

DOUBLE OR NOTHING?

THE INTER-AMERICAN COURT OF HUMAN RIGHTS IN AN INCREASINGLY ADVERSE CONTEXT

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INTRODUCTION

After more than two decades of prominence, the Inter-American System of Human Rights (IAS) faces unprecedented challenges. While it is hard to point to a single event that shifted the tide, the fact is that the overall context in which the system operates has become increasingly adverse. For almost twenty years, the Inter-American Court of Human Rights (IACtHR or Court) positioned itself not only as a dispute resolution and “lawmaking” institution,¹ but also as a sort of regional constitutional court with two complementary venues of enforcement: the

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¹ DAVID HARRIS, THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS 1–4, 23–29 (David Harris & Stephen Livingstone eds., 1998); Armin von Bogdandy & Ingo Venzke, *Beyond Dispute: International Judicial Institutions as Lawmakers*, in INTERNATIONAL JUDICIAL LAWMAKING: ON PUBLIC AUTHORITY AND DEMOCRATIC LEGITIMATION IN GLOBAL GOVERNANCE 3 (Armin von Bogdandy & Ingo Venzke eds., 2012).

organs of the IAS, on the one hand, and domestic courts and institutions, on the other.² In effect, the IACtHR succeeded in establishing and expanding a veritable transnational framework of human rights governance, with deep impacts on local politics in Latin America.

Nevertheless, some of the factors that allowed the IACtHR to undertake such an expansion have changed. Perhaps due to its own success, the IAS is seeing new challenges, which warrant some kind of reaction from both the Court and the Inter-American Commission of Human Rights (IACHR or Commission). There is, indeed, some evidence of a backlash to this trajectory of transnationalism. Facing these challenges, one possible reaction is “double or nothing”: doubling down on the current strategy—striving for a deepening of the system’s transnationalism—or nothing; watering down IAS involvement in regional politics. This paper, though, suggests some caution. The way the Court has advanced its agenda has distinctive blind spots, which makes the IAS an easy target for populism and nationalism. Doubling down on transnationalism may prevent us, in fact, from protecting the System’s achievements from the attack of a disturbing new kind of political opponent.

This article describes how and why the IACtHR achieved such relevance in the region, highlighting how political and economic conditions in Latin America provided an appropriate context for its consolidation of authority. It then explores four challenges that the IACtHR needs to face strategically, taking into account some of the changes occurring in the internal politics of Latin American countries. In particular, this article explores political challenges threatening the IACtHR due to new economic policies in Latin America, the populist backlash against technocratic elites, and the economic downturn in the region. In the face of these challenges, “double or nothing” will not do. Against this strategy, the text proposes in its final part two pathways to adaptation for these new challenges, suggesting the importance of acknowledging the threats, and changing old strategies.

² RENÉ URUEÑA, GLOBAL GOVERNANCE THROUGH COMPARATIVE INTERNATIONAL LAW?: INTER-AMERICAN CONSTITUTIONALISM AND THE CHANGING ROLE OF DOMESTIC COURTS IN THE CONSTRUCTION OF THE INTERNATIONAL LAW (2013).

I. THE EMERGENCE OF A TRANSNATIONAL LEGAL ORDER

For the last couple of decades, the IAS has become a centralized system of international lawmaking, in which the IACtHR exercises power over domestic legal systems through both centralized and decentralized mechanisms of enforcement.³ The transnational arrangement emerging from the IAS is a form of Inter-American constitutionalism,⁴ which presses towards a harmonization of domestic laws and policies with international standards. This harmonization is achieved through a system of governance that enforces Inter-American standards both vertically and horizontally,⁵ achieving important transformation in the local politics and distribution of resources in the region.⁶

The emergence of Inter-American constitutionalism, and its success, was made possible by two interrelated phenomena: (i) the transformation of domestic constitutional frameworks in the region; and (ii) the doctrine of *conventionality control*.

First, the emergence and subsequent consolidation of a form of Inter-American constitutionalism is intimately linked with structural changes introduced to the political and constitutional arrangements of most countries in Latin America. Since the mid-1980s the region witnessed a process of democratization and pacification,⁷ which prompted important constitutional reforms in the continent. Some countries introduced major reforms to their existing constitutions (Costa Rica in 1989, Mexico in 1992, and Argentina in 1994), while others

³ René Urueña, *Interaction as a site of postnational rule-making: A case study of the Interamerican System of Human Rights*, in THE ACTORS OF POSTNATIONAL RULE-MAKING: CONTEMPORARY CHALLENGES OF EUROPEAN AND INTERNATIONAL LAW 133 (Elaine Fahey ed., 2015).

⁴ See Jorge Contesse, *The Final Word? Constitutional Dialogue and the Inter-American Court of Human Rights*, 15 INT'L J. CONST. L. 414 (2017); Ariel E. Dulitzky, *An Inter-American Constitutional Court: The Invention of the Conventionality Control by the Inter-American Court of Human Rights*, 50 TEX. INT'L L.J. 45, 65 (2015).

⁵ URUEÑA, *supra* note 2; Diego Garcia-Sayan, *The Inter-American Court and Constitutionalism in Latin America*, 89 TEX. L. REV. 1835, 1837–38 (2010).

⁶ See René Urueña, Beatriz Sanchez & Sergio Anzola, *Después del fallo: El cumplimiento de las decisiones del sistema interamericano de derechos humanos*, in MANUAL DE DERECHOS HUMANOS Y POLÍTICAS PÚBLICAS 447, 461 & ss (Laurence Burgogue-Larsen, Beatriz Sanchez & Antonio Maués eds., 2014).

⁷ By the 1970s, sixteen of the nineteen Latin American countries were governed by dictatorships; by 2012 Cuba remained as the only non-democratic country. See Mark Jones, *The Diversity of Latin American Democracy*, WORLD POLITICS REVIEW (Mar. 20, 2012), <https://www.worldpoliticsreview.com/articles/11751/the-diversity-of-latin-american-democracy>.

adopted new ones (Brazil in 1988, Colombia in 1991, Paraguay in 1992, Peru in 1993, Ecuador in 1998 and 2008, Venezuela in 1999, and Bolivia in 2009).⁸

Many of the new constitutions contained a generous bill of rights, including ambitious socio-economic, environmental, and collective rights. In addition to the creation of new constitutions and the introduction of new constitutional reforms, many countries incorporated for the first time constitutional courts (Chile in 1981, Colombia in 1991, Peru in 1993, Bolivia in 1998, and Ecuador in 1996), while others established jurisdictional mechanisms to enable the justiciability of the rights clauses in the constitutions (Argentina in 1994).⁹ This pattern of reform became known in Latin America as “new constitutionalism,” which has also included methods of constitutional interpretation and a new role for the judges as counter-majoritarian guarantors of the constitutional rights.¹⁰ Legal changes, by themselves, were not enough to bring about structural transformation in the region. Following amendments in constitutional texts, a new legal culture emerged, characterized by a growing reliance on law, legal discourse, and the role of judges as ultimate interpreters of constitutions.¹¹

While these changes were occurring locally, the IACtHR was developing a doctrine that would pave the way for the emergence of the Inter-American constitutionalism. Conventionality control (*control de convencionalidad*) vests both the IACtHR and domestic courts with the power to undertake judicial review of domestic laws on the basis of the American Convention of Human Rights,¹² which obliges States to

⁸ Rodrigo Uprimny, *The Recent Transformation of Constitutional Law in Latin America: Trends and Challenges*, 89 TEX. L. REV. 1587, 1587 (2010).

⁹ Javier Couso, *The Transformation of Constitutional Discourse and the Judicialization of Politics in Latin America*, in CULTURES OF LEGALITY: JUDICIALIZATION AND POLITICAL ACTIVISM IN LATIN AMERICA 141 (Javier Couso, Alexandra Huneeus & Rachel Sieder eds., 2010).

¹⁰ For an account of some of the patterns of the “new constitutionalism,” see David Landau, *Los derechos socioeconómicos sin transformación social en América Latina: la teorización de los tribunales favorables a las ideas mayoritarias en la sociedad*, in EL CONSTITUCIONALISMO EN EL CONTINENTE AMERICANO 254 (Daniel Bonilla Maldonado ed., 2016). See also Miguel Carbonell, *Teoría del Neoconstitucionalismo: Ensayos Escogidos*, 23 REVISTA MEXICANA DE DERECHO CONSTITUCIONAL 338, 338 (2010).

¹¹ ALEXANDRA HUNEEUS, JAVIER COUSO & RACHEL SIEDER, CULTURES OF LEGALITY. JUDICIALIZATION AND POLITICAL ACTIVISM IN CONTEMPORARY LATIN AMERICA 3 (Javier Couso, Alexandra Huneeus & Rachel Sieder eds., 2010); see also Pilar Domingo, *Novel appropriations of the Law in the Pursuit of Political and Social Change in Latin America*, in CULTURES OF LEGALITY: JUDICIALIZATION AND POLITICAL ACTIVISM IN CONTEMPORARY LATIN AMERICA 254 (Javier Couso, Alexandra Huneeus & Rachel Sieder eds., 2010).

¹² Article 2 of the American Convention on Human Rights states:

interpret any domestic legal instrument in accordance with the Inter-American *corpus juris*.¹³ For the IACtHR,

the judiciary must exercise a sort of ‘conventionality control’ between the domestic legal provisions which are applied to specific cases and the American Convention on Human Rights. To perform this task, the judiciary has to take into account not only the treaty, but also the interpretation thereof made by the Inter-American Court, which is the ultimate interpreter of the American Convention.¹⁴

The conventionality control is one of the integrated mechanisms that guarantee the consolidation of the Inter-American System of Human Rights as a transnational governance regime. As a result, States have repealed and amended laws, courts have relied on the Inter-American *corpus juris* to decide prominent cases, and administrative agencies have created countless policies and programs to comply with the IACtHR orders on reparations.¹⁵

The effectiveness of this new form of Inter-American constitutionalism depends on the operative entanglement of the vertical

Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

Organization of American States, American Convention on Human Rights, art. 2, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.pdf. The conventional control is the international equivalent of the constitutional control (*control de constitucionalidad*), which is used by national courts to review national laws on the basis of the Constitution. The analogy between constitutional control and conventional control was elaborated by García Ramírez in his concurring opinion in the case *Tibi v. Ecuador*. *Tibi v. Ecuador*, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H. R. (ser. C) No.114, ¶ 3 (Sep. 7, 2004) (García-Ramírez, J., concurring).

¹³ Eduardo Ferrer Mac-Gregor, *The Constitutionalization of International Law in Latin America: Conventional Control the New Doctrine of the Inter-American Court of Human Rights*, 109 AJIL UNBOUND 93, 93 (2015).

¹⁴ Almonacid-Arellano et al. v. Chile, Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H. R. (ser. C.) No. 154, ¶ 124 (Sept. 26, 2006).

¹⁵ Armin von Bogdandy, *The Constitutionalization of International Law in Latin America. Ius Constitutionale Commune en America Latina: Observations on Transformative Constitutionalism*, 109 AJIL UNBOUND 109, 109 (2015). Regarding the origins of the constitutional bloc in France and Spain, see Aida Torres Pérez, *El impacto del derecho internacional de los derechos humanos en España*, in PROTECCIÓN MULTINIVEL DE DERECHOS HUMANOS 417 (George Rodrigo Bandería Galindo, René Urueña & Aida Torres Pérez eds., 2013); Enzamaría Tramontana, *Recepción e impacto de los tratados internacionales de derechos humanos en Francia*, in PROTECCIÓN MULTINIVEL DE DERECHOS HUMANOS 435 (George Rodrigo Bandería Galindo, René Urueña & Aida Torre Pérez eds., 2013).

(or centralized), and horizontal (decentralized) axis of the conventionality control.¹⁶ On one side, the IACtHR has established itself as the center of international norm-production, with the power to enforce such a legal regime even through the annulment of domestic norms.¹⁷ Thus, in cases where precedent from the Court exists, the degree of freedom for national courts is limited when it comes to the interpretation or application of the American Convention on Human Rights.¹⁸

On the other side, the effectiveness of the horizontal axis of the conventionality control is operative thanks to the inclusion of opening clauses in the new constitutions of the region, which take different forms but, in general terms, grant human rights' instruments a special rank in the hierarchy within the national legal system.¹⁹ In most countries, opening clauses have been put into effect by national courts through the reinterpretation of the so-called *constitutional block* (*bloque de constitucionalidad*), a legal institution coming to Latin America from France (via Spain), which serves to integrate international norms into the national legal systems.²⁰ The constitutional block became the instrument

¹⁶ URUEÑA, *supra* note 2; Dulitzky, *supra* note 4, at 83–86.

¹⁷ See *La Cantuta v. Peru*, Merits, Reparations, and Costs, Inter-Am. Ct. H. R. (ser. C) No. 162, ¶ 189 (Nov. 29, 2006). In his separate opinion to this decision, Sergio García Ramírez argues that domestic laws that violate the Convention are “basically invalid.” *La Cantuta v. Peru*, Separate Opinion of Judge Sergio García Ramírez, Inter-Am. Ct. H. R. (ser. C) No. 162, ¶¶ 4–5 (Nov. 29, 2006); see also *Barrios Altos v. Peru*, Merits, Inter-Am. Ct. H. R. (ser. C) No. 75, (Mar. 14, 2001).

¹⁸ See Dulitzky, *supra* note 4, at 56, 69–70. See generally Christina Binder, *The Prohibition of Amnesties by the Inter-American Court of Human Rights*, 12 GER. L.J. 1203 (2011).

¹⁹ Manuel Eduardo Góngora Mera, *La difusión del bloque de constitucionalidad en la jurisprudencia latinoamericana y su potencial en la construcción del Ius Constitutionale Commune latinoamericano*, in IUS CONSTITUTIONALE COMMUNE EN AMÉRICA LATINA: RASGOS, POTENCIALIDADES Y DESAFÍOS 301 (Armin von Bogdandy, Héctor Fix-Fierro & Mariela Morales Antoniazzi eds., 2014). For a thorough analysis of the integration of international human rights law into the legal system of several countries in Latin America, see George Rodrigo Bandería Galindo & Antonio Moreira Maués, *El caso brasileño*, in PROTECCIÓN MULTINIVEL DE DERECHOS HUMANOS 343 (George Rodrigo Bandería Galindo, René Uruña & Aida Torrez Pérez eds., 2013); Renata Bregaglio Lazarte, *La protección multinivel de derechos humanos en el Perú*, in PROTECCIÓN MULTINIVEL DE DERECHOS HUMANOS 449 (George Rodrigo Bandería Galindo, René Uruña & Aida Torres Pérez eds., 2013); Felipe Paredes, *Chile en el sistema interamericano de derechos humanos*, in PROTECCIÓN MULTINIVEL DE DERECHOS HUMANOS 393 (George Rodrigo Bandería Galindo, René Uruña & Aida Torres Pérez eds., 2013); María Angelica Prada, *La integración del Derecho Internacional en el sistema Colombiano*, in PROTECCIÓN MULTINIVEL DE DERECHOS HUMANOS 365 (George Rodrigo Bandería Galindo, René Uruña & Aida Torres Pérez eds., 2013); Nataly Viviana & Vargas Gamboa, *Los tratados internacionales de derechos humanos en la nueva constitución política del Estado plurinacional de Bolivia*, in PROTECCIÓN MULTINIVEL DE DERECHOS HUMANOS 329 (George Rodrigo Bandería Galindo, René Uruña & Aida Torres Pérez eds., 2013).

²⁰ von Bogdandy, *supra* note 15, at 313.

through which national courts in the region justify the access, interpretation, and direct application of international human rights norms in order to review laws or to adjudicate on constitutional rights. The combination of both these axes—the doctrine of conventionality control and the concept of the constitutional block—has allowed the IACtHR to recruit domestic courts to enforce Inter-American human rights standards in domestic contexts.

The economic situation in the region facilitated these developments. Since the 2000s, a regional commodity boom has facilitated the expansion of Inter-American constitutionalism which, in turn, made possible the adjudication of socio-economic rights by national courts in the region.²¹ Indeed, the combination of new constitutional arrangements with severe institutional blockages in the region led courts to adjudicate on public policy issues that were traditionally in the hands of the legislative and administrative branches.²² The new institutional arrangements, together with the new legal culture that recognized a more important role for the judiciary, prompted a wave of litigation of socio-economic cases, which led to the recognition of the justiciability of social rights in the region.²³

These developments, however, would not have been possible without the resources from the commodity boom in the early 2000s. Between 1980 and 2000, per capita GDP in the region grew by just 0.4 percent annually; in contrast, in the 2000s, growth picked up to an average annual rate of 1.9 percent.²⁴ Perhaps more importantly, the regional poverty rate fell sharply for the first time in decades, from 40 percent in 1980 to 28 percent in 2013.²⁵ In this context, adjudication of socio-economic rights by domestic courts had the actual power to change reality, as governments had the financial resources to comply, however grudgingly, with ever more demanding court orders. This move towards

²¹ See generally Malcolm Langford, *Domestic Adjudication and Economic, Social and Cultural Rights: A Socio-Legal Review*, 6 SUR REVISTA INTERNACIONAL DE DERECHOS HUMANOS 91 (2009).

²² See César Rodríguez-Garavito, *Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America*, 89 TEX. L. REV. 1669 (2011).

²³ See ROBERTO GARGARELLA, PILAR DOMINGO & THEUNIS ROUX, COURTS AND SOCIAL TRANSFORMATION IN NEW DEMOCRACIES: AN INSTITUTIONAL VOICE FOR THE POOR? (Roberto Gargarella, Pilar Domingo & Theunis Roux eds., 2006); David Landau, *Political Institutions and Judicial Role in Comparative Constitutional Law*, 51 HARV. INT'L L.J. 319 (2010).

²⁴ DAVID ROSNICK & MARK WIESBROT, CENTER FOR ECONOMIC AND POLICY RESEARCH, LATIN AMERICAN GROWTH IN THE 21ST CENTURY: THE “COMMODITIES BOOM” THAT WASN’T 3 (2014).

²⁵ *Id.*

effective justiciability of socio-economic rights contributed to the expansion of the Inter-American system of human rights governance. National courts found in the jurisprudence of the IACtHR the language to expand socio-economic rights and a politically safe ground to order reluctant bureaucracies into action to spend financial resources that were not prohibitively scarce. In a region dominated by strong presidencies and populist or clientelist legislatures, courts found in the IAS an important ally to bolster their independence.²⁶

II. THE INTER-AMERICAN SYSTEM UNDER THREAT

Perhaps due to the important changes described earlier, Latin America seems to be relapsing to the “sovereigntist” approach to constitutional and international law that characterized the region’s legal and political discourse before the mid-1980s.²⁷ By the end of the 1990s, a clear consensus had been reached, in which both the Latin-American right and left seemed to agree that democracy and a constitutional state of rights were inseparable, and that national sovereignty had to yield to the decisions of the different international human rights tribunals and organs.²⁸ Nonetheless, this consensus is not only losing strength, but is currently contested by the reemergence of nationalist and sovereigntist discourses that come from both the right and the left in the continent.

One of the first challenges the Inter-American human rights consensus faced was the arrival of new forms of constitutionalism in Venezuela, Ecuador, Bolivia, and Nicaragua. These countries recovered the concept of “non-intervention” to criticize the IAS for serving the “imperialistic” interests of the United States.²⁹ Moreover, conservative political parties and movements in countries such as Colombia, Chile,

²⁶ Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 AM. J. INT’L L. 241, 244 (2008).

²⁷ Alexandra Hunees, Introduction to Symposium on the Constitutionalization of International Law in Latin America, 109 AJIL UNBOUND 89, 89 (2015).

²⁸ Daphne Barak-Erez, *The International Law of Human Rights and Constitutional Law: A Case Study of an Expanding Dialogue*, 2 INT’L J. CONST. L. 611 (2004).

²⁹ See Javier Couso, *¿Regreso al futuro?: el retorno de la soberanía y del principio de no intervención en los asuntos internos de los Estados en el constitucionalismo radical latinoamericano*, in EL CONSTITUCIONALISMO EN EL CONTINENTE AMERICANO 195, 211–12 (Daniel Bonilla ed., 2016).

and Argentina also see in the IAS a threat, due to its promotion of progressive values, such as gender diversity.³⁰

In addition, some states have denounced the American Convention on Human Rights, or have tried to block funding of the system. The first country to leave was Trinidad and Tobago in 1998 because of a near de facto abolition of the death penalty following a decision of the IACtHR.³¹ Since the election of Hugo Chávez as president of Venezuela in 1998, the Venezuelan government and courts increasingly rejected the rulings and recommendations issued by the different organs of the Inter-American System.³² In 2012, Chávez denounced the American Convention, arguing that it was a “sovereign decision”—as the Court was biased against Venezuela because it served US interests.³³ The Dominican Republic, in turn, also withdrew from the American Convention in 2014. In this case, however, the decision came from the Constitutional Tribunal, as a clear response to the ruling in *Expelled Dominicans and Haitians v. Dominican Republic*, seeing that in November 2014 the Constitutional Court decided that the instrument that recognized the jurisdiction of the IACtHR was unconstitutional.

Not all challenges to the IAS have emerged from denouncing the Convention. Other governments in the region have opted for withdrawing funding to the system. Such was the case of Brazil. In 2011, the Inter-American Commission of Human Rights granted the indigenous communities of Brazil precautionary measures, ordering the government to “immediately suspend the licensing process for the Belo Monte Hydroelectric Plant project and stop any construction work from moving forward until certain minimum conditions are met.”³⁴ In response, the Government of Dilma Rousseff withdrew the candidature for a Brazilian

³⁰ Christopher McCrudden, *Transnational Culture Wars*, 13 INT’L J. CONST. L. 434, 452–55 (2015).

³¹ Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash against Human Rights Regimes*, 102 COLUM. L. REV. 1832, 1879–81, 1884 (2002).

³² Alexandra Huneus, *Constitutional Lawyers and the Inter-American Court’s Varied Authority*, 79 LAW & CONTEMP. PROBS. 179, 199–202 (2016).

³³ Comisión Interamericana de Derechos Humanos, *Comunicado de Prensa: CIDH manifiesta su profunda preocupación por efecto de la denuncia de la Convención Americana por parte de Venezuela*, ORG. OF AMERICAN STATES (Sept. 10, 2013), <http://www.oas.org/es/cidh/prensa/comunicados/2013/064.asp>.

³⁴ *Indigenous Communities of the Xingu River Basin v. Brazil*, Precautionary Measure 382/10, Inter-Am. Comm’n H.R., Report No. PM 382/10, OEA/Ser.L/V/II, doc. 69, ¶ 32 (2011).

commissioner and cut down its financial contribution to the system.³⁵ Although Brazil revived its relationship with the Organization of American States (OAS) in 2014, its financial contribution has remained insignificant in comparison to the contributions made to other international organizations.³⁶

In 2011, the OAS decided to start a “Process for the Strengthening of the Commission,” which lasted for two years.³⁷ During this process, countries of the *Alianza Bolivariana para los Pueblos de Nuestra América* (ALBA) group (Ecuador, Venezuela, Bolivia, and Nicaragua) proposed reforms that would have weakened the IAS.³⁸ Although this proposal failed to pass, and despite the efforts to strengthen the IAS, in 2016 the IACHR announced that it was facing an important financial crisis due to a decrease in the contributions of the state parties to the OAS. Although it is not the first time that the Commission has had financial problems, the President of the organ, James L. Cavallaro, warned that due to the severe financial crisis the IACHR had to suspend its hearings and could lose forty percent of its personnel due to lack of funds.³⁹

Perhaps most significantly, national courts, a traditional ally of the IAS, have also started to reject IACtHR decisions. For example, the high courts of Argentina, Chile, and Venezuela have rejected or have refused to apply the ruling of the Inter-American Court in the cases: *Bueno Alvez v. Argentina*, *Almonacid v. Chile*, and *Apitz v. Venezuela*. More interesting is that these instances of rejection of the Inter-American System of Human Rights came from countries that are representatives of different trends in the region; Argentina being a clear example of new constitutionalism, Chile of a more traditional constitutionalism, and Venezuela of a new variant of constitutionalism.⁴⁰ Most recently, the

³⁵ *Politóloga brasileña: Brasil es responsable de crisis financiera de CIDH*, SPUTNIK NEWS (Sept. 6, 2016, 9:59 AM), <https://mundo.sputniknews.com/americalatina/201606091060604459-brasil-crisis/>.

³⁶ *Id.*

³⁷ INTER-AMERICAN COMM’N OF HUMAN RIGHTS, POSITION DOCUMENT ON THE PROCESS OF STRENGTHENING OF THE INTER-AMERICAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS 2 (2012), <http://www.oas.org/en/iachr/docs/pdf/PosicionFortalecimientoENG.pdf>.

³⁸ Wayne Sandholtz et al., *Backlash and International Human Rights Courts*, in CONTRACTING HUMAN RIGHTS CRISIS, ACCOUNTABILITY, AND OPPORTUNITY 159 (2017).

³⁹ Press Release, Inter-American Comm’n on Human Rights, Severe Financial Crisis of the IACHR Leads to Suspension of Hearings and Imminent Layoff of Nearly Half its Staff (May 23, 2016), http://www.oas.org/en/iachr/media_center/PReleases/2016/069.asp.

⁴⁰ Huneeus, *supra* note 32, at 181, 187, 193, 195, 200.

Argentinean Supreme Court expressly denied effects to an Inter-American decision, thus openly breaking with the transnational trajectory that had characterized Inter-American constitutionalism.⁴¹

Finally, the election of Donald J. Trump may also have a negative impact on IAS governance. Although the United States has never ratified the American Convention of Human Rights, it played an important role in promoting human rights protection in the region by pressuring unwilling governments to comply with the international obligations. In many cases, this pressure was exerted through what Margaret Keck and Kathryn Sikkink have called a “boomerang effect,” which takes place when domestic activists enter into transnational alliances in order to have foreign NGOs pressure their own government to pressure the other regime to comply with international human rights standards.⁴²

III. DOUBLE OR NOTHING? FOUR OVERLOOKED CHALLENGES OF THE INTER-AMERICAN REGIME OF HUMAN RIGHTS

Facing such threats, one possible reaction is “double or nothing”: doubling down on the current strategy—striving for a deepening of the system’s transnationalism—or nothing; watering down the IAS’ involvement in regional politics. Following this logic, even if states are withholding funding, domestic courts are rejecting IAS decisions, and if populism is on the rise, the strategy would be to continue the current trajectory of transnationalism. This paper suggests some caution. The way the Court has advanced its agenda features blind spots, which makes the Inter-American Human Rights System an easy target for populism and nationalism. Doubling down on transnationalism may prevent us, in fact, from protecting the System’s achievements from the attack of a disturbing new kind of political opponent. In order to fully understand how deep the crisis is—and therefore, the possible risks it poses to the system—it is necessary to complement the analysis by pointing to four challenges that are also threatening the continuity of the Inter-American

⁴¹ See *Corta Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice]*, 14/2/2001, “Ministerio de Relaciones Exteriores y Culto s/informe sentencia dictada en el caso ‘Fontevecchia y D’Amico vs. Argentina’ por la Corte Interamericana de Derechos Humanos,” *Fallos* (2017–340–257) (Arg.).

⁴² MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* 12–13 (1998).

Human Rights System of transnational governance. The following sections will describe four challenges that the IAS needs to acknowledge and address.

A. THE FIRST CHALLENGE: TECHNOCRATIC GOVERNANCE

The first challenge facing the IACtHR concerns its deep connection with neoliberal forms of governance in the region. In a world of resurging populism, the IAS is open to charges of unaccountable technocratic governance because the System builds its authority on a local basis that was, ultimately, the result of a technocratic process of institutional reform in Latin America in the 1990s. The “double or nothing” strategy fails to account for this technocratic dimension of the IAS.

In general, human rights in their contemporary form share a common historic and ideological origin with the rise of neoliberal capitalism, particularly since the 1970s.⁴³ Despite clear differences in approach, human rights are committed to methodological individualism, as market fundamentalism is,⁴⁴ and may emerge as a non-political “creed,” hiding the structural conditions of the economic model, and distracting the attention away from the structural causes of rights violations.⁴⁵

In Latin America, the connection between human rights and neoliberal mechanisms has been exemplified by the parallel rise of regulatory agencies and strong Constitutional Courts. The wave of privatization that characterized neoliberal politics in the region during the 1990s required new institutions that were supposed to bring security to investors, regulatory stability, and ensure technical expertise.⁴⁶ Independent regulatory agencies were thus created, emerging from the lack of trust in the traditional institutions of representative democracies (such as Congress). They were supposed to be isolated from political

⁴³ Susan Marks, *Four Human Rights Myths*, in HUMAN RIGHTS: OLD PROBLEMS, NEW POSSIBILITIES 225, 225–35 (Kevin Kinley et al. eds., 2013).

⁴⁴ Mary Nolan, *Human Rights and Market Fundamentalism*, MAX WEBER LECTURE SERIES, 2014/02, 1, 1 (2014).

⁴⁵ Marks, *supra* note 43.

⁴⁶ See generally Jacint Jordana & David Levi-Faur, *The Diffusion of Regulatory Capitalism in Latin America: Sectoral and National Channels in the Making of a New Order*, 598 ANN. AM. ACAD. POL. & SOC. SCI. 102 (2005) (on Latin America generally); René Urueña, *The rise of the constitutional regulatory state in Colombia: The case of water governance*, 6 REG. & GOVERNANCE 282 (2012) (on Colombia specifically).

pressures and based on technical expertise.⁴⁷ For economists, removing political strains was an effective way to regulate specific markets and correct market failures, as was the case for services such as water supply and energy, among many others.⁴⁸

This fear of politics and political capture also inspired institutional reform in human rights and constitutional adjudication. So called neo-constitutionalists⁴⁹ responded by aiming for ambitious bills of rights and activist Constitutional Courts—isolated from political pressures and based on technical expertise. This might seem unrelated, but as the Colombian case on water supply evidences, the human rights language has been crucial to implement redistributive policies by Constitutional Courts, while maintaining the overall economic model and a decision-making process that is shielded from “political” interference.⁵⁰

⁴⁷ See Karen Yeung, *The Regulatory State*, in THE OXFORD HANDBOOK OF REGULATION 64 (Martin Baldwin et al. eds., 2010).

⁴⁸ Navroz K. Dubash & Bronwen Morgan, *Understanding the Rise of the Regulatory State of the South*, 6 REG. & GOVERNANCE 261, 268–72 (2012).

⁴⁹ The ‘neo-constitutionalist’ label was first used retrospectively by the Genoa School. See generally PAOLO COMANDUCCI ET AL., POSITIVISMO JURÍDICO Y NEOCONSTITUCIONALISMO (2009); Paolo Comanducci, *Formas de (neo)constitucionalismo: un análisis metateórico*, in NEOCONSTITUCIONALISMO(S) 90 (Miguel Carbonell ed., 2d ed. 2003). It described:

[T]he assumption [that] the notion of law together with its forms of identification, application and cognition (i.e., in its ontological, phenomenological, and epistemological dimension) requires to be radically revisited because of the prominent role and pervasive influence fundamental rights have been acquiring since the conclusion of the Second World War both in the domestic law of an ever increasing number of countries, and in international law. In other words, the assumption is . . . that fundamental rights have been so deeply affecting law in all its major aspects, as to justify the need and to urge the claim for a new understanding of its notion.

Tecla Mazzaresse, *Towards a Positivist Reading of Neo-constitutionalism*, 6 ASSOC. J. LEG. SOC. THEORY 233, 233–34 (2002). While loosely inspired by the work of some American scholars (most prominently Ronald Dworkin), this new approach to law gained little traction in the US or in the UK. In contrast, it spread over Latin America like wildfire during the 1990s. The idea that fundamental rights and activist courts could transform the difficult economic situation of the region appealed to scholars and judges in Argentina. See MIGUEL CARBONELL & LEONARDO GARCÍA JARAMILLO, EL CANON NEOCONSTITUCIONAL (2010) (providing information on neoconstitutionalism in Mexico); JORGE E ZAVALA EGAS, DERECHO CONSTITUCIONAL, NEOCONSTITUCIONALISMO Y ARGUMENTACIÓN JURÍDICA (2010) (providing information on neoconstitutionalism in Ecuador); REGINA QUARESMA ET AL., NEOCONSTITUCIONALISMO (1st ed. 2009) (providing information on neoconstitutionalism in Brazil); Alfonso Santiago, *Sistema jurídico, teoría del derecho y rol de los jueces: las novedades del Neoconstitucionalismo*, 22 DÍAKON 131, 134–35 (2008).

⁵⁰ René Urueña, *Global Water Governance and the Rise of the Constitutional Regulatory State in Colombia*, in THE RISE OF THE REGULATORY STATE OF THE SOUTH 26, 26–27 (2013).

The IACtHR is part of this parallel structure of human rights and the regulatory state. Neo-constitutionalism promoted this model by strengthening national constitutional courts, and creating ever-closer ties with the IACtHR. As Alexandra Huneus has shown, the legitimacy of the IACtHR is dependent, at least in part, of an active network of lawyers with a particular conception of constitutional law that emphasizes judicial power, rights-based review, and a broad understanding of constitutional rights that includes human rights.⁵¹ The IACtHR's influence on a particular state is in part a function of the domestic legal community—which, in turn, is defined in Latin America by a technocratic mindset emerging from the years of privatization, and which is parallel to the emergence of independent regulatory agencies. Thus, despite their differences, neo-constitutionalist and neoliberal policy makers coexist more or less peacefully, and share a general rejection of traditional legislatures, which in turn informs the overall approach of the IAS.

To be sure, this phenomenon coincides in part with the more general debate on judicial review and its democratic implications. Perhaps the most articulate case against judicial review was made by Jeremy Waldron, who argued that, by “privileging majority voting among a small number of unelected and unaccountable judges, [strong judicial review of legislation] disenfranchises ordinary citizens and brushes aside cherished principles of representation and political equality in the final resolution of issues about rights.”⁵² The IACtHR's strong form of Inter-American constitutionalism can certainly be subject to Waldron's critique, with the added complication of its international character—thus being even more removed from the “ordinary citizens” to whom Waldron refers.⁵³ The point here, though, is not that the IACtHR's constitutionalist project is anti-democratic (there are good reasons why it is not⁵⁴), but rather that the institutional expression of the Inter-American constitutionalist project shares a common background with the neoliberal project of institutional reform in the region. This

⁵¹ Alexandra Huneus, *Constitutional Lawyers and the Inter-American Court's Varied Authority*, 79 *LAW & CONTEMP. PROBS.* 179, 180 (2016).

⁵² Jeremy Waldron, *The Core of the Case against Judicial Review*, 115 *YALE L.J.* 1346, 1353 (2006).

⁵³ On the distinct legitimacy challenges of international courts, see Nienke Grossman, *The Normative Legitimacy of International Courts*, 86 *TEMPLE L. REV.* 61 (2013).

⁵⁴ See Andreas Follesdal, *The Legitimacy Deficits of the Human Rights Judiciary: Elements and Implications of a Normative Theory*, 14 *THEORETICAL INQUIRES L.* 339, 352–59 (2013).

common background is systematically downplayed by the Inter-American constitutionalist project. If anything, Inter-American constitutionalism sees its role as that of controlling the excesses of neoliberalism.⁵⁵ However, the underlying link remains and, while external challenges to the IAS are indeed crucial, it is important to underscore that the populist charge against technocratic governance, as established in Latin America in the 1990s, might also target the IAS.

B. THE SECOND CHALLENGE: END OF THE COMMODITY BOOM

The exposure to the slowdown in China and the strong dependence of South American countries on commodity exports makes socio-economic rights adjudication particularly vulnerable to market forces,⁵⁶ which in turn undermines the potential impacts of the IAS in achieving a veritable “transformative constitutionalism” in the region.⁵⁷ Ultimately, economic downturn, the rise of extreme poverty, and the arrival of austerity measures are making the IACtHR lose leverage to trigger socio-economic transformations via structural adjudication.

This challenge is crucial for the future of the System. As dictatorships ended in Latin America in the 1990s, socio-economic justice became a central theme of the Inter-American System,⁵⁸ either as the debate on the justiciability of socio-economic rights,⁵⁹ or under the form of a more economically aware reading of civil and political rights

⁵⁵ See María Paula Saffon, *Can Constitutional Courts be Counterhegemonic Powers vis-à-vis Neoliberalism? The Case of the Colombian Constitutional Court*, 5 SEATTLE J. SOC. JUST. 533, 535–39 (2007).

⁵⁶ *Latin America's disappointing economic growth*, ECONOMIST (July 20, 2017), <https://www.economist.com/news/americas/21725344-commodity-hangover-has-been-compounded-political-uncertainty-latin-americas-disappointing>.

⁵⁷ Armin von Bogdandy, *Ius Constitutionale Commune en América Latina: Observations on Transformative Constitutionalism*, 109 AJIL UNBOUND 109, 110–11 (2015). On the concept of “transformative constitutionalism,” see Theunis Roux, *Transformative Constitutionalism and the Best Interpretation of the South African Constitution: Distinction without a Difference*, 20 STELLENBOSCH L. REV. 258 (2009).

⁵⁸ Victor Abramovich, *De las violaciones masivas a los patrones estructurales: nuevos enfoques y clásicas tensiones en el Sistema Interamericano de Derechos Humanos*, 6 SUR REVISTA INTERNACIONAL DE DIREITOS HUMANOS [SOUTH INTERNATIONAL JOURNAL ON HUMAN RIGHTS] 7, 9, 23 (2009).

⁵⁹ Carolina Fairstein et al., *En Busca de un Remedio Judicial Efectivo: Nuevos Desafíos para la Justiciabilidad de los Derechos Sociales*, in DERECHOS SOCIALES: JUSTICIA, POLÍTICA Y ECONOMÍA EN AMÉRICA LATINA 25, 25–32 (Pilar Arcidacono et al. eds., 2010).

(such as the right to life⁶⁰ or the right to property⁶¹). Even though the Court has been somehow slow in effectively expanding its protection of socio-economic rights,⁶² such an expansion became the goal towards which the institution was moving (at least rhetorically).⁶³ Achieving that goal, however, depends on having functioning states in the region, with financial resources to comply with structural injunctions adopted by the IACtHR, or by domestic courts using Inter-American standards. The end of the commodity boom is a direct threat to this transformative agenda, which is completely overlooked by the “double or nothing” strategy of ever-more expansive international adjudication. Despite recent years of prosperity, increases in aggregate demand in the region failed to increase domestic output, and most of the countries benefiting from relative prosperity have low levels of savings.⁶⁴ According to the Semi-Annual World Bank Report, Latin American countries will need to find a “new balance,” because these external conditions will be durable, and therefore it will be necessary to adapt to a “new normal.”⁶⁵

This situation will imply a setback in terms of poverty reduction, which improved during the 2000s. By 2013, less of the twenty-five percent of the region’s population lived on less than \$4.00 a day, and ten percent with less than \$2.50 per day—a significant reduction compared to the early 2000s when more than forty percent lived on less than \$4.00 per day, and more than twenty-five percent lived with less than \$2.50.⁶⁶ However, this improvement seems to be linked with the commodity

⁶⁰ See “Niños de la Calle” (Villagrán Morales y otros) v. Guatemala, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 63, ¶¶ 137–47 (Nov. 19, 1999).

⁶¹ See Comunidad Indígena Xákmok Kásek v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 214, ¶¶ 122–54 (Aug. 24, 2010); Comunidad Indígena Yakye Axa v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶¶ 120–56 (June 17, 2005); Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶¶ 138–57 (Aug. 31, 2001).

⁶² See Elizabeth Salmón & Renata Bregaglio, *Estándares jurisprudenciales de derechos económicos, sociales y culturales en el sistema interamericano*, in *MANUAL DE DERECHOS HUMANOS Y POLÍTICAS PÚBLICAS* 383 (Laurence Burgorgue-Larsen, Beatriz Sanchez & Antonio Maués eds., 2014).

⁶³ See Abramovich, *supra* note 58.

⁶⁴ Anthony Harrup, *South America Suffers From End of Commodities Boom*, WALL STREET J. (Apr. 12, 2016, 2:25 PM), <https://www.wsj.com/articles/south-america-suffers-from-end-of-commodities-boom-1460487125>.

⁶⁵ AUGUSTO DE LA TORRE ET. AL., *THE COMMODITY CYCLE IN LATIN AMERICA* 5, 11 (World Bank, 2016).

⁶⁶ *World Bank, Working to End Poverty in Latin America and the Caribbean: Workers, Jobs, and Wages*, at 7, LAC Poverty and Labor Brief (June 2015).

boom and not with structural changes in the region's structure of employment, since most incomes in the region still depend on self-employment or micro enterprises.⁶⁷ Most of the countries were not prepared for the end of the boom, and Latin America is currently facing the return of extreme poverty. In 2015, around 7 million people fell into poverty,⁶⁸ and it is estimated that in the next years between twenty-five and thirty million people will be vulnerable to fall into poverty again.⁶⁹

Most importantly for the IAS, Latin American countries have been forced to adjust internal policies in order to adapt to lower export revenue,⁷⁰ and in some cases aggressive austerity measures are starting to be implemented. In many cases, these strict austerity measures take the form of constitutional amendments that put a ceiling on fiscal expenses, which collides with the expansion of social expenses emerging from the enforcement of socio-economic rights,⁷¹ thus creating a tension within constitutional texts and adjudication. Brazil is the prime example of this situation, where government is promoting constitutional amendments to increase labor market flexibility, create a spending ceiling for the next twenty years, and make reforms on social security.⁷² Austerity measures may imply a setback in terms of socio-economic rights, as fiscal cuts especially affect vulnerable populations,⁷³ which in turn may impose a constitutional limit to the IACtHR's influence in the region and impede its agenda of transforming the deep economic structures in the region via constitutional adjudication.

⁶⁷ Liliana Sousa & Leonardo Lucchetti, *What Does The End of The Commodity Boom Mean for Poverty in Latin America?*, WORLD BANK: LET'S TALK DEVELOPMENT (June 23, 2015), <http://blogs.worldbank.org/developmenttalk/what-does-end-commodity-boom-mean-poverty-latin-america>.

⁶⁸ Org. for Econ. Co-ordination and Dev., Dev. Ctr. [OECD], Econ. Comm. for Latin America & the Caribbean [ECLAC], & Dev. Bank of Latin America [CAF], *Latin American Economic Outlook 2017: Youth, Skills and Entrepreneurship*, at 15, 72, ECLAC Doc. LC/G.2689, CAF Doc. CAF-513i-2017 (2016), <http://dx.doi.org/10.1787/leo-2017-en>.

⁶⁹ U.N. Dev. Programme, *Regional Human Development Report for Latin America and the Caribbean Multidimensional Progress: Well-being Beyond Income*, at vi, 2, 17 (2016).

⁷⁰ Harrup, *supra* note 64.

⁷¹ For this tension in the Colombian case, see Daniel Ricardo Quiroga-Villamarín, *Recontextualizando la globalización. El "espacio intermedio" de la sostenibilidad fiscal en Colombia*, 22 ANUARIO DERECHO CONSTITUCIONAL LATINOAMERICANO 547 (2016).

⁷² Marcos Reis & Igor Rocha, *The Paradoxes of Fiscal Austerity in Brazil*, INST. FOR NEW ECON. THINKING (Mar. 30, 2017), <https://www.ineteconomics.org/perspectives/blog/the-paradoxes-of-fiscal-austerity-in-brazil>.

⁷³ U.N., Office of the High Comm'r for Human Rights, *Brazil 20-year Public Expenditure Cap Will Breach Human Rights UN Expert Warns* (Dec. 9, 2016), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21006>.

C. THE THIRD CHALLENGE: INTER-REGIME INTERACTIONS IN
LATIN AMERICA

Fragmentation of international law poses another important challenge to the IAS. With the increasing emergence of new “self-contained” regimes, the IACtHR must interact, and sometimes compete, with other international institutions that are also operating in the background of cases that reach the Court. Cases that were understood as exclusively issues of human rights violations, now must be conceptualized also as problems of international criminal law, international environmental law, international investment law, and so on. The problem is that although some of these regimes may complement each other, in many cases they promote conflicting principles and rules.⁷⁴

The “double or nothing” strategy fails to account for this challenge. Insisting on the transnational trajectory of the IAS seems to ignore that there are other strong transnational agendas in play in the region, agendas which are also expressed in the language of international law. The protection of foreign investment or the prosecution of war crimes is an example of this. Latin America today is a space of dense international regulation, where Inter-American standards are not the only game in town. The IAS interacts, on a regular basis, with other international regimes. Yet, the “double or nothing” strategy overlooks these interactions and its implication for the Inter-American constitutionalist project.⁷⁵

The level of fragmentation or integration of two or more regimes may depend on the identity of the courts involved, their procedures, and on the substance of the law. For example, the permanent nature of a court may encourage integration, while ad hoc tribunals are more prone to experimentation and thus fragmentation. Similarly, multi-stage, collective decision-making and judicial dialogue also promote coherence in the development of international law.⁷⁶

⁷⁴ See Martti Koskenniemi (Chairman of the Study Group of the International Law Commission), *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, U.N. Doc. A/CN.4.L682 (Apr. 13, 2006); see also Gerhard Hafner, *Pros and Cons Ensuring From Fragmentation of International Law*, 25 MICH. J. INT'L L. 849, 854 (2004); Tulio Treves, *Fragmentation of International Law: The Judicial Perspective*, 27 AGENDA INTERNACIONAL, AÑO XVI 213 (2009).

⁷⁵ A recent exception is Víctor Abramovich, *Poderes regulatorios estatales en el pluralismo jurídico global*, 1 GLOBAL CAMPUS HUM. RTS J. 141 (2017).

⁷⁶ PHILIPPA MAHAL WEBB, INTERNATIONAL JUDICIAL INTEGRATION AND FRAGMENTATION 145–202 (2016).

Two examples may give an idea of the difficulties that arise from inter-regime interaction for the IAS. The first is the coexistence of international human rights law and international humanitarian law in the context of non-international armed conflicts and, more recently, of human rights standards and international criminal law in the process of transitional justice. In Colombia, for instance, the IACtHR and the International Criminal Court (ICC) have been competing for influence in the different transitional justice processes that have been underway in the country since 2005. During the peace process with the paramilitaries in the late 2000s, the IACtHR promoted a maximalist approach to the investigation and judicialization of crimes committed by members of these groups, requiring that *all* perpetrators of grave crimes were prosecuted for *all* their crimes, while the ICC's Office of the Prosecutor emphasized the need to prioritize the violations committed by paramilitary leaders.⁷⁷ In that context, the ICC's approach became a way for local actors to undermine the stringent IAS standards—a complex dynamic that cannot be ignored by those interested in pushing for even more Inter-American constitutional development.

The interaction between IAS and foreign investment protection is a second example. In the case of *Comunidad Indígena Sawhoyamaya v. Paraguay*, the regimes of human rights and investment protection collided.⁷⁸ In this case, Paraguay argued that it was not able to restitute the traditional land of the Sawhoyamaya community because the owner of the land was protected by the bilateral investment treaty between Germany and Paraguay.⁷⁹ The Court rejected the State's argument by stating that the application of bilateral trade agreements does not justify the breach of the obligations contained in the American Convention; on the contrary, its application should always be compatible with it.⁸⁰ As a result, tension has emerged in the region between the protection of human rights and the protection of foreign investment, especially with the end of the commodity boom that has prompted inequalities and hindered the redistribution of resources.

⁷⁷ On this interaction, see René Urueña, *Prosecutorial Politics: The ICC's Influence in Colombian Peace Processes, 2003 - 2016*, 111 AM. J. INT'L L. 104 (2017).

⁷⁸ René Urueña, *Symposium on the Colombian Peace Talks and the International Law. The Colombian Peace Negotiation and Foreign Investment Law*, 110 AJIL UNBOUND 199, 204 (2016).

⁷⁹ *Sawhoyamaya Indigenous Community v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 115 (Mar. 29, 2006).

⁸⁰ *Id.* ¶ 140.

One possible answer to this challenge is to argue that IAS standards must always prevail. This theory implies a hierarchy that denies the existence of conflict and states that Inter-American constitutional norms are, indeed, the supranational Constitution of Latin America, and all other international norms need to comply with them. Another less extreme version of that argument is that there should be some kind of conventionality control of other international obligations adopted by states in the region.⁸¹ But, this requires an explicit normative theory of the relative weights to be applied to the different international regimes operating in Latin America, which, as will be argued in the final section of this article, the IACtHR should develop.

Fragmentation has forced the IACtHR to share the international regulatory space with other judicial institutions and, in some cases, even to compete for influence with national institutions. The primary problem of these phenomena is that the IACtHR risks being put in a position of undermining, embedding, or boosting other international regimes, or vice versa. Despite being in this position, the Court has not developed a normative standard to deal with other international regimes and, as a result, its decisions may be received as arbitrary or unjustified. Such perception may, in turn, affect the legitimacy of the IAS and, in consequence, the Inter-American system of human rights governance may lose its dominant status in Latin America, being replaced by other transnational governance regimes.

D. THE FOURTH CHALLENGE: POPULISM AND DOMESTIC ANTI-LIBERAL MOVEMENTS

Finally, anti-liberal social movements, which have consolidated their power through populist governments in the region, are the fourth challenge faced by the IACtHR. Inequality and exclusion in Latin America provide a context prone to populism, which is potentially dangerous for the IACtHR. In particular, populist movements tend to rely on some democratic mechanisms (such as the vote) but will reject the ones created to request individual rights protection or impose limits on the government.⁸² They tend to undermine internal institutional control to

⁸¹ See Juan Pablo Bohoslavsky & Juan Bautista Justo, *Control de convencionalidad de los arbitrajes de inversión*, 2 REV. DERECHO PÚBLICO CONTROL JUDIC. JURISD. ADM. 2010 1.

⁸² Cristóbal Rovira Kaltwasser, *Latin American Populism: Some Conceptual and Normative Lessons*, 21 CONSTELLATIONS 494, 497, 500–01 (2014).

consolidate their power, increasing human rights violations and leaving international monitoring bodies as the only space for opposition.⁸³ This challenge can undermine the Court's role, framing it as an institution against the *people*, which is interfering in internal affairs to perpetuate status quo—a populist challenge that dovetails the risk of the IAS being perceived as a technocratic regime of governance, far removed from domestic politics, as was discussed earlier.

Intimately connected to this concern, other phenomena that should raise concerns to IACtHR are the recent strategies that (mainly) American faith groups use to promote their agendas. Religious civil society organizations in the United States are using transnational strategies, such as international litigation, to promote their ideological positions around the globe.⁸⁴ The transnational presence and influence of religious groups around the world is not new, especially in the Global South, considering that nowadays more than sixty percent of Christians live outside of the North Atlantic region.⁸⁵ What is different, however, is the way these groups are starting to use international spaces and human rights language⁸⁶ in order to take advantage of their international networks, for example by funding local NGOs to assist litigation processes among others.⁸⁷

Perhaps the best example of this dynamic is the Alliance Defending Freedom (ADF, formerly the Alliance Defense Fund), based in Scottsdale, Arizona. The ADF is a “pro-family” legal organization that, according to its IRS income tax return, seeks to “keep the doors open for the gospel by advocating for religious liberty, sanctity of life, and marriage and the family.”⁸⁸ The ADF has tried to have an impact on international human rights institutions, and it holds United Nations

⁸³ Marcelo Alegre, *Populism and Human Rights: Oil and Water?*, 19–24 (Systema Economico de America latina) [Latin Am. and Caribbean Econ. Sys.], Working Paper, 2016).

⁸⁴ See McCrudden, *supra* note 30.

⁸⁵ David Swartz, *Embodying the Global Soul: Internationalism and the American Evangelical Left*, 3 RELIGIONS 887, 898 (2012).

⁸⁶ Nicolas Cardenas, *Los 4 pecados capitales de la ONU contra la libertad religiosa*, ACTUAL (Feb. 2, 2017), <https://www.actuall.com/persecucion/los-4-pecados-capitales-de-la-onu-contra-la-libertad-religiosa-en-el-mundo/>.

⁸⁷ Effie Fokas, *Comparative Susceptibility and Differential Effects on the Two European Courts: A Study of Grassroots Mobilizations around Religion*, 5 OXFORD J.L. & RELIGION 541, 543 (2016).

⁸⁸ 2014 IRS Form 990, Alliance Defending Freedom [ADF] (2015), <https://adflegal.blob.core.windows.net/web-content-dev/docs/default-source/documents/resources/about-us-resources/financials/990-public-adf-june-2015.pdf?sfvrsn=2>.

ECOSOC 15 special consultative status.⁸⁹ Outside the United States, it has offices in Vienna, Geneva, Brussels, Strasbourg, Delhi, and London, and has filed amicus briefs before the European Court of Human Rights.⁹⁰ Most recently, it opened offices in Mexico City, from which it has launched litigation efforts in Latin America.⁹¹ The ADF has been active in Belize, in the context of the litigation concerning the constitutionality of its anti-sodomy laws.⁹² Moreover, the ADF filed an amicus brief before the IACtHR in *Atala Rifo y niñas v. Chile*,⁹³ in which a Chilean judge lost custody of her children after coming out as a lesbian, and also in the *Artavia Murillo y otros v. Costa Rica*, dealing with the ban of in vitro fertilization in Costa Rica.⁹⁴ The ADF also intervened in *Duque v. Colombia*, related with pension rights of same-sex couples,⁹⁵ and, most recently, the ADF intervened in a case concerning same-sex marriage legislation in Costa Rica.⁹⁶

These strategies undermine the assumption that NGOs only adopt progressive or liberal political orientations, and show how new actors are entering the political arena using similar dynamics as progressive NGOs. The “double or nothing” strategy came into form in a time when public participation and civil society engagement implied, for the most part, a deeper engagement with the progressive values of Inter-American constitutionalism. Examples such as the ADF may show that this tide may be changing. One reason for this group to use these strategies is that the same tactics have been effective for secular NGOs

⁸⁹ U.N., Econ. & Soc. Council, List of Non-Governmental Organizations in Consultative Status with the Economic & Social Council as of 1 Sept. 2016, U.N. Doc. E/2016/INF/5 (Dec. 29, 2016), <http://undocs.org/E/2016/INF/5>.

⁹⁰ *Who We Are*, ADF INT’L, <https://adfinternational.org/about-us/who-we-are> (last visited Mar. 20, 2018).

⁹¹ *Id.*

⁹² S. POVERTY LAW CTR., DANGEROUS LIAISONS: THE AMERICAN RELIGIOUS RIGHT & THE CRIMINALIZATION OF HOMOSEXUALITY IN BELIZE 5, 9 (2013), https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/resource/dangerous_liaisons_splc-report.pdf.

⁹³ *Atala v. Chile*, ADF INT’L, <https://adfinternational.org/detailspages/case-details/atala-v.-chile> (last modified Feb. 19, 2011).

⁹⁴ ALL. DEFENDING FREEDOM, MURILLO ET AL. V. COSTA RICA: PROTECTING LIFE “FROM CONCEPTION” IN THE INTER-AMERICAN SYSTEM (2012), http://www.adfmedia.org/files/2012-05-08_Costa_Rica_Update.pdf.

⁹⁵ *Alberto Duque v. Colombia*, ADF INT’L, <https://adfinternational.org/detailspages/case-details/alberto-duque-v.-colombia> (last visited Mar. 20, 2018).

⁹⁶ Press Release, All. Defending Freedom, Inter-American Court Must Respect Nat’l Sovereignty, (May 3, 2017), <https://adfinternational.org/detailspages/press-release-details/inter-american-court-must-respect-national-sovereignty>.

on both national and international levels.⁹⁷ Internal confrontation in the United States between conservatives and liberals, known as “cultural wars,” is becoming global and will be translated in disputes between religious rights and liberal rights such as reproductive rights and LGBT rights, among others.⁹⁸ Consequently, the IACtHR will become one of the venues where this war will take place, creating a risk that the Court will be seen as part of American “culture wars,” or instrumentalized by them.

IV. PATHWAYS TO ADAPTATION

The IACtHR must acknowledge all previous challenges and engage in a pathway to adaptation. “Double or nothing” is not a strategic solution because it reproduces some of the blind spots of the system and fails to directly address the challenges described above. This paper suggests a different approach: three pathways of adaptation that respond to the challenges posed to the IAS.

First, the IACtHR must acknowledge that its origins are closely related to neoliberalism and neo-constitutionalism in Latin America, two epistemic communities that, although different, do share a preference for technocratic and elite knowledge, and a suspicion of democracy due to the risk of populism. Therefore, the IACtHR should start by acknowledging that the risk of a populist backlash against technocratic elites in the Americas may also be directed against the Court itself. Acknowledging this risk is an important first step, and the IAS must also take actions in order to come closer to the people, open more participation channels, and build on more dialogic and experimental forms of human rights enforcement.

Indeed, the IACtHR needs to operate on the assumption that it is deeply immersed in a set of strategic interactions, in which private and public actors have a space for dialogue with the Court and among themselves, instead of just issuing strong remedies directed at State institutions. In other words, the IACtHR needs to shift its form of adjudication from best-practices and top-down adjudication towards open-ended objectives and open processes of monitoring compliance. This should allow the Court to learn and adapt, by considering past iterations and the feedback provided by the involved stakeholders. I call

⁹⁷ McCrudden, *supra* note 30, at 436.

⁹⁸ *Id.* at 435.

these *experimental* forms of adjudication because they resemble theories of experimental governance, which seek to engage in iterative problem-solving (as opposed to transplanting grand-solutions) or experimental approaches to “finding and fitting solutions” in response to those concerns prioritized by local stakeholders.⁹⁹ A clear example of these new forms of adjudication can be found in some of the latest structural decisions of the Constitutional Court in Colombia, especially in the cases on displaced population¹⁰⁰ and waste management governance in Bogota.¹⁰¹ Having learned from previous failed cases,¹⁰² the Constitutional Court decided, in the two cases mentioned before, to apply a process similar to the problem-driven iterative adaptation approach, shifting its emphasis towards the creation of an open-ended objective. In addition, the Tribunal established a process of monitoring compliance that guaranteed the participation of different stakeholders. Similarly, in the *Matanza-Riachuelo* River basin case in Argentina, further development of judicial experimental adjudication took place. The basin is home to a large concentration of urban poor, who live in degrading conditions and suffer from multiple illnesses (such as diarrhea, breathing problems, skin diseases, among others) due to pollution and lack of basic infrastructure. Following a claim filed by a group of neighbors in 2004, the Supreme Court of Argentina adopted two wide-ranging decisions in

⁹⁹ For a discussion on these new forms of governance, see DUNCAN GREEN, *HOW CHANGE HAPPENS* 243–45 (2016); Deval Desai & Michael Woolcock, *Experimental Justice Reform: Lessons from the World Bank and Beyond*, 11 ANN. REV. L. & SOC. SCI. 155, 164–65 (2015). See generally Matt Andrews, Lant Pritchett & Michael Woolcock, *Escaping Capability Traps Through Problem Driven Iterative Adaptation (PDIA)*, 51 WORLD DEV. 234; Grainne De Burca, Robert O. Keohane & Charles Sabel, *New Modes of Pluralist Global Governance*, 45 N.Y.U.J. INT’L L. & POL. 723, 738–44 (2012).

¹⁰⁰ See Corte Constitucional [C.C.] [Constitutional Court], Third Review Chamber enero 22, 2004, M. Espinosa, Sentencia T-025, (Colom.). To understand the context and evolution of the case, see René Urueña, *Internally Displaced Population in Colombia: A Case Study on the Domestic Aspects of Indicators as Technologies of Global Governance*, in GOVERNANCE BY INDICATORS: GLOBAL POWER THROUGH QUANTIFICATION AND RANKINGS 249, 256–64 (Kevin E. Davis et al. eds., 2012).

¹⁰¹ See Corte Constitucional [C.C.] [Constitutional Court], diciembre 19, 2011, M.P. J. Perez, Auto 275/11, (Colom.); Corte Constitucional [C.C.] [Constitutional Court], julio 30, 2010, M.P. J. Perez, Auto 268/10, (Colom.); Corte Constitucional [C.C.] [Constitutional Court], Abril 23, 2009, M.P. C. Gutierrez, Sentencia T-291/09, (Colom.); Corte Constitucional [C.C.] [Constitutional Court], agosto 20, 2003, M.P. J. Renteria, Sentencia T-724/03, (Colom.).

¹⁰² In the decision T-153 of 1998, regarding the systematic violation of the rights of inmates, the Court issued a series of very specific orders directed at several administrative entities, giving the government and exact route of action that had to be followed in order to achieve a very concrete result. This decision proved to be very ineffective since the government failed to comply with the orders of the Court. See Corte Constitucional [C.C.] [Constitutional Court], abril 28, 1998, M.P. E. Munoz, Sentencia T-153/98, (Colom.).

2006 and 2008, ordering the creation of a cleanup plan for the basin. In this case the Supreme Court created new spaces of dialogue, in which government agencies, such as the *Autoridad de la Cuenca Matanza-Richuelo* (ACUMAR), the civil society, and the Court discussed the cleanup plan.¹⁰³

This open-ended, dialogic, and experimental form of adjudication also recognizes that the Latin American region has changed. Now that most Latin American states have become democratic regimes and that massive violations of human rights (at least related to dictatorships or armed conflicts) have become the exception,¹⁰⁴ it is time for the IACtHR to drop the failed state discourse towards states in the region. Not only does this discourse oversimplify the way states work in the region, but it also reproduces a discourse that has justified the intervention of international financial institutions (IFIs) in the region. For that reason, the Court could benefit from changing the generalized failed state discourse to one of an “uneven state,” which, in turn, would justify including a theory of deference in cases of structural problems or socio-economic rights (SER).

A theory of deference or margin of appreciation is not new in international law, and several authors have argued that courts need to develop a doctrine of restraint and flexibility when reviewing the decisions of national courts.¹⁰⁵ Introducing a margin of appreciation would also help the Court resolve some of the concerns that it has recognized regarding the adjudication of socio-economic rights. Finally, introducing a theory of deference or margin of appreciation could also serve to answer to the “culture wars” argument, since it would allow the

¹⁰³ René Uruña, *Courts and Regulatory Governance in Latin America: Improving Delivery in Development by Managing Institutional Interplay*, in 6 WORLD BANK LEGAL REVIEW, IMPROVING DELIVERY IN DEVELOPMENT: THE ROLE OF VOICE, SOCIAL CONTRACT, AND ACCOUNTABILITY 345, 350 (Jan Wouters et al. eds., 2015). The *Matanza-Riachuelo* was researched by Florencia Delia Lebensohn, of Universidad de Buenos Aires and Universidad Torcuato di Tella. See *id.* at 349.

¹⁰⁴ Abramovich, *supra* note 58, at 9–10, 17

¹⁰⁵ For a discussion on the doctrine of deference in different regimes of international law, see Steven P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 AM. J. INT'L L. 193, 212 (1996); Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law?*, 16 EUR. J. INT'L L. 907, 908 (2005). See generally ANDREW LEGG, *THE MARGIN OF APPRECIATION IN INTERNATIONAL HUMAN RIGHTS LAW: DEFERENCE AND PROPORTIONALITY* (2012); Caroline Henckels, *Balancing Investment Protection and the Public Interest: The Role of the Standard of Review and the Importance of Deference in Investor-State Arbitration*, 4 J. INT'L DISP. SETTLEMENT 197 (2013).

IACtHR to acknowledge the existence of multiple and plural solutions and forms of governance regarding human rights problems.

In direct relationship with the previous pathway, the democratization of the continent has also meant that the types of cases that reach the IACtHR have changed. The Court is increasingly called to decide cases regarding human rights issues that concerned structural problems in the region,¹⁰⁶ which have been framed (at least in terms of goal and objectives, if not actual practice) as socio-economic rights issues. The problem faced by the IACtHR is that its jurisprudence on socio-economic rights fails to respond to the growing inequalities and rising poverty in the region. And yet, the pathway for adaptation is not only to strengthen the adjudication of socio-economic rights, as even powerful and innovative courts are struggling to target their efforts towards marginalized social groups.¹⁰⁷ Indeed, socio-economic rights speak of minimum requirements of economic well-being, which are of course of crucial importance, but fail to address the other great problem of Latin America: income inequality.¹⁰⁸ In order to thoroughly address the challenge posed to the system by rising levels of inequality and poverty in Latin America, the IACtHR needs to complement its socio-economic rights jurisprudence with normative developments on inequality, concentration of income, and redistribution of resources.

Finally, to address the challenge of fragmentation in international law, the IACtHR needs to develop normative standards to deal with other international regimes. Up to now, the IACtHR's approach towards other international regimes has not been clearly articulated. In some cases, especially regarding other human rights organs and international humanitarian law, the Court has tried to articulate its jurisprudence with the normative content of other regimes;¹⁰⁹ however, in other cases, such as the one regarding international investment law, the Court has implicitly dismissed the relevance of the other regimes without giving a clear justification.¹¹⁰ Just as the international investment regime

¹⁰⁶ URUEÑA, *supra* note 2, at 19.

¹⁰⁷ David Landau, *The Reality of Social Rights Enforcement*, 53 HARV. INT'L L.J. 190, 202–03 (2012).

¹⁰⁸ On this critique of socio-economic rights, see generally Samuel Moyn, *A Powerless Companion: Human Rights in the Age of Neoliberalism*, 77 LAW & CONTEMP. PROBS. 147 (2015).

¹⁰⁹ *Massacres of El Mozote v. El Salvador*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 252, ¶¶ 283–96 (Oct. 25, 2012).

¹¹⁰ *Sawhoyamaya Indigenous Community v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶¶ 115–27 (Mar. 29, 2006).

needs to integrate standards of human rights compliance,¹¹¹ it seems important that the IACtHR recognize the need for dialogue with other international regimes. The Court needs to start approaching the cases that reach its bench differently; instead of understanding them as mere problems of human rights violations it should acknowledge that each case represents a problem of global governance characterized by the interaction of several international regimes and institutions. By doing so the Court recognizes that each regime carries a particular weight and exerts a particular pull over the others.¹¹²

Once the IACtHR has acknowledged that each case encompasses multiple regimes, each one carrying its own weight, it needs to develop a normative theory of balancing that gives it a clear standard on how to resolve conflict between its human rights jurisprudence and the case law or doctrine of other international law institutions. By developing such a normative theory,¹¹³ the IACtHR would explicitly acknowledge the existence of conflicting interests or principles and, instead of dismissing them without presenting any clear arguments, it would develop a doctrine explaining when (and how) the Court takes the weight of other regimens into account in its own decisions.

V. CONCLUSIONS

The IAS, and especially the IACtHR, positioned itself during almost twenty years as an effective mechanism of transnational governance, turning human rights into a dominant language around Latin America. Nevertheless, the success of the system cannot be explained in reference to its institutions in isolation, but as a result of the convergence

¹¹¹ See Ernest-Ulrich Petersmann, *Introduction and Summary: 'Administration of Justice' in International Investment Law and Adjudication*, in HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 3, 11–12 (Pierre-Marie Dupuy et al. eds., 2009); Bruno Simma & Theodore Kill, *Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology*, in INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 678 (2009); Bruno Simma, *Foreign Investment Arbitration: A Place for Human Rights?*, 60 INT'L COMP. L. Q. 573, 580 (2011).

¹¹² René Urueña, *Temporariness and Change in Global Governance*, in 45 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 2014, BETWEEN PRAGMATISM AND PREDICTABILITY: TEMPORARINESS IN INTERNATIONAL LAW 19, 35 (Mónika Ambrus & Ramses A. Wessel eds., 2015).

¹¹³ The idea of this normative theory has been suggested earlier in Benedict Kingsbury, *Global Administrative Law: Implications for National Courts*, in SEEING THE WORLD WHOLE: ESSAYS IN HONOUR OF SIR KENNETH KEITH 101 (Claudia Geiringer & Dean R. Knight eds., 2008).

of several structural, cultural, and normative changes taking place in the region since the mid-1980s.

With the end of dictatorships and of several armed conflicts, many countries in the region enacted new constitutions or passed important constitutional amendments that inaugurated a period of “new constitutionalism” in Latin America. In this period of time, new constitutions with ambitious bills of rights were enacted and new constitutional courts were created, but most importantly, legal culture radically changed to accept new forms of constitutional interpretation and arguments, as well as a new role for the judges as active political actors. This, in turn, created a positive and receptive environment for the expansion and adjudication of constitutional rights, including socio-economic rights. Furthermore, the IACtHR managed to recruit national courts as guarantors of the American Convention through the development of the doctrine of conventionality control, which vested both the IACtHR and domestic courts with the power to perform judicial review of domestic laws. The national courts, in turn, saw in the Inter-American jurisprudence an instrument to enhance their legitimacy and to justify their increasingly expansive jurisprudence.

Despite this narrative of success, today the situation of the IAS seems less positive. Not only is it currently facing challenges to its legitimacy; it is also suffering a financial crisis as a result of some states withdrawing from the American Convention and the reduction of funding by other governments. The IAS needs to acknowledge deeper challenges that are changing the context in which the IACtHR operates in the region. If the IAS does not recognize these new challenges and take measures to tackle them, it risks losing its legitimacy and dominant position as a source of transnational governance in Latin America.