

Article

Resisting the Inter-American Human Rights System

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I. INTRODUCTION.....	180
II. HUMAN RIGHTS LAW COMES TO THE AMERICAS.....	183
A. The Rise of International Human Rights	183
B. The Inter-American Court’s Influence on States	185
1. Domestic Adaptation of International Law	186
2. The Anti-Impunity Doctrine	188
III. THE DECLINE OF HUMAN RIGHTS LAW?.....	190
A. European Backlash.....	191
B. The “Africa Question”.....	193
IV. RESISTANCE COMES TO THE AMERICAS.....	194
A. Frontal Backlash.....	195
1. Partial Exit	196
2. Full Exit	204
B. Covert Resistance	208
1. Implied Powers	211
2. Expansive Powers.....	213
3. New Regulations.....	216
C. Judicial Pushback	217
1. Domestic Challenge.....	218
2. International Accommodation	222
V. AVENUES FOR REFORM.....	224
A. Revisiting the Fourth Instance Doctrine	225
1. The Fourth Instance Doctrine	226
2. Reforming the Doctrine for the Inter-American System	228
B. Political Compliance	231
1. The Court’s Self-Asserted Monitoring Jurisdiction	232

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2. Reexamining Monitoring Jurisdiction	233
3. Revising Compliance Mechanisms and Procedures	234
VI. CONCLUSION	235

I. INTRODUCTION

In a decision that shocked the inter-American human rights world, the Argentinean Supreme Court in February 2017 refused to comply with an Inter-American Court of Human Rights decision ordering it to revoke a domestic judgment. At issue was a case in which Argentina's Supreme Court had affirmed a civil judgment that found two journalists liable for defamation for publishing stories about an unacknowledged child of former President Carlos Menem in 2001. Ten years later, the Inter-American Court found that the Argentinean Supreme Court's affirmation of the civil judgment against the journalists violated the journalists' right to freedom of expression under the American Convention on Human Rights—the region's core human rights treaty. The Inter-American Court ordered Argentina's Supreme Court to “revoke the decision in its entirety.”¹ In 2016, Argentina's president asked the Supreme Court to comply with the Inter-American Court's decision and revoke the 2001 ruling, but the Supreme Court declined to do so, arguing that the Inter-American Court lacked the authority to order the revocation of a domestic judgment.²

The Argentinean court's decision was particularly striking because, in 2017, Argentina had one of the most progressive domestic courts in the region and was refusing to comply an international court's binding decision. The Inter-American Court responded by indicating that Argentina could find other ways to comply with the international court's judgment³ other than “reviewing” the 2001 decision—for instance, making an annotation on the margin of the Court's opinion. The Supreme Court ultimately agreed to the human rights tribunal's “suggestion,” seemingly putting an end to the stand-off between the two courts.⁴

A year later, an ultra-conservative pastor in Costa Rica turned presidential candidate rose from having merely four percent support in the polls to winning the run-off in only one month. His message was simple: if he became president, he would pull Costa Rica out of the Inter-American Court's jurisdiction.⁵ The

1. *Fontevicchia and D'Amico v. Argentina, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 238, ¶ 105 (Nov. 29, 2011)*. The Court also ordered the State to publish and disseminate the Court's decision, *id.* ¶¶ 107-08, and to reimburse the amounts paid by each of the victims as a result of their civil conviction, *id.* ¶ 116.

2. *Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 14/2/2017, “Ministerio de Relaciones Exteriores y Culto s/ informe sentencia dictada en el caso ‘Fontevicchia y D'Amico c. Argentina’ por la Corte Interamericana de Derechos Humanos,” CSJ 368/1998 (34-M)/CS1 (Arg.)*.

3. *Fontevicchia and D'Amico v. Argentina, Monitoring Compliance with Judgment, Order, Inter-Am. Ct. H.R., Considering ¶ 21 (Oct. 18, 2017)*.

4. *Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 5/12/2017, “Expediente No. 6439/12,” Res. No. 4015/17, ESC/41218/2017, at 2 (Arg.)*.

5. *Latin America's Human-Rights Court Moves into Touchy Territory*, THE ECONOMIST (Feb. 1, 2018), <https://www.economist.com/the-americas/2018/02/01/latin-americas-human-rights-court-moves-into-touchy-territory>.

move would have been particularly embarrassing for the country because the Inter-American Court itself sits in San José, Costa Rica. But the claim gained support particularly because an Inter-American Court advisory opinion had declared that Costa Rica—and every State of the Americas—should legalize same-sex marriage and allow name changes for transgender individuals.⁶ Although the conservative anti-Court candidate eventually lost to the official candidate sixty to forty percent, his campaign's success was shocking because it was unforeseeable that the Inter-American Court could have ignited so much resistance with its decision in only a matter of weeks.

These examples are just some of the latest developments in a series of episodes of resistance from members of the Organization of American States against international human rights bodies—a pattern that other international courts have also been struggling with.⁷ In 2012, after several judgments handed down by the Inter-American Court of Human Rights, Venezuela denounced the American Convention—just as Trinidad & Tobago did in 1998, and Peru did partially in 1999. In 2014, the Constitutional Court of the Dominican Republic ruled against its State's acceptance of the Inter-American Court's compulsory jurisdiction. Between 2011 and 2013, States' discontent with some inter-American decisions triggered an unprecedented process of revising the human rights system's organs—the so-called “strengthening process,” which both advocates and scholars saw as an effort to weaken the system's powers. In 2017, the U.S. government decided not to participate in hearings that the Inter-American Commission held on various human rights issues concerning the country.⁸ Until then, the United States had always appeared before the Commission.

Legal scholars are increasingly paying attention to what they see as the “decline”⁹ or “twilight”¹⁰ of international human rights law, or even the end¹¹ of what Louis Henkin famously called “the age of human rights.”¹² Commentators

6. *Identidad de género, e igualdad y no discriminación a parejas del mismo sexo* [Gender Identity, and Equality and Non-Discrimination to Same-Sex Couples], Advisory Opinion OC-24/17, Inter-Am. Ct. H.R. (ser. A) No. 24 (Nov. 24, 2017).

7. See *infra* Part III.

8. Elise Foley, *Trump Administration Is a No-Show at Hearings on Human Rights*, HUFFINGTON POST (Mar. 21, 2017), https://www.huffingtonpost.com/entry/trump-administration-iachr_us_58d17201e4b0be71dcf8b27b. The United States is not a party to the American Convention on Human Rights, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123. It is, however, a member of the Organization of American States and a signatory to the American Declaration on the Rights and Duties of Man, Int'l Conference of American States, American Declaration of the Rights and Duties of Man (1948), <https://www.cidh.oas.org/Basicos/English/Basic2.American%20Declaration.htm>.

9. See Ingrid Wuerth, *International Law in the Post-Human Rights Era*, 96 TEX. L. REV. 279, 319 (2017) (observing that “[h]uman rights, and especially . . . their enforcement through international law, are in a period of stasis and decline”).

10. See ERIC A. POSNER, *THE TWILIGHT OF HUMAN RIGHTS LAW* (2014). Cf. BETH A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* (2009); Beth A. Simmons, *What's Right with Human Rights*, 35 DEMOCRACY (Winter 2015), <https://democracyjournal.org/magazine/35/whats-right-with-human-rights/>.

11. See Makau Mutua, *Is the Age of Human Rights Over?*, in ROUTLEDGE COMPANION TO LITERATURE AND HUMAN RIGHTS 450, 455 (Sophia A. McClennen et al. eds., 2016) (arguing that “the human rights era has ended”).

12. In 1990, Louis Henkin wrote that human rights was “the idea of our time, the only political

have warned about the risks of backlash against human rights,¹³ examining instances of resistance in Europe¹⁴ and Africa¹⁵ as well as examining the notorious case of the United States' exceptionalist attitude towards international law.¹⁶ The situation of Latin America, however, remains unstudied, notwithstanding the fact that the region hosts one of the most active international human rights mechanisms in the world. This Article fills that gap in two ways. First, it identifies and analyzes the growing and multi-layered forms of resistance that the inter-American human rights system faces. In particular, it identifies three forms of resistance: frontal backlash, covert resistance, and judicial pushback. Second, it develops two avenues for reform to counteract what could constitute a major setback for the protection of human rights in the region.

The Article proceeds as follows. In Part II, I discuss both the rise of human rights law generally as well as the expansive influence of human rights law within inter-American law. I show how national constitutions and subsequently national courts in Latin America have embraced international human rights law as a key element of constitutional adjudication, making international law "the law of the land." Specifically, I look at the Inter-American Court's development of its anti-amnesty doctrine as a crucial tool for the domestic fight against impunity. In Part III, I explore the trend of challenging the project of international law and how this process particularly affects human rights law. I analyze instances of resistance and pushback in both Europe and Africa in order to situate the discussion of the inter-American human rights system that follows. In Part IV, I describe multiple forms of resistance, from full and partial withdrawal from the treaty regime to the more nuanced instances of judicial resistance by domestic courts. In Part V, I suggest avenues for reform. I re-examine the "fourth instance" doctrine, whereby international courts should not act as an additional instance of judicial review of domestic proceedings, and I argue for the adoption of a political mechanism for monitoring compliance similar to the European Committee of Ministers, which is charged with the task

moral idea that has received universal acceptance." LOUIS HENKIN, *THE AGE OF HUMAN RIGHTS* xvii (1990).

13. See Hurst Hannum, *Reinvigorating Human Rights for the Twenty-First Century*, 16 HUM. RTS. L. REV. 409, 413 (2016) (noting that calls by human rights activists "for adherence to the contemporary liberal European construct of society is likely to create a backlash in the rest of the world").

14. See, e.g., RUSSIA AND THE EUROPEAN COURT OF HUMAN RIGHTS: THE STRASBOURG EFFECT (Lauri Mälksoo & Wolfgang Benedek eds., 2017) (describing the evolution of the relationship between Russia and the European Court of Human Rights); Mikael Rask Madsen, *The Challenging Authority of the European Court of Human Rights: From Cold War Legal Diplomacy to the Brighton Declaration and Backlash*, 79 LAW & CONTEMP. PROBS. 141 (2016) (describing pushback against the European Court of Human Rights by, among others, the UK and Russia); Susan Marks, *Backlash: The Undeclared War Against Human Rights*, 4 EUR. HUM. RTS. L. REV. 319 (2014) (discussing UK backlash against the European Court of Human Rights).

15. See Karen J. Alter, James T. Gathii & Laurence R. Helfer, *Backlash Against International Courts in West, East and Southern Africa: Causes and Consequences*, 27 EUR. J. INT'L L. 293 (2016) (describing three instances of African countries resisting international courts).

16. See Oona Hathaway et al., *International Law at Home: Enforcing Treaties in U.S. Courts*, 37 YALE J. INT'L L. 51, 68 (2012) ("The global human rights revolution and the very public backlash against it . . . led to greater wariness among the courts to find that such treaties created private rights of action in U.S. courts."). Cf. Sabrina Safrin, *The Un-Exceptionalism of U.S. Exceptionalism*, 41 VAND. J. TRANSNAT'L L. 1307 (2008) (arguing that countries in general, including the United States, view themselves as "exceptional" with regard to international law).

of ensuring that States enforce regional human rights judgments. Part VI concludes.

II. HUMAN RIGHTS LAW COMES TO THE AMERICAS

A. *The Rise of International Human Rights*

The contemporaneous story of international human rights law is a story of humankind becoming aware of the devastating impact of mass atrocities on human dignity and taking action to prevent future atrocities. “Human rights” became the moral, political, and legal device to address the horrors of World War II. “Humankind” was represented in the convening of mostly, though not exclusively, Western nations that adopted a universal instrument establishing “human rights.”¹⁷ The “lingua franca of global moral thought,” as Michael Ignatieff has put it, was thus born.¹⁸ The United States, through the work of First Lady Eleanor Roosevelt, in alliance with a handful of States, served as a key ideological force behind the enactment of human rights—that is, a set of entitlements that would apply to all persons, notwithstanding their nationality, creed, race, sex, ethnicity, and social condition.¹⁹

Resistance to this universal project was apparent as soon as talks on a universal human rights instrument began. The most famous critique came from the Executive Board of the American Association of Anthropology’s “Statement on Human Rights,” submitted to the United Nations in 1947, a year before the adoption of the Universal Declaration.²⁰ The Statement “warned the United Nations against adopting a universal bill of rights that did not attend to cultural particularities.”²¹

Nonetheless, the United Nations moved forward and adopted the Universal Declaration. Scholars tend to refer to 1948 as the decisive moment in which the international human rights movement was born, although more recent accounts dispute that narrative.²² In any event, at least two decades after the adoption of

17. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

18. Michael Ignatieff, *Human Rights as Politics and Idolatry*, in HUMAN RIGHTS AS POLITICS AND IDOLATRY 53, 53 (Amy Gutman ed., 2001).

19. See generally MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* (2001) (describing the history of the Universal Declaration of Human Rights); JOHANNES MORSINK, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING, AND INTENT* (2000) (focusing on the influences on the drafting process of the Universal Declaration of Human Rights).

20. Executive Board of the American Anthropological Association, *Statement on Human Rights*, 49 AM. ANTHROLOGIST 539 (1947).

21. Karen Engle, *From Skepticism to Embrace: Human Rights and the American Anthropological Association from 1947-1999*, 23 HUM. RTS. Q. 536, 537 (2001). In 1999, the American Anthropological Association published a “Declaration on Anthropology and Human Rights,” expressing “a commitment to human rights consistent with international principles but not limited by them.” *Declaration on Anthropology and Human Rights Committee for Human Rights American Anthropological Association*, AM. ANTHROPOLOGICAL ASS’N (June 1999), <https://www.americananthro.org/ConnectWithAAA/Content.aspx?ItemNumber=1880>.

22. Samuel Moyn has argued that it was not until the 1970s that human rights as we understand them today really took hold. He claims that the Universal Declaration’s impact on international relations and national law was limited, certainly less than what most commentators argue. See SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* (2010).

the Universal Declaration, human rights began developing in impressive ways with the adoption of two international covenants: one covenant addressing civil and political rights and the other addressing economic, social, and cultural rights.²³ With the two covenants and the Declaration, an international bill of human rights was developed.

Human rights continued to expand, mainly through international treaties that addressed racial discrimination,²⁴ women's rights,²⁵ torture,²⁶ children's rights,²⁷ and other areas of concern. Regional human rights courts were established in both Europe and Latin America, and alongside treaty bodies,²⁸ became a moral watchtower over the domestic protection of rights. International non-governmental organizations successfully pushed rights-based agendas, forcing States to account for human rights violations using the language of law. Human rights were not just a set of moral principles—they were the *law*.

By the end of the 1980s the theory and practice of human rights seemed uncontested. By then, the European Court of Human Rights had developed a rich case law that effectively held States accountable for human rights violations.²⁹ In the Americas, the Inter-American Court had just started handing down decisions against States for their failure to observe their obligations under the American Convention on Human Rights.³⁰ The Inter-American Commission, the other human rights body in the inter-American system, was credited with putting pressure on the Argentinean military junta at the end of the 1970s by documenting human rights violations, thereby contributing to the junta's demise.³¹ New constitutions in Latin America embraced human rights as a core

23. International Covenant on Civil and Political Rights, Dec. 16, 1966, S. TREATY DOC. NO. 95-20, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

24. International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, S. TREATY DOC. 95-18, 660 U.N.T.S. 195.

25. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

26. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. 100-20, 1465 U.N.T.S. 85.

27. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

28. Treaty bodies are typically the organs that international treaties create to monitor compliance with the obligations that stem from a particular treaty. Thus, the Human Rights Committee, for example, monitors compliance with the International Covenant on Civil and Political Rights, while the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) Committee monitors compliance with CEDAW. Treaty bodies issue general comments on specific treaty provisions and some may address individual complaints from individuals.

29. See DIVERSITY AND EUROPEAN HUMAN RIGHTS (Eva Brems ed., 2013) (critiquing judgments and decisions of the European Court of Human Rights); MARK JANIS ET AL., EUROPEAN HUMAN RIGHTS LAW: TEXT AND MATERIALS (2008) (reviewing fifty years of European human rights law); THE EU AND HUMAN RIGHTS (Philip Alston et al. eds., 1999) (examining the European Union's human rights agenda).

30. See, e.g., Godinez-Cruz Case, Inter-Am. Ct. H.R. (ser. C) No. 5, ¶ 136 (Jan. 20, 1989) (holding that Honduras had violated the Convention); Velásquez Rodríguez Case, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988) (holding that Honduras had violated the Convention).

31. See Leonardo G. Filippini, *Argentina*, in VICTIMS UNSILENCED: THE INTER-AMERICAN HUMAN RIGHTS SYSTEM AND TRANSITIONAL JUSTICE IN LATIN AMERICA 71, 75 (Mónica Ávila Paulette & Catherine A. Sunshine eds., Gretta K. Siebentritt trans., 2007) ("This visit [by the Commission to Argentina] had a significant impact on public opinion and helped consolidate some of the human rights initiatives taking place inside the country.").

principle of their new legal architecture,³² and in the United States, human rights advocates leveraged an obscure but powerful federal statute to hold individuals responsible for human rights violations.³³ At the beginning of the 1990s, the United Nations determined that going forward, there should not be a separation between civil and political rights on one hand, and economic and social rights on the other, as was enshrined in the two distinct covenants of the 1960s.³⁴ “All human rights,” the U.N. would now proclaim, “are universal, indivisible and interdependent and interrelated.”³⁵ Such was the context when Professor Louis Henkin famously wrote that we lived in “the age of rights.”³⁶

B. The Inter-American Court’s Influence on States

In its three decades of existence, the Inter-American Court of Human Rights—and, more generally, the regional inter-American human rights regime—has exerted significant influence upon States.³⁷ Both the Commission and the Court have effectively put pressure on authoritarian regimes to cede power.³⁸ For example, they have ordered States to amend their domestic law—which in some cases resulted in changes to States’ national constitutions³⁹—to

32. See César Rodríguez-Garavito, *Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America*, 89 TEX. L. REV. 1669, 1671 (2011) (“I posit that this variety of judicial activism, although particularly visible in the [Colombian Constitutional Court] jurisprudence, is part of an emerging trend in Latin America and other regions of the global south. Embodied most clearly by judicial intervention in structural cases that address widespread violations of socioeconomic rights, this type of progressive neoconstitutionalism has unfolded with different names and features in different parts of the global south.”).

33. See COMPARATIVE CONSTITUTIONAL LAW IN LATIN AMERICA (Rosalind Dixon & Tom Ginsburg eds., 2017) (discussing the variety of constitutional experiences in Latin America and the potential of constitutions as avenues of change); Beth Stephens, *The Curious History of the Alien Tort Statute*, 89 NOTRE DAME L. REV. 1467, 1490 (2014) (“Human rights advocates lauded the statute as a means to define and strengthen both the substance of human rights norms and their enforcement.”).

34. The adoption of two separate Covenants in 1966 was due to States’ inability to agree on a single treaty containing all human rights obligations. At that time, the Cold War was well underway, and the two political blocs—the United States and the Soviet Union, West and East—had sharply different understandings of what a set of binding international human rights norms should look like.

35. World Conference on Human Rights, *Vienna Declaration and Programme of Action*, ¶ 5, U.N. Doc. A/CONF. 157/23 (June 25, 1993).

36. LOUIS HENKIN, *THE AGE OF RIGHTS* (1990).

37. The Inter-American Court is comprised of seven judges, who are elected by the Organization of American States General Assembly for a term of six years and may be reelected once. Organization of American States [OAS], Statute of the Inter-American Court of Human Rights, art. 5(1), Oct. 31, 1979, AG/Res. 448 (IX-0/79). The Court sits in San José, Costa Rica. *Id.* art. 3.1. Individuals may not file complaints directly before the Court. Organization of American States, American Convention on Human Rights art. 61.1, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123. Instead, they must petition the Inter-American Commission. *Id.* art. 33. If the Commission finds that a State has violated its international obligations under the American Convention on Human Rights, it issues recommendations. *Id.* art. 50.3; *id.* art. 51.2. If a State is unable or unwilling to comply with the Commission’s recommendations, then the Commission takes the case before the Court. Rules of Procedure of the Inter-American Commission on Human Rights art. 45, 144th Reg. Period Sess. (Mar. 2013) [hereinafter Commission Rules of Procedure]. Only then can individuals appear before the Court. Rules of Procedure of the Inter-American Court of Human Rights art. 25.1, 85th Reg. Period Sess. (Nov. 2009).

38. For a discussion on human rights in Latin America, see SONIA CARDENAS, *HUMAN RIGHTS IN LATIN AMERICA: A POLITICS OF TERROR AND HOPE* (2010).

39. “The Last Temptation of Christ” Olmedo Bustos v. Chile (*The Last Temptation of Christ*), Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 73 (Feb. 5, 2001).

recognize certain collective rights for indigenous peoples,⁴⁰ reform military jurisdiction,⁴¹ legalize *in vitro* fertilization procedures,⁴² and recognize same-sex marriage.⁴³

One of the areas in which the system has been most successful in influencing state conduct is in the proscription of self-amnesty-laws. In a number of decisions, the Commission and the Court have declared such laws to be incompatible with States' obligations under the American Convention on Human Rights.⁴⁴ States have not just complied with those decisions; they have also adopted the Inter-American Court's anti-amnesty doctrine from cases decided against third States, under the belief that it is their legal obligation to do so.⁴⁵ Latin American States' *opinio juris*, in other words, decisively shaped by the Inter-American Court's case law, was that self-amnesty laws should be prohibited.

In this section, I describe how States have used international human rights law in domestic adjudication. Such influence is in tension (or at least must coexist today) with the resisting attitude that States have developed—an attitude that sometimes comes from the very States that were once friendly to the Court's case law.

1. Domestic Adaptation of International Law

By the end of the 1980s, several Latin American States were transitioning from authoritarianism to democracy. As part of the transition to democracy, countries adopted new constitutions or amended their existing constitutions.⁴⁶ A key feature of this Latin American constitutional moment was States' commitment to international human rights principles. Countries enshrined norms that gave international human rights treaties constitutional rank. In a legal culture where statutes are the main source of law, enshrining human rights law in constitutions was an unequivocal message about States' commitment to abide by international human rights law.⁴⁷

40. The Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 173.3 (Aug. 31, 2001).

41. Palamara-Iribarne v. Chile, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 135, ¶ 269.14 (Sept. 23, 2005).

42. Artavia Murillo v. Costa Rica (*In Virto Fertilization*), Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C.) No. 257, ¶ 381.2 (Nov. 28, 2012).

43. Identidad de género, e igualdad y no discriminación a parejas del mismo sexo [Gender Identity, and Equality and Non-Discrimination with Regard to Same-Sex Couples], Advisory Opinion OC-24/17, Inter-Am. Ct. H.R. (ser. A) No. 24, ¶ 229.7 (Nov. 24, 2017).

44. See *infra* note 57.

45. See, for example, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 14/06/2005, "Simón, Julio Héctor y otros s/ privación ilegítima de la libertad, etc." Fallos (328:2056) (Arg.), and Corte Suprema de Justicia [C.S.J.] [Supreme Court], 13 diciembre 2006, "Calo Molco," No. 559-2004 (Chile) (adopting the Inter-American Court's *Barrios Altos* anti-impunity doctrine).

46. See, e.g., CONSTITUCIÓN NACIONAL [CONTS. NAC.] (1994) (Arg.); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] (1989); CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] (1991); CONSTITUICAO FEDERAL [C.F.] [CONSTITUTION] (1988) (Braz.); CONSTITUCIÓN POLÍTICA DEL PERÚ [C.P.] (1993).

47. See, e.g., M.C. MIROW, LATIN AMERICAN LAW: A HISTORY OF PRIVATE LAW AND

But national courts also contributed to the expansion of human rights law. Latin American constitutional courts began using inter-American human rights jurisprudence in their local adjudication, albeit in non-uniform ways. In some countries, like Colombia, courts established that international law and domestic constitutional law form a single “block” of law to be applied by judges.⁴⁸ Hence, when an individual files a case before a Colombian court, she can directly claim that her human rights—as established both internationally and domestically—have been violated. The Colombian Constitutional Court blurred all lines between the international and the national planes and quickly became the most progressive court in the region.⁴⁹

In Argentina, after the 1994 constitutional reform that granted constitutional status to international human rights treaties, the Supreme Court embraced enhanced monism as an interpretative tool, giving direct application to the American Convention on Human Rights.⁵⁰ In the leading *Ekmekdjian* case, the Supreme Court of Argentina found that public international law imposes the duty upon Argentinean organs to give primacy to an international treaty over a national norm in case such norm is in conflict with the treaty.⁵¹ The supremacy doctrine created by the Court became one of the key components of Argentina’s constitutional law.

Other tribunals, like Chile’s Constitutional Court, showed less enthusiasm for the use of international norms, although the country’s Supreme Court broke ground when it gave direct application to the Geneva Conventions to allow the investigation of human rights violations despite the crimes being time-barred.⁵² In one case, the Supreme Court—a mainly conservative tribunal—applied international humanitarian treaties that the country had not even ratified, relying on *jus cogens* arguments.⁵³ Interviewed for this study, the current Chief Justice of the Supreme Court of Chile lamented that “there are people who still believe that individual rights can be protected by domestic courts only. That is not acceptable.”⁵⁴ In another case, the Constitutional Court of Chile gave primacy to

INSTITUTIONS IN SPANISH AMERICA 237 (2004) (observing that formalism is one of the most important factors determining Latin American attitudes towards law).

48. See MANUEL JOSÉ CEPEDA ESPINOSA & DAVID LANDAU, *COLOMBIAN CONSTITUTIONAL LAW: LEADING CASES* 42-48 (2017).

49. See generally Manuel Iturralde, *Access to Constitutional Justice in Colombia: Opportunities and Challenges for Social and Political Change*, in *CONSTITUTIONALISM OF THE GLOBAL SOUTH: THE ACTIVIST TRIBUNALS OF INDIA, SOUTH AFRICA, AND COLOMBIA* 361 (Daniel Bonilla Maldonado ed., 2013).

50. See Víctor Bazán, *El derecho internacional de los derechos humanos desde la óptica de la Corte Suprema de Justicia de Argentina*, 8 *ESTUDIOS CONSTITUCIONALES* 359, 368 (2010).

51. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 7/7/1992, “*Ekmekdjian c. Sofovich / recurso extraordinario*,” Fallos (1992-315-1492) ¶ 19 (Arg.).

52. See Fernando Basch & Jorge Contesse, *International Law and Domestic Adjudication*, in *THE LATIN AMERICAN CASEBOOK: COURTS, CONSTITUTIONS, AND RIGHTS* 248, 254 (Juan F. González-Bertomeu & Roberto Gargarella eds., 2016).

53. Corte Suprema de Justicia [C.S.J.] [Supreme Court], 13 diciembre 2006, “Caso Molco,” Rol de la causa: 559-2004 ¶ 19 (Chile).

54. Interview with Chief Justice Haroldo Brito, Supreme Court of Chile, Santiago (Jan. 4, 2018). I personally conducted semi-structured interviews with judges from the Supreme Court of Chile, the Constitutional Court of Chile, the Constitutional Court of Peru, and the Supreme Court of Argentina with the goal of obtaining their opinions on the issues of resistance to and backlash against international human

international human rights treaties, in particular the American Convention on Human Rights, to find a “right to identity” not found in the domestic bill of rights.⁵⁵ As noted by a justice from the Constitutional Court of Chile, litigants routinely invoke human rights law as a way “to amplify the rhetoric” of their pleas and arguments.⁵⁶

2. The Anti-Impunity Doctrine

The Inter-American Court of Human Rights has been more influential in the context of addressing impunity. Since 2001, the Inter-American Court’s case law has found amnesty laws to be incompatible with States’ obligations under the American Convention on Human Rights to investigate, prosecute, and punish those responsible for such violations.⁵⁷ According to the Court, amnesty laws may even render inapplicable some of the criminal law’s most basic principles, such as the prohibition of ex post facto laws and the res judicata principle.⁵⁸

In its landmark decision *Barrios Altos v. Peru*, the Inter-American Court found that Peru had international responsibility for the violation of the right to life, the right to humane treatment, the right to a fair trial, and judicial protection of fifteen individuals killed by a death squad that operated under the autocratic regime of former Peruvian president Alberto Fujimori.⁵⁹ The Court declared that amnesty laws “violate non-derogable rights recognized by international human rights law,”⁶⁰ further noting that such laws “lack legal effect.”⁶¹ As I have noted elsewhere, the Court’s pronouncement laid the ground for the Court’s bold

rights law, as well as their views on the ways in which their courts interact with the inter-American human rights system.

55. Tribunal Constitucional [T.C.] [Constitutional Court], 29 septiembre 2009, Rol de la causa: 1.340-09 (Chile).

56. Interview with Justice 1 of the Constitutional Court of Chile (Dec. 6, 2017) (name omitted to preserve anonymity). The Justice also stated that his court in general views international human rights law as “binding.”

57. *Massacre of El Mozote and Nearby Places v. El Salvador*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 252 ¶ 283 (Oct. 25, 2012); *Gelman v. Uruguay*, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 221 ¶ 229 (Feb. 24, 2011); *Gomes Lund (“Guerrilha do Araguaia”) v. Brazil*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 219 ¶ 147 (Nov. 24, 2010); *Almonacid Arellano v. Chile*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 154 ¶ 110 (Sept. 26, 2006); *La Cantuta v. Peru*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. Hum. Rts. (ser. C) No. 162 ¶ 187 (Nov. 29, 2006); *Barrios Altos v. Peru*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 75, ¶ 41 (Mar. 14, 2001).

58. For a critique of the Court’s doctrine on criminal law, see generally Ezequiel Malarino, *Judicial Activism, Punitivism and Supranationalisation: Illiberal and Antidemocratic Tendencies of the Inter-American Court of Human Rights*, 12 INT’L CRIM. L. REV. 665 (2012) (criticizing the Court’s recent case law as deviating too far from the text of the American Convention on Human Rights).

59. The Court found that Peru was “responsible for failing to comply with Article 1(1) (Obligation to Respect Rights) and Article 2 (Domestic Legal Effects) of the American Convention on Human Rights as a result of the promulgation and application of Amnesty Laws No. 26479 and No. 26492.” *Barrios Altos*, 2011 Inter-Am. Ct. H.R. (ser. C) No. 75, ¶ 39.

60. *Id.* ¶ 41.

61. *Id.* ¶ 44. In his concurring opinion, Judge Sergio García Ramírez added, “[T]his incompatibility signifies that those laws are null and void . . . [and] determines the invalidity of the act, which signifies that the said act cannot produce legal effects.” *Id.* ¶ 15 (García Ramírez, J., concurring) (emphasis added).

assertion of jurisdiction over States⁶²—an assertion of jurisdiction that has today come into question.⁶³

Barrios Altos had a major impact on domestic judges. District courts issued rulings ordering the reopening of criminal investigations in cases where courts had applied the amnesty laws.⁶⁴ And the Peruvian Constitutional Court embraced the Inter-American Court's jurisprudence in its entirety, declaring that,

[T]he state's duty to investigate and punish those responsible for the violation of the human rights declared in the Inter-American Court of Human Rights' decision [of *Barrios Altos*] not only includes the annulment of judicial proceedings which applied the amnesty laws . . . [i]t also encompasses *any practice* aimed at impeding the investigation and punishment of those responsible of the violation of the right to life and physical wellbeing . . .⁶⁵

As noted by a current member of the Constitutional Court interviewed for this study,

[S]ince *Barrios Altos*, under Peru's case law there is no separation between our law and inter-American human rights law, or international law, in general. It is our duty to use and apply international norms. If we don't do it, we could even be impeached. That is how important international human rights law is for us.⁶⁶

The impact of the *Barrios Altos* decision, however, was not limited to Peruvian courts. In 2005, the Argentinean Supreme Court overruled a 1987 decision and declared unconstitutional several of the country's amnesty laws.⁶⁷ The Court addressed the Law of National Pacification (1983), which granted amnesty to members of the army involved in human rights violations, the Full Stop Law (1986), which terminated all pending and future investigations for human rights violations, and the Due Obedience Law (1987), which allowed low-ranking officials to claim that they could not resist orders given by high-ranking officials.⁶⁸ The District Court held that Argentina's amnesty laws violate international human rights law,⁶⁹ and the Appellate Court, affirming the lower

62. Jorge Contesse, *The International Authority of the Inter-American Court of Human Rights: A Critique of the Conventionality Control Doctrine*, 22 INT'L J. HUM. RTS. 1168, 1172-74 (2018).

63. See *infra* Part IV.C.

64. The Peruvian government requested an interpretation decision by the Inter-American Court to determine whether the *Barrios Altos* decision applied only to that actual case or whether the holding extended to other similar cases. In response, the Court said that the case's doctrine—that amnesty laws are inapplicable—encompass all cases, not only the criminal investigations in *Barrios Altos*. See *Case of Barrios Altos v. Peru, Merits, Interpretation of the Judgment of the Merits, Judgment Inter-Am. Ct. H.R. (ser. C) No. 83 (Sep. 3, 2001)*.

65. Tribunal Constitucional del Perú [Constitutional Court of Peru], Exp. No. 4587-2004-AA/TC, Santiago Enrique Martín Rivas (Nov. 29, 2005) ¶ 63 (emphasis added).

66. Interview with Judge Eloy Espinosa Saldaña, Constitutional Court of Peru, Lima (Aug. 30, 2017).

67. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 14/06/2005, "Simón, Julio Héctor y otros s/ privación ilegítima de la libertad, etc." Fallos (328:2056) (Arg.), *overruling* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 22/06/1987, "Camps, Ramón Juan Alberto y otros," Fallos (310:1162) (Arg.).

68. For a detailed analysis of the politics of the Argentinean transitional justice, see ANNELEN MICUS, *THE INTER-AMERICAN HUMAN RIGHTS SYSTEM AS A SAFEGUARD FOR JUSTICE IN NATIONAL TRANSITIONS: FROM AMNESTY LAWS TO ACCOUNTABILITY IN ARGENTINA, CHILE AND PERU* (2015). For an analysis of the *Simón* decision, see Christina A.E. Bakker, *A Full Stop to Amnesty in Argentina: The Simón Case*, 3 J. INT'L CRIM. JUST. 1106 (2005).

69. Juzgado Nacional en lo Criminal y Correccional Federal No. 4, "*Fallo Simón*." The decision

court's ruling, included the doctrine from *Barrios Altos* in its decision.⁷⁰ Then, the Supreme Court relied on *Barrios Altos*⁷¹ and a report by the Inter-American Commission on Human Rights, which recommended the adoption of all necessary measures to determine the identity of those responsible for the human rights violations.⁷²

The Argentinean Court found that the Inter-American Court's decision in the *Barrios Altos* case addressed all questions about State obligations under international anti-impunity doctrines.⁷³ The Argentinean Court cited the Inter-American Court's holding at length before declaring that that decision must govern the present case, thus rendering Argentina's amnesty laws null and void.⁷⁴ Along with other constitutional courts in the region, Argentina's Supreme Court embraced international human rights law and, in particular, the decisions by the Inter-American Court, whether against Argentina or other States. Inter-American human rights law was to be considered part of the law of Latin American States.

III. THE DECLINE OF HUMAN RIGHTS LAW?

In recent years, it has become more and more common to hear that international law is going through difficult times. To be sure, both States and non-State actors continue to engage in international law-making—through the adoption of treaties, soft-law instruments, judicial decisions, and international lobbying. Yet over the past decade, talk about pushback, resistance and backlash against international law has intensified. The project of international law, commentators observe, is living in “turbulent times.”⁷⁵

Human rights law has been particularly affected by the broader pushback against international law. Against the rosy narrative of international law and human rights law as a moral mechanism that brings the world together, scholars are increasingly noticing the ways in which States defy international law—whether by refusing to comply with judicial decisions handed down by

discussed the development of international criminal law generally, but did not use the Inter-American Court's case law.

70. See MICUS, *supra* note 68, at 238 (describing Cámara Nacional de Apelaciones en lo Criminal y Correccional Federal, Sala 11, “*Incidente de apelación de Simón, Julio*,” Decision of November 9, 2001, Case No. 17.899).

71. “*Simón, Julio Héctor y Otros*,” at ¶ 23.

72. *Id.* ¶ 20 (citing Consuelo Herrera v. Argentina, Judgments, Cases 10.147, 10.181, 10.420, 10.262, 10.309 & 10.311, Inter-Am. Comm'n. H.R. Report No. 28 (1992)).

73. *Id.* ¶ 23.

74. *Simón* was a step further in a political process that began years earlier. In 2003, the Argentinean Congress had declared that both amnesty laws were null and void *ab initio*, along the lines of the *Barrios Altos* doctrine. When the Supreme Court handed down *Simón*, it was thus confirming the legislature's decision not just to repeal, but in fact to annul, such legislation. The effects of such annulment were that all those who had benefited from the amnesty could not invoke the prohibition of retroactivity of penal laws and the principle of *res judicata*, and could now be tried. *Id.* ¶ 31.

75. See Monica Hakimi, *International Law in “Turbulent Times,” Part I*, EJIL: TALK! (Mar. 6, 2018), <https://www.ejiltalk.org/international-law-in-turbulent-times-part-i/>.

international courts,⁷⁶ or by exiting treaties.⁷⁷ Scholars urge international courts to be “resilien[t].”⁷⁸ More broadly, the challenge to international law seems to be linked to the attack on Western values, such as liberal democracy and human rights, as exemplified by the surge of illiberal regimes in Europe, the election of Donald Trump in the United States, and events such as Brexit. Scholars associated with the global constitutionalist school in fact ask whether it is the very existence of “the West” that is at risk.⁷⁹

Human rights have come under attack, both in the United States and elsewhere.⁸⁰ The Universal Declaration of Human Rights’ seventieth anniversary in December 2018 comes at a crucial time as States recede from their human rights obligations. Exploring States’ forms of resistance to these obligations may inform the direction that human rights, and international law more generally, may take. One thing is certain: because of the instability of States’ commitment to their international obligations, we should no longer take for granted the universal moral project that was set up seven decades ago.

To better understand the under-studied matter of States’ resistance to the inter-American human rights system, it may be useful to consider the discussion in the broader context of pushback against other human rights and international law regimes. The remainder of this Section briefly describes instances of resistance outside of the inter-American context: (1) in the European human rights system, and (2) in Africa, regarding the International Criminal Court and the pushback against the young African Court on Human and People’s Rights.

A. European Backlash

In 2005, the European Court of Human Rights handed down a decision, *Hirst v. United Kingdom*, in which it found that the country’s blanket ban on prisoners’ right to vote violated the European Convention.⁸¹ The European Court faced an unprecedented backlash from the U.K. tabloid media and politicians.

76. Andreas Zimmermann, *Times Are Changing—and What About the International Rule of Law Then?*, EJIL: TALK! (Mar. 5, 2018), <https://www.ejiltalk.org/times-are-changing-and-what-about-the-international-rule-of-law-then/>.

77. See Laurence Helfer, *Treaty Exit and Intra-Branch Conflict at the Interface of International and Domestic Law*, in OXFORD HANDBOOK OF COMPARATIVE FOREIGN RELATIONS LAW (Curtis A. Bradley ed., 2019).

78. Consider two panels organized by the Max Planck Institute on Comparative Public Law and International Law at the 2018 ICON-S Annual Conference in Hong Kong, on “The Authoritarian Pushback and the Resilience of International Institutions.” See also Ximena Soley & Silvia Steininger, *Parting Ways or Lashing Back?: Withdrawals, Backlash and the Inter-American Court of Human Rights*, 14 INT’L J.L. CONTEXT 237, 253–55 (2018) (offering ways for the Inter-American Court to be resilient in the face of growing backlash by States).

79. See M. Kumm, J. Havercroft et al., *The End of “the West” and the Future of Global Constitutionalism*, 6 GLOBAL CONSTITUTIONALISM 1 (2017).

80. See Sarah Margon, *Giving Up the High Ground: America’s Retreat on Human Rights*, 97 FOREIGN AFFAIRS 39, 40 (Mar.-Apr. 2018) (“[T]he United States has walked away from . . . a number of vital global commitments, institutions, and initiatives that would provide an opportunity to share the burden of combating global challenges while respecting rights.”).

81. See *Hirst v. United Kingdom* (No. 2), App. No. 74025/01, Eur. Ct. H.R. ¶¶ 40, 42 (2005) (Grand Chamber). See also Merris Amos, *The Dialogue Between United Kingdom Courts and the European Court of Human Rights*, 61 INT’L & COMP. L. Q. 557 (2012); Ed Bates, *Analysing the Prisoner Voting Saga and the British Challenge to Strasbourg*, 14 HUM. RTS. L. REV. 503 (2014).

Then-Home Secretary Theresa May went as far as to say the U.K. should leave the European Convention of Human Rights.⁸² *Hirst* not only marked the first salient case of backlash against an international human rights court, but it was also notable in that the backlash came from a nation that both was a decisive contributor to the formation of a European human rights regime and is a well-functioning parliamentary democracy.

The European Court has responded to *Hirst* in various ways, mainly by granting more deference to States through the use of the margin of appreciation doctrine.⁸³ However, despite the more favorable position the European Court has taken towards the country, the standoff is not over. The extent of the impact that the negative sentiment towards “Europe,” sparked by decisions by the European Court of Human Rights, had on the U.K.’s Brexit vote of 2016 has yet to be determined. U.K. pushback has led to larger political efforts on the part of European States to contain the European Court of Human Rights. This is exemplified by the adoption of several High Level Declarations that stress that the role of the Court should remain that of a subsidiary tribunal, and that the Court should grant a wide margin of appreciation to domestic States.⁸⁴

A more recent example of resistance towards the European human rights regime comes from Russia, also involving restrictions to prisoners’ right to vote. In 2013, the European Court addressed Russia’s blanket prohibition on prisoners’ electoral right and found the country in violation of the European Convention on Human Rights.⁸⁵ Unlike the case of the U.K., however, Russia’s ban stems directly from its constitution, not a parliamentary act.⁸⁶ Thus, in order to comply with the European Court’s judgment, Russia would have had to amend its national constitution. However, in July 2015, the Russian Constitutional Court issued a groundbreaking decision, finding that judgments by the European Court that contradict the Russian Constitution could not be executed.⁸⁷ Then, in December of that same year, the Russian Parliament passed a law formally granting the Russian Constitutional Court the power to review the decisions of the European Court of Human Rights and to declare such judgments “non-executable” if they violate Russia’s constitution.⁸⁸ This unprecedented defiance

82. Charlie Cooper, *Theresa May Says UK Should Leave European Human Rights Convention*, THE INDEPENDENT (Apr. 25, 2016), <https://www.independent.co.uk/news/uk/politics/european-convention-human-rights-eu-referendum-brexit-theresa-may-a6999701.html>.

83. See Eirik Bjorge, *National Supreme Courts and the Development of ECHR Rights*, 9 INT’L J. CONST. L. 5, 17 (2011); Madsen, *supra* note 14, at 171 (2016).

84. See Oddny Mjöll Arnardóttir, *The Brighton Aftermath and the Changing Role of the European Court of Human Rights*, 9 J. INT’L DISP. SETTLEMENT 223 (2018).

85. *Anchugov & Gladkov v. Russian Federation*, App. Nos. 11157/04 & 15162/05, Eur. Ct. H.R. (2013).

86. Article 32(3) of the Russian Constitution states, “Deprived of the right to elect and be elected shall be citizens recognized by court as legally unfit, as well as citizens kept in places of confinement by a court sentence.” KONSTITUTSIJA ROSSIJSKOI FEDERASTII [KONST. RF] [CONSTITUTION] art. 32(3) (Russ.). See Marina Aksenova, *Anchugov and Gladkov is Not Enforceable: The Russian Constitutional Court Opines in its First ECtHR Implementation Case*, OPINIOJURIS (Apr. 25, 2016).

87. Postanovlenie Konstitutsionnogo Suda Rossijskoi Federatsii ot 14 ijulja 2015 g. [Ruling of the Russian Federation Constitutional Court of Jul. 14, 2015], SOBRANIE ZAKONODATEL’STVA ROSSIJSKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation], No. 21-II/2015, Jul. 14, 2015.

88. Alexandra Sims, *Vladimir Putin Signs Law Allowing Russia to Ignore International Human*

took shape in April 2016, when the Russian Court used its newly granted power and declared that the European Court's judgment in *Anchugov and Gladkov v. Russia* could not be executed.⁸⁹ Commentators have expressed concern that Russia's challenge to European human rights decisions may have larger implications for the system in general as it struggles to retain its legitimacy.⁹⁰

B. The "Africa Question"

In January 2017, African countries announced their intention to leave *en masse* the International Criminal Court.⁹¹ The sentiment among African nations was—and, to a large extent, still is—that the International Criminal Court, based in The Hague, unjustly focuses on issues occurring in African States,⁹² an issue that even current members of the Court have had to acknowledge.⁹³ The first countries to announce their intention to withdraw from the Rome Statute (the treaty that created the International Criminal Court) were South Africa and Burundi. The former eventually decided not to withdraw; the latter, however, did withdraw from the treaty, thus becoming the first country to exit the Rome Statute.⁹⁴

In the context of regional human rights, the African Union established a regional Court on Human and People's Rights, which, like the European and Inter-American courts, exerts both advisory and contentious jurisdiction.⁹⁵ The Court is just one of five regional courts with competence to address human rights issues.⁹⁶ However, despite its young age, it is already facing resistance from States.⁹⁷ Along with the unresolved tensions between the African Union and the

Rights Rulings, THE INDEPENDENT (Dec. 15, 2015), <https://www.independent.co.uk/news/world/europe/vladimir-putin-signs-law-allowing-russian-court-to-overthrow-international-human-rights-rulings-a6773581.html>.

89. Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 19 apreliia 2016 g. [Ruling of the Russian Federation Constitutional Court of Apr. 19, 2016], ROSSIISKAIA GAZETA [ROS. GAZ.] May 5, 2016, <https://rg.ru/2016/05/05/sud-dok.html> [<https://perma.cc/X2S2-RGCT>].

90. Rachel M. Fleig-Goldstein, Note, *The Russian Constitutional Court versus the European Court of Human Rights: How the Strasbourg Court Should Respond to Russia's Refusal to Execute ECtHR Judgments*, 56 COLUM. J. TRANSNAT'L L. 172 (2017).

91. *African Leaders Plan Mass Withdrawal from International Criminal Court*, THE GUARDIAN (Jan. 31, 2017), <https://www.theguardian.com/law/2017/jan/31/african-leaders-plan-mass-withdrawal-from-international-criminal-court>.

92. See Kurt Mills & Alan Bloomfield, *African Resistance to the International Criminal Court: Halting the Advance of the Anti-Impunity Norm*, 44 REV. INT'L STUD. 101 (2017); Mandiaye Niang, *Africa and the Legitimacy of the ICC in Question*, 17 INT'L CRIM. L. REV. 615 (2017). Cf. Margaret deGuzman, *Is the ICC Targeting Africa Inappropriately?*, ICC FORUM (Mar. 17, 2013), <http://iccforum.com/africa#deguzman> ("This small number of decisions provides an insufficient basis to conclude that the ICC is discriminating in its selection practices.")

93. "It is important for the future that the ICC is able to demonstrate that it is not exclusively focused on Africa." Bertram Schmitt, *ICC Judge Schmitt Counsels Resilience to Preserve International Justice*, JUST SECURITY (Feb. 13, 2019), <https://www.justsecurity.org/62577/icc-judge-schmitt-counsels-resilience-preserve-international-justice/>.

94. Jina Moore, *Burundi Quits International Criminal Court*, N.Y. TIMES (Oct. 27, 2017), <https://www.nytimes.com/2017/10/27/world/africa/burundi-international-criminal-court.html>.

95. See Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (Jun. 9, 1998).

96. See Daniel Abebe, *Does International Human Rights Law in African Court Make a Difference?*, 56 VA. J. INT'L L. 527 (2016).

97. See Tom Daly & Micha Wiebusch, *The African Court on Human and Peoples' Rights:*

International Criminal Court, international tribunals are wrestling to obtain African States' compliance with their international obligations. Pushback and resistance is occurring in Africa as well.

IV. RESISTANCE COMES TO THE AMERICAS

The influence of the Inter-American Court's case law upon States identified in Part II has led some legal scholars to believe that there is a "common Latin American law," a sort of regional *corpus juris* that binds all States, for which the Inter-American Court is the ultimate interpreter.⁹⁸ Others view it as a "new-constitutionalist" turn—where the international protection of fundamental rights has become the lingua franca of domestic constitutional law.⁹⁹ Regardless, Latin American constitutional courts use international law, and in particular, international human rights law, as part of the legal material to be applied in all constitutional disputes.¹⁰⁰

In recent years, however, the Court's attempts to establish itself as the ultimate authoritative legal voice in the Americas and to hold States accountable has resulted in pushback from some States. In some cases, States' resistance to the inter-American system is hardly defensible. In other cases, however, States' discontent needs to be examined more carefully, as it raises plausible questions about the scope of international authority. In fact, current judges from Latin America's highest courts express skepticism towards some of the Inter-American Court's legal doctrines, even though they generally acknowledge that States should be members of a regional regime of human rights protection.¹⁰¹

In this sense, some States' actions may be oriented toward actually *improving* the system, while others may be aimed at *undermining* it. As I show below, Latin American States have engaged in reform talks to adjust the mechanisms and procedures of the Inter-American Commission on Human Rights.¹⁰² However, while some States participated in such processes in good faith to make reforms that would improve the Commission's performance, others took part in, and even led, the process with the goal of undermining the Commission. All States were engaged in the same reform process, yet their motivations did not necessarily coincide. Similarly, when a domestic court issues a decision that challenges the international court's assertion of powers,¹⁰³ that decision may be construed as an action of resistance aimed at either *improving* the human rights system (or, more specifically, the international court's legitimacy vis-à-vis domestic authorities), or *undermining* the international

Mapping Resistance Against a Young Court, 14 INT'L J. LAW IN CONTEXT 294 (2018).

98. See Armin von Bogdandy et al., *Ius Constitutionale Commune en América Latina: A Regional Approach to Transformative Constitutionalism*, in TRANSFORMATIVE CONSTITUTIONALISM IN LATIN AMERICA: THE EMERGENCE OF A NEW IUS COMMUNE (A. von Bogdandy et al. eds, 2017).

99. See generally NECONSTITUCIONALISMO(S) (Miguel Carbonell, comp. 2005).

100. Alexandra Huneeus, *Introduction to Symposium on the Constitutionalization of International Law in Latin America*, 109 AJIL UNBOUND 89, 89–90 (2015).

101. See *infra* Part IV (discussing interviews with judges from Peru's Constitutional Court and Chile's Supreme Court).

102. See *infra* Part IV.B.

103. See *infra* Part IV.C.

court's position. The decision by the Supreme Court of Argentina that I discuss below is a fine example of this phenomenon. Distinguishing between the two forms of engagement will be useful to better understand the reforms that I propose in Part V, as their ultimate goal is to enhance the human rights system, not to undermine it.

In this Section, I discuss different instances of resistance and reform, grouping them as (a) frontal backlash against the inter-American system, (b) covert resistance, and (c) judicial pushback.

A. Frontal Backlash

For years, legal scholars, human rights advocates and officials in the Americas have expressed concern that there is a need for all Organization of American States (OAS) Member States to ratify all inter-American human rights instruments—the so-called “universalization” goal. In the context of inter-American human rights law, the term is used to signal “universal ratification of all inter-American instruments” by most—hopefully all—Organization of American States members.¹⁰⁴ Regional human rights bodies consider universalization “a necessary step toward full protection of human rights within the region.”¹⁰⁵ Among the thirty-five OAS members, twenty-five have ratified the American Convention,¹⁰⁶ making almost all Latin American States parties to the main human rights regional treaty, which establishes and gives jurisdiction to the Inter-American Court.

One of the biggest challenges to universalization is, of course, some States' unwillingness to ratify the American Convention (and other regional human rights treaties). With the United States and Canada as the prime example of such States,¹⁰⁷ many efforts on universalization are directed to attract those countries to the treaty regime. Yet, universalization faces another, arguably greater, challenge, one that comes from States that express their discomfort with the system by taking the most radical action—denunciation. Because such decisions are usually accompanied by strong criticism against the treaty regime when a State exits, a State's withdrawal can cause harm to the system's overall stability. Understanding the practice of treaty exit, therefore, is a necessary step to addressing the problems of resistance against international human rights law.

I will now discuss instances in which States have attempted to withdraw from the Inter-American Court's jurisdiction without denouncing the treaty (“partial exit”), as well as cases where States have fully exited (“full exit”).

104. Inter-Am. Comm'n H.R., *Considerations Related to the Universal Ratification of the American Convention and other Inter-American Human Rights Treaties*, OAS/Ser.L/V/II.152, doc. 21 ¶ 4 (2014).

105. *Id.*

106. Two States, however, have denounced the convention.

107. U.S. President Jimmy Carter signed the American Convention in 1978, and although the Senate considered the matter back then, it has not taken subsequent action to ratify the treaty. Canada has not signed the American Convention, despite calls from official bodies and civil society to do so. See Report of the Standing Senate Committee on Human Rights, *Enhancing Canada's Role in the OAS: Canadian Adherence to the American Convention on Human Rights*, at 3 (May 2003), <https://sencanada.ca/Content/SEN/Committee/372/huma/rep/rep04may03-e.pdf>.

I. Partial Exit

Peru ratified the American Convention on Human Rights in 1978 and, at that time, it also recognized the Court's contentious jurisdiction. However, in 1999, in response to the Court's order that Peru annul domestic convictions and overturn domestic law, the government attempted to withdraw from the Inter-American Court's jurisdiction under a theory that it could do so without fully denouncing the American Convention on Human Rights.¹⁰⁸ At issue was a 1999 decision in which the Court found Peru responsible for the violation of the rights of a university professor tried by military tribunals under charges of terrorist crimes.¹⁰⁹ The Court ordered Peru to annul the judgment and to amend the constitutional and legal norms that granted military courts jurisdiction over non-military individuals. Two years later, in a similar case of terrorist acts—but this time against four Chilean nationals charged with being members of the terrorist group Tupac Amaru—the Court again found against Peru.¹¹⁰ As in *Loayza Tamayo*, the Court found that military trials, in particular the use of “faceless” judges, violated the right to due process under the American Convention,¹¹¹ that Peru must annul the convictions, and that the government repeal the legal rules under which the four individuals were tried.¹¹²

The Peruvian Executive, led by the authoritarian Alberto Fujimori, reacted to the Court's decision by asking Congress to declare that the country would no longer be subject to the Inter-American Court's jurisdiction.¹¹³ The Inter-American Court's ruling ordering Peru to overturn domestic law was the perfect reason Fujimori needed to directly challenge the Court's authority.¹¹⁴ Fujimori had used the struggle against terrorism as a successful platform to keep his authoritarian rule. The Court's decision in *Loayza Tamayo*, where the convicted

108. See Ariel Dulitzky, *El retiro del reconocimiento de la competencia contenciosa de la Corte Interamericana de Derechos Humanos por parte de Perú: Análisis Jurídico*, 6 PENSAMIENTO CONSTITUCIONAL 705, 708 (1999). Article 78 of the American Convention establishes how States can exit the treaty:

“1. The States Parties may denounce this Convention at the expiration of a five-year period from the date of its entry into force and by means of notice given one year in advance. Notice of the denunciation shall be addressed to the Secretary General of the Organization, who shall inform the other States Parties.

2. Such a denunciation shall not have the effect of releasing the State Party concerned from the obligations contained in this Convention with respect to any act that may constitute a violation of those obligations and that has been taken by that state prior to the effective date of denunciation.” American Convention on Human Rights, *supra* note 8, art. 78.

109. *Loayza-Tamayo v. Peru*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 33 (Sept. 17, 1997).

110. *Castillo Petruzzi v. Peru*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 52 (May 30, 1999).

111. *Id.* ¶¶ 221–22.

112. *Id.* ¶ 226.

113. Like other international treaties, the American Convention on Human Rights states that once a country decides to denounce the treaty, there is a one-year latency period. The purpose of these types of norms is to impede States seeking to avoid their international obligations by the unilateral act of denouncing the treaty.

114. Douglass Cassel, *El Perú se retira de la Corte: ¿afrontará el reto el sistema interamericano de derechos humanos?*, 29 REVISTA INSTITUTO INTERAMERICANO DE DERECHOS HUMANOS 69, 71 (1999) (translated by author).

was a Peruvian university professor, was not enough of an excuse to impugn the inter-American human rights system's intromission in Peru's national security. However, an international judgment ordering the State to conduct a new trial against four aliens charged with terrorism was enough.

Peruvian courts were the first to react. Less than two weeks after the Inter-American Court's decision in *Loayza*, the Criminal Chamber of the Military Jurisdiction's Supreme Council declared the Inter-American Court's judgment to be "non-executable."¹¹⁵ Similarly, the Military Jurisdiction Supreme Council's Grand Chamber denounced the Inter-American Court's decision in *Castillo* as "lacking impartiality and violating the Peruvian Constitution."¹¹⁶ Hence, the domestic court reasoned, the international decision could not be implemented.

With the support of the Military Jurisdiction's Supreme Council, Fujimori's ambassador to the OAS sent a letter to the Organization's Secretary General, informing him that Peru considered the Inter-American Court's orders to amend domestic legislation "simply unacceptable"¹¹⁷ and that it was "impossible to accept" the Court's decisions.¹¹⁸ On the national plane, Fujimori turned to Congress, requesting the approval of a Legislative Resolution arguing for Peru's withdrawal from the Inter-American Court's contentious jurisdiction¹¹⁹ with immediate effect.¹²⁰ Following a 14-hour debate, the Fujimori-controlled Congress approved the Executive's motion.¹²¹ Members of Congress resorted to the rhetoric of national security and terrorism: one decried the Inter-American Court's decisions as "demanding to sacrifice the rights of more than 25 million Peruvians for the rights of a few."¹²²

The same day, the Peruvian government submitted an instrument "wherein it advised that it was withdrawing its declaration consenting to the optional clause in the American Convention recognizing the contentious jurisdiction of the Court."¹²³ The decision by the Peruvian government was received with criticism by human rights organizations, the U.S. government,¹²⁴ the International Bar Association,¹²⁵ and, of course, inter-American human rights

115. *Id.*

116. *Id.*

117. *Id.* at 72.

118. *Id.*

119. Upon request of the Organization of American States and member States, the Inter-American Court may also exert advisory jurisdiction, to issue non-binding opinions on issues pertaining to the interpretation of the rights established in the American Convention and other regional treaties. See American Convention on Human Rights, *supra* note 8, art. 64.

120. E-mail from Jorge Bustamante Romero, former Minister of Justice of Peru, to José Luis Sardón, former Dean of the School of Law of the Universidad Peruana de Ciencias Aplicadas (Feb. 16, 2012, 12:30 PET) (on file with author).

121. Legislative Resolution No. 27152, July 8, 1999.

122. *Perú aprobó su retiro de la Corte Interamericana de Derechos Humanos*, EL DÍA (La Plata), July 9, 1999, <http://www.eldia.com/nota/1999-7-9-peru-aprobo-su-retiro-de-la-corte-interamericana-de-derechos-humanos> (translated by author).

123. *Ivcher-Bronstein v. Peru*, Jurisdiction, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 54, ¶ 28 (Sept. 24, 1999).

124. *U.S. Faults Peru for Quitting Latin Court*, N.Y. TIMES, July 10, 1999, at A5.

125. *Peru's Withdrawal from the Jurisdiction of the Inter-American Court, August 1999*, INT'L

bodies. The President of the Inter-American Commission on Human Rights lamented Peru's decision, declaring that it was "illegal" insofar as the text of the American Convention does not contemplate the possibility of a State withdrawing from the Court's contentious jurisdiction; it only contemplates a full denunciation of the treaty.¹²⁶ However, neither the OAS Permanent Council nor its Secretary General stood up for the Court and the inter-American human rights system. César Gaviria, the OAS Secretary General, expressed his support for the inter-American system but stopped short of criticizing Peru, noting that he highly respected Peru's effective policy against terrorism, despite the Inter-American Court's and Commission's pronouncement condemning Peru's actions to combat terrorism.¹²⁷

Finally, the Inter-American Court reacted by issuing, on the same day, two decisions on its competence regarding two pending cases against Peru.¹²⁸ In both cases, the Court found that Peru's purported withdrawal was "inadmissible" under the law of treaties.¹²⁹ The Court advanced two arguments. First, it declared that an interpretation of the American Convention made "in good faith in accordance with the ordinary meaning to the terms of the treaty in their context and in light of its object and purpose" led the Court to the unequivocal conclusion that the only way a State may disengage from its obligations under the treaty is by *fully* denouncing it.¹³⁰ Second, the Court observed that even if "release" were possible, it could never take effect immediately, as Peru had argued.¹³¹ The Court considered that the Vienna Convention requires a State party that wishes to exit a treaty to give "not less than twelve months' notice of its intention to denounce or withdraw from a treaty."¹³² In an exercise of its own

BAR ASSOC., http://www.ibanet.org/Human_Rights_Institute/About_the_HRI/HRI_Activities/HRI_Media/HRI_Interventions/archive/000899_Peru.aspx ("The IBA is concerned that the decision not to recognise the jurisdiction of the Inter-American Court as binding deprives Peruvian citizens of their right to appeal to a supranational court guaranteed by Article 205 of Perú's 1993 Constitution . . . Perú's action will seriously undermine the Inter-American system for the protection and promotion of human rights.") (last visited Apr. 18, 2019).

126. *Perú aprobó su retiro de la Corte Interamericana de Derechos Humanos*, *supra* note 122.

127. Cassel, *supra* note 114, at 74.

128. The first case concerned the Israeli-born, naturalized Peruvian partial owner of a TV station, whose citizenship was revoked by the government after a sham investigation allegedly revealed that there was no evidence that he had renounced his Israeli citizenship. Government officials had requested him to change his editorial stance after the station aired reports of torture committed by members of the Peruvian Army's Intelligence Service and corruption accusations against an Intelligence Service advisor. *Ivcher-Bronstein*, 1999 Inter-Am. Ct. H.R. (ser. C) No. 54, ¶ 2(d). Mr. Ivcher unsuccessfully sought relief before Peruvian courts, the government revoked his Peruvian citizenship, and a judge handed over management of the company to the other shareholders. *Id.* ¶¶ 2(h)–(l). The second case concerned the congressional decision to impeach three members of the Constitutional Court who declared that a law allowing President Fujimori to run for another term in 2000 violated the 1993 Constitution. *Constitutional Court v. Peru*, Jurisdiction, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 55 (Sept. 24, 1999).

129. *Ivcher-Bronstein*, 1999 Inter-Am. Ct. H.R. (ser. C) No. 54, ¶ 54; *Constitutional Court*, 1999 Inter-Am. Ct. H.R. (ser. C) No. 55, ¶ 53.

130. *Ivcher-Bronstein*, 1999 Inter-Am. Ct. H.R. (ser. C) No. 54, ¶ 40 (quoting Vienna Convention on the Law of Treaties, art. 31(1), May 23, 1969, 1155 U.N.T.S. 331); *Constitutional Court*, 1999 Inter-Am. Ct. H.R. (ser. C) No. 55, ¶ 39.

131. *Ivcher-Bronstein*, 1999 Inter-Am. Ct. H.R. (ser. C) No. 54, ¶ 52; *Constitutional Court*, 1999 Inter-Am. Ct. H.R. (ser. C) No. 55, ¶ 51.

132. *Ivcher-Bronstein*, 1999 Inter-Am. Ct. H.R. (ser. C) No. 54, ¶ 52 (citing Vienna Convention on the Law of Treaties, *supra* note 128, art. 56(2)). The Court's holding is inconsistent with the text of

powers to determine its own jurisdiction—what the Court called the “*compétence de la compétence*” or “*Kompetenz-Kompetenz*”¹³³—the regional tribunal found that it was still competent and would therefore continue with the proceedings against Peru.¹³⁴

Despite the Court’s response to Peru’s exit, the country did not amend its decision. It was only in 2001, after Alberto Fujimori stepped down from office and the country initiated its path to rebuild democratic institutions, that the newly elected authorities reinstated Peru’s recognition of the Court’s contentious jurisdiction,¹³⁵ thereby adopting a collaborative attitude towards the inter-American organs.¹³⁶ This process suggests that Peru’s resistance was directly connected to both the ruling by an autocrat and the political context that made Fujimori possible.

States may also seek to partially exit a treaty without having to engage in a direct challenge like Peru’s 1999 challenge. One such case is the partial exit (presumably) effected through a 2014 decision by the Constitutional Court of the Dominican Republic.¹³⁷ In its judgment, the Court found that the Instrument of Recognition of the Inter-American Court’s jurisdiction, signed by the President of the Dominican Republic in February 1999, was unconstitutional, as Congress had not approved it. The Court’s decision came only a few weeks after the Inter-American Court notified the Dominican Republic of its judgment against the country on the sensitive issue of the right to citizenship of individuals of Haitian descent born in the Dominican Republic, in which it demanded that the country amend its national constitution.¹³⁸

The ruling was not the first one by the Inter-American Court on the matter. In 2005, the Court had found the State responsible for violating the rights to citizenship of two children of Haitian descent born in the country,¹³⁹ ordering the Dominican Republic government to recognize the nationality of the two petitioners and to adopt all necessary measures “to regulate the procedure and

the Vienna Convention, which provides a default rule for the case of a treaty that contains “no provision regarding its termination and which does *not* provide for termination or *withdrawal*.” *Id.* art. 56(1) (emphasis added). Because Article 78(1) of the American Convention *does* provide for denunciation (or “*withdrawal*”), the Vienna Convention’s default rule does not apply in this case—the Court should have referred to Article 78(1) of the American Convention instead. *Constitutional Court*, 1999 Inter-Am. Ct. H.R. (ser. C) No. 55, ¶ 51.

133. *Ivcher-Bronstein*, 1999 Inter-Am. Ct. H.R. (ser. C) No. 54, ¶ 32; *Constitutional Court*, 1999 Inter-Am. Ct. H.R. (ser. C) No. 55, ¶ 31.

134. *Ivcher-Bronstein*, 1999 Inter-Am. Ct. H.R. (ser. C) No. 54, ¶ 56; *Constitutional Court*, 1999 Inter-Am. Ct. H.R. (ser. C) No. 55, ¶ 55.

135. *Perú vuelve a reconocer jurisdicción de Corte Interamericana de OEA*, EL MERCURIO (Santiago), Jan. 31, 2001, <http://www.emol.com/noticias/internacional/2001/01/31/44847/peru-vuelve-a-reconocer-jurisdiccion-de-corte-interamericana-de-oea.html>.

136. Less than a month later, Peruvian officials met with the Inter-American Commission to propose settlement agreements in more than 150 pending petitions before the Commission. See Inter-Am. Comm’n Hum. Rts., *Comunicado de prensa conjunto* [Joint Press Release] (Feb. 22, 2001), <http://www.cidh.org/Comunicados/Spanish/2001/PERU.htm>.

137. Tribunal Constitucional [Constitutional Court], 4 noviembre 2014, Sentencia TC/0256/14 [Judgment TC/0256/14], <http://www.tribunalconstitucional.gob.do/content/sentencia-tc025614>.

138. *Expelled Dominicans and Haitians v. Dominican Republic*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 282 (Aug. 28, 2014).

139. *Yean and Bosico v. Dominican Republic*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 130 (Sept. 8, 2005).

requirements for acquiring Dominican nationality based on late declaration of birth.”¹⁴⁰ The country did not comply with the decision. Furthermore, conservative politicians pushed to amend the constitution in the opposite direction as required by the Inter-American Court, seeking to enshrine norms that would deny citizenship to Dominican-born individuals of Haitian descent.¹⁴¹ In 2010, the campaign ended up with the adoption of a new constitution that established a critical exception to the *jus soli* principle: Dominican-born children of immigrants “illegally” residing in the State would not be granted Dominican citizenship.¹⁴²

Furthermore, three years later, the Constitutional Court dramatically expanded this newly enacted *jus soli* principle. Dominican authorities had seized a Haitian Dominican woman’s birth certificate, and refused to grant her a Dominican identification card. The woman challenged the authorities’ decision before the Constitutional Court, and the Court issued an unprecedented decision, establishing that the new constitutional norm on *jus soli* must be applied retroactively, going back to 1929.¹⁴³ The Dominican Constitutional Court’s decision rendered “tens of thousands of Dominican-born people of Haitian descent effectively stateless.”¹⁴⁴

In response, the Inter-American Court addressed the 2013 Dominican court’s decision in its August 2014 judgment.¹⁴⁵ As previously discussed, the Inter-American Court demanded that the State amend its national constitution to bring it in line with the country’s international obligations under the American Convention on Human Rights.¹⁴⁶ Though the challenge against the Instrument

140. *Id.* ¶ 239.

141. According to two U.S. law professors who represented the petitioners before the Court, “a small group of racist, ultranationalist politicians orchestrated an aggressive campaign against the ruling.” Roxanna Altholz & Laurel E. Fletcher, Opinion, *The Dominican Republic Must Stop Expulsions of Haitians*, N.Y. TIMES, July 5, 2015, <http://nyti.ms/1KIJtrZ>.

142. CONSTITUCIÓN DE LA REPÚBLICA DOMINICANA [CONSTITUTION], 13 junio 2015, art. 18(3) (Dom. Rep.) (excluding persons born in the national territory to foreigners that find themselves in transit or reside illegally in Dominican territory from Dominican nationality).

143. Tribunal Constitucional [Constitutional Court], 23 septiembre 2013, Sentencia TC/0168/13 [Judgment TC/0168/13], at 99, <http://presidencia.gob.do/themes/custom/presidency/docs/gobplan/gobplan-15/Sentencia-TC-0168-13-C.pdf>. In 1929, a constitutional amendment established the exception to Dominican citizenship for the “children of foreigners who find themselves in transit.” *Id.* at 51-52. Since 1929, all constitutional reforms have affirmed the same norm: in 1934, 1942, 1947, 1955, 1959, 1960, 1961, 1962, 1963, 1966, 1994, 2002, 2010 and 2015. Consultoría Jurídica del Poder Ejecutivo [CJPE] [Legal Consultancy of the Executive Power], *Colección de constituciones* [Collection of Constitutions], <http://www.consultoria.gov.do/Services/Constitutions>.

144. Editorial, *Stateless in the Dominican Republic*, N.Y. TIMES, July 11, 2015, <https://nyti.ms/1CvVkZe>. Facing international criticism, the Dominican government established a process that was supposed to offer a path to citizenship to individuals affected by the Constitutional Tribunal decision. However, “the application process was so onerous and poorly administered” that individuals could not realistically seek remedy to their precarious immigration status—or lack of status, for that matter. *Id.* See also Ernesto Sagás, *Report on Citizenship Law: Dominican Republic*, GLOBAL CITIZENSHIP OBSERVATORY 9-10 (2017), http://cadmus.eui.eu/bitstream/handle/1814/50045/RSCAS_GLOBALCIT_CR_2017_16.pdf?sequence=1&isAllowed=y (discussing Naturalization Law 169-14 that attempted to grant residency to some of those affected by the 2013 ruling by the Constitutional Tribunal).

145. See *Expelled Dominicans and Haitians v. Dominican Republic*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 282 (Aug. 28, 2014).

146. The Court ordered the State to adopt measures for the registration and generation of identity documents for the victims, to allow one of the victims with Haitian origin to reside in Dominican territory,

of Ratification had been pending since 2005—with the Dominican court seemingly uninterested in moving forward with the case—the 2014 judgment by the Inter-American Court prompted the Dominican court to quickly turn its attention to the challenge against the Instrument of Recognition to decide whether or not the country’s acceptance of the Inter-American Court’s jurisdiction was a constitutional violation. The Dominican court did find a breach of domestic constitutional law: just as the president needs congressional approval for the State to become a party to the American Convention, the Court reasoned, he must also seek congressional approval to recognize the Court’s jurisdiction.¹⁴⁷ The court established that the executive’s will to subject the country to international obligations requires the participation of other government bodies as a check on the power of each branch, with the ultimate goal of protecting the fundamental principle of constitutional supremacy.¹⁴⁸ The Court relied on previous practice, in particular the country’s acceptance of the jurisdiction of the Permanent Court of International Justice,¹⁴⁹ and on the practice of other Latin American States.¹⁵⁰ Since Congress passed a resolution to approve the recognition of jurisdiction of the Permanent Court of International Justice, the Dominican court reasoned that the acceptance of jurisdiction for the Inter-American Court must follow the same procedure.¹⁵¹

The Dominican court dismissed two arguments that advocates and constitutional lawyers put forward to oppose the challenge against the Dominican Republic’s recognition of the Inter-American Court’s jurisdiction. An amicus brief submitted by the Latin American Council of International and Comparative Law Scholars argued that the Court could not declare the Instrument of Recognition of jurisdiction invalid without violating the principles of estoppel and *forum prorogatum*.¹⁵² In public international law, the doctrine of estoppel “protects legitimate expectations of States induced by the conduct of another State.”¹⁵³ In this situation, of course, the matter does not involve a dispute between States, but between an international court and a member State. More specifically, the matter involves the question of whether a State can be estopped from denying the international court’s jurisdiction.¹⁵⁴ The brief

and to adopt legislative measures (including constitutional measures) to ensure to every newborn in the territory of the Dominican Republic an accessible and simple birth registration. *Id.* ¶ 512.

147. Tribunal Constitucional [Constitutional Court], 4 noviembre 2014, Sentencia TC/0256/14 [Judgment TC/0256/14], <http://www.tribunalconstitucional.gob.do/content/sentencia-tc025614> ¶ 9.18.

148. *Id.*

149. *Id.* ¶ 5.2(C)(d).

150. *Id.* ¶ 9.20 (citing Corte Constitucional [C.C.] [Constitutional Court], noviembre 10, 2009, Sentencia C-801/09 (Colom.)).

151. *Id.*

152. Brief for Latin American Council of International and Comparative Law Scholars as Amici Curiae, Corte Constitucional [C.C.] [Constitutional Court], 4 noviembre 2014, Sentencia TC/0256/14 ¶ 5.2(B) (Dom. Rep.).

153. Thomas Cottier & Jörg Paul Müller, *Estoppel*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2007). On the origins and application of the international doctrine of estoppel, see Megan L. Wagner, *Jurisdiction by Estoppel in the International Court of Justice*, 74 CAL. L. REV. 1777 (1986).

154. See Jack Wass, *Jurisdiction by Estoppel and Acquiescence in International Courts and Tribunals*, 86 BRITISH YEARBOOK OF INTERNATIONAL LAW 155, 158 (2016) (arguing that there is “significant support in both doctrine and case law for [the application of estoppel and acquiescence] to

observed that, between the Dominican Republic's ratification of the American Convention in 1977 and the submission of the Instrument of Recognition of the Court's jurisdiction in 1999, the country did not make any declarations or reservations regarding the Inter-American Court's competence.¹⁵⁵ Nor did the country make reservations during the more than fifteen years that elapsed between the submission of the Instrument of Recognition and the challenge against said Instrument.¹⁵⁶ Hence, the brief argued, the Dominican Republic was effectively estopped from denying jurisdiction to the Inter-American Court through the Dominican court's decision.

The principle of *forum prorogatum* can be characterized as a manifestation of estoppel in the specific context of jurisdiction. Pursuant to the doctrine of *forum prorogatum*, a State that has not consented to the jurisdiction of an international treaty but that agrees to take part in proceedings after it has been instituted may not challenge that court's jurisdiction.¹⁵⁷ In the specific context of the Dominican case, the *forum prorogatum* argument seems to be even stronger as the State—or at least its highest authority—had expressly manifested its intention to recognize the Inter-American Court's contentious jurisdiction. The Dominican court countered these arguments by simply noting that State officials representing the country in proceedings before the Inter-American Court of Human Rights had acted upon a “presumption of legality” for the Instrument of Recognition of the Court's jurisdiction.¹⁵⁸ The Dominican court notably observed that the challenge against the Instrument of Recognition was, however, “a factor that could rebut the Instrument's presumption of legality.”¹⁵⁹

The Dominican court's ruling caused an immediate reaction by the Inter-American Commission on Human Rights.¹⁶⁰ Human rights leaders and advocates denounced the ruling as “shameful” and “without effect on the international plane.”¹⁶¹ By declaring the Instrument of Recognition of the Court's jurisdiction unconstitutional, the Dominican tribunal put the country on the path to partially exiting the American Convention. Since the Dominican court's decision, the Inter-American Court has not decided a contentious case against the country, but only two requests for provisional measures. In the first case, which was decided ten days after the Dominican court's ruling, the Court granted provisional measures, but the second request for provisional measures, in a case involving

the question of jurisdiction”).

155. Corte Constitucional, 2014 Sentencia TC/0256/14 (Dom. Rep.), ¶ B(e).

156. *Id.*

157. Corfu Channel Case (U.K. v. Albania), Preliminary Objections, 1948 I.C.J. Rep. 15, 27 (Mar. 25).

158. Corte Constitucional, 2014 Sentencia TC/0256/14 (Dom. Rep.), ¶ 9.9.

159. *Id.*

160. The Commission observed that the Dominican court's decision had “no basis whatsoever in international law, and therefore it [could] have no effect.” Inter-Am. Comm'n Hum Rts., *IACHR Condemns Judgment of the Constitutional Court of the Dominican Republic*, Press Release No. 130/14 (Nov. 6, 2014), http://www.oas.org/en/iachr/media_center/preleases/2014/130.asp.

161. Santiago Cantón, former Executive Secretary of the Inter-American Commission, commented: “the Dominican Republic's court shows its total ignorance and lack of adherence to basic principles of international law. With their discriminatory decisions, they are Latin America's embarrassment.” Silvia Ayuso, *La República Dominicana se desliga de la Corte Interamericana de DDHH*, EL PAÍS (Nov. 5, 2014) (translated by author).

death threats against Haitian nationals, was rejected in February 2016.¹⁶² Also, in a reaction to the decision, the Inter-American Commission included the Dominican Republic in Chapter IV of the Commission's 2017 Annual Report, the so-called "blacklist" of countries that violate human rights,¹⁶³ causing Dominican leaders to react vehemently. Former president Leonel Fernández, who signed the impugned Instrument of Recognition of jurisdiction in 1999, published a scathing article against the Inter-American Commission, accusing the Commission of "[launching] a new attack against the Dominican Republic using erroneous arguments, deploying fallacious concepts, and displaying a worrying bias that could continue to erode its already diminished credibility amongst OAS member States."¹⁶⁴

The Dominican case presents more complexities than the previously discussed attempted (partial) exit by Peru. First, the pushback in the Dominican case did not come from an authoritarian State, but rather from a democratic one. Second, the act of resistance in the Dominican case was a decision by the country's highest court—an act that the executive may not challenge without creating a separation of powers issue, as has happened in other cases.¹⁶⁵ In fact, the Court did not directly address the question of the Inter-American Court's *international* jurisdiction; the Dominican court's analysis was circumscribed to the *domestic* implications of the President's actions without congressional approval. To be sure, by declaring the Instrument of Recognition unconstitutional, its direct effect was the questioning of the Inter-American Court's jurisdiction over the country. But despite its weaknesses, the Dominican court's decision raises an important question: whether the assertion of jurisdiction of an international court is a domestic or an international matter—or both. The Inter-American Court seems to believe that the issue is governed by international law,¹⁶⁶ and that "events extraneous to [the Court's] own actions" cannot affect the Court's jurisdiction.¹⁶⁷ But municipal law evidently plays a role

162. Juan Almonte Herrera v. Dominican Republic, Provisional Measures, Inter-Am. Ct. H.R. (Nov. 13, 2015) (granted); Nadege Dorzema v. Dominican Republic, Provisional Measures, Inter-Am. Ct. H.R. (Feb. 23, 2016) (denied).

163. The Inter-American Commission uses four criteria to list States in Chapter IV of its Annual Report: 1) serious breach of fundamental elements and institutions provided by the Inter-American Democratic Charter; 2) the illegitimate suspension of constitutional guarantees through the declaration of a state of emergency or siege; 3) the commission of massive, serious, and widespread human rights violations; and 4) the presence of structural situations that seriously affect the enjoyment and use of said fundamental rights. Chapter IV of the Commission's Annual Report became one of the most contentious issues of the two-year process that States conducted to review the Commission's powers under the American Convention. See *infra* Part III.B.

164. Leonel Fernández, *The IACHR Strikes Again*, GLOB. FOUND. DEMOCRACY & DEV. (Aug. 5, 2017), <http://www.globalfoundationdd.org/fulltext.asp?t=a&id=9561> (observing that the Commission's report "constitutes a genuine interference in the internal affairs of the Dominican Republic" and "a great legal blunder revealing a colossal disregard of history and a malevolent political intent").

165. See *infra* Part IV.C.

166. The Court has stated that the "acceptance [of jurisdiction] is determined and shaped by the treaty itself and, in particular, through fulfillment of its object and purpose." *Constitutional Court v. Peru*, Jurisdiction, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 55, ¶ 48 (Sept. 24, 1999).

167. *Id.* ¶ 33. In a revealing passage from his academic writings, former judge Antonio Cançado Trindade (a current member of the International Court of Justice) proclaimed: "The [Inter-American] Court, and not the State, has the last word on its jurisdiction—the opposite would lead to the subversion of the international legal order and to the destruction of all legal certainty in international

in determining how States exit a treaty.¹⁶⁸ States may perceive the Court's position as too aggressive, leaving no room for domestic constitutional regulations to determine fundamental issues such as jurisdiction.

2. Full Exit

A more radical measure to express discontent with an international court or the regime that a court oversees is to fully exit such regime. In the last years, countries have withdrawn from several international treaties, prompting scholars and international judges to pay increased attention to such developments.¹⁶⁹ So far, two States from the Americas have withdrawn from the American Convention on Human Rights: Trinidad & Tobago and Venezuela.

In 1998, following multiple battles with international human rights tribunals and the London-based Judicial Committee of the Privy Council,¹⁷⁰ Trinidad & Tobago became the first Member State of the Organization of American States to denounce the Convention. The discord began when, in response to the increase of violent criminality, Trinidad & Tobago and other Caribbean nations put an end to the moratoria for the death penalty established in the late 1970s. Although public opinion and legal elites were largely supportive of the countries' use of death penalty,¹⁷¹ the Inter-American Commission on Human Rights, along with other international human rights bodies (such as the United Nations Human Rights Committee), issued a number of recommendations against the use of the death penalty that provoked the country's ultimate decision to abandon the treaty regime.

During the 1980s and early 1990s, in response to the imposition of death penalty convictions, many individuals filed petitions before human rights bodies and the Caribbean countries' highest appellate court: the United Kingdom-based Judicial Committee of the Privy Council.¹⁷² The latter court's role in the death

dispute resolutions." ANTONIO CANÇADO TRINDÁDE, *Las cláusulas pétreas de la protección internacional del ser humano: El acceso directo de los individuos a la justicia a nivel internacional y la intangibilidad de la jurisdicción obligatoria de los tribunales internacionales de derechos humanos* [The eternity clauses of the international protection of the human being: The direct access of individuals to justice at the international level and the inviolability of the compulsory jurisdiction of international human rights courts], in I EL SISTEMA INTERAMERICANO DE PROTECCIÓN DE LOS DERECHOS HUMANOS EN EL UMBRAL DEL SIGLO XXI 41 (2003) (translated by the author).

168. James Crawford, *The Current Political Discourse Concerning International Law*, 81 MOD. L. REV. 1, 12 (2018) ("Domestic law provisions will also be relevant for withdrawal, and here the role of domestic courts is of particular importance.")

169. Crawford, a leading scholar of international law and a judge on the International Court of Justice, has recently observed that "allowing the possibility of withdrawal by including express clauses in treaties may be the price of getting States to consent to be bound in the first place." *Id.* at 22. See also Laurence R. Helfer, *Introduction to Symposium on Treaty Exit at the Interface of Domestic and International Law*, 111 AJIL UNBOUND 425 (2017-2018). On the particular case of Latin America, see Alexandra Huneus & René Urueña, *Treaty Exit and Latin America's Constitutional Courts*, 111 AJIL UNBOUND 456 (2017-2018).

170. For an account of Trinidad & Tobago's (and other Caribbean nations') confrontation with the Privy Council, see Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 COLUM. L. REV. 1832, 1860-82 (2002).

171. *Id.* at 1868 ("Contrary to a trend in other parts of the world, Commonwealth Caribbean nations had never abolished the death penalty.")

172. Trinidad & Tobago had ratified the American Convention on Human Rights, thus accepting

row cases is critical to explain Trinidad & Tobago's decision to denounce the American Convention. In a 1993 decision against Jamaica,¹⁷³ the Privy Council found that the prolonged time that inmates were on death row was a form of inhuman and degrading treatment which violated both constitutional norms and international treaties,¹⁷⁴ and declared that inmates on death row could not wait for more than five years between their sentences and their executions.¹⁷⁵ The court also found that using judicial recourses to prolong the wait time could not be attributable to the inmates but to the faulty judicial system.¹⁷⁶ The decision caused Jamaica—and other Caribbean nations—to commute the death sentences of more than a hundred prisoners who had been on death row for over five years.

The Privy Council's decision established that the review of death penalty cases carried out by international bodies would take less than eighteen months.¹⁷⁷ It noted that the U.N. Human Rights Committee would not act as "a further appellate court" that reviews the facts and the evidence submitted to the jury, and therefore individuals would have "no grounds . . . to make a complaint based upon delay."¹⁷⁸ However, the Council was mistaken. As Helfer notes, "only in 1999 did review times [before the Inter-American Commission] decrease below the Privy Council's eighteen-month estimate."¹⁷⁹ Furthermore, complainants were allowed to petition both the Human Rights Committee and the Inter-American Commission. Hence, review times added up, causing post-conviction reviews to exceed the five-year limit that *Pratt* had set. By lodging petitions before both international bodies, inmates could effectively delay their executions, forcing Caribbean countries to commute their death sentences,¹⁸⁰ resulting in "a near de facto abolition of the death penalty."¹⁸¹

Officials and the general public were unhappy with the situation. Trinidad & Tobago's Attorney General stated that the Human Rights Committee's delay

the Inter-American Court's jurisdiction, in 1991. Previously, the country had ratified the International Covenant on Civil and Political Rights (ICCPR) in 1978 and the Covenant's Optional Protocol in 1980. By accepting the Inter-American Court's contentious jurisdiction and ratifying the ICCPR's Optional Protocol, citizens of Trinidad & Tobago had international avenues to seek for redress whenever the country failed to protect citizens' fundamental rights.

173. *Pratt v. Att'y Gen. for Jamaica* [1994] 2 AC 1 (PC) (appeal taken from Jam.).

174. In the words of the court: "To execute these men now after holding them in custody in an agony of suspense for so many years would be inhuman punishment within the meaning of section 17(1) [of the Jamaican Constitution]." *Id.* ¶ 75.

175. *Id.* ¶ 85.

176. *Id.* ¶ 73.

177. *Id.* ¶ 84.

178. *Id.* ¶ 83.

179. Helfer, *supra* note 170, at 1877. As for the U.N. Human Rights Committee, the review time lasted between forty-four and fifty-six months before the ruling in *Pratt*. After the Privy Council's decision, review times generally decreased, but only in one year (1997) did they fall below the eighteen-month estimate. *Id.* at 1875-77.

180. See Glenn McGrory, *Reservations of Virtue? Lessons from Trinidad and Tobago's Reservations to the First Optional Protocol*, 23 HUM. RTS. Q. 769, 777-78 (2001).

181. Helfer, *supra* note 170, at 1879. See also Jane E. Cross, *A Matter of Discretion: The De Facto Abolition of the Mandatory Death Penalty in Barbados—A Study of the Boyce and Joseph Cases*, 46 U. MIAMI INTER-AM. L. REV. 39, 58-59 (2014) (arguing that international obligations have served to constrain the actions of the Barbados Privy Council, resulting in a de facto repeal of the mandatory death penalty in Barbados).

in reviewing claims by death row inmates had “facilitated persons convicted of murder to escape the death penalty.”¹⁸² In a remarkable move, the Caribbean States issued “instructions” to the two international human rights bodies with the aim of expediting death sentence examinations.¹⁸³ Unsurprisingly, the U.N. Committee rejected the attempt to unilaterally impose timetables on a human rights body.¹⁸⁴

On 26 May 1998, the government of Trinidad & Tobago finally decided to withdraw its ratification of the American Convention on Human Rights.¹⁸⁵ As a result of the country’s treaty exit, after May 26, 1999, the Inter-American Court could no longer hear cases brought by Trinidadian nationals.¹⁸⁶ Only the Commission would thereafter be permitted to hear cases from, and issue recommendations against, Trinidad & Tobago.¹⁸⁷

More recently, Venezuela followed suit. After several years of direct accusations against both the Inter-American Court and the Commission for lack of impartiality, and following the denunciation of other international treaties,¹⁸⁸ Venezuela announced its decision to withdraw from the American Convention in September 2012.¹⁸⁹ Unlike the case of Trinidad & Tobago, Venezuela’s full

182. Helfer, *supra* note 170, at 1880 n.199.

183. *Id.* at 1880.

184. See U.N. Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Comm. Jamaica, U.N. Doc. CCPR/C/79/Add.83, ¶ 11 (Nov. 19, 1997) (“The Committee considers that the Governor-General’s notification of 7 August 1997, unilaterally imposing timetables for the examination of communications under the Optional Protocol by the Committee, cannot be invoked as justification for any measure that would deviate from the Covenant, the Optional Protocol, or requests by the Committee for interim measures of protection.”).

185. In his letter to the OAS Secretary General, Trinidad & Tobago’s Minister of Foreign Affairs, Ralph Maraj, stated that his government could not “allow the inability of the [Inter-American] Commission to deal with applications in respect of capital cases expeditiously to frustrate the implementation of the lawful penalty for the crime of murder in Trinidad and Tobago.” Trinidad and Tobago: Notice to Denounce the American Convention on Human Rights, Letter from Ralph Maraj to César Gaviria Trujillo, Secretary General, Organization of American States (May 26, 1998), https://www.oas.org/dil/treaties_b-32_american_convention_on_human_rights_sign.htm#Trinidad%20and%20Tobago. On the same date (May 26, 1998), Trinidad & Tobago withdrew its ratification of the International Covenant on Civil and Political Rights’ Optional Protocol. See Optional Protocol to the International Covenant on Civil and Political Rights n.1, Dec. 16, 1966, 999 U.N.T.S. 171. Some scholars posit Trinidad & Tobago’s denunciation of the American Convention as the first instance of backlash in the context of the inter-American human rights system. See Wayne Sandholtz, Yining Bei & Kayla Caldwell, *Backlash and International Human Rights Courts*, in CONTRACTING HUMAN RIGHTS: CRISIS, ACCOUNTABILITY, AND OPPORTUNITY 159, 162-3 (Alison Brysk & Michael Stohl eds., 2017).

186. Pursuant to Article 78 of the Convention, the denunciation takes effect only one year after a State submits the instrument of withdrawal. American Convention on Human Rights, *supra* note 8, art. 78.

187. See Natasha Parassram Concepcion, *The Legal Implications of Trinidad & Tobago’s Withdrawal from the American Convention on Human Rights*, 16 AM. U. INT’L L. REV. 847, 854 (2001).

188. In 2012, Venezuela also denounced the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention). See Sergey Ripinsky, *Venezuela’s Withdrawal From ICSID: What it Does and Does Not Achieve*, INVESTMENT TREATY NEWS (Apr. 13, 2012), <https://www.iisd.org/itn/2012/04/13/venezuelas-withdrawal-from-icsid-what-it-does-and-does-not-achieve/>.

189. Notice of Denunciation, Minister of Popular Power for Foreign Affairs of the Bolivarian Republic of Venezuela, Letter from Nicolás Maduro Moros to José Miguel Insulza, Secretary General, Organization of American States at 11 (Sep. 6, 2012), http://www.oas.or/DIL/Nota_Republica_Bolivariana_Venezuela_to_SG.English.pdf [hereinafter Notice of Denunciation]. Venezuela expressly stated its intention to also withdraw from the Inter-American Commission on Human Rights’

exit came at a particularly difficult time for the inter-American system, as several States had successfully pushed for a reform process of the Inter-American Commission that debilitated much of the system's strength.¹⁹⁰ The denunciation also came at a difficult time for the country itself. At the time, Venezuela was going through a political crisis. The situation has since dramatically deteriorated, reaching what human rights organizations see as a "humanitarian crisis"¹⁹¹ with systematic human rights violations.¹⁹²

In its Notice of Denunciation, then-Minister of Foreign Affairs and current President Nicolás Maduro explained the country's radical decision, denouncing the inter-American human rights bodies' "perverted practices"¹⁹³ and "flagrant [and] systematic"¹⁹⁴ violations of the American Convention, and asserting that Venezuela was "in the vanguard of rights-based systems in the region."¹⁹⁵ Maduro criticized the OAS human rights bodies for becoming "a political weapon aimed at undermining the stability of specific governments . . . [interfering] in the internal affairs of our government, violating . . . the principle of respect for state sovereignty and the principle of self-determination of peoples"¹⁹⁶ In the same communication, he praised the United Nations' Human Rights Council's Universal Periodic Review mechanism as based on "constructive dialogue under conditions of equality, compatibility, respect, and justice,"¹⁹⁷ despite legal scholars' increasing questioning of the Human Rights Council as a politicized mechanism for human rights protection.¹⁹⁸

Unlike Peru's and Trinidad & Tobago's submissions to withdraw from the American Convention, Venezuela's Notice of Denunciation included an appendix containing a detailed explanation of its decision. The country offered

competence. *Id.* The country ratified the Convention in 1977 and recognized the competence of the Inter-American Court in 1981. *Id.* at 1.

190. See *infra* IV.B.

191. See, e.g., *Venezuela's Humanitarian Crisis*, HUMAN RIGHTS WATCH (Oct. 24, 2016) ("Venezuela is experiencing a profound humanitarian crisis.").

192. Press Release, U.N. Off. of the High Commissioner of H.R., *Venezuela: Human Rights Violations Indicate 'Policy to Repress'* (Aug. 30, 2017), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22007&LangID=E>. The economic and social situation in the country is so precarious that children literally die of hunger, despite the country having "the largest proven oil reserves in the world." See Nicholas Casey, *Dying Infants and No Medicine: Inside Venezuela's Failing Hospitals*, N.Y. TIMES (May 15, 2016), <https://nyti.ms/1V3SFNG>; Meridith Kohut and Isayen Herrera, *As Venezuela Collapses, Children Are Dying of Hunger*, N.Y. TIMES (Dec. 17, 2017), <https://nyti.ms/2kDIN0S>.

193. Notice of Denunciation, *supra* note 189, at 11.

194. *Id.* at 5.

195. *Id.* at 2.

196. *Id.* at 3.

197. *Id.* at 4.

198. See Wuerth, *supra* note 9, at 313 (noting that "the Human Rights Council, like the Human Rights Commission before it, is of questionable value . . ."); see also Gayatri Patel, *Smoke and Mirrors at the United Nations' Universal Periodic Review Process*, 10 INT'L J. HUM. RTS. IN HEALTHCARE 310 (2017) (calling the Universal Periodic Review mechanism "superficial in nature"); Mie Roesdahl, *Universal Periodic Review and its Limited Change Potential: Tracking the Complexity of Multiple Actors and Approaches to Human Rights Change Through the Lens of the UPR Process of Nepal*, 9 J. HUM. RTS. PRACTICE 401 (2017). But see Rochelle Terman & Erik Voeten, *The Relational Politics of Shame: Evidence from the Universal Periodic Review*, 13 REV. INT'L ORGS. 1 (2018) (arguing that "selective and politicized" interactions between States can affect positively States' compliance with human rights norms).

three sets of reasons for its denunciation: first, the alleged lack of impartiality of the Inter-American Commission;¹⁹⁹ second, the fact that cases were submitted by the Commission to the Court in violation of the rule of prior exhaustion of domestic remedies;²⁰⁰ and finally, a number of reasons based on the interaction between Venezuela's constitutional law and the country's international human rights obligations, as articulated by the Venezuelan Supreme Court.²⁰¹

B. Covert Resistance

Among the reasons Venezuela gave for denouncing the American Convention was an unprecedented event in the history of the inter-American system: a two-year process led by the Organization of American States' Permanent Council in which the Inter-American Commission, States, and civil society organizations addressed the need for reforming the Inter-American Commission.

The Commission is not a judicial body; rather, it issues recommendations. If States fail to follow those recommendations, the Commission may submit a petition to the Inter-American Court, since, unlike in the European human rights system, individuals in the Americas may not submit complaints directly to the Inter-American Court. The Commission also conducts country visits,²⁰² issues precautionary measures,²⁰³ publishes annual reports on the state of human rights in the region to be presented to the OAS General Assembly,²⁰⁴ and publishes thematic reports on different human rights matters.²⁰⁵ The Commission's jurisdiction stems from the Charter of the Organization of American States,²⁰⁶

199. Specifically, Venezuela denounced the Commission's "[p]artiality and lack of precision" in including certain countries in the Commission's annual report on grave human rights violations; the Commission's interference with domestic legislative processes; the lack of criteria for the Commission's timing of proceedings; the lack of precision regarding precautionary measures and individual petitions; the Commission's "[d]iscretion and laxness in reinterpreting its mandates and rules"; the "conspiratorial negligence" of the Commission's Executive Secretary in response to the thwarted coup d'état of April 2002; and the "impossibility of making necessary reforms" to the inter-American human rights system. Notice of Denunciation, *supra* note 189, at 15–19.

200. See American Convention on Human Rights, *supra* note 37, art. 46.1(a), 1144 U.N.T.S. at 155 (prohibiting the Commission from admitting a petition or communication unless "the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law").

201. See Notice of Denunciation, *supra* note 189, at 3, 5.

202. See Commission Rules of Procedure, *supra* note 37, ch. IV.

203. See Commission Rules of Procedure, *supra* note 37, art. 25.

204. See Commission Rules of Procedure, *supra* note 37, art. 59.

205. See Commission Rules of Procedure, *supra* note 37, art. 58. The Commission has published reports on a wide range of topics, such as poverty and human rights; rights of indigenous peoples; pretrial detention; freedom of expression; human mobility; violence against LGBTI persons; gender equality; the right to truth; the death penalty; sexual violence; indicators on economic, social and cultural rights; and terrorism and human rights.

206. See Charter of the Organization of American States art. 106, Apr. 30, 1948, 48 U.N.T.S. 1609 ("There shall be an Inter-American Commission on Human Rights, whose principal function shall be to promote the observance and protection of human rights and to serve as a consultative organ of the Organization in these matters. An inter-American convention on human rights shall determine the structure, competence, and procedure of this Commission, as well as those of other organs responsible for these matters.").

the American Convention on Human Rights²⁰⁷ and the American Declaration on the Rights and Duties of Man²⁰⁸—an international instrument that predated the Universal Declaration of Human Rights by months.²⁰⁹

In June 2011, “with the aim of strengthening the inter-American human rights system,”²¹⁰ the OAS Permanent Council established a Special Working Group to make recommendations. Multiple rounds of conversations, academic conferences, and diplomatic meetings took place between 2011 and 2013.²¹¹ As a leading human rights activist observes, the process kept human rights defenders in the Americas “on tenterhooks for nearly two years.”²¹² The consultation process, which resulted in the adoption of a new set of rules of procedure for the Commission,²¹³ was a direct response to States’ discomfort with the Commission’s handling of certain matters—particularly, the Commission’s expansive use of precautionary measures, the absence of clear guidelines for the admissibility of petitions against States, and the lack of guidelines for the inclusion of certain States under Chapter IV of the Commission’s Annual Report, known as the “black list” of countries that violate human rights in a systematic manner.²¹⁴ Former OAS officials candidly observe that, when the process began, the environment was one “of mistrust between the member States and the Commission.”²¹⁵ That environment did not change significantly, and though the process ended with both the Commission and States praising the many agreements they reached, such agreements came at the expense of a painfully detailed set of regulations imposed on the Commission. By forcing the Commission to adopt new rules and regulations with specific and detailed guidelines, States effectively demonstrated that they retained the power to guide,

207. See American Convention on Human Rights, *supra* note 37, ch. VII, 1144 U.N.T.S. at 153.

208. See Commission Rules of Procedure, *supra* note 37, art. 51 (“The Commission shall receive and examine any petition that contains a denunciation of alleged violations of the human rights set forth in the American Declaration of the Rights and Duties of Man in relation to the Member States of the Organization that are not parties to the American Convention on Human Rights.”).

209. See G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

210. OAS Permanent Council, *Rep. of the Special Working Group to Reflect on the Workings of the Inter-American Commission on Human Rights with a View to Strengthening the Inter-American Human Rights System*, OEA/Ser.G, CP/doc.4675/12, at 1 (Jan. 25, 2012).

211. The Permanent Council held fifteen regular and special sessions and the Inter-American Commission devoted thirty-seven meetings to the issue. Five regional forums were held, with more than 150 speakers from civil society and representatives from 32 States and States, non-governmental organizations, academics, and individuals submitted position papers (more than one hundred and fifty in total). See J. Jesús Orozco, *The Process of Strengthening the Inter-American Human Rights System*, 19 APORTE DPLF 4 (2014).

212. Katya Salazar, *Between Reality and Appearances*, 19 APORTE DPLF 16 (2014).

213. Commission Rules of Procedure, *supra* note 37.

214. See Gabriela Kletzel, *The Inter-American Commission on Human Rights’ New Strategic Plan: An Opportunity for True Strengthening*, 22 INT’L J. HUM. RTS. 1249 (2018). The term “black list” (“*lista negra*”) is used colloquially by media outlets to refer to the annual report’s designation. See, e.g., Sergio Gómez Maseri, *Colombia ingresó de nuevo a la ‘lista negra’ de la Comisión Interamericana de Derechos Humanos* [Colombia re-entered the “blacklist” of the Inter-American Commission on Human Rights], EL TIEMPO (Apr. 15, 2010), <https://www.eltiempo.com/archivo/documento/CMS-7601167>.

215. Hugo de Zela, *The Process of Strengthening the Inter-American Human Rights System*, 19 APORTE DPLF 9, 10 (2014). De Zela, then Chief of Staff of the General Secretariat of the OAS, further notes that the lack of dialogue between States and the Commission “resulted in a significant degree of misunderstanding on both sides, frequently marked by mistrust and misconceptions of the reasons behind some actions.” *Id.* at 9.

if not control, many of the Commission's powers. The "strengthening process" has amounted to a covert pushback by the States under diplomatic guise, even if some of its results—such as the requirement that the Commission pay more attention to how it justifies its recommendations—have been reasonable.

Sustained resistance may not be intended to undermine a system but could be part of a healthy process to improve it. Something of this sort could happen with judicial challenges to the Inter-American Court's decisions, as I show in the next Section. To be sure, some States may have participated in the strengthening process with a sincere belief that it was necessary to effect changes in order to improve the Commission's work. Just as domestic lawmakers push for changes to domestic policy when they see that current regulations are not sound or need to be updated, so do States when international norms and regulations need to be reformed.²¹⁶ However, when other interests drive the push for change, the attempt to alter the regulations—or, in the present case, the inter-American system—may not be bona fide efforts to enhance the system but rather a covert attempt to weaken it.

The process discussed in this Section was significantly an effort *not* to improve the system, but rather to undermine it, despite the friendly rhetoric that accompanied it. To determine whether instances of resistance are part of a concealed effort to weaken an international institution, one must look at the motivations that underlie the reform processes (why do States want to bring about change?), the public statements and the general rhetoric that States' representatives use (what are the problems or challenges that States identify?), and the ultimate results of such processes (how is the international institution affected by the reform process?). These are some of the questions that guide the analysis that follows, where I show that the efforts to reform the Commission—and, more generally, the system—were essentially instances of resistance with the (covert) aim of undermining it.

International human rights bodies routinely issue precautionary measures, also called "interim" or "provisional" measures.²¹⁷ Under the Inter-American Commission's Rules of Procedure, the Commission may adopt precautionary measures whenever there are "serious and urgent situations" presenting a risk of "irreparable harm to persons or to the subject matter of a pending petition or case

216. States have attempted to reform the inter-American human rights system several times. The distinctive feature of the 2011-2013 process, as noted by a former chairman of the Inter-American Commission, was that States pushed to take over the reform process—something that had not occurred before. See Felipe González Morales, *El proceso de reformas recientes al Sistema Interamericano de Derechos Humanos* [The process of recent reforms to the Inter-American Human Rights System], 59 REVISTA INSTITUTO INTERAMERICANO DE DERECHOS HUMANOS 119, 121 (2014).

217. The International Court of Justice exercises its legal authority to issue precautionary measures as well. See Statute of the International Court of Justice art. 41, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993 ("The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party."). Human rights bodies that use precautionary measures include: the U.N. Committee Against Torture; the U.N. Committee on the Elimination of Discrimination Against Women; the Human Rights Committee; the Committee on Economic, Social, and Cultural Rights; the Committee on the Elimination of Racial Discrimination; the Committee on the Rights of Persons with Disabilities; and the Committee on Enforced Disappearances.

before the organs of the inter-American system.”²¹⁸ Human rights activists and commentators widely praise the Commission’s rich case law on precautionary measures,²¹⁹ but leading up to the June 2011 “strengthening process,” States were becoming increasingly dissatisfied with the Commission’s use of precautionary measures for at least two reasons. First, some States directly challenged the Inter-American Commission’s assertion of “implied powers” to issue precautionary measures, largely because the American Convention does not grant the Commission such power. Second, even some of the States that did not impugn the Commission’s precautionary jurisdiction nonetheless expressed concern for what they saw as an illegitimate expansion of the jurisdiction. In Sections 1 and 2 below, I address the two reasons advanced by States. In Section 3, I summarize States’ latest efforts to reform the system.

1. *Implied Powers*

The American Convention on Human Rights gives power to the *Court*, not the Commission, to issue “provisional measures.” The Commission’s power to issue precautionary measures is not within the enumerated functions listed in Article 41 of the Convention, nor is it in the Commission’s Statute.²²⁰ The Statute grants the Commission the power to make recommendations “on the adoption of *progressive* measures in favor of human rights . . . as well as *appropriate* measures to further observance of those rights,”²²¹ and to request that the Inter-American Court take provisional measures in urgent cases not yet submitted for consideration by the Court.²²² As previously discussed, the Commission’s power to issue interim measures is found in the Commission’s Rules of Procedure adopted by the Commission itself.

According to the Commission, its authority to grant precautionary measures with a binding character rests on “the general duty of the States to respect and guarantee human rights, to adopt the legislative or other measures necessary for ensuring effective observance of human rights, and to carry out in good faith the obligations contracted under the American Convention and the Charter of the OAS.”²²³ The Commission’s justification is vague at best, especially given the fact that neither the American Convention nor the Charter of the OAS mention the Commission’s power to grant urgent measures. Moreover, such a power hardly follows from States’ “general duty” to respect

218. Inter-Am. Comm’n H.R., Rules of Procedure, art. 25 (2011).

219. Regional human rights mechanisms, such as the European Court of Human Rights and the African Commission on Human and People’s Rights, also issue interim measures. In some cases, human rights bodies use precautionary measures to protect other rights, such as freedom of expression, due process, and property. *See generally* Jo M. Pasqualucci, *Interim Measures in International Human Rights: Evolution and Harmonization*, 38 VAND. J. TRANSNAT’L L. 1 (2005).

220. OAS, Statute of the Inter-American Commission on Human Rights, O.A.S. Res. 447 (IX-0/79), OEA/Ser.P./IX.0.2/80 (1979).

221. *Id.* art. 18(b) (emphasis added).

222. *Id.* art. 19(c).

223. Inter-Am. Comm’n H.R., *Report on the Situation of Human Rights Defenders in the Americas*, OEA/Ser.L/V/II.124, doc. 5 rev. 1, ¶ 241 (Mar. 7, 2006), <http://www.cidh.org/countryrep/Defenders/defenderstoc.htm>.

human rights and to adopt “legislative or other measures.” In fact, when the OAS General Assembly did want to grant such a power to a human rights body, it expressly stated it in the text of the American Convention.²²⁴ In a formalistic legal culture such as Latin America’s, a body that asserts a power not expressly enumerated in its constituent instrument must provide strong reasons to support such assertion of power.²²⁵ The Commission, in this case, failed to do so.

However, the main criticism levied against the Commission’s self-asserted power to issue precautionary measures has not come from Latin American countries but from the United States. U.S. human rights advocates have asked for precautionary measures in a number of cases, including challenges to detention and deportation,²²⁶ the death penalty,²²⁷ the rights of persons detained in Guantanamo Bay,²²⁸ and the rights of Sioux tribes opposing the construction of the Dakota Access Pipeline.²²⁹ These advocates observe that “[p]recautionary measures are not binding on the United States and U.S. compliance is generally low.”²³⁰ More interestingly, although the U.S. government—at least until 2017—actively participated in hearings convened by the Inter-American Commission and responded to requests for precautionary measures,²³¹ its responses to the Commission have routinely pointed out the Commission’s “lack of jurisdiction to issue precautionary measures.”²³² More recently, other States

224. See American Convention on Human Rights, *supra* note 8, art. 63(2).

225. On Latin America’s legal formalism, see, generally, Jorge L. Esquirol, *Writing the Law of Latin America*, 40 GEO. WASH. INT’L L. REV. 693, 695 (2008-2009); Jorge L. Esquirol, *The Turn to Legal Interpretation in Latin America*, 26 AM. U. INT’L L. REV. 1031 (2011).

226. See, e.g., Haitian Refugees v. United States, Case 10.675, Inter-Am. Comm’n H.R., Report No. 28/93, OEA/Ser.L/V/85, doc. 9 rev. (1993); Nyamhindi v. United States, PM 149/08, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II.134, doc. 5 rev. 1, ch. III, ¶ 36 (2008); Wayne Smith v. United States, Case 12.562, Inter-Am. Comm’n H.R., Report No. 81.10 (2010).

227. See, e.g., Beazley v. United States, Case 12.412, Inter-Am. Comm’n H.R., Report No. 101/03, OEA/Ser.L/V/II.118, doc. 5 rev. 2 (2003); Bucklew v. United States, PM 177/14, Petition 684-14, Inter-Am. Comm’n H.R. (2014); Kevin Cooper v. United States, PM 160/11, Petition 593-11, Inter-Am. Comm’n H.R. (2011); José Ernesto Medellín v. United States, Case 12.644, Inter-Am. Comm’n H.R., Report No. 90-09 (2006).

228. See, e.g., Detainees being held by the United States at Guantanamo Bay, Cuba v. United States, Petition 259/02, Inter-Am. Comm’n H.R. (2002).

229. Cymie Payne, *Standing Rock goes to the Inter-American Commission on Human Rights*, INTLAWGRRLS (Dec. 3, 2016), <https://ilg2.org/2016/12/03/standing-rock-goes-to-the-inter-american-commission-on-human-rights/>.

230. Human Rights Institute, Columbia Law School, *Human Rights in the United States: Primer on Recommendations from the Inter-American Human Rights Commission & the United Nations*, at 14 (Jun. 2015), http://www.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/primer_june_2015_for_cle.pdf.

231. For example, in its 2014 Digest of United States Practice in International Law, the year after the strengthening process had concluded, the U.S. government proclaimed to be “firmly committed to supporting an Organization that values accountability to its member States and transparency in its operating procedures.” The government stated: “We look forward to working with other member States to consolidate this process . . . and transform the OAS into a more vibrant and efficient institution that supports the core values of its founding Charter, representative democracy, the exercise of human rights, security for those most vulnerable and sustainable development for all.” U.S. DEP’T OF STATE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW, ch. 7, § E(1) at 303 (2014).

232. See, e.g., U.S. Additional Response to the request for precautionary measures, Detainees being held by the United States at Guantanamo Bay, Cuba, Petition 259/02, Inter-Am. Comm’n H.R. (July 15, 2002), <https://www.state.gov/s/l/38642.htm>. In response to a 2015 precautionary measures request, the U.S. noted: “While the Commission’s arrogation of such a power is perhaps understandable, it is not within the mandate given to the Commission by the OAS Member States.” U.S. DEP’T OF STATE, DIGEST

have joined the United States' jurisdictional challenge to the Commission's granting of precautionary measures.²³³

2. Expansive Powers

The majority of requests for precautionary measures concern the rights to life and personal integrity.²³⁴ In the context of militarized police forces in most countries in the region, such figures are not surprising, especially in light of the lack of judicial oversight for the use of military force. Through the use of urgent measures, human rights defenders found an expedited avenue to protect victims of human rights violations. States did not object to the Commission's granting of said measures—they at least addressed the requests, even if some ultimately failed to provide the Commission with relevant information regarding the matter at hand. But as human rights petitions became more complex and diverse in nature, so did the Commission's precautionary jurisdiction. Latin American human rights defenders were no longer only facing the urgency of threats against the lives or physical integrity of individuals persecuted by authoritarian regimes, but they were dealing with other types of human rights violations as well. Thus, human rights advocates began to submit requests for precautionary measures in cases that did not deal directly with threats to basic rights such as the right to life or physical integrity. The Commission began addressing petitions for urgent measures on the rights to freedom of expression,²³⁵ access to healthcare,²³⁶ children's rights,²³⁷ and indigenous peoples' rights.²³⁸ Again, States did not

OF UNITED STATES PRACTICE IN INTERNATIONAL LAW, ch. 7, § E(c) at 296 (2015).

233. In March 2014, the government of Ecuador—one of the most prominent critics of the Inter-American Commission before, and during, the strengthening process—rejected the request for precautionary measures on behalf of three journalists charged with the crime of “legal defamation” under section 494 of the Ecuadorian Penal Code. The government argued first that neither the American Convention, nor the Commission's Statute “provide power (*sic*) to the IACHR to order interim measures.” See *Ecuador rejects the precautionary measures of the Inter-American Commission on Human Rights (IACHR)*, MINISTERIO DE RELACIONES EXTERIORES Y MOVILIDAD HUMANA, <http://www.cancilleria.gob.ec/ecuador-rejects-the-precautionary-measures-of-the-inter-american-commission-on-human-rights-iachr/> (last visited on Jan. 4, 2018).

234. Burbano and Viljoen note that “[i]nterim measures granted to detainees represent 27% (210 out of a total of 771 adopted interim measures) of the total of measures adopted in the inter-American system” Clara Burbano-Herrera & Franz Viljoen, *Interim Measures Before the Inter-American and African Human Rights Commissions: Strengths and Weaknesses*, in *HUMAN RIGHTS AND CIVIL LIBERTIES IN THE 21ST CENTURY 168–69* (Yves Haeck & Eva Brems eds., 2014).

235. See, e.g., *Trabajadores de la Radio Calenda v. México*, PM, Inter-Am. Comm'n H.R., ¶¶ 90–96 (2002).

236. *Jorge Odir Miranda Cortez y otros v. El Salvador*, PM, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.111, doc. 20 rev. 1, ¶ 30 (2000); “*Amelia*” v. Nicaragua, PM, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II, doc. 5 rev. 1, ¶ 71 (2010); *X v. Argentina*, PM, Inter-Am. Comm'n H.R., Report No. 412/11 OEA/Ser.L/V/II, doc. 69 rev. 1, ¶ 29 (2011); *Niurka Luque Alvarez v. Cuba*, PM, Inter-Am. Comm'n H.R., Report No. 153/12 (2012).

237. *AW v. Guyana*, PM 254/07, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.134, doc. 5 rev. 1, ¶ 22 (2008).

238. See e.g., *Comunidad Garifuna Triunfo de la Cruz v. Honduras*, PM, Case 12.548, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.127, doc. 4 rev. 1, ¶ 34 (2006); *Comunidad Indígena Maho v. Suriname*, PM, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II, doc. 5 rev. 1, ¶ 43 (2010); *Comunidades Indígenas Mayas v. Belice*, PM, Case 12.053, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.111, doc. 20 rev., ¶ 11 (2000); *Comunidades Indígenas Ngobe y Otras v. Panamá*, PM 56/08, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II, doc. 51 rev. 1, ¶ 43 (2009); *Comunidad Lof Paichil Antrio del Pueblo Indígena Mapuche v. Argentina*, PM, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II, doc. 69 rev. 1, ¶ 27 (2011); *Comunidad Yaxye Axa del*

object to the Commission's expansion of precautionary powers, but rather responded to the Commission's requests for urgent measures, in some cases accepting them and acting to enforce them.

In 2010, the Commission granted precautionary measures on behalf of eighteen Mayan communities who alleged that the government of Guatemala had failed to obtain the communities' free, prior, and informed consent and to consult with them before granting a mining concession to the multinational company GoldCorp to develop a \$250-million exploitation project.²³⁹ The precautionary request had been filed as part of a full petition submitted by the communities three years earlier, and was pending before the Commission at the time of Guatemala's grant to GoldCorp. In response, the Inter-American Commission requested that Guatemala suspend all mining activities until it could decide on the merits of the petition.²⁴⁰ The President of Guatemala initially declared that the government would not order the suspension of mining activities,²⁴¹ a move that caused human rights defenders—including religious leaders and the Nobel Peace Prize laureate and Mayan leader Rigoberta Menchú—to publish an open letter urging him to reconsider his decision.²⁴² The pressure from civil society proved effective, and the government ultimately stepped back and formally communicated to the Commission that Guatemala would comply with the requested measure.²⁴³ This opened the door to precautionary measures being used on behalf of large groups of individuals, many of them unidentified.²⁴⁴ More significantly, precautionary measures, once conceived as an urgent mechanism to protect specific victims at the hands of the state, could now halt

Pueblo Enxet-Lengua v. Paraguay, PM, Case 12.313, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.114, doc. 5 rev., ¶ 53 (2001); Doce Clanes Saramaka v. Surinam, PM, Case 12.338, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.117, doc. 1 rev. 1, ¶ 89 (2002); Pueblo Indígena Naso de la Región Bocas del Toro v. Panamá, PM, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II, doc. 51 rev. 1, ¶ 44 (2009); Sarayacu v. Ecuador, PM, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.118, doc. 5 rev. 2, ¶ 34 (2003).

239. Communities of the Maya People (Sipakense and Mam) of the Sipacapa and San Miguel Ixtahuacán Municipalities in the Department of San Marcos v. Guatemala, PM, Petition 1566-07, Inter-Am. Comm'n H.R., Report No. 20/14 ¶ 6 (2010).

240. *Id.* Additionally, the Commission asked the state of Guatemala "to implement effective measures to prevent environmental contamination . . . to decontaminate, as much as possible, the water sources of the 18 beneficiary communities . . . to begin a health assistance and health care program for the beneficiaries . . . to adopt any other necessary measures to guarantee the life and physical integrity of the members of the 18 aforementioned Maya communities; and to plan and implement the protection measures with the participation of the beneficiaries and/or their representatives." *Id.*

241. Rigoberta Menchú Tum & Álvaro Ramazzini, *Por el cierre de la mina Marlin que causa contaminación y enfermedades: Carta abierta a Álvaro Colom* [In support of closing the Marlin mine which causes pollution and disease: Open letter to Álvaro Colom], AMÉRICA LATINA EN MOVIMIENTO REVISTA (June 11, 2010), <https://www.alainet.org/es/active/38838>.

242. *Id.*

243. Letter from Dora Ruth del Valle Cóbar, President of the Guatemalan Presidential Commission on Coordination of the Executive's Human Rights Policy, containing the Report by the State of Guatemala to the Honorable Inter-American Commission on Human Rights regarding Precautionary Measure (MC 260-07) on behalf of the communities of the Maya People (Sipakense and Mam) of the Sipacapa and San Miguel Ixtahuacán Municipalities in the Department of San Marcos, Ref. P-1018-2010/RDVC/HEMJ/ad (June 23, 2010) (translated by author). The government did observe, however, that their studies did not indicate that the waters were contaminated or that there were diseases related to the alleged contamination caused by the mine.

244. In fact, in its response to the Commission, the government requested the petitioners "to provide a detailed and individualized list of alleged incidents concerning the rights to life and physical integrity." *Id.* at 3.

the construction of multimillion-dollar development projects.

Less than a year later, indigenous communities of the Xingu River Basin in the Brazilian Amazon rainforest turned to the Commission to request precautionary measures.²⁴⁵ The petitioners' claims were similar to those of the Mayan communities: they alleged that the government had failed to conduct consultation processes for the construction of the \$14-billion Belo Monte hydroelectric dam—the world's third-largest dam—considered by the government to be “a flagship project of national modernization and development.”²⁴⁶ The project, however, could potentially impact thousands of indigenous people.²⁴⁷ The petitioners claimed that their rights to life and physical integrity were at risk due to the construction of the power plant.²⁴⁸ The Inter-American Commission granted the petitioners' request for urgent measures, and requested that the State “immediately suspend the licensing process . . . and stop any construction work from moving forward until certain minimum conditions [were] met.”²⁴⁹ The Commission ordered Brazil to conduct consultation processes pursuant to international standards, to “adopt measures to protect the life and physical integrity of the members of the indigenous communities living in voluntary isolation . . . and to prevent the spread of diseases and epidemics . . . as a consequence of the construction of the Belo Monte hydropower plant.”²⁵⁰

This time, however, the State's response was very different. Brazil vehemently rejected the Commission's measures, calling them “unjustified and premature.”²⁵¹ The government of President Dilma Rousseff recalled its ambassador to the Organization of American States, temporarily withdrew its candidate for a position on the Inter-American Commission, and ordered a stop to its \$800,000 contribution to the Commission.²⁵² The Brazilian Ministry of Foreign Affairs released a press statement expressing its “perplexity” with the Commission's decision, observing—just as Venezuela would do a year later in its Notice of Denunciation of the American Convention²⁵³—that petitioners had not exhausted domestic remedies, and that the Commission had inappropriately

245. Indigenous Communities of the Xingu River Basin, Pará, Brazil v. Brazil, PM 382/10, Inter-Am. Comm'n H.R. (Apr. 1, 2011).

246. Anthony Hall & Sue Branford, *Development, Dams and Dilma: The Saga of Belo Monte*, 38 CRITICAL SOC. 851, 853 (2012).

247. Tom Phillips, *Brazil to Build Controversial Belo Monte Hydroelectric Dam in Amazon Rainforest*, THE GUARDIAN (Feb. 2, 2010), <https://www.theguardian.com/environment/2010/feb/02/brazil-amazon-rainforest-hydroelectric-dam>.

248. *Indigenous Communities*, Inter-Am. Comm'n H.R., *supra* note 245.

249. *Id.*

250. *Id.*

251. *Brazil Rejects Request to Halt Belo Monte Dam in Amazon*, BBC NEWS (Apr. 6, 2011), <https://www.bbc.com/news/world-latin-america-12990099>; *OEA pede que Brasil suspenda Belo Monte, e governo se diz 'perplexo,'* BBC NEWS BRASIL (Apr. 5, 2011), https://www.bbc.com/portuguese/noticias/2011/04/110405_belomonte_oea_pai (translated by author).

252. Natuza Nery, *Dilma retalia OEA por Belo Monte e suspende recursos*, FOLHA DE S. PAULO (Apr. 30, 2011), <https://www1.folha.uol.com.br/fsp/mercado/me3004201117.htm> (translated by author); see also Denise Chrispim Marin, *Brasil não paga OEA por causa de Belo Monte*, ESTADÃO (Oct. 20, 2011) <https://economia.estadao.com.br/noticias/geral,brasil-nao-paga-oea-por-causa-de-belo-monte-imp-,787892> (translated by author).

253. See Notice of Denunciation, *supra* note 189.

used its precautionary jurisdiction.²⁵⁴ In the government's press release, there was one particular phrase that would prove critical for the strengthening process that OAS States would soon set up: the Ministry of Foreign Affairs stated that, "without downplaying the relevance of international human rights systems, it must be remembered that these systems are subsidiary or complementary..."²⁵⁵ Thus, in accusing the Commission of illegitimately intervening in its country's domestic affairs, Brazil launched the argument for greater deference towards States.

As one commentator notes, the Belo Monte incident "changed the relationship between Brazil and the [inter-American system] from one of benign neglect to outright animosity."²⁵⁶ Such animosity found reception in States that had been uncomfortable with the Commission's performance for years, such as Venezuela, Colombia, Ecuador and Nicaragua. It took only a couple of months for diplomatic efforts to lead to the unprecedented and coordinated critique of the inter-American human rights system at the June 2011 OAS General Assembly in El Salvador.

3. *New Regulations*

After two years of evaluations and debate, the "strengthening process" came to an end in June of 2013. In a resolution adopted a few months earlier, the Inter-American Commission addressed all the recommendations made by the Working Group,²⁵⁷ and, despite some States' hesitations about whether the process should continue, the OAS General Assembly was ultimately satisfied with the result.²⁵⁸ Some of the key reforms that States imposed on the Commission were the adoption of clear guidelines and criteria for the Commission's annual reports and for the processing of precautionary measures and individual complaints.²⁵⁹ The new Rules of Procedure contain strict and detailed guidelines for when the Commission may grant precautionary measures, along with the duty to publish the opinions of all members of the Commission, especially if some of them disagree with the measures issued. The Commission

254. Ministério das Relações Exteriores, *Solicitação da Comissão Interamericana de Direitos Humanos (CIDH) da OEA*, Nota 142 (Apr. 5, 2011), <http://www.itamaraty.gov.br/pt-BR/notas-a-imprensa/2555-solicitacao-da-comissao-interamericana-de-direitos-humanos-cidh-da-oea>.

255. *Id.* (translated by author).

256. COURTNEY HILLEBRECHT, DOMESTIC POLITICS AND INTERNATIONAL HUMAN RIGHTS TRIBUNALS: THE PROBLEM OF COMPLIANCE 132 (2013).

257. IACHR, Res. 1/2013, Reform of the Rules of Procedure, Policies and Practices (Mar. 18, 2013), <http://www.oas.org/en/iachr/decisions/pdf/resolution1-2013eng.pdf>.

258. See OAS General Assembly, AG/RES. 1 (XLIV-E/13), Results of the Process of Reflection on the Workings of the Inter-American Commission on Human Rights with a View to Strengthening the Inter-American Human Rights System, (July 23, 2013) ("[R]ecognizing . . . that the [Inter-American Commission on Human Rights] has made significant efforts and progress in applying the General Assembly recommendations for strengthening the system.").

259. As Salazar explains, "[t]he reforms to precautionary measures were aimed at increasing the transparency of the criteria used to grant them and to identify beneficiaries, and also sought to improve the follow-up to such measures. With respect to the individual complaint mechanism, the reform offered predictability in the determination of priorities for the examination and admission of petitions." Salazar, *supra* note 212, at 19.

also made changes to its work on human rights monitoring and promotion.²⁶⁰

In spite of diplomatic calls for unity and the need to work together to make the system stronger, scholars and advocates unanimously see the “strengthening process” as a more or less successful effort to weaken the Commission.²⁶¹ And even if some see the outcome as a “happy ending,”²⁶² debates on how to improve the system’s performance—or even discussions on the Inter-American Commission’s location—did not cease with the adoption of the process’s final report. At the 2014 Third Conference on State Parties to the American Convention, both Ecuador and the host Uruguay led States to adopt a declaration agreeing to undertake “legal, political, budgetary, regulatory and operational” studies to change the Commission’s venue from Washington, DC, to a city in a country that is a party to the American Convention, and to regulate the Commission’s special rapporteurships.²⁶³ In sum, the push for reform does not seem to have ended with the adoption of the final report.

C. Judicial Pushback

As the inter-American system becomes more complex due to the diversity of cases it must address and the shift in States’ governments from dictatorial to democratic, States’ forms of resistance also diversify. Besides the diplomatic and political setbacks discussed above, States also push back through judicial decisions issued by domestic courts. In the context of other human rights regimes, as explained above, some of the most salient examples of States resisting international human rights courts are the cases of the United Kingdom and the Russian Federation, as well as African States’ tense relations with the International Criminal Court.²⁶⁴ In the Americas as well, judicial resistance is becoming an increasingly complex form of resistance that calls for scrutiny and

260. The Commission carries out both “protection” and “promotion” activities. Through its protective jurisdiction, the Commission hears individual petitions, which it may then take to the Inter-American Court. Issuing precautionary measures in cases of imminent danger is also part of the Commission’s protection activities. “Promotion” activities are usually understood as educational activities, such as the elaboration of thematic reports, academic conferences and general training to officials from OAS member States. Some States wanted the Commission to simply—or mostly—focus on “promotion” activities, leaving all protection tasks to the Court.

261. See Douglass Cassel, *The Perfect Storm: Count and Balance*, 19 APORTES DPLF 20, 23 (2014) (“Although many elements of the Working Group’s report made sense and were accepted by the Commission, other proposals were designed to appear to strengthen the Commission while in fact weakening it.”); Gabriela Kletzel, *The Inter-American Commission on Human Rights’ New Strategic Plan: An Opportunity for True Strengthening*, 22 INT’L J. HUM. RTS. 1249 (2018); Claudia Martin & Diego Rodríguez-Pinzón, *Strengthening or Straining the Inter-American Human Rights System*, in THE INTER-AMERICAN COURT OF HUMAN RIGHTS: THEORY AND PRACTICE, PRESENT AND FUTURE 810 (Yves Haecck et al. eds., 2015) (observing that “it was clear that some of the States that instigated the process were not content with the work of [the Commission] and had a hidden agenda intended to limit the scope of the Commission’s powers”).

262. Cassel, *supra* note 261, at 23.

263. Third Conference of States Parties to the American Convention on Human Rights, Declaration of Montevideo (Jan. 22, 2014), <http://cancilleria.gob.ec/wp-content/uploads/2014/01/Montevideo-Declaration-version-3-01-2014-Ingles.pdf>. The Inter-American Commission currently sits in Washington, D.C. to facilitate its work under and with the main bodies of the Organization of American States, which is based in Washington, D.C. as well.

264. See *supra* Part III.

that scholars have largely neglected.²⁶⁵ In Part II, I discussed how national courts helped solidify the Inter-American Court's case law on anti-impunity.²⁶⁶ That was a salient example of national courts following the lead of the Inter-American Court—a situation that not only helped the Inter-American Court become a stronger and more legitimate international tribunal, but that also helped States address human rights violations. But State support may have gone too far. The Court has become a super-constitutional tribunal, not an international court with contained powers,²⁶⁷ and States have started to perceive the system as too intrusive. As I have written before, an example of such intrusiveness is the use of “conventionality control,” the Inter-American Court's doctrine whereby all domestic judges must follow, and give preference to, the Court's interpretation of fundamental rights.²⁶⁸

I now turn my attention to instances where national courts do the opposite of what I traced in Part II of this Article. Instances of resistance may be read both as efforts to improve the system's legitimacy—for instance, when a domestic court understands itself as a partner in legitimizing the international regime—or to undermine it—for example, when the domestic court sees the system as being too intrusive or plainly illegitimate. The case study I explore in this section illustrates this twofold model of judicial pushback as a resistance method: the Argentinean Supreme Court could be seen as either contributing to the Inter-American Court's overall legitimacy by challenging it or seeking to undermine the Inter-American Court's assertion of power as a super-constitutional tribunal with regional reach. As with instances of covert resistance identified in the previous section, here again it is necessary to dig into the actors' motivations and their actions' ultimate effects. Despite the immediate hard consequences—i.e., the rebuke of international authority—domestic judicial pushback can contribute to a process of improvement of the human rights system. It may reduce the international court's powers (*potestas*), but in so doing it may well enhance the international court's authority (*auctoritas*).

1. Domestic Challenge

On February 14, 2017, the Argentinean Supreme Court handed down a decision that sent shock waves through the field of regional human rights law. The ruling concerned the implementation of a 2011 Inter-American Court of Human Rights decision against Argentina in which the Court had found the State

265. *But see* Soley & Steinger, *supra* note 78. *See also* Alexandra Huneus, *Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights*, 44 CORNELL INT'L L.J. 493 (2011). Huneus' analysis deals with national courts' inability or unwillingness to enforce decisions by the Inter-American Court of Human Rights, and assumes a top-down relation among international courts and domestic courts. My discussion aims at theorizing domestic courts' resistance in the context of agonistic interactions among courts and, more specifically, without assuming a vertical relationship among them.

266. *See supra* Part II.B.

267. Ariel E. Dulitzky, *An Inter-American Constitutional Court? The Invention of the Conventionality Control by the Inter-American Court of Human Rights*, 50 TEXAS INT'L L.J. 45, 52 (2015).

268. *See* Jorge Contesse, *The Final Word? Constitutional Dialogue and the Inter-American Court of Human Rights*, 15 INT'L J. CONST. L. 414, 417 (2017).

to be in violation of the American Convention.

At issue was a 2001 decision in which Argentina's Supreme Court affirmed a civil judgment against two publishers, Jorge Fontevecchia and Héctor D'Amico, for running stories about an unacknowledged child of then-President Carlos Menem.²⁶⁹ In response, the journalists filed a case against Argentina before the inter-American human rights system. Ten years later, the Inter-American Court ordered the State to "revoke the decision in its entirety."²⁷⁰ Argentina's executive branch then asked the Supreme Court to comply with the Inter-American Court's remedy—that is, to revoke its 2001 ruling.

The Supreme Court, however, declined to do so. It reasoned that the Inter-American Court lacked the authority to order the revocation of a domestic judgment, as doing so exceeded its powers under the American Convention.²⁷¹ The decision stunned commentators and legal scholars.²⁷² Human rights organizations decried it, claiming that the Court had "unlatched" Argentina from the inter-American human rights system,²⁷³ and a member of the Inter-American Court, an Argentinean jurist who had previously served on the country's Supreme Court, rebuked the decision in the press.²⁷⁴

These criticisms suggested that Argentina, a country once very supportive of the international system, was now abruptly compromising it.²⁷⁵ To fully understand the reasoning and impact of the Argentinean Supreme Court decision, we need to consider several aspects of the decision with caution.

First, in the decision, the Supreme Court effectively reined in its otherwise progressive approach toward the incorporation of international law.²⁷⁶ In a

269. Fontevecchia and D'Amico v. Argentina, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R., (ser. C) No. 238 (Nov. 29, 2011).

270. *Id.* ¶ 105. The Court also ordered the publication of the judgment in social and official publications. *Id.* ¶¶ 108–110.

271. Corte Suprema de Justicia de la Nación, *supra* note 2, ¶ 11.

272. Víctor Abramovich, *Comentarios sobre el "caso Fontevecchia,"* CENTRO DE JUSTICIA Y DERECHOS HUMANOS UNLA (Feb. 17, 2017), <http://ijdh.unla.edu.ar/advf/documentos/2017/02/58ab010a10d4c.pdf>; Gustavo Arballo, *La Corte Argentina frente a la Corte Interamericana: la resolución de no-cumplimiento del caso Fontevecchia*, SABER LEYES NO ES SABER DERECHO (Feb. 14, 2017), <http://www.saberderecho.com/2017/02/la-corte-argentina-frente-la-corte.html>; Alberto Bovino, *Caso Fontevecchia: la incompetencia de un tribunal*, NO HAY DERECHO (Feb. 24, 2017), <http://nohuboderecho.blogspot.com/2017/02/caso-fontevecchia-la-incompetencia-de.html>; Roberto Gargarella, *La Corte Suprema y los alcances de las decisiones de la Corte Interamericana*, SEMINARIO DE TEORÍA CONSTITUCIONAL Y FILOSOFÍA POLÍTICA (Feb. 15, 2017), <http://seminariogargarella.blogspot.com/2017/02/la-corte-suprema-y-los-alcances-de-las.html>.

273. Centro de Estudios Legales y Sociales, *Las consecuencias del fallo de la Corte Suprema para la vigencia de los derechos humanos en la Argentina*, DPLF BLOG (Feb. 23, 2017), <https://dplfblog.com/2017/02/23/las-consecuencias-del-fallo-de-la-corte-suprema-para-la-vigencia-de-los-derechos-humanos-en-la-argentina/>.

274. Martín Granovsky, *El fallo choca hasta con el Preámbulo*, PÁGINA 12 (Feb. 19, 2017), <https://www.pagina12.com.ar/21115-el-fallo-choca-hasta-con-el-preambulo>; Raúl Zaffaroni, *La Corte Suprema declara su independencia del Estado*, AGENCIA PACO URONDO (Feb. 15, 2017), <https://agenciapacourondo.com.ar/secciones/ddhh/22099-zaffaroni-la-corte-suprema-declara-su-independencia-del-estado>.

275. Daniel Politi, *Argentines Fight Court's Leniency for Human Rights Crimes*, N.Y. TIMES (May 13, 2017), <https://www.nytimes.com/2017/05/13/world/americas/argentina-mauricio-macri-luis-muia.html>

276. Remarkably, the Court cited cases decided over twenty years prior to buttress its claims on subsidiarity. Corte Suprema de Justicia de la Nación, *supra* note 2, ¶ 9.

critical passage, the Court declared that “[i]t is beyond discussion that the Inter-American Court’s decision in contentious cases against the Argentinian State are, *in principle*, binding on the State.”²⁷⁷ Prior to this decision, compliance with international decisions was perceived as mandatory, without qualifications. It was not until now that the court appeared to articulate some space between theory and practice. This allows domestic noncompliance with decisions from the Inter-American Court and potentially with other treaties enshrined in the Argentinean Constitution.²⁷⁸

Second, the Argentinean court’s decision to review the jurisdictional powers of the Inter-American Court is itself astonishing. By purporting to review the powers of an international tribunal, the Supreme Court of Argentina, a domestic body, placed itself above the international system. The Court thus went further than merely unlatching Argentina from the system of human rights law enforcement.

Third, the Argentinean court’s decision went to the core of a critical issue: it resisted the Inter-American Court’s order to “revoke” a decision, an order that typically only superior courts may give to lower courts.²⁷⁹ Such pretension, the Argentinean court observed, would make the Inter-American Court a court of “fourth instance” or of cassation.²⁸⁰ In the Argentinean court’s view, this is not the role of the international tribunal. In the international plane, the Inter-American Court is the final interpreter of the norms of the American Convention, but with respect to domestic law, the final interpreter is the Supreme Court.²⁸¹ It would violate the Argentinian Constitution, the Argentinean court believed, to *revoke* a judicial decision merely upon an order from an international tribunal.²⁸²

Finally, the Argentinean court took issue with the nature of the Inter-American court’s order—an important issue at the core of the implementation of regional human rights law. When an international court finds that a state has violated a regional human rights treaty, it can order the state to remedy the

277. *Id.* ¶ 6 (emphasis added) (translated by author).

278. Art. 75(22), CONSTITUTION OF THE ARGENTINE NATION [ARG.] [CONSTITUTION].

279. Interestingly, the Spanish version of the Inter-American Court’s ruling refers to Argentina’s duty to “refrain from enforcing” (“dejar sin efecto”) the 2001 ruling by the Supreme Court. The English (official) translation uses the verb “to revoke.” When the Argentinean Supreme Court issued its opinion, in February 2017, it also issued a press release summarizing the court’s decision. The press release (in Spanish) stated that the Supreme Court had found that it could not “revoke” (“revocar”) its 2001 decision, as requested by the Inter-American Court. See *La Corte sostuvo que la Corte Interamericana de Derechos Humanos no puede revocar sentencias del Máximo Tribunal argentino*, CENTRO DE INFORMACIÓN JUDICIAL (Feb. 14, 2017), <https://www.cij.gov.ar/nota-24822-La-Corte-sostuvo-que-la-Corte-Interamericana-de-Derechos-Humanos-no-puede-revocar-sentencias-del-M-ximo-Tribunal-argentino.html>.

280. See *id.* ¶ 11 (Maqueda, J., dissenting).

281. Interestingly, almost all constitutional judges interviewed for this study made the exact same proposition: the Inter-American Court is a tribunal that deserves respect, but it cannot dictate how domestic courts should interpret domestic law—let alone order them to revoke a decision or reopen cases.

282. The Court finds that the Inter-American Court’s remedy ordering Argentina “refrain from enforcing” (“dejar sin efecto”) is synonymous with revocation. *Id.* ¶ 11. The Argentinean Court is correct in that this is how the Inter-American Court translated the remedy into the English version of the judgment. By making the words synonyms *in Spanish*, however, the Argentinean Court limited the options available domestically to comply with the remedy. The Supreme Court could have remanded the case both to the executive and Congress, either by declaring that it faced a problem that Congress could address or by exploring alternatives to judicially revoking a firm decision.

violation. But, can it also specify *how* the state is to remedy the violation? This is, to be sure, what the Inter-American Court has done in its three decades of detailed and exhaustive remedial jurisprudence.²⁸³ In its 2017 decision, the Argentinean court directly challenged that approach. The Argentinean court's claim was simple: a State's compliance is limited by its own political structure and by the domestic principle of separation of powers. It is, of course, possible to challenge the Argentinean court's interpretation, but the nature of this challenge raises another important question: should a State be allowed to determine, to some extent, its means of compliance with the general holding of an international tribunal's order?

A critical factor in the Argentinean court's rebuke of the Inter-American Court's authority concerns the appointment of two new justices by President Mauricio Macri in 2016: Carlos Rosenkrantz and Horacio Rosatti. Although no single Justice authored the February 2017 ruling in *Fontevicchia*, it is easy to detect Justice Rosenkrantz's judicial philosophy in the judgment. Before joining the Court, Rosenkrantz, a prominent legal scholar, actively wrote against the use of foreign precedents by constitutional courts.²⁸⁴ As explained in Part II, the Supreme Court of Argentina was a key adopter of the *Barrios Altos* anti-impunity doctrine,²⁸⁵ Rosenkrantz, however, vehemently rejected the Court's receptive approach to inter-American human rights caselaw.²⁸⁶ Citing international human rights law was, according to Rosenkrantz, similar to resorting to "transcendent rules"—that is, "norms that are *beyond* the Constitution."²⁸⁷

Justice Rosenkrantz's academic writings took the form of judicial doctrine, first in *Fontevicchia*, and then a few months later in *Bignone*, a controversial decision that allowed an individual convicted for torture and kidnapping during the Argentinean dictatorship to benefit from a 1990s law enacted to address the extremely lengthy periods of pre-trial detention.²⁸⁸ The ruling sparked massive

283. See Thomas M. Antkowiak, *Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond*, 46 COLUM. J. TRANSNAT'L L. 351 (2008).

284. See Carlos F. Rosenkrantz, *Against Borrowings and Other Nonauthoritative Uses of Foreign Law*, 1 INT'L J. CONST. L. 269 (2003).

285. See *supra* Part II.B.2.

286. See Carlos F. Rosenkrantz, *Advertencias a un internacionalista (o los problemas de Simón y Mazzeo)*, 8 REV. JUR. U. PALERMO 203, 207–09 (2007).

287. *Id.* at 210 (emphasis added). Rosenkrantz's assertion is problematic. First, he allegedly adopts the notion of "transcendent rules" from Owen Fiss's work but fails to note that Fiss, in turn, has taken the notion from Frank Michelman's work. See Owen M. Fiss, *The Death of the Law*, 72 CORNELL L. REV. 1, 13 (1986). Second, and more importantly, Rosenkrantz's claim that the use of international human rights law is equivalent to utilizing "norms that are beyond the Constitution" is in plain contradiction with the Argentinean Constitution, which expressly incorporates human rights treaties into its text.

288. *La Corte Suprema, por mayoría, declaró aplicable el cómputo del 2x1 para la prisión en un caso de delitos de lesa humanidad*, CENTRO DE INFORMACIÓN JUDICIAL (May 3, 2017), <https://www.cij.gov.ar/nota-25746-La-Corte-Suprema--por-mayor-a--declar--aplicable-el-c-mputo-del-2x1-para-la-presi-n-en-un-caso-de-delitos-de-lesa-humanidad.html>. Law No. 24,390, known as "the 2x1 Act," allowed defendants in pre-trial detention to have their pre-trial time counted toward their sentences. The 2x1 Act, Ley 24.390 (1994 (Arg.)). Congress enacted the "2x1 Act" to address the severe crisis of overcrowded prisons and the extensive use of pre-trial detention. The law remained in effect from 1994 to 2001. Until the *Muiña* decision, the Supreme Court ruled that individuals convicted for human rights violations committed during the dictatorship could not benefit from the "2x1" law.

demonstrations against the Supreme Court and propelled Congress to rapidly pass an “interpretative law” that clarified the scope and meaning of the “2x1” benefit as not applicable to human rights violators.²⁸⁹ A year later, the Argentinean court stepped back and reinstated its earlier doctrine, with Rosenkrantz writing a dissenting opinion.²⁹⁰ From a domestic perspective, it could be argued that the judicial pushback stemmed from a single state actor—the Supreme Court—or even further, from a contingent majority in the court that was led by a justice who views international human rights law as “foreign” law. But the full story is that decisions such as *Fontev ecchia* and *Bignone* are possible due to a larger context in which international organs also bear responsibility in how they define their powers vis-à-vis domestic actors.²⁹¹

2. International Accommodation

In *Fontev ecchia*, the Inter-American Court had the power to hold that Argentina had violated the petitioners’ right to freedom of expression; however, it does not follow from that power that the Inter-American Court can determine the precise means that the State must use to comply with the judgment. By ordering a state to revoke a judicial decision without considering the domestic allocation of powers, the Inter-American Court armed opponents to the Court’s judicial activism with solid grounds for critique.²⁹²

Notwithstanding this potential overreach, the Argentinean court in its initial response missed a valuable opportunity to craft a viable way forward. The Court could (and should) have honored the state’s international obligations and accords with the country’s constitutional practice. For instance, the Argentinean court could have remanded the case back to Argentina’s executive or Congress, requesting that they implement the tribunal’s order in a way that achieved international compliance pursuant to constitutional provisions, without violating

289. *Conductas Delictivas. Delitos de Lesa Humanidad, Genocidio o Crímenes de Guerra*, Ley 27362 (2017) (Arg.).

290. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice]. 4/12/2018, “Recurso de hecho deducido por Batalla, Rufino en la causa Hidalgo Garzón, Carlos del Señor y otros,” FLP 91003389/2012/T01/93/1/RH11 (Arg.), <https://cijur.mpba.gov.ar/files/content/rufino%20batalla.pdf>.

291. For example, in the case of the Dominican Republic’s Constitutional Court’s decisions discussed above, see Part IV.A.1. Other State actors and even civil society seem to largely back the Dominican court’s antagonistic approach toward the Inter-American Court of Human Rights. Five years after the TC/0256/14 decision, neither the executive nor the Dominican Congress have attempted to fix the Constitutional Court’s partial exit from the inter-American human rights system. In a country visit conducted in 2015, the Inter-American Commission on Human Rights observed that individuals who criticized the Dominican court’s 2013 decision (which was the antecedent to Judgment TC/0256/14) were called “traitors,” and received threats. See Inter-Am. Comm’n H.R., *Situation of Human Rights in the Dominican Republic*, OEA/Ser.L/V/II doc. 45/15, at 13, ¶ 10 (Dec. 31, 2015), <http://www.oas.org/en/iachr/reports/pdfs/dominicanrepublic-2015.pdf>. Polls have shown that 66% of Dominicans reject people of Haitian descent. See Gabriela Alvarez Guerrero, *La discriminación y la #GallupHoy*, ACENTO (Sept. 12, 2014) <https://acento.com.do/2014/opinion/8173285-la-discriminacion-y-la-gallup-hoy/>. Thus, while the instances of resistance in Argentina may be episodic, the Dominican case seems to exemplify a more systemic resistance against the system, due to the system’s protection of Haitians and Dominicans of Haitian descent.

292. See Jorge Contesse, *Contestation and Deference in the Inter-American Human Rights System*, 79 LAW & CONTEMP. PROBS. 123, 137–38 (2016).

the judicial supremacy of Argentina's Supreme Court or domestic constitutional law. In turn, the Inter-American Court could have requested the State to remedy the violation using all domestic means at the State's disposition, rather than demanding that it effect one particular remedy. However, because neither judicial body adopted those solutions, a lack of legal mechanisms to address the dispute became apparent, as did the implication that domestic courts that used to be friendly toward the inter-American system could have adopted a different posture.

As a response, the Inter-American Court convened a compliance monitoring hearing in August 2017, where the Argentinean government would have to explain to the Court the implications of the February 2017 Supreme Court decision. Lawyers for the victims and the Inter-American Commission were also present. The State representatives explained that the executive was unable to do anything after the Supreme Court had found that it could not revoke (or halt the effects of) its 2001 decision.²⁹³ Relying on a separation of powers argument, the government claimed that the Supreme Court was sovereign to interpret the Constitution, and that the executive could not interfere with the Court's judicial interpretative powers. As the government's representatives put it, "the Supreme Court is the Argentinean State,"²⁹⁴ and therefore the opinion of the Supreme Court was the opinion of the State.

After the hearing, the Inter-American Court issued a resolution stating that Argentina needed to identify which domestic avenues would allow the State to comply with the Inter-American Court's judgment.²⁹⁵ It also noted that revoking the 2001 decision was not the only possible remedy to comply;²⁹⁶ that, in the past, Argentina and other States had not challenged the Inter-American Court's authority to order these remedies;²⁹⁷ and that the State had alternative mechanisms to comply with the judgment—for instance, it could remove the decision from all electronic websites, or order that an annotation be made on the margins of the decision stating that the Inter-American Court had declared it incompatible with the American Convention on Human Rights.²⁹⁸

Two months later, the Supreme Court of Argentina put an end to the stand-off between the two courts: it issued a four-paragraph resolution observing two important facts. First, the Supreme Court observed that the Inter-American Court had acknowledged that revocation was not the only mechanism for complying with the Inter-American Court's 2001 judgment against Argentina, in line with

293. See *Fontevicchia and D'Amico v. Argentina*, Hearing on Monitoring Compliance with Judgment, Inter-Am. Ct. H.R. (Aug. 21, 2017), <https://vimeo.com/230510053>.

294. *Id.* at min. 1:07:27 (translation by author). The statement was made in response to a question by Judge Eduardo Vío Grossi, who asked whether the government's position was that of the Supreme Court.

295. See *Fontevicchia and D'Amico v. Argentina*, Monitoring Compliance with Judgment, Inter-Am. Ct. H. R., Considering ¶ 16 (Oct. 18, 2017).

296. *Id.* ¶ 20.

297. *Id.*

298. *Id.* ¶ 21. The Inter-American Court also found that Argentina does not have the power to determine when an Inter-American Court decision is obligatory, and that the Argentinean court's decision had departed from established precedent on the legal force of international judgments. *Id.* ¶ 25.

the Argentinean court's decision of February 2017.²⁹⁹ Second, it observed that the Inter-American Court's "suggestion" to make an annotation in the margins of the 2001 decision "does not violate public law principles established in the Argentinean Constitution."³⁰⁰ Hence, the Supreme Court "accepted" the Inter-American Court's suggestion.³⁰¹

In conclusion, the incident forced the Inter-American Court to elaborate upon its supervisory jurisdiction at greater length. And, while the Argentinean court did put an end to the tense back-and-forth, the underlying reasons for the domestic court's challenge to the authority of the regional human rights tribunal may not have dissipated.

V. AVENUES FOR REFORM

I have explored how the inter-American human rights system first gained influence on States, and how those same States have recently become less receptive of, and at times directly confrontational towards, the system. I now turn my attention to two areas where the system could make progress toward complying with two goals that are seemingly in tension: on the one hand, the protection of human rights at a regional level, and, on the other, the collaboration between States and international bodies.

I argue that the system could address the tension in at least two ways. First, the Inter-American Court should revisit the "fourth instance" doctrine, in which international tribunals do not act as higher or appellate courts, inquiring into both facts and evidence. Although the Inter-American Court has repeatedly stated that it is *not* a fourth instance court, many of its decisions—and States' reactions to the Court's decisions—show that it may indeed be acting as such. Revising the fourth instance doctrine would be an appropriate response to the problems identified in this Article.

Second, scholars have often discussed the most critical problem with international human rights law: States' lack of compliance with international bodies' decisions and recommendations.³⁰² The inter-American human rights system is no exception.³⁰³ In other human rights systems, regional human rights

299. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 5/12/2017, Res. 4015/17 ¶¶ 1–2 (Arg.).

300. *Id.* ¶ 4.

301. *Id.*

302. See, e.g., Darren Hawkins, *Explaining Costly International Institutions: Persuasion and Enforceable Human Rights Norms*, 48 INT'L STUD. Q. 779 (2004); Courtney Hillebrecht, *Rethinking Compliance: The Challenges and Prospects of Measuring Compliance with International Human Rights Tribunals*, 1 J. HUM. RTS. PRAC. 362 (2009) [hereinafter Hillebrecht, *Rethinking Compliance*]; Courtney Hillebrecht, *The Power of Human Rights Tribunals: Compliance with the European Court of Human Rights and Domestic Policy Change*, 20 EUR. J. INT'L REL. 1100 (2014); Jasper Krommendijk, *The Domestic Effectiveness of International Human Rights Monitoring in Established Democracies: The Case of the UN Human Rights Treaty Bodies*, 10 REV. INT'L ORG. 489 (2015).

303. See David C. Baluarte, *Strategizing for Compliance: The Evolution of a Compliance Phase of Inter-American Court Litigation and the Strategic Imperative For Victims' Representatives*, 27 AM. U. INT'L L. REV. 263 (2012); Mathias Poertner, *Institutional Capacity for Compliance: Domestic Compliance with the Inter-American Court of Human Rights* (Aug. 29–Sept. 1, 2013) (unpublished manuscript), <https://ssrn.com/abstract=2299763>).

courts are not tasked with monitoring compliance of their own judgments: in Europe, for example, monitoring compliance is the function of the Committee of Ministers of the Council of Europe—a political, not judicial, body. The Committee reviews whether or not States that have been found in violation of the European Convention of Human Rights by a decision of the European Court are complying with the judgment.³⁰⁴

In the Americas, the Organization of American States' Permanent Council has left this task unattended, forcing the Inter-American Court not only to decide cases, but also to supervise States' compliance with its decisions. The cases analyzed in this Article show that OAS member States remain silent when another State acts in ways that may undermine the system's strength. The time has come to change States' passivity and explore ways in which the OAS Permanent Council, or a new body, may undertake the critical task of monitoring compliance with the Court's rulings. Scholars seem more concerned with the most serious forms of resistance—particularly backlash, as expressed in States' actual or threatened exits from treaties.³⁰⁵ But *Fontevicchia* shows how the Inter-American Court's authority can be undermined in ways that may seem less serious or confrontational but are ultimately more damaging to the Court's authority. When the Court is forced to monitor compliance by holding unproductive hearings or requesting information from States that intend never to provide it, this is an indication that monitoring compliance should no longer be a (purely) judicial task. Under such circumstances, compliance is better suited as a political task.

A. Revisiting the Fourth Instance Doctrine

Human rights courts assert subsidiary jurisdiction.³⁰⁶ Their task is to intervene when domestic authorities are either unwilling or unable to provide remedies to human rights violations. Human rights law has devised different mechanisms for materializing its subsidiary nature—arguably the most notorious aspect of which is the requirement that all domestic remedies be exhausted before filing an international complaint.³⁰⁷

The rule of prior exhaustion of domestic remedies is not, however, the only

304. Article 46.2 of the European Convention on Human Rights states: "The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution." Council of Europe, Convention for the Protection of Human Rights and Foundational Freedoms art. 46.2, Nov. 4, 1950, E.T.S. No. 5, 213 U.N.T.S. 221.

305. See Mikael Rask Madsen et al., *Backlash Against International Courts: Explaining the Forms and Patterns of Resistance to International Courts*, 14 INT'L J.L. IN CONTEXT 197 (2018). On the particular case of the Inter-American Court of Human Rights see Soley & Steininger, *supra* note 78.

306. See Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 AM. J. INT'L L. 38 (2003).

307. See Cesare P.R. Romano, *The Rule of Prior Exhaustion of Domestic Remedies: Theory and Practice in International Human Rights Procedures*, in INTERNATIONAL COURTS AND THE DEVELOPMENT OF INTERNATIONAL LAW 561, 561–62 (Nerina Boschiero et al. eds., 2013) (stating that the rule of exhaustion of domestic remedies is arguably the most important admissibility requirement in international human rights procedure). According to the International Court of Justice, the exhaustion rule "is a well-established rule of customary international law." See *Interhandel (Switz. v. U.S.)*, Preliminary Objections, 1959 I.C.J. 6, 27 (Mar. 21).

mechanism to ensure that human rights law does not override States' legal authority. International courts and human rights bodies have also developed the "fourth instance doctrine" to calibrate the level of interference that international courts may legitimately exert upon States. Under the fourth instance doctrine, international courts must refrain from addressing errors of fact or law that national courts may have made in domestic proceedings.³⁰⁸ Under this doctrine, the role of international courts is not to consider the merits or fairness of a domestic decision but rather to identify a violation of rights. As a European commentator has put it, the fourth instance doctrine "acts as a brake on the [European Court of Human Rights'] interpretations of the [European] Convention by ensuring that it bears in mind the constitutional limits on its competence."³⁰⁹ However, the doctrine is not easy to apply, and, more significantly, the lack of clear criteria for its application can have important consequences for how States perceive international courts' authority. The Argentinean case previously discussed is a good example of this problem.

1. *The Fourth Instance Doctrine*

In the late 1980s, the inter-American human rights system adopted the fourth instance doctrine.³¹⁰ In *Marzioni v. Argentina*, the Inter-American Commission declared that "the Commission cannot review the judgments issued by the domestic courts acting within their competence and with due judicial guarantees, unless it considers that a possible violation of the Convention is involved."³¹¹ The Commission's articulation of the doctrine—or "formula," as the Commission called it—and that of the European Court of Human Rights³¹² share the same key component: international human rights bodies should not act as domestic appellate courts with the power to review how a lower court has found facts and how it has applied (or misapplied) the law to those facts.

In exploring the European articulation of the doctrine, however, one must not lose sight of a critical feature: in European human rights law, the fourth instance doctrine exists as a consequence of, and in the company of, a unique understanding of the subsidiarity principle, with the margin of appreciation doctrine as a corollary.³¹³ European States recently reiterated the validity of the

308. The first articulation of the fourth instance doctrine is found in the jurisprudence of the European Court of Human Rights, in the case of *X v. Belgium*, 458/59 (Mar. 29, 1960). The United Nations Human Rights Committee has also adopted the doctrine. See Pillai v. Canada, ¶ 11.2, Views, U.N. Human Rights Committee, Communication No. 1763/2008, U.N. Doc. C/101/D/1763/2008 (2011); Masih v. Canada, Views, U.N. Human Rights Committee, Communication No. 1881/2009, U.N. Doc. C/108/D/1881/2009, ¶ 2 (2013) (Dissenting opinion of Mr Yuval Shany) (cited in Maija Dahlberg, '...It is Not Its Task to Act as a Court of Fourth Instance': *The Case of the European Court of Human Rights*, 7 EUR. J. LEG. STUD. 77, 86 (2014)).

309. See Dahlberg, *supra* note 308, at 83.

310. Clifton Wright v. Jamaica, Case 9260, Inter-Am. Comm'n. H. R., OEA/ser. L/V/II.74, doc. 10 rev. 1 (1988).

311. Case 11.673, Inter-Am. Comm'n. H. R., OEA/ser. L/V/II.95, doc. 7 rev. 76, ¶ 50 (1997).

312. In a 1988 decision, the European Court declared: "it is not [the Court's] function to deal with errors of fact or of law allegedly committed by a national court unless and insofar as they may have infringed rights and freedoms protected by the [European] Convention." *Schenk v. Switzerland*, App. No. 10862/84, Eur. Ct. H.R., at 26, ¶ 45 (July 12, 1988).

313. Dahlberg, *supra* note 308, at 78–80.

subsidiarity principle and the margin of appreciation doctrine.³¹⁴ The prominence of these principles in Europe have no parallel in Latin America, where both commentators and the Inter-American Court itself have persistently shied away from granting States any form of margin of appreciation.³¹⁵ This attitude needs to be reexamined in light of both the Court's case law and States' multi-layered forms of resistance against the system.

Almost two decades ago, legal scholars anticipated that the inter-American system would make use of the doctrine in a way similar to the European Court, but this prediction has proven wrong.³¹⁶ Inter-American human rights law has only expanded in both scope and competence, even in instances where States that have independent judiciaries claim degrees of deference.³¹⁷ The most salient case is a 2011 decision by the Inter-American Court that declared invalid two Uruguayan referenda in which the Uruguayan people voted in favor of upholding their amnesty law.³¹⁸ In *Gelman*, the Inter-American Court reiterated its doctrine on amnesty laws—i.e., that such laws are incompatible with the American Convention—without giving any special consideration to the fact that Uruguay is a State with an independent judiciary, or the fact that the decision to uphold the country's expiry law rested on a decision by *the people* of Uruguay, not by its judiciary, nor its Congress. The Court's bold assertion of authority has been subject to the criticism of "punitivism"—a form of expansive and maximalist jurisprudence.³¹⁹

The Inter-American Court has thus far failed to articulate systematic case law on the fourth instance doctrine and on deference. The European Court mainly applies the doctrine in cases concerning the application of the right to a fair trial,³²⁰ an area in which the Inter-American Court has ruled multiple times.³²¹ Despite its adoption of the fourth instance doctrine, inter-American human rights bodies have not followed the European model in drawing clear boundaries that would allow States to anticipate whether or not they will be granted some degree of deference.

314. See generally Madsen, *supra* note 14.

315. See Pablo Contreras, *National Discretion and International Deference in the Restriction of Human Rights: A Comparison Between the Jurisprudence of the European and the Inter-American Court of Human Rights*, 11 NW. J. INT'L HUM. RTS. 28 (2012).

316. An expert on the inter-American system wrote in 2001: "[S]tates that have independent and impartial judiciaries will be treated with more deference than those states where such independence or impartiality is compromised." Diego Rodríguez Pinzón, *The "Victim" Requirement, the Fourth Instance Formula and the Notion of "Person" in the Individual Compliant Procedure of the Inter-American Human Rights System*, 7 ILSA J. INT'L & COMP. L. 369, 380 (2001).

317. See Contesse, *supra* note 292, at 145.

318. *Gelman v. Uruguay*, Merits and Reparations, Inter-Am Ct. H.R. (ser. C) No. 221, ¶¶ 195–206 (Feb. 24, 2011).

319. See Ezequiel Malarino, *Judicial Activism, Punitivism and Supranationalisation: Illiberal and Antidemocratic Tendencies of the Inter-American Court of Human Rights*, 12 INT'L CRIM. L. REV. 665, 681–83 (2012).

320. Dahlberg, *supra* note 308, at 85.

321. See, e.g., *Apitz Barbera v. Venezuela*, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 182 (Aug. 5, 2008); *Salvador Chiriboga v. Ecuador*, Preliminary Objection and Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 179 (May 6, 2008); *Genie Lacayo v. Nicaragua*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 30 (Jan. 29, 1997).

Constitutional judges in Latin America are aware of this problem. In a series of interviews conducted for this study, justices from several high courts of Latin America expressed concern, and, in some cases, discontent with the Inter-American Court's handling of cases. In the eloquent words of one justice on the Supreme Court of Chile: "we respect the authority of the Inter-American Court as a legal tribunal. But its role is to interpret an international treaty—our role is to interpret domestic law, our own Constitution. It is not desirable that the Court pretend to rule upon us."³²² Another constitutional justice espoused the pervasive view among them that regional courts should decide as if human rights cases were not about the application of hard and fast rules but rather about the application of principles.³²³ The reference to the distinction between rules and principles is directed to the work of legal theorists Ronald Dworkin³²⁴ and Robert Alexy.³²⁵ The claim is that the Inter-American Court should establish differentiated criteria depending on the type of violation it addresses, without a one-size-fits-all model of adjudication. Or, as the former Chief Justice of Chile's Constitutional Court put it: "the Inter-American Court has steadily transformed into a supranational tribunal with powers that go beyond what States intended when they adopted the American Convention . . . national judges are displeased because the Court is actually reviewing our decisions."³²⁶

2. Reforming the Doctrine for the Inter-American System

The inter-American human rights system must address instances of resistance. When such resistance comes from judicial actors, as in the cases of the Dominican Constitutional Court or the Argentinean Supreme Court, the Inter-American Court should directly engage with such resistance, viewing it as an opportunity to improve the Court's authority and legitimacy. An important reform could concern the levels of deference the Court provides to States when a violation of rights is submitted for its consideration. Although the system formally embraces the fourth instance doctrine, it has so far failed to provide a clear set of criteria to determine under what circumstances States enjoy some level of discretion.

The doctrine's basic formulation, and not just in the context of the inter-American system, calls for reconsideration. Recall that under the doctrine, international courts should not review domestic matters of fact and law unless the domestic decision was obtained in violation of due process rights *or any other right guaranteed by international or regional human rights treaties*. As evidenced by this last caveat, the doctrine seems to carry with it a tension that is difficult to reconcile: international courts must not act as appellate courts as per

322. Interview with Justice 1 of the Supreme Court of Chile, Santiago (Dec. 6, 2017) (name omitted to preserve anonymity).

323. Interview with Justice 10 of the Supreme Court of Chile, Santiago (Jan. 4, 2018) (name omitted to preserve anonymity).

324. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1978).

325. See ROBERT ALEXY, *A THEORY OF CONSTITUTIONAL RIGHTS* (Julian Rivers trans., 2010).

326. Interview with Justice 3 of the Constitutional Court of Chile, Santiago (Dec. 29, 2017) (name omitted to preserve anonymity).

the fourth instance doctrine, but if national courts violate the rights of an individual, then the fourth instance doctrine does not apply.

Under the doctrine, international courts may expand their competence—just as the Inter-American Court has done over the past decades—to find violations beyond the more limited domain of due process rights.³²⁷ Consider *Fontevicchia*: the Argentinean journalists who challenged their conviction for defamation did not allege a violation of their rights to a fair trial. The journalists pleaded their case in Argentinean courts to challenge President Menem's lawsuit under Argentinean law. While the trial itself was procedurally valid, the journalists alleged that the *substance* of the Argentinean court's ruling violated their right to freedom of expression. The Inter-American Court was substantially correct in finding that, by convicting journalists for publishing stories of public interest, Argentina violated its international human rights obligation. However, the fourth instance doctrine indicates that if a State has "independent and impartial judiciaries,"³²⁸ then it should enjoy a higher degree of deference. In the *Fontevicchia* case, the convicted journalists did not impugn the Argentinian judiciary's independence and impartiality.

I am not arguing that the Inter-American Court should have refrained from intervening and allowed journalists to be silenced when investigating allegations of misconduct by political authorities. I am pointing out, however, that under the original formulation of the fourth instance doctrine, intervention by an international court may not necessarily have been authorized. Therefore, the issue seems to be whether or not the fourth instance doctrine lacks criteria for its proper application.

Inter-American human rights bodies need not go beyond their existing case law to refine their articulation of the fourth instance doctrine. First, the Court should engage with the documentation compiled by the Commission on how States protect—or fail to protect—human rights. As already explained, the Commission publishes an annual report documenting the most critical human rights problems in the region—with special reference to those countries where human rights violations are acute. If the Court handles a case from a country that, according to the Commission's reports, has an "independent judiciary," then the Court should adopt a more deferential approach. For example, in *Gelman*, the Court should not have dismissed Uruguay's sovereignty claim so easily. On the

327. On the expansion of the Court's case law, see *Foreword*, in THE INTER-AMERICAN COURT OF HUMAN RIGHTS: THEORY AND PRACTICE, PRESENT AND FUTURE, x (Yves Haeck et al. eds., 2015) (noting that the Court's jurisprudence "is not only observed and closely followed by the High Courts of the region, but it also guides the design of laws and public policy within States"). See also THOMAS M. ANTKOWIAK & ALEJANDRA GONZA, THE AMERICAN CONVENTION ON HUMAN RIGHTS: ESSENTIAL RIGHTS (2017); LAURENCE BURGOGUE-LARSEN & AMAYA ÚBEDA DE TORRES, THE INTER-AMERICAN COURT OF HUMAN RIGHTS: CASE-LAW AND COMMENTARY (2011); JOE M. PASQUALUCCI, THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS (2014). On how international tribunals can expand their powers or even modify the norms of treaties through judicial interpretation, see Julian Arato, *Treaty Interpretation and Constitutional Transformation: Change in International Organizations*, 38 YALE J. INT'L L. 289 (2013) (comparing approaches toward subsequent practice in the case law of the World Trade Organization's Appellate Body, the International Court of Justice, and the European Court of Human Rights).

328. Rodríguez Pinzón, *supra* note 311, at 380.

other hand, when handling cases from Venezuela—before the country denounced the American Convention in 2012—the Court could have legitimately granted much less deference, because official documents from the inter-American human rights system—as well as reports from civil society organizations—indicated that Venezuela’s courts were neither independent nor impartial.³²⁹

Critics of this differentiated approach may observe that this is what both the Commission and the Court *in fact* did—or at least tried to do. The Commission dedicated much of its work to carefully documenting human rights violations in the country.³³⁰ However, under the approach I defend here, the Court should have used that information to lay the groundwork for the Court’s more aggressive approach towards the State. Of course, Venezuela might have ultimately made the same decision it did: to withdraw from the American Convention. But the Court would have been in a better position to protect itself and the system from accusations of intervention when other countries lashed out against the Court or the system, as happened during the “strengthening process.”³³¹ In the next section, I come back to this point, where I develop my proposal for a political, or “hybrid,” rather than a juridical, model of ensuring compliance.

Second, human rights bodies may also articulate criteria to differentiate among cases depending on the type of violations alleged by the petitioners. According to the inter-American system’s existing case law, for instance, decisions on how States organize their electoral systems enjoy a higher degree of deference.³³² Additionally, in the 1980s, the Court considered States’ decisions on granting citizenship to warrant more deference.³³³ However, according to more recent cases against the Dominican Republic, the Court seems to have changed its doctrine on citizenship³³⁴ but has yet to explain this change or its extent definitively. Was the change warranted by the nature of alleged violations? Or their magnitude? Or maybe the State against which the petitions were filed? The Court overlooked these questions. With a fourth instance doctrine that fails to make crucial distinctions, it is harder to rationally reconcile the Court’s decisions when they seem to be in tension with prior rulings.

I argue that the fourth instance test should consider three factors: 1) an inquiry into whether the respondent State is one where courts are independent and impartial; 2) whether or not the domestic decision under review is a reasoned

329. See Inter-Am. Comm’n H.R., *Democracy and Human Rights in Venezuela*, OEA/Ser.L/V/II doc. 54 (Dec. 30, 2009); HUMAN RIGHTS WATCH, *A DECADE UNDER CHÁVEZ: POLITICAL INTOLERANCE AND LOST OPPORTUNITIES FOR ADVANCING HUMAN RIGHTS IN VENEZUELA* (Sep. 18, 2008).

330. The Inter-American Commission on Human Rights has released three full-scale reports on the situation of human rights in Venezuela: in 2003, 2009 and 2017. For the most recent of these reports, see Inter-Am. Comm’n H.R., *Democratic Institutions, the Rule of Law and Human Rights in Venezuela*, OEA/Ser.L/V/II doc. 209 (Dec. 31, 2017).

331. See *supra* Part IV.B.

332. *Castañeda-Gutman v. Mexico*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 184 (Aug. 6, 2008).

333. Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica, Advisory Opinion OC-4/84, Inter-Am. Ct. H.R. (ser. A) No. 4 (Jan. 19, 1984).

334. See *supra* Part IV.A.1.

ruling; and 3) the type of violation alleged by petitioners—i.e. is it a non-derogable right, such as the right not to be tortured, or a peripheral aspect of a right that could legitimately be subject to restriction? Revitalizing the fourth instance doctrine would give the Court's case law stability by making its judgments more predictable, and would protect the Court from accusations of undue intervention.

Finally, a differentiated approach could have an impact on the Court's remedial jurisprudence. In its rebuke of the Inter-American Court's judgment, the Supreme Court of Argentina challenged the Inter-American Court's power to issue a specific remedy (the revocation of a domestic judicial decision), accusing the Inter-American Court of going beyond its powers, affecting its legitimacy and authority.³³⁵ By revising the fourth instance doctrine, the Inter-American Court could engage with States to devise appropriate mechanisms for compliance. The Court seems to believe that its most prominent means of interaction with domestic courts is through the conventionality control doctrine, whereby domestic courts are bound by the Inter-American Court's interpretations of rights.³³⁶ By introducing a differentiated approach toward the fourth instance doctrine, the Court could send an unequivocal message to its domestic partners—i.e., constitutional judges—that the Inter-American Court's goal is to work *with* them, not against them.

B. Political Compliance

Compliance is one of the most important and difficult themes in international law.³³⁷ To ensure compliance, international courts must necessarily engage with domestic actors—both governmental and non-governmental. Many instances of resistance that this Article explores are based on States' pushback against the Inter-American Court's push for compliance. Analyzing the Court's compliance methods is therefore critical in order to address the underlying problem of resistance. I argue for a shift in how the system should carry out compliance and enforcement: instead of using the current *legalized* compliance

335. Corte Suprema de Justicia de la Nación, *supra* note 2, ¶ 11. See Harlan Grant Cohen et al., *Legitimacy and International Courts—A Framework*, in LEGITIMACY AND INTERNATIONAL COURTS 1, 5 (Nienke Grossman et al. eds., 2018) (“[A] court that acts beyond the scope of authority granted to it, or *ultra vires*, exceeds the bounds of state consent and lacks justified authority.”).

336. See generally Eduardo Ferrer Mac-Gregor, *Conventionality Control: The New Doctrine of the Inter-American Court of Human Rights*, 109 AJIL UNBOUND 93 (2015) (discussing the evolution of the conventionality control doctrine at the IACHR).

337. There is a wide range of theories regarding compliance in international law. See, e.g., MARKUS BURGSTALLER, *THEORIES OF COMPLIANCE WITH INTERNATIONAL LAW* (2004) (outlining a typology of theories of compliance with international law); Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CALIF. L. REV. 1823, 1827 (2002) (setting forth a compliance theory of “rational, self-interested states . . . concern[ed] about both reputational and direct sanctions triggered by violations of the law”); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L. J. 2599, 2603 (1997) (arguing that a “process of interaction, interpretation, and internalization of international norms into domestic legal systems is pivotal to understanding why nations ‘obey’ international law, rather than merely conform their behavior to it when convenient”); Beth A. Simmons, *International Law and State Behavior: Commitment and Compliance in International Monetary Affairs*, 94 AM. POL. SCI. REV. 819, 819 (2000) (“An international legal commitment is one way that governments seek to raise the reputational costs of renegeing, with important consequences for state behavior.”).

mechanism, whereby the Court itself monitors State compliance, I argue that States and non-governmental organizations should also—or even instead—take up the responsibility of assessing compliance.

1. *The Court's Self-Asserted Monitoring Jurisdiction*

Unlike the European human rights system, with traditionally higher levels of compliance,³³⁸ but a much narrower jurisprudence on remedies, the inter-American human rights system has to deal with a structural lack of enforcement.³³⁹ Most States do not comply with the Court's judgments, except for the Court's orders to pay just satisfaction to victims of violations.³⁴⁰

As seen in the case of Peru's attempt to withdraw from the Inter-American Court's contentious jurisdiction, Latin American States have persistently failed to hold other States accountable for their lack of compliance or their utter disregard for inter-American human rights norms.³⁴¹ States passively sat by while a member State directly challenged not just the Court, but the very norms of the system. It was the Court, not OAS member States, that stepped up to declare that a partial withdrawal was not possible under inter-American human rights law.

Such passivity comes at a cost. Without specific norms detailing the method for compliance, the Court, under the *compétence-compétence* principle,³⁴² ruled that the power to supervise the execution of its judgments falls upon the Court itself.³⁴³ Such assertion of power is unprecedented in international law; international courts generally do not supervise compliance with their own judgments.³⁴⁴ The Inter-American Court of Human Rights stands as a salient exception to the general rule.

From this judicial enlargement of powers, the Court has developed an

338. Alexandra Huneus, *Compliance with Judgments and Decisions*, in OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION (Karen Alter, et al. eds., 2013); Fernando Basch et al., *The Effectiveness of The Inter-American System of Human Rights Protection: A Quantitative Approach to its Functioning and Compliance with its Decisions*, 7 SUR-INT'L J. HUM. RTS. 9 (2010); Damian Gonzalez-Salzburg, *Do States Comply with the Compulsory Judgments of the Inter-American Court of Human Rights? An Empirical Study of the Compliance with 330 Measures of Reparation*, 13 REVISTA INSTITUTO BRASILEIRO DIREITOS HUMANOS 93 (2013); Courtney Hillebrecht, *Rethinking Compliance: The Challenges and Prospects of Measuring Compliance with International Human Rights Tribunals*, 1 J. HUM. RTS. PRAC. 362 (2009).

339. See David C. Baluarte, *Strategizing for Compliance: The Evolution of a Compliance Phase of Inter-American Court Litigation and the Strategic Imperative for Victims' Representatives*, 27 AM. U. INT'L L. REV. 263 (2012).

340. Much of the European human rights system's record of compliance comes from the European Court's strong emphasis on monetary compensation. Monetary compensation is also routine in inter-American human rights case law, and States tend to comply with the remedy within a reasonable time. But along with monetary remedies, the Inter-American Court's decisions order many more remedies: from the erection of memorials to honor victims of human rights violations, to judicial training programs, to constitutional reforms. See Thomas M. Antkowiak, *Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond*, 46 COLUM. J. TRANSNAT'L L. 351 (2008).

341. See *supra* Part IV.A.1.

342. See *supra* text accompanying note 134.

343. Baena-Ricardo et al. v. Panama, Competence, Judgment, Inter-Am. Ct. H.R. (ser. C), No. 104, ¶¶ 68, 84–93 (Nov. 28, 2003).

344. Madsen et al., *supra* note 305 (“[International courts] ultimately play a limited role with regard . . . to the enforcement of their rulings . . .”).

extensive case law on “compliance.”³⁴⁵ It is routine for the Court to convene hearings both to address the merits of a case as well as to follow up on the enforcement of merits judgments. In compliance judgments, the Court examines the measures it ordered the State to adopt, reviews information provided by both petitioners and State officials, and issues a monitoring judgment.

This compliance system creates at least two kinds of problems. First, the mechanism has no basis in actual treaties, nor does it find legal footing in customary international law or inter-American human rights law. It is an instance of judicially-made law. This is problematic because the Court exercises jurisdiction in a region where statutes—*i.e.* treaties in this case—are the primary source of law, and some States have become discontented with the lax methodology by which the Court creates rules and doctrines. States have stronger reasons to resist court orders that have shaky or no legal basis. Hence, the Court’s expansion of its authority through judicially-created rules may perpetuate or even exacerbate States’ lack of compliance with the court orders.³⁴⁶

Second, the current judicial monitoring mechanism exposes the Court’s diminished authority. The Court orders States to comply, and States refuse to do so. The Court insists on compliance through “monitoring judgments” which, in turn, States may refuse to follow. Sometimes such refusal occurs when States simply ignore the Court’s order or delay responding; other times, the national courts’ resistance is open and upfront. Such dynamics may damage the Court’s authority in the eyes of its stakeholders: States, civil society organizations, advocates, and human rights victims. International courts lack the enforcement powers that domestic courts have: unlike domestic courts, international courts exert *auctoritas*, rather than *potestas*.³⁴⁷ Hence, when States routinely ignore an international court’s order, it is the international court’s legitimacy that is in peril.³⁴⁸

2. Reexamining Monitoring Jurisdiction

To address the two problems that I have identified—the lack of legal footing for the Inter-American Court’s monitoring jurisdiction and the weakening of the Court’s *auctoritas*—two steps could be taken. First, the Court should reexamine its monitoring jurisdiction. Second, compliance mechanisms and procedures should also be reassessed.

It is implausible that the Inter-American Court—or any court, for that matter—will simply give up the power to monitor compliance with its judgments. If anything, the Court has been *expanding*, not *shrinking*, its

345. The Court has issued almost 200 monitoring compliance judgments and more than 370 merits judgments. See Inter-Am. Ct. H.R., ANNUAL REPORT 88 (2018), <http://www.corteidh.or.cr/tablas/informe2018/ingles.pdf>; Inter-American Court, *Decisions and Judgments*, http://www.corteidh.or.cr/cf/Jurisprudencia2/busqueda_casos_contenciosos.cfm?lang=en.

346. On the Court’s expansion of its own powers to create legal doctrine, see Contesse, *supra* note 60.

347. See GIORGIO AGAMBEN, STATE OF EXCEPTION 74–88 (2005).

348. See Erik Voeten, *International Judicial Independence*, in INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS 436 (Mark Pollack & Jeffrey Dunoff eds., 2012).

jurisdiction. However, as I have demonstrated, the Court's expansive case law can incite pushback from States. And if pushback persists, it can end in frontal backlash.³⁴⁹ Thus, the Court cannot afford to ignore the problem.

To reexamine its monitoring jurisdiction, the Court should make an effort to engage with States in a non-top-down manner. Refashioning the fourth instance doctrine can serve this goal. By laying out clear criteria and a differentiated approach as to how it engages with States, the Court can send a message to one of its main constituencies: domestic judges.³⁵⁰ The message will be that the Inter-American Court does not seek to "review" or "correct" national courts' decisions, thus addressing the concern that several constitutional justices expressed when interviewed for this study.

Further, the Court should also engage with other branches of government. Although executive officials are the ones who appear before the Court, in both merits and monitoring hearings, the Court engages mostly with domestic judges through the exercise of conventionality control. The Court seems to engage far less with national parliaments, and some commentators have in fact argued that the Court should increase those interactions.³⁵¹ Hence, the Court needs to engage with States through political, not solely judicial, means.

3. *Revising Compliance Mechanisms and Procedures*

The second step that the inter-American human rights system as a whole, not just the Court, should take is a revision of current compliance mechanisms and procedures. This revision should consider the norms of the American Convention. Looking to the European human rights system may provide guidance as to how the inter-American system could accomplish this. I do not argue that OAS States should *adopt* the European mechanisms; rather, States should consider how some European features *might* be applied in the context of inter-American human rights law.

In Europe, enforcement of the judgments of the European Court of Human Rights falls upon the Committee of Ministers of the Council of Europe.³⁵² The Committee is comprised of foreign ministers from each member State, and is the executive body of the Court. The European Court's rulings are forwarded to the Committee, which determines how compliance should be carried out. Additionally, the Committee decides the consequences and the course of action to be taken if a State is found to be out of compliance with a ruling of the Court. The Committee of Ministers' power is based on the Convention as well as on the States' individual reliance on the Committee's role in settling disputes.

349. See Madsen et al., *supra* note 305, at 207-08.

350. See Huneus, *supra* note 265, at 495.

351. See, e.g., Leiv Marsteintredet, *The Inter-American Court of Human Rights and the Mobilisation of Parliaments*, in *THE INTERNATIONAL HUMAN RIGHTS JUDICIARY AND NATIONAL PARLIAMENTS: EUROPE AND BEYOND* 248, 249 (Matthew Saul et al. eds., 2017) ("The crucial dilemma to be discussed in this chapter is how the IACtHR can engage and mobilise national parliaments to improve and strengthen the protection of human rights without the reforms being perceived by member states as another imposition from the Court and thus increase the risk of backlash.").

352. Council of Europe, Convention for the Protection of Human Rights and Foundational Freedoms arts. 39.4, 46.2-46.5, Nov. 4, 1950, E.T.S. No. 5, 213 U.N.T.S. 221.

Compliance in Europe is higher than in the inter-American system. One reason for the difference lies in the type of remedies that the two courts tend to order: the European Court has traditionally ordered monetary compensation as the main remedy (which is easier to comply with and, in turn, to monitor). In contrast, the Inter-American Court's remedial jurisprudence is far broader and more complex.³⁵³ But European human rights compliance may also be higher because the task of ensuring compliance lies with the regional members that make up the organization, namely, the Council of Europe. The processes involve political negotiations with which courts have nothing, or very little, to do. In the inter-American compliance mechanism, on the other hand, the Inter-American Court places itself in the middle of political and diplomatic battles under the guise of legal disputes, which causes the Court to spend resources engaging with States in interactions that routinely prove to be unproductive. That interaction should be left to the political bodies of the OAS, such as the Permanent Council.

However, considering the recent experience of the "strengthening process,"³⁵⁴ the mechanism of political compliance should not be left solely to OAS' political bodies. Latin American civil society has been crucial to the development of inter-American human rights law. Just as non-governmental organizations may have standing before certain United Nations bodies, so too should the OAS consider establishing permanent consultation mechanisms with civil society organizations. Those mechanisms should include the monitoring phase of the Inter-American Court's rulings. Civil society organizations could register in an open process to ensure robust participation and close scrutiny.³⁵⁵

Establishing mechanisms of political compliance may require the revision of major legal instruments, such as the 1969 American Convention on Human Rights. Fifty years after the adoption of the major inter-American treaty seems an appropriate time to undertake a responsible revision of some of its norms. Furthermore, opening up a revision process should enable OAS States to reiterate their commitment to the system and, perhaps, bring back the States that have abandoned it, with the ultimate goal of universalization—that is, the ratification of the treaty by *all* OAS States.

VI. CONCLUSION

In June 2017, the American Society of International Law convened a panel discussion with a judge from the European Court of Human Rights and another

353. See Thomas M. Antkowiak, *Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond*, 46 COLUM. J. TRANSNAT'L L. 351 (2008).

354. See *supra* Part IV.B.

355. In Europe, the Committee of Ministers is "entitled to consider any communication from non-governmental organisations, as well as national institutions for the promotion and protection of human rights, with regard to the execution of judgments." See Committee of Ministers of the Council of Europe Rules for the Supervision of the Execution of Judgments and of the Terms of Friendly Settlements, Rule 9.2 (Jan. 18, 2017) (as amended), <https://rm.coe.int/16806eebf0>. In 2016, European lawyers and academics established the European Implementation Network, which "advocate[s] for the full and timely implementation of judgments of the European Court of Human Rights," organizing "regular NGO briefings with the Committee of Ministers, which supervises the implementation of human rights judgments." See *Overview of the Network*, EUR. IMPLEMENTATION NETWORK, <http://www.einnetwork.org/implementation-activities> (last visited Apr. 19, 2019).

from the Inter-American Court (who is currently the Court's president). The topic was "backlash against regional human rights courts."³⁵⁶ The European judge addressed several contentious issues that the European Court has faced, such as the *Hirst* decision against the United Kingdom and the Russian Federation's response to the judgments of the European Court discussed above.³⁵⁷ The Inter-American judge, however, took a different path. He observed that "instead of talking about 'backlash' [he] prefer[red] to talk about the 'challenges' that the inter-American system is facing."³⁵⁸ He then moved to address the system's financial constraints, the need for all States to ratify the American Convention, the virtues of the Court's expansive case law, the need to address social rights, and the problems of compliance. It was only when Judge Ferrer addressed the latter issue that he mentioned two cases discussed in this Article: *Gelman* and *Fontevecchia*. However, instead of analyzing the difficult issues around the two cases, he merely noted them as examples of some of the compliance "challenges" that the system faces.

Judge Ferrer's meager account of backlash against the inter-American system suggests that the Court may not be attentive enough to the issues discussed in this Article. With greater scrutiny upon the Court's work in its different forms of engagement with States, and the rise of nationalist views in several parts of the world, including Latin America, it is vital for the organs of the inter-American human rights system to take care to justify the exercise and extent of their legal authority. Human rights institutions around the world are under attack. To address those attacks, human rights courts must identify how States challenge the authority of human rights law.

This Article offers a description of the multiple forms of resistance that the inter-American human rights system faces, as well as a framework that distinguishes the types of resistance against human rights bodies. It provides a historical account of several instances of resistance, identifying, first, episodes of frontal backlash against both the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights—for instance, when States withdraw, either partially or fully, from the regional human rights system. It then analyzes instances of diplomatic pushback—specifically, when States conducted a reform process of the two regional human rights bodies (with an emphasis on the Commission) and when domestic courts challenged the Inter-American Court's authority, either by indirectly finding that a State should not be bound by the Court's decisions (as in the Dominican case) or by directly confronting the Court's doctrines (as in the Argentinean case).

Finally, this Article argues for specific paths for reform that could help the system address instances of resistance. First, the Article suggests a revision of judicial doctrines on engagement with States—in particular, a revision of the

356. Luis Lopez Guerra, Judge, European Court of Human Rights & Eduardo Ferrer Mac-Gregor Poisot, Judge, Inter-American Court of Human Rights, American Society of International Law Panel on The Backlash against Regional Human Rights Systems: An Ongoing Concern (Jun. 2, 2017), <https://www.youtube.com/watch?v=cufc6B12St4>.

357. See *supra* Part III.A.

358. Lopez Guerra & Mac-Gregor Poisot, *supra* note 356.

“fourth instance” doctrine, whereby international courts carefully articulate the scope and limitations of their interventions in domestic policy and regulations. Second, the Article suggests consideration of political mechanisms for ensuring compliance, which would allow the Inter-American Court to engage with member States in less judicialized ways and thus create more productive dynamics and interactions between States and human rights organs.

The prescriptions that the Article offers could be applied to other regional and international human rights systems as well, as pushback against international courts seems only to be increasing. To determine whether or not, and how, these mechanisms could be applied to those other regimes, such as the African or European human rights systems, further research is needed.

