, and the rule of law is no longer as stable as it once seemed;<sup>16</sup> the system's organs have entered the tricky terrain of social and economic rights;<sup>17</sup> and some strands of religious conservatism—although certainly not all—are willing to damage the system to uphold traditional views on marriage and reproductive or women's rights.<sup>18</sup> Most of the onus of how to deal with these new scenarios is on the inter-American organs themselves. If they are too cautious, they risk becoming irrelevant; if they are too bold, they may set off an inter-American version of the U.S. “culture wars.”<sup>19</sup>

If human rights NGOs wish to continue playing a critical role within the IAS, they do not need to throw out their playbook, but they might be well-advised to tweak it. In particular, their vigilance in the face of creeping authoritarianism will continue to be as necessary as ever. Populist leaders of the Left and Right are attacking the institutions of liberal democracy, making a principled stance on the independence of the judiciary, the separation of powers, and freedom of the press as important now as ever. In addition, although the desire to keep enlarging the human rights agenda is understandable, NGOs would do well to continue dedicating energy to constraining the Hobbesian tendencies of the state. After all, state violence is a problem that lends itself well to human rights framing.

There are other issues, however, where the strategy of increasing juridification of human rights struggles might have reached its peak. I am referring here to certain aspects of social and economic rights and the causes opposed by the well-organized conservative movement. Regarding the former, if the goal is to create a functioning social welfare system, a piecemeal approach to social and economic rights might end up being counterproductive. If anything, framework decisions should be pursued that continue pushing states toward the progressive realization of social and economic rights while at the same time allowing them the policy space to determine which interventions are most helpful or have the broadest impact.

Regarding the causes espoused by the conservative movement, the traditionally more progressive human rights NGOs should exercise caution on several fronts. Their legal strategies should be accompanied by more political forms of mobilization, or at least they should try to join forces with the political movements that are also driving such causes forward. In other words, a legal “win” should not be the only goal. NGOs should try to make allies of those who are on the fence on a matter, both before and after a judgment has been rendered. Although it seems unlikely that committed Evangelicals will ever see eye-to-eye with liberal progressives on certain matters, they should interact with civility and mutual respect, particularly if the ultimate goal is to keep the IAS relevant and functional for the next fifty years.

<sup>16</sup> This sometimes happens after democratic consolidation. See Wayne Sandholtz et al., *Backlash and International Human Rights Courts*, in *CONTRACTING HUMAN RIGHTS: CRISIS, ACCOUNTABILITY, AND OPPORTUNITY* 161 (Alison Brysk & Michael Stohl eds., 2018).

<sup>17</sup> *Poblete Vilches and Others v. Chile*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 349. (Mar. 8, 2018).

<sup>18</sup> Uruña, *supra* note 13.

<sup>19</sup> Jorge Contesse, *Resisting the Inter-American Human Rights System*, 44 *YALE J. INT'L L.* 179 (2019).