



Juan Auz, Hertie School Centre for Fundamental Rights*

Situating the Inter-American Human Rights System in the Oscillation of International Law

Abstract: This article considers the Inter-American Human Rights System (IAHRS) as a response to the general assessments of some critical scholarship on international law. It employs the concept of “oscillation of international law” to organize different views of the international human rights and environmental law (IHREL) scholarship, two legal regimes that speak loudest to the IAHRS’ interests. These views are distributed within a spectrum that goes from *utopian* demands placed on IHREL, to *apologist* defenses of these legal regimes. I put forward a third strand of critical intervention by framing the IAHRS as a space of political and legal contention that promises to address some of the IHREL’s shortcomings. I caution, however, that, although the IAHRS functions as an enabling platform for subaltern polities that redraw the boundaries of legal meanings, the system may fall short in tackling challenges that are contingent on global capitalist logics.

Keywords: Inter-American Human Rights System, oscillation, international human rights law, international environmental law, utopia, apology

I. Introduction

Does not the Spirit of Laws state that they . . . must bear relation to the physical features of a country, its climate, its soil, its situation, extension and manner of living of the people . . . ? Such is the Code that we should consult, not that of Washington!

—Simón Bolívar

Several scholars have employed the concept of “oscillation” between different legal arguments within discrete regimes of international law (Koskeniemi 2005, 20), such as international human rights and environmental law (IHREL). For instance, Marie-Benedicte Dembour (2001) resorts to the metaphor of a pendulum to trace the constant flux of international human rights law between its “universal” and “relativist” characters, the former seen as “arrogant” and the latter as “indifferent.” In a similar vein, Frédéric Mégret (2013) argues that international human rights law is prone to reproduce the oscillatory nature of international law, not only because both share a liberal point of departure, but also because both are grounded in the idea of sovereignty. This might produce additional tensions for international human rights law, due to its mission to protect individual rights of non-subjects of international law. Therefore, sovereignty stretches the continuum on which it oscillates, making it go from displaying its own pedigree to becoming a “managerial conspiracy by elites” (Mégret 2013, 495).

* Ecuadorian lawyer and PhD Researcher. Please direct correspondence to juangauz@gmail.com. The author would like to thank Başak Çalı for her supervisory tenacity and kindness. Also, this paper would not exist without the opportunity given by the Harvard Law School Political Economy Association, whose Law and Political Economy Writing Prize was a crucial space to elaborate the ideas presented in this paper. Special thanks go to Professor Aziza Ahmed, Sannoy Das, and Daniel Eric Rohde, who contributed with their comments in earlier versions of this paper.

As far as international environmental law is concerned, some scholars have identified its fluctuations based on teleological aspects and geopolitical factors that mold its proverbial principles. For instance, Kotzé, du Toit, and French (2020, 183) elaborate on the idea that the international environmental legal order is complicit in deliberately creating, emboldening, and exacerbating the “many paradigms that drive climate injustice in the Anthropocene.” They describe a form of oscillation between its “utilitarian” character on the one hand, and an “ecological” aspiration on the other. Similarly, they also add the tendency of this branch of international law to move across the spectrum from “anthropocentrism” to “biocentrism” (Kotzé, du Toit, and French 2020, 189). Furthermore, Atapattu and Gonzalez (2015, 2) highlight the close connection between the environment and economic issues, which explains why international environmental law is “the site of intense contestation over environmental priorities” where variegated positions oscillate, ranging from benchmarks of historic responsibility to differential treatment based on capacities and circumstances of specific states.

While this scholarly work successfully unveils the malleable and fluid nature of international law, it does so by prioritizing abstract legal concepts rather than its material functioning, thereby neglecting the role of agency and geography in the making and operation of international law. Consequently, analyses tend to avoid the situated perspective of certain international legal regimes – such as human rights and environmental law (Haraway 1988). With that in mind, this article inquires about the possibility of conceptualizing international human rights institutions as spaces of legal production located along an international law continuum that perennially oscillates. Space, therefore, will be regarded as a multidimensional construct, which accommodates “its political status as a means of social regulation and as the site of political struggle” (Butler 2009, 321), where “hybrid, relational, and dynamic” phenomena occur (Bonilla Maldonado 2018, 40; Müller Mall 2013). Therefore, the notion of space is both a physical location (the auspices of the IAHR) and the performativity and agency (stakeholders’ subjectivity) that exist within it. Anchoring the analysis around the “legal space” allows response to reductionist accounts that disregard the spatial and material conditions of law (Bartel 2017, 160).

Since this is a first and modest attempt at conceiving international human rights institutions as spaces within an international law oscillatory continuum, this article will use the Inter-American Human Rights System (IAHR) as a case study. This regional human rights institution will be dissected according to the exigencies found in IHREL scholarship. IHREL are the two selected regimes of international law for this article, not only because more regimes would have resulted in an overlong piece, but also, and more importantly, because these regimes are embedded in the IAHR’s remit, as evinced by norms’ cross-references (Feria-Tinta and Milnes 2018).

The hypothesis that will lead this article is that the IAHR is located in the furthest progressive pole of the international law continuum, because it is a space for subaltern polities’ struggles that reflect Latin America’s historical and geographical contingencies. Latin America, despite its socio-political heterogeneity, is imbued with multiple relevant commonalities, which to a significant extent determine its intervention in the making and application of IHREL. For example, Latin America hosts the world’s highest rate of biodiversity, located in unique and endangered ecosystems. This biodiversity is not only a paramount source of material and cultural conditions on which indigenous and *campesino* communities rely, but also a source of socio-environmental conflicts that stem from extractivism (de Castro, Hogenboom, and Baud 2016). This complex interaction between subaltern polities, their value system tied to their territories, and the ceaseless pressures the global economy exert over them might explain the role of Latin America both as a receptor and a producer of IHREL (Uribe and Urdinola-Rengifo 2020; Sikkink 2015). This article

will argue that these rich relational dimensions might explain the progressive legal production of the IAHRS, a characteristic fairly neglected in critical legal scholarship.

The article proceeds as follows. First, I will engage with the literature on IHREL that addresses these regimes' general conceptualization and operation. For analytic purposes, the literature will be divided into two categories borrowed from Koskenniemi's (2005) work: the *utopian* vision of human rights, and the *apologist* vision. Scholars who hold a *utopian* vision frequently embrace intellectual movements such as Third World, Critical, and New Approaches to International Law (TWAAIL, CAAIL, and NAAIL), movements whose theoretical lenses include Marxism, feminism, post-colonialism, and political economy. Overall, these literatures lay bare, on the one hand, a critique of existing international legal institutions as apolitical and managerial, and on the other, a demand for a utopian horizon, where societies enjoy dignified material conditions and a healthy social metabolism, hence rendering human rights law almost redundant. In contrast, the *apologist* vision acknowledges the limits of international human rights law and institutions, but still endorses its instrumental or tactical use by human rights movements. In that connection, it stresses legal victories throughout history, which have dismantled oppressive legal frameworks and institutions across the world.

Second, based on this literature review, I will offer a third strand of argumentation, in which international human rights institutions are framed as complex spaces of legal production, which should be located somewhere in the continuum of scholarly descriptions of international law. This article will dissect the IAHRS's latest interpretive innovations in the areas of economic, social, cultural, and environmental rights and indigenous peoples' rights. The analysis shows how this system transcends the confines of formalistic, apolitical human rights institutions because it gives a high priority to the "locus of enunciation" of victims, that is, the "geo-political and body-political location of the subject that speaks" (Grosfoguel 2007, 213). In this sense, I assert, the IAHRS is a multidimensional space that enables a relational encounter with Latin America's socio-historical context, geography, and actors, facilitating attempts to redraw the boundaries of legal imaginaries (Ntona and Schröder 2020). This re/production of legal meanings allows collective traumas of victims, geopolitical history, intersectional violence, and colonial legacies to supplement adjudicators' tools in interpreting international law, thereby engendering regional legal idiosyncrasies.

Third, in order to test the limits of the IAHRS as a transformative space within international law's oscillation, I will situate it within the larger context of global political economy and its contradictions. The argument will justify why the IAHRS lies on the furthest side of the spectrum where the "utopian" traits are located, yet fails to satisfy the expectations of radical commentators, who view human rights as "meaningless rhetoric" (Miéville 2005, 303).

I propose to compare international human rights institutions within the oscillatory nature of international law. However, this piece is not a comparative exercise, but an attempt to interrogate what and how to compare. I argue for recognition of Latin American polities as protagonists in the making of international law (Singh 2010), with all the limitations and unfulfilled expectations that might entail.

II. Between the *Apology* and *Utopia* of International Human Rights and Environmental Law

With the emergence and expansion of international human rights law and institutions in a post-Cold War context, also arise their most forceful critiques. The same is true of international environmental law, since both fields connect sovereign states and individuals' interests. In parallel,

both practitioners and scholars have defended the advancements of these self-contained international regimes—for example, by invoking counterfactual scenarios, in which reality is far from perfect but could have been far worse had these regimes not existed (Mcneilly 2021). These opposing views reflect international law’s oscillatory nature. What follows is a brief literature review that will lay bare the oscillation of legal scholars’ perspectives on certain aspects of international human rights and environmental law (IHREL). I label the critical voices that unveil the shortcomings of IHREL as *utopians*, and those that uphold these regimes’ tenets and operation, as *apologists*. This section focuses on three common themes that commentators from the TWAIL, CAIL, and NAIL traditions often elaborate about IHREL and that will be relevant to juxtapose against an IAHRs analysis. These themes are (1) its colonial and Eurocentric underpinnings; (2) its effect of diverting attention from structural socio-economic issues; and (3) its overtly formalistic, managerial, and apolitical façades. Subsequently, the apologists’ views will provide some balance based on the tactical use of IHREL.

A. *The Colonial and Eurocentric Traits of IHREL*

Utopian critiques of IHREL include denunciations of “abstract and universalizing principles that characterize modernist thinking” and “a keen awareness of the legacy of colonial, racist, and patriarchal heritage inserted in international law,” which conceal the “systems of power” behind “regimes of truth” (de la Rasilla del Moral 2012, 277). One intellectual movement that embraces such critiques of international law is TWAIL (Bianchi 2016, 207). Indeed, TWAIL literature constantly emphasizes how human rights scholars and media from the global North highlight human rights violations occurring in the global South, while obscuring their own (Mutua 2016, 49). TWAIL scholars attribute this trait to the subtle continuation of colonial doctrines in international law, such as the “standard of civilization” (Mégret 2012, 10). Makau Mutua (2001) uses a three-dimensional model he names the “savages-victims-saviors construction” to explain this phenomenon, in which evil states and peoples in the global South (savages) encroach victims’ rights, and then saviors (Western institutions and states) rescue the victims to redeem themselves. Overall, TWAIL exposes the past and enduring inequality among nations in international law as the result of the colonial conquest, an assessment that also involves IHREL (al Attar 2020, 170).

In addition, TWAIL scholars argue that international human rights law tends to promote a “universal” culture of human rights without adequate global South input (Ramina 2018). In response, TWAIL advocates for giving voice to oppressed people through a critical human rights vision. Indeed, Chimni (2006, 27) points out a contradiction in the TWAIL perspective on international human rights law: even though this branch of law often attempts to promote property rights above other interests, it can also provide for economic, social, and cultural rights to marginalized peoples. Badaru (2008) adds that TWAIL is useful to understand how IHREL operates. First, TWAIL scholarship highlights the historical roots of socio-economic deficits in the global South and contextualizes the impacts of contemporary international economic law on human rights. Second, TWAIL uncovers the extraterritorial dimensions of human rights violations, especially those committed by richer nations against global South nations (Badaru 2008).

International environmental law is also becoming a target of TWAIL critique. Usha Natarajan (2017) provides an historical account of how Third World lawyers advocated for doctrines such as the permanent sovereignty of natural resources and nature as the common heritage of humankind; however, they did so by treating nature as a mere object of inexhaustible exploitation. Until the 1990s, when this discourse faded away, local Third World elites used such concepts to “perpetrate injustice on their own peoples to enrich themselves, all the while using anti-Western sentiment as shields from international scrutiny” (Natarajan 2017, 217). For most of the 1990s and

2000s TWAIL scholars did not meaningfully engage with international environmental law, mainly because global South countries considered Western environmentalism a hindrance to development, thereby opening a bifurcation between the global North's scientific narrative of urgent action and the global South's clamor for social justice (Natarajan 2017, 228). However, in subsequent environmental negotiations, global South coalitions have introduced concepts that benefit them, such as the principle of common but differentiated responsibilities and the concept of sustainable development. In reaction, TWAIL scholars are starting to take this field of law more seriously, and to apply traditional TWAIL critiques to the international environmental regime.

For instance, Puthucherril (2020) addresses the toxic chemicals regime in international law, specifically the Basel, Rotterdam, and Stockholm Conventions. By drawing on TWAIL sensibilities and insights from the environmental justice movement, he reveals the colonial and racial dimensions of toxic waste management, whereby pollutants end up both in the proximities of Black impoverished communities in the global North and in marginalized neighborhoods in global South countries. This systemic pattern of waste movement, from the sites of production (developed geographies) to dumping sites (subaltern geographies), generates significant deterioration of life support systems and concomitant human rights violations, a phenomenon that imbricates international trade law, multinational companies, and national political elites. Although he accentuates the potential of the current regulatory regime to adjust structural distortions, big players like the US have not ratified the core treaties, hence adumbrating the perpetuation of global environmental injustice (Puthucherril 2020).

Finally, the breadth and sophistication of TWAIL analysis in disclosing the colonial, universalist, and pollutant character of IHREL keeps expanding. However, very few accounts have yet elaborated on spaces of opportunity to develop international law that is tailored for the oppressed and by the oppressed. The TWAIL literature has not sufficiently delved into the human rights institutions with transnational purview that are located in the global South as producers of law with emancipatory potential. According to Mutua (2001), to universalize an essentially European corpus of human rights, it is necessary to first abandon the savage-victim-savior model and then instill a multicultural perspective. This entails, he adds, "balancing between individual and group rights, giving more substance to social and economic rights . . . and addressing the relationship between the corpus and economic systems" (Mutua 2001, 243). It is precisely these kinds of aspirations the IAHR is arguably developing to respond to the Eurocentric prism of human rights, something this piece will discuss further.

B. IHREL and Structural Socio-Economic Issues: A Parting of the Ways?

As stated earlier, one conspicuous critique amongst a group of IHREL scholars is the tendency of these branches of law to conceal the immanent contradictions of capitalism and its manifestation in the global political economy. After all, the prioritization of civil and political rights after the international human rights regime took off in the 1970s disproportionately dismissed the underlying global dynamics of social inequality, both in terms of wealth distribution and political decision-making power. Today, the chasm between rich and poor is steadily deepening, threatening to become permanent in light of major risks such as climate change and future pandemics. Against this background, IHREL takes a neutral stance, seemingly incapable of imagining radical alternatives to its interpretative and balancing approach. Accordingly, scholars have asked themselves if IHREL might not be complicit with the creation and perpetuation of an unjust world (Chadwick 2020, 5).

One of the most influential critiques in this regard comes from Samuel Moyn (2018, 176), who argues that even if human rights may have been useful to alleviate precarious situations in specific

cases, they did remarkably little to check the explosion of wealth and income inequality in an expanding neoliberal world order. This could be exacerbated by the form of human rights, which “tend to accord primacy to the individual rights-bearer, presuppose a stark distinction between private right and public authority, present themselves as apolitical and beyond ideology, and encourage a high degree of suspicion of state power” (Özsu 2018, 147).

Rémi Bachand (2013) points to the same issue, and contends that the main characteristic of human rights is not to abolish structures of domination and exploitation, but only to mitigate their adverse effects in a way that is acceptable to those who benefit from the system. In that connection, he argues that international financial and economic law both dispossess global South countries’ resources and collaterally enable human rights violations as a direct consequence of capital accumulation in industrialized nations (Bachand 2013). Indeed, the main argument of this literature is that neoliberalism, which started as an experiment in some Latin American countries during their years of dictatorship, was not only responsible for thwarting the attainment of economic and social rights, but also of civil and political rights. However, the international human rights regime did not advocate against the advent and development of neoliberalism, but rather opted for a “sentimental moral discourse of humanitarian compassion for suffering, which invited individuals to “identify with the injuries of others” (Slaughter 2018, 767). Moreover, the enthusiasm of early neoliberalism for open markets and the expansion commodification of life was transposed onto human rights organizations, who commodified “suffering and sympathy, especially non-Western suffering for Western sympathy;” this led to overtly emphasizing “the singularized spectacular suffering of an individual victim . . . rather than the collective problem of politics and redistribution of resources”(Slaughter 2018, 766).

International environmental scholars who critically assessed this regime’s characteristics have also identified the ideological bases of neoliberalism in the operation of law as an essential impediment to the regime’s grand objective of fine-tuning global governance within the earth’s limits. They claim that examining the “relationship between capital and energy may be the most important task for understanding the emergence and transformation of the global political economy” (Cardesa-Salzmann and Cocciolo 2019, 13). This assessment can be transposed to the international climate regime and its nascent relationship with human rights, suggesting that intertwining the normative and mobilization potential of these regimes might not be “adequate to address underlying shifting dynamics of power that the expansion of new global carbon markets represent” (Dehm 2017, 138). Carbon markets as a global mitigation mechanism will affect local communities in the global South, specifically in relation to land tenure and potential limitations on land use. Hence, deploying human rights institutions in this arena might address the symptoms but not the underlying cause, which is the “expansion of global power over land in the South through market mechanisms” (Dehm 2017, 138).

Returning to the principles of the international climate regime, Julia Dehm (2017) problematizes the approaches of some IHREL scholars oriented to the South. She argues that legal principles promoted by global South states, such as burden sharing and differentiated responsibility, provide limited theoretical tools with which to examine the effects of the increasing marketization of international climate governance (Dehm 2017, 138). Instead, she claims, although the principle of differentiation in international climate law continues to be important, it assumes a specific organization of “common responsibilities” that no longer exists in the increasingly “bottom-up” regime (Dehm 2017, 160).

Overall, the literature in this area accentuates the exploitative nature of the global capitalist order, including how “economic development, the costs of cosmopolitan lifestyles, or even the accumulation of capital itself are the source of First-to-Third world imbalance” (al Attar 2020,

178). This reality influences the development and operation of IHREL, not only in the constant formation of its legal identity, but also in perpetuating the status quo. This mutually reinforcing symbiosis is ubiquitous in the literature of law and political economy with an emphasis on IHREL. However, what the literature fails to underscore is the emergence of counter-narratives that defy critical descriptions. The next sections will shed light on how the IAHRs is indeed adopting holistic views in which the root causes of human rights violations are at the forefront of its analyses.

C. *The Formalistic, Managerial, and Apolitical Façades of IHREL*

The last strand of critique that this article delves into is the perception of IHREL as a technocratic intervention that elides a proper engagement with the political nature of conflict. Koskenniemi (2009, 16), for instance, disparages the managerial disposition of international law because of its “anxious concern for concrete results” and its “insistence on the policy-proposal,” which have nothing at all to say that would be of “normative and even less of emancipatory interest.” Indeed, some critical accounts of human rights shed light on the separation between contemporary humanist norms and the revolutionary utopian intention of state- and nation-building (Moyn 2010, 20). The instilment of the language of human rights into popular consciousness from the 1980s onwards, so the argument goes, was not the result of “political utopianism that so long fired the modern quest for the nation-state, but [of] the moral displacement of politics” (Moyn 2010, 43). David Kennedy (2012) recognizes that it is not a novel insight to appraise the limitations of the human rights tradition for the attainment of “human emancipation,” a goal that focuses on the individual, the legal, and the participatory dimensions of government-citizen interactions. Kennedy’s (2012, 24) diagnosis in this regard is that overreliance on the individual might foment competition among the oppressed, thus making solidarity and alliances more difficult. Therefore, the crux of the human rights movement’s problem, according to this literature, is “leaving behind political utopias and turning to smaller and more manageable moral acts” (Moyn 2010, 147).

Like the critique of the separation between structural inequalities and human rights, this critique also signals the role of human rights in obfuscating the forces that produce unjust outcomes in the first place, thus enabling the conditions for recurrence. Susan Marks (2013, 229), for example, describes human rights as “fatalist,” stressing that “the renunciation of hopes for significant and lasting change affects the prospects of such change.” On this view, human rights, as a liberal project, has perpetuated the assumption that the invocation of certain principles and norms will effectively limit political and economic activities, framing “states and corporations [as] otherwise natural phenomena subject only to such weak limitations, rather than being legally constructed in ways which could be changed” (Kennedy 2020, 143).

Drawing on three different human rights reports, Marks (2011) argues that the human rights method and discourse are limited because they do not explore what she calls the “root causes” of human rights violations. She concludes that while the reports direct attention to the conditions that enabled abuses and vulnerabilities, they explain too little about the ‘larger framework within which those conditions are systematically reproduced’ (Marks 2011, 71). Therefore, these reports’ overreliance on technical legal changes to prevent human rights violations might operate, intentionally or not, to “domesticat[e] more complex (and potentially more radical) demands on the social structure”; the result is the “demobilization of social movements and other forms of emancipatory struggle” (Marks 2011, 71). Marks (2011, 73) communicates the anxiety that even though root causes are increasingly present in contemporary human rights discourse, they are deemed irreducible givens, against which “practical” legal strategies are nothing but “false promises,” incapable of articulating effective conditions of emancipation.

In a similar spirit, critical environmental lawyers have underscored the fact that global environmental ruin is the result of the discipline's reluctance to apprehend complexity. Most of the complex phenomena that international environmental law has so far neglected are political ones with negative impacts on Earth's ecosystems. Natarajan and Dehm (2019) mention two such political complexities: "the North-South divide (the rich and poor cannot agree on how to protect the environment) and a lack of political will (people have other priorities that override environmental protection)." Therefore, international lawyers remain trapped in the "seemingly inescapable orbit of globalized capitalism and myths of progress, unable to produce viable solutions to increasing inequality and environmental destruction" (Natarajan and Dehm 2019).

To these scholars then, IHREL "is no longer the way forward," because it "focuses too longingly on the perfection of a politics already past its prime" (Kennedy 2012, 34). Taking the construction of politics in national constitutional orders as an example, Kennedy (2012, 34) highlights its adversities and foresees a similarly difficult path for IHREL, which in addition, needs to deal with a global society embedded in a global economy. These are challenges that IHREL "has very little to say—other than that state power must continue to be civilized and legitimate" (Kennedy 2012, 33). Kennedy (2012, 33), against this trying reality, asks, "[W]hat government—what NGO, what civil society—will be able to stem the revolutionary tide of resentment and desire unleashed along the fault lines of global politics today?"

D. *An Apologist Defense of IHREL: A Tactical Instrument for Justice?*

Having explored the arguments of the utopians, it is time to go to the opposite side to construct a broader view. This section will review the main arguments of those I call the *apologists* of IHREL, meaning scholars who, although not blindly committed to the discipline's tenets and practice, do deploy a rather defensive approach to it. The objective is to make visible the other side of the oscillatory spectrum of IHREL.

The literature positing this defense of human rights hinges on the belief that the current challenging times represent an opportunity for transformation, innovation, creativity, and experimentation (Rodríguez Garavito and Gomez 2018, 34). This literature also embraces the historical legitimacy of human rights, both as means and ends of struggles spearheaded by oppressed groups around the globe. These scholars claim that empirically, the world is, in some respects, in a better condition thanks to the victories of the human rights movement: "a decline in genocide, a shrinking number of people killed in war, decreasing use of the death penalty, and improvements in poverty, infant mortality, and life expectancy, as well as advances in gender equality" (Sikkink 2019). These victories are, of course, compared to past realities rather than to an ideal world. Besides, according to this view, critics have failed to produce such an ideal system in which material equality and individual dignity could be attained without replicating current undesirable patterns.

Apologists for IHREL also claim that the discipline, and the social movement that uses law in a tactical way to achieve justice, treat all sets of rights as interdependent and inseparable. This means that both "status equality" and "socio-economic equality" have always been and continue to be the goal of the global human rights movement, contrary to what critics say about focusing too much on civil and political rights (de Búrca 2018, 1350). Human rights and environmental defenders are constantly challenging state and corporate power, risking their own lives. So, to suggest that these actors are "engaged in human rights anti-politics placed beyond political economy seems both careless and wrong" (de Búrca 2018, 1350).

Furthermore, according to the apologists, the utopians' critiques feature their own shortcomings: overemphasis on centers of power's human rights perspectives; critiques crafted *in abstracto*; and neglect of how rights are utilized in real scenarios (O'Connell 2018, 978). Indeed, the utopians barely mention some of the legal developments in the global South. For instance, courts in the global South, particularly in Latin America, are interpreting their domestic constitutions to promote economic equality using the vernacular of human rights (Versteeg 2020). As an example, in Colombia, the widespread usage of constitutional lawsuits propelled the Constitutional Court to order a structural overhaul of the national healthcare system as a whole, demanding, "among other things, . . . the equalization of healthcare benefits for those with and without formal sector employment" (Versteeg 2020). In addition, several courts have adopted a proportionality analysis in which judges value the importance of some rights over others in light of the context of the case, a progressive and broader interpretation of the right to property, and the right to formal equality to invalidate austerity measures affecting workers (Versteeg 2020, 2034).

Commentators even suggest that despite all the limitations and shortcomings of international environmental law, it is less anthropocentric than it used to be. New developments include protecting the intrinsic value of nature, limiting property rights in light of environmental interests, ensuring that barriers to access environmental justice are lifted, and lessening the burdens of proof for plaintiffs in environmental legal cases (Bétaille 2019). If TWAIL engages in an exercise of re-encountering and reappraisal of what the environment and nature are, then new opportunities to constructively disrupt the field might emerge from the global South (Natarajan 2017, 230). Indeed, the global South is moving toward internalizing new connections between the natural and the social, identifying the ways in which "control of the natural environment is related to the allocation of resources and how environmental concerns are inextricably intertwined with problems of poverty, inequality and underdevelopment" (Natarajan 2017, 234). This view is exemplified by the move by some global South countries in international fora to recognize the necessity of a binding treaty on business and human rights that would include environmental dimensions, as well as the campaign to recognize an international human right to a healthy environment (Auz 2018; Boyd, Knox, and Limon 2021).

These points segue into the next part of this article, which builds a case for looking at the South as a space, not only for tactical use of the law, but potentially emancipatory legal production. This is the space of the IAHRs.

III. The IAHRs as a Transformative Space

What if international human rights institutions were more than mere formal producers and interpreters of law, but rather a crucible where everything converges, from actors, histories, regimes, ecologies, and legal traditions, to politics? What if we saw these institutions as spaces where dynamic interactions occur and steer the wheels of history towards different trajectories? That is what this article proposes: a framing experiment in which international human rights institutions, especially regional human rights courts and bodies, are regarded as spaces where new international law emerges after a distillation process, and where the main ingredients are argumentation and mobilization, and the main techniques are interpretation and tactics.

Scholars have described and compared regional human rights systems from several perspectives, including historical origins (Huneus and Rask Madsen 2018); levels of intrusion into domestic remedies (Çalı 2018); types of remedies and compliance (Hawkins and Jacoby 2010; Schneider 2015); approaches to legal interpretation (Burgogue-Larsen 2018); and developments in specific types of rights (Pavoni 2015; Riegner 2020). However, no account has addressed how the distinctiveness of a human rights institution and its production of legal knowledge are the result

of a co-constitutive process of relationality of plural epistemologies and ontologies, on the one hand, and the material reality of geographies on the other, converging in a “space.” Additionally, no account has challenged scholarly arguments of IHREL based on the practices of regional human rights courts and bodies, at least not from the vantage point of epistemic diversity that shapes the outcome of a human rights case.

Walter D. Mignolo (2012, 5), the Latin American decolonial thinker, posits that knowledge and aesthetic norms are not universally established by a transcendent subject, but rather are established by historical subjects in diverse cultural centers. These historical subjects create a locus of enunciation in which different individual and collective expressions and epistemes mingle, offering the possibility of new forms of political emancipation, not just mimicry (Mignolo 2012, 5). This theoretical assertion resonates with an insight from comparative international human rights law, an aspiration from TWAIL, and a remark from CAIL. Comparative international human rights scholars have identified the legal culture of regional human rights courts and bodies as the reason for variance in formalistic approaches when it comes to remedies (Çalı 2018, 230). This insight resonates with the suggestion of some TWAIL scholars that the place of origin of human rights actors matters, because the global South is an “epistemic site of production and not merely a site of reception for international legal knowledge” (Gathii 2020, 166). Finally, one scholar has used the Marxist notion of commodity fetishism to describe the reification of international courts and tribunals as if they were autonomous objects capable of having a life and will of their own, forgetting they are the expression of social forces (Bianchi 2016, 85).

The remainder of this section will consider the IAHRs as a space of legal production from the global South in which historically marginalized peoples have found a locus of enunciation to achieve justice, thereby acknowledging their agency as part of the social forces that create law. As was mentioned earlier, I will not present a comparison exercise, but rather plant the seeds for further methodological inquiry, in which the basic assumption is to accept the oscillatory and indeterminate nature of IHREL and to try to establish where our object of analysis lies within the continuum. Is our object of analysis where the utopians place their hopes, or is it where the apologists build their defenses? This section will explore some recent cases from the IAHRs that deal with economic, social, and cultural rights to test the arguments of the utopians and see whether a similar approach can be brought to a comparative endeavor.

A. Transformation of Socio-Economic Rights in the IAHRs

The IAHRs, created by the Inter-American Commission and Court of Human Rights, is an international legal actor because it engages in the exercise of interpreting rules and principles that shape states’ behavior. These interpretations then become binding for the defendant state party in a contentious case, and as an authoritative reference for the other parties that have accepted the court’s jurisdiction (Carvalho and Baker 2014). It is important to recognize that the facts of a given case, which serve the purposes of contextualizing the application of certain rules and principles, are contingent upon historical and political conditions, which in turn determine the experience of human rights victims. In this connection, human rights victims in Latin America—quite often subsumed in historically marginalized and oppressed populations—argue before the IAHRs with the hope that these institutions will provide not a shallow grievance forum, but a profoundly transformative experience (Soley 2017). Users of the IAHRs hold such high expectations precisely because of its progressive resolutions and case law, which have helped expand the scope of protection for entire populations, despite constraints on the interpretation of certain provisions in the American Convention on Human Rights.

Few social issues are as delicate as the question of equality and redistribution, and it is impossible for a society to alleviate systemic inequality without overcoming the exclusion of entire populations from participation in social systems, including the legal system. Seen in this light, overcoming exclusion is a project shared by conceptions with very different ideas regarding social welfare, redistribution, trade, or investment regulation. Since Latin America is one of the most unequal regions in the world in terms of economic income (Busso and Messina 2020, 17), it makes perfect sense that victims affected by an unequal redistribution of wealth and unfair labor conditions would seek recourse from the IAHRs.

Against this background, the Inter-American Court of Human Rights (IACtHR) has expanded some important notions that the utopians have not sufficiently considered in their critiques. For instance, in the case of *Hacienda Brasil Verde Workers v. Brazil*,¹ the IACtHR found that workers of the *Fazenda* subject to the practice of slave labor were being recruited from the poorest regions of the country through fraud, deception, and false promises. The Court also acknowledged that these events had occurred in the context of “historical structural discrimination,” based on the economic status of the 85 workers identified and rescued by the Ministry of Labor in March 2000 (*Hacienda Brasil Verde Workers Case*, para. 343). This was the first time that the Court connected the economic background of a group of victims with their status of vulnerability and structural discrimination. More recently, the IACtHR issued a judgment declaring the international responsibility of Brazil for violations of various rights connected with the deaths of 60 people and the injury of 6 in an explosion at a fireworks factory in the municipality of Santo Antônio de Jesus, state of Bahia.² The Court concluded that “the female employees of the fireworks factory were part of a discriminated or marginalized group because they were in a situation of structural poverty and were, in the vast majority, women and girls of African descent” (*Employees of the Santo Antônio de Jesus Fireworks Factory Case*, para. 200). The state then failed to adopt “measures to guarantee the exercise of the right to equitable and satisfactory working conditions without discrimination, and the intersection of comparative disadvantages aggravated the victimization experience” (*Employees of the Santo Antônio de Jesus Fireworks Factory Case*, para. 198).

The court’s turn to emphasizing the economic status of victims has, in some respects, a parallel with its focus on expanding the interpretative scope of justiciable rights. The American Convention on Human Rights includes a chapter on economic, social, and cultural rights; Article 26 of the chapter stresses that the States Parties commit to adopt measures to achieving progressively the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards.³ However, these rights are not by themselves directly justiciable, which led the IACtHR to interpret Article 26 in a broader manner. In the case of *Gonzales Lluy and Family Members v. Ecuador*,⁴ the IACtHR issued the first of its judgments in a case involving discrimination against people with HIV. This was also the first case to declare a violation of the right to education, and the first occasion on which a violation of the Additional Protocol to the American Convention on Economic, Social, and Cultural Rights (Protocol of San Salvador) was found. The Court rejected the framing of these problems as a violation of the right to life (because of the risk to the child’s life in the face of such a serious illness) and the right to personal integrity. This led to the issuance of three concurring opinions on whether the case should be framed as a direct violation of the right to health, through Article 26 of the American Convention, or as an

¹ I/A Court H.R., *Hacienda Brasil Verde Workers Case*, Judgment of October 20, 2016. Series C, No. 318.

² I/A Court H.R., *Employees of the Santo Antônio de Jesus Fireworks Factory Case*, Judgment of July 15, 2020. Series C, No. 407.

³ American Convention on Human Rights (San Jose, Costa Rica, 22 Nov. 1969), 9 I.L.M. 673 (1970), entered into force 18 July 1978.

⁴ I/A Court H.R., *Gonzales Lluy Case*, Judgment of September 1, 2015. Series C, No. 298.

indirect violation of the right life and personal integrity, in accordance with prior precedent. (*Gonzales Lhuy Case*, concurrent opinions).

One of the reasons why the IACtHR has slowly shifted to adopt more generous interpretations of the ACHR is because of its broader methodological interpretive tools. The Court has endorsed the view that the ACHR should integrate literal, teleological, systemic, and historical methods of interpretation.⁵ The *Lagos del Campo v. Peru*⁶ case provided the ideal opportunity for the manifestation of these interpretive prerogatives. While it is true that the IACtHR had long recognized its competence to adjudicate violations of Article 26 through the “existing interdependence and indivisibility between civil and political rights and economic, social and cultural rights,” stating “that they must be understood comprehensively and without the existence of hierarchy” (*Pollo Rivera and Lagos del Campo Case*, para. 141), it is only in *Lagos del Campo* that a proper violation of Article 26 was found. Alfredo Lagos del Campo was fired from his job in 1989, after an interview he gave in his capacity as a union leader. The Court found that Mr. Lagos del Campo clearly acted in a union representative capacity, and that by not protecting Mr. Lagos del Campos’ rights, the state impacted his ability to represent workers, and deprived workers of their representative. The Court concluded that Mr. Lagos del Campo’s arbitrary and unjustified firing deprived him of his right to work and to job security under Article 26 in relation to the rights to freedom of expression, association, and fair trial (*Pollo Rivera and Lagos del Campo Case*, para. 166). This is the first judgment of the IACtHR recognizing the direct enforceability of economic and social rights.

B. *Transformation of Indigenous Peoples’ and Environmental Rights in the LAHRS*

In addition to the progressive development the IACtHR has shown in expanding the interpretive scope of Article 26, it has also developed a rich jurisprudence on indigenous people’s rights, one of the most vulnerable groups in the region. The IACtHR’s expansive interpretation of the right to property led to its articulating a state’s obligation to guarantee the meaningful participation of indigenous peoples when projects, programs, and activities in their territories could affect their rights. As explained by the IACtHR in *Saramaka v. Suriname*, the right to property, including that of indigenous peoples, is not absolute and may be subject to legitimate restrictions.⁷ However, when it comes to limiting indigenous property, the state must not only comply with the conditions commonly required under international human rights law (*Pueblo Saramaka Case*, para. 127), but must also ensure that such a restriction “does not entail a denial of their subsistence as tribal peoples” (*Pueblo Saramaka Case*, para. 128). This entails that in projects “that have a significant impact on the right to the use and enjoyment of their ancestral territories,” the state must “obtain the consent of the tribal and indigenous peoples”;⁸ local communities should benefit from the project;⁹ and a prior social and environmental impact assessment should be conducted.¹⁰

In addition, the IACtHR has extensively interpreted the right to cultural identity in its jurisprudence concerning indigenous peoples. The Court has stated that the right to cultural identity is a fundamental and collective right of indigenous communities, which must be respected in a multicultural, pluralist, and democratic society (*Pueblo Indígena Kichwa de Sarayaku Case*, para.

⁵ I/A Court H.R., *González Cotton Field Case*, Judgment of November 16, 2009. Series C, No. 205.

⁶ I/A Court H.R., *Pollo Rivera and Lagos del Campo Case*, Judgment of August 31, 2017. Series C, No. 340.

⁷ I/A Court H.R., *Pueblo Saramaka Case*, Judgment of August 12, 2008. Series C, No. 185.

⁸ *Pueblo Saramaka Case*, para. 129.

⁹ I/A Court H.R., *Garifuna Community of Punta Piedra Case*, Judgment of October 8, 2015. Series C, No. 304, para. 215.

¹⁰ I/A Court H.R., *Pueblo Indígena Kichwa de Sarayaku Case*, Judgment of June 27, 2012. Series C, No. 245, para. 176;

213). In addition, in the Court's view, the right to cultural identity is connected to the right to life and to indigenous territorial rights, because of the "intrinsic connection that the members of indigenous and tribal peoples have with their territory, the protection of the right to ownership, use, and enjoyment of this is necessary to guarantee their physical and cultural survival, as well as the development and continuity of their worldview" (*Pueblo Indígena Kichwa de Sarayaku Case*, para. 40).

Furthermore, the Protocol of San Salvador, which sets out economic, social, and cultural rights, expressly articulates the right to a healthy environment. Article 11 of the Protocol recognizes both a human right "to live in a healthy environment" and a duty on States to "promote the protection, preservation, and improvement of the environment." Although the Protocol only makes two rights justiciable through the complaint procedure, neither of them arising under Article 11, this situation dramatically shifted after the IACtHR published its Advisory Opinion on Human Rights and the Environment (AO) in 2017,¹¹ and its judgment in the *Lhaka Honbat v. Argentina*¹² case in 2020, in which the IACtHR deemed the right to a healthy environment directly justiciable.

The Court considered in its AO that the right to a healthy environment "protects the components of the environment, such as forests, rivers and seas, as legal interests in themselves, even in the absence of the certainty or evidence of a risk to individuals" (*Environment and Human Rights Advisory Opinion*, para. 62). The obligation to protect the environment includes a special duty of prevention, which involves taking all measures available to prevent activities under the state's jurisdiction from causing "significant harm" to the environment. This obligation must be fulfilled under a standard of due diligence and should include measures such as: (1) regulating, supervising, and overseeing activities capable of producing significant environmental damage; (2) requiring and approving environmental impact studies; and (3) establishing contingency plans and mitigation plans in cases of environmental damage. The adoption of such measures must be governed by the precautionary principle, and respect so-called procedural rights, such as access to information, public participation, and justice (*Indigenous Community Members of the Lhaka Honbat Association Case*, para. 208). The Court also bears in mind that environmental damage "will be experienced with greater force in the sectors of the population that are already in a vulnerable situation" (*Environment and Human Rights Advisory Opinion*, para. 67). Hence, based on "international human rights law, States are legally obliged to confront these vulnerabilities based on the principle of equality and non-discrimination" (*Environment and Human Rights Advisory Opinion*, para. 67).

In the *Lhaka Honbat* case, indigenous communities alleged before the IACtHR violations to their right to a healthy environment as an autonomous right, and to adequate food and to cultural identity, also considered autonomous rights and contained in Article 26 of the ACHR. They argued that the activities of "criollo" farmers degraded the environment and, consequently, limited their right of access to their traditional food sources and to water, and, ultimately, affected their cultural identity. The state, they added, was fully aware of the circumstances described, but had failed to adopt appropriate protective measures (*Indigenous Community Members of the Lhaka Honbat Association Case*, para. 186-90). The Court established that the communities' possession of their territories was indeed affected by these interferences, which had encroached on their ancestral practices and compromised their right to food (*Indigenous Community Members of the Lhaka Honbat Association Case*, para. 280-84).

¹¹ I/A Court H.R., *The Environment and Human Rights*, Advisory Opinion OC-23/17 of November 15, 2017, Series A, No. 23.

¹² I/A Court H.R., *Indigenous Community Members of the Lhaka Honbat Association Case*, Judgment of February 6, 2020, Series C, No. 400.

IV. The IAHRs and Its Transformational Limits

At this juncture, it is necessary to ask whether the novel and ambitious development of creating the right to a healthy environment, combined with the generous interpretative methods the IACtHR uses for the application of economic and social rights, can make a difference when human rights violations related to global challenges reach its docket. The climate crisis and biodiversity loss, symptoms of capital accumulation (Moore 2015), are unfolding quickly over Latin America, but their encounter with regional human rights courts and bodies is not something with which critical legal scholars have seriously engaged. I argue that these global phenomena are fundamental variables that should, at the very least, prompt new critical formulations. The locus of enunciation created by the IAHRs is arguably the motivation for its latest ambitious jurisprudential developments, but it might not be sufficient to change the course of a global challenge.

North America has been a pioneer in using its regional human rights system to advance climate-related concerns. At present, two cases in which the climate crisis affects indigenous peoples from the Arctic have been filed before the Inter-American Commission on Human Rights. The first was led by the Inuit from the US, and was dismissed in 2005; the second pending case was submitted in 2013 by the Athabaskan peoples from Canada (de la Rosa Jaimes 2015; Hohmann 2009). However, the rest of the region—the poorest and most economically unequal bearer of a vast yet threatened biodiversity ravaged by the legacies of its colonial past—has not fully engaged with the IAHRs in the context of the climate crisis and rapid ecosystem decimation.

I suggest there are at least two major limitations on reaching the emancipatory spectrum of the oscillatory spatial boundaries of international human rights law. The first is the enclave nature of regional human rights institutions in the global South such as the IAHRs. This renders the system vulnerable to hegemonic forces that drive global political economy, which in turn, shape normative and political conditions for and in the region. For this reason, the region alone will never be able to effect mitigation and adaptation requirements to significantly prevent human rights violations arising from the climate crisis or ecosystems destruction. This is an ontological difference with the provenance of other human rights violations, in which state power is the essential factor behind them, rather than the dynamics of Earth's systemic, anthropogenic disturbances. The second barrier, as I have argued elsewhere (Auz 2021), is the structural dependency of Latin America on an extractivist economic model, which molds the regulatory landscape to enable an investment-friendly environment—one in which human rights and ecological concerns become mere managerial, secondary issues.

Thus, even if a flurry of progressive climate and environmental rulings start pouring forth from the IACtHR, states are likely to display variable compliance, due to a dense set of “socio-metabolic interdependences” between Latin America and its economic partners (Arboleda 2020, 65). These relationships include numerous legal obligations that ensure investments flows to domestic economies. This suspicion is bolstered by the current lack of compliance with numerous rulings for the protection of indigenous peoples that include significant legal and policy reforms to manage socio-environmental conflicts in extractivist contexts (Correia 2018, 76).

Additionally, the US, Canada, and most of the Caribbean countries are not under the jurisdiction of the IACtHR. This is a problem because the US and Canada are big CO₂ emitters, and many Caribbean countries are significantly vulnerable to climate-induced disasters. Also, some high-emitting countries have either denounced the American Convention on Human Rights, such as Venezuela, or threatened to do so, such as Brazil. If these countries are not participating in the

regional human rights community, then the authority that might compel them to change their behavior will not come from the IAHRs. These absolute limitations confine the IAHRs; its emancipatory potential is greater than other human rights spaces but still dependent on extra-legal conditions.

V. Conclusion

As we have seen, recent developments in the IACtHR's jurisprudence demonstrate that society's most vulnerable are mobilizing in the space of the IAHRs and voicing their subjective experiences. In doing so, they are co-producing law that is to an important extent transformative, an endeavor supported by the institutions that channel their anxieties and thirst for justice. This is something that the literature critical of IHREL has so far failed to account for and could provide additional arguments for theoretical recalibration.

The diagnosis of the IAHRs as a progressive space for legal production is predicated upon its bold and generous interpretation of human rights obligations resulting from the situated experience of victims. However, these relational encounters traditionally have not engaged with environmental or climate dimensions. That is why the limits of the IAHRs as a space of emancipation reverberate louder when the multifaceted aspects of environmental degradation at a global scale are included. This condition downplays the role of any regional human rights system seeking to tackle aspects of global crises, such as the climate emergency, which will constantly return to haunt the marginalized unless the underlying causes become the priority.

In the end, being a progressive human rights space within the oscillatory international law continuum is not sufficient to counter the massive forces of the Anthropocene, and it is of paramount importance that rich nations take responsibility for having exacerbated it. If the underlying causes are not fully addressed, then invoking international law is "no more than an act of self-defence" (Quintana and Uriburu 2020, 694).

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