

THE POLITICIZATION OF HUMAN RIGHTS

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PRELUDE

After evolving into a quasi-constitutional regime boasting wide recognition of its jurisdiction and a respectable compliance record,¹ the Inter-American Human Rights System is presently undergoing a life-threatening crisis. Several countries—most conspicuously the “Bolivarian”² faction of Venezuela, Ecuador, Bolivia, and Nicaragua³—have fiercely attacked the key institutions, *i.e.*, the Commission and Court. Not surprisingly, high-profile figures have spearheaded the onslaught. Ecuador’s President, Rafael Correa, for example, has urged the sponsoring Organization of American States (OAS), in the face of the ongoing dispute, to “revolutionize itself or disappear.”⁴ Bolivian President Evo Morales, in turn, has proclaimed that the entity must either “die at the service of the empire or be born again to serve the peoples of the Americas.”⁵ In this piece, I will probe into this transcontinental challenge and, ultimately, read it as an appealing, though partly problematic, call for the politicization of human rights. In other words, I will construe and appraise it as the assertion that international decision makers should largely defer to governments, especially to those that are implementing the entitlements at stake as part of a broader project of social emancipation.

Of course, critics of the regional human rights structures have delivered more than rousing rhetoric. They have also condemned, with unusual ferocity, certain adverse determinations and unfavorable findings.⁶ In the same breath, the coalition of dissenters has proposed, beyond depriving the Commission of the ability “to adopt precautionary measures for

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¹ See generally ÁNGEL R. OQUENDO, *LATIN AMERICAN LAW* 250-251 (2011).

² The term “Bolivarian” alludes to Simón Bolívar (1783-1830), who played a leading role in the Spanish American wars of independence in the nineteenth century and who has become a symbol of the struggle to unify the southern continent. See Simon Romero, *Building a New History By Exhuming Bolivar*, N.Y. TIMES, Aug. 4, 2010, at A7. The Bolivarian Alliance for the Americas (*Alianza Bolivariana para los Pueblos de Nuestra América*), for instance, promotes the cooperation and integration of these Bolivarian nations along with various Caribbean islands, such as Antigua and Barbuda, Cuba, Dominica, as well as Saint Vincent and the Grenadines. See ALIANZA BOLIVARIANA, <http://www.alianzabolivariana.org/> (last visited Sept. 3, 2013).

³ Nicaragua has played a relatively minor role. Venezuela, Ecuador, and Bolivia, for their part, have assumed, as this article will point out, somewhat different positions on the controversy. For instance, while Venezuela has decided to abandon the System altogether, Ecuador has advanced specific proposals for reform and Bolivia has mainly formulated general statements in support of the group’s position. Nonetheless, all four countries have insisted on presenting themselves as a block and, to the extent possible, on coordinating their actions.

⁴ Mabel Azcui, *El presidente Correa dice que la OEA debe “revolucionarse o desaparecer,”* EL PAÍS, June 5, 2012 (quoting Ecuadorian President Rafael Correa).

⁵ Mabel Azcui, *Evo Morales: “La OEA puede morir al servicio del imperio o renacer,”* EL PAÍS, June 4, 2012.

⁶ See discussion in Section I(B), *infra*.

the protection of potential victims” or “to consider individual petitions” altogether,⁷ barring states that have not ratified the Convention, such as the United States and Canada, from nominating Commissioners.⁸

Ecuadorian authorities, in particular, have advanced their own additional demands, such as the discontinuation of the so-called blacklist of delinquent regimes under Chapter IV of the Commission’s Annual Report and the relocation of the seat of the Commission from Washington to Buenos Aires.⁹ Moreover, they submitted a written proposal in 2011 urging the Organization of American States (OAS) to embrace, “in the shortest order possible,” the “goal” of funding the “Inter-American Human Rights System” solely out of internal “resources,” (2) to forbid external donors, right away, from earmarking their “contributions” for specific purposes, and (3) to equalize the funds available to, as well as the exposure enjoyed by, the Commission’s various “Rapporteurships.”¹⁰ In the same submission, Ecuador stressed that the authoritative bodies should treat “all states” equally and enforce “not only civil and political rights but also economic, social, and cultural rights.”¹¹

Finally, after formally complaining about the Commission’s bias, “politicization,” and “partiality,”¹² Venezuela exercised its right under Article 78 of the American Convention of Human Rights to denounce the treaty as a whole.¹³ In 2012, it filed a Notice of Denunciation, which bears the signature of then Foreign Minister and now President Nicolás Maduro and which became effective on September 6, 2013.¹⁴ Ecuador and Bolivia have threatened to follow suit.¹⁵

⁷ See Eva Sáiz, *La OEA, dividida ante la reforma de su órgano de derechos humanos*, EL PAÍS, Dec. 7, 2012.

⁸ See César Gaviria Trujillo, *Mordaza a un líder de la libertad de expresión*, EL PAÍS, Mar. 20, 2013.

⁹ See Eva Sáiz, *La OEA cierra en falso la reforma del su sistema de derechos humanos*, EL PAÍS, Mar. 23, 2013; Eva Sáiz, “*La reforma del sistema de protección de derechos de la OEA no ha concluido*,” EL PAÍS, Mar. 22, 2013; Eva Sáiz, *El ALBA afronta aislado la reforma del sistema de derechos humanos de la OEA*, EL PAÍS, Mar. 21, 2013.

¹⁰ Propuestas de la Delegación del Ecuador sobre los Temas “Financiamiento”, “Universalidad”, “Asuntos de Procedimiento” e “Informe Anual de la CIDH”, submitted to the Special Working Group on the Inter-American Commission for Human Rights and for the Strengthening of the Inter-American Human Rights System, OEA/SER. G, GT/SIDH/INF. 46/11 (Dec. 5, 2011) [hereinafter Ecuador, *Proposals (Span.)*].

¹¹ *Id.*

¹² Propuestas de la Delegación de República Bolivariana de Venezuela Sobre el Tema “Criterios Para la Construcción del Capítulo IV del Informe Anual de la Comisión Interamericana de Derechos Humanos (CIDH),” submitted to the Special Working Group on the Inter-American Commission for Human Rights and for the Strengthening of the Inter-American Human Rights System, OEA/Ser. G/GT/SIDH/INF. 44/11 (2011).

¹³ See Convención Americana de Derechos Humanos, art. 78, Nov. 22 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S 123 [hereinafter *American Convention (Span.)*].

¹⁴ Nicolás Maduro Moros, Ministro de Relaciones Exteriores de la República Bolivariana de Venezuela, *Carta a José Miguel Insulza, Secretario General de la Organización de Estados Americanos* (Sept. 6, 2012) (Available at http://www.oas.org/dil/esp/Nota_Republica_Bolivariana_de_Venezuela_al_SG_OEA.PDF) [hereinafter *Venez., Notice of Denunciation (Span.)*]. In the Supporting Memorandum, the Venezuelan authorities also generally condemned the Commission for its partiality and vagueness in determining which countries to subject to special monitoring (black list), for its consideration of hypothetical facts, and for the elusiveness of its criteria for precautionary measures and individual petitions. Nicolás Maduro Moros, Ministro de Relaciones Exteriores de la República Bolivariana de Venezuela, *Fundamentación que sustenta la denuncia de la República Bolivariana de Venezuela de la Convención Americana sobre Derechos Humanos presentada a la Secretaría General de la OEA 1-3* (2012), available at http://www.oas.org/dil/esp/Nota_Republica_Bolivariana_de_Venezuela_al_SG_OEA.PDF [hereinafter *Venez., Supporting Memorandum (Span.)*].

¹⁵ Eva Sáiz, *La OEA cierra en falso la reforma del su sistema de derechos humanos*, EL PAÍS, Mar. 23, 2013; Eva Sáiz, *El ALBA afronta aislado la reforma del sistema de derechos humanos de la OEA*, EL PAÍS, Mar. 21, 2013; Eva Sáiz, *La OEA, dividida ante la reforma de su órgano de derechos humanos*, EL PAÍS, Dec. 7, 2012; Mabel Azcui, *El eje bolivariano ataca la Comisión Interamericana de Derechos Humanos*, EL PAÍS, Jun. 6, 2012.

“Other countries, such as Colombia or Costa Rica,” have distanced themselves and supported the embattled establishment.¹⁶ They have, for instance, “argued that the Commission must preserve its autonomous and international character.”¹⁷ John Kerry, as Secretary of State, has intimated that the United States holds a somewhat similar position.

We’ve heard a lot of talk about the [Commission] lately, and I think that’s good, actually. Dialogue is a key part of democracy, and we want to make the [Commission] work better. But we need to bear in mind that the Inter-American Human Rights [System] is already making a significant difference. It’s promoting representative democracy and fundamental freedoms, and these are principles that the OAS members champion. When we advance democracy anywhere in the region, when we take a stand against restrictions on fundamental rights, when we push for greater opportunity, we are acting in solidarity with all of the people of this region.¹⁸

More directly, César Gaviria, the former President of Colombia and onetime Secretary General of the Organization of American States, has affirmed that the alterations advocated by the discontented regimes “would gravely debilitate the Commission and would make it easier for governments to disregard basic rights and to restrict freedom of expression.”¹⁹

Furthermore, in March of 2013, the Organization of American States, in a plenary session, overwhelmingly rejected the reform plan promoted by the Ecuadorian authorities.²⁰ Nonetheless, it resolved to instruct its Permanent Council to “continue the dialogue on fundamental matters related to strengthening the Inter-American Human Rights System.”²¹ In fact, Argentina had tendered and pressed for this resolution in response to a “threat by Ecuador . . . to abandon the System.”²²

Without doubt, this battle constitutes a defining moment for the Western Hemisphere. It could transform or even subvert the existing human rights order. The region could end up with a multiplicity of transnational micro-systems or, *in extremis*, regress to a situation of exclusively national enforcement of rights.

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

At the end of the day, the article will recast the transcontinental quarrel as a crypto-philosophical disputation about the nature of human rights. It will tease out of the polemics of

¹⁶ Mabel Azcui, *El eje bolivariano ataca la Comisión Interamericana de Derechos Humanos*, EL PAÍS, Jun. 6, 2012.

¹⁷ *Id.*

¹⁸ Press Release, John Kerry, U.S. State Department, Comments at the Organization of American States (June 6, 2013).

¹⁹ César Gaviria Trujillo, *Mordaza a un líder de la libertad de expresión*, EL PAÍS, Mar. 20, 2013.

²⁰ Eva Sáiz, *La OEA cierra en falso la reforma del su sistema de derechos humanos*, EL PAÍS, Mar. 23, 2013.

²¹ *Id.* (quoting from the “final text” of resolution submitted by Argentine and adopted by the the Permanent Council of the OAS).

²² *Id.*

the leftist alliance the argument that such entitlements amount to progressive politics. From this perspective, each country's government should set the relevant political agenda and judges, whether national or international, must respond supportively rather than critically.

Part I will identify the underlying Bolivarian claim. It will analyze three alternative formulations in order to determine whether they construct the clamor for institutional renovation not only accurately but also in an interesting manner for today's international debate on human rights. Hence, Part I will first contemplate whether the demands raised rest primarily on the notions of sovereignty and nonintervention (A) or on a repudiation of a number of discrete decisions issued by the Commission and the Court (B). Upon discarding these two possibilities, it will interpret the claim, instead, as a plea for the politicization of human rights (C). Inevitably, the interpretation will take the form of a reconstruction.

Part II will, in turn, assess the claim. It will refuse to react by denying politics any role in the realization of human rights (A), and will recognize the crucial, though far from exhaustive, political dimension of these entitlements (B). After underscoring the pivotal role of both principle and policy, Part II will argue that state officials deserve deference with respect to the latter, but far less than the dissident nations seek (C). It will next illustrate the point by examining the exercise of free speech and of the right to health in a series concrete controversies (D).

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

Secondly, the paramount official quest for social justice does, at times, collide with and trump human rights. Nonetheless, it does so very exceptionally. Therefore, a regime profoundly committed to the creation of a just society neither needs nor merits a free pass with respect to such entitlements.

Thirdly, the self-proclaimed "Bolivarian Axis"²³ and its opponents seem to agree that human rights must involve, exclusively, either politics or principles. In addition, they appear to have converged upon a utopianism of sorts, according to which the judiciary and the executive should approach such entitlements hand in hand, with one of the two governmental branches leading the way and the other one tagging along. As already noted, however, human rights touch upon both politics and principles. Moreover, adjudicators and the political authorities ineluctably engage in a power struggle around the two components of these entitlements and must, as a result, accept conflict as a way of life.

I. CLAIM IDENTIFICATION

²³ Former Venezuelan President Hugo Chávez often used the expression "Bolivarian Axis" ("*eje bolivariano*") to refer to his alliance with like-minded regimes in the region. He thus played sardonically on the negative connotation of the word "axis." In fact, he even declared himself part of the "axis of evil," mockingly drawing on George W. Bush's oratory. See, e.g., *Chávez se incluye en el eje del mal*, LA NACIÓN (June 28, 2010). The denomination "Bolivarian Axis" in this sense dates back at least to 2005. See Mercedes Gallego, *Comienza a llegar la primera ayuda federal a las zonas devastadas por el "Katrina,"* ABC (April 9, 2005) ("Fidel Castro joined . . . the initiative launched by the 'Bolivarian Axis,' which his friend, Colonel Hugo Chávez heads."). See also RICHARD LAPPER, COUNCIL ON FOREIGN RELATIONS, VENEZUELA AND THE RISE OF CHAVEZ: A BACKGROUND DISCUSSION PAPER § 3.3 (2005) ("Chavez talks about building a Bolivarian axis in Latin America.").

A. SOVEREIGNTY AND NON-INTERVENTION

On first impression, the dissident states within the Organization of American States appear to be asserting a traditional sovereignty and nonintervention claim. That is, they seem to be denying the legitimacy of international human rights. From such a perspective, the community of nations has no business second-guessing how governments treat their citizens.²⁴

At times, critics have characterized the Bolivarian campaign in precisely these terms. For example, José Miguel Vivanco, Director of Human Rights Watch's Americas Division,²⁵ has portrayed it as a crusade, undertaken by "governments . . . nostalgic for sovereignty and for the principle of nonintervention," "to discredit and weaken the Commission."²⁶ Indeed, he has decried the whole effort as an attempt to undermine and, if possible, abolish the Inter-American Human Rights System.²⁷

Occasionally, the pronouncements of the concerned countries appear to bear out this characterization. Venezuela's Notice of Denunciation, for instance, charges the Commission and the Court with "interventionist actions" and with the violation of "basic and essential principles, which international law has amply consecrated, such as the principle of state sovereignty."²⁸ In each of its last two paragraphs, the instrument invokes, once again, the concepts of nonintervention and "sovereignty."²⁹ Similarly, the Supporting Memorandum brands some of the Commission's work "an affront to the sovereignty of the Venezuelan state."³⁰ Elsewhere, it refers to "the legislative sovereignty of the nation" and to "the sovereignty" that "inalienably resides in the people."³¹

In reality, however, the dissident governments are not basing their objections on the notions of state sovereignty and of nonintervention. After all, they are pleading for reform, not for the eradication of the existing human rights regime. Significantly, the debate has taken place, in part, before a "Special Working Group" expressly charged, as signaled by its full name, with "Strengthening the Inter-American Human Rights System."³² Even if the clamor for change comes to nothing, the Bolivarian Axis evidently intends not to give up on the entitlements at stake, but rather to create an alternative human rights scheme.³³

²⁴ The British government has apparently complained about the European System of Human Rights along such lines. See Estelle Shirbon, *British Minister Floats Quitting European Rights Convention*, REUTERS (Mar. 9, 2013), <http://www.reuters.com/article/2013/03/09/us-britain-rights-idUSBRE9280FL20130309> (The ruling "Conservative Party has long criticized the Strasbourg-based European Court of Human Rights (ECHR), which enforces the convention, as an encroachment on British sovereignty.").

²⁵ In 2008, the Venezuelan government "apprehended" and "expelled" Vivanco after he and his Deputy Director, Daniel Wilkinson, "released a long report . . . documenting rights violations in Venezuela." Simon Romero, *Venezuela Expels 2 After Report on Rights*, N.Y. TIMES, Sept. 20, 2008, at A8. See also Clodovaldo Hernández, *Venezuela expulsada al director del informe crítico con Hugo Chávez*, EL PAÍS, Sept. 20, 2008.

²⁶ José Miguel Vivanco, *Derechos Humanos, Insulza, Brasil y el ALBA*, EL PAÍS, June 3, 2012.

²⁷ *Id.*

²⁸ Venez., *Notice of Denunciation (Span.)*, *supra* note 14, at 2.

²⁹ *Id.* at 9-10.

³⁰ Venez., *Supporting Memorandum (Span.)*, *supra* note 14, at 2.

³¹ *Id.* at 2, 22.

³² See, e.g., Ecuador, *Proposals (Span.)*, *supra* note 10.

³³ See Eva Sáiz, *La OEA, dividida ante la reforma de su órgano de derechos humanos*, EL PAÍS, Dec. 7, 2012 (The "presidents of Bolivia and Ecuador, Evo Morales and Rafael Correa, warned that [their countries] might withdraw from the Inter-American System of Human Rights and that [they were] considering the creation of a similar body under the Union of South American Nations.").

Actually, the aforementioned Venezuelan Notice of Denunciation itself describes (1) the ratification “of the American Convention of Human Rights” and (2) the institutionalization of “mechanisms” for “the promotion and protection of human rights” as “very important” for the “region.”³⁴ In the same instrument, Venezuela takes pride in having ratified the treaty before any other state, in doing so “through a unilateral declaration,” and in being the second country “to accept the [Inter-American] Court’s jurisdiction.”³⁵ In addition, it calls attention to the breadth of human rights enshrined in its own 1999 Constitution.³⁶

Despite denouncing the American Convention, Venezuelan authorities simultaneously commit, in their submission, to respecting and complying with “other mechanisms . . . for the promotion and protection of human rights”³⁷ Presumably speaking for themselves and for their allies in the region, they also “express the firm intention . . . to contribute to the construction of Our Own American System of Human and Popular Rights”³⁸ With these words, the document reiterates the pledge to build a new human rights regime upon the declared repudiation of the existing structures.

Venezuela, Ecuador, Bolivia, and Nicaragua would surely have situated themselves differently if they intended to reject human rights as an affront to their sovereignty. They would have simply announced their impending denunciation of the Convention and maybe an eventual exit out of the Organization of American States. Neither demands for reform, nor professions of devotion, let alone vows to launch another system, would have preceded the announcement.

Therefore, the Bolivarian nations are clearly not contesting the international enforceability, against sovereign states, of the entitlements in question. Perchance they are engaging in deception when they represent themselves as reformists, as human rights devotees, and as the prospective builders of a parallel human rights body. However, this Part seeks to interpret the group’s contentions, not to divine its possible hidden designs.

In any event, a sovereignty and nonintervention claim would barely fire up a transnational discussion on human rights. Such an assertion might have appealed to many people up to the middle of the last century. Nonetheless, it sounds much less attractive at the present time.

Many key treaties adopted since the end of the Second World War confirm that the global community has not only the authority but also the duty to stop a state from infringing upon citizens’ freedoms.³⁹ In this fashion, these agreements reflect both an altered consensus and a quite an attractive construction of the relationship among the world, the nation, and the individual. From such a standpoint, an encroachment upon a person’s entitlements in any country constitutes an international, rather than an internal affair.

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

reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and

³⁴ Venez., *Notice of Denunciation (Span.)*, *supra* note 14, at 1.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 9.

³⁸ *Id.* at 10.

³⁹ See, e.g., *International Covenant on Civil and Political Rights*; *International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 2200, at 52, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966).

to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom.⁴⁰

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

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

Of course, states usually have a duty to respect a specific human right only to the extent that they have agreed, as sovereigns, to do so by ratifying the relevant instrument, whether a treaty or the U.N. Charter itself.⁴¹ By the same token, they may refuse to participate in any existing or prospective human rights system. All the same, the Bolivarian Axis does not realistically appear to be pursuing such a course of action. Nor would it attract much international scholarly attention if it were.

Without doubt, a nation would have to pay an extremely high price in order to exercise its sovereignty “fully” and abjure all human rights. It would have to relinquish its membership in the United Nations, as well as in most global and regional institutions and arrangements. Moreover, condemnation and perhaps sanctions from other countries would almost certainly follow.

In any event, some human rights would continue to apply as peremptory norms (*ius cogens*).⁴² To be sure, a nation may purport to render such entitlements inapplicable by isolating itself and turning its back on the rest of the planet. However, it would thus attain not an exemption for itself but, at best, the status of a conscientious objector or, at worst, that of a global outlaw.

More generally, an appealing conception of the state as a self-determining entity embedded in a complex and inextricable web of relations and commitments to individuals and collectivities has gradually but decisively displaced that of the state as an absolutely sovereign and self-contained unit. Accordingly, nations may not treat their citizens as they see fit and expect to be left alone in so doing. Instead, they must honor their responsibilities to a wide array of private and public parties, both at home and abroad, while acting autonomously and resisting heteronomy or domination.⁴³

⁴⁰ U.N. Charter preamble.

⁴¹ See, e.g., *id.*, art. 2(1) (“The Organization is based on the principle of the sovereign equality of all its Members.”); art. 2(2) (“All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them. . . .”); art. 2(7) (“Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state. . . .”).

⁴² See, e.g., *Condición Jurídica y Derechos de los Migrantes Indocumentados*, Opinión Consultativa OC-18/03, Inter-Am. Ct. H.R. (Ser. A) No. 18, p. 117 (¶ 101) (Sept. 17, 2003) (“[T]he principle of equality before the law, of equal protection before the law and of non-discrimination constitutes *jus cogens*. It sustains the entire juridical structure of the national and international public order and permeates, as a fundamental principle, the legal system as a whole. . . . At the current stage of development of international law, the fundamental principle of equality and non-discrimination has entered the realm of *jus cogens*.”).

⁴³ See, e.g., IRIS MARION YOUNG, *Two Concepts of Self-Determination*, GLOBAL CHALLENGES: WAR, SELF-DETERMINATION, AND RESPONSIBILITY FOR JUSTICE 50-51 (2007) (“. . . self-determination for peoples means that

Needless to say, contemporary states frequently violate their transnational duties, whether voluntarily assumed or externally imposed. At times, they deal with their citizens no less brutally than their pre-1945 predecessors did. The emergence of a consensus in favor of the view that human rights categorically apply to nations has not ushered in an era of full compliance.

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

In sum, an attempt to resuscitate the sovereignty model and recast the Bolivarian claim in such terms would hardly come across as persuasive or interesting. After all, nations neither have consented to all applicable human rights nor possess the ability to render the totality of such entitlements inoperative. More plausibly, human rights bind states crucially and compulsorily. The dissident members of the Organization of American States must and should be acknowledging as much. While they do occasionally invoke their prerogatives as sovereigns, as well as the notion of non-intervention, they do not (and should not) appear to be seeking thereby to negate the mandatory character of human rights.

B. DECISION MAKING

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

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

Unfortunately, the Inter-American System has not lived up at all to our epoch's challenges. It has failed to offer solutions or to take a firm and decisive position with respect to problems such as the existing colonies in the Americas, *i.e.*, the Malvinas Islands, or the criminal embargo against a sister nation, *i.e.*, Cuba.⁴⁴

The "System," according to Correa, has not even done "simple things, like trying the individuals responsible for the *coup d'état* against [Honduran] President [Manuel] Zelaya."⁴⁵

they have a right to their own governance institutions through which they decide on their goals and interpret their way of life. . . . Because a people stands in interdependent relations with others, however, a people cannot ignore the claims and interests of those others when their actions potentially affect them."); *id.* at 57 ("A relational concept of self-determination for peoples does not entail that members of the group can do anything they want to other members without interference from those outside. It does entail, however, that insofar as there are global rules defining individual rights and agents to enforce them, all peoples should have the right to be represented *as peoples* in the fora that define and defend those rights.").

⁴⁴ Mabel Azcui, *El presidente Correa dice que la OEA debe "revolucionarse o desaparecer,"* EL PAÍS, June 5, 2012 (quoting Ecuadorian President Rafael Correa).

⁴⁵ *Id.*

Venezuela's authorities, for their part, complained, in their Notice of Denunciation, about the Commission's silence in the face of two massacres that occurred in Venezuela in the 1980s. They also condemned the denial of precautionary measures in favor of former President Hugo Chávez during the 2002 *putsch*. Finally, the Venezuelan government censured the body's alleged implicit endorsement of the insurrectionist regime.⁴⁶

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

Surely, the Commissioners might have quickly awarded the preliminary remedy supposedly requested against Chávez's deposition in 2002. In fairness, though, they did not have enough time to do so, as the overthrown leader returned to power within 48 hours. As a result, the matter became moot almost instantly.

Nonetheless, the Commission scheduled, "immediately after the institutional rupture of April, 2002," a visit to Venezuela for May of 2002.⁴⁷ Moreover, it issued, on April 13 (two days after the insurrection), a press release "calling for a prompt restoration of the rule of law and of the democratic system of government."⁴⁸ Conspicuously, however, the Commissioners did not demand the reinstatement of the legitimate head of state.⁴⁹

The Organization of American States and some of its other organs, for their part, responded right away to the rebellion. For example, the Permanent Commission quickly adopted an unequivocally condemnatory resolution. It decried "the subversion of the constitutional order in Venezuela" and pressed for "the normalization of the democratic institutions . . . within the framework of the Inter-American Democratic Charter."⁵⁰ Presumably, this plea did entail the restitution of Chávez and his government.

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

In fact, Venezuela's President Chávez himself pointed precisely to the Commission's 2010 Report when he had his administration repudiate the American Convention of Human Rights. Significantly, he focused on what the Commissioners had written rather than on what they had neglected to mention. In particular, they had "alerted to the deterioration of democracy in Venezuela."⁵¹

⁴⁶ Venez., *Notice of Denunciation (Span.)*, *supra* note 14, at 4-5.

⁴⁷ Inter-Am. Comm'n H.R., *Democracia y Derechos Humanos en Venezuela*, OEA/Ser. L./V./II. (Doc. 54), p. 1 (Intro., ¶ 3) (Dec. 30, 2009).

⁴⁸ Press Release, Inter-Am. Comm'n H.R., *Sobre los Sucesos en Venezuela* (Apr. 13, 2002).

⁴⁹ The document merely "deplores the removal . . . of the highest judicial officials and of independent officials of the Executive Branch, as well as the suspension of the terms of the members of the Legislative Branch." *Id.* It additionally calls for the "organization of elections." *Id.*

⁵⁰ Permanent Council (O.A.S.), *Resolution: Situación en Venezuela* CP/RES. 811 (1315/02) (2002).

⁵¹ Maye Primera, *Chávez ordena la salida de Venezuela de la CIDH*, EL PAÍS, Feb. 26, 2010. The 2010 Report included Venezuela, in its controversial Chapter IV, among the "countries that drew special attention from the

Chávez riposted in unambiguous terms: “It’s pure garbage. We should prepare to denounce the treaty through which Venezuela adhered (or whatever) to that nefarious Inter-American Commission on Human Rights and to get out of there because it’s not worth it.”⁵²

Without doubt, the Commission could have toned down the Chapter-IV Section on Venezuela in its 2010 Report. In truth, however, it did not use particularly harsh words. The comments on the Venezuelan violations parallel those on the infringements attributed to the other countries listed in the Chapter: Colombia, Cuba, and Honduras.⁵³

Specifically, the Commissioners concluded by urging Venezuela not only to “[r]efrain from undertaking reprisals against or using the State’s punitive power to intimidate or sanction people based on their political opinions,” but also to “guarantee sufficient space for pluralism within the democratic process.”⁵⁴ Nonetheless, the document also focuses on the positive. For instance, it “recognizes and appreciates the progress achieved in the realm of economic, social, and cultural rights” and includes an entire subsection on the topic, highlighting the state’s accomplishments in reducing poverty, inequality, and unemployment.⁵⁵

Of course, the reprimand just referred to, like the previously enumerated alleged oversights, hardly qualifies as a judicial or quasi-judicial decision. More importantly, the pronouncements that the Commission might articulate as part of its reporting function are of a general nature and do not bind the targeted state or anyone else. Therefore, they might perhaps move the relevant regime to remonstrate, but would probably not lead it to rock the boat.

In reality, the Bolivarian Axis regards the blunders that it perceives in the Commissioners’ reports as a sign of a deeper systemic flaw, namely a misconception of the politics of human rights, in the sense expounded in the next section. It believes that Inter-American institutions should embrace its perspective on such entitlements. Accordingly, they should, at the very least, refrain from condemning, let alone blacklisting, progressive governments.

In any event, the rest of the world would surely not have much of a reason to pay attention to national protestations against the Inter-American Human Rights System’s critical reporting. It would likely regard them as possessing mostly local interest. If the Latin American left-wing regimes were essentially aiming their clamor at the Commission’s reports, they would indubitably be revealing a universal verity, but a banal one at that: namely, that countries dislike criticism.

All the same, the Venezuelan state, in its Notice of Denunciation and in its Supporting Memorandum, did not concentrate on the Commissioners’ reports, but, rather, on six concrete cases. It accused the Commission and the Court of admitting petitions on matters that national tribunals either were still examining or never had the opportunity to consider.⁵⁶ In this sense, Venezuela’s authorities deplored a supposed contravention of the exhaustion-of-domestic-

Commission during the . . . year.” Inter-Am. Comm’n H.R., Inf. Anual 2010 (Ch. IV), OEA/Ser. L/V/II., Doc. 5 corr. 1, p. 351 (Intro., § 1) (2011) [hereinafter *Inter-Am. Comm’n H.R., Annual Rpt. 2010 (Ch. IV) (Span.)*].

⁵² *Maye Primera, Chávez ordena la salida de Venezuela de la CIDH*, EL PAÍS, Feb. 26, 2010 (quoting Venezuelan President Hugo Chávez).

⁵³ *See generally, Inter-Am. Comm’n H.R., Annual Rpt. 2010 (Ch. IV) (Span.)*, *supra* note 51, at 353 & ff.

⁵⁴ *Id.* at 600 (Recommendations).

⁵⁵ *Id.* at 598 (Venezuela, § VI (Derechos Económicos, Sociales y Culturales) (¶ 835)); *id.* at 598 (Venezuela, § VI (Derechos Económicos, Sociales y Culturales), ¶¶ 831-832). *See also id.* at 536 (Venezuela, ¶ 612) (“Similarly, the Commission’s 2009 Report stressed the important achievements with respect to economic, social, and cultural rights . . .”).

⁵⁶ *Venez., Notice of Denunciation*, *supra* note 14, at 4.

remedies requirement.⁵⁷ In addition, they averred that in *Usón Ramírez v. Venezuela*, a recording of the judicial deliberations revealed that the Inter-American Court of Human Rights arrived at its judgment “without listening to the arguments, to the parties, or even to the answers to its own questions.”⁵⁸

Unlike the declarations of the Commissioners as investigators and reporters, the adjudicative holdings of the Commission and the Court obligate the state.⁵⁹ As a consequence, they usually matter very much to the concerned government. Pertinently, Venezuela, Ecuador, Bolivia, and Nicaragua—like virtually all other Latin American countries—originally not only ratified the American Convention but also acknowledged the binding jurisdiction of the Court.⁶⁰

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

In truth, the contested cases constitute a miniscule minority of the caseload concerning Venezuela from 2000 to 2012.⁶¹ More exactly, they amount to one percent (1%) of the total. All in all, the complainant prevailed on the merits in only three percent (3%) of the totality of actions filed against the Venezuelan state during this period.⁶² Such numbers show that, not surprisingly, the authorities face considerably more favorable odds than the petitioners in these proceedings.

Obviously, all of the members of the Organization of American States have confronted unfavorable determinations.⁶³ Some have subsequently conveyed disappointment or even indignation. In fact, “Brazil . . . recalled its ambassador to the Organization in 2011 upon receiving an official request from the Commission to suspend the construction of a hydroelectric plant in Belo Monte.”⁶⁴ It also joined Argentina and Venezuela in “very strongly criticizing the work of the Inter-American Commission on Human Rights” during the “inaugural session” of the 2012 “General Assembly” of the Organization of American States.⁶⁵

Furthermore, Brazil, Argentina, and Guatemala have supported the overall plea for renewal.⁶⁶ Nevertheless, these and other non-Bolivarian nations have maintained their adherence

⁵⁷ *Id.*

⁵⁸ *Id.* at 7.

⁵⁹ See, e.g., *American Convention*, *supra* note 13, art. 51(1) (“The Commission shall make relevant recommendations and set a deadline for the State to adopt the measures due in order to remedy the alleged violation.”) & art. 68(1) (“The State Parties to the Convention commit to complying with the Court’s decision in any case in which they are parties.”).

⁶⁰ See *supra* note 1 and accompanying text.

⁶¹ For purposes of this article, Lauren Kinell conducted, as research assistant, a quick survey on the sites of the Commission and the Court and concluded that the former and the latter body ruled favorably on the merits in only two (2) and fourteen (14), respectively, out of a total of 573 petitions filed from 2000 to 2012.

⁶² *Id.*

⁶³ See generally *Inter-Am. Comm’n H.R., Annual Rpt. 2010 (Ch. IV) (Span.)*, *supra* note 51.

⁶⁴ Eva Sáiz, *La OEA, dividida ante la reforma de su órgano de derechos humanos*, EL PAÍS, Dec. 7, 2012.

⁶⁵ *Id.*

⁶⁶ *Id.*

to the Inter-American Human Rights System. They have not launched an existential onslaught because of their disagreement with a few adverse judgments.

More generally, the Venezuelan expostulations on the precedents listed in its Notice of Denunciation and Supporting Memorandum do not come across as particularly exciting or compelling. In the context of its main argument, Venezuela never bothers to acknowledge the existence of exceptions to the exhaustion requirement,⁶⁷ let alone to explain why none of them applies. In reality, the institutions of the Inter-American Human Rights System took a relatively standard approach to the issue.

In *Usón Ramírez*, for instance, the Court cited its own precedents, as well as those of the European Court of Human Rights, in holding that the authorities had waived the exhaustion-of-remedies defense by neglecting to raise it during the admissibility stage.⁶⁸ Coincidentally, the tribunal ruled against the Venezuelan government on identical grounds upon deciding *Perozo*.⁶⁹ Moreover, the judges concluded, in regards to one of the claims asserted in *Díaz Peña*, that Venezuela's domestic law did not confer any remedy that the claimant could have exhausted.⁷⁰ Nevertheless, they sided with the Venezuelan state on the same objection with respect to the other assertions advanced.⁷¹

The Inter-American Commission, for its part, proceeded in the disputed cases along analogous lines. Accordingly, it relied on the unjustified delay in the already initiated domestic procedure in order to exempt the petitioner from having to exhaust remedies in *López Mendoza*.⁷² In *Brewer Carías*, the Commissioners invoked that same rationale for the exemption, as well as the claimant's insufficient access to the available remedies.⁷³

Undoubtedly, the imputation of prejudgment in *Usón Ramírez* may carry more weight. Nonetheless, it requires no in-depth jurisprudential analysis, but instead careful evaluation of the evidence at hand. What exactly did the judges say on tape prior to oral argument? Did they simply insinuate an inclination to vote against Venezuela on the basis of the written submissions? Or did they actually demonstrate that they had definitely made up their minds and did not intend to take the parties' disputation seriously?

Apparently, the Venezuelan authorities did not broach the matter during the litigation. They did so only upon denouncing the American Convention three years later. Therefore, the government exposed its accusation neither to adversarial rebuttal, nor to judicial probe.

Incidentally, Venezuela never addressed, in its denunciation papers, the treatment of the exhaustion issue in *Usón Ramírez*. In any event, it identified no substantive mistakes committed by the judges. Therefore, the original petitioner and the tribunal itself might have convincingly construed the purported procedural violation as ultimately harmless.

⁶⁷ For example, the American Convention of Human Rights establishes that the requirement does not apply “when (a) the domestic legislation of the concerned state does not guarantee due process of law for the protection of the allegedly violated right or rights; (b) the party alleging an encroachment upon his or her rights has been denied access to—or has been prevented from exhausting—the remedies available under domestic law; and (c) there has been an unjustified delay in issuing a final decision upon the exhaustion of such remedies.” See *American Convention*, *supra* note 13, art. 46(2).

⁶⁸ *Usón Ramírez vs. Venezuela*, Inter-Am. Ct. H.R. (Ser. C) No. 207, pp. 6-7 (¶¶ 19-23) (Nov. 20, 2009).

⁶⁹ *Perozo vs. Venezuela*, Inter-Am. Ct. H.R. (Ser. C) No. 195, p. 14 (¶ 44) (Jan. 28, 2009).

⁷⁰ *Díaz Peña vs. Venezuela*, Inter-Am. Ct. H.R. (Ser. C) No. 244, p. 49 (¶ 126) (June 26, 2012).

⁷¹ *Id.* at 48 (¶¶ 122-125).

⁷² *López Mendoza vs. Venezuela*, Pet. 275-08, Inter-Am. Comm'n H.R., Rpt. No. 67/08, OEA/Ser. L/V/II.134, doc. 5 rev. 1, ¶ 34 (2008).

⁷³ *Brewer Carías vs. Venezuela*, Pet. 84-07, Inter-Am. Comm'n H.R., Rpt. No. 97/09, OEA/Ser. L/V/II, doc. 51 corr. 1, ¶¶ 87, 89, 95-96 (2009).

In sum, interpreting the Bolivarian cry for change as resting mainly on these unfavorable rulings would amount to distorting it and to depriving it of any substantial interest. The dissatisfaction manifested by Venezuelan authorities does not differ much from that of other countries all over the continent under similar circumstances. It would, in itself, normally bring about a motion for reexamination, an official statement of protest, or, under extreme circumstances, a call for the resignation of the members of the responsible bodies. More significantly, the criticisms formulated would not contribute much to the ongoing, worldwide discussion on human rights. First, the exhaustion-of-remedies charge does not even sound persuasive. Secondly, the belated allegation that the decision makers never listened to the parties' arguments lacks substantiation and pertains, at any rate, only to the facts of a single, specific dispute.

C. POLITICIZATION

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

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

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

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

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

Venezuela unambiguously enunciates this general contention in its Notice of Denunciation: "The state parties' efforts, within the Organization of American States, to

promote the necessary reform and transformation of [the Commission and the Court] have been to no avail because such institutions find themselves hostages to a small cadre of unscrupulous bureaucrats, who have blocked, obstructed, and impeded the much needed alterations.”⁷⁴ In the Supporting Memo, the Venezuelan authorities complain, more precisely, that the U.S. government, in a display of “extreme insolence” deserving of “the strongest and most categorical condemnation,” “prevents the modification or correction of the . . . System.”⁷⁵

From this standpoint, the “empire” is probably not merely trying to shield its preferred appointees to the controversial human-rights bureaucracy and to avert any attempt to reduce the incidence of mistake and bias in their fact finding and decision making. It is additionally seeking to forestall a defeat in its trans-continental political battle against the anti-colonial regimes south of its border. In response, the Commission and the Court should (but in all likelihood will not) defer to such revolutionary states as parties to the treaty and as governments and, ultimately, embrace a politically enlightened, anti-U.S. vision of human rights. As observed by Venezuela, “the United States has not [even] ratified the American Convention on Human Rights”⁷⁶ and, consequently, should carry little weight on this ground alone, independently of its purportedly reactionary bent.

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

For instance, Venezuela’s Ambassador to the Organization of American States disparaged the Inter-American Commission on Human Rights as a front for “a mafia” that operates as “an inquisition especially against leftist governments.”⁷⁷ He was thus echoing an earlier declaration by late President Hugo Chávez: “There’s a mafia in there. The last thing that institutions like the nefarious Inter-American Commission on Human Rights do is defend human rights. It is a politicized body, utilized by the empire to attack governments such as that of Venezuela.”⁷⁸

For his part, Bolivian President Evo Morales has stated that the sponsoring Organization of American States “has covered up for dictatorships and has intervened in nations” and “has allowed the repression and the punishment of social movements.”⁷⁹ Morales has specifically campaigned for the “disappearance of various organs”⁸⁰ of “domination and subjugation.”⁸¹

⁷⁴ Venez., *Notice of Denunciation (Span.)*, *supra* note 14, at 2.

⁷⁵ Venez., *Supporting Memo (Span.)*, *supra* note 14, at 5-6.

⁷⁶ *Id.* at 6.

⁷⁷ Eva Sáiz, *La OEA, dividida ante la reforma de su órgano de derechos humanos*, EL PAÍS, Dec. 7, 2012 (quoting Venezuela’s Ambassador to the Organization of American States).

⁷⁸ Maye Primera, *Chávez ordena la salida de Venezuela de la CIDH*, EL PAÍS, Feb. 26, 2010 (quoting Venezuelan President Hugo Chávez).

⁷⁹ Mabel Azcui, *Evo Morales: “La OEA puede morir al servicio del imperio o renacer,”* EL PAÍS, June 4, 2012 (quoting Bolivian President Evo Morales).

⁸⁰ *Id.*

⁸¹ *Id.* (quoting Bolivian President Evo Morales).

Upon threatening to withdraw his country from the Inter-American Human Rights System, he likened the Commission to a “military base of the United States.”⁸²

The Spanish newspaper *El país* has extensively covered the debate surrounding free speech. “The Bolivarian Axis” has reportedly “accused the Rapporteurship for Freedom of Expression of the Inter-American Commission on Human Rights of sustaining the hegemony of the media, which do not practice ‘freedom of expression, but rather of extortion.’”⁸³ According to the alliance, “this exercise of power . . . boils down to a ‘dictatorship of the media’ against progressive governments in the region.”⁸⁴

As mentioned in the Prelude, one of Ecuador’s reform propositions would have precluded “third-party States” or “other institutions” from earmarking their financial contributions for “particular purposes.”⁸⁵ It would have, thereby, seriously compromised the Commission’s finances and would have effectively “terminated the Rapporteurship for Freedom of Expression.”⁸⁶ “This Rapporteurship, *qua* special, is the only one that is not financed with funds of the Organization of American States and that depends entirely on international cooperation programs.”⁸⁷ In fact, “it disposes of a budget that, due to these circumstances, thrice exceeds that of other rapporteurships.”⁸⁸ Against such state of affairs, the Ecuadorian authorities proposed correcting, without delay, “the imbalance in financial and human resources available to [the various] rapporteurships.”⁸⁹

In its Notice of Denunciation, the Venezuelan government expressed, similarly, its commitment “to a balanced realization of economic, social, cultural, civil, and political rights.”⁹⁰ Hence, it hinted that it would rank positive entitlements ahead of their negative counterparts, including free speech. Ecuador’s authorities, for their part, openly embraced the overall position in their proposal. They urged that Chapter IV of the Commission’s Annual Report “concentrate not only on civil and political rights but also on economic, social, and cultural rights.”⁹¹

Bolivian President Evo Morales has, in turn, focused on the latter over and above the former. For example, he has insisted that “Latin American peoples should have access to all basic services, such as energy, water, and telecommunications, as a human right.”⁹² He has additionally spoken of an “obligation to break the monopoly on medicines.”⁹³

Curiously, Venezuela’s Notice of Denunciation itself accuses the Commission and the Court of acting politically. It specifically reviles them for “becoming a political throwing

⁸² Eva Sáiz, *El ALBA afronta aislado la reforma del sistema de derechos humanos de la OEA*, EL PAÍS, Mar. 21, 2013 (quoting Bolivian President Evo Morales).

⁸³ Mabel Azcui, *El eje bolivariano ataca la Comisión Interamericana de Derechos Humanos*, EL PAÍS, Jun. 6, 2012 (quoting the “Bolivarian Axis.”).

⁸⁴ *Id.*

⁸⁵ Eva Sáiz, *La OEA cierra en falso la reforma del su sistema de derechos humanos*, EL PAÍS, Mar. 23, 2013. See Ecuador, *Proposals*, *supra* note 10 (The “voluntary contributions” should not be “conditioned or assigned.”). See also Eva Sáiz, *La OEA, dividida ante la reforma de su órgano de derechos humanos*, EL PAÍS, Dec. 7, 2012.

⁸⁶ Eva Sáiz, *La OEA cierra en falso la reforma del su sistema de derechos humanos*, EL PAÍS, Mar. 23, 2013.

⁸⁷ *Id.*

⁸⁸ *Id.* See also Eva Sáiz, *El ALBA afronta aislado la reforma del sistema de derechos humanos de la OEA*, EL PAÍS, Mar. 21, 2013.

⁸⁹ Ecuador, *Proposals* (Span.), *supra* note 10.

⁹⁰ Venez., *Notice of Denunciation* (Span.), *supra* note 14, at 10.

⁹¹ Ecuador, *Proposals* (Span.), *supra* note 10.

⁹² Mabel Azcui, *El presidente Correa dice que la OEA debe “revolucionarse o desaparecer,”* EL PAÍS, June 5, 2012 (quoting Bolivian President Evo Morales).

⁹³ *Id.*

weapon.”⁹⁴ The document refers to the disputed “cases” as “clearly politicized and biased against the Venezuelan state.”⁹⁵ It thereby evokes President Chávez’s previously quoted declarations writing off the Inter-American Commission on Human Rights as “a politicized body, utilized by the empire to attack governments such as that of Venezuela.”⁹⁶

Such language obviously suggests that the Venezuelan state perceives the politicization of human rights as a problem. Nonetheless, it may indicate, further, that Venezuela’s authorities oppose politicizing such entitlements in a particular way. Venezuela may be merely condemning the Commission and the Court for injecting the wrong type of politics, *viz.*, of a counter-revolutionary and non-democratic kind, into their decision making.

Quite revealingly, the concerned governments have dealt with the vindication of rights at home in a manner that parallels and sheds some light on their actions abroad. They have, (1) at the outset, assailed the national judiciary for playing a destructive, rather than supportive role with respect to their political program; (2) thereupon, replaced the highest constitutional tribunal’s membership; (3) next, instituted new constitutions that reflect their progressive convictions; and, (4) finally, striven to keep in line, politically, the newly invested justices and judges.⁹⁷ In Venezuela, Ecuador, and Bolivia, the authorities have evidently read from the same script in politicizing rights and judicial institutions.

These regimes most certainly intend to continue this political campaign in the international arena. In fact, they have already taken the first step by attacking the principal bodies of the Inter-American Human Rights System and followed up with a general plea for the replacement of the currently sitting decision-makers.⁹⁸ Perhaps the Bolivarian Axis feels no need to undertake, at the moment, the complicated task of altering the regional conventional norms because the wide-ranging entitlements presently in place mesh well enough with its politics. Nonetheless, it most likely dreams of introducing investigative and adjudicative institutions that share or, at least, do not interfere with its agenda.

Surely, the repudiation of international, as well as national, judicial scrutiny definitely may seem to rest, once again, on the desire to attain absolute sovereign supremacy. The former Ambassador of Panama to the Organization of American States, Guillermo A. Cochez, ventures such a reading. Referring principally to the Venezuela, Ecuador, Bolivia, and Nicaragua, he writes: “The system of justice has become an Achilles’ heel for those who wish to have no control over them; for those who understand power as a way of practically doing whatever they want.”⁹⁹

Irrespective of the merits of such an accusation, the dissenting nations also appear to be promoting their political conception of human rights. Accordingly, courts must uphold the official political program. Naturally, they do not owe the government loyalty as a cabinet member does. Nonetheless, the judiciary must conform for the sake of congruence and integrity.

⁹⁴ Venez., *Notice of Denunciation (Span.)*, *supra* note 14, at 2.

⁹⁵ *Id.* at 4.

⁹⁶ Maye Primera, *Chávez ordena la salida de Venezuela de la CIDH*, EL PAÍS, Feb. 26, 2010 (quoting Venezuelan President Hugo Chávez).

⁹⁷ See OQUENDO, *supra* note 1, at 170-195 (Ch. III, § E) (2011) (“When Constitutionalism Breaks Down: Venezuela’s 1999 Constitutional Crisis”). For the situation in Ecuador see EFE, *El Parlamento de Ecuador designa un nuevo Tribunal Constitucional tras el cese del anterior*, EL PAÍS, Jun. 1, 2007; Daniela Creamer, *Correa celebra un referéndum que le permitirá controlar la justicia*, EL PAÍS, May 7, 2011. For the situation in Bolivia see Mabel Azcui, *Morales emprende la reforma del poder judicial con 18 nombramientos*, EL PAÍS, Feb. 19, 2010.

⁹⁸ See, generally, *Prelude*, *supra*.

⁹⁹ Guillermo A. Cochez, *La justicia y el poder*, EL PAÍS, August 31, 2013.

In this sense, tribunals act incongruently when they go out on a limb politically and advance their own preferred policies. From this point of view, they expose society to political disarray. The situation resembles somewhat that of a country in which the president and the prime minister belong to different parties, as occasionally happened in France prior to the 2000 referendum.¹⁰⁰ Hence, an activist judiciary might do as much damage as a second head of government by “working at cross purposes”¹⁰¹ with the executive branch.

Furthermore, courts arguably trample upon the legal order’s integrity when they defy the elected authorities politically. They thus transgress cardinal legal principles. Unlike the prime minister, judges normally bear a duty of restraint and must abstain from meddling in politics.

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

All in all, the assertion invites reflection upon the relationship between, as well as revolutionary optimism about, human rights and politics. It radically renews the entreaty, which groups on the left and on the right have enunciated in the past,¹⁰² to concede political powers significant leeway. The novelty resides in the idea that judicial institutions must defer because they are dealing not with policies in contradistinction to rights, but rather with ineluctably political entitlements.

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

II. CLAIM ASSESSMENT

A. PRINCIPLES

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

Jürgen Habermas, for instance, divides the moral and the ethical-political spheres and places fundamental entitlements in the first, as opposed to the second of these spheres. Moral

¹⁰⁰ See Suzanne Daley, *In Underwhelming Turnout, French Voters Cut Presidential Term*, N.Y. TIMES, Sept. 25, 2000, at A3 (“A referendum to cut the French president’s term of office from seven to five years was overwhelmingly approved today though a record number of voters did not bother to cast a ballot. . . . Supporters have argued that the seven-year term . . . will cut down or eliminate awkward periods of ‘co-habitation’ like the one France is experiencing now, with a president and prime minister from different parties and often working at cross-purposes”).

¹⁰¹ *Id.*

¹⁰² See, e.g., Duncan M. Kennedy, *The Critique of Rights in Critical Legal Studies*, in LEFT LEGALISM/LEFT CRITIQUE 178, 199-200 (Janet Halley & Wendy Brown eds., 2002) (“The realists argued [in the 1920s and 30s] that because the conservative constitutional rights case against reform statutes necessarily involved mere policy argument, the courts had no specifically legal basis for overruling legislative judgments. . . . Moderates and conservatives argued [in the 1950s] that because all the courts could do was balance rights against powers, or rights against rights, they had no specifically legal basis for overruling legislative judgments.”).

matters interest people similarly everywhere: “In asking moral questions, humanity—or a presumed republic of world citizens—constitutes the reference system for the justification of regulations that are equally in the interest of all. The decisive reasons must, in principle, be able to be accepted by anyone.”¹⁰³ Ethical-political matters, in comparison, concern solely a particular community:

In asking ethical-political questions, the life form of “our respective” political collectivities constitutes the reference system for the justification of regulations that express a conscious and collective self-understanding. The decisive reasons must, in principle, be able to be accepted by all the members who share “our” traditions and firmly held values.¹⁰⁴

While morality is deontological, ethical politics is teleological. Accordingly, the former imposes obligations independently of the purposes of the agent; the latter is binding insofar as the agent adopts a specific end or “*telos*.”¹⁰⁵

In addition, moral reasons possess hierarchical priority and prevail over their ethical-political counterparts. They sustain principles or norms, as contradistinguished from values. Significantly, principles may not clash with each other but rather build a coherent system. Values, in turn, often compete against each other and allow a ranking according to the extent to which the subjects adhere to them.¹⁰⁶

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

I call a “policy” that kind of standard that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community (though some goals are negative, in that they stipulate that some present feature is to be protected from adverse change). I call a “principle” a standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality.¹⁰⁷

Dworkin ultimately identifies fundamental entitlements with principle and with morality, not with policy and politics. He expressly describes the interpretation of “individual rights” as “moral rather than political” and as primarily the prerogative of the judiciary.¹⁰⁸

Dworkin and Habermas, hence, agree that basic human rights rest on principles and pertain to the realm of morality, instead of that of politics. They also both believe that these entitlements oblige categorically and that they take precedence over political ideals.

¹⁰³ JÜRGEN HABERMAS, FAKTIZITÄT UND GELTUNG: BEITRÄGE ZUR DISKURSTHEORIE DES RECHTS UND DES DEMOKRATISCHEN RECHTSSTAATS 139 (1992) [hereinafter, HABERMAS, FG].

¹⁰⁴ HABERMAS, FG, *supra* note 103, at 139. See also JÜRGEN HABERMAS, DIE EINBEZIEHUNG DES ANDEREN: STUDIEN ZUR POLITISCHEN THEORIE 252 & 254 (1996) [hereinafter HABERMAS, EA].

¹⁰⁵ HABERMAS, FG, *supra* note 103, at 127, 188.

¹⁰⁶ See, generally, Ángel R. Oquendo, *When Democracy and Human Rights Collide*, 7 SYMPOSIUM 67 (2003).

¹⁰⁷ RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 22 (1977) [hereinafter DWORKIN, RIGHTS]. See also RONALD DWORKIN, A MATTER OF PRINCIPLE 72-103 (1985).

¹⁰⁸ Ronald Dworkin, *Constitutionalism and Democracy*, 3 EUROPEAN JOURNAL OF PHILOSOPHY 2, 10-11 (1995). See also Ronald Dworkin, *Rights as Trumps*, THEORIES OF RIGHTS 153 (Jeremy Waldron ed. 1984).

As one might expect, other philosophers, especially those operating under the influence of Kant, embrace this perspective. Tim Scanlon provides a case in point:

That is to say, first, that to assert a right is not merely to assert the value of some goal or the great disvalue of having a certain harm befall one. Rather, it is either to deny that governments or individuals have the authority to act in certain ways, or to assert that they have an affirmative duty to act in a certain other ways, for example, to render assistance of a specified kind.¹⁰⁹

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

Even some present-day critics of the concept of human rights, who draw on the philosophy of Aristotle, Hegel, Marx, or Nietzsche, appear to concur with this definition. For example, Richard Rorty, invoking the writings of Eduardo Rabossi, rejects these entitlements precisely because they rest on principles that purportedly derive from universal reason and apply to all rational beings.¹¹⁰ The “trouble with rights talk,” he contends, “is that it makes political morality not a result of political discourse—of reflection, compromise, and choice of the lesser evil—but rather an unconditional moral imperative.”¹¹¹ Rorty follows Annette Baier’s lead in his shift away from human rights and toward an approach based on sympathy, trust, sentiments, care, and solidarity.¹¹²

Bernard Williams, for his part, censures attempts to expand the notion of human rights beyond a narrow core of instances of “unmediated coercion,”¹¹³ contextually construed, onto “good things” generally, like “so-called positive rights, such as the right to work.”¹¹⁴ He explains that “there are human goods the value of which is perhaps not best expressed in terms of rights.”¹¹⁵ Thus, he demarcates rights from the good and from values, more broadly.

In addition, Williams distinguishes human rights from policies. For instance, he criticizes some U.S. liberals for advocating the protection of hate speech under the federal Constitution’s First Amendment. He suggests that they thereby articulate a “powerful personal conviction,” which entails “a policy question,” rather than “a matter of ultimate right.”¹¹⁶

In sum, the philosophers referenced would all repudiate any endeavor to politicize human rights. They would do so on different grounds, but would converge in viewing the identification of such entitlements with a particular political project as problematic. Irrespective of whether or

¹⁰⁹ Thomas M. Scanlon, *Human Rights as a Neutral Concern*, in *THE DIFFICULTY OF TOLERANCE: ESSAYS IN POLITICAL PHILOSOPHY* 113, 115 (2003). See also *id.* at 117 (“Even those human rights involving the least commitment to specific institutional remedies retain a political character that differentiates them from mere goals.”).

¹¹⁰ See Richard Rorty, *Human Rights, Rationality and Sentimentality*, in *THE POLITICS OF HUMAN RIGHTS* 67-83 (Belgrade Circle ed., 1999) (“Rabossi’s claim that human rights foundationalism is *outmoded* seems to me both true and important; it will be my principal topic in this lecture. I shall be enlarging on, and defending, Rabossi’s claim that the question whether human beings really have the rights enumerated in the Helsinki Declaration is not worth raising. In particular, I shall be defending the claim that nothing relevant to moral choice separates human beings from animals except historically contingent facts of the world, cultural facts.”).

¹¹¹ Richard Rorty, *What’s Wrong with “Rights,”* *HARPER’S*, June 1996, at 15-18.

¹¹² *Id.*

¹¹³ Bernard Williams, *Human Rights: The Challenge of Relativism* 13, SACKLER DISTINGUISHED LECTURE: UNIV. CONN. (Apr. 23, 1997).

¹¹⁴ *Id.* at 2-3.

¹¹⁵ *Id.* at 3.

¹¹⁶ *Id.* at 5.

not rights should ordinarily prevail over politics, the philosophical establishment appears to frown upon the conflation of the former with the latter.

From this general standpoint, a human rights claim poses a question of principle. An assessment involves figuring out whether or not the alleged violator encroached upon the moral norm at stake. It has nothing to do with politics, whether those of the framers of the entitlement at issue, those of politically legitimate and competent entities, or those of particularly progressive parties to the dispute.

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

Nonetheless, the regime might insist that it curtailed the expressive liberties of the petitioner because, for instance, she was working to undermine an ethically impeccable program to redistribute land. It might additionally show that permitting folks like her to agitate will visit unimaginable damage upon the entire population. In response, however, the decision maker could simply quote John Rawls: “Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override Therefore in a just society . . . the rights secured by justice are not subject to political bargaining or to the calculus of social interests.”¹¹⁷

Not surprisingly, Ronald Dworkin assumes a similar stance: “A right against the government must be a right to do something even when the majority thinks that it would be bad to do it and even when to do it would harm the majority.”¹¹⁸ “If a person has a right to something,” Dworkin elucidates, “it is bad for the government to deny it even when it is in the general interest.”¹¹⁹

B. POLITICS

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

Of course, the preceding section already alluded to Bernard Williams’ skepticism *vis-à-vis* “so-called positive rights, such as the right to work.”¹²⁰ Williams elaborates:

Declarations of human rights standardly proclaim rights of this kind, but there is a problem with them. Nobody doubts that having the opportunity to work is a good thing, or that unemployment is an evil. But does this mean that people have a right to work? The problem is: against whom is this right held? Who violates it if it is not observed? [E]ven if governments accept some responsibility for levels of employment, it may not be possible for them to provide or generate

¹¹⁷ JOHN RAWLS, A THEORY OF JUSTICE 3-4 (1971).

¹¹⁸ DWORKIN, RIGHTS, *supra* note 107, at 194 (1977).

¹¹⁹ *Id.* at 269.

¹²⁰ Williams, *supra* note 113, at 2-3.

work, and if they fail to do so, it is not clear that the best thing to say is that the rights of the unemployed have been violated.¹²¹

Williams thus voices a concern common in philosophy and law. Philosophers often regard these positive entitlements as mere aspirations.¹²² Lawyers frequently note the lack of judicial enforceability of such rights.¹²³

At this juncture, the critics of the Inter-American Human Rights System would point out, without hesitation, that the American Declaration of the Rights and Duties of Man enshrines the right to work, as well as other positive entitlements,¹²⁴ and that the San Salvador Protocol does too.¹²⁵ They would also remark that the American Convention of Human Rights likewise contains a Chapter on “Economic, Social, and Cultural Rights.”¹²⁶ Furthermore, national and international adjudicators in the region have consistently held these entitlements enforceable.¹²⁷

In light of these and other international documents and decisions, philosophers can hardly question the international recognition of this type of entitlement. Nonetheless, they might dig in their heels and argue that reasonableness precludes deeming such an entitlement a genuine right. Bernard Williams would undoubtedly take such a stance.

Indeed, Williams considers it “unfortunate that declarations of human rights have, though for understandable reasons, included supposed rights of this kind.”¹²⁸ He believes that the international community thereby waters down the concept of a human right.

Since in many cases governments cannot actually deliver what their peoples are said to have a right to, this encourages the idea that human rights represent simply aspirations, that they signal goods and opportunities which, as a matter of urgency, should be provided if it is possible. But that is not the shape of a right. If people have a right to something, then someone does wrong who denies it to them.¹²⁹

Williams, hence, concentrates on the classical civil and political liberties, or rather on a narrow, almost “self-evident,”¹³⁰ subset thereof, which rest on the universal notion “that might is not *per se* right” and that the state acts illegitimately when it exercises “unmediated coercive power.”¹³¹

One might retort by defining positive entitlements more narrowly. The government does not have a vague and wide-ranging obligation to create jobs for its citizens. Instead, it must merely demonstrate an earnest commitment to the right to work. For instance, the authorities

¹²¹ *Id.*

¹²² *See id.* at 3 (“Since in many cases governments cannot actually deliver what their peoples are said to have a right to, this encourages the idea that human rights represent simply aspirations. . . .”).

¹²³ With such entitlements in mind, Joseph Raz observes that “legal rights [do not] always come with powers of enforcement.” Joseph Raz, *Rights and Politics*, 71 *IND. L.J.* 27, 41 (1995). “Many legal systems,” he adds, “recognise what can be called declaratory rights, which do not entitle their holders to sue for their enforcement. They may be purely declaratory, or they may be enforceable by other government institutions” *Id.*

¹²⁴ American Declaration of the Rights and Duties of Man (1948), art. XIV; *See also id.*, arts. XI-XVI.

¹²⁵ San Salvador Protocol (1988), art. 6; *See also id.*, arts. 9-18.

¹²⁶ *American Convention (Span.)*, *supra* note 13, Ch. III (“Derechos Económicos, Sociales y Culturales”).

¹²⁷ *See* OQUENDO, *supra* note 1, at 351-386 (Ch. VI; § B).

¹²⁸ Williams, *supra* note 113, at 3.

¹²⁹ *Id.*

¹³⁰ *Id.* at 4.

¹³¹ *Id.* at 10.

could show that they have implemented a credible program to achieve full employment. Naturally, they cannot and need not guarantee success in their endeavors.

Even some philosophers influenced by Immanuel Kant and, therefore, supportive of a principled, non-political conception of human rights, such as Tim Scanlon, have embraced such programmatic entitlements. Scanlon explains that the difference *vis-à-vis* long-established, negative rights lies in the extent to which the state has a duty to embrace “specific institutional strategies”¹³² in the enforcement of the entitlement at stake: “What are sometimes called welfare or humanitarian rights,” he writes, “differ from traditional civil rights in this respect.”¹³³ Specifically, the government enjoys more leeway when choosing means of implementation in relation to the former than the latter. Despite this distinction, Scanlon would maintain both types of entitlements within the overarching category of human rights.

Scanlon supplies the following illustration.

For example when people speak of “the right to a decent diet,” they are not just saying that it is a very bad thing to people to be without adequate food. They are also, I believe, expressing the judgment that political institutions must take responsibility in this area: institutions that do not take reasonable steps to avert starvation for their citizens (and, one might add, for others), are not meeting minimum conditions of legitimacy. It is this connection with institutional authority and responsibility that makes it appropriate to speak here of a *right*.¹³⁴

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

The Bolivarian movement might add that even so-called negative entitlements require an equivalent approach. For instance, the state must adopt sensible measures to enforce the right to equality with regard to, say, primary educational opportunities. All in all, it must prevent otherwise disadvantaged groups from receiving a subpar education, but does not have to (1) grant them access to any given class or extra-curricular activity, (2) assure that all of their members will flourish academically, or (3) demonstrate that it has opted for the best plan imaginable.

Naturally, the authorities deserve ample deference regarding the policy dimension of any kind of right, whether civil, political, social, economic, or cultural. After all, they have utmost expertise and legitimacy in matters of politics. Consequently, a tribunal should not second-guess governmental decisions on this front.¹³⁵ Moreover, it should accept that different regimes may duly deal with the challenge before them quite differently.

In fact, Ronald Dworkin and Jürgen Habermas might concede as much. After all, the former recognizes that the same concept of a particular principle may beget a multiplicity of

¹³² Scanlon, *supra* note 109, at 116.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *See, e.g.,* West Coast Hotel Co. v. Parrish 300 U.S. 379, 399 (1937) (“Even if the wisdom of the policy be regarded as debatable and its effects uncertain, still the legislature is entitled to its judgment.”).

alternative conceptions.¹³⁶ The latter, in turn, acknowledges that basic rights allow for a variety of interpretations from one society to the next.¹³⁷ The interpretive latitude in each of these accounts might stem from the influence, respectively, of either policy or ethical-political factors.

Nonetheless, Dworkin would distance himself from this overall position. He views the various conceptions not as equally legitimate, but rather as standing in competition with each other with respect to truth or correctness. In particular, he suggests that a community that constitutionally sets forth a specific concept and calls on decision makers to define a correlated conception “assumes that one conception is superior to another.”¹³⁸ In any event, Dworkin would surely insist on strictly separating principle from policy and deny that the latter may serve to flesh out the former.

In contrast, Habermas would gladly embark upon the delineated path. He explicitly admits that “the process of legal realization [of rights] unfolds in contexts that also demand self-understanding discourses, as important components of politics: discussions about a common conception of the good and about the form of life whose authentic recognition is sought.”¹³⁹ He elucidates further:

Certainly, political lawmakers’ decisions and policies must be interpretable, respectively, as realizations of and as elaborations on the system of rights. Nonetheless, the more concrete the topic under consideration becomes, the more the self-understanding of a collectivity, along with the corresponding life forms, *also* expresses itself in . . . the ensuing legal regulation. . . .¹⁴⁰

Accordingly, when worked into a constitution and, above all, when enacted as statutes, human rights internalize politics, policy, values, and conceptions of the good. Habermas speaks in this sense of “the ethical impregnation of every legal community, as well as of every democratic process aimed at the realization of fundamental rights.”¹⁴¹

From this standpoint, the implementation of a particular entitlement often entails transcending the realm of principle onto that of politics. Freedom of religion provides a case in point. On the one hand, the authorities may implement this right in an exclusively principled manner by refraining from suppressing anyone’s faith. On the other hand, they may proceed politically and honor a local commitment to support civic groups collectively by distributing grants to each confessional denomination on an equal basis. Almost inevitably, a polity will pass on from the first to the second approach and increase its wiggle room as it intensifies its efforts on behalf of the entitlement at issue. It will then end up acting in ways that, while fully justifiable politically, differ from those of its counterparts elsewhere.

¹³⁶ DWORKIN, RIGHTS, *supra* note 107, at 134-136. *See also* RONALD DWORKIN, LAW’S EMPIRE 71 (1986) (“At the first level agreement collects around discrete ideas that are uncontroversially employed in all interpretations; at the second the controversy latent in this abstraction is identified and taken up.”)

¹³⁷ HABERMAS, FG, *supra* note 103, at 1162 (“Consequently, the sections that enumerate fundamental rights in the various historical constitutions can be understood as contextual interpretations of *the same* system of rights.”). *See also, id.* at 163, 226, 238, 379, 527; HABERMAS, EA, *supra* note 104, at 245, 263.

¹³⁸ DWORKIN, RIGHTS, *supra* note 107, at 135.

¹³⁹ HABERMAS, EA, *supra* note 104, at 254.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 255.

Notwithstanding his rejection of positive rights, Bernard Williams similarly emphasizes “the importance of thinking politically about human rights abuses.”¹⁴² He is thereby seeking, in first instance, to underscore “reality at the expense of philosophical abstraction.”¹⁴³ Beyond philosophically ascertaining whether such infringements, *viz.*, “practices involv[ing] coercion without legitimation,”¹⁴⁴ have taken place, one must resolve how to respond, which constitutes, according to Williams, “on every occasion a political question.”¹⁴⁵

Williams cautions “that the political does not simply exclude principle; it includes it, but many other things as well.”¹⁴⁶ In his opinion, politics starts with a principled and philosophical ascertainment as to whether a human rights violation, in the form of “unmediated coercion,”¹⁴⁷ has occurred. Thereafter, it must weigh a wide array of factors before determining what, if anything, to do about any actual breach.

At the end of the day, Williams would amply defer to governments. As mentioned in the previous section, he concludes that they must honor solely a reduced number of negative, self-evident, and universal rights relating to “unjust coercion.”¹⁴⁸ In addition, oppressive states would escape censure if they could “make a decent case (in both senses of that helpful expression) that the coercion is legitimate.”¹⁴⁹ Williams warns, however, that their justification must rely on a “belief system” that cannot “be reasonably interpreted as (to put it in improbably simple terms) a device for sustaining the domination.”¹⁵⁰

In other words, Williams imparts to politics an extremely wide field of operation. Actually, he accords the authorities *carte blanche* so long as they do not unjustly coerce their subjects. Remarkably, he would leave off the hook even a coercive regime if the leadership could formulate a colorable claim of legitimacy.

Coincidentally, Habermas and Williams view political action not only as impinging upon but also as remaining external to human rights. To be sure, they would probably acknowledge the difficulty of drawing a clear line to separate the principled inside of such entitlements from the political outside. In practical effect, however, whether politics impacts human rights exogenously or endogenously does not matter much. For example, the government conducts itself identically when it subsidizes all confessional organizations in exercise of its political discretion as when it does so as part of its enforcement of freedom of religion. It merely appears to benefit from a more solid defense in the latter than in the former scenario against individuals complaining about an official impingement upon their entitlements. In either situation, however, the authorities may assert that the alleged encroachment happened in the process of protecting religious liberties.

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

¹⁴² Williams, *supra* note 113, at 3.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 11.

¹⁴⁵ *Id.* at 13.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 12.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 11.

¹⁵⁰ *Id.* at 12.

Such a position calls to mind that advanced by U.S. legal realism and, later, by the critical legal studies movement. These schools sought, in part, to debunk notions such as “formalism and objectivism” in order to postulate understanding law as a means for accomplishment of reformist or “leftist” political objectives.¹⁵¹ The dissident nations within the Inter-American Human Rights System appear to be making an equivalent move with respect to human rights, instead of the law as a whole.

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

All the same, this posture does not boil down to the seemingly conservative idea that judges should always defer to the political authorities, whether good, bad, or ugly. It additionally incorporates a passionate plea for progressive politics. Accordingly, if the government pursues emancipation, tribunals should show themselves supportive. If it practices oppression, however, they would lack the capacity to make a difference anyway and would simply become irrelevant. Under such circumstances, citizens should take not to the courthouse, but, rather, to the streets in an attempt to subvert the existing order.

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

C. BETWEEN PRINCIPLES AND POLITICS

Nevertheless, one should not jettison principles too quickly. In fact, one should make every effort to preserve them, at the very least in order to convey the ideas (1) that a human right generally contains a normative component and (2) that the state merits only limited latitude on this front. Accordingly, the judiciary and society as a whole should amply defer to the authorities only in relation to other matters, *e.g.*, those that pertain to the political realm.

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

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

¹⁵¹ See, *e.g.*, ROBERTO MANGABEIRA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* (1983) (“If the critique of formalism and objectivism is the first characteristic theme of leftist movements in modern legal thought, the purely instrumental use of legal practice and legal doctrine to advance leftist aims is the second.”).

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

All the same, rights do possess a political dimension, as stressed in the previous section. In other words, they regularly call for realization through policy. Thus, when the government realizes rights in this manner, it characteristically commands a comfortable margin of error.

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

Of course, a different conceptual scheme might serve just as well to articulate this alternation, in the vindication of human rights, between increased and decreased levels of leeway *vis-à-vis* the government. For example, Bernard Williams relies on the phrase “unmediated coercion,”¹⁵² which might evoke a single super-principle, to describe the relatively rare instances in which he would tolerate external interference in state affairs. He proposes conceding the authorities a free hand in all other cases.

Ultimately, Williams draws extremely tightly the circle within which intervention may rightfully take place. In the end, he would leave the government off the hook with respect to not only civil and political rights unrelated to crass oppression but also all economic, social and cultural rights. He believes that one cannot persuasively uphold enforcing any of these entitlements from the outside.¹⁵³

Curiously, Williams never contemplates whether a transnational tribunal could legitimately intervene merely by referring to a treaty ratified by a state that is confronting charges for human rights abuses. He does not, in all likelihood, because he is focusing on situations in which the alleged oppressors reign in a collectivity that does not acknowledge the norms that outsiders purport to deploy. More precisely, he is trying to figure out the extent to which morality *per se*, independently of international law, permits condemnation in such a setting.¹⁵⁴

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

¹⁵² Williams, *supra* note 113, at 14.

¹⁵³ See *id.* at 12 (“It is a mark of philosophical good sense that the accusation [that a practice violates fundamental human rights] should not be distributed too inconsiderately, and in particular that our theories should not lead us to treat like manifest crimes every practice that we reject on liberal principle and could not accept here—especially if in its locality it can be decently supposed to be legitimated.”).

¹⁵⁴ See *id.* at 10 (“Conceptual complications multiply when one is concerned with a different case, that in which a style of legitimation that was accepted at one time is still accepted in some places but no longer accepted in others. . . . However, the contemporary world is certainly within the reach of the past, and the influences of the past include, now, theocratic conceptions of government and patriarchal ideas of the rights of women.”).

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

For example, such argumentation, in conjunction with a militant battle for the empowerment of women, has brought most nations today to recognize a nearly unconditional right against sexual discrimination. Undeniably, a present-day country might still openly and virtually unanimously reject this entitlement, carving out an exception to the overarching principle of equality. In doing so, it would certainly expose itself to criticism for insensitivity, crudeness, narrow-mindedness, or even sexism, but not necessarily for failure to accept the universality or absoluteness of the right. Regarding such an unlikely national collectivity, one should perhaps refrain from disparaging it as irrational and from hoping to bring it, with a moral rebuke, to mend its ways.

Tim Scanlon, for his part, thus voices his willingness to renounce universalism: “The empirical judgments on which rights are based presuppose certain background conditions These conditions are not universal, though in the case of most rights commonly listed as ‘human rights’ they are sufficiently widespread to be considered universal for all practical purposes.”¹⁵⁵ Specifically, Scanlon affirms that the goal that bolsters such entitlements, *viz.*, that “of promoting an acceptable distribution of control over important factors in our lives,” “would be important to people in a wide range of societies, but naturally not everywhere.”¹⁵⁶ Finally, he avers, echoing Habermas, that “the particular rights [that such goal] calls for may vary from society to society.”¹⁵⁷

At the end of the day, one might even espouse Williams’ “relativism of distance,” according to which “one isn’t compelled to extend all one’s moral opinions, in particular about rights, to the past.”¹⁵⁸ Such entitlements fully apply only to contemporary communities. “So far as human rights are concerned,” Williams elucidates, “what matters is what presents itself in our world, now. In this sense, the past is not another country: if it were just another country, we might have to wonder what to do about it.”¹⁵⁹ Within ancient societies, Williams would deploy, at most, the right against “unmediated coercion,”¹⁶⁰ as detailed in this and the last section.

As to modern-day states, global courts might, when enforcing the whole panoply of human rights, not only yield to the authorities, by and large, on issues of policy but also consistently display considerable cultural sensitivity. For instance, they might show themselves flexible if a nation like Argentina, based on its history, curbed the associational entitlements of civic groups advocating the return of the military to power or of the ghastly campaign to suppress suspected subversives. Such an overall judicial attitude should, *ceteris paribus*, reduce the risk of illegitimate exogenous judicial intrusion.

In fleshing out his point of view, Tim Scanlon additionally asserts that the entitlements at stake need not bind absolutely. Although he assigns them enormous weight, he appropriately steers clear of absolutism in their regard: “While I would not take the extreme position that

¹⁵⁵ Scanlon, *supra* note 109, at 116.

¹⁵⁶ Thomas M. Scanlon, *Rights, Goals, and Fairness*, THE DIFFICULTY OF TOLERANCE: ESSAYS IN POLITICAL PHILOSOPHY 26, 36 (2003).

¹⁵⁷ *Id.*

¹⁵⁸ Williams, *supra* note 113, at 8.

¹⁵⁹ *Id.* at 9.

¹⁶⁰ *Id.* at 14.

human rights may never be violated no matter what the consequences, I do want to say that the situations in which their violation could be justified would have to be very extreme.”¹⁶¹

Once again, Williams carries the overall concession one step further. As discussed in the preceding section, he portrays the query of how to respond to demonstrable contraventions of human rights as political and as open. Indeed, Williams would advise against interference, “other things being equal (which is a large qualification),” except “if the violation is gross.”¹⁶² He adduces his grounds for encouraging international involvement against and only against such exorbitant encroachments in the following terms:

Well, (1) what is happening is worse. (2) In other cases, it is more likely that intervention will make it worse. (3) If in a case which looks less like unmediated coercion, the victims may not think they are victims, and then intervention may be difficult to distinguish from ideological imperialism. But, most basically, (4) the nearer to the paradigm the violations are, and the more the state is part of the problem, the nearer the situation may be to that of a state apparatus being at war with its own people.¹⁶³

Nevertheless, Williams would recommend, as a rule, intervening against an infringement upon free speech; for “freedom of speech is involved in making effective any criticism of what a regime is doing, in relation to any reasonable conception of the individual’s interests.”¹⁶⁴

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

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

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

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

Since social justice may clash with principled entitlements, it may analogously authorize or even require their provisional suspension. Venezuela’s then President Hugo Chávez definitely

¹⁶¹ Scanlon, *supra* note 109, at 121. *See also* Scanlon, *supra* note 156, at 34 (2003) (“But to say that a rule or a right is not in general subject to exceptions justified on act-utilitarian grounds is not to say that it is absolute. One can ask how important it is to preserve an equitable distribution of control of the kind in question, and there will undoubtedly be some things that outweigh this value.”).

¹⁶² Williams, *supra* note 113, at 13.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 14.

thought that he had arrived at such a juncture when he “ordered hotels with vacancies to shelter thousands of people who lost their homes as a result of flooding” in December of 2010.¹⁶⁵ He would have positively and properly professed that treating the homeless justly demanded setting aside the hoteliers’ property rights. Still, one should resist the temptation additionally to sustain that his administration was properly subordinating those entitlements to the right to housing. Most plausibly, the latter entitlement does not oblige the authorities to proffer any particular person lodging, much less to coerce others into helping out.

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

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

Moreover, principles do not exhaust the content of rights, not even that of negative entitlements. Similarly, positive entitlements do not concern policy exclusively. Instead, one might favor a less clean-cut stance. In particular, one might contend that all rights possess both a normative and a political dimension and that the authorities should have less elbow room on the former and more on the latter. From such a perspective, judges should either strictly scrutinize or deferentially look over governmental engagement, depending on whether it touched upon the principles or upon the politics of human rights.

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

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

Conversely, politics seems to play a more prominent role regarding positive entitlements than regarding their negative counterparts. The former appear to necessitate, more patently than the latter, that the welfare state deploy its bureaucracy and that it adopt a long-term plan for programmatic, progressive implementation. Hence, the government would normally enforce the

¹⁶⁵ Simon Romero, *21 Bodies Found in Colombia Mudslide; Dozens Feared Dead*, N.Y. TIMES, Dec. 7, 2010, at A11.

right to housing by building and running public apartment complexes, by doling out subsidies and tax reductions for home buyers, *etc.*

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

Independently of the kind of right in contention, plaintiffs will usually not succeed with a complaint against the official policy unless they demonstrate that the government has flagrantly failed to do anything or has acted wholly arbitrarily. Significantly, such a demonstration would suggest that the authorities have contravened, at least indirectly, the underlying norm. Not surprisingly, such a situation crops up more often in relation to positive than negative entitlements.

One might simplistically restate and somewhat distort this entire posture as follows. On the one hand, the state must perform a series of actions under pain of social and/or judicial reproach for violating the norm. On the other hand, it must opt for one or more among an array of protracted bureaucratic strategies and will commit an infraction if it either makes no choice at all or chooses in a completely capricious manner.

The authorities manifestly enjoy a narrower space to maneuver on the first than on the second type of responsibility. In addition, they may more easily infringe upon principle on the former than on the latter, concerning which they mostly risk political miscalculation. Finally, the government confronts more of the stricter kind of compulsion on civil and political entitlements, such as freedom of association, than on social, economic, and cultural entitlements, like the right to housing.

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

In these presumably principled disputes, the Commission and the Court owed the authorities scant wiggle room. Nonetheless, Venezuela seemed to expect extensive freedom of movement. It observed, apparently striving to buttress this expectation, that the petitions all came from morally and politically despicable individuals: namely, (1) from journalists “of great belligerence against the government,”¹⁶⁶ (2) from a lawyer charged with “the crime of conspiracy,”¹⁶⁷ (3) from an oppositional politician accused of acting “in support of the *coup d'état* of April 11, 2002,”¹⁶⁸ (4) from an “insurrectionist” General,¹⁶⁹ (5) from a “terrorist . . . convicted”¹⁷⁰ for bomb attacks “aimed at destabilizing Venezuela’s democracy,”¹⁷¹ and (6) from

¹⁶⁶ Venez., *Notice of Denunciation (Span.)*, *supra* note 14, at 5.

¹⁶⁷ *Id.* at 6.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 7.

¹⁷⁰ *Id.* at 7-8.

¹⁷¹ *Id.*

three judges who “incurred a ‘grave judicial error of an inexcusable character.’”¹⁷² In truth, however, the supposed unworthiness of the petitioners should have moved the transnational decision-makers to more, rather than less, vigilance. After all, the authorities typically mind the entitlements of unpopular people much less than those of others.

Now, at the other end of the spectrum, should tribunals afford the government *carte blanche* on policy-loaded positive rights? Actually, no: as just pointed out, they should accord it substantial discretion, but should not, by any means, abdicate their duties. Such entitlements qualify as rights precisely because they impose judiciable obligations on the authorities. They do not boil down to sheer recommendations.

As submitted in the Section II(B), adjudicators should read these rights as programmatic. In other words, they should command the state to show that it has designed a serious program on point. Elected officials deserve deference on the details, though not on the need for credible engagement. They should face censure if they either neglect to take any action whatsoever or act without any manifest rhyme or reason.

Needless to say, establishing whether a particular challenge turns on principle or on politics will relentlessly breed discussion and disagreement. It will invariably pit the state against citizens and against the judiciary. Nevertheless, the debate will most likely unfold more translucently by centering on this dual conceptual scheme.

D. HUMAN RIGHTS ADJUDICATION

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

As a matter of principle, the authorities generally may not repress pure speech on the basis of their dislike of its manner or message or of the speaker. In *Cohen v. California*,¹⁷³ for instance, the state convicted the appellant for standing in a courthouse “wearing a jacket bearing the words ‘Fuck the Draft’ which were plainly visible.”¹⁷⁴ The United States Supreme Court persuasively found a breach of “the usual rule that governmental bodies may not prescribe the form or content of individual expression.”¹⁷⁵ It then fleshed out its guiding norms:

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

¹⁷² Venez., *Supporting Memorandum (Span.)*, *supra* note 14, at 13.

¹⁷³ 403 U.S. 15 (1971).

¹⁷⁴ *Id.* at 16.

¹⁷⁵ *Id.* at 24.

the premise of individual dignity and choice upon which our political system rests.¹⁷⁶

The justices did not bestow upon California officials much space to depict the forbidden words as a disturbance of the peace or as inherently offensive.¹⁷⁷

Equivalently, in *Olmedo v. Chile*,¹⁷⁸ the Chilean state banned the film *The Last Temptation of Christ*. More precisely, the Court of Appeals of Santiago issued and Chile's Supreme Court affirmed a writ of protection in the name of the Catholic Church against the picture.¹⁷⁹ "The bar on the movie's exhibition rested on its supposed offensiveness to the figure of Jesus Christ."¹⁸⁰ The Inter-American Court of Human Rights pronounced the proscription "a prior restraint in violation of [the liberty of thought and expression preserved in] Article 13 of the [American] Convention."¹⁸¹ Thereupon, it deduced "that the State [had] reneged on the general obligations to respect and assure the rights enshrined in the Convention and to adapt internal laws to the relevant provisions."¹⁸²

After detecting an unequivocal encroachment upon the normative ban on prior restrictions on free speech, the majority spent little time on the domestic tribunals' attempt to characterize the picture as odious or on the executive branch's contemporaneous endeavors to amend the Constitution in order to end all censorship. The judges expressed esteem for and underscored the importance of "the government's initiative to propose such a constitutional amendment." Nonetheless, upon observing that non-compliance persisted,¹⁸³ they resolved thus: "[T]he State must, within a reasonable period of time, modify its internal laws so as to supersede the prior restraint and to allow the exhibition of the movie . . . and must, within six months . . . , file with the Inter-American Court of Human Rights a report on the measures adopted in this respect"¹⁸⁴

Normatively, the right to health prohibits a regime from denying a person basic medical treatment. In *Rural Psychiatric Institute v. Ministry of Health and Social Welfare*,¹⁸⁵ for example, several clinics sued the Venezuelan government for declining to renew their contracts and for thereby trampling upon their indigent mental patients' right to life and health.¹⁸⁶ The Political and Administrative Chamber of Venezuela's Supreme Court agreed with the plaintiffs.

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

¹⁷⁶ *Id.*

¹⁷⁷ *See id.* at 22-23 (denying "California" the authority to "excise . . . one particular scurrilous epithet from the public discourse, either upon the theory of the court below that its use is inherently likely to cause violent reaction or upon a more general assertion that the States, acting as guardians of public morality.")

¹⁷⁸ *Olmedo Bustos* ("*La Última Tentación de Cristo*") vs. Chile, Inter-Am. Ct. H.R. (Ser. C) No. 73 (Feb. 5, 2001).

¹⁷⁹ *Id.*, at 22 (¶ 60(e)).

¹⁸⁰ *Id.* at 24 (¶ 61(h)).

¹⁸¹ *Id.* at 29 (¶ 71).

¹⁸² *Id.* at 36 (¶ 90).

¹⁸³ *Id.* at 38 (¶ 98) ("Therefore, the state continues reneging on [the general obligations referred to in the Convention's provisions].")

¹⁸⁴ *Id.* at 39 (¶ 4).

¹⁸⁵ *Rural Psych. Inst. Virgen del Rosario v. Min. Health & Soc. Wel.*, Rec. No. 14695 (Pol. & Adm. Ch.) (Sup. Ct.) (Venez.) (1998), translated & reprinted in OQUENDO, *supra* note 1, at 354-361.

¹⁸⁶ *Id.* at 355 (§ 1).

The Venezuelan justices also expressed utter “disapproval of the Ministry’s deplorable conduct”¹⁸⁷ regarding its contractual responsibilities. The ministerial staff admittedly “never intended to rescind the contracts.”¹⁸⁸ Moreover, it secured, during the litigation, “the necessary funds” for a renewal, but refused to act prior to a judgment on the merits.¹⁸⁹

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

This Supreme Court believes that this conduct constitutes an open violation of the rights to life and health of these mental patients. The state cannot effectively guarantee these rights without the necessary resources. Furthermore, defendant has inexcusably failed to meet his duty to care for these unfortunate and neglected Venezuelan citizens, who are unable to improve their situation on their own.¹⁹⁰

The justices consequently requisitioned the government to contract anew with the complainants and to pay for services performed after the expiration of the original agreements.¹⁹¹

Once again, the tribunal first ascertained a contravention of the underlying norm. Next, it spurned the “only” justification adduced by the authorities: “lack of funds.”¹⁹² The justices proclaimed that “the Ministry’s only legal and moral option, once the necessary funds became available, was either to extend the existing contracts *without any delay or excuse* or to sign new contracts.”¹⁹³

Likewise, in *Vera v. Ecuador*,¹⁹⁴ the government arrested the petitioner for armed robbery and denied him medical attention for a bullet wound, which he had endured prior to the arrest and from which he eventually died. The Inter-American Court of Human Rights noted “that . . . the State did not accord Mr. Pedro Miguel Vera Vera adequate and timely medical attention.”¹⁹⁵ It concluded that “the series of omissions on the part of the [authorities] while holding [him] in custody constituted medical negligence that resulted in his death and that should entail international liability.”¹⁹⁶

The judges unanimously verified a “clear” infringement upon “the rights to humane treatment and to life,”¹⁹⁷ which incorporate the right to health. On the last of these entitlements, the Inter-American Commission’s complaint specifically cited Principle X of the *Principles and Best Practices on the Protection of Individuals Deprived of Liberty in the Americas*: “Individuals deprived of liberty shall have the right to health, understood as the enjoyment of the

¹⁸⁷ *Id.*, at 358 (§ IV(4)(2)).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 358-359 (§ IV(4)(2)).

¹⁹¹ *Id.* at 358 (§ IV(4)(2)). *See also id.* at 360 (§ V(1-2)).

¹⁹² *Id.* at 359 (§ IV(4)(2)).

¹⁹³ *Id.*

¹⁹⁴ *Vera Vera vs. Ecuador*, Inter-Am. Ct. H.R. (Ser. C) No. 224 (May 19, 2011) [hereinafter *Vera Vera* (2011) (*Span.*)].

¹⁹⁵ *Id.* at 32 (¶ 75).

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 33 (¶ 79). *See also id.* at 56 (¶ 2) (Resolutions).

highest possible level of physical, mental, and social well-being.”¹⁹⁸ The tribunal’s final decision explicates the interrelationship of all three entitlements in the following terms.

The rights to life and to humane treatment depend, directly and immediately, on proper health care. In this sense, Article 10 of the Additional Protocol on Economic, Social, and Cultural Rights of the American Convention on Human Rights declares that everyone has a right to health, understood as the enjoyment of the highest possible level of physical, mental, and social well-being, and that human health constitutes a public good. [The] state, as the entity responsible for the health of individuals under its custody, has a duty to afford detainees regular medical checkups, as well as adequate therapeutic attention and treatment, whenever necessary.¹⁹⁹

The Court commented that “the denial of adequate medical attention runs counter to the minimal material requirements for a treatment worthy of a human being”²⁰⁰

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

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

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

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

In *Red Lion Broadcasting Co. v. FCC*,²⁰¹ for instance, an operator of “a Pennsylvania radio station, WGCB,”²⁰² challenged the Federal Communications Commission’s “fairness doctrine,” which “for many years imposed on radio and television broadcasters the requirement that discussion of public issues be presented on broadcast stations, . . . that each side of those

¹⁹⁸ Demanda ante la Corte Interamericana de Derechos Humanos en el caso de Pedro Miguel Vera Vera y Otros (Caso 11.535) Contra la República de Ecuador, Inter-Am. Cmm’n H.R., OEA/Ser. L/V/II, doc. 5 rev. ¶ 39 (Feb. 24, 2010).

¹⁹⁹ *Vera Vera* (2011) (*Span.*), *supra* note 194, at 19-20 (¶ 43).

²⁰⁰ *Id.* at 20 (¶ 44).

²⁰¹ 395 U.S. 367 (1969).

²⁰² *Id.* at 371.

issues must be given fair coverage, [and] that equal time be allotted all qualified candidates for public office,” especially “relating to personal attacks in the context of controversial public issues.”²⁰³ The United States Supreme Court cleared the authorities of the charge that they had thwarted “freedom of speech and press.”²⁰⁴

The highest federal tribunal unanimously held “that the Congress and the Commission do not violate the First Amendment when they require a radio or television station to give reply time to answer personal attacks and political editorials.”²⁰⁵ It reflected thus:

There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves.²⁰⁶

In other words:

It does not violate the First Amendment to treat licensees given the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern. To condition the granting or renewal of licenses on a willingness to present representative community views on controversial issues is consistent with the ends and purposes of those constitutional provisions forbidding the abridgment of freedom of speech and freedom of the press.²⁰⁷

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

Rather than confer frequency monopolies on a relatively small number of licensees, in a Nation of 200,000,000, the Government could surely have decreed that each frequency should be shared among all or some of those who wish to use it, each being assigned a portion of the broadcast day or the broadcast week. The ruling and regulations at issue here do not go quite so far. They assert that under specified circumstances, a licensee must offer to make available a reasonable amount of broadcast time to those who have a view different from that which has already been expressed on his station. The expression of a political endorsement, or of a personal attack while dealing with a controversial public issue, simply triggers this time sharing.²⁰⁸

The opinion goes so far as to submit that the authorities, beyond exercising their prerogative to launch policy in this domain, were vindicating cardinal societal entitlements. It sustains that “the people as a whole retain their interest in free speech by radio and their collective right to have the

²⁰³ *Id.* at 369-370.

²⁰⁴ *Id.* at 386.

²⁰⁵ *Id.* at 396.

²⁰⁶ *Id.* at 389.

²⁰⁷ *Id.* at 394.

²⁰⁸ *Id.* at 390-391.

medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.”²⁰⁹ The decision thereafter spells out the nature of this communal entitlement: “It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.”²¹⁰

In this area, the federal government enjoys ample, but not endless leeway. As an illustration of this proposition, the Supreme Court enunciated its readiness to revisit its holding in the future if it encountered proof of “self-censorship” and of avoidance “of controversial public issues” as an upshot of the official regulations.²¹¹ It announced that “if experience with the administration of these doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications.”²¹² The justices thus intimated that the policy would then backfire and merit repudiation. Moreover, they might have ruled against the government if they had discarded as false the technological premise of scarcity of frequencies.²¹³

On a similar note, the Inter-American Court’s advisory opinion on the *Enforceability of the Right of Reply or Correction* details how the state should implement the right to respond to broadcasts or publications that either misrepresent the facts or cause offense.²¹⁴ Article 14 of the American Convention on Human Rights reads: “Anyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication has the right to reply or to make a correction using the same communications outlet, under such conditions as the law may establish.”²¹⁵ Accordingly, the treaty renders the protection of the right of reply mandatory. Nevertheless, it imparts flexibility to the government, insofar as it expressly assures the entitlement “under such conditions as the law may establish.”²¹⁶

In 1985, Costa Rica asked the Inter-American Court to expound the principles and the policies, so to speak, of the right of reply. In particular, it posed, *inter alia*, the following queries: (1) “[D]oes the right consecrated in Article 14 of the American Convention on Human Rights, of its own force, guarantee its free and full exercise to anyone within Costa Rica’s jurisdiction;”²¹⁷ and (2) “[D]oes the Costa Rican State have an international legal obligation . . . to adopt, in accordance with its own constitutional procedure, legislative or other measures

²⁰⁹ *Id.* at 389.

²¹⁰ *Id.* at 390.

²¹¹ *Id.* at 393.

²¹² *Id.*

²¹³ *See id.* at 396 (“It is argued that even if at one time the lack of available frequencies for all who wished to use them justified the Government’s choice of those who would best serve the public interest by acting as proxy for those who would present differing views, or by giving the latter access directly to broadcast facilities, this condition no longer prevails so that continuing control is not justified.”); *id.* at 400-401 (“In view of the scarcity of broadcast frequencies, . . . we hold the regulations and ruling at issue here are both authorized by statute and constitutional.”).

²¹⁴ *Exigibilidad del Derecho de Rectificación o Respuesta* (arts. 14(1), 1(1) y 2, Convención Americana de Derechos Humanos), Advisory Opinion OC-7/86, Inter-Am. Ct. H.R. (Ser. A.) No.7, (Aug.29, 1986) [hereinafter *Enforceability of the Right to Reply (Span.)*].

²¹⁵ *American Convention (Span.)*, *supra* note 13, art. 14(1).

²¹⁶ *Id.*

²¹⁷ *Enforceability of the Right to Reply (Span.)*, *supra* note 214, at 3 (¶ 13).

necessary for the effective exercise of the right of reply or correction under Article 14 of the Convention?”²¹⁸

The tribunal did not hesitate on the binding nature of the entitlement. It underscored “that Article 14(1) of the Convention posits an internationally enforceable right of reply or correction, which the state parties have an obligation to respect and whose free and full exercise by anyone within their jurisdiction they must secure.”²¹⁹ More generally, “the Convention aims itself to recognize people’s rights and freedoms and not simply to authorize states to do so.”²²⁰ The judges repudiated the view that Article 14 “merely entitles the states parties to enact the right of reply or correction into the law, but does not mandate them to” do so.²²¹

Nonetheless, the majority bestowed upon the authorities significant latitude on the particulars. It explained that Article 14 “demands the establishment of conditions for the exercise of the right of reply or correction by means of the ‘law,’ whose content may vary from one state to the next, within certain reasonable limits and within the framework of principles affirmed by the Court.”²²² The judges thus clarified that the government may exercise its sound discretion within the structure erected upon the entitlement’s principles.

At any rate, the tribunal insisted on the compatibility of its contextual construction with the efficacious enforcement of the entitlement: “The fact that the states may define the conditions for the exercise of the right of reply or correction does not detract from the enforceability, under international law, of the obligations undertaken.”²²³ “As a consequence, if, for any reason, the right of reply or correction could not be exercised by ‘anyone’ within the jurisdiction of a signatory state, a violation of the Convention would result, which could be denounced before the organs of protection conceived for such purpose.”²²⁴

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

In *Del Valle Bermúdez v. Ministry of Health and Social Welfare*,²²⁵ for example, the Venezuelan Supreme Court reviewed the official national policy on the human immunodeficiency virus (HIV) and the acquired immunodeficiency syndrome (AIDS). In doing so, it owed the authorities a respectable margin of error. As the Bolivarian faction would recall, the state possesses utmost expertise and legitimacy to call the shots in this domain.

Venezuela’s highest tribunal first ascertained whether the Ministry’s “refusal to supply HIV/AIDS patients with the medications . . . necessary for the treatment of their disease” collided with the right to health.²²⁶ Curiously, this issue seems to touch upon principle alone. It appears not to differ much from the question central to *Rural Psychiatric Institute* and *Vera*. In other words, did the denial of medical attention infringe upon the victims’ right to health?

²¹⁸ *Id.* at 4 (¶ 16).

²¹⁹ *Id.* at 9 (¶ 2A).

²²⁰ *Id.* at 6-7 (¶ 24).

²²¹ *Id.* at 6 (¶ 23).

²²² *Id.* at 7 (¶ 27).

²²³ *Id.* at 7 (¶ 28).

²²⁴ *Id.* at 7 (¶ 28).

²²⁵ Rec. No. 15789 (Pol. & Adm. Ch.) (Sup. Ct.) (Venez.) (1999), *translated & reprinted in* OQUENDO, *supra* note 1, at 363-374.

²²⁶ *Id.* at 364.

Indeed, the Venezuelan justices in *Del Valle Bermúdez* initially approached the inquiry in the mode of their counterparts in those two previously analyzed opinions. They reasoned “that the state had failed to fulfill its duty” under “the right to health” because it did not “regularly and correctly administer[] [prescription] medications to HIV/AIDS patients.”²²⁷ As a result, the Ministry received a judicial injunction “to deliver, regularly and periodically,” all prescribed medicines,²²⁸ “to carry out or pay for specialized [and other] tests,”²²⁹ and to supply “all of the medications for the treatment of opportunist infections”²³⁰

Nevertheless, the Supreme Court then unequivocally shifted to the political realm in its adjudication. First, it rendered its ruling applicable not only to the complainants but also to all other indigent Venezuelan citizens suffering “from HIV/AIDS” and in “need [of] treatment.”²³¹ Secondly, it compelled the authorities “to develop a policy of information, treatment, and comprehensive medical assistance for the benefit of the plaintiffs”²³² and, presumably, of all other similarly situated individuals.

Finally, the tribunal stressed that, in light of the lack of a known cure and of the “high” costs of treatment, “the battle against the disease should focus on prevention.”²³³ On this front, the authorities had prepared “5000 brochures,” distributed “100,000 condoms,” cooperated with several civic AIDS organizations, and launched a “Safe Sex” campaign.²³⁴ The justices politely praised “these measures” as “a positive initiative, which should continue and intensify,”²³⁵ but evidently deemed them insufficient.

The Supreme Court, accordingly, directed the state “to develop a national prevention program along the following lines”²³⁶

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

The justices observed further:

Each of these programs requires special preparation and implementation, taking into account matters such as the general information currently available about the disease, the adequate use of condoms, and the availability of sterile syringes for drug users; the need for special attention for vulnerable groups; the existing efforts at the level of the community; and the role of marriage counseling.²³⁷

²²⁷ *Id.* at 367-368.

²²⁸ *Id.* at 372-373 (§ 1).

²²⁹ *Id.* at 373 (Decision (2)).

²³⁰ *Id.* at 373 (§ 4).

²³¹ *Id.* at 372. *See also id.* at 374 (§ 3).

²³² *Id.* at 373 (§ 4).

²³³ *Id.* at 370 (Analysis (Right to Health, Life, and Access to Science and Technology)).

²³⁴ *Id.* at 370.

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*, at 370-371.

The Supreme Court finished off its delineation of the defendant's responsibilities in these terms:

The Ministry of Health and Social Welfare must conduct, pursuant to the previously established principles, a thorough study of the basic needs of HIV/AIDS patients and of the different programs available to prevent an increase in the number of people infected. The findings of this study shall be presented to the President of the Republic and the Council of Ministers for consideration in defining the general guidelines for the next fiscal year's budget.²³⁸

The order at the end of the opinion expressly commands the realization of such a survey. It states: "The goal must be to develop a policy of prevention based on facilitating information to individuals infected with HIV/AIDS, as well as on raising their level of awareness, educating them, and providing comprehensive assistance to them."²³⁹

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

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

Having exposed the absence of an official strategy, the justices displayed scant patience for the official assertion that, due to budgetary constraints, it was "impossible to finance the treatment in question for the totality of persons suffering from HIV/AIDS."²⁴⁰ They obligated the government to undertake any necessary adjustments in the budget in order to live up to its constitutional commitments.²⁴¹ The Supreme Court warned that it had itself no option but to "safeguard plaintiffs' right to health and life" and to "enforce the state's duty to provide healthcare."²⁴²

Subsequent to *Del Valle Bermúdez*, the Venezuelan judiciary has fundamentally maintained this approach to the AIDS crisis.²⁴³ Elsewhere in Latin American, courts have

²³⁸ *Id.*

²³⁹ *Id.* at 373-374 (Writ of Protection (3)).

²⁴⁰ *Id.* at 368 (Analysis (Right to Health, Life, and Access to Science and Technology)).

²⁴¹ *Id.* at 369-370, 373.

²⁴² *Id.* at 368.

²⁴³ See generally OQUENDO, *supra* note 1, at 375-380. Venezuela's highest tribunal decided *Del Valle* in 1999, during Hugo Chávez's first year in office. The 1999 Venezuelan Constitution founded a new Supreme Court (*Tribunal Supremo de Justicia*), whose justices soon confronted additional claims by HIV/AIDS patients. In *Glenda López v. the Venezuelan Institute for Social Security*, translated & reprinted in *id.* at 375-379, a number of beneficiaries, represented by the same group of attorneys as before, sued the Institute for Social Security for failing to pay and deliver prescribed HIV/AIDS medicines. The Constitutional Chamber echoed its predecessor tribunal in opining that the defendant had "violated the right to health, threatened the right to life, and encroached upon the right to benefit from scientific and technological progress." *Id.* at 376 (Considerations (II)). In 2002, the Constitutional Chamber confronted a virtually identical action in *Loreto Tabares v. the Venezuelan Institute for*

mostly dealt with such claims in an equivalent vein.²⁴⁴ Nonetheless, some tribunals in the region have shown themselves much less receptive. In response, the claimants have headed to and prevailed in transnational forums.²⁴⁵ The discussion will now ponder, as its last “case,” five such petitions.

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

In its communication of November 20, 2001, the [body] informed the Chilean State that [the petitioners] urgently required basic assistance from state institutions to secure the drugs necessary for their treatment. It therefore requested on their behalf the adoption of urgent provisions to ensure them access to medicines essential to their survival, as well as to medical checkups for the regular monitoring of their health.²⁴⁶

The injunction quickly produced concrete results. “On December 5, 2001, the State described the preliminary steps taken at the Ministry of Health. It reported that Juan Pablo Améstica, Manuel Orlando Farías, and Náyade Orieta Rojas Vera were receiving medication, in addition to undergoing examination at public hospitals to monitor their physical condition.”²⁴⁷

HIV/AIDS victims from El Salvador also turned to the Inter-American Commission.²⁴⁸ They obtained precautionary measures on February 29, 2000.²⁴⁹ “On June 26, 2000, the Board of Directors of the Salvadoran Social Security Institute authorized the administration of the triple antiretroviral therapy for HIV-positive and AIDS patients.”²⁵⁰ The Commissioners adjudged the petition admissible in 2001.²⁵¹ They crafted parallel preliminary injunctions in favor of petitioners from Bolivia and Ecuador in 2002 and from Guatemala in 2005.²⁵²

To be sure, *Cuscul Pivaral v. Guatemala*, which admitted the Guatemalan complaint, acknowledges that “the right to health,” as an entitlement to “curative” as well as “preventive” action, merely entails “an obligation calling for progressive compliance.”²⁵³ All the same, the decision cautions, in the same breath, that “at least two situations demand immediate

Social Security. Not surprisingly, the tribunal endorsed “the holding of Judgment Number 487 of April 6, 2001, (the *Glenda López* case).” *Id.* at 380.

²⁴⁴ See generally *id.* at 380-386.

²⁴⁵ See *id.* at 384-385.

²⁴⁶ Inter. Am. Comm’n H.R., Inf. Anual 2001 (Ch. III, (C) Sistema Peticiones y Casos Individuales, (1) Medidas cautelares acordadas o extendidas por la Comisión durante el año 2001, (b) Chile) OEA/Ser. L/V./II.114, doc. 5 rev. ¶ 12 (2002).

²⁴⁷ *Id.*

²⁴⁸ *Miranda Cortez vs. El Sal.* (Caso 12.249), Inter. Am. Comm’n H.R., Rpt. No. 29/01, OEA/Ser. L/V/II.111, doc. 20 rev. (2001) [hereinafter *Miranda Cortez (Span.)*].

²⁴⁹ Inter. Am. Comm’n H.R., Inf. Anual 2001 (Ch. III, (C) Sistema Peticiones y Casos Individuales, (1) Medidas cautelares acordadas o extendidas por la Comisión durante el año 2000, (i) El Salvador) OEA/Ser. L/V./II.111, doc. 20 rev. ¶ 30 (2001).

²⁵⁰ *Id.*

²⁵¹ *Miranda Cortez (Span.)*, *supra* note 248, Decision, ¶ 1.

²⁵² Inter. Am. Comm’n H.R., Inf. Anual 2002 (Ch. III, (C) Sistema Peticiones y Casos Individuales, (1) Medidas cautelares acordadas o extendidas por la Comisión durante el año 2002, (b) Bolivia & (h) Ecuador) OEA/Ser. L/V./II.117, doc. 1 rev. 1 ¶¶ 13 & 52 (2003); *Cuscul Pivaral vs. Guat.* (Pet. 642-03), Inter-Am. Cmm’n H.R., Rpt. No. 32/05, OEA/Ser. L/V/II.124, doc. 5 (2005) [hereinafter *Cuscul Pivaral (Span.)*].

²⁵³ *Cuscul Pivaral (Span.)*, *supra* note 252, ¶ 42.

enforcement.”²⁵⁴ “The first such scenario involves the bar against discrimination, in the sense that the state may not enforce the right to health on a discriminatory basis.”²⁵⁵ “The second scenario revolves around a grave or imminent risk of loss of human life, which the state must obligatorily protect.”²⁵⁶ The Commissioners appreciated that the dispute at hand might fall within the latter category and, consequently, agreed to entertain the substance of the claim.²⁵⁷

Unquestionably, the Commission was contemplating Article 26 of the American Convention on Human Rights in which the “state parties commit . . . to bring about progressively the full enforcement” of economic, social, and cultural rights, to the extent of the “available resources.” It was, accordingly, conceding the authorities wide freedom of movement on such matters of policy. Simultaneously, the Commissioners kept the government on a short leash insofar as it was seriously endangering the survival of the complainants.

Of course, even though the state need not instantly realize the right to health, it must dutifully come up with a credible program for gradual realization. The public and the judiciary may rightfully hold governmental representatives accountable on this obligation. Hence, they may support sanctions in the event of official inaction or arbitrariness.

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

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

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

Obviously, the state may not escape an indictment for disregarding rights simply by asserting that it is rightfully occupying the sphere of politics. It must bear the burden with respect to this assertion. Courts must, first, corroborate that the regime has specifically honored the pertinent principle as such and, second, confirm that official policies generally cohere with the corresponding normative imperative. Naturally, they may very well generate polemics on either end.

When the citizenry reaches out to national and international tribunals to vindicate human rights, it may surely seem to act undemocratically. Nonetheless, it thus essentially engages in

²⁵⁴ *Id.*, ¶ 43.

²⁵⁵ *Id.*.

²⁵⁶ *Id.*, ¶ 44.

²⁵⁷ *Id.*

participatory democracy, insofar as it takes its affairs in its own hands, rather than rely on its representatives. Of course, the objective should not consist in opening up an alternative debate on politics, but actually in assuring that the state stays within the bounds delineated by the people's entitlements. Moreover, courts must accord the government the benefit of the doubt, at least in relation to policy issues.

Undeniably, international adjudicators play a role akin to that of their domestic counterparts. Due to their geographic and cultural distance, however, they should comport themselves more deferentially *vis-à-vis* the authorities. In any event, a special procedural and substantive law applies and ordinarily imposes, whether directly or indirectly, such duty of prudence.²⁵⁸

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

All the same, the dissident nations should not count on the national or supranational judiciary merely to cheerlead. On the contrary, they should expect it to investigate and confront. In the words of Viviana Krsticevic, Executive Director of the Center for Justice and International Law: "The Inter-American Commission on Human Rights," as well as the Court, "must continue making governments uncomfortable; that's a sign that it's doing its job."²⁵⁹

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

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

CODA

This work has both interpreted and assessed the so-called "Bolivarian" objections to the Inter-American Human Rights System. First, it has read them as primarily amounting not to a claim to sovereignty or a declaration of dissatisfaction with the institutional decision making, but

²⁵⁸ For example, the Inter-American Commission and Court ordinarily must, as discussed in Section I(B), *supra*, dismiss a claim if the petitioner has not exhausted available national remedies.

²⁵⁹ Eva Sáiz, *La OEA, dividida ante la reforma de su órgano de derechos humanos*, EL PAÍS, Dec. 7, 2012 (quoting Viviana Krsticevic).

rather to a call for the politicization of human rights. This interpretation finds general support in the available evidence and, more importantly, renders the overall challenge most interesting.

Secondly, the article has appraised and ultimately questioned the philosophical soundness of an attempt to politicize the entitlements at stake. It has refused to respond with the contention that human rights rest essentially on principles, not on politics. The discussion has instead insisted that human rights possess both a political and a normative component. It has concluded that tribunals owe the government deference on the former, but not on the latter, and has illustrated this conclusion through a series of national and international cases touching upon the principles and the policies of free speech and the right to health.

Accordingly, the dissident bloc has correctly contended that states deserve a respectable amount of leeway not only as signatories of the pertinent treaties but also as entities with utmost experience and legitimacy in matters of politics. In addition, it has properly protested that the judiciary should not look down upon politically loaded second-generation rights or upon regimes that focus on such entitlements. Actually, as the authorities intensify their engagement on behalf of a human right of any kind, they typically enter deeper into the realm of policy and thereby widen their margin of discretion.

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

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

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

Significantly, none of the contested determinations turned on a clash between the endeavor to construct a just society and the obligation to honor human rights. In fact, other Latin American countries, such as Brazil, Chile, El Salvador, and, Uruguay, have also progressively committed to the former without perceiving any tension with the latter. As a result, they have ultimately opted to sustain, rather than defy, the Inter-American Human Rights System as a whole.

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

In fact, the Bolivarian Axis and its enemies converge not only in rejecting this position but also in embracing a utopianism of sorts in relation to human rights. Hence, they both expect permanent harmony between the adjudicator and the state and disagree simply on whether the adjudicator should yield to the state, as an expert on policy, or *vice versa*, insofar as the judiciary's expertise lies in the construal of norms. The Inter-American Human Rights System

will ineluctably perish, unless both sides learn to live with constant conflict in the enforcement of the established entitlements.