

**Reconceptualising the Impact of the Inter-American Human Rights System**

*Reconceitualizando o Impacto do Sistema Interamericano de Direitos Humanos*

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**Abstract**

This article offers a reconceptualization of the impact of the Inter-American Human Rights System (IAHRS, or the System). To understand the impact of the IAHRS, and the continuing demand for it from across the region of Latin America, in particular, we need to look beyond rule compliance models of international human rights law. This article examines how, in what ways, and under what conditions the IAHRS impacts on domestic human rights. In a nutshell, the IAHRS is activated by domestic stakeholders in ways that transcend traditional compliance perspectives, and that have the potential to provoke positive domestic human rights change.

**Keywords:** Inter-American Human Rights System; Latin America; human rights impact; compliance; international human rights law.

**Resumo**

Esse artigo oferece uma reconceitualização sobre o impacto do Sistema Interamericano de Direitos Humanos (SIDH, Sistema). Para entender o impacto do SIDH e a continuada demanda de toda a região da América Latina ao Sistema, é necessário olhar para além dos modelos que focam a observância do Direito Internacional dos Direitos Humanos. Esse artigo analisa como, de que maneiras e em que condições o SIDH impacta os direitos humanos no plano doméstico. Em síntese, o SIDH é ativado por atores domésticos de maneiras que transcendem as perspectivas tradicionais de observância legal, com potencial para produzirem mudanças positivas nos direitos humanos no plano doméstico.

**Palavras-chave:** Sistema Interamericano de Direitos Humanos; América Latina; impacto dos direitos humanos; observância; direito internacional dos direitos humanos.

This article offers a reconceptualization of the impact of the Inter-American Human Rights System (IAHRS, or the System). The main theme that animates this article is that in order to understand the impact of the IAHRS, and the continuing demand for it from across the region of Latin America, in particular, we need to look beyond rule compliance models of international human rights law. It is often commented that the IAHRS suffers from a compliance crisis. Governments in the region, on this view, generally refuse to abide by, or simply ignore, the rulings and orders issued by the Inter-American Commission and the Inter-American Court. Indeed, the IAHRS suffers from generally low levels of compliance. This, it is argued, demonstrates the limited, or indeed, non-existent impact of the Inter-American System in ways that undermine its legitimacy and authority. And yet, the demand for the regional human rights system has never been higher as its caseload continues to increase year by year. Constant and increasing demand for the IAHRS indicates that the System matters, particularly to those whose rights have been violated. This article examines how, in what ways, and under what conditions the IAHRS impacts on domestic human rights. In a nutshell, the IAHRS is activated by domestic stakeholders in ways that transcend traditional compliance perspectives, and that have the potential to provoke positive domestic human rights change.

There are three main parts to this article. The first part discusses the need to go beyond conventional compliance perspectives on international human rights. The second part highlights three key dimensions of how the IAHRS works in practice by focusing on the role of domestic stakeholders in provoking human rights change. The final part offers reflections on the challenges facing the IAHRS and what a scholarly research agenda on the system might look like in order to contribute towards the genuine strengthening of the System.

## I. The Inter-American Human Rights System: from compliance to impact

The Inter-American Human Rights System (IAHRS) has emerged as an integral part of the regional institutional landscape of the Americas since the mid-20th century. The system was created and experienced its initial development in a region marked by the Cold War and long periods of repressive and authoritarian rule, from the 1950s to the mid-1980s. During this period, the IAHRS primarily sought to identify general patterns of human rights violations rather than focusing on individual cases. The Inter-American Commission's country visits and reports played an important role in some cases – for example in Nicaragua under Somoza (1978), and in Argentina in 1979 – but had limited influence overall. With the general return to democracy in Latin America, the Inter-American System gained in influence. In particular, with the democratic transitions, the System shaped political struggles over transitional justice, and the political calculations made by transitional governments with regards to how to deal with human rights abuses under previous (predominantly military) regimes. From the mid-1990s onwards, the IAHRS turned its attention to the challenge of improving the quality of democratic rule, and efforts to address human rights challenges in a regional context where electoral democracy has made significant advances, but also where there continue to be widespread human rights abuses.

Since its creation, the institutional development of the IAHRS has been significant. The IAHRS has established the legal obligation under regional and international human rights law of states to protect the rights of citizens, and in the light of the failure to do so, the international obligation to hold states accountable. In the process, the IAHRS has evolved from its origins as a 'classical' intergovernmental regime. An independent regional human rights court and an autonomous commission are regularly judging whether regional states are in compliance with their international human rights obligations. The access of individuals and regional human rights organizations to the human rights regime has strengthened over time as the system has become increasingly judicialized with a procedural focus on legal argumentation and the generation of regional human rights jurisprudence.

These institutional developments notwithstanding, it is regularly pointed out that the IAHRs has a patchy compliance record. General compliance rates with both the Commission and the Court are indeed low. Partial compliance with the System's rulings and recommendations are a common outcome, meaning that states comply with some of the IAHRs' requirements but not all of them.<sup>2</sup> These findings are regularly seized upon to highlight a 'compliance crisis' within the IAHRs, in which governments in the region frequently refuse to abide by, or simply ignore, the rulings and orders issued by the Inter-American Commission and the Inter-American Court. The patchy compliance record demonstrates, on this view, the limited impact of the Inter-American System in ways that undermine its legitimacy and authority.

Nonetheless, the demand for the System has never been higher. The number of complaints submitted to the IAHRs against states by individuals and organisations across the region have been continually rising over the last two decades. This indicates that the System matters, particularly to those whose rights have been violated, and are vulnerable to violations. It also suggests that there are significant 'extra-compliance' effects of the IAHRs that merit closer scrutiny. Recent research, moreover, on little-studied cases of friendly settlements, precautionary measures, as well as strategic litigation by human rights organisations, has consistently confirmed the existence of such effects, which reach beyond the degree of state compliance in individual cases (Engstrom forthcoming). And yet, how could this apparent mismatch between what might be crudely understood as the System's supply of justice in concrete cases, on the one hand, and demand for justice, on the other, be explained? Put differently, how, in what ways, under what conditions, and to whom does the System matter?

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<sup>2</sup> It should be recognised, however, that a major challenge in assessing compliance with IAHRs decisions is the absence of adequate data, especially longitudinal data, to allow for the development of reliable indicators and measurements of the effects of the System. I will return to this point later in the article.

### The Problem of (Rule) Compliance: towards an understanding of the domestic effects of the IAHRs

The IAHRs offers a unique opportunity to examine how international human rights may matter in ways that are not captured in rates of compliance with formal legal rules and judicial rulings. The limitations of compliance perspectives on international (human rights) law have been noted in the literature (Howse and Teitel 2010). It is widely recognised that compliance is characterised by prolonged and often highly contested processes. For example, Hafner-Burton highlights that “compliance is not an all-or-nothing affair and that the effects of human rights regimes, when and where they exist, are conditional on other institutions and actors” (Hafner-Burton 2012: 275). There is also an important distinction between ‘compliance’ and ‘effectiveness’ that is often glossed over in human rights and international law scholarship. Compliance usually refers to the implementation of the decisions – rulings, recommendations - handed down by international human rights institutions, such as the IACtHR or IACHR. Raustiala and Slaughter argue that “most theories of compliance with international law are at bottom theories of behavioural influence of legal rules” and they define compliance as “a state of conformity or identity between an actor’s behavior and a specified rule” (Raustiala and Slaughter 2002:539). Effectiveness, in contrast, generally refers to the degree to which the international human rights institutions work improves the level of human rights conditions and decreases the likelihood of the repetition of abuses, while also providing satisfactory recourse to the victims.

On this account, compliance might be necessary for effectiveness, but it is not sufficient. For example, international rules as embedded in human rights institutions can be effective even if compliance is low as “high levels of compliance can indicate low, readily met and ineffective standards” and institutions with “significant non-compliance can still be effective if they induce changes in behavior” (Raustiala and Slaughter 2002:539). For Levy et al., referring generally to international institutions, or regimes, “[e]ffective regimes cause changes in the behaviour of actors and in patterns of interaction among them in ways that contribute to the management of targeted

problems” (Levy et al. 1995:292). From this perspective, assessments of institutional effectiveness focus on the capacity of institutions to generate specific policies and the extent to which these are implemented through the passage of legislation, the creation or reform of domestic institutions that prove effective in attaining institutional objectives. On this account, the emphasis lies on observable behaviour and effectiveness is evaluated on the basis of the degree to which an institution ameliorates the problem that prompted its creation in the first place. Compliance, in short, is distinct from (although related to) effectiveness. Assessing compliance may shed some light on the effectiveness of international human rights institutions. But it cannot tell the full story, and quite possibly, an exclusive focus on compliance risks being misleading.

Most research to date on the IAHRs has adopted rule compliance perspectives to assess its impact. This body of research has tended to focus on the Inter-American Court. Compliance has been measured by assessing states’ implementation of the discrete obligations within each Court ruling. The Inter-American Court’s jurisprudence is arguably well-suited for this type of analysis, as the Court outlines specific orders within each case and then the Court tracks states’ implementation of those orders. For example, if the Court asks a state to pay reparations, hold a perpetrator accountable and pass a new law, conceptually, though not always practically, it is relatively straightforward to determine if the state has complied with each of these specific orders. Disaggregating compliance into the smallest unit of analysis can provide a nuanced image of compliance. Hillebrecht, for example, has assessed compliance on this basis and she has captured states’ practice of picking and choosing discrete measures within each ruling, in what she refers to as *à la carte* compliance (Hillebrecht 2014).

These insights notwithstanding, there are three main set of reasons for shifting the analytical focus beyond rule compliance to generate a better understanding of the impact of the IAHRs. The first concerns the normative and institutional development of the IAHRs that highlights the System’s role in advancing, interpreting, and enforcing human rights standards. In terms of rule-making both the Inter-American Commission and the Court perform a

crucial function in the development of human rights standards. The System has developed regional standards incorporating a wide range of human rights norms.<sup>3</sup> In its practice, the IAHRs has progressively addressed an increasingly expansive set of human rights issues. The Court has developed progressive human rights jurisprudence through its rulings. The Commission also serves an important function in this regard through its thematic reports, development of policy guidelines (ranging from, e.g. freedom of expression, rights of detainees, to LGBT rights); in other words, though its role in the development of soft law. The IAHRs is increasingly ambitious not only in terms of the types of human rights challenges it deals with, but also in terms of what it demands from states. In particular, the Inter-American Court's evolving policies of reparations now span from monetary compensation to victims, symbolic reparations (e.g. memorials), to demands for state reforms and criminal prosecutions of individual perpetrators. As a result, the IAHRs has emerged as the central human rights reference point in its region.

The IAHRs has also developed important accountability functions. The IAHRs monitors and evaluates states' human rights records. An independent regional human rights court and an autonomous commission regularly monitor the performance of regional states and judge whether regional states are in compliance with their international human rights obligations. In addition, the IAHRs has established itself as an important advocacy actor in its own right. The Commission in particular, has developed a set of tools in addition to individual cases that range from public diplomacy in the form of press releases, public hearings, onsite visits, interim measures (precautionary mechanisms), to behind the scenes negotiations with state officials and individual petitioners. When exclusively seen from a top-down perspective, however, these are weak

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<sup>3</sup> For example, an indication of the evolution of the regional human rights system as it has extended its reach across a variety of human rights issue-areas could be seen in the ratification rates of regional human rights instruments. Yet, there is significant regional variation with regards to the formal adherence to the system. This is reflected in the uneven adoption of regional human rights instruments by OAS member states. Indeed, one of the contentious issues surrounding the IAHRs is precisely its uneven ratification record. While most Latin American states demonstrate a high degree of formal commitment to the IAHRs, the US, Canada, and most of the English-speaking Caribbean have not ratified the American Convention and have not accepted the jurisdiction of the Inter-American Court.

accountability mechanisms. There are no enforcement mechanisms in place to hold states responsible for implementation to account. For example, there is no clearly mandated political compliance mechanism, as assumed by the Committee of Ministers in the European human rights system. Nonetheless, as will be discussed below, accountability can operate through various channels, including primarily domestic accountability mechanisms – e.g. in the form of mobilisation of public opinion around specific cases, raising awareness through media strategies, and domestic litigation processes.

The second dimension of the IAHRs' impact not captured by rule compliance models concerns its increasing insertion into domestic policy, legislative, and judicial debates across the region. The internalization of IAHRs mechanisms and norms in domestic political and legal systems has significantly altered the character of human rights implementation. The IAHRs is no longer primarily concerned with “naming and shaming” repressive military regimes. It seeks rather to engage democratic regimes through a (quasi)judicial process that assumes at least partially responsive state institutions. This broader point underlines the importance for human rights scholarship to move beyond the unitary state to consider how various state institutions and officials interact with the IAHRs to shape human rights implementation. Processes of human rights implementation have traditionally been dominated by the political branches of government and largely controlled by the Executive and the Ministry of Foreign Affairs in particular. Although these state entities remain crucial, a broader range of state institutions and actors are now involved in processes of implementation. In the practice of the IAHRs, states in Latin America have gone from being abusers of human rights to being their main guarantors. An analytical focus on the disaggregated state in the region is therefore required. Yet, human rights scholarship, generally, continues to lag behind the practice that it seeks to analyse.

Building on this last point, the third dimension of the IAHRs' impact concerns its role in providing opportunities for domestic and transnational human rights actors to bring pressure for change in their domestic political and legal systems. The IAHRs is increasingly used for the implementation of regional human rights norms. The System offers an important platform for

human rights NGOs; some of which have been very adept at integrating the IAHRs into their advocacy strategies in order to bring pressure for change in their domestic political and legal systems. Moreover, domestic judiciaries in particular have come to play more prominent roles as arenas of human rights compliance, leading to increasingly judicialized processes of compliance. Further study is required of the domestic judicial actors and institutions that act and could potentially act as ‘compliance constituencies’ and conduits of domestic implementation linking international human rights norms to domestic political and legal institutions and actors.<sup>4</sup> Similarly, this signals the importance of not only contentious litigation of individual cases, but attempts to advance broader changes through friendly settlement procedures. This “change of paradigm” in human rights activism reflects the increasing use of individual cases to promote broader government policy, institutional, and judicial changes.

The case of Latin America and the IAHRs has the potential to offer scholarship and advocacy significant insights into how human rights matter. In the region, sustained human rights activism has indeed strengthened processes of socialization in many societies, but rule-consistent behaviour as predicted by earlier human rights scholarship has not materialised (Risse et al 1999). To understand such partial outcomes requires a more contextualised grasp of Latin American societies and rights-violating groups and perpetrators. Such perspectives would allow a better understanding of many contemporary human rights violations in Latin America, and elsewhere, that are occurring in the context of weak and fragile states where state responsibility for violations is difficult to establish and often even absent. In this regional context, even where and when genuine political will may exist, implementation is often hamstrung by a state infrastructure ill-equipped to fulfil its function across the

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<sup>4</sup> Interestingly, a more strategic vision of the IAHRs appears to be increasingly recognised within some state bureaucracies across Latin America. State prosecutors’ offices in several countries (e.g. Argentina and Brazil) have created dedicated human rights units to actively petition the Inter-American Commission. For many state officials engaged in these forms of international litigation this engagement between state institutions and the IAHRs highlights that human rights advocacy is not about being for or against the state. Rather, it is about using all available tools to defend human rights, particularly when state authorities fail to protect them.

national territory (O'Donnell 1993). This also draws attention to the political contestation of human rights. The domestic impact of international human rights norms is invariably mediated by their broader norm salience in local contexts (Goodale and Engle Merry 2007). This reminds us of the risks of the reification of the 'the lens of rule-compliance' to the detriment of advancing knowledge on local understandings of international human rights. As Howse and Teitel argue:

Interpretation is pervasively determinative of what happens to legal rules when they are out in the world; and yet 'compliance' studies begin with the notion that to look at effects, we start with an assumed stable and agreed meaning to a rule, and whether it is complied with or obeyed, so understood (Howse and Teitel 2010:135).

## **II. The Impact of the Inter-American System: the central role of domestic stakeholders**

The normative and institutional evolution of the IAHRs, as highlighted above, has led to an increased interaction between the system and domestic political processes and national legal orders. This section assesses how the System affects actors and structures political relationships. Three particularly significant dimensions will be highlighted: first, the role of the IAHRs in stimulating human rights mobilisation in the region; second, how the regional human rights standards and the Inter-American Court's jurisprudence are shaping domestic constitutional debates, litigation strategies, judicial thinking and practice; and third, the role of state institutions in the effective implementation of IAHRs rulings, recommendations and human rights standards.

### Civil Society Mobilisation

Organised civil society has become the lifeblood of the IAHRs. Although non-state actors remain excluded from the formal decision-making fora of the Inter-American system, they have gained significant informal influence through their agenda-setting activities and expertise. Individuals and groups in the Americas may submit complaints of human rights violations to the Inter-American Commission, and the Commission may refer cases to the Inter-American Court if the country involved has accepted the Court's jurisdiction. The IAHRs hence has provided the platform upon which the struggle over human rights between activists and states has played out. Conversely, the IAHRs has had a significant impact on human rights organisations (HROs) in multiple ways. The availability of the IAHRs for domestic human rights groups has the potential to strengthen the domestic position of those groups that engage with the system. The system has opened new political opportunities, increased flows of resources for human rights advocacy, encouraged the formation and activities of human rights organisations, provided discursive tools for effective framing in politically and socially salient terms, and facilitated formation of alliances, new identities, and statuses (Engstrom and Low forthcoming; Tsutsui et al. 2012). Human rights groups can use the IAHRs to expose systemic human rights violations; to negotiate with state institutions through the friendly settlement procedures provided by the IACHR; to frame social and political debates on the basis of IAHRs norms and jurisprudence; to promote the interests of vulnerable groups; to boost human rights litigation before domestic courts; and to strengthen regional human rights networks and use of the IAHRs in strategic supranational litigation. In short, the IAHRs provides opportunities for domestic and transnational human rights activists to bring pressure for change in their domestic political systems.

It is important to note that the capacity of actors to mobilize the law is highly unequal, and there is significant variation among civil society organizations in their use of the system. The vast majority of petitions that actually gain traction in the System – i.e. proceed beyond initial submission phase – are advocated by NGOs (for example, see: Ferreira and Lima 2017, in

this special issue). The differentiated engagement with the IAHRs by human rights organizations reflects varied capacities in terms of degree of professionalization, their levels of legal and technical expertise, and their access to international resources and human rights networks (Engstrom and Low, forthcoming). The organisations that score high on these dimensions are able to integrate the IAHRs into their advocacy work – such as Argentina’s CELS and Colombia’s CCJAR (Colectivo de Abogados José Alvear Restrepo). The organisations that do not, have difficulties in taking advantage of the IAHRs. Engaging in the process of litigation before the IAHRs involves very lengthy proceedings that imply a significant drain on already limited resources for NGOs that pursue litigation. The outcomes are also highly unpredictable and very often partial. Still, the Commission receives an increasing number of petitions, which has led to a significantly increased case-load, and back-log of cases, for the System.<sup>5</sup>

Another aspect to highlight with regards to the use of the Inter-American System by human rights defenders concerns the considerable risks often associated with human rights work in Latin America. From efforts to hold perpetrators to account for gender violence in Mexico to mobilisation around LGBT or land rights in Brazil, HRDs face regular and widespread low-level police harassment, political vilification, paramilitary violence, and threats of assassination. In the face of these realities, a slow-moving judicial process in Washington D.C. and San José, Costa Rica is of little direct help. The IAHRs has attempted to respond to these realities by developing specific institutional

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<sup>5</sup> It should be noted in this regard that individuals and groups do not have direct access to the Court. The Commission only has the mandate to bring cases to the Court. In practice, this means that the lawyers of the Inter-American Commission have been delegated the responsibility to act on behalf of individual petitioners. This also means that often professional human rights NGOs bring cases representing individual victims or group of victims. The structure of these dynamics is such that potential problems of representation and legitimacy may arise, with NGOs pursuing interests and objectives that are not necessarily aligned with the interests of individual victims. While HROs often pursue actions and reforms that aim to bring about structural human rights reforms, e.g. devising litigation strategies that may that seek to leverage individual cases to bring about broader policy and legislative changes, victims may prioritise obtaining remedy for their own suffering. These divergent aims could adversely affect victims’ confidence in the ability of HROs, and the IAHRs more generally, to address their areas of greatest concern. This, indeed, is always a potential issue in strategic litigation cases.

mechanisms aimed at HRDs such as the use of precautionary measures (*medidas cautelares*) to respond quickly to situations of acute risks.

Nonetheless, the IAHRs constitutes a privileged transnational political space for civil society activism (on transnationalism and the IAHRs, see Torelly 2015). The IAHRs provides opportunities for coalitions and alliances between on the one hand international and regional organizations with knowledge of the system and local organizations with detailed knowledge of local issues on the other. Yet, civil society activism by itself is not sufficient to prompt social and political change. In Latin America's imperfect yet really-existing democracies, human rights activists are often compelled to engage with domestic judicial authorities and state institutions. As Dulitzky argues,

Inter-American system has been more effective where there has been greater demand, and more spaces, for dialogue between the government and civil society and between government, civil society, and the Inter-American system. It is also in those same countries where the greatest progress has been made in truth, justice, and reparations (Dulitzky 2007:145).

### **Domestic Judiciaries**

Beyond civil society activism, it is also important to see domestic judiciaries as political actors. The impact of the human rights standards developed by the IAHRs depends on the extent to which domestic legal systems incorporate these standards. In many Latin American states human rights have been 'constitutionalized', and a wide range of human rights treaties and conventions have become embedded in domestic legal systems. There is, moreover, a distinguished Latin American constitutional tradition that incorporates extensive human rights protections. The constitutional incorporation of international human rights treaties has made domestic courts key actors with a potential to activate human rights treaties and interpret international norms in light of domestic conditions (Torelly 2016).

The IAHRs, like any other international human rights mechanism, requires petitioners to have reasonably exhausted remedies available in the domestic legal system.<sup>6</sup> Traditionally, this allocation of responsibilities for the protection of human rights – as enshrined in the principle of complementarity in international human rights law more generally – limits the scope of the IAHRs’ judicial intervention to those cases where domestic laws and/or domestic judicial mechanisms have not adequately protected the rights and principles as embodied in the international human rights instruments adopted by the state (Abregú 2004:4). The principle of complementarity also means that the IAHRs has to decide at what point due process rights as enshrined in the American Convention have been breached and at what point domestic courts have acted arbitrarily. The IAHRs has extensively examined the scope of its judicial review powers in order to establish the boundaries within which decisions taken by domestic courts cannot be revised by international judicial instances.<sup>7</sup> The IAHRs itself has interpreted its mandate not to be a ‘fourth instance’ and as such cannot review the interpretations of facts made by domestic courts. The IACHR has established that “the basic premise [of the ‘fourth instance formula’] is that the Commission cannot revise the sentences issued by domestic courts that act within the sphere of their competences and that apply due process guarantees, unless it considers the possibility that a violation of the Convention has been committed.”<sup>8</sup> Hence, although the Inter-American system establishes the parameters within which domestic laws and judicial procedures may operate in order to guarantee the protection of human rights, it is in the context of the domestic legal system where rights need to be guaranteed.

There is nonetheless significant regional variation not just in the effective enforcement of human rights within domestic legal systems but also in the willingness of judges to engage in the transnational legal culture of

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<sup>6</sup> American Convention Article 31. In practice, given the problematic nature of domestic judicial remedies in many Latin American countries in particular, the exhaustion rule is interpreted quite flexibly by the IACHR and the Court. See, Cancado Trindade 2000. See also IACtHR Advisory Opinion no.11, 10 August 1990.

<sup>7</sup> IACHR, Report 39/96 in *Marzioni* (Argentina), 14 March 1997. See also, Albanese 1997.

<sup>8</sup> IACHR, Report 39/96 in *Marzioni* (Argentina), 14 March 1997. para.51.

human rights and to take advantage of the potential legal and argumentative resources available. Understanding the sources of this variation in judicial thinking and practice is tricky. Some key factors include different degrees of judicial independence, but also divergent national legal traditions, patterns of legal education, and engagement with transnational legal communities. There have been gradual yet significant changes in judicial thinking with regards to international human rights law and the jurisprudence of the IAHRs in particular (González-Ocantos 2016). But, we also need to keep in mind the fragility of such shifts in judicial attitudes. Beyond individual cases of committed judges, Latin American judiciaries, and elsewhere, are attuned to and generally accommodate political shifts. That is, influences external to the judiciary – including from the governments and HROs – are clearly important when accounting for any judicial changes. The key point to make here is that domestic judges are important political actors that shape the ways in which international human rights are applied domestically.

Human rights litigation before domestic courts has therefore become an important mechanism for human rights activists in their efforts of activating the IAHRs at the domestic level. The formal embedment of IAHRs norms in domestic law provides crucial opportunities for individuals and groups to claim, define, and struggle over human rights. The availability of litigation before domestic courts drawing from international human rights norms incorporated in domestic law is a key legitimating factor for civil society actors in their efforts of political and legal mobilization. Domestic courts therefore have become key arenas for human rights politics as litigants are seeking to pressure state and judicial authorities to give effects to their international human rights commitments and to reform domestic human rights legislation. The internalization of IAHRs norms in domestic political and legal systems across the region has, therefore, partially shifted how the System works in practice. Traditionally, the System has relied on various forms of political pressure from the IACHR, the OAS (not common), or (highly infrequently) other countries to ensure compliance with its decisions and judgements. At the domestic level, the targets of compliance pressures would mainly be the executive or the legislative. That is, processes of compliance with the IAHRs were dominated by

the political branches of government Abregú 2004:27). However, the increasing constitutionalization of human rights has established domestic court systems, as the links between constitutional principles and human rights in practice, in the process locating domestic courts as key arenas and domestic judiciaries as key actors of human rights politics.

Moreover, the IAHRs has been an active participant in these efforts at activating domestic judiciaries as enforcers of the Inter-American System's norms and standards. In particular, domestic judiciaries are increasingly in the spotlight following far-reaching doctrinal developments by the Inter-American Court. A unique aspect of the Inter-American Court's relationship to domestic judiciaries is the doctrine of conventionality control, which says that all state actors must review laws under the American Convention, and not apply laws found to be in violation of it (see: Torelly, 2017). Through this doctrine, the Court seeks to enlist all state actors in monitoring compliance with the Convention, as interpreted by the Court. Hence, the Inter-American Court has sought to expand the role of domestic judiciaries in enforcing the American Convention and the rulings of the Court itself. Conventionality control has the potential to extend the shadow of the Court far beyond its relatively small docket. In so doing, however, it also seeks to harmonise judicial interpretations of the American Convention. This has led some legal scholars to argue that the Inter-American Court has been transformed into a 'supranational human rights constitutional court', whose role it is to standardise the interpretation of rights enshrined in the American Convention on Human Rights.

Yet, the legitimate and effective scope of the IAHRs' impact on domestic legal and judicial processes has been questioned. In the first instance, some note the crucial limitations on how conventionality control works in practice, especially given the constraints of the institutional limits of the Court, the capacity of and resources available to domestic judiciaries, as well as the politics of distinct state actors on the ground. There are also issues related to the practice and legal doctrine of subsidiarity, as well as questions concerning the degree of domestic autonomy in the implementation of international human rights obligations. For some legal scholars the conventionality control doctrine raises questions of democratic legitimacy. Contesse, for example,

criticises what he refers to as the Inter-American Court's 'Velasquez-Rodriguez ethos' rooted in the early days of the Court confronting widespread impunity and unresponsive domestic institutions (Contesse 2016). This is reflected in Cançado Trindade's rejection of the adoption of a 'margin of appreciation' doctrine for the Inter-American Court as inappropriate in the socio-political context of Latin America. Cançado Trindade asked (quoted in Contesse 2016:134):

How could we apply [the margin of appreciation doctrine] in the context of a regional human rights system where many countries' judges are subject to intimidation and pressure? How could we apply it in a region where the judicial function does not distinguish between military jurisdiction and ordinary jurisdiction? How could we apply it in the context of national legal systems that are heavily questioned for the failure to combat impunity? ... We have no alternative but to strengthen the international mechanisms for protection ... Fortunately, such doctrine has not been developed within the inter-American human rights system.

Contesse, in contrast, maintains that regional changes towards democracy requires increased deference to national political and judicial decisions concerning the most appropriate and effective ways to protect human rights domestically. He argues that after the Court's development of decades of case law and "significant political and legal developments in the region, one might expect a more nuanced approach to the relationship between the Court and states parties" (Contesse 2016:134).

Regardless of one's understanding of the legitimacy and effectiveness of the Inter-American Court's doctrinal approach to its relationship with domestic judiciaries, regional jurisprudential interaction and legal dialogues have intensified in recent years. This is evidenced, for example, in citation rates of the Inter-American Court's jurisprudence by domestic judges (DPLF 2010; DPLF 2013; Medellín Urquiaga 2015). As Cassel argues, one key aspect of the importance of the Inter-American Court lies in its "interpretations of the human rights guarantees of the American Convention on Human Rights, as inspirations for the jurisprudence of national courts" (Cassel 2007:151). This highlights, as well, the 'erga omnes' effects of the Court. Huneeus captures this

aspect of the impact of the Inter-American Court very well in her analysis of the Court and advances in indigenous rights in Colombia:

The Inter-American Court has never issued a judgment against Colombia on indigenous rights. It has in recent years, however, developed a rich jurisprudence in this area through cases against Nicaragua, Suriname, Paraguay and Ecuador, and the CCC [Colombian Constitutional Court] has frequently made reference to these cases and used them to review national legislation and treaties under the constitutional block. The constitutionalization of the [IAHRS] has also meant that the CCC refers to [the System's] jurisprudence even in matters not traditionally considered to be human rights law, such as criminal law, family law, and administrative law. The Supreme Court and the Council of State, Colombia's highest administrative court, also regularly refer to the Inter-American Court's jurisprudence in interpreting questions of national law (Huneus, 2016:191).

### State Institutions

State institutions are crucial actors in the effective implementation of IAHRs rulings, recommendations and human rights standards. State institutions often represent, however, the 'black box' of political analysis through which societal interests are translated into policies and policy outcomes. Unpacking the ways in which states respond to the IAHRs highlights the importance of moving beyond the unitary state to consider how various state institutions interact with the IAHRs and shape the impact of the System. Recent scholarship has highlighted how international human rights institutions rely on different state constituencies both to garner compliance with particular judgments, and to make human rights relevant in domestic politics more broadly. With regards to the IAHRs specifically, different state institutions are now engaged with the System, which has led to the 'disaggregation' of the relationship between countries and the IAHRs. This increasingly means that states no longer interact with the system solely through their respective Ministry of Foreign Affairs, but also through a number of different institutional channels including the Ministry of Justice, *Ministerios Públicos*, as well as sub-national authorities. The IACHR's friendly settlement procedures, for example, are frequently used to facilitate negotiations between different state institutions and petitioners.

Also, due to the IACtHR's creative remedial regime that emphasizes equitable relief, the Court frequently issues orders that require action from state actors other than the executive. This highlights the importance of paying closer attention to the mechanisms through which human rights norms become embedded, or not, in formal state institutions and the informal politics surrounding them.

There are various pathways through which the procedures and norms of the Inter-American human rights system have become embedded in state institutions. For example, the increasing interaction with the IAHRs may strengthen the relative power of sections of the bureaucracy dealing with human rights. The adoption of a human rights discourse within the state bureaucracy empowers those actors and agencies with the required policy expertise over others in national policy-making. In cases of policy disputes, claims based on salient human rights norms shift and raise the burden of justification necessary to overcome the claimant's position in favour of competing policy options. Also, the institutional status of those state officials who are engaged with the IAHRs and who are active participants in transnational and regional dialogues on matters of human rights is strengthened. The recognized policy expertise and international linkages of the specialized state bureaucracy may help to overcome resistance by other state actors. Embattled 'pro-rights' constituencies in some contexts have utilised rulings, statements and legal precedents set by the IAHRs to lend international weight to their efforts to bring about domestic policy change. Yet, this is not to exaggerate the relative influence and institutional weight of the human rights bureaucracy, as the numerous challenges of state administration in relation to human rights implementation discussed below amply illustrate.

Moreover, the interaction between the IAHRs and sectors of the state bureaucracy may also give rise to processes of socialization on the part of state officials involved. Whatever their original views, engaging with the IAHRs, having to justify policy within the terms of the dominant discourse of the system fosters such socialization.<sup>9</sup> For example, the dynamics of the IACHR's friendly

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<sup>9</sup> See generally, Finnemore (1993) emphasises international organizations as the normative teachers of state elites, and Pevehouse's (2009) theory of democratization

settlement procedures allow specific cases to generate opportunities to pursue a dialogue between petitioners, NGOs and the state both with regards to the case itself and the possibilities of broader institutional reforms. Although friendly settlement procedures do not imply a level playing field between the petitioners and the state, there are significant public repercussions when engaging in negotiations that may put pressure on the government to reach a solution. Having to engage with petitioners and domestic human rights groups may reinforce processes of socialization of state officials.

In addition, implementing IAHRs decisions and recommendations often also requires measures from the state beyond reparations to victims of human rights violations in specific cases. In this way, specific IAHRs cases can push specific human rights issues onto policy and legislative agendas and produce government policy changes and institutional initiatives with the view to prevent similar violations from occurring in the future. In its interactions with states the IAHRs is increasingly looking more closely at the state's institutional response to any violations that have been committed than at a single rights violation by a state agent. The impact of the IAHRs on public policy formulation and implementation is to a large extent a function of its embedment, or institutionalisation, in state institutions, and whether the state has effectively organized its institutions in ways that provide effective remedies for human rights violations. As a result, IAHRs norms have wide-ranging implications for the organization of administrative structures as they increasingly advance standards for how state institutions should be organized in order to guarantee human rights and appropriate remedies to victims of human rights violations.

Despite these notable changes in the institutional relationships between many Latin American states and the IAHRs, significant challenges facing substantive human rights reforms remain. Clearly, the System is dependent on the cooperation of state institutions for it to have an impact on human rights outcomes. But, general political will to accept the authority of

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from the outside in focuses on the role that face to face elite interactions in regional organizations can play in sensitizing bureaucratic elites to their interests in democratization and regional cooperation.

the IAHRs, albeit important, does not necessarily translate into effective implementation of the IAHRs' decisions and recommendations. As outlined above, states are not monolithic entities and there is often a degree of divergence – both within and between the different branches of government – regarding the relative weight institutions ascribe to human rights considerations. Even in cases where political will exists to comply with the judgements and recommendations of the IAHRs, state institutions do not always have the capacity – whether managerial, administrative, technical, or human – to ensure effective implementation of human rights reforms. In addition, the relationship between petitioners and the human rights bureaucracy is rarely smooth and collaborative. The negotiations of specific human rights cases under the auspices of the IACHR are often difficult and contentious. Petitioners are, after all, threatening the state with international condemnation; government lawyers – as all lawyers – do not like to lose legal arguments; and international scrutiny restricts the autonomy of government action.

Moreover, few Latin American states have formal institutional mechanisms in place to ensure consistent implementation of IAHRs' decisions and recommendations. Indeed, in light of the administrative frailties of many Latin American states, one of the key challenges lies in establishing administrative procedures and institutional mechanisms that ensure the implementation of IACHR recommendations, the sentences of the Inter-American Court, and that would not rely on the discretionary support of the executive on a case to case basis. Effective state implementation requires high level of coordination among different state institutions, both within the executive branch and with the legislative and judicial branches. But, there are often significant obstacles to inter-agency communication and coordination within state institutions that limit the effective implementation of human rights reforms. Given these intricacies and pervasive irregularities of state administration the influence of the IAHRs on domestic reforms is often subject to significant limitations. The IAHRs can provide, nonetheless, a political space for discussion and negotiation between the key actors involved in human rights reforms (including different parts of the state); it provides an authoritative set of norms and standards to regulate the specific issue-area

subject to the reforms; and it adds an additional layer of political pressure, momentum and urgency to the resolution of human rights problems.

### III. A Research Agenda on the IAHRs: Political and Methodological Considerations

The previous section highlighted the multitude of ways in which the IAHRs matters for domestic human rights change; that include key dimensions of impact that are not captured in conventional compliance models of international human rights law. In lieu of a formal conclusion, I will now turn to the question of how scholarship can contribute towards the genuine strengthening of the Inter-American Human Rights System.<sup>10</sup>

As is well known, the IAHRs is facing a series of inter-locking political challenges that fundamentally affect its capacity to advance the realisation of human rights in the region (see: Osmo and Martin-Chenut, section 3.2; and Veçoso and Villagran Sandoval; both in in this special issue). In recent years, several states have become increasingly strident in their challenges of the system, particularly when IAHRs decisions have run counter to important geopolitical and economic policy objectives. Moreover, the rise of sub-regional organisations, such as UNASUR, has seen other incipient human rights mechanisms expand into areas that were previously the exclusive institutional remit of the IAHRs. The continued lack of universal ratification of the System's major human rights instruments, particularly by Anglophone parts of the region, remains a source of criticism for those seeking to undermine the IAHRs. Also, as highlighted above, unlike in earlier periods of the System's institutional development, the region's governments are today nearly universally elected by popular vote. The formal democratic credentials of governments have made the balancing act for the IAHRs between its role as a supranational human rights arbiter on the one hand, and the principle and practice of subsidiarity on

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<sup>10</sup> For an extended account of many of the issues discussed in this section, see Engstrom et al. 2016.

the other, increasingly delicate.<sup>11</sup> In addition, transnational and domestic challenges to IAHRs jurisprudence risk damaging the System's authority and legitimacy in the eyes of its key stakeholders. At the transnational level, cross-national resistance movements target the System's developing jurisprudence and practice on particular human rights standards, such as women's or LGBTI rights, while challenges at the domestic level take many forms, including the overturning of IAHRs-inspired legislation.

It should be recognised, however, that throughout its history, the IAHRs has regularly been subject to fierce criticisms, and it has operated in an often politically hostile regional context. For example, one of the reasons why the Commission struggled in its early days was the perception that it had been created by the United States as part of its efforts to undermine the Cuban revolution. The System has also regularly faced challenges from states and officials hostile to its expansion and/or to certain rulings. One crisis in the late 1990s arose as a result of attempts by the government of Alberto Fujimori in Peru to withdraw from the Court's jurisdiction. Over the past few decades, Brazil, Dominican Republic, Ecuador, Nicaragua, Peru, Trinidad and Tobago, and Venezuela have all variously suspended payment of organisational dues, (temporarily) withdrawn their ambassadors, claimed not to be bound by a particular Court judgment, and threatened to or actually denounced the American Convention following contested decisions.

A sanguine perspective on the IAHRs, therefore, would seek to put the System's contemporary challenges in context. While the threat of backlash from states is real, it is important to differentiate between backlash and routine domestic judicial and political processes. Resistance may, in part, be an inevitable consequence of being an international human rights institution fulfilling its institutional mandate of monitoring and scrutinizing the human rights records of states. Put differently, as the impact of the IAHRs grows, so, too, do the challenges to its authority. Backlash against the IAHRs, and international human rights more generally, also reminds us that any

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<sup>11</sup> Such challenges have been evident in, for example, the Court's deliberations in relation to the applicability (or otherwise) of domestic reparation programmes, the rule of exhaustion of domestic remedies, and decisions handed down by domestic courts regarding reparations.

progressive human rights change is never irreversible. States can move away from implementing human rights standards just as they can move towards it. In other words, while the political challenges to the IAHRs have their immediate causes in the shifting regional politics of Latin America, resistance to impactful human rights politics should not come as a surprise. Longer-term perspectives on the IAHRs therefore help us to understand contemporary forms of resistance to the IAHRs.

Moreover, the IAHRs itself has important agency in confronting political challenges. The IAHRs has undertaken important institutional innovations and adaptations in response to persistent changing political circumstances. For example, some of the procedural reforms the IAHRs has undergone have had positive impact. Changes to the reporting on compliance monitoring from written reports only to private hearings are credited with increasing institutional impact. Procedural changes are unlikely to be sufficient, however, as the historical record of the IAHRs indicates. New initiatives in recent years, such as creating a working group of experts to investigate the disappearances of students in Ayotzinapa, Mexico, have enabled impact in real time, rather than only as a result of years of extended legal proceedings. Such institutional innovations could inspire future activities.

With these, and other, challenges in mind, I will conclude by highlighting some of the many areas of concern that future research and advocacy on the IAHRs could fruitfully address. First, there is a pressing need to think more seriously about backlash and resistance to human rights, including the IAHRs. As a concrete illustration of such resistance, there are the perennial concerns over the politicised nature of IAHRs appointments processes and states using appointments as a way to shape the Commission and Court into more deferential organs. These efforts to constrain the influence of the System and to exert more subtle political control of its institutional development can be seen in attempts to secure appointments of officials who favour a minimalist system to both the Commission and the Court. At the same time, civil society groups are pushing to create more avenues for weighing in on appointments debates. There is clearly a need for clarity and transparency in the criteria and procedures for the appointments of

officials. Important advances, external to the IAHRs, have recently taken place in this regard, as manifested, for example, in the work of the Independent Panel for the Election of Inter-American Commissioners and Judges. Here, further research is needed on the design and implementation of appointment procedures (see the article of Salazar e Arriaza, in this issue). There is important comparative scholarship, for example, on international tribunals that looks into the process and politics of appointments procedures. There has been less research, however, on the impact that particular judges and commissioners have on their institutions, and how this shapes, in turn, the impact of the Inter-American System.

A second, and related, challenge facing the IAHRs concerns its consistent underfunding, which continues to limit the scope for conducting proactive rights work and investigations. The limited resources available to the IAHRs and, in particular, the Commission, have contributed to a significant backlog of petitions. Despite some restructuring of the Commission's case-management system in recent years, such difficulties are likely to persist given the increasing caseload of both the Commission and the Court. Although the most alarming projections concerning the future of the Commission have been dispelled following the acute financial crisis of 2016, limited resources continue to be an existential challenge (Engstrom et al 2016). Assuming stagnant or, at best, modestly rising funding in the coming years, the development of new models of work will inevitably mean that personnel and funds will be diverted away from existing areas of activity. Previous institutional changes – for example, expanding the work of the Commission's Rapporteurs – resulted in greater pressure being put on resources for processing petitions. Additionally, decisions to prioritise particular areas or activities are often not subject to the System's autonomous discretion. Institutional initiatives are often dependent on external donors, whose priorities may not necessarily align with those of the IAHRs. This is manifested, for example, in the current difficulties of the Commission to secure funding for its newly established Unit on Economic, Social and Cultural Rights. Systematic research on how resource priorities are set is crucial, therefore, in order to understand the decisions that shape whether the institutional resources at the

System's disposal are deployed where the need is the greatest (however conceived). Further research is also needed on the politics of financing of the IAHRs. For example, seeking to boost funding from extra-regional donors, whether that entails state donors or private foundations, may appear attractive in the short-term, although such fundraising efforts may generate significant legitimacy and authority challenges from the System's detractors.

Third, and building on the point relating to institutional priorities and resource allocation, there is a pressing need for evidence-based research on the impact of the System. The absence of systematised and comprehensive data on many areas of the IAHRs' activities – for example, on the results of precautionary measures and friendly settlements – continues to prevent rigorous analysis of the System. The need for better quality data on the IAHRs is pressing in order to generate more detailed understanding of the impact of the System. For example, as has been emphasised throughout this article, focusing exclusively on the IAHRs' general compliance record conceals the important effects that the System has on domestic human rights. Although the 'compliance crisis' of the IAHRs is real, there is significant variation in compliance patterns across mechanisms and orders. In particular, significant variation in 'compliance pull' is manifested between different IAHRs mechanisms. For example, states tend to comply more readily with the provisions of friendly settlements than they do with the rulings of the Inter-American Court. Research indicates that this is explained by the fact that states have agreed to undertake remedial action during a negotiation process, rather than having it imposed upon them by a court ruling (Saltalamacchi et al forthcoming).

Moreover, further research is also needed to better understand complex interactive effects, institutional feedback loops, and the potential complementarity of institutional mechanisms. For example, there is evidence to suggest that the higher the degree of complementarity between institutional mechanisms, the greater the effects. The potential impact of the IAHRs is greatest when the IAHRs mechanisms are used in a coordinated fashion and as part of a coherent strategy. Specific rulings or awareness-raising activities can generate human rights change in and of themselves, but their

impact may be amplified if they occur within the context of a broad and coordinated strategy. A notable example of this has been in the area of women's rights where the IAHRs has used all the various instruments at its disposal – such as treaty-making (the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, “Convention of Belém do Pará”), rapporteurships, in-country visits, the petitioning process and court rulings – to achieve highly significant outcomes (see, in this issue, the work of Prandini). Where used strategically and in tandem, the System's mechanisms can be mutually reinforcing and can amplify the impact of one another. Impact tends to be more limited, on the other hand, where mechanisms are used in isolation. In-depth and sustained research is needed to better understand whether, and in what ways, the Inter-American System may have demonstrable positive effects on domestic human rights through such pathways of impact.

Finally, genuine methodological and disciplinary pluralism in the study of the IAHRs, and international human rights more generally, is long over-due. Hafner-Burton and Ron argue that scholarly assessments of the role of law and institutions in protecting human rights tend to be significantly shaped by choice of research method (Hafner-Burton and Ron 2009). While statistically inclined research generally attribute very little impact, if any, to international human rights institutions, qualitative case studies tend to find often significant influence of international law and institutions on political behaviour. Qualitative approaches to the study of the effects of the IAHRs enable in-depth analyses of what are often complex and prolonged pathways to human rights compliance; processes that quantitative studies are ill equipped to illuminate. Yet, divergent assessments are grounded in often-irreconcilable epistemological positions with many qualitative scholars rejecting the utilitarian groundings of research into questions of impact and institutional effectiveness. Fortunately, an increasing methodological diversity is enriching our understandings of both the potential and limits of human rights institutions in affecting political outcomes. The combination of methodological approaches is clearly to be promoted, but at the same time it should be the central questions and research puzzles of this particular field of enquiry that

guide the appropriate methods and disciplinary approaches and not the other way around.

In this sense, moreover, an interdisciplinary approach to the study of international human rights and its impact on domestic politics calls for a dislocation of disciplinary and theoretical boundaries. For example, much scholarship continues to adopt understandings of human rights that focus exclusively on imposing constraints on state behaviour. Focusing exclusively on the law as a constraint, however, misses the important constructive role that international human rights law has in legitimating political behaviour and in enabling state reforms. This has been highlighted above, for instance, in the discussion of the role of the IAHRs in potentially enabling, as opposed to constraining, state action for the protection and promotion of human rights. Similarly, there has been an overwhelming focus in human rights research on evaluations of the empirical relationship between state participation in human rights treaties and country performance on different measures of human rights in practice. This literature has generated important insights into the political dynamics of state commitment to international human rights and, to a lesser extent, the effects of treaty ratification on state behaviour. Yet, an exclusive focus on formal treaties has important drawbacks. In the first instance, these global large-N comparisons do not capture what are strong regional differences in the relative effectiveness of regional human rights regimes which countries are parties to. But most crucially, as pointed out above, there is clearly no mechanical equivalence between treaty ratification and domestic human rights reforms. Rather, formal state ratification of human rights treaties is often followed by a protracted and contentious process of political struggle about the domestic implementation of human rights norms. This points to the importance of grounded analysis of domestic political processes of the kind suggested in this article. This seems particularly important as studies of human rights governance increasingly engage with studies of what explains repression and human rights violations in the first place. By leveraging the IAHRs, domestic human rights groups across Latin America have been able to keep human rights demands alive, despite state and judicial resistance and obstacles encountered at home. Indeed, the emergence and consolidation of

movements of victims, their relatives, and human rights advocates explain to a large extent the persistence of claims over time that characterises the development of human rights as a field of political practice in Latin America.

In short, domestic actors tend not to remain passive recipients of international human rights norms and there are important feedback mechanisms as these actors influence the development of international norms and institutions. The effects on the institutional development of the IAHRs in turn have been significant. The Inter-American Commission in particular, but also the Inter-American Court, have at various critical junctures found allies in the regional human rights movements. As a result, the normative strengthening of human rights, as codified by the IAHRs, can from this perspective be seen as a series of legal and institutional responses to the concrete conditions the human rights advocates and movements faced following the formal political transitions to democracy in Latin America. From this perspective, despite the many challenges, the future of the Inter-American System looks distinctly bright.

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