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Human Rights Tribunals and the Challenge of Compliance

I. TWO ANECDOTES FROM THE AMERICAS

In 2003, the Brazilian legislature passed a new domestic violence law. The law is named after a Brazilian woman, Maria da Penha, whose husband tried to kill her twice – once by electrocuting her while she was in the bathtub and once by shooting her. His assaults left da Penha paralyzed, but the Brazilian judicial system was unable and unwilling to hold him accountable for his abuse. In 1998, Maria da Penha brought a petition to the Inter-American Commission on Human Rights (IACmHR) against the state of Brazil for sitting idly by while she was repeatedly assaulted.

More than four years after da Penha's petition reached the Inter-American Commission, Brazil began to take action. During the Commission's annual session in 2002, the government of Brazil announced that da Penha's ex-husband was finally on trial. The following year, the Brazilian legislature began considering a new bill that would increase the penalties for domestic violence and create special courts to deal with domestic violence cases. Although the bill faced strong opposition in the legislature and some dissension within the judiciary's ranks, it had the support of the administration, and, increasingly, the judiciary. The bill has since been passed and is known as the "Maria da Penha Law." Since the bill's passage in 2006, the National Council of Justice of Brazil reports that Brazil has seen 331,000 prosecutions and 110,000 final judgments related to domestic violence. The Service Center for Women has received more than 2 million calls regarding domestic abuse.[1]

[1] UN Women, "Maria da Penha Law: A Name That Changed Society," August 30, 2011, http://www.unwomen.org/2011/08/espanol-ley-maria-da-penha/.

In 1992, then–President of Peru, Alberto Fujimori, authorized a military strike on the Castro Castro Prison in Lima, which housed suspected and convicted members of the Sendero Luminoso and Tupac Amaru terrorist groups. The military strike resulted in nearly forty deaths, and those who survived were transferred to another prison where they were beaten, raped, and tortured. The victims of the assault pursued justice, first in Peru and then at the IACmHR and Inter-American Court of Human Rights (IACtHR).

The IACtHR handed down its ruling on the case in 2005, claiming that Peru had an obligation to compensate the victims for their hardships, find and prosecute those responsible for the abuses, and engage in a series of public acknowledgments of its responsibility for the abuses that took place at the Castro Castro Prison. The president at the time, Alan García, claimed that he was absolutely outraged by the ruling, and the minister of the interior said that the ruling would be a blow to the morale of the armed forces. The head of the Peruvian Council of Ministers claimed that, although the Council of Ministers would consider Peru's international legal obligations, it was unfeasible for the state to go against public opinion. The very thought of siding with Sendero or Tupac Amaru would be tantamount to political suicide.

The Peruvian government claims that it has already paid some of the victims a portion of their promised compensation, and it has asked the Court for a reinterpretation of the ruling. The IACmHR, which has been monitoring Peru's compliance with the Court's decision, argues otherwise, stating concern that, years after the ruling, the government still has not secured compliance with any of the Court's orders.[2] In fact, not only has Peru not complied with the Court's rulings, but the government of Peru also has an international arrest warrant out for the lawyer and activist who brought the petition to the Inter-American human rights institutions in the first place. However, in the years since the IACtHR handed down the Castro Castro ruling, the Special Criminal Court of the Peruvian Supreme Court sentenced Fujimori to twenty-five years in prison for human rights abuses committed under his administration, thus marking an important but insufficient step toward justice in Peru.[3]

These anecdotes generate a number of questions that this book seeks to answer: why did Brazil comply with the IACmHR's recommendations whereas Peru shirked its international legal responsibilities? What does this mean for the domestic implementation of international law and for the effect of international human rights tribunals on the protection and promotion of human rights?

[2] Case of the *Miguel Castro Castro Prison v. Peru* (Interpretation of the Judgment on Merits, Reparations, and Costs) (Inter-American Court of Human Rights 2008).

[3] Jo-Marie Burt, "Guilty as Charged: The Trial of Former Peruvian President Alberto Fujimori for Human Rights Violations," *The International Journal of Transitional Justice* 3 (2009): 384–405.

II. INTRODUCTION TO THE BOOK

International politics has become increasingly legalized over the past fifty years, restructuring the way that states interact with each other, with international institutions, and even with their own constituents.[4] Although this trend of legalization and institutionalization has intensified states' international participation and created international spaces for policy making and adjudication, it also has restructured the incentives that political elites have for using and usurping international law in domestic politics. Human rights has been perhaps the area subjected to the most intense restructuring. Unlike international trade or security law, human rights law governs the vertical relationship between states and constituents, not the horizontal relationship between states. The rise of theinternational legalization of human rights now makes it possible for individual constituents to sue their governments at international courts like the European Court of Human Rights (ECtHR) and the IACtHR. Although this process exacts high costs on the states – financially, reputationally, and politically – political elites also can benefit from their interactions with international human rights courts.

This book asks three questions: why do states comply with international human rights tribunals' (HRTs) rulings? How does the compliance process unfold domestically? And, what effect does compliance with human rights tribunals' rulings have on the protection of human rights? The central argument of this book is that compliance with international human rights tribunals' rulings is an inherently domestic affair. Pro-compliance partnerships, comprising executives, judges, legislatures, and civil society actors, facilitate compliance on the domestic level. These domestic political institutions take responsibility for the compliance process and hold governments accountable for their international legal commitments. This is not to say that compliance with the tribunals' rulings is magnanimous. Rather, executives and other domestic actors use compliance to advance their policy goals. Governments can use compliance with international human rights tribunals for a variety of domestic political purposes, including (1) signaling a commitment to human rights, (2) advancing and legitimizing domestic human rights reform, and (3) providing political cover for contentious or politically divisive policies. Although compliance is a difficult and often messy process, the outcome can be impressive: the improved protection of human rights. Indeed, this book argues that the most important way that international human rights tribunals affects changes in human rights is through states' compliance with their rulings.

[4] Judith Goldstein et al., "Introduction: Legalization and World Politics," *International Organization* 54, no. 3 (2000): 385–399.

III. THE HUMAN RIGHTS TRIBUNALS IN CONTEXT AND IN PRACTICE

There are more than one hundred multilateral human rights agreements – not counting those that pertain to the laws of armed conflict and diplomatic immunity – on issues as broad as ending slavery and protecting the rights of migrant workers.[5] Although many of these treaties have only nominal oversight and rely on states' self-reporting of their human rights practices, a growing number of United Nations (UN) and regional treaties are developing oversight bodies, such as committees or tribunals, to monitor states' compliance and implementation of the norms embodied in the treaties. The European and Inter-American Courts of Human Rights have two defining features that set them apart from most oversight mechanisms: they issue binding legal rulings and allow individuals to submit petitions alleging abuse. Although the European and Inter-American human rights tribunals are at the far end of the spectrum with respect to their oversight and enforcement capacities, the realities of these tribunals is that they depend entirely on state actors and domestic political forces for compliance.

Born out of the human atrocity of World War II, the ECtHR and the Inter-American human rights institutions were among the first international tribunals – not simply for the adjudication of human rights claims but for any issue area. Unsurprisingly, they faced early challenges. In 1960, nearly a decade after the ECtHR came into effect, a judge on the Court questioned the Court's viability in a widely distributed essay titled, "Has the European Court of Human Rights a Future?"[6] In the Inter-Americas, meanwhile, dictators and military henchmen populated the Organization of American States (OAS), and the Inter-American Commission and Court of Human Rights had little hope of reining in the human rights abuses that plagued the region. Despite these early challenges, both the European and Inter-American human rights tribunals developed into novel and respected human rights instruments.

The European Court of Human Rights

The ECtHR has its roots in the 1950 European Convention on the Protection of Human Rights and Fundamental Freedoms. The Convention, which was created by the Council of Europe (COE), provides for the protection of fundamental civil and political rights. When it was drafted in 1950, the Convention established three enforcement mechanisms: the European Commission on Human Rights, the

[5] University of Minnesota Human Rights Library (2010); University of Minnesota Human Rights Library, "Human Rights Treaties and Other Instruments" (n.d.), http://www1.umn.edu/humanrts/treaties.htm.

[6] Michael Goldhaber, *A People's History of the European Court of Human Rights* (New Brunswick, NJ: Rutgers University Press, 2007).

Court, and the Committee of Ministers (CM). The Convention also provided for individual petitioning, allowing individuals to pursue justice for human rights abuses at the COE level after having exhausted domestic judicial remedies. Protocol 9 of the European Convention on Human Rights and Fundamental Freedoms, dating back to 1994, codifies this right, although many states voluntarily submitted to the Court's authority prior to ratifying the Protocol. Today, all states in the COE accept the individual petitioning mechanism, making the individual petition a hallmark of the European system of human rights protection.

In the first forty-three years of the Convention's history, the Commission played the role of gatekeeper. Individuals would take petitions to the Commission, which would strike out those cases that were inadmissible, attempt to broker friendly settlements, and send contentious cases to the Court for adjudication. Notably, accepting the Court's jurisdiction was optional until 1998, so if the respondent state did not accept the Court's jurisdiction, the case against it could not proceed past the Commission. If a case was not submitted to the Court for a ruling, the Committee of Ministers, a political organ of the COE that oversees and tracks states' implementation of the human rights recommendations and rulings they receive, would determine whether a violation had occurred and decide on a settlement. Similarly, if a case did go before the Court, the Committee of Ministers would monitor state compliance with the tribunal's rulings.

The structure of the European human rights system changed drastically in 1998. Protocol 11 of the European Convention on Human Rights and Fundamental Freedoms eliminated the European Commission on Human Rights and changed the role of the Committee of Ministers. This overhaul of the system was a response to the growing caseload of the Commission and the Court, as well as the growing number of COE member states. In 1981, the COE had twenty-one members, and the Commission received only 404 complaints. By 1998, however, the COE had forty-one members, and the Commission received 4,750 complaints. Moreover, the Commission had more than 12,000 unregistered or provisional files pending in 1997. The need for reform was apparent. In addition to changing the structure of the COE, Protocol 11 made accepting the Court's jurisdiction mandatory for all COE member states. Thus, the ECtHR became the primary venue for the adjudication of human rights practices on the regional/supranational level.[7]

The reforms of the 1990s streamlined the adjudication of human rights complaints into four steps: exhausting domestic remedies, clearing admissibility, ruling on the merits, and monitoring for compliance. In the first step, the victim(s) must exhaust all domestic remedies, meaning that they must pursue their claim in

[7] Registry of the European Court of Human Rights, *European Court of Human Rights Annual Report 2008* (Strasbourg, France: Council of Europe, 2009); Council of Europe, "A Unique and Effective Mechanism," accessed January 31, 2009, http://www.coe.int/T/E/Human_rights/execution/01_Introduction/01_Introduction.asp.

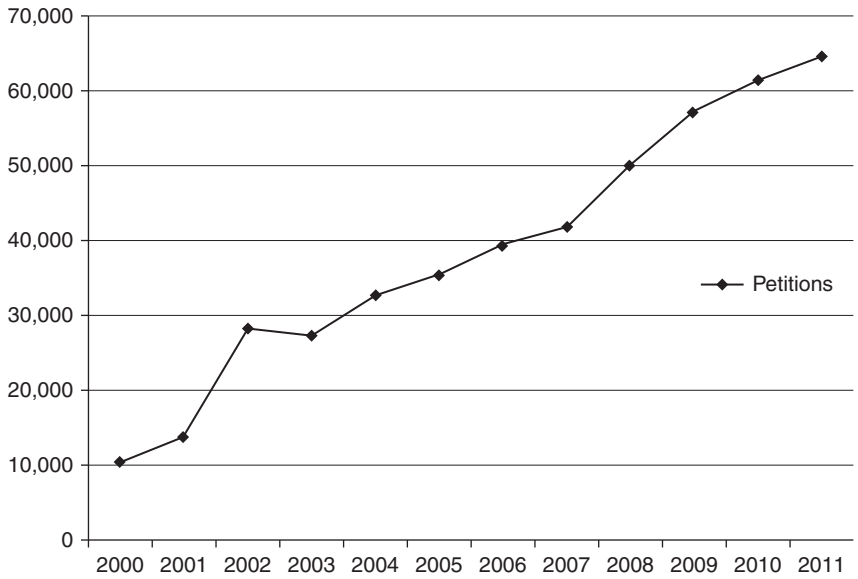

FIGURE 1.1 Applications to the European Court of Human Rights.

domestic courts and must take their case to the highest court applicable before turning to the ECtHR. There are exceptions to this rule; namely, if pursuing justice domestically threatens the life of the victim, his or her family, and legal counsel or if the victim would suffer under delays in the domestic legal system. Despite this policy, the number of petitions that the ECtHR receives each year is staggering. In 2011, for example, the Court received more than 60,000 petitions from constituents in Council of Europe member states alleging human rights abuses.[8] Figure 1.1 uses data from the 2011 European Court of Human Rights Annual Report and shows the change in the number of petitions the Court has received since 2000.

The second step in the process of human rights adjudication in Europe is clearing admissibility, which weeds out the vast majority of cases. In 2007, for example, the ECtHR ruled 24,067 petitions inadmissible, as compared to the 1,621 petitions it deemed admissible.[9] Most petitions are dismissed because the applicants failed to exhaust domestic remedies or did not correctly file their claim. Once a case has cleared the admissibility process, it moves to one of the Court's five sections, in which a chamber of seven judges rules on the merits of the case. There is also the possibility of appeal within the ECtHR system in the form of a Grand Chamber Judgment.

[8] Registry of the European Court of Human Rights, *Annual Report 2011 of the European Court of Human Rights* (Strasbourg, France: Council of Europe, 2012).

[9] Registry of the European Court of Human Rights, *European Court of Human Rights Annual Report 2008*.

Once the Court hands down the ruling, supervision of the case is transferred to the Committee of Ministers, which is responsible for monitoring and facilitating compliance with the rulings. The CM's supervisory role means that the Court's rulings take on political, as well as judicial, importance. The CM holds regular meetings to evaluate states' progress on complying with the Court's rulings and uses a combination of information politics, technical expertise in the area of human rights, and naming and shaming to facilitate compliance.[10]

By most measures, the ECtHR has been very successful. It has handed down a total 14,017 judgments, a startling sum for any court, but particularly for an international court. Yet, many wonder if the Court has become a victim of its own success.[11] The Court cannot manage its growing backlog of cases. It receives nearly 50,000 new petitions each year, driven in large part by repeat, or clone, cases from Russia, Italy, Turkey, and the Ukraine. These cases highlight a problem with respect to compliance with the ECtHR. Repeat cases deal with issues on which the Court has already adjudicated, and their frequent recurrence at the Court suggests that states are not complying with the tribunal's rulings, particularly with respect to making the large policy and programmatic changes necessary to avoid the repetition of certain abuses.

The COE has been keenly aware of this problem, and it implemented Protocol 14 to the Convention to mitigate the flow of petitions and the problem of repeat cases. Protocol 14 grants the Court and the CM enhanced power to move repeat petitions along more quickly, dismissing petitions that are similar to other cases that were dismissed on their merits and providing an expedited review for other repeat cases.[12]

[10] Nicholas Sitaropoulos, "Supervising Execution of the European Court of Human Rights, Judgments Concerning Minorities: The Committee of Ministers' Potentials and Constraints," *Annuaire International Des Droits De L'Homme* 3 (2008): 523–550; R. Ryssdal and S. K. Martens, "European Court of Human Rights: The Enforcement System Set Up under the European Convention on Human Rights; Commentary," in *Compliance with Judgments of International Courts: Proceedings of the Symposium Organized in Honour of Professor Henry G. Schermers by Mordenate College and the Department of International Public Law of Leiden University*, ed. M. K. Bulterman and M. Kuijer (The Hague: Martinus Nijhoff, 1996), 47–79; Ed Bates, "Supervising the Execution of Judgments Delivered by the European Court of Human Rights: The Challenges Facing the Committee of Ministers," in *European Court of Human Rights: Remedies and Execution of Judgments*, ed. Theodora Christou and Juan Pablo Raymond (London: British Institute of International and Comparative Law, 2005), 49–106; Council of Europe Committee of Ministers, *Supervision of the Execution of Judgments of the European Court of Human Rights* (Strasbourg, France: Directorate General of Human Rights and Legal Affairs, Council of Europe, March 2008); Council of Europe Committee of Ministers, *Supervision of the Execution of Judgments of the European Court of Human Rights* (Strasbourg, France: Directorate General of Human Rights and Legal Affairs, Council of Europe, 2009); Council of Europe Committee of Ministers, "About the Committee of Ministers," 2004, http://www.coe.int/t/cm/aboutCM_en.asp.

[11] Registry of the European Court of Human Rights, *Annual Report 2011 of the European Court of Human Rights*; Courtney Hillebrecht, "Implementing International Human Rights Law at Home: Domestic Politics and the European Court of Human Rights," *Human Rights Review* 13, no. 3 (2012): 279–301.

[12] Council of Europe, *Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention*, 2004.

Russia had stalled the implementation of these reforms, but, in January 2010, the Russian State Duma agreed to the new provisions.[13] Since Protocol 14 entered into force, however, the ECtHR and the CM continue to face the fundamental challenge of compliance: relying on states' political will and capacity to comply with their rulings. The Interlaken Action Plan of 2010 begins to address these concerns by providing the Committee of Ministers with enhanced oversight capacity, but these new reforms, although robust on paper, do not functionally endow the CM with additional powers to enforce their rulings and will, at best, treat the symptoms of noncompliance, not the causes.[14]

The Inter-American Human Rights System

Despite a history of rights-abusing regimes, Latin America has been a world leader in the codification of human rights norms. The 1948 Declaration of the Rights and Duties of Man was the earliest international human rights instrument, predating even the UN Declaration of Human Rights.[15] A decade later, the OAS established the IACmHR in 1959. Then, in 1969, the OAS drafted the Inter-American Convention on Human Rights and created the groundwork for the IACtHR. The Convention came into force in 1978, thus solidifying the framework of human rights protections in the Americas, at least on paper.

The IACmHR, based in Washington, D.C., was formed in 1960, as the political organs of the OAS sought to provide a stopgap to monitor and protect human rights in the absence of a binding human rights convention.[16] Today, the Commission carries out a wide range of functions, including receiving and processing individual complaints of rights violations, publishing special reports on human rights, conducting site visits, researching and publishing studies on important rights-related issues, organizing and carrying out conferences, issuing recommendations to OAS member states, urging states to take precautionary measures in the face of imminent human rights abuses, handing human rights cases up to the IACtHR, and requesting that the Court issue advisory opinions. Although the functions of the Commission are various, the function that I will focus most on is

[13] Council of Europe Directorate of Communication, *Statement by Secretary General of the Council of Europe, Thorbjørn Jagland*, January 15, 2010.

[14] Antoine Buyse, "Interlaken Declaration and Protocol 14," *ECHR Blog*, February 19, 2010, http://echrblog.blogspot.com/2010/02/interlaken-declaration-and-protocol-14.html; Committee of Ministers of the Council of Europe, "High Level Conference on the Future of the European Court of Human Rights: Interlaken Declaration," February 19, 2010; Hillebrecht, "Implementing International Human Rights Law at Home: Domestic Politics and the European Court of Human Rights."

[15] Inter-American Commission on Human Rights, *Basic Documents Pertaining to Human Rights in the Inter-American System* (Washington, DC: Organization of American States, 2007).

[16] The 1948 Declaration of the Rights and Duties of Man, although indisputably an important document, was nonbinding, as it was a declaration, not a convention or covenant.

its role in processing and adjudicating on individuals' petitions of human rights abuses.[17]

All petitions alleging human rights abuse in OAS member states go through the IACmHR. As with the ECtHR, victims must exhaust all domestic remedies, meaning that they must take their claims to the highest national court before seeking international recourse. Victims can seek recourse with the IACmHR if pursuing justice domestically threatens the victims or their counsel or if domestic proceedings suffer from long and unjust delays. The number of petitions the Inter-American Commission receives each year has grown remarkably. In 2000, the Inter-American Commission received 231 petitions.[18] By 2011, that number grew to 1,658.[19]

Judging the admissibility of petitions occupies a large portion of the Commission's time and effort. Once the Commission has established that a case is admissible, it corresponds with the appropriate state to gather information and asks both parties to comment on the information provided by the other. The Commission can hold hearings and issue friendly settlement agreements, which is generally its preferred course of action. If the parties cannot or will not reach a friendly settlement, the Commission prepares a report with its conclusions and recommendations and sets a timeframe for compliance. After the expiry of the timeframe set by the Commission, the Commission can proceed in two ways: it can produce and publish, if it sees fit, a second report, or it can hand a case up to the IACtHR.[20] Notably, the original report, and occasionally the second report, is kept confidential. This practice dilutes the Commission's ability to name and shame uncooperative and noncompliant states and weakens the institution's moral authority, not to mention its capacity to leverage civil society actors to enforce its recommendations.[21]

[17] Inter-American Commission on Human Rights, *Basic Documents Pertaining to Human Rights in the Inter-American System* (Washington, DC: Organization of American States, 2007).

[18] Inter-American Commission on Human Rights, *Annual Report of the Inter-American Commission on Human Rights 2000* (Washington, DC: General Secretariat of the Organization of American States, 2001).

[19] Inter-American Commission on Human Rights, *Annual Report of the Inter-American Commission on Human Rights 2008* (Washington, DC: General Secretariat of the Organization of American States, 2009); Inter-American Commission on Human Rights, *Inter-American Commission on Human Rights 2011 Annual Report* (Washington, DC: Organization of American States, 2012).

[20] Inter-American Commission on Human Rights, *Basic Documents Pertaining to Human Rights in the Inter-American System*.

[21] Margaret Keck and Kathryn Sikkink, *Activists Beyond Borders* (Ithaca, NY: Cornell University Press, 1998); Michael Barnett and Martha Finnemore, *Rules for the World: International Organizations and Global Politics* (Ithaca, NY: Cornell University Press, 2004); Martha Finnemore, "Norms, Culture, and World Politics: Insights from Sociology's Institutionalism," *International Organization* 50, no. 2 (1996): 325–347; Tom Farer, "The Rise of the Inter-American Human Rights Regime: No Longer a Unicorn, Not Yet an Ox," *Human Rights Quarterly* 19, no. 3 (1997): 510–546; Thomas Risse, Stephen C. Ropp, and Kathryn Sikkink, eds., *The Power of Human Rights* (Cambridge: Cambridge University Press, 1999).

Unlike the Commission, which has a semi-judicial function and falls into a jurisprudential grey area, the IACtHR is purely juridical in its mandate and work. The Court was established in 1979, following the entering into force of the Inter-American Convention on Human Rights, and it has its seat in San José, Costa Rica. The Court does not meet year-round, but rather in periodic ordinary sessions in San José. The Court also holds extraordinary sessions in other cities in the Americas in order to familiarize a larger number of Latin American citizens with the Court. The Court's caseload depends entirely on the cases handed up to it by the Inter-American Commission. Individuals, nongovernmental organizations, and other non-state actors do not (technically) have standing before the Court. Rather, once a case progresses through the Commission, the Commission serves as the victims' representative at the Court, although victims and their counsel regularly appear before the Court to give testimony.

Once the Commission hands a case up to the Court, the Court can rule on the admissibility, merits, and reparations of the case. The Court's rulings are legally binding, but the OAS provides very limited enforcement capacity. The Court does make its rulings public, however, and, as of 2001, it began a more systematic oversight procedure in which it periodically reviews states' compliance with its judgments. Although this process is an important step toward more transparent and sustained oversight, enforcement is shallow at best. Unlike in the European system, where the political institution of the CM oversees compliance, the political organs of the OAS are notably absent in monitoring compliance. The Court is left to monitor states' compliance with its own judgments.[22] Although the implementation reports are important for facilitating better oversight and enforcement, this development has put a tremendous strain on the human and financial resources of the IACtHR.

At the close of the last century, legal scholar Thomas Farer argued that the Inter-American human rights infrastructure was "no longer a unicorn, not yet an ox."[23] These words ring truer today than ever before. The legitimacy of the system has improved markedly since the widespread transition to democracy in the Western hemisphere in the 1980s, yet domestic legal systems remain slow, inefficient, and biased. The Commission and the Court are only beginning to have the influence they need to see their rulings implemented, and the start-and-stop pattern of domestic legal development means that the true impact of the Commission and the Court are yet to be determined.[24]

[22] Inter-American Commission on Human Rights, *Basic Documents Pertaining to Human Rights in the Inter-American System*; Jo M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (Cambridge: Cambridge University Press, 2003); Lynda E. Frost, "The Evolution of the Inter-American Court of Human Rights: Reflections of Present and Former Judges," *Human Rights Quarterly* 14, no. 2 (1992): 171–205.

[23] Farer, "The Rise of the Inter-American Human Rights Regime: No Longer a Unicorn, Not Yet an Ox."

[24] Thomas Buergenthal, "The Evolving International Human Rights System," *The American Journal of International Law* 100 (2006): 783–807.