

# THE POLITICIZATION OF HUMAN RIGHTS: WITHIN THE INTER-AMERICAN SYSTEM AND BEYOND

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*The Inter-American Human Rights System is undergoing a life-threatening crisis. Several countries led by Venezuela, Ecuador, Bolivia, and Nicaragua have fiercely attacked the key institutions, i.e., the Commission and Court. One might alternatively construe the underlying challenge as resting on (1) the notions of sovereignty and nonintervention, (2) a repudiation of certain specific decisions, or (3) a call for the politicization of human rights. The third interpretation is the most accurate and interesting in terms of the current international debate on such entitlements. Human rights indeed possess a crucial, though non-exhaustive, political dimension. Ultimately, States deserve deference with respect to politics or policy, as opposed to principle, but far less than the dissident nations claim. A few concrete controversies around free speech and the right to health serve to illustrate the point.*

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## I. PRELUDE

After evolving into a quasi-constitutional regime with wide recognition of its binding jurisdiction and a respectable compliance record,<sup>1</sup> the Inter-American Human Rights System is presently undergoing a life-threatening crisis. Several countries—most conspicuously the “Bolivarian”<sup>2</sup> faction of Venezuela, Ecuador, Bolivia, and Nicaragua<sup>3</sup>—have fiercely attacked each of the two main organs, i.e., the Commission and the Court, for overstepping its bounds. Not surprisingly, high-profile figures have spearheaded the onslaught. For example, Ecuador’s ex-President, Rafael Correa, has held the sponsoring Organization of American States (OAS) responsible for the alleged overreaching and has urged it to “revolutionize itself or disappear.”<sup>4</sup> Bolivian President Evo Morales, in turn, has proclaimed that the entity must either “die at the service of the empire or be born again to serve the peoples of the Ameri-

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1. See generally ÁNGEL R. OQUENDO, *LATIN AMERICAN LAW* 250–51 (2d ed. 2011).

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. 3, 2010), <http://www.nytimes.com/2010/08/04/world/americas/04venez.html>. 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, (Apr. 30, 2011), <http://www.nytimes.com/2011/05/01/world/americas/01peru.html> (“[T]he Bolivarian Alliance for the Americas, or ALBA, [is a] Venezuelan-led political bloc that includes Bolivia, Cuba and Nicaragua.”).

3. Nicaragua has played a relatively minor role. Venezuela, Ecuador, and Bolivia, for their part, have assumed, as this Article 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. See *infra* Part I (Prelude).

4. Mabel Azcui, *El presidente Correa dice que la OEA debe “revolucionarse o desaparecer,”* EL PAÍS (June 5, 2012, 1:15 PM), [https://elpais.com/internacional/2012/06/05/actualidad/1338851707\\_700894.html](https://elpais.com/internacional/2012/06/05/actualidad/1338851707_700894.html) (quoting Ecuadorian President Rafael Correa).

cas.”<sup>5</sup> In this Article, I will probe into this transcontinental challenge and, ultimately, read it as an appealing, though partly problematic, call for the politicization of human rights. In other words, I will construe and appraise it as consisting in the assertion that international decision makers should largely defer to governments, especially to those implementing such rights or entitlements as part of a broader project of social emancipation.<sup>6</sup>

Critics of regional human-rights structures have not limited themselves to delivering rousing rhetoric. They have also condemned, with unusual ferocity, certain adverse determinations and unfavorable findings.<sup>7</sup> In the same breath, the coalition of dissenters has proposed, beyond depriving the Commission of the ability “to adopt precautionary measures for the protection of potential victims” or “to consider individual petitions” altogether,<sup>8</sup> barring States that have not ratified the principal human rights treaties, such as the United States and Canada, from nominating Commissioners.<sup>9</sup>

Ecuadorian authorities have advanced their own additional demands, such as the discontinuation of the so-called blacklist of delinquent regimes under Chapter IV of the Commission’s Annual Report and the relocation of the seat of the Commission from Washington to Buenos Aires.<sup>10</sup> Moreover,

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5. Mabel Azcui, *Evo Morales: “La OEA puede morir al servicio del imperio o renacer,”* EL PAÍS (June 4, 2012, 8:59 PM), [https://elpais.com/internacional/2012/06/04/actualidad/1338771573\\_435960.html](https://elpais.com/internacional/2012/06/04/actualidad/1338771573_435960.html).

6. This piece will generally use the terms “right” and “entitlement” interchangeably.

7. See *infra* Part II.B.

8. See Eva Sáiz, *La OEA, dividida ante la reforma de su órgano de derechos humanos*, EL PAÍS (Dec. 7, 2012, 3:56 PM), [https://elpais.com/internacional/2012/12/07/actualidad/1354913762\\_239436.html](https://elpais.com/internacional/2012/12/07/actualidad/1354913762_239436.html).

9. See César Gaviria Trujillo, *Mordaza a un líder de la libertad de expresión*, EL PAÍS (Mar. 20, 2013, 11:48 AM), [https://elpais.com/internacional/2013/03/20/actualidad/1363794515\\_610970.html](https://elpais.com/internacional/2013/03/20/actualidad/1363794515_610970.html).

10. See Eva Sáiz, *El ALBA afronta aislado la reforma del sistema de derechos humanos de la OEA*, EL PAÍS (Mar. 21, 2013, 8:36 PM), [https://elpais.com/internacional/2013/03/21/actualidad/1363822960\\_046935.html](https://elpais.com/internacional/2013/03/21/actualidad/1363822960_046935.html) [hereinafter Sáiz, *El ALBA*]; Eva Sáiz, *La OEA cierra en falso la reforma del su sistema de derechos humanos*, EL PAÍS (Mar. 23, 2013, 12:57 AM), [https://elpais.com/internacional/2013/03/22/actualidad/1363988807\\_701303.html](https://elpais.com/internacional/2013/03/22/actualidad/1363988807_701303.html) [hereinafter Sáiz, *La OEA*]; Eva Sáiz, “*La reforma del sistema de protección de derechos de la OEA no ha concluido*,” EL PAÍS (Mar. 22, 2013, 11:03 AM), [https://elpais.com/internacional/2013/03/22/actualidad/1363963857\\_946878.html](https://elpais.com/internacional/2013/03/22/actualidad/1363963857_946878.html).

they submitted a written proposal in 2011 urging the Organization of American States (1) to embrace, “in the shortest order possible,” the “goal” of funding the “Inter-American Human Rights System” 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 Commission’s various “Rapporteurships.”<sup>11</sup> In this very submission, Ecuador stressed that the authoritative bodies should treat “all states” equally and enforce “not only civil and political rights but also economic, social, and cultural rights.”<sup>12</sup>

After formally complaining about the Commission’s bias, “politicization,” and “partiality,”<sup>13</sup> Venezuela exercised its right under Article 78 to denounce the American Convention of Human Rights.<sup>14</sup> In 2012, it filed a Notice of Denunciation, which bears the signature of Nicolás Maduro, then Foreign Minister and now President, and which became effective on

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11. Propuestas de la delegación del Ecuador sobre los temas “financiamiento,” “universalidad,” “asuntos de procedimiento” e “informe anual de la CIDH,” submitted to the Special Working Group on the Inter-American Commission for 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) [hereinafter *Ecuador Proposals (Span.)*].

12. *Id.*

13. 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),” submitted to the Special Working Group on the Inter-American Commission for 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).

14. Org. of Am. States (OAS), Convención Americana de Derechos Humanos, art. 78, Nov. 22, 1969, 1144 U.N.T.S. 123, O.A.S.T.S. No. 36 [hereinafter *American Convention (Span.)*].

September 6, 2013.<sup>15</sup> Ecuador and Bolivia have threatened to follow suit.<sup>16</sup>

“Other countries, such as Colombia or Costa Rica,” have distanced themselves and supported the embattled establishment.<sup>17</sup> They have “argued that the Commission must preserve its autonomous and international character.”<sup>18</sup> Former U.S. Secretary of State John Kerry has signaled that the United States holds a somewhat similar position:

We’ve heard a lot of talk about the [Commission] lately, and I think that’s good, actually. Dialogue is a key part of democracy, and we want to make the [Commission] work better. But we need to bear in mind that the Inter-American Human Rights [S]ystem is already making a significant difference. It’s promoting representative democracy and fundamental freedoms, and these are principles that the OAS members champion. When we advance democracy anywhere in the region, when we take a stand against restrictions on fundamental rights, when we push for greater opportunity, we are acting in solidarity with all of the people of this region.<sup>19</sup>

More directly, César Gaviria, the onetime President of Colombia and Secretary General of the Organization of American

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15. Letter from Nicolás Maduro Moros, Minister of Foreign Affairs of Venezuela, to José Miguel Insulza, Sec’y Gen. of the Organization of American States (Sept. 6, 2012) (on file with author) [hereinafter *Venezuelan Notice of Denunciation (Span.)*]. 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 (i.e. blacklisting), for its consideration of hypothetical facts, and for the elusiveness of its criteria for precautionary measures and individual petitions. Nicolás Maduro Moros, Ministro de Relaciones Exteriores de la República Bolivariana de 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* 1-3 (2012) (on file with author) [hereinafter *Venezuelan Supporting Memorandum (Span.)*].

16. See Sáiz, *La OEA*, *supra* note 10; Sáiz, *El ALBA*, *supra* note 10; Sáiz, *supra* note 8; see also Mabel Azcui, *El eje bolivariano ataca la Comisión Interamericana de Derechos Humanos*, EL PAÍS (June 6, 2012, 2:27 AM), [https://elpais.com/internacional/2012/06/06/actualidad/1338964029\\_280541.html](https://elpais.com/internacional/2012/06/06/actualidad/1338964029_280541.html).

17. Azcui, *supra* note 16.

18. *Id.*

19. Press Release, John Kerry, U.S. Sec’y of State, Comments at Organization of American States (June 6, 2013).

States, has affirmed that the institutional alterations advocated by the discontented regimes “would gravely debilitate the Commission and would make it easier for governments to disregard basic rights and to restrict freedom of expression.”<sup>20</sup>

In March of 2013, the Organization of American States, in a plenary session, overwhelmingly rejected the reform plan espoused by the Ecuadorian authorities.<sup>21</sup> Nonetheless, it resolved to instruct its Permanent Council to “continue the dialogue on fundamental matters related to strengthening the Inter-American Human Rights System.”<sup>22</sup> In fact, Argentina had tendered and pressed for this resolution in response to a “threat by Ecuador . . . to abandon the System.”<sup>23</sup>

Without doubt, the described showdown constitutes a defining moment for the Western Hemisphere. It could transform or even subvert the existing human-rights order. The region could end up with a multiplicity of transnational micro-systems or, in the worst-case scenario, regress to a situation of merely national enforcement of rights.

The whole confrontation provides the international community with a unique opportunity to reflect upon the nature of human rights. This piece will seize the occasion and take a first step in that direction. It will ponder questions such as the following: What roles do principle and politics play, respectively, in the vindication of human rights? To what extent may an ideologically diverse group of nations work together on the implementation of such entitlements? What place, if any, should human rights occupy in an emancipatory political project?

This work will recast the transcontinental quarrel as a philosophical disputation on the nature of human rights. It will tease out of the protestations of the leftist alliance the argument that such entitlements amount to progressive politics. From this perspective, each country’s government sets the political agenda and judges, whether national or international, should respond supportively rather than critically.

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20. Trujillo, *supra* note 9.

21. Sáiz, *La OEA*, *supra* note 10.

22. *Id.* (quoting from the final text of the resolution submitted by Argentina and adopted by the Permanent Council of the OAS).

23. *Id.*

Part II will identify the underlying Bolivarian claim. It will analyze three alternative formulations in order to determine whether they construct this assertion accurately, as well as relevantly for today's international debate on human rights. Part II will first contemplate whether the claim rests primarily on (A) the notions of sovereignty and nonintervention, or (B) a repudiation of a number of discrete decisions issued by the Commission and the Court. Upon discarding these two possibilities, it will interpret the assertion, instead, as (C) a plea for the politicization of human rights. Inevitably, the interpretation will take the form of a reconstruction of the actual argumentation.

Part III will, in turn, assess the claim. It will (A) refuse to associate human rights exclusively with principles and (B) recognize the crucial, though far from exhaustive, political, or goal-oriented, dimension of these entitlements. After underscoring the importance of both principle and policy, Part III will (C) argue that state officials deserve deference with respect to the latter, but far less than the dissident nations seek. It will next (D) illustrate the point by examining the exercise of free speech and of the right to health in a series of concrete controversies.

Beyond reviewing the entire discussion, the Coda will venture some concluding thoughts. First, as a government deepens its engagement on behalf of human rights, it ordinarily relies more heavily on policy and, consequently, widens its margin of discretion. All the same, tribunals should not shirk their duty to control for arbitrariness. Nor should they neglect to keep in check any direct violation of principle.

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

Thirdly, the self-proclaimed Bolivarian Axis<sup>24</sup> and its opponents seem to agree that human rights must involve either

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24. 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. 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 U.S. counterpart, George W. Bush. See, e.g.,

deontological principles or teleological politics. In addition, they appear to have converged upon a utopianism of sorts, according to which the executive and the judiciary should approach these entitlements hand in hand, with one of the two institutions leading the way and the other one tagging along. The disagreement apparently boils down to whether the adjudicator should happily yield to the State—as an expert on policy, or vice versa, insofar as the judiciary’s expertise lies in the construal of norms. As already noted, however, human rights touch upon both principles and politics. Moreover, political and judicial authorities partake coequally in the safeguard of these entitlements. They ineluctably engage in a power struggle on this front and must, as a result, accept conflict as a way of life.

## II. CLAIM IDENTIFICATION

### A. *Sovereignty and Nonintervention*

On first impression, the dissident States within the Organization of American States appear to be asserting a traditional sovereignty and nonintervention claim. That is, they seem to be maintaining that they may sovereignly rule within their jurisdiction without outside interference and ultimately denying the legitimacy of international human rights. From this perspective, the community of nations has no business second-guessing how governments treat their citizenry.<sup>25</sup>

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*Chávez se incluye en el eje del mal*, LA NACIÓN (June 28, 2010), <http://www.lanacion.com.ar/1279345-chavez-se-incluye-en-el-eje-del-mal>. The denomination “Bolivarian Axis” in this sense dates back at least to 2005. See Mercedes Gallego, *Comienza a llegar la primera ayuda federal a las zonas devastadas por el “Katrina,”* ABC.ES (Apr. 9, 2005, 12:31 PM), [http://www.abc.es/hemero-teca/historico-04-09-2005/abc/Internacional/comienzo-a-llegar-la-primerayuda-federal-a-las-zonas-devastadas-por-el-katrina\\_61635063430.html](http://www.abc.es/hemero-teca/historico-04-09-2005/abc/Internacional/comienzo-a-llegar-la-primerayuda-federal-a-las-zonas-devastadas-por-el-katrina_61635063430.html) (“Fidel Castro joined . . . the initiative launched by the ‘Bolivarian Axis,’ which his friend, Colonel Hugo Chávez, heads.”); see also Richard Lapper, *Venezuela and the Rise of Chavez: A Background Discussion Paper*, COUNCIL ON FOREIGN REL. pt. 3.3 (Nov. 22, 2005), <https://www.cfr.org/background/venezuela-and-rise-chavez-background-discussion-paper> (“Chavez talks about building a Bolivarian axis in Latin America.”).

25. The British government has apparently complained about the European System of Human Rights along such lines. See, e.g., Estelle Shirbon, *British Minister Floats Quitting European Rights Convention*, REUTERS (Mar. 9, 2013, 2:15 PM), <http://www.reuters.com/article/us-britain-rights/british-minister-floats-quitting-european-rights-convention-idUSBRE9280FL201303>



At times, detractors have characterized the Bolivarian campaign in precisely these terms. For example, José Miguel Vivanco, Director of Human Rights Watch's Americas Division,<sup>26</sup> has portrayed it as a crusade, undertaken by "governments . . . nostalgic for sovereignty and for the principle of nonintervention," "to discredit and weaken the Commission."<sup>27</sup> Indeed, Vivanco has decried the whole effort as an attempt to undermine and, if possible, abolish the Inter-American Human Rights System.<sup>28</sup>

Occasionally, the pronouncements of the concerned countries appear to bear out this characterization. Venezuela's Notice of Denunciation, for instance, charges the Commission and the Court with "interventionist actions" and with the contravention of "basic and essential principles, which international law has amply consecrated, such as the principle of state sovereignty."<sup>29</sup> In each of its last two paragraphs, the document invokes, once again, the concepts of nonintervention and "sovereignty."<sup>30</sup> Similarly, the Supporting Memorandum brands some of the Commission's work "an affront to the sovereignty of the Venezuelan state."<sup>31</sup> Finally, it refers to "the legislative sovereignty of the nation" and to "the sovereignty" that "inalienably resides in the people."<sup>32</sup>

In reality, the dissenting governments are not predominantly basing their objections on the notions of state sovereignty and of nonintervention. They are pleading for reform,

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09 (The ruling "Conservative Party has long criticized the Strasbourg-based European Court of Human Rights (ECHR), which enforces the convention, as an encroachment on British sovereignty.").

26. In 2008, the Venezuelan government "apprehended" and "expelled" Vivanco after he and his Deputy Director, Daniel Wilkinson, "released a long report . . . documenting rights violations in Venezuela." Simon Romero, *Venezuela Expels 2 After Human Rights Report*, N.Y. TIMES (Sept. 19, 2008), <http://www.nytimes.com/2008/09/20/world/americas/20venez.html>; see also Clodovaldo Hernández, *Venezuela expulsada al director del informe crítico con Hugo Chávez*, EL PAÍS (Sept. 19, 2008, 2:59 PM), [https://elpais.com/internacional/2008/09/19/actualidad/1221775208\\_850215.html](https://elpais.com/internacional/2008/09/19/actualidad/1221775208_850215.html).

27. José Miguel Vivanco, *Derechos Humanos, Insulza, Brasil y el ALBA*, EL PAÍS (June 3, 2012, 2:17 PM), [https://elpais.com/internacional/2012/06/03/actualidad/1338747475\\_797065.html](https://elpais.com/internacional/2012/06/03/actualidad/1338747475_797065.html).

28. *Id.*

29. *Venezuelan Notice of Denunciation (Span.)*, *supra* note 15, at 2.

30. *Id.* at 9-10.

31. *Venezuelan Supporting Memorandum (Span.)*, *supra* note 15, at 2.

32. *Id.* at 2, 22.

not for the eradication of the existing human-rights apparatus. Significantly, the debate has taken place before a "Special Working Group" expressly tasked with "[s]trengthening the Inter-American Human Rights System."<sup>33</sup> If the clamor for change goes unheeded, the leftist bloc insists that it will not give up on the entitlements at stake, but rather create an alternative human-rights regime.<sup>34</sup>

Indicating a willingness to yield on sovereign privileges in favor of citizens' international entitlements, the aforementioned Venezuelan Notice of Denunciation itself describes (1) the ratification "of the American Convention of Human Rights" and (2) the institutionalization of "mechanisms" for "the promotion and protection of human rights" as "very important" for the "region."<sup>35</sup> In the same instrument, Venezuela takes pride in having ratified the treaty before any other State, in doing so "through a unilateral declaration," and in being the second country "to accept the [Inter-American] Court's jurisdiction."<sup>36</sup> In addition, it calls attention to the breadth of human rights enshrined in its own 1999 Constitution.<sup>37</sup>

Despite denouncing the American Convention, Venezuelan authorities commit, in their submission, to respecting and complying with "other mechanisms . . . for the promotion and protection of human rights . . . ."<sup>38</sup> Presumably speaking for themselves and for their allies in the region, they also "express the firm intention . . . to contribute to the construction of Our Own American System of Human and Popular Rights . . . ."<sup>39</sup> With these words, the document reiterates the pledge to build a new human-rights scheme upon the declared repudiation of the existing structures. Coincidentally, it also seems to reveal a certain skepticism about the possibility of ideologically diverse

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33. See, e.g., *Ecuador Proposals (Span.)*, *supra* note 11.

34. See Sáiz, *supra* note 8 (noting the warnings of the "presidents of Bolivia and Ecuador, Evo Morales and Rafael Correa, . . . that [their countries] might withdraw from the Inter-American System of Human Rights and that [they were] considering the creation of a similar body under the Union of South American Nations.").

35. *Venezuelan Notice of Denunciation (Span.)*, *supra* note 15, at 1.

36. *Id.*

37. *Id.*

38. *Id.* at 9.

39. *Id.* at 10.

polities working together in the enforcement of these entitlements.

Surely, Venezuela, Ecuador, Bolivia, and Nicaragua would have situated themselves differently if they intended to reject human rights as an affront to their sovereignty. They would have simply announced their impending denunciation of the Convention and maybe an eventual exit from the Organization of American States. Neither demands for reform nor professions of devotion, let alone vows to launch another system, would have preceded the announcement. Therefore, these nations are clearly not contesting the international enforceability of the entitlements in question against sovereign States.<sup>40</sup>

In any event, a sovereignty and nonintervention claim would fail to ignite a serious transnational discussion on human rights. Up to the middle of the last century, such an assertion might have appealed to many people. At present, it sounds much less attractive.

Many key treaties adopted since the end of the Second World War confirm that the global community has not only the authority but also the duty to stop a State from infringing upon citizens' freedoms.<sup>41</sup> These agreements reflect both an altered consensus and a quite attractive construction of the relationship among the world, the nation, and the individual. From this standpoint, an encroachment upon a person's fundamental entitlements in any country constitutes an international, rather than an internal affair.

More broadly, international law, as a whole, rests today on the notion of universal human rights. Such entitlements play a critical role in defining the sphere of legitimate action by global actors. Presaging this paradigm shift, the Charter of the United Nations opens with a pledge to:

reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal

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40. Granted, the dissident regimes might be engaging in deception when they represent themselves as reformists, as human-rights devotees, and as the builders-to-be of a parallel human-rights body. However, this Part seeks to interpret the group's contentions, not to divine its hidden designs.

41. *See, e.g.*, International Covenant on Civil and Political Rights, Dec. 16, 1966, 1966 U.S.T. 521, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom.<sup>42</sup>

This statement evokes a world community that is directly and thoroughly concerned with the basic entitlements of people everywhere.

In this regard, the fact that several nations so enraged by the work of the Inter-American Commission and Court feel nonetheless compelled to proclaim their attachment to human rights deserves attention. It demonstrates that such entitlements have attained a high degree of respectability and recognition. Indeed, they have come a long way in their relatively short history.

Of course, States usually have a duty to respect a specific human right only to the extent that they, as sovereigns, have agreed to do so by ratifying the relevant instrument, whether a treaty or the U.N. Charter itself.<sup>43</sup> By the same token, they may refuse to participate in any existing or prospective human-rights system. All the same, the Bolivarian faction does not realistically appear to be pursuing such a course of action. Nor would it attract much international scholarly attention if it were.

Incidentally, a nation would have to pay an extremely high price in order to exercise its sovereignty fully and abjure all human rights. It would probably have to relinquish its membership in the United Nations, as well as in most global and regional institutions and arrangements. Condemnation and perhaps sanctions from other countries would almost certainly follow.

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42. U.N. Charter pmb1.

43. See, e.g., *id.* at art. 2, ¶ 1 ("The Organization is based on the principle of the sovereign equality of all its Members."); *id.* at art. 2, ¶ 2 ("All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them . . ."); *id.* at art. 2, ¶ 7 ("Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state . . .").

Moreover, some human rights would continue to apply as peremptory norms (*jus cogens*).<sup>44</sup> To be sure, a nation may purport to render such entitlements inapplicable by isolating itself and turning its back on the rest of the planet. It would thus attain not an exemption for itself but, at best, the status of a conscientious objector or, at worst, that of a global outlaw.

More generally, an appealing conception of the State as a self-determining entity embedded in a complex and inextricable web of relations and commitments to individuals and collectivities has gradually, but decisively, displaced that of the State as an absolutely sovereign and self-contained unit. In this sense, nations may not treat their citizens as they see fit and expect to be left alone in so doing. Instead, they must honor their responsibilities to a wide array of private and public parties, both at home and abroad, while acting autonomously and resisting heteronomy or domination.<sup>45</sup>

Contemporary States, some might say, frequently violate their transnational duties, whether voluntarily assumed or externally imposed. At times, they deal with their citizenry no

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44. The Inter-American Court of Human Rights provides an illustrative example of a peremptory norm:

[T]he principle of equality before the law, of equal protection before the law and of non-discrimination constitutes *jus cogens*. It sustains the entire juridical structure of the national and international public order and permeates, as a fundamental principle, the legal system as a whole. . . . At the current stage of development of international law, the fundamental principle of equality and non-discrimination has entered the realm of *jus cogens*.

Condición Jurídica y Derechos de los Migrantes Indocumentados, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, ¶ 101 (Sept. 17, 2003).

45. See, e.g., IRIS MARION YOUNG, *Two Concepts of Self-Determination, in GLOBAL CHALLENGES: WAR, SELF-DETERMINATION, AND RESPONSIBILITY FOR JUSTICE* 50-51 (2007). Young writes that “self-determination for peoples means that they have a right to their own governance institutions through which they decide on their goals and interpret their way of life.” *Id.* at 50. “Because a people stands in interdependent relations with others,” she cautions, “a people cannot ignore the claims and interests of those others when their actions potentially affect them.” *Id.* at 51. Furthermore, Young declares: “A relational concept of self-determination for peoples does not entail that members of the group can do anything they want to other members without interference from those outside.” *Id.* at 57. “It does entail,” she concludes, “that insofar as there are global rules defining individual rights and agents to enforce them, all peoples should have the right to be represented as *peoples* in the fora that define and defend those rights.” *Id.*

less brutally than their pre-1945 predecessors did. The emergence of a consensus that human rights categorically apply to all nations has not ushered in an era of full compliance.

Furthermore, so the argument may run, national regimes often manipulate—sometimes with the blessing of the United Nations—the human-rights discourse to achieve a dishonorable or even despicable end. Thus, they may proceed to sanction, strike, or invade their enemies, while exempting, exonerating, and defending their cohorts, as well as themselves. Nevertheless, anyone, especially a victim, may now appeal to the very same entitlements to decry their manipulation, as well as their violation, and to struggle for their vindication.

In sum, an attempt to resuscitate the sovereignty model and recast the Bolivarian claim accordingly would hardly come across as persuasive or interesting. After all, nations may not ignore human rights at will. Such entitlements bind States crucially and compulsorily. The dissident members of the Organization of American States must and should acknowledge as much. While they do occasionally invoke their prerogatives as sovereigns, as well as the notion of nonintervention, they evidently are not—and definitely should not be—negating the mandatory character of human rights.

### B. *Decision Making*

Alternatively, the Bolivarian Axis might merely be expressing disapproval of the decision making in the Inter-American Human Rights System. It might feel that the responsible organs recurrently err when they approach particular controversies. The discontented nations might be rallying precisely and principally against these errors.

Indeed, the leftist alliance has taken vigorous exception to certain omissions by the Court and the Commission. Ecuador's Ex-President Rafael Correa, for example, has broadly declared the following:

Unfortunately, the Inter-American System has not lived up at all to our epoch's challenges. It has failed to offer solutions or to take a firm and decisive position with respect to problems such as the existing colonies in the Americas, namely, the Malvinas Islands,

or the criminal embargo against a sister nation, that is, Cuba.<sup>46</sup>

The System, according to Correa, has not even done “simple things like trying the individuals responsible for the *coup d’état* against [Honduran] President Manuel Zelaya.”<sup>47</sup>

Similarly, Venezuela’s government complained, in its Notice of Denunciation, about the Commission’s silence in the face of three massacres that occurred in Venezuela in 1982, 1986, and 1989. It also condemned the denial of precautionary measures in favor of former President Hugo Chávez during the 2002 *putsch*. Finally, Venezuelan authorities censured the body’s alleged implicit endorsement of the insurrectionist regime.<sup>48</sup>

The Commission and the Court may well have fallen short in some or all of these instances. All the same, they evidently never received a formal complaint that would have enabled them fully to adjudicate on the underlying issues. Hence, one can hardly speak of a mistaken determination.

Surely, the Commissioners should have awarded any preliminary remedy requested against Chávez’s deposition in 2002. Realistically, though, they did not have enough time to do so, as the overthrown leader returned to power within forty-eight hours.<sup>49</sup> As a result, the matter became moot almost instantly.

Moreover, the Commission scheduled, “immediately after the institutional rupture of April of 2002,” a visit to Venezuela for May of 2002.<sup>50</sup> Ultimately, on April 13, two days after the insurrection, it issued a press release “calling for a prompt restoration of the rule of law and of the democratic system of government.”<sup>51</sup> Conspicuously, however, the Commissioners

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46. Azcui, *supra* note 4 (quoting Ecuadorian President Rafael Correa).

47. *Id.*

48. See generally *Venezuelan Notice of Denunciation (Span.)*, *supra* note 15, at 4-5.

49. See generally Larry Rohter, *Venezuela’s 2 Fateful Days: Leader Is Out, and In Again*, N.Y. TIMES (Apr. 20, 2002), <http://www.nytimes.com/2002/04/20/world/venezuela-s-2-fateful-days-leader-is-out-and-in-again.html>.

50. Inter-Am. Comm’n H.R., *Democracia y derechos humanos en Venezuela*, pt. 1, ¶ 3 (Intro.), OEA/Ser. L/V/II (Doc. 54) (Dec. 30, 2009).

51. Press Release, Inter-Am. Comm’n H.R., *Sobre los sucesos de Venezuela* (Apr. 13, 2002).

did not demand the reinstatement of the legitimate head of state.<sup>52</sup>

The Organization of American States itself and some of its other organs responded to the rebellion right away. For example, the Permanent Commission quickly adopted an unequivocally condemnatory resolution. It decried “the subversion of the constitutional order in Venezuela” and pressed for “the normalization of the democratic institutions . . . within the framework of the Inter-American Democratic Charter.”<sup>53</sup> Presumably, this plea did entail the restitution of Chávez and his administration.

Once again, the Inter-American Commission and Court did not really confront a concrete case that they could have resolved on a timely basis and that they might have in some way bungled. Nevertheless, the Commission could have acted, *sua sponte*, through its investigative and reporting powers in order to reprove, *ex post facto*, the 2002 Venezuelan insurrection. It could have done as much in relation to the British occupation of the Malvinas Islands, the U.S. embargo on Cuba, the 2009 coup against Honduras’ then President Zelaya, and the killings in Venezuela during the 1980s. The Bolivarian faction might be lamenting the Commissioners’ failure to do so.

Venezuela’s President Chávez himself pointed precisely to the Commission’s 2010 Report when he had his administration repudiate the American Convention of Human Rights. He focused on what the Commissioners had written rather than on what they had neglected to mention. In particular, they had “alerted to the deterioration of democracy in Venezuela.”<sup>54</sup>

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52. The document merely “deplores the removal . . . of the highest judicial officials and of independent officials of the Executive Branch, as well as the suspension of the terms of the members of the Legislative Branch.” *Id.* It additionally calls for the “organization of elections.” *Id.*

53. Org. of Am. States [OAS], Permanent Council, CP/RES. 811 (1315/02), *Situación en Venezuela* (Apr. 13, 2002).

54. See generally Maye Primera, *Chávez ordena la salida de Venezuela de la CIDH*, EL PAÍS (Feb. 26, 2010, 10:21 AM), [https://elpais.com/internacional/2010/02/26/actualidad/1267138801\\_850215.html](https://elpais.com/internacional/2010/02/26/actualidad/1267138801_850215.html). The 2010 Report included Venezuela, in its controversial Chapter IV, among the “countries that drew special attention from the Commission during the . . . year.” Inter-Am. Comm’n H.R., *Inf. anual 2010, Ch. IV: Desarrollo de los derechos humanos en la región*, at 351, OEA/Ser. L/V/II., doc. 5 corr. 1 (Mar. 7, 2011) [hereinafter Inter-Am. Comm’n H.R., *Annual Rpt. 2010 (Ch. IV) (Span.)*].



Chávez riposted in unambiguous terms to the document: “It’s pure garbage. We should prepare to denounce the treaty through which Venezuela adhered (or whatever) to that nefarious Inter-American Commission on Human Rights and to get out of there because it’s not worth it.”<sup>55</sup>

Without doubt, the Commission could have toned down its censure of Venezuela. However, it did not use particularly harsh words. The comments on the violations imputed to Venezuela parallel those on the infringements attributed to the other countries listed in Chapter IV that year: Colombia, Cuba, and Honduras.<sup>56</sup>

Specifically, the Commissioners concluded by urging Venezuela not only to “[r]efrain from undertaking reprisals against, or using the State’s punitive power to intimidate or sanction, people based on their political opinions,” but also to “guarantee sufficient space for pluralism within the democratic process.”<sup>57</sup> Nonetheless, the Report also focuses on the positive. For instance, it “recognizes and appreciates the progress achieved in the realm of economic, social, and cultural rights”<sup>58</sup> and includes an entire subsection on the topic,<sup>59</sup> highlighting the regime’s accomplishments in reducing poverty, inequality, and unemployment.<sup>60</sup>

Of course, the reprimand just referred to, like the previously enumerated omitted condemnations, does not constitute a judicial or quasi-judicial decision. Such general pronouncements instead form part of the Commission’s reporting function. They do not bind the targeted State, or anyone else, and typically move it to remonstrate, but not to rock the boat.

In fact, the dissenting bloc regards these perceived blunders in the Commissioners’ reports as a sign of a deeper systemic flaw, namely a misconception of the politics of human

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55. Primera, *supra* note 54 (quoting Venezuelan President Hugo Chávez).

56. See generally Inter-Am. Comm’n H.R., *Annual Rpt. 2010 (Ch. IV) (Span.)*, *supra* note 54.

57. *Id.*, ¶ 836(2).

58. *Id.*, ¶ 834.

59. *Id.*, ¶ 829-35 (§ VI) (“Derechos económicos, sociales y culturales”).

60. *Id.*, ¶¶ 831-32; see also *id.* at 533, ¶ 612 (“Similarly, the Commission’s 2009 Report stressed the important achievements with respect to economic, social, and cultural rights . . .”).

rights, in the sense expounded in the next section.<sup>61</sup> It believes that Inter-American institutions should themselves embrace its perspective on such entitlements. From this standpoint, they should, at the very least, refrain from vituperating, let alone blacklisting, progressive governments.

In any event, the rest of the world would surely not have much of a reason to pay attention to national protestations against the Inter-American Human Rights System's critical reporting. If it took notice of them at all, it would likely regard them as possessing mostly local interest. A clamor by Latin American left-wing regimes against the Commission's reports would indubitably reveal a universal verity, but a banal one at that: namely, that countries dislike criticism.

All the same, the Venezuelan state, in its Notice of Denunciation and in its Supporting Memorandum, did not concentrate on the Commissioners' reports, but rather on six concrete cases. It accused the Commission and the Court of admitting petitions on matters that national tribunals either were still examining or never had the opportunity to consider.<sup>62</sup> Venezuela's authorities deplored a supposed contravention of the exhaustion-of-domestic-remedies requirement.<sup>63</sup> In addition, they averred that in *Usón Ramírez v. Venezuela*, a recording of the judicial deliberations revealed that the Inter-American Court of Human Rights arrived at its judgment "without listening to the pleading, to the parties, or even to the answers to its own questions."<sup>64</sup>

Unlike the declarations of the Commissioners as investigators and reporters, the adjudicative holdings of the Commission and the Court do obligate the State to conform to them.<sup>65</sup> As a consequence, they usually matter a great deal to the concerned government. Pertinently, Venezuela, Ecuador, Bolivia, and Nicaragua—like virtually all other Latin American coun-

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61. See *infra* Part II.C.

62. *Venezuelan Notice of Denunciation*, *supra* note 15, at 4.

63. *Id.*

64. *Id.* at 7.

65. See, e.g., American Convention (Span.), *supra* note 14, at art. 51(2) ("The Commission shall make relevant recommendations and set a deadline for the State to adopt the measures due in order to remedy the alleged violation."); *id.* at art. 68(1) ("The State Parties to the Convention commit to complying with the Court's decision in any case in which they are parties.").

tries—originally not only ratified the American Convention but also acknowledged the binding jurisdiction of the Court.<sup>66</sup>

However, the grievances aired about discrete adjudicative determinations do not seem to lie at the heart of the Bolivarian clash with the Inter-American Human Rights System. They would ordinarily inspire a motion for reconsideration, not a challenge to the legitimacy of the regime as a whole. After all, participating in a judicial scheme entails—beyond attempting to marshal the strongest arguments available in each lawsuit in the hope of carrying the day—accepting the possibility of defeat and of having to comply despite disagreeing with the tribunal. Even if the disputed decisions signaled a larger pattern of mistake and unfairness, they might justify an entreaty to replace the membership of the Commission and the Court, but not to overhaul the entire human-rights edifice.

Besides, the contested cases barely add up to one percent of the caseload against Venezuela from 2000 to 2012.<sup>67</sup> All in all, the complainant prevailed on the merits in only three percent of the actions filed against the Venezuelan state during this period.<sup>68</sup> Such numbers show that, not surprisingly, the authorities face considerably more favorable odds than the petitioners in these proceedings.

Obviously, all of the members of the Organization of American States have sporadically confronted unfavorable determinations.<sup>69</sup> Some have subsequently conveyed disappointment or even indignation. For example, “Brazil . . . recalled its ambassador to the Organization in 2011 upon receiving an official request from the Commission to suspend the construction of a hydroelectric plant in Belo Monte” in order to protect the entitlements of neighboring indigenous peoples.<sup>70</sup> It also joined Argentina and Venezuela in “very strongly criticiz-

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66. See OQUENDO, *supra* note 1.

67. For purposes of this article, Lauren Kinell, as a research assistant, conducted and filed with the author a brief survey on the sites of the Commission and the Court. She concluded that each of these two bodies ruled favorably on the merits of only two (2) and fourteen (14) petitions, respectively, out of a total of 573 lodged before both of them from 2000 to 2012 (research on file with author).

68. *Id.*

69. See generally Inter-Am. Comm’n H.R., *Annual Rpt. 2010 (Ch. IV) (Span.)*, *supra* note 54.

70. Sáiz, *supra* note 8.

ing the work of the Inter-American Commission on Human Rights” during the “inaugural session” of the 2012 “General Assembly” of the Organization of American States.<sup>71</sup>

Brazil, Argentina, and Guatemala have supported the overall plea for renewal.<sup>72</sup> Nonetheless, these and other non-Bolivarian nations have maintained their adherence to the Inter-American Human Rights System. They have not launched an existential onslaught based on their disagreement with a few adverse findings or judgments.

At any rate, the Venezuelan expostulations on the precedents listed in its Notice of Denunciation and Supporting Memorandum do not come across as particularly exciting or compelling. In the context of its main contention, Venezuela never bothers to acknowledge the existence of exceptions to the exhaustion requirement,<sup>73</sup> let alone to explain why none of them apply. In reality, the institutions of the Inter-American Human Rights System took a relatively standard approach to the issue.

In *Usón Ramírez*, for instance, the Court cited its own precedents, as well as those of the European Court of Human Rights, in holding that the authorities had waived the exhaustion-of-remedies defense by neglecting to raise it during the admissibility stage.<sup>74</sup> Moreover, the tribunal ruled against the Venezuelan government on identical grounds upon deciding *Perozo*.<sup>75</sup> Finally, the judges concluded, in regard to one of the claims asserted in *Díaz Peña*, that Venezuela’s domestic law did

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71. *Id.*

72. *Id.*

73. For example, the American Convention of Human Rights establishes that the requirement does not apply:

when (a) the domestic legislation of the concerned state does not guarantee due process of law for the protection of the allegedly violated right or rights; (b) the party alleging an encroachment upon his or her rights has been denied access to—or has been prevented from exhausting—the remedies available under domestic law; and (c) there has been an unjustified delay in issuing a final decision upon the exhaustion of such remedies.

American Convention (Span.), *supra* note 14, at art. 46(2).

74. *Usón Ramírez vs. Venezuela*, Sentencia, Inter-Am. Ct. H.R. (Ser. C) No. 207, 6–7 (¶¶ 19–23) (Nov. 20, 2009).

75. *Perozo vs. Venezuela*, Sentencia, Inter-Am. Ct. H.R. (Ser. C) No. 195, 14 (¶ 44) (Jan. 28, 2009).

not confer any remedy the claimant could have exhausted.<sup>76</sup> Nevertheless, they sided with the Venezuelan state on the same objection with respect to the other assertions advanced in the same complaint.<sup>77</sup>

The Inter-American Commission, for its part, proceeded in the disputed cases along analogous lines. It relied on the unjustified delay in the already initiated domestic procedure in order to exempt the petitioner from having to exhaust remedies in *López Mendoza*.<sup>78</sup> In *Brewer Carías*, the Commissioners invoked that same rationale for the exemption, as well as the claimant's insufficient access to the available remedies.<sup>79</sup>

Certainly, the imputation of prejudgment in *Usón Ramírez* may carry more weight. Nonetheless, it requires no in-depth jurisprudential analysis, but instead careful evaluation of the evidence at hand. What exactly did the judges say on tape prior to oral argument? Did they simply insinuate an inclination to vote against Venezuela based on the written submissions? Or did they actually demonstrate that they had definitively made up their minds and had no intention of taking the parties' disputation seriously?

Oddly enough, Venezuelan representatives seem not to have broached the matter during the litigation. Apparently, they did so only upon denouncing the American Convention three years later. The regime exposed its accusation neither to adversarial rebuttal nor to judicial probe.

Furthermore, Venezuela identified no substantive errors that the judges might have otherwise committed. The original petitioner and the tribunal itself might have convincingly construed the purported procedural violation as ultimately harmless. Incidentally, the Venezuelan denunciation papers never addressed the treatment of the exhaustion issue in *Usón Ramírez*.

In sum, interpreting the Bolivarian cry for change as resting chiefly on these unfavorable rulings would amount to dis-

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76. Díaz Peña vs. Venezuela, Sentencia, Inter-Am. Ct. H.R. (Ser. C) No. 244, 49 (¶ 126) (June 26, 2012).

77. *Id.* ¶¶ 122–25.

78. López Mendoza vs. Venezuela, Pet. 275-08, Admisibilidad, Inter-Am. Comm'n H.R., Rpt. No. 67/08, OEA/Ser. L/V/II.134, doc. 5 rev. 1, ¶ 34.

79. Brewer Carías vs. Venezuela, Pet. 84-07, Admisibilidad, Inter-Am. Comm'n H.R., Rpt. No. 97/09, OEA/Ser. L/V/II, doc. 51 corr. 1, ¶¶ 87, 89, 95-96 (Sept. 8, 2009).

torting it and to depriving it of any substantial interest. The dissatisfaction manifested by Venezuelan officials would not differ much from that of other countries all over the continent under similar circumstances. It would, in itself, normally prompt a motion for reexamination, an official statement of protest, or, under extreme circumstances, a call for the resignation of the members of the responsible organs.

More significantly, the argumentation laid out would not contribute much to the ongoing, worldwide discussion on human rights. First, the exhaustion-of-remedies charge does not sound persuasive. Second, the belated allegation that the decision makers never listened to the parties' arguments lacks substantiation and pertains only to a single, specific dispute.

### C. *Politicization*

Instead, the Bolivarian bloc might be calling for the politicization of human rights. It might be contending, in other words, that the Inter-American Human Rights System should recognize and focus on the politics of such entitlements. Thus, the investigative and adjudicative bodies should support, rather than undermine, the crusade of countries such as Venezuela, Ecuador, Bolivia, and Nicaragua on behalf of the political values and of the policies that underlie the American Convention.

Significantly, the dissenting nations have formulated their protestations mostly in Spanish, which, like Portuguese, has only one word, "*política*," to denominate both politics and policy.<sup>80</sup> In fact, other languages also feature a single term for the latter and the former: e.g., "*politique*" in French, "*Politik*" in German.<sup>81</sup> Therefore, a speaker of any of these tongues would readily associate the two concepts. Furthermore, she would

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80. See THE OXFORD SPANISH DICTIONARY: SPANISH-ENGLISH, ENGLISH-SPANISH 1414 (1998) (translating "policy" as "política."); see also *Translation of "Policy" – English-Portuguese Dictionary*, CAMBRIDGE DICTIONARY, <http://dictionary.cambridge.org/us/dictionary/english-portuguese/policy> (last visited Sept. 17, 2017) (translating "policy" as "política").

81. See *Translation of "Policy" – English-French Dictionary*, CAMBRIDGE DICTIONARY, <http://dictionary.cambridge.org/us/dictionary/english-french/policy> (last visited Sept. 17, 2017) (translating "policy" as "politique"); see also *Translation of "Policy" – English-German Dictionary*, CAMBRIDGE DICTIONARY, [http://dictionary.cambridge.org/us/dictionary/english-german/policy\\_1](http://dictionary.cambridge.org/us/dictionary/english-german/policy_1) (last visited Sept. 17, 2017) (translating "policy" as "die Politik").

rather naturally understand the politicization of human rights as the realization of these entitlements through a series of concrete policies.

In any event, the dissidents' claim, so construed, breaks down into three independent, though interrelated, points. First, the state parties have posited the entitlements in question as part of their international engagement and, therefore, the Inter-American Human Rights System should defer to their interpretation thereof. Second, human rights generally involve politics and, as a result, the government deserves deference because of its democratic legitimacy and its expertise. Third, decision makers should pause before castigating nations that have politically devoted themselves the most to the emancipatory ideals that undergird these entitlements.

From this perspective, the Commission and the Court have been doing exactly the opposite of what they should, on all three counts. They have declined to defer to the States, whether as signatories of the relevant treaties specifically, or as governmental units generally. Moreover, these international entities have refused to appreciate the extent to which leftist regimes have excelled in politically propelling entitlements such as the right to equality, to dignity, to health, to housing, and to cultural diversity.

Similarly, the Commission and the Court have supposedly violated or manipulated the rules in order to assail a progressive political project and to side with imperialist forces. Finally, they have allegedly inverted the hierarchy of human rights, to the detriment of policy-loaded, programmatic entitlements. In particular, these enforcement organs have placed free speech at the top of the scale and social, economic, and cultural rights at the bottom.

Someone might ask why the solution should not simply consist in sanctioning or replacing the members of the Commission and the Court. In response, the discontented nations might identify a more pervasive problem. They might underscore that the Organization of American States, under the perverse influence of the United States, has no real interest in human rights, let alone in progressivism. Rather, it imposes a conservative agenda and thwarts any endeavor to revamp the responsible entities or even substitute the personnel.

Venezuela unambiguously enunciates this general contention in its Notice of Denunciation: "The state parties' efforts, within the Organization of American States, to promote the necessary reform and transformation of [the Commission and the Court] have been to no avail because these entities find themselves hostages to a small cadre of unscrupulous bureaucrats, who have blocked, obstructed, and impeded the much needed alterations."<sup>82</sup> In the Supporting Memo, the Venezuelan authorities complain, more precisely, that the U.S. government, in a display of "extreme insolence" deserving of "the strongest and most categorical condemnation," "prevents the modification or correction of the . . . System."<sup>83</sup>

From this standpoint, the "empire" is not merely trying to maintain its preferred appointees to the controversial human-rights bureaucracy and to avert any attempt to reduce the incidence of mistake and bias in their fact finding and decision making. It is additionally seeking to forestall a defeat in its trans-continental political battle against anti-colonial forces south of its border. In response, the Commission and the Court should (but in all likelihood will not) defer to revolutionary States as parties to the treaty and as governments and, ultimately, embrace a politically enlightened, anti-U.S. vision of human rights. As observed by Venezuela, "the United States has not [even] ratified the American Convention on Human Rights"<sup>84</sup> and, consequently, should carry little weight on this ground alone, independently of its purportedly reactionary bent.

The Bolivarian faction has never explicitly articulated its entire claim in so many words. Nonetheless, it has clearly condemned the Commission and the Court for not deferring sufficiently to the signatory States, or to governments in general, and to those most committed to societal emancipation specifically. It has also deprecated them as excessively focused on free speech, to the detriment of social-welfare entitlements. As a whole, the officially voiced objections point in the direction of a call for a politically correct construal of the American Convention.

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82. *Venezuelan Notice of Denunciation (Span.)*, *supra* note 15, at 2.

83. *Venezuelan Supporting Memorandum (Span.)*, *supra* note 15, at 5-6.

84. *Id.* at 6.



For instance, Venezuela's Ambassador to the Organization of American States disparaged the Inter-American Commission on Human Rights as a front for "a mafia" that operates as "an inquisition especially against leftist governments."<sup>85</sup> He was echoing an earlier declaration by the late President Hugo Chávez: "There's a mafia in there. The last thing that institutions like the nefarious Inter-American Commission on Human Rights do is defend human rights. It is a politicized body, utilized by the empire to attack governments such as that of Venezuela."<sup>86</sup>

For his part, Bolivian President Evo Morales has stated that the sponsoring Organization of American States "has covered up for dictatorships and has intervened in nations" and "has allowed the repression and the punishment of social movements."<sup>87</sup> Morales has expressly campaigned for the "disappearance of various organs"<sup>88</sup> of "domination and subjugation."<sup>89</sup> Upon threatening to withdraw his country from the Inter-American Human Rights System, he likened the Commission to a "military base of the United States."<sup>90</sup>

The Spanish newspaper *El país* has extensively covered the debate surrounding free speech. "The Bolivarian Axis" has reportedly "accused the Rapporteurship for Freedom of Expression of the Inter-American Commission on Human Rights of sustaining the hegemony of media that do not practice 'freedom of expression, but rather of extortion.'"<sup>91</sup> According to the alliance, "this exercise of power . . . boils down to a 'dictatorship of the media' against progressive governments in the region."<sup>92</sup>

As mentioned in the Prelude, one of Ecuador's reform propositions would have precluded "third-party States" or

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85. Sáiz, *supra* note 8 (quoting Venezuela's Ambassador to the Organization of American States).

86. Primera, *supra* note 54 (quoting Venezuelan President Hugo Chávez).

87. Azcui, *supra* note 5 (quoting Bolivian President Evo Morales).

88. Mabel Azcui, *El presidente Correa dice que la OEA debe "revolucionarse o desaparecer,"* EL PAÍS, June 5, 2012 (attributing the expression to Bolivian President Evo Morales).

89. *Id.* (quoting Bolivian President Evo Morales).

90. Sáiz, *El ALBA, supra* note 10 (quoting Bolivian President Evo Morales).

91. Azcui, *supra* note 16 (quoting the "Bolivarian Axis").

92. *Id.*

“other institutions” from earmarking their financial contributions for “specific purposes.”<sup>93</sup> It would have, thereby, seriously compromised the Commission’s finances and would have effectively “terminated the Rapporteurship for Freedom of Expression.”<sup>94</sup> “This Rapporteurship, qua special, is the only one that is not financed with funds from the Organization of American States and that depends entirely on international cooperation programs.”<sup>95</sup> In fact, “it has a budget that, due to these circumstances, thrice exceeds that of other rapporteurships.”<sup>96</sup> Against this state of affairs, the Ecuadorian authorities proposed correcting, without delay, “the imbalance in financial and human resources available to [the various] rapporteurships.”<sup>97</sup>

In its Notice of Denunciation, the Venezuelan government similarly expressed its commitment “to a balanced realization of economic, social, cultural, civil, and political rights.”<sup>98</sup> Hence, it hinted that it would equally rank positive entitlements and their negative counterparts, including free speech. Characteristically, the former bid the State to embark upon, and the latter to desist from, a certain course of action.

Ecuador’s authorities also advocated this overall position in their proposal. They urged that Chapter IV of the Commission’s Annual Report “concentrate not only on civil and political rights but also on economic, social, and cultural rights.”<sup>99</sup> From this point of view, Inter-American adjudicators should refrain from pushing their own ideologically backward ranking of these entitlements and from alienating regimes that do not share it.

Bolivian President Evo Morales has frequently focused on rights related to collective welfare. For example, he has insisted that “Latin American peoples should have access to all basic services, such as energy, water, and telecommunications,

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93. Sáiz, *La OEA*, *supra* note 10; *see also Ecuador Proposals (Span.)*, *supra* note 11 (noting that the “voluntary contributions” should not be “conditioned or assigned”); Sáiz, *supra* note 8.

94. Sáiz, *La OEA*, *supra* note 10.

95. *Id.*

96. *Id.*; *see also* Sáiz, *El ALBA*, *supra* note 10.

97. *Ecuador Proposals (Span.)*, *supra* note 11.

98. *Venezuelan Notice of Denunciation (Span.)*, *supra* note 15, at 10.

99. *Ecuador Proposals (Span.)*, *supra* note 11, at 1.

as a human right.”<sup>100</sup> He has additionally spoken of an “obligation to break the monopoly on medicines.”<sup>101</sup>

Curiously, Venezuela’s Notice of Denunciation itself accuses the Commission and the Court of acting politically. It berates them for “becoming a political throwing weapon.”<sup>102</sup> The document refers to the disputed “cases” as “clearly politicized and biased against the Venezuelan state.”<sup>103</sup> It thereby evokes President Chávez’s previously quoted declarations writing off the Inter-American Commission on Human Rights as “a politicized body, utilized by the empire to attack governments such as that of Venezuela.”<sup>104</sup>

Such language suggests that Venezuelan officials themselves perceive the politicization of human rights as a problem. Nonetheless, it may indicate that Venezuela’s authorities oppose politicizing these entitlements in a particular way. Venezuela may be reviling the Commission and the Court for injecting the wrong type of politics—namely, counter-revolutionary and non-democratic—into their decision making.

Almost all of the concerned governments have dealt with the vindication of rights at home in a manner that parallels and sheds some light on their actions abroad. They have sequentially (1) assailed the national judiciary for playing a destructive, rather than supportive role with respect to their political program; (2) replaced the highest constitutional tribunal’s membership; (3) instituted new constitutions that reflect their emancipatory convictions; and (4) striven to keep the newly invested justices and judges politically in line.<sup>105</sup> In Venezuela, Ecuador, and Bolivia, the authorities have evidently

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100. Azcui, *supra* note 5 (quoting Bolivian President Evo Morales).

101. *Id.*

102. *Venezuelan Notice of Denunciation (Span.)*, *supra* note 15, at 2.

103. *Id.* at 4.

104. Primera, *supra* note 54 (quoting Venezuelan President Hugo Chávez).

105. See OQUENDO, *supra* note 1, at 170–95 (section titled “When Constitutionalism Breaks Down: Venezuela’s 1999 Constitutional Crisis”). For the situation in Ecuador, see EFE, *El Parlamento de Ecuador designa un nuevo Tribunal Constitucional tras el cese del anterior*, EL PAÍS (June 1, 2007, 6:18 PM), [https://elpais.com/internacional/2007/06/01/actualidad/1180648803\\_850215.html](https://elpais.com/internacional/2007/06/01/actualidad/1180648803_850215.html); Daniela Creamer, *Correa celebra un referéndum que le permitirá controlar la justicia*, EL PAÍS (May 7, 2011), [https://elpais.com/diario/2011/05/07/internacional/1304719211\\_850215.html](https://elpais.com/diario/2011/05/07/internacional/1304719211_850215.html). For the situation in Bolivia, see Mabel Azcui, *Morales emprende la reforma del poder judicial con 18 nombramientos*, EL

read from the same script in politicizing rights and judicial institutions.

These regimes most certainly intend to continue this political campaign in the international arena. They have already taken the first step by attacking the principal organs of the Inter-American Human Rights System and have followed up with a general plea for the replacement of the currently sitting decision makers.<sup>106</sup> Perhaps the Bolivarian bloc feels no need, at the moment, to undertake the complicated task of altering the regional conventional norms because the wide-ranging entitlements presently in place blend well enough with its own politics. Nonetheless, it most likely dreams of introducing investigative and adjudicative entities that espouse or, at least, do not interfere with its agenda.

Surely, the repudiation of international, as well as national, judicial scrutiny may seem to rest, once again, on the desire to attain absolute sovereign supremacy. The former Ambassador of Panama to the Organization of American States, Guillermo A. Cochez, ventures such a reading. Referring primarily to Venezuela, Ecuador, Bolivia, and Nicaragua, he writes, “[t]he system of justice has become an Achilles’ heel for those who wish to have no control over them; for those who understand power as a way of practically doing whatever they want.”<sup>107</sup>

Irrespective of the merits of this accusation, the dissenting nations appear to be mainly translating into practice their political conception of human rights. From this viewpoint, courts must uphold the official political program. Naturally, they do not owe the government loyalty, as a cabinet member does. Nonetheless, an adjudicator must conform to the programmatic objectives laid down, for the sake of congruence and integrity.

In this sense, tribunals act incongruently when they go out on a limb politically and advance their own preferred policies. Specifically, they expose society to political disarray. The

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PAÍS (Feb. 19, 2010, 6:37 PM), [https://elpais.com/internacional/2010/02/19/actualidad/1266534003\\_850215.html](https://elpais.com/internacional/2010/02/19/actualidad/1266534003_850215.html).

106. See generally *supra* Part I (Prelude).

107. Guillermo A. Cochez, *La justicia y el poder*, EL PAÍS (Aug. 31, 2013, 8:46 PM), [https://elpais.com/internacional/2013/08/31/actualidad/1377974816\\_517698.html](https://elpais.com/internacional/2013/08/31/actualidad/1377974816_517698.html).

situation resembles somewhat that of a country in which the president and the prime minister belong to different parties, as occasionally happened in France prior to the 2000 referendum, which brought about an amendment of the French Constitution to render this scenario unlikely.<sup>108</sup> Hence, an activist bench might do as much damage as a second head of government by “working at cross purposes”<sup>109</sup> with the executive branch.

Moreover, judges arguably trample upon the legal order’s integrity when they politically defy the elected authorities. They thus transgress cardinal tenets of their profession. Unlike the prime ministry, the judiciary normally bears a duty of restraint and must abstain from meddling in politics.

At any rate, the described demand sounds provocative precisely because it entails approaching human rights politically, as well as severely constraining international, along with national, tribunals. At the same time, it comes across as counter-intuitive. One tends to think of such entitlements as opposed to or, at least, as distinctly dissimilar from politics.

The assertion invites revolutionary optimism about the State’s capacity to honor both human rights and emancipation politics. It radically renews the entreaty, which U.S. groups on the left and the right have enunciated in the past,<sup>110</sup> to con-

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108. A 2000 article by Suzanne Daley recalls that

[a] referendum to cut the French president’s term of office from seven to five years was overwhelmingly approved today though a record number of voters did not bother to cast a ballot. . . . Supporters have argued that the seven-year term . . . will cut down or eliminate awkward periods of ‘co-habitation’ like the one France is experiencing now, with a president and prime minister from different parties and often working at cross-purposes.

See Suzanne Daley, *In Underwhelming Turnout, French Voters Cut Presidential Term*, N.Y. TIMES (Sept. 25, 2000), <http://www.nytimes.com/2000/09/25/world/in-underwhelming-turnout-french-voters-cut-presidential-term.html>.

109. *Id.*

110. Duncan Kennedy notes that

[t]he realists argued [in the 1920s and 30s] that because the conservative constitutional rights case against reform statutes necessarily involved mere policy argument, the courts had no specifically legal basis for overruling legislative judgments. . . . Moderates and conservatives argued [in the 1950s] that because all the courts could do was balance rights against powers, or rights against rights, they had no specifically legal basis for overruling legislative judgments.

cede political powers significant leeway in this domain. The novelty resides in the idea that judicial institutions should defer because they are dealing not with policies (in contradistinction to rights), but rather with political entitlements.

As already noted, the Bolivarian Axis has not phrased its postulations in these exact terms. Nonetheless, it has made statements that cohere with the formulation spelled out in this section. In addition, the present construction renders the claim most interesting for an international and scholarly discussion on human rights. Part III will further shore up this contention.

### III. CLAIM ASSESSMENT

#### A. *Principles*

Finding inspiration in the writings of Immanuel Kant, many contemporary philosophers have conceived of human rights as apolitical. In other words, they have sought to demonstrate that such entitlements do not form part of the realm of politics. The Bolivarian claim, as just defined, impinges upon this well-entrenched view of human rights.

Jürgen Habermas, for instance, decidedly divides the moral and ethical-political spheres and places fundamental entitlements in the first of these spheres. Moral matters interest people everywhere similarly: "In asking moral questions, humanity—or a presumed republic of world citizens—constitutes the reference system for the justification of regulations that are equally in the interest of all. The decisive reasons must, in principle, be able to be accepted by anyone."<sup>111</sup> Ethical-political matters, however, concern solely a particular community:

In asking ethical-political questions, the life form of "our respective" political collectivities constitutes the reference system for the justification of regulations that express a conscious and collective self-understanding. The decisive reasons must, in principle, be

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Duncan M. Kennedy, *The Critique of Rights in Critical Legal Studies*, in *LEFT LEGALISM/LEFT CRITIQUE* 178, 199–200 (Janet Halley & Wendy Brown eds., 2002).

111. JÜRGEN HABERMAS, *FAKTIZITÄT UND GELTUNG: BEITRÄGE ZUR DISKURSTHEORIE DES RECHTS UND DES DEMOKRATISCHEN RECHTSSTAATS* 139 (1992) [hereinafter HABERMAS, FG].

able to be accepted by all the members who share “our” traditions and firmly held values.<sup>112</sup>

While morality is deontological, ethical politics is teleological. Accordingly, the former imposes obligations independently of the purposes of the agent; the latter is binding insofar as the agent adopts a specific end or *telos*.<sup>113</sup>

In addition, moral reasons possess hierarchical priority and prevail over their ethical-political counterparts. They sustain principles or norms, as contradistinguished from values. Significantly, principles may not clash with each other, but rather build a coherent system. Values, in turn, often compete against each other and allow a ranking according to the extent to which the subjects adhere to them.<sup>114</sup>

Ronald Dworkin proffers another articulation of this overall position. He differentiates between principle and policy along the following lines:

I call a ‘policy’ that kind of standard that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community (though some goals are negative, in that they stipulate that some present feature is to be protected from adverse change). I call a ‘principle’ a standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality.<sup>115</sup>

Dworkin ultimately identifies fundamental entitlements with principle and morality, not with policy and politics. He expressly describes the interpretation of “individual rights” as

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112. *Id.* at 139; see also JÜRGEN HABERMAS, DIE EINBEZIEHUNG DES ANDEREN: STUDIEN ZUR POLITISCHEN THEORIE 252, 254 (1996) [hereinafter HABERMAS, EA].

113. HABERMAS, FG, *supra* note 111, at 127, 188.

114. See generally Ángel R. Oquendo, *When Democracy and Human Rights Collide*, 7 SYMPOSIUM 67 (2003).

115. RONALD DWORIN, TAKING RIGHTS SERIOUSLY 22 (1977) [hereinafter DWORIN, RIGHTS]; see also RONALD DWORIN, A MATTER OF PRINCIPLE 72-103 (1985).

“moral rather than . . . political” and as primarily the prerogative of the judiciary.<sup>116</sup>

Dworkin and Habermas agree that basic human rights rest on principles and pertain to the realm of morality, instead of politics. They also both believe that this type of entitlement obliges categorically and takes precedence over political ideals.

Other philosophers, especially those operating under the influence of Kant, embrace this perspective. Tim Scanlon provides a case in point:

That is to say, first, that to assert a right is not merely to assert the value of some goal or the great disvalue of having a certain harm befall one. Rather, it is either to deny that governments or individuals have the authority to act in certain ways, or to assert that they have an affirmative duty to act in certain other ways, for example, to render assistance of a specified kind.<sup>117</sup>

In this passage, Scanlon likewise opposes rights to goals and values and associates them with obligations, as well as with limits on the political power of the authorities.

Even some present-day foes of this well-engrained conception of human rights who draw on the philosophy of Aristotle, Hegel, Marx, or Nietzsche appear to concur with this definition. For example, Richard Rorty, invoking the writings of Eduardo Rabossi, rejects such entitlements precisely because they rest on principles that purport to derive from universal reason and to apply to all rational beings.<sup>118</sup> The “trouble with

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116. Ronald Dworkin, *Constitutionalism and Democracy*, 3 EUR. J. PHIL. 2, 10-11 (1995); see generally Ronald Dworkin, *Rights as Trumps*, in THEORIES OF RIGHTS 153 (Jeremy Waldron ed., 1984).

117. THOMAS M. SCANLON, *Human Rights as a Neutral Concern*, in THE DIFFICULTY OF TOLERANCE: ESSAYS IN POLITICAL PHILOSOPHY 113, 115 (2003); see also *id.* at 117 (“Even those human rights involving the least commitment to specific institutional remedies retain a political character that differentiates them from mere goals.”).

118. See Richard Rorty, *Human Rights, Rationality and Sentimentality*, in THE POLITICS OF HUMAN RIGHTS 67-83 (Belgrade Circle ed., 1999). Rorty states:

Rabossi’s claim that human rights foundationalism is *outmoded* seems to me both true and important; it will be my principal topic in this essay. I shall be enlarging on, and defending, Rabossi’s claim that the question whether human beings really have the rights enu-



rights talk,” he contends, “is that it makes political morality not a result of political discourse—of reflection, compromise, and choice of the lesser evil—but rather an unconditional moral imperative.”<sup>119</sup> Rorty follows Annette Baier’s lead in his shift away from human rights and toward an approach based on sympathy, trust, sentiments, care, and solidarity.<sup>120</sup>

Bernard Williams, for his part, censures attempts to expand the notion of human rights beyond a narrow core of instances of “unmediated coercion,”<sup>121</sup> contextually construed, onto “good things” generally, like “so-called positive rights, such as the right to work.”<sup>122</sup> He explains that “there are human goods the value of which is perhaps not best expressed in terms of rights.”<sup>123</sup> Thus, he decouples rights from the good and from values, more broadly.

In addition, Williams distinguishes human rights from policies. For instance, he scolds U.S. liberals who advocate the protection of hate speech under the Constitution’s First Amendment. He suggests that they thereby articulate a “powerful personal conviction,” which entails “a policy question,” rather than “a matter of ultimate right.”<sup>124</sup>

In sum, the philosophers referenced would all repudiate any endeavor to politicize human rights. They would do so on different grounds, but would converge in viewing the identification of such entitlements with a particular political project as problematic. Irrespective of whether or not rights should ordinarily prevail over politics, the philosophical establishment appears to frown upon the conflation of the former with the latter.

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merated in the Helsinki Declaration is not worth raising. In particular, I shall be defending the claim that nothing relevant to moral choice separates human beings from animals except historically contingent facts of the world, cultural facts.

*Id.* at 69-70.

119. Richard Rorty, *What’s Wrong with “Rights,”* HARPER’S, June 1996, at 15.

120. *Id.* at 15-18.

121. Bernard Williams, *Human Rights: The Challenge of Relativism*, Lecture at the Raymond & Beverly Sackler Distinguished Lecture Series 13 (Apr. 23, 1997) (on file with the author).

122. *Id.* at 2-3.

123. *Id.* at 3.

124. *Id.* at 5.

From this general standpoint, a human rights claim poses a question of principle. Assessing whether a violation has taken place involves figuring out whether the alleged violator encroached upon the moral norm at stake. It has nothing to do with politics, whether those of the framers of the entitlement at issue, those of politically legitimate and competent entities, or those of particularly progressive parties to the dispute.

For example, a citizen may charge the government with infringing upon her freedom of expression. The adjudicating institution must deontologically determine whether a violation of the underlying principle has taken place and, if so, find for the claimant. It should pay no mind to whether the authorities participated in the drafting of the provision that establishes the entitlement under examination, whether they have any special expertise or legitimacy in politics, or whether they undertook the contested actions in pursuit of a noble political project.

Nonetheless, the regime might react in the usual defensive manner and insist that it curtailed the expressive liberties of the petitioner because, for instance, she was working to undermine an ethically impeccable program to redistribute land. It might additionally show that permitting persons like her to agitate would visit unimaginable damage upon the entire population. In response, however, the decision maker could quote John Rawls: "Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override. . . . Therefore in a just society . . . the rights secured by justice are not subject to political bargaining or to the calculus of social interests."<sup>125</sup>

Not surprisingly, Ronald Dworkin assumes a similar stance: "A right against the government must be a right to do something even when the majority thinks that it would be bad to do it and even when to do it would harm the majority."<sup>126</sup> "If someone has a right to something," Dworkin elucidates, "then it is wrong for the government to deny it to him even though it would be in the general interest."<sup>127</sup>

Needless to say, this overall response rides on a clear differentiation between norms or principles, which underlie

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125. JOHN RAWLS, *A THEORY OF JUSTICE* 3–4 (1971).

126. DWORKIN, *RIGHTS*, *supra* note 115, at 194.

127. *Id.* at 269.

rights, and values, which serve as a basis for policies or politics. Habermas meticulously defines and distinguishes these two primordial notions:

Norms and values differ, first, in that the former refer to obligatory action, while the latter refer to teleological action; second, in that the validity claim of the former has a binary coding, whereas that of the latter has a graduated coding; third, in that the former bind absolutely and the latter relatively; and, fourth, in that the interrelation of a system of norms and that of a system of values must satisfy different criteria.<sup>128</sup>

Insofar as he regards human rights essentially as norms, Habermas ascribes to them the four properties.

First, such entitlements must be deontological—i.e., they must set forth a duty without any reference to a particular aim. Hence, they diverge from teleologically structured policies. For instance, voting rights call for regularly held elections not to increase happiness or utility, but rather to enforce a specific governmental obligation. They would require universal suffrage even if they thus impaired any or many of the citizenry's ends.

Secondly, a human right, as opposed to a policy, designates specific actions as either right or wrong, not as recommendable to some degree or another. For example, privacy entitlements either permit or condemn telephone tapping. They do not declare it very, considerably, hardly, or minimally commendable and thus differ from particular political objectives, such as that of so-called zero tolerance on crime.

Thirdly, Habermas believes that the mandate of basic human rights, like that of principles generally, “has the absolute sense of an unconditional and universal obligation: the imperative claim to be equally valid for all.”<sup>129</sup> Such entitlements, consequently, apply across societies at all times. This absoluteness does not preclude the possibility of deploying these concepts contextually, so that their specific requirements may vary somewhat from one community to the next. “The attractiveness of values,” in contrast, “has the relative sense of a valuation of goods that is embedded or adopted

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128. HABERMAS, FG, *supra* note 111, at 311.

129. *Id.*

within a culture or life form.”<sup>130</sup> Consistently, Habermas terms values “inter-subjectively shared preferences”<sup>131</sup> and would attribute to policies, as a subcategory, the same denomination and narrow range of application.

Finally, the various human rights must make up a coherent system. They must ultimately be in harmony with each other. When one of them prescribes a certain course of action, another one of them may not point in a contrary direction. For instance, freedom of religion, correctly construed, must always be compatible with sexual equality. On the opposite extreme, however, political goals may indeed clash or compete with one another and necessitate a relative ranking. For example, encouraging immigration of highly skilled labor and achieving full-employment for the current population may, as policies, run counter to each other and force a government to balance them against each other.

From this standpoint, the Bolivarian faction seems to be engaging in a category mistake. Specifically, it erroneously assimilates human rights to politics. Nevertheless, the former, as norms, necessarily diverge from the latter, as values. They intrinsically resist the proposed politicization, which would amount to disregarding their normative character.

### B. *Politics*

The response just described sounds too easy, though. The Bolivarian allies might reply that politics must play a part in the vindication of a right. They might offer economic, social, and cultural entitlements as examples.

The preceding section already alluded to Bernard Williams’ skepticism vis-à-vis “so-called positive rights, such as the right to work.”<sup>132</sup> Williams elaborates:

Declarations of human rights standardly proclaim rights of this kind, but there is a problem with them. Nobody doubts that having the opportunity to work is a good thing, or that unemployment is an evil. But does this mean that people have a right to work? The problem is: against whom is this right held? Who vio-

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130. *Id.*

131. *Id.*

132. Williams, *supra* note 121, at 2–3.

lates it if it is not observed? . . . [E]ven if governments accept some responsibility for levels of employment, it may not be possible for them to provide or generate work, and if they fail to do so, it is not clear that the best thing to say is that the rights of the unemployed have been violated.<sup>133</sup>

Williams thus voices a concern common in philosophy and law. Philosophers often regard these positive entitlements as mere aspirations.<sup>134</sup> Lawyers frequently note the lack of judicial enforceability of such rights.<sup>135</sup>

At this juncture, the challengers of the Inter-American Human Rights System would point out that the American Declaration of the Rights and Duties of Man enshrines the right to work, as well as other positive entitlements,<sup>136</sup> and that the San Salvador Protocol does too.<sup>137</sup> They would also remark that the American Convention of Human Rights likewise contains a Chapter on “Economic, Social, and Cultural Rights.”<sup>138</sup> Furthermore, national and international adjudicators in the region have consistently held such entitlements enforceable.<sup>139</sup>

In light of these and other international documents and decisions, philosophers can hardly question the international recognition of this type of right. Nonetheless, they might dig in their heels and argue that reasonableness precludes deem-

133. *Id.*

134. *See id.* at 3 (“Since in many cases governments cannot actually deliver what their peoples are said to have a right to, this encourages the idea that human rights represent simply aspirations . . .”).

135. With such entitlements in mind, Joseph Raz observes that “legal rights [do not] always come with powers of enforcement.” Joseph Raz, *Rights and Politics*, 71 *IND. L.J.* 27, 41 (1995). “Many legal systems,” he adds, “recognise what can be called declaratory rights, which do not entitle their holders to sue for their enforcement. They may be purely declaratory, or they may be enforceable by other government institutions . . .” *Id.*

136. *Org. of Am. States (OAS), American Declaration of the Rights and Duties of Man, Ninth Int’l Conf. of Am. States, O.A.S. Res. XXX, art. XIV, OEA/Ser.L/V/II.23, (1948); see also id.* at arts. XI–XVI.

137. *Org. of Am. States (OAS), Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights “Protocol of San Salvador” art. 6, Nov. 17, 1988, O.A.S.T.S. No. 69, 1144 U.N.T.S. 123; see also id.* at arts. 9–18.

138. American Convention (Span.), *supra* note 14, at art. 26 (“Derechos económicos, sociales y culturales”).

139. *See OQUENDO, supra* note 1, at 351–86.

ing such an entitlement a genuine right. Bernard Williams would undoubtedly take this stance.

Indeed, Williams considers it “unfortunate that declarations of human rights have, though for understandable reasons, included supposed rights of this kind.”<sup>140</sup> He believes that the international community thereby waters down the concept of a human right:

Since in many cases governments cannot actually deliver what their peoples are said to have a right to, this encourages the idea that human rights represent simply aspirations, that they signal goods and opportunities which, as a matter of urgency, should be provided if it is possible. But that is not the shape of a right. If people have a right to something, then someone does wrong who denies it to them.<sup>141</sup>

Williams, hence, concentrates on the classical civil and political liberties, or rather on a narrow, almost “self-evident,”<sup>142</sup> subset thereof, which rests on the universal notion “that might is not *per se* right” and that the State acts illegitimately when it exercises “unmediated coercive power.”<sup>143</sup>

One might retort by defining positive entitlements more narrowly. The government does not have a vague and wide-ranging obligation to create jobs for its citizens. Instead, it must merely demonstrate an earnest engagement on the right to work. For instance, the authorities could show that they have implemented a credible program to achieve full employment. They cannot and need not guarantee success in their endeavors.

Even some philosophers influenced by Immanuel Kant and, therefore, supportive of a principled, non-political conception of human rights, such as Tim Scanlon, have embraced such programmatic entitlements. Scanlon explains that the difference *vis-à-vis* long-established, negative rights lies in the extent to which the State has a duty to devise “specific strategies”<sup>144</sup> for the enforcement of the entitlement at stake: “What are sometimes called welfare or humanitarian rights,” he

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140. Williams, *supra* note 121, at 3.

141. *Id.*

142. *Id.* at 4.

143. *Id.* at 10.

144. SCANLON, *supra* note 117, at 116.

writes, “differ from traditional civil or personal rights in this respect.”<sup>145</sup> Specifically, the government enjoys more leeway when choosing means of implementation in relation to the former than the latter. Despite this distinction, Scanlon would likely maintain both types of entitlements within the overarching category of human rights. Scanlon supplies the following illustration:

For example when people speak of “the right to a decent diet,” they are not just saying that it is a very bad thing for people to be without adequate food. They are also, I believe, expressing the judgment that political institutions must take responsibility in this area: institutions that do not take reasonable steps to avert starvation for their citizens (and, one might add, for others), are not meeting minimum conditions of legitimacy. It is this connection with institutional authority and responsibility that makes it appropriate to speak here of a *right*.<sup>146</sup>

Under pain of sanction for encroaching upon this entitlement, the government must design a well-thought-out policy to afford the citizenry proper nutrition. Obviously, it does not have an obligation to undertake the best course of action conceivable, let alone to protect every single person from undernourishment.

The Bolivarian movement might add that even so-called negative entitlements, which require the authorities to abstain from certain actions, necessitate an equivalent approach. For instance, the State must adopt sensible measures to enforce the right to equality with regard to primary educational opportunities. It must prevent otherwise disadvantaged groups from receiving a subpar education, but does not have to grant them access to any given class or extra-curricular activity, assure that all of their members will flourish academically, or demonstrate that it has opted for the best plan imaginable.

Governmental authorities deserve ample deference regarding the policy dimension of any kind of right, whether civil, political, social, economic, or cultural. After all, they have the utmost expertise and legitimacy in matters of politics. Con-

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145. *Id.*

146. *Id.*

sequently, a tribunal should not second-guess governmental decisions on this front.<sup>147</sup> Moreover, it should accept that some regimes may duly deal with the challenge before them quite differently than others.

Ronald Dworkin and Jürgen Habermas might concede as much to the Bolivarian states. After all, the former recognizes that the same concept of a particular principle may beget a multiplicity of alternative conceptions.<sup>148</sup> The latter, in turn, acknowledges that basic rights allow for a variety of interpretations from one society to the next.<sup>149</sup> The interpretive latitude in each of these accounts might stem from the influence of either policy or ethical-political factors.

Nonetheless, Dworkin would distance himself from this overall position. He views the various conceptions not as equally legitimate, but rather as standing in competition with each other with respect to truth or correctness. He suggests that a community that constitutionally sets forth a specific concept and calls on decision makers to define a correlated conception “assumes that one conception is superior to another.”<sup>150</sup> In any event, Dworkin would surely insist on strictly separating principle from policy and deny that the latter may serve to flesh out the former.

In contrast, Habermas would gladly embark upon the delineated path. He explicitly admits that “the process of legal realization [of rights] unfolds in contexts that also demand self-understanding discourses, as important components of politics: discussions about a common conception of the good and about the form of life whose authentic recognition is sought.”<sup>151</sup> He elucidates further:

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147. See, e.g., *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399 (1937) (“Even if the wisdom of the policy be regarded as debatable and its effects uncertain, still the legislature is entitled to its judgment.”).

148. DWORKIN, *RIGHTS*, *supra* note 115, at 134–36; see also RONALD DWORIN, *LAW’S EMPIRE* 71 (1986) (“At the first level agreement collects around discrete ideas that are uncontroversially employed in all interpretations; at the second the controversy latent in this abstraction is identified and taken up.”)

149. HABERMAS, *FG*, *supra* note 111, at 162 (“Consequently, the sections that enumerate fundamental rights in the various historical constitutions can be understood as contextual interpretations of the same system of rights.”); see also *id.* at 163, 226, 238, 379, 527; HABERMAS, *EA*, *supra* note 112, at 245, 263.

150. DWORKIN, *RIGHTS*, *supra* note 115, at 135.

151. HABERMAS, *EA*, *supra* note 112, at 254.



Certainly, political lawmakers' decisions and policies must be interpretable, respectively, as realizations of and as elaborations on the system of rights. Nonetheless, the more concrete the topic under consideration becomes, the more the self-understanding of a collectivity, along with the corresponding life forms, *also* expresses itself in . . . the ensuing legal regulation. . . .<sup>152</sup>

Accordingly, when worked into a constitution and, above all, when enacted as statutes, human rights internalize politics, policy, values, and conceptions of the good. Habermas speaks in this sense of "the ethical impregnation of every legal community, as well as of every democratic process aimed at the realization of fundamental rights."<sup>153</sup>

From this standpoint, the implementation of a particular entitlement often entails transcending the realm of principle and transiting that of politics. Freedom of religion provides a case in point. On the one hand, the authorities may implement this right in an exclusively principled manner by refraining from suppressing anyone's faith. On the other hand, they may proceed politically and honor a local commitment to support civic groups collectively by distributing grants to each creedal denomination on an equal basis. Almost inevitably, a polity will pass on from the first to the second approach and increase its wiggle room as it intensifies its efforts on behalf of the entitlement at issue. It will then end up acting in ways that, while fully justifiable politically, differ from those of its less engaged counterparts. In this fashion, regimes devoted to progressivism to different degrees can coexist and find their place within the same human-rights scheme.

Notwithstanding his rejection of positive entitlements, Bernard Williams similarly emphasizes "the importance of thinking politically about human rights abuses."<sup>154</sup> He thereby seeks to underscore "reality at the expense of philosophical abstraction."<sup>155</sup> Beyond philosophically ascertaining whether such infringements, *viz.*, "practices involv[ing] coercion with-

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152. *Id.*

153. *Id.* at 255.

154. Williams, *supra* note 121, at 3.

155. *Id.*

out legitimation,"<sup>156</sup> have occurred, one must figure out how to respond, which constitutes, according to Williams, "on every occasion a political question."<sup>157</sup>

Williams cautions "that the political does not simply exclude principle; it includes it, but many other things as well."<sup>158</sup> In his opinion, politics starts with a principled and philosophical ascertainment as to whether a human rights violation, in the form of "unmediated coercion,"<sup>159</sup> has taken place. Thereafter, it must weigh a wide array of factors before determining what, if anything, to do about any actual breach.

At the end of the day, Williams would amply defer to governments. He concludes that they must honor solely a reduced number of negative, self-evident, and universal human rights relating to "unjust coercion."<sup>160</sup> In addition, oppressive States would escape blame if they could "make a decent case (in both senses of that helpful expression) that the coercion is legitimate."<sup>161</sup> Williams warns, however, that their justification must rely on a "belief system" that cannot "be reasonably interpreted as (to put it in improbably simple terms) a device for sustaining the domination."<sup>162</sup>

Williams imparts an extremely wide field of unfettered operation to politics. He effectively accords the authorities *carte blanche* so long as they do not unjustly coerce their subjects. Remarkably, he would tolerate even a coercive regime if the leadership could formulate a colorable claim of legitimacy.

Coincidentally, Habermas and Williams view political action not only as impinging upon but also as remaining external to human rights. To be sure, they would probably acknowledge the difficulty of drawing a clear line to separate the principled inside of such entitlements from the political outside. In practical effect, however, whether politics impacts human rights exogenously or endogenously does not matter much. For example, the government conducts itself identically when it subsidizes all confessional organizations by exercising its po-

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156. *Id.* at 11.

157. *Id.* at 13.

158. *Id.*

159. *Id.* at 12.

160. *Id.*

161. *Id.* at 11.

162. *Id.* at 12.

litical discretion as when it does so as part of its enforcement of freedom of religion. It merely appears to benefit from a more solid and principle-based defense in the latter than in the former scenario against individuals complaining about an official impingement upon their entitlements. In either situation, however, the authorities may assert just as well that the alleged encroachment happened in the process of protecting religious liberties.

At any rate, the Bolivarian Axis purports, under the interpretation elaborated in Part II.C, to go beyond the assertion that human rights possess a political dimension. It is, indeed, proposing that such entitlements consist of politics and nothing else. In the final analysis, the principled component disappears altogether.

Such a position calls to mind that advanced by U.S. legal realism and, later, by the critical legal studies movement. These schools sought, in part, to debunk notions such as “formalism and objectivism” in order to postulate understanding law as a means for accomplishment of reformist or “leftist” political objectives.<sup>163</sup> The dissident nations within the Inter-American Human Rights System appear to be making an equivalent move with respect to human rights, instead of the law as a whole.

This resemblance notwithstanding, the dissenting faction within the Organization of American States has assumed a stand crucially at odds with the instrumentalist models of law just alluded to. It has certainly *not* postulated that courts should push their own political agenda against that of the executive or legislative branch of government. On the contrary, the concerned countries have insisted, as previously exposed, that judges should normally embrace and enforce the politics of the elected authorities.

This posture does not boil down to the seemingly conservative idea that judges should always defer to the political authorities, whether good, bad, or ugly. Instead, it incorporates a passionate plea for progressive politics. From this view-

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163. See, e.g., ROBERTO MANGABEIRA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* 3–4 (1983) (“If the criticism of formalism and objectivism is the first characteristic theme of leftist movements in modern legal thought, the purely instrumental use of legal practice and legal doctrine to advance leftist aims is the second.”).

point, if the government pursues emancipatory aims, tribunals should show themselves supportive. If it practices oppression, however, they would lack the capacity to make a difference and would become irrelevant. Under such circumstances, citizens should take not to the courthouse, but, rather, to the streets and attempt to subvert the existing order.

Venezuela and its allies would contend, specifically, that any human right should serve to attain social justice. They would demand deference from the judiciary because they participated, as States, in the framing of the American Convention, because they possess, as governments, political expertise and legitimacy, and foremost because they have set in motion a formidable revolutionary political project. From this point of view, the Inter-American Commission and the Court of Human Rights are thwarting this lofty crusade for emancipation and should therefore, at the very least, step aside. The region's left-wing bloc, for its part, should vigorously exert itself in the realms of politics and law in order to keep these bodies in check and, ultimately, to force them either to metamorphose or to disappear.

### C. *Between Principles and Politics*

All the same, maybe one should not jettison principles too quickly. In fact, one might want to make an effort to preserve them, at the very least to convey the ideas that a human right generally contains a normative component and that the State merits only limited latitude on this front. The judiciary and society as a whole should amply defer to the authorities only in relation to other matters, such as those that pertain to the political realm.

In this sense, a right essentially embodies a principle or a norm. Paradigmatically, it posits an obligation and its enforcement entails, in the first instance, determining whether individuals or entities have complied or not. When public officials flout the principle underlying a given entitlement, they should almost ineludibly endure reproof and sanction.

If rights amounted to no more than policies and rested on mere values or goals, international or constitutional tribunals would hardly have a constructive role to play. At the outset, the government would simply consider the various policies and act as it deemed most appropriate. Thereupon, judges

could not sensibly conclude that the ensuing action “violated” any such policy, not even a disfavored or discarded one. They could, at most, fault the regime for affording no consideration to some of the enumerated policies and direct it to deliberate again. If the judiciary instead chose to repeat the overall assessment and second-guess the executive, it would be engaging in a seemingly pointless and unwarranted exercise.

As stressed in the previous section, rights do possess a political dimension. They, as well as the norm they incarnate, may call for realization through policy. And when the government realizes rights in this manner, it characteristically commands a comfortable margin of error.

The right to privacy may help illustrate the point. From the present perspective, it expresses not a particular policy, but rather the principle that the State should not mind people’s business. When the authorities spy on citizens solely to keep an eye on potential dissidence, they trample upon this norm and should face strict control. However, when they launch a program for, say, the development and dispensation of software that the population may wield as a shield against public and private snooping, they may rightfully expect ample (though not endless) breathing room. Without question, differentiating the former type of scenario from the latter will constantly engender complications and polemics.

Of course, a different conceptual scheme might serve just as well to articulate this alternation between high and low levels of leeway enjoyed by the government in the vindication of human rights. For example, Bernard Williams relies on the phrase “unmediated coercion,”<sup>164</sup> which might evoke a single super-principle, to describe the relatively rare instances in which he would tolerate external interference in State affairs. He proposes conceding the authorities a free hand in all other cases.

Ultimately, Williams tightly draws the circle within which intervention may rightfully take place. He would leave the government off the hook with respect to not only civil and political rights unrelated to crass oppression but also all economic, social, and cultural rights. He believes that one cannot persua-

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164. Williams, *supra* note 121, at 14.

sively uphold enforcing any of these entitlements from the outside.<sup>165</sup>

Curiously, Williams never contemplates whether a transnational tribunal could legitimately intervene merely by referring to a treaty ratified by a State that is confronting denunciations for human-rights abuses. He does not, evidently, because he is focusing on situations in which the alleged oppressors reign over a community that does not acknowledge the norms that outsiders purport to deploy.<sup>166</sup> More precisely, he is striving to figure out the extent to which morality per se, independent of international law, allows condemnation in such a setting.

The concept of a principle or right does not have to exhibit all of the characteristics commonly associated with it. For instance, one may deny it the universality and absoluteness apparently attributed to it by Ronald Dworkin and others. The work of Richard Rorty referenced in Part III.A serves as a reminder of the problems to which such attributions lead.

Principled, codified human rights need not mirror any transcendental catalogue of moral human rights. Nonetheless, they have found a home in most cultures, as well as in international law, and oblige almost categorically because they rest on very broadly shared and utterly crucial notions, like reasonableness, justification, and acceptability. One may therefore defend these entitlements with widely appealing and forceful arguments.

For example, such argumentation, in conjunction with a pitched battle for the empowerment of women, has brought most nations to recognize a nearly unconditional right against

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165. For Williams,

[i]t is a mark of philosophical good sense that the accusation [that a practice violates fundamental human rights] should not be distributed too inconsiderately, and in particular that our theories should not lead us to treat like manifest crimes every practice that we reject on liberal principle and could not accept here—especially if in its locality it can be decently supposed to be legitimated.

*Id.* at 12.

166. *Id.* at 8 (“Conceptual complications multiply when one is concerned with a different case, that in which a style of legitimation that was accepted at one time is still accepted in some places but no longer accepted in others.”) In Williams’s view, “the contemporary world is certainly within the reach of the past, and the influences of the past include, now, theocratic conceptions of government and patriarchal ideas of the rights of women.” *Id.*

sexual discrimination. Undeniably, a present-day culture might still openly and overwhelmingly reject this entitlement, carving out an exception to the overarching principle of equality. In doing so, it would expose itself to criticism, most definitely, for insensitivity, crudeness, narrow-mindedness, or even sexism, but not necessarily for failure to understand the universality or absoluteness of the right. Regarding such an unlikely national collectivity, one should perhaps refrain from disparaging it as irrational and from hoping to bring it, with a moral rebuke, to mend its ways.

Tim Scanlon, for his part, voices his willingness to renounce rigid universalism thus: “The empirical judgments on which rights are based presuppose certain background conditions . . . . These conditions are not universal, though in the case of most rights commonly listed as ‘human rights’ they are sufficiently widespread to be considered universal for all practical purposes.”<sup>167</sup> Specifically, Scanlon affirms that the goal that bolsters such entitlements, namely, that “of promoting an acceptable distribution of control over important factors in our lives, . . . would be of importance to people in a wide range of societies,” but naturally not everywhere.<sup>168</sup> Finally, he avers, echoing Jürgen Habermas, that “the particular rights [that this goal] calls for may vary from society to society.”<sup>169</sup>

At the end of the day, one might even espouse Williams’s “relativism of distance,” according to which “one isn’t compelled to extend all one’s moral opinions, in particular about rights, to the past.”<sup>170</sup> Such entitlements fully apply only to contemporary communities. “So far as human rights are concerned,” Williams elucidates, “what matters is what presents itself in our world, now. In this sense, the past is not another country: if it were just another country, we might have to wonder what to do about it.”<sup>171</sup>

As to modern States, global courts might, when enforcing the whole panoply of human rights, not only yield to the authorities on issues of policy but also consistently display consid-

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167. SCANLON, *supra* note 117, at 116.

168. See THOMAS M. SCANLON, *Rights, Goals, and Fairness*, in *THE DIFFICULTY OF TOLERANCE: ESSAYS IN POLITICAL PHILOSOPHY* 26, 36 (2003).

169. *Id.*

170. Williams, *supra* note 121, at 8.

171. *Id.* at 9.

erable cultural sensitivity. For instance, they might show themselves flexible if a nation like Argentina, mindful of its history, curbed the associational entitlements of civic groups advocating the return of the military to power or of the ghastly campaign to suppress suspected subversives. Such an overall judicial attitude should, *ceteris paribus*, reduce the risk of illegitimate exogenous intrusion.

In fleshing out his point of view, Tim Scanlon additionally asserts that human rights need not bind absolutely. Although he assigns them enormous weight, he prudently steers clear of absolutism in their regard: "While I would not take the extreme position that human rights may never be violated no matter what the consequences, I do want to say that the situations in which their violation could be justified would have to be very extreme indeed."<sup>172</sup>

Williams carries the overall concession one step further. As discussed in the preceding section, he portrays the query of how to respond to demonstrable contraventions of human rights as political and as open. Indeed, Williams would advise against interference, "other things being equal (which is a large qualification)," except "if the violation is gross."<sup>173</sup> He adduces the following grounds for encouraging international involvement against and only against such exorbitant encroachments:

Well, (1) what is happening is worse. (2) In other cases, it is more likely that intervention will make it worse. (3) [In] a case which looks less like unmediated coercion, the victims may not think they are victims, and then intervention may be difficult to distinguish from ideological imperialism. But, most basically, (4) the nearer to the paradigm the violations are, and the more the state is part of the prob-

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172. SCANLON, *supra* note 117, at 121. According to Scanlon,

to say that a rule or a right is not in general subject to exceptions justified on act-utilitarian grounds is not to say that it is absolute. One can ask how important it is to preserve an equitable distribution of control of the kind in question, and there will undoubtedly be some things that outweigh this value.

SCANLON, *supra* note 168, at 34.

173. Williams, *supra* note 121, at 13.



lem, the nearer the situation may be to that of a state apparatus being at war with its own people.<sup>174</sup>

Nevertheless, Williams would recommend, as a rule, intervening against an infringement upon free speech; for “freedom of speech is involved in making effective any criticism of what a regime is doing, in relation to any reasonable conception of the individual’s interests.”<sup>175</sup>

If a State signs key human-rights conventions, even Williams and other skeptics might endorse holding it liable more promptly. In other words, they might accept fewer exceptions to the mandate of the agreed-upon entitlements. In any event, a human-rights system that occasionally exempted the authorities would not thereby become aberrational or dysfunctional.

Naturally, one should have a precise sense of when such admittedly exceptional exemptions kick in because the government will ineluctably claim to qualify for them all too often. A human-rights treaty or the judiciary should address the issue. Otherwise, the authorities will surely decide themselves and might disregard a particular entitlement as they see fit.

For example, a regime may confront an illicit insurrection and ban televised anti-government broadcasts temporarily. It may also suspend its environmental protection program and divert the responsible staff to other, more urgent tasks. A supranational tribunal might ascertain an impingement upon basic entitlements, but abstain from sanctioning the State in light of the subversion under way.

The judges would have to monitor the whole affair closely. They would have to take the official assertions—pertaining to the emergency and the appropriateness of the ensuing response—with a grain of salt. After all, a government has every incentive to exaggerate or create a crisis in order to put the citizenry’s rights on hold.

Since social justice may clash with principled entitlements, it may analogously authorize or even require their provisional suspension. Venezuela’s then President Hugo Chávez thought that he had arrived at such a juncture when he “ordered hotels with vacancies to shelter thousands of people who

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174. *Id.*

175. *Id.* at 14.

lost their homes as a result of flooding” in December 2010.<sup>176</sup> He would have properly professed that treating the homeless justly demanded setting aside the hoteliers’ property rights. Still, one should resist the temptation to sustain that his administration was appropriately subordinating those entitlements to the right to housing. Most plausibly, the latter entitlement does not obligate the authorities or anyone else to assure any particular person lodging.

In sum, human rights generally revolve around reasons and generate obligations, but need not match up with anything like a set of non-experiential moral entitlements. Furthermore, they do not have to operate universally or absolutely, even when construed as founded on principle. Consequently, a regime may ignore certain rights or formulations thereof as inapplicable due to its cultural context or due to a short-run, pressing predicament of the sort referred to. Nonetheless, it may take such a way out only rarely, upon carrying an awesome onus of persuasion.

As noted almost incidentally, human rights intricately interrelate with social justice. They tend to advance it, but do not guarantee it and may, under extraordinary circumstances, thwart it. Hence, the Bolivarian Axis may duly implement such entitlements as part of its struggle for a just society. It may rightfully go beyond and even against human rights in the name of the broader cause. Nevertheless, citizens may *ordinarily* vindicate any such normative entitlement against their government and insist on compliance.

At any rate, principles do not exhaust the content of rights, not even that of negative entitlements. Similarly, positive entitlements do not concern policy exclusively. One might contend that all rights possess *both* a narrowly normative and an interrelated political dimension and that the authorities should have less elbow room on the former and more on the latter. From this perspective, judges should either strictly scrutinize or deferentially look over governmental engagement, depending on whether it touches predominantly upon the principles or upon the politics of human rights.

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176. Simon Romero, *21 Bodies Found in Colombia Mudslide*, N.Y. TIMES (Dec. 6, 2010), <http://www.nytimes.com/2010/12/07/world/americas/07colombia.html>.

As conceded in Part III.B, civil and political entitlements do seem to bear more heavily upon principle and, therefore, to call for more exacting judicial review. Economic, social, and cultural rights, in turn, appear to gravitate readily to the zone of policy and to permit cutting the State some slack. The opposition between a classical freedom-of-association dispute and a right-to-housing suit might illuminate this dichotomy. On the one hand, the judiciary might stringently hold the authorities accountable when they forbid, out of a dislike for dissidence, an unpopular group's gatherings. On the other hand, it might grant them the benefit of the doubt in assessing whether their political measures to increase the supply of residences run counter to the right to housing.

From this general standpoint, each of these entitlements rests on a norm, respectively and roughly phrased as follows: (1) "Citizens shall have the right freely to associate with each other" and (2) "People shall have the right to housing." A direct encroachment occurs more commonly against the former principle than against the latter. Indeed, governments go about more frequently banning certain organizations, such as those they perceive as seditious, than wantonly demolishing privately owned homes. Of course, in either scenario, the aggrieved may request a tribunal's intercession.

Conversely, politics seems to play a more prominent role with respect to positive entitlements than with respect to negative entitlements. The former appear to necessitate, more patently than the latter, the deployment of the welfare state's bureaucracy and the adoption of a long-term plan for programmatic, progressive implementation. Hence, the government would normally realize the right to housing by building and running public apartment complexes, by doling out subsidies and tax reductions to home buyers, etc.

In contrast, the authorities honor freedom of association, foremost, by simply entitling groups to mobilize, as well as assemble. Only secondarily do they proceed through more elaborate policies, like awarding associational subventions, non-profit status for organizations that qualify, and so forth. In fact, a regime might, though probably should not, fully escape liability by confining itself to the first step and wholly refusing to take the second—in other words, by undertaking an approach based on non-interference.

Independently of the category of right at stake, however, plaintiffs should not succeed with a complaint against the official policy unless they demonstrate that the government has acted either arbitrarily or not at all. Significantly, such a demonstration would suggest that the authorities have contravened, at least indirectly, the underlying norm. Accordingly, a judge's policing of governmental political measures ultimately amounts to enforcing the corresponding principle.

One might simplistically restate this entire posture as follows: (1) The State must perform a series of actions under pain of social and/or judicial reproach for violating the norm. (2) Besides, it must opt for one or more among an array of protracted bureaucratic strategies and will commit an infraction if it either makes no choice at all or chooses in a capricious manner.

The authorities manifestly enjoy a narrower space to maneuver on the first than on the second form of responsibility. In addition, they may more easily infringe upon principle and may have to sustain legal, as well as political, consequences. Finally, the government usually confronts more of the stricter kind of compulsion on civil and political entitlements, such as freedom of association, than on social, economic, and cultural entitlements, like the right to housing.

Almost all of the controversies that have caused commotion in the Inter-American Human Rights System have hinged upon traditional negative rights. Venezuela, Ecuador, Bolivia, and Nicaragua have repeatedly complained about free-speech decisions and findings, as well as about the Rapporteurship for Freedom of Expression of the Inter-American Commission on Human Rights. Moreover, the Venezuelan Notice of Denunciation and the Supporting Memorandum zero in on six opinions involving civil and political entitlements: two on liberty of expression, two on due process, one on political persecution, and one on inhumane treatment.<sup>177</sup>

In these presumably principled disputes, the Commission and the Court owed the authorities scant wiggle room. Nonetheless, Venezuela seemed to expect extensive freedom of movement. It observed, apparently striving to portray this expectation as legitimate, that the petitions all came from mor-

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177. See *Venezuelan Notice of Denunciation (Span.)*, *supra* note 15; *Venezuelan Supporting Memorandum (Span.)*, *supra* note 15.

ally and politically despicable individuals: namely, (1) from journalists “of great belligerence against the government,”<sup>178</sup> (2) from a lawyer charged with “the crime of conspiracy,”<sup>179</sup> (3) from an oppositional politician accused of acting in support of “the *coup d'état* of April 11, 2002,”<sup>180</sup> (4) from an “insurrectionist” General,<sup>181</sup> (5) from a “terrorist . . . convicted”<sup>182</sup> for bomb attacks “aimed at destabilizing Venezuela’s democracy,”<sup>183</sup> and (6) from three judges who “incurred a ‘grave judicial error of an inexcusable character.’”<sup>184</sup> However, the supposed unworthiness of the petitioners should have moved the transnational decision makers to more, rather than less, vigilance. After all, the authorities typically attend to the entitlements of unpopular persons much less than to those of others.

At the other end of the spectrum, tribunals should not afford a government *carte blanche* on policy-loaded positive rights. As just pointed out, they should accord it substantial discretion, but should not abdicate their duties. Such entitlements qualify as rights precisely because they impose judiciable obligations on the authorities. Otherwise, they would boil down to sheer recommendations.

As submitted in Part III.B, adjudicators should read these rights as programmatic. They should command the State to show that it has designed a serious program on point. Elected officials deserve deference on the details, though not on the need for credible engagement. They should face censure if they either neglect to take any action whatsoever or act unreasonably.

Needless to say, establishing whether a particular challenge turns on principle or on politics will recurrently breed discussion and disagreement. It will invariably pit the State against citizens and the judiciary. Nevertheless, the debate on human rights will, in all likelihood, unfold more intelligibly by centering on this dual conceptual scheme.

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178. *Venezuelan Notice of Denunciation (Span.)*, *supra* note 15, at 5.

179. *Id.* at 6.

180. *Id.*

181. *Id.* at 7.

182. *Id.* at 7–8.

183. *Id.*

184. *Venezuelan Supporting Memorandum (Span.)*, *supra* note 15, at 13.

#### D. *Human Rights Adjudication*

Thinking about negative and positive rights in the context of real-life litigation will hopefully contribute to a better understanding not only of the interplay of their principled and political components but also of the extent to which adjudicators should yield to the government. Hence, the discussion will now traverse eight cases and will interpret four of them as decided on principle, which demands rather rigorous adherence, and four of them as turning on policy, with respect to which the government merits a decent amount of wiggle room. Each of these two groups will include a couple of opinions (one national, one international) involving free speech and a parallel pair touching upon the right to health.

As a matter of principle, the authorities generally may not repress pure speech on the basis of their dislike of its manner or message, or of the speaker. In *Cohen v. California*,<sup>185</sup> for instance, the state convicted the appellant for standing in a courthouse “wearing a jacket bearing the words ‘Fuck the Draft’ which were plainly visible.”<sup>186</sup> The United States Supreme Court persuasively found a breach of “the usual rule that governmental bodies may not prescribe the form or content of individual expression.”<sup>187</sup> It then fleshed out its guiding norms:

The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.<sup>188</sup>

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185. *Cohen v. California*, 403 U.S. 15 (1971).

186. *Id.* at 16.

187. *Id.* at 24.

188. *Id.*

The justices did not bestow upon California officials much space to depict the forbidden words as a disturbance of the peace or as inherently offensive.<sup>189</sup>

Equivalently, in *Olmedo v. Chile*,<sup>190</sup> the Chilean state banned the film *The Last Temptation of Christ*. More precisely, the Court of Appeals of Santiago issued, and Chile's Supreme Court affirmed, a writ of protection in the name of the Catholic Church against the picture.<sup>191</sup> "The bar on the movie's exhibition rested on its supposed offensiveness to the figure of Jesus Christ."<sup>192</sup> The Inter-American Court of Human Rights pronounced the proscription "a prior restraint in violation of [the liberty of thought and expression preserved in] Article 13 of the [American] Convention."<sup>193</sup> From this pronouncement, it deduced "that the State [had] reneged on the general obligations to respect and assure the rights enshrined in the Convention and to adapt internal laws to the relevant provisions."<sup>194</sup>

After detecting an unequivocal encroachment upon the normative ban on prior restrictions on free speech, the majority spent little time on the domestic tribunals' attempt to characterize the picture as odious or on the executive branch's contemporaneous endeavors to amend the Constitution to end all censorship. The judges expressed esteem for and underscored the importance of "the government's initiative to propose such a constitutional amendment."<sup>195</sup> Nonetheless, upon observing that non-compliance persisted,<sup>196</sup> they resolved that "the State must, within a reasonable period of time, modify its internal laws so as to supersede the prior restraint and to allow the exhibition of the movie . . . and must, within

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189. Indeed, the Court held that California lacked the authority to "excise . . . one particular scurrilous epithet from the public discourse," regardless of whether the excision was premised on "the theory . . . that its use is inherently likely to cause violent reaction or upon a more general assertion that the States, acting as guardians of public morality, may properly remove this offensive word from the public vocabulary." *Id.* at 22–23.

190. *Sentencia*, Inter-Am. Ct. H.R. (Ser. C) No. 224 (May 19, 2011).

191. *Id.* ¶ 60(e).

192. *Id.* ¶ 61(h).

193. *Id.* ¶ 71.

194. *Id.* ¶ 90.

195. *Id.* ¶ 89.

196. *Id.* ¶ 98 ("Therefore, the state continues renegeing on the general obligations referred to in the Convention's provisions.").

six months . . . , file with the Inter-American Court of Human Rights a report on the measures adopted in this respect.”<sup>197</sup>

The right to health, for its part, normatively prohibits a regime from denying a person basic medical treatment. In *Rural Psychiatric Institute v. Ministry of Health and Social Welfare*,<sup>198</sup> for example, several clinics sued the Venezuelan government for declining to renew their contracts and thereby trampling upon their indigent mental patients’ right to life and health.<sup>199</sup> The Political and Administrative Chamber of Venezuela’s Supreme Court agreed with the plaintiffs.

The holding should not come as a surprise. After all, the State had paid absolutely no mind to these chronically mentally ill and destitute individuals or to their simplest sanitary needs. It had ultimately contributed to the deterioration, rather than to the improvement, of their condition.

The Venezuelan justices also expressed utter “disapproval of the Ministry’s deplorable conduct”<sup>200</sup> regarding its contractual responsibilities. The ministerial staff admittedly “never intended to rescind the contracts.”<sup>201</sup> Moreover, it secured, during the litigation, “the necessary funds” for a renewal, but refused to act prior to a judgment on the merits.<sup>202</sup>

As a consequence, Venezuela’s highest tribunal adjudged the official actions an impingement upon the entitlement at stake and upon the corresponding obligation:

This Supreme Court believes that this conduct constitutes an open violation of the rights to life and health of these mental patients. The state cannot effectively guarantee these entitlements without the necessary resources. Furthermore, defendant has inexcusably failed to meet his duty to care for these unfortunate and neglected Venezuelan citizens who are unable to improve their situation on their own.<sup>203</sup>

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197. *Id.* ¶ 4.

198. The opinion from the court’s 1998 term is translated and reprinted in OQUENDO, *supra* note 1, at 354–61.

199. *Id.* at 355.

200. *Id.* at 358.

201. *Id.*

202. *Id.*

203. *Id.* at 358–59.



The justices accordingly enjoined the government to contract anew with the complainants and to pay for services performed after the expiration of the original agreements.<sup>204</sup>

Once again, the tribunal first ascertained a contravention of the underlying norm. Next, it spurned the justification adduced by the authorities: “lack of funds.”<sup>205</sup> The justices proclaimed that “the Ministry’s only legal and moral option, once the necessary funds became available, was either to extend the existing contracts *without any delay or excuse* or to sign new contracts.”<sup>206</sup>

Likewise, in *Vera Vera vs. Ecuador*,<sup>207</sup> the government arrested the petitioner for armed robbery and denied him medical attention for a bullet wound, which he had endured prior to the arrest and from which he eventually died. The Inter-American Court of Human Rights noted that “the State did not accord Mr. Pedro Miguel Vera Vera adequate and timely medical attention.”<sup>208</sup> It concluded that “the series of omissions on the part of the [authorities] while holding [him] in custody constituted medical negligence that resulted in his death and that should entail international liability.”<sup>209</sup>

The judges unanimously found a “clear” infringement upon “the rights to humane treatment and to life,”<sup>210</sup> which incorporate the right to health. On the last of these entitlements, the Inter-American Commission’s complaint specifically cited Principle X of the *Principles and Best Practices on the Protection of Individuals Deprived of Liberty in the Americas*: “Persons deprived of liberty shall have the right to health, understood as the enjoyment of the highest possible level of physical, mental, and social well-being.”<sup>211</sup> The tribunal’s final deci-

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204. *Id.* at 359–60.

205. *Id.* at 359.

206. *Id.*

207. Preliminary Objections, Background, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 224 (May 19, 2011) [hereinafter *Vera Vera (Span.) (2011)*].

208. *Id.* ¶ 75.

209. *Id.*

210. *Id.* ¶ 79. *See also id.* ¶ 2 (Resolutions).

211. Demanda ante la Corte Interamericana de Derechos Humanos en el caso de Pedro Miguel Vera Vera y Otros Contra la República de Ecuador, Caso 11.535, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II, doc. 5 rev., ¶ 39 (Feb. 24, 2010).

sion explicates the interrelationship of all three entitlements in the following terms:

The rights to life and to humane treatment depend, directly and immediately, on proper health care. In this sense, Article 10 of the Additional Protocol on Economic, Social, and Cultural Rights of the American Convention on Human Rights declares that everyone has a right to health, understood as the enjoyment of the highest possible level of physical, mental, and social well-being, and that human health constitutes a public good. [The] state, as the entity responsible for the health of individuals under its custody, has a duty to afford detainees regular medical check-ups, as well as adequate therapeutic attention and treatment, whenever necessary.<sup>212</sup>

The Court commented that “the denial of adequate medical attention runs counter to the minimal material requirements for a treatment worthy of a human being . . . .”<sup>213</sup>

The government had unambiguously shirked its commitments under the right to health. It had ignored the victim’s urgent medical circumstances and thus materially contributed to his death. Hence, the judges appropriately cut the authorities no slack.

In all four of these instances of arguably principled adjudication, the State could have, theoretically, alleged that it was acting politically. It might have gone beyond a naked allegation to argue that it was pursuing a policy, in the first two controversies, to shield the community’s morals and, in the second two disputes, to save health-care monies for the physiological ailments of law-abiding citizens. Naturally, the authorities would have had to prove not only that the claimed political strategy in fact existed but also, against all odds, that it did not, in itself, clash with the pertinent principle. Indeed, they would have actually had to demonstrate that they were not problematically assuming the prerogative to determine, based on their particular preferences or prejudices, who may speak and who should receive health care.

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212. *Vera Vera (Span.)* (2011), *supra* note 207, ¶ 43.

213. *Id.* ¶ 44.

In the cases explored so far in this section, civil society and the judiciary did not evince much flexibility *vis-à-vis* the State, and rightly so. They identified an infraction of a vital norm and insisted upon rectification, casting aside official rationalizations. Of course, pinpointing the principle at play, as well as figuring out whether an encroachment has occurred, typically demands intense deliberation and spawns considerable contestation.

Sometimes, however, human rights necessitate implementation through policy. They then point to a different approach. The citizenry, along with the eventual adjudicators, must generally cede to the authorities. It may normally sue them only for abandonment or capriciousness.

In *Red Lion Broadcasting Co. v. FCC*,<sup>214</sup> for instance, an operator of “a Pennsylvania radio station, WGCB,”<sup>215</sup> challenged the Federal Communications Commission’s “fairness doctrine,” which “for many years imposed on radio and television broadcasters the requirement that discussion of public issues be presented on broadcast stations, . . . that each side of those issues must be given fair coverage, [and] that equal time be allotted all qualified candidates for public office,” especially “relating to personal attacks in the context of controversial public issues.”<sup>216</sup> The United States Supreme Court cleared the authorities of the charge that they had thwarted “freedom of speech and press.”<sup>217</sup>

The highest federal tribunal unanimously held “that the Congress and the Commission do not violate the First Amendment when they require a radio or television station to give reply time to answer personal attacks and political editorials.”<sup>218</sup> It reflected thus:

There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his

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214. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

215. *Id.* at 371.

216. *Id.* at 369–70.

217. *Id.* at 386.

218. *Id.* at 396.

community and which would otherwise, by necessity, be barred from the airwaves.<sup>219</sup>

In other words:

It does not violate the First Amendment to treat licensees given the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern. To condition the granting or renewal of licenses on a willingness to present representative community views on controversial issues is consistent with the ends and purposes of those constitutional provisions forbidding the abridgment of freedom of speech and freedom of the press.<sup>220</sup>

Not surprisingly, the justices permitted the government plenty of space to maneuver:

Rather than confer frequency monopolies on a relatively small number of licensees, in a Nation of 200,000,000, the Government could surely have decreed that each frequency should be shared among all or some of those who wish to use it, each being assigned a portion of the broadcast day or the broadcast week. The ruling and regulations at issue here do not go quite so far. They assert that under specified circumstances, a licensee must offer to make available a reasonable amount of broadcast time to those who have a view different from that which has already been expressed on his station. The expression of a political endorsement, or of a personal attack while dealing with a controversial public issue, simply triggers this time sharing.<sup>221</sup>

The opinion goes so far as to submit that the authorities, beyond exercising their prerogative to launch policy in this domain, were vindicating cardinal societal entitlements. It remarks:

the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and pur-

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219. *Id.* at 389.

220. *Id.* at 394.

221. *Id.* at 390–91.

poses of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.<sup>222</sup>

The decision thereafter spells out the nature of this communal entitlement: "It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC."<sup>223</sup>

In this area, the federal government enjoys ample, but not endless, leeway. As an illustration of this proposition, the Supreme Court enunciated its readiness to revisit its holding in the future if it encountered proof of "self-censorship" and of avoidance "of controversial public issues" as an upshot of the official regulations.<sup>224</sup> It announced that "if experience with the administration of these doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications."<sup>225</sup> The justices thus intimated that the policy would then backfire and merit repudiation. Moreover, they might have ruled against the government if they had discarded, as false, the technological premise of scarcity of frequencies.<sup>226</sup>

On a similar note, the Inter-American Court's advisory opinion on the *Enforceability of the Right of Reply or Correction* details how the state should implement the right to respond to broadcasts or publications that either misrepresent the facts or cause offense.<sup>227</sup> Article 14 of the American Convention on

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222. *Id.* at 390.

223. *Id.*

224. *Id.* at 393.

225. *Id.*

226. The Court acknowledges and rejects the argument that,

even if at one time the lack of available frequencies for all who wished to use them justified the Government's choice of those who would best serve the public interest by acting as proxy for those who would present differing views, or by giving the latter access directly to broadcast facilities, this condition no longer prevails so that continuing control is not justified.

*Id.* at 396; *see also id.* at 400-01 ("In view of the scarcity of broadcast frequencies, . . . we hold the regulations and ruling at issue here are both authorized by statute and constitutional.").

227. *Exigibilidad del Derecho de Rectificación o Respuesta* (arts. 14(1), 1(1) y 2, Convención Americana sobre Derechos Humanos), Opinión Con-

Human Rights reads: "Anyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication has the right to reply or to make a correction using the same communications outlet, under such conditions as the law may establish."<sup>228</sup> Accordingly, the treaty renders the protection of the right of reply mandatory. Nevertheless, it concedes the authorities flexibility, insofar as it expressly assures the entitlement "under such conditions as the law may establish."<sup>229</sup>

In 1985, Costa Rica asked the Inter-American Court to expound the principles and the policies, so to speak, of the right of reply. In particular, it posed, *inter alia*, the following queries: (1) "[D]oes the right consecrated in Article 14 of the American Convention on Human Rights, of its own force, guarantee its free and full exercise to anyone within Costa Rica's jurisdiction[?];"<sup>230</sup> and (2) "[D]oes the Costa Rican State have an international legal obligation . . . to adopt, in accordance with its own constitutional procedure, legislative or other measures necessary for the effective exercise of the right of reply or correction under Article 14 of the Convention?"<sup>231</sup>

The tribunal did not hesitate to endorse the binding nature of the entitlement. It underscored "that Article 14(1) of the Convention posits an internationally enforceable right of reply or correction. The state parties have an obligation to respect this entitlement and to secure its free and full exercise to everyone within their jurisdiction."<sup>232</sup> More generally, "the Convention aims itself to recognize people's rights and freedoms and not simply to authorize states to do so."<sup>233</sup> The judges repudiated the view that Article 14 "merely entitles the state parties to enact the right of reply or correction into the law, but does not mandate them to" do so.<sup>234</sup>

Nonetheless, the majority bestowed upon the authorities significant latitude on the particulars. It explained that Article

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sultiva OC-7/86, Inter-Am. Ct. H.R. (Ser. A.) No.7 (Aug. 29, 1986) [hereinafter *Enforceability of the Right of Reply (Span.)*].

228. American Convention (Span.), *supra* note 14, at art. 14(1).

229. *Id.*

230. *Enforceability of the Right of Reply (Span.)*, *supra* note 227, at 3.

231. *Id.* at 4.

232. *Id.* at 9.

233. *Id.* at 6-7.

234. *Id.* at 6.

14 “demands the establishment of conditions for the exercise of the right of reply or correction by means of the ‘law,’ whose content may vary from one state to the next, within certain reasonable limits and within the framework of principles affirmed by the Court.”<sup>235</sup> The judges thus clarified that the government may exercise its sound discretion within the structure erected upon the entitlement’s principles.

At any rate, the tribunal insisted on the compatibility of its contextual construction with the efficacious enforcement of the entitlement: “The fact that the states may define the conditions for the exercise of the right of reply or correction does not detract from the enforceability, under international law, of the obligations undertaken.”<sup>236</sup> “As a consequence, if, for any reason, the right of reply or correction could not be exercised by ‘anyone’ within the jurisdiction of a signatory state, a violation of the Convention would result, which could be denounced before the organs of protection conceived for this purpose.”<sup>237</sup>

Likewise, the authorities must often implement the right to health through policy. They may, therefore, expect plenty of breathing room in their efforts. Once again, one may ordinarily take the government to task only if it fails to approve any measures whatsoever or if it proceeds arbitrarily.

In *Del Valle Bermúdez v. Ministry of Health & Soc. Welfare*,<sup>238</sup> for example, the Venezuelan Supreme Court reviewed the official national policy on the human immunodeficiency virus (HIV) and the acquired immune deficiency syndrome (AIDS). In doing so, it owed the authorities a respectable margin of error. As the Bolivarian faction would recall, the State possesses utmost expertise and legitimacy to call the shots in this domain.

Venezuela’s highest tribunal first ascertained whether the Ministry’s “refusal to supply HIV/AIDS patients with the medications . . . necessary for the treatment of their disease” collided with the right to health.<sup>239</sup> Curiously, this issue seems to

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235. *Id.* at 7.

236. *Id.*

237. *Id.*

238. The opinion from the court’s 1999 term is translated and reprinted in OQUENDO, *supra* note 1, at 363–74.

239. *Id.* at 364.

touch upon principle alone. It appears not to differ much from the question central to *Rural Psychiatric Institute* and *Vera*. In other words, did the denial of medical attention infringe upon the victims' right to health?

Indeed, the Venezuelan justices in *Del Valle Bermúdez* initially approached the inquiry in the mode of those two previously analyzed opinions. They reasoned "that the state had failed to fulfill its duty" under "the right to health" because it did not "regularly and correctly administer[ ] [prescription] medications to HIV/AIDS patients."<sup>240</sup> As a result, the Ministry received a judicial injunction "to deliver, regularly and periodically," all prescribed medicines,<sup>241</sup> "to carry out or pay for specialized [and other] tests,"<sup>242</sup> and to furnish "all of the medications for the treatment of opportunistic infections . . . ."<sup>243</sup>

Nevertheless, the Supreme Court then shifted gears and landed in the midst of the political realm. First, it rendered its ruling applicable not only to the complainants but also to all other indigent Venezuelan citizens suffering "from HIV/AIDS" and in "need [of] treatment."<sup>244</sup> Second, it compelled the authorities "to develop a policy of information, treatment, and comprehensive medical assistance for the benefit of the plaintiffs"<sup>245</sup> and, presumably, of all other similarly situated individuals.

Finally, the tribunal stressed that, in light of the lack of a known cure and of the "high" costs of treatment, "the battle against the disease should focus on prevention."<sup>246</sup> On this front, the authorities had prepared "5000 brochures," distributed "100,000 condoms," cooperated with several civic AIDS organizations, and launched a "Safe Sex" campaign.<sup>247</sup> The justices politely praised "these measures" as "a positive initiative, which should continue and intensify,"<sup>248</sup> but evidently deemed them insufficient.

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240. *Id.* at 367–68.

241. *Id.* at 372–73.

242. *Id.* at 373.

243. *Id.*

244. *Id.* at 372; *see also id.* at 374.

245. *Id.* at 373.

246. *Id.* at 370.

247. *Id.*

248. *Id.*



The Supreme Court, consequently, directed the state to “develop a national prevention program along the following lines . . . .”<sup>249</sup>

- Educational programs to target vulnerable groups, teenagers, married couples with problems, etc.
- Massive provision of information for the community on the disease, its causes, its transmission, and its prevention.
- Elaboration of a national plan to make affordable diagnoses possible through the state’s medical institutions.<sup>250</sup>

The justices observed further:

Each of these programs requires special preparation and implementation, taking into account matters such as the general information currently available about the disease, the adequate use of condoms, and the availability of sterile syringes for drug users; the need for special attention for vulnerable groups; the existing efforts at the level of the community; and the role of marriage counseling.<sup>251</sup>

The Supreme Court finished up its delineation of the defendant’s responsibilities in these terms:

The Ministry of Health and Social Welfare must conduct, pursuant to the previously established principles, a thorough study of the basic needs of HIV/AIDS patients and of the different programs available to prevent an increase in the number of people infected. The findings of this study shall be presented to the President of the Republic and the Council of Ministers for consideration in defining the general guidelines for the next fiscal year’s budget.<sup>252</sup>

The order at the end of the opinion expressly commands the realization of such a survey. It states: “The goal must be to develop a policy of prevention based on facilitating information to individuals infected with HIV/AIDS, as well as on raising

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249. *Id.*

250. *Id.* at 370–71

251. *Id.* at 371.

252. *Id.*

their level of awareness, educating them, and providing comprehensive assistance to them.”<sup>253</sup>

On such political issues, the justices obviously owed deference to the government. As a result, they were bound to validate any non-arbitrary official plan. Nonetheless, the tribunal ultimately condemned the authorities because of their inability or reluctance to formulate any strategy at all. It therefore instructed them to move in that direction and outlined broad parameters.

Despite mandating a long-term plan to treat HIV/AIDS victims and hinder the spread of the illness, the decision leaves the details up to the government. The guidance dispensed allows the authorities to work out on their own, for instance, how to care for patients, how to educate individuals at risk of infection, how to inform the population at large, how to offer inexpensive diagnostics, how to capitalize on the available data and means, how to elaborate the requisite report, and so forth.

Having exposed the absence of an official strategy, the justices displayed scant patience for the official assertion that, due to budgetary constraints, it was “impossible to finance the treatment in question for the totality of persons suffering from HIV/AIDS.”<sup>254</sup> They obligated the government to undertake any necessary adjustments in the budget in order to live up to its constitutional commitments.<sup>255</sup> The Supreme Court warned that it had itself no option but to “safeguard plaintiffs’ right to health and life” and to “enforce the state’s duty to provide healthcare.”<sup>256</sup>

Subsequent to *Del Valle Bermúdez*, the Venezuelan judiciary has fundamentally maintained this approach to the AIDS crisis.<sup>257</sup> Elsewhere in Latin American, courts have mostly dealt

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253. *Id.* at 373–74.

254. *Id.* at 368.

255. *Id.* at 369–70, 373.

256. *Id.* at 369.

257. See generally *id.* at 375–80. Venezuela’s highest tribunal decided *Del Valle* in 1999, during Hugo Chávez’s first year in office. The 1999 Venezuelan Constitution established a new Supreme Court (*Tribunal Supremo de Justicia*), whose justices soon confronted additional claims by HIV/AIDS patients. In *Glenda López v. Venezuelan Institute for Social Security*, translated and reprinted in *id.* at 375–79, a number of beneficiaries, represented by the same group of attorneys as before, sued the Institute for Social Security for failing to pay and deliver prescribed HIV/AIDS medicines. The Constitu-

with such claims in an equivalent vein.<sup>258</sup> Nonetheless, some tribunals in the region have shown themselves much less receptive. In response, the claimants have headed to and prevailed in transnational forums.<sup>259</sup> The discussion will now ponder, as its last “case,” five such petitions.

Unable to persuade Chile’s Supreme Court in a previous attempt, HIV/AIDS patients brought their grievance to the Inter-American Commission on Human Rights and obtained preliminary relief.

In its communication of November 20, 2001, the [body] informed the Chilean State that [the petitioners] urgently required basic assistance from state institutions to secure the drugs necessary for their treatment. It therefore requested on their behalf the adoption of urgent provisions to ensure them access not only to medicines essential to their survival but also to medical checkups for the regular monitoring of their health.<sup>260</sup>

The injunction quickly produced concrete results. “On December 5, 2001, the State described the preliminary steps taken at the Ministry of Health. It reported that Juan Pablo Améstica, Manuel Orlando Farías, and Náyade Orieta Rojas Vera were receiving medication, in addition to undergoing examination at public hospitals to monitor their physical condition.”<sup>261</sup>

HIV/AIDS victims from El Salvador also turned to the Inter-American Commission.<sup>262</sup> They obtained precautionary

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tional Chamber echoed its predecessor tribunal in opining that the defendant had “violated the right to health, threatened the right to life, and encroached upon the right to benefit from scientific and technological progress . . . .” *Id.* at 376. In 2002, the Constitutional Chamber confronted a virtually identical action in *Loreto Tabares v. Venezuelan Institute for Social Security*. Not surprisingly, the tribunal endorsed “the holding of Judgment Number 487 of April 6, 2001 (the *Glenda López* case).” *Id.* at 380.

258. *See generally id.* at 380–86.

259. *See id.* at 384–85.

260. Inter-Am. Comm’n H.R., *Medidas Cautelares 2001*, ¶ 12, OEA/Ser. L/V./II.114, doc. 5 rev. (2002).

261. *Id.*

262. *Miranda Cortez v. El Salvador*, Case 12.249, Inter-Am. Comm’n H.R., Report No. 29/01, OEA/Ser. L/V/II.111, doc. 20 (2001) [hereinafter *Miranda Cortez (Span.)*].

measures on February 29, 2000.<sup>263</sup> “On June 26, 2000, the Board of Directors of the Salvadoran Social Security Institute authorized the administration of the triple antiretroviral therapy for HIV-positive and AIDS patients.”<sup>264</sup> The Commissioners adjudged the petition admissible in 2001.<sup>265</sup> They crafted equivalent preliminary injunctions in favor of petitioners from Bolivia and Ecuador in 2002 and from Guatemala in 2005.<sup>266</sup>

To be sure, *Cuscul Pivaral v. Guatemala*, which admitted the Guatemalan complaint, acknowledges that “the right to health,” as an entitlement to “curative” as well as “preventive” action, merely entails “an obligation calling for progressive compliance.”<sup>267</sup> All the same, the decision cautions, in the same breath, that “in at least two situations enforcement must take place immediately.”<sup>268</sup> “In the first such scenario, the state must respect the bar against discrimination from the outset, in the sense that it may never implement the right to health on a discriminatory basis.”<sup>269</sup> “In the second scenario, it must address grave or imminent risks of loss of human life, which it must obligatorily protect at all times.”<sup>270</sup> The Commissioners appreciated that the dispute at hand might fall within the latter category and, consequently, agreed to entertain the substance of the claim.<sup>271</sup>

Unquestionably, the Commission was contemplating Article 26 of the American Convention on Human Rights in which the “state parties commit . . . to bring about progressively the full enforcement” of economic, social, and cultural rights, to

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263. Inter-Am. Comm’n H.R., Inf. Anual 2000 (Ch. III, (C) Sistema Peticiones y Casos Individuales, (1) Medidas cautelares acordadas o extendidas por la Comisión durante el año 2000, (i) El Salvador) OEA/Ser. L/V./II.111, doc. 20 rev. (2001) at 4 (¶ 30).

264. *Id.*

265. *Miranda Cortez (Span.)*, *supra* note 262, at 9.

266. Inter-Am. Comm’n H.R., *Inf. anual De La Comision Interamericana de Derechos Humanos 2002: Medidas cautelares otorgadas por la CIDH durante el año 2002*, ¶¶ 13, 52, OEA/Ser. L/V./II.117, doc. 1 rev. 1 (2003); *Cuscul Pivaral v. Guatemala*, Petition 642/03, Inter-Am. Comm’n H.R., Report No. 32/05, OEA/Ser. L/V/II.124, doc. 5 (2005) [hereinafter *Cuscul Pivaral*].

267. *Cuscul Pivaral*, *supra* note 266, at 9.

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

the extent of the “available resources.”<sup>272</sup> It was, accordingly, conceding the authorities wide freedom of movement on such matters of policy. Nonetheless, the Commissioners kept the government on a short leash insofar as it was seriously endangering the survival of the complainants.

Even though the authorities need not instantly realize the right to health, they must dutifully come up with a credible program for gradual realization. Courts may rightfully hold the State accountable on this obligation. Hence, they may adopt sanctions in the event of official inaction or arbitrariness.

*Cuscul Pivaral* seems to presume that the authorities had devised no strategy whatsoever on the disease. It resembles *Del Valle Bermúdez* in that it appears to order the administration of the prescribed medication as preliminary relief while officials put their long-term planning in place. From this perspective, both opinions make a short-run policy determination in the expectation that the government will afterward set the course permanently.

The decision makers in each of these two controversies would probably not have objected if the State had denied medication as part of a well-thought-out cost-allocation arrangement. For example, the authorities might have prioritized more widespread diseases, such as cancer, or curable and less expensively treatable illnesses, such as malaria, and approved only partial funding for AIDS therapy. Analogously, they might have allocated scarce HIV/AIDS monies to those who, *ceteris paribus*, would benefit the longest, namely, the young. Even if the adjudicative body believed these choices mistaken, it would have likely upheld them.

Adjudicators should not, however, grant the government carte blanche on any plan that it might concoct. For instance, they may reject, as insufficient from the standpoint of the right to health, any AIDS program that attended to the treatment of the illness, but not to prevention. The *Del Valle Bermúdez* tribunal would have certainly considered this kind of strategy hopelessly counterproductive and, as such, unacceptable. The Inter-American Commissioners would have perhaps reacted identically.

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272. American Convention (Span.), *supra* note 14, at art. 26.

The State must bear a heavy burden of proof when it professes to be rightfully occupying the sphere of politics. Courts must corroborate that the regime has specifically honored the pertinent principle and that the official policy generally coheres with the corresponding normative imperative. They may very well generate polemics on either end.

When the citizenry reaches out to national and international tribunals to vindicate human rights, it may seem to act undemocratically. Nonetheless, it essentially engages in participatory democracy insofar as it takes its affairs into its own hands, rather than relying on its representatives. Of course, the objective should not be to open up an alternative debate on politics, but to assure that the State stays within the bounds delineated by the people's entitlements. Moreover, courts must accord the government the benefit of the doubt, at least in relation to policy issues.

International adjudicators play a role akin to that of their domestic counterparts. Due to their geographic and cultural distance, however, they should comport themselves more deferentially vis-à-vis the local authorities. In any event, a special procedural and substantive law applies and ordinarily imposes, whether directly or indirectly, such duty of prudence.<sup>273</sup>

Consequently, the Bolivarian bloc may legitimately postulate that the Inter-American Human Rights System owes the signatory States and governments, in general, substantial elbow room in relation to the political, as opposed to the normative, facet of rights. Secondly, the Commission, like the Court, should give credit for a valiant crusade on behalf of rights to equality, dignity, health, housing, and cultural diversity. Finally, it should painstakingly avoid implying that these entitlements matter less than others, such as freedom of expression.

All the same, the discontented nations should not count on the national or supranational judiciary merely to cheerlead. On the contrary, they should expect it to investigate and confront. In the words of Viviana Krsticevic, Executive Director of the Center for Justice and International Law: "The Inter-American Commission on Human Rights," as well as the

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273. For example, the Inter-American Commission and Court ordinarily must, as discussed *supra* in Part II.B, dismiss a claim if the petitioner has not exhausted available national remedies.

Court, “must continue making governments uncomfortable; that’s a sign that it’s doing its job.”<sup>274</sup>

Tribunals should not operate as a ministry, let alone as a lackey, of the government. Furthermore, they need not follow the official line for the sake of consistency or integrity. While the judiciary does not have to check or counterbalance the elected authorities, it must punctiliously enforce entitlements upon the holders’ request. It must undertake a probe, more exacting on principles and more relaxed on policies; yet it may not altogether abdicate its responsibilities on either front.

Ineluctably, judges and state officials will lock horns over human rights. Under the proposed framework, they will often disagree on whether a particular case hinges on principle or politics, on what the relevant principles necessitate, and on which implementation programs qualify as *bona fide* and sensible. The government will probably accuse the courts of all too eagerly adjudicating based on principle, of illegitimately interpreting principles in a far-reaching manner, and of unwarrantedly classifying official political strategies as capricious. While the conceptual scheme advanced will certainly not eradicate such inter-institutional conflicts, it might help illuminate them.

#### IV. CODA

This work has both interpreted and assessed the so-called “Bolivarian” objections to the Inter-American Human Rights System. First, it has read them as primarily amounting not to a claim to sovereignty or a declaration of dissatisfaction with the institutional decision making, but rather to a call for the politicization of human rights. This interpretation finds general support in the available evidence and renders the overall challenge most interesting.

Second, the Article has appraised and questioned the philosophical soundness of an attempt to politicize the entitlements at stake. It has nonetheless repudiated the contention that human rights rest essentially on principles, not on politics. The discussion has instead insisted that human rights possess both a political and a normative component. It has concluded that tribunals owe the government deference on the

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274. Sáiz, *supra* note 8 (quoting Viviana Krsticevic).

former, but not on the latter, and has illustrated this conclusion through a series of national and international cases touching upon the principles and policies of free speech and the right to health.

Accordingly, the dissident bloc has correctly contended that States deserve a respectable amount of leeway not only as signatories of the pertinent treaties but also as entities with utmost experience and legitimacy in matters of politics. In addition, it has properly protested that the judiciary should not look down, in an ideologically narrow-minded manner, upon politically loaded second-generation rights; nor upon regimes that focus on such entitlements. Actually, as the authorities intensify their engagement on behalf of a human right of any kind, they typically dive deeper into the realm of policy and thereby widen their margin of discretion.

All the same, global and local adjudicators should not give the government a free pass. They should hold the State accountable if it proceeds arbitrarily, as well as if it fails to devise any program whatsoever. At any rate, a court should strictly scrutinize and, thereupon, severely sanction the authorities if they trample upon the principle underlying a particular entitlement.

Judges should not feel compelled to endorse the official line. Unlike a governmental ministry or even an administrative agency, they bear no duty of allegiance to the administration in power. On the contrary, a tribunal must tenaciously uphold human-rights norms and prudently probe into any proposed policies. It need not oppose or even check the authorities, yet it must independently investigate.

Venezuela, Ecuador, Bolivia, and Nicaragua might argue that they are principally pursuing social justice, which presumably prevails over human rights. Nevertheless, the exercise of these entitlements mostly contributes to or, at the very least, coheres with such a pursuit. Only under extreme circumstances does it stand in the way.

Significantly, none of the contested determinations turned on a clash between the endeavor to construct a just society and the obligation to honor human rights. In fact, other Latin American countries, such as Brazil, Chile, El Salvador, and Uruguay, have also progressively committed to the former without perceiving any tension with the latter. As a re-



sult, they have opted to sustain, rather than defy, the Inter-American Human Rights System, evidently viewing it as capable of accommodating substantial ideological diversity.

At the end of the day, one should resist the temptation to conceive of human rights as exclusively concerning principle or politics. They inevitably involve both. Once again, the authorities merit considerable, though not absolute, latitude on the political dimension and much less on the principled dimension.

In fact, the Bolivarian Axis and its enemies converge not only in rejecting this position but also in embracing a utopianism of sorts in relation to human rights. Hence, they both expect permanent harmony between the adjudicator and the State and disagree simply on whether the adjudicator should happily yield to the State, as an expert on policy, or vice versa, insofar as the judiciary's expertise lies in the construal of norms. The Inter-American Human Rights System will ineluctably stagnate, unless both sides learn to live with constant conflict in the enforcement of the established entitlements and, ultimately, with each other.